

No.

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR NEGRON-ESPADA, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

HECTOR NEGRON-ESPADA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0864

[January 18, 2024]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert B. Meadows, Judge; L.T. Case No. 312010CF000621A.

Carey Haughwout, Public Defender, and Alan T. Lipson, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Lindsay A. Warner, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

MAY, CIKLIN and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

POINT II.

**DEFENDANT WAS ENTITLED TO A TWELVE PERSON JURY
UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND
DID NOT WAIVE THAT RIGHT.**

Standard of Review

The standard of review of constitutional claims is *de novo*. See, A.B. v. Florida Dept. of Children & Family Services, 901 So. 2d 324, 326 (Fla. 3d DCA 2005).

Argument

Defendant was convicted of a life felony by a jury composed of six persons. (T 226-228) He argues that the Sixth and Fourteenth Amendments guarantee the right to a twelve (12) person jury when the defendant is charged with an offense punishable by more than 6 months in jail.

Defendant can raise this issue for the first time on appeal because the issue isn't whether he preserved this issue by objecting in the trial court; rather, the issue is whether he personally waived his constitutional right to a twelve-person jury. He did not. For example, even if defense counsel had no objection to a five-person jury, but the trial court did not secure the defendant's personal waiver of his or her right to a six-person jury, the case would present reversible error on appeal. Wallace v. State, 722 So. 2d 913,

914 (Fla. 2d DCA 1998); Gamble v. State, 696 So. 2d 420, 420 (Fla. 5th DCA 1997); Blair v. State, 698 So. 2d 1210, 1217-18 (Fla. 1997); see also, Johnson v. State, 994 So. 2d 960, 963-64 (Fla. 2008) (holding that defendant must personally waive constitutional right to have jury decide prior-convictions element in felony DUI case; defense counsel's stipulation that trial court act as fact finder is insufficient).

In short, a defendant personally must agree to be tried by a jury with fewer jurors than constitutionally required. Defendant acknowledges this Honorable Court came to a different conclusion in Albritton v. State, 48 Fla. L. Weekly D922 (Fla. 4th DCA opinion filed May 3, 2023). However, this Honorable Court may have overlooked the holdings in the Wallace, Gamble, Blair, and Johnson cases.

The U.S. Supreme Court held in Williams v. Florida, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible. But Williams is impossible to square with the Court's ruling in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), which concluded that the Sixth Amendment's "trial by an impartial jury" requirement encompasses what the term "meant at the Sixth Amendment's adoption," *id.* at 1395. "Defendant enjoys a constitutional right to demand that his liberty should not be taken from him except by the joint

action of the court and the unanimous verdict of a jury of twelve persons.” Id. at 1396-9. Defendant’s conviction by a six-person jury violated the Sixth and Fourteenth Amendments to the United States Constitution.

Defendant acknowledges that this Court rejected this argument in Guzman v. State, 350 So. 3d 72 (Fla. 4th DCA 2022). This will provide defendant an avenue for supreme court review under Jollie v. State, 405 So. 2d 418 (Fla. 1981), and will avoid the randomness of the review process. See id. at 421 (recognizing that “no litigant can guide the district court’s selection of the lead case” and the citation PCA can avoid the randomness of the review process).

In rejecting Guzman’s argument, this Court cited State v. Khorrami, 1 CA-CR 20-0088, 2021 WL 3197499 (Ariz. Ct. App. July 29, 2021). Guzman, 350 So. 3d at 73. At the time of this Court’s decision, Khorrami’s petition for writ of certiorari in the United States Supreme Court was pending. The petition was subsequently denied, over dissents by Justices Kavanaugh and Gorsuch. Khorrami v. Arizona, 21-1553, 2022 WL 16726030 (U.S. Nov. 7, 2022).

Although there is no legal significance to the denial of a petition for writ

of certiorari,¹ there are differences between Florida's and Arizona's systems that may account for the denial of the writ.

In Arizona, criminal defendants are guaranteed "a twelve-person jury in cases when the sentence authorized by law is death or imprisonment for thirty years or more.... Otherwise, a criminal defendant may be tried with an eight-person jury." State v. Khorrami, 2021 WL 3197499, at *8 (citations omitted). Florida juries are smaller (six versus eight), and those smaller juries are mandated in every case except capital cases.

And the origin of Florida's rule is disturbing. In his dissent, Justice Gorsuch observed: "During the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs." Khorrami v. Arizona, 2022 WL 16726030, at *5 (Gorsuch, J., dissenting) (citations omitted). He noted, however, that Arizona's law was likely motivated by costs not race. *Id.* But Florida's jury of six did arise in that Jim Crow era context of a "deliberate and systematic effort to suppress minority voices in

¹ See *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) at n.56 ("The significance of a denial of a petition for certiorari ought no longer require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim.") (cleaned up).

public affairs.” *Id.* The historical background is as follows:

In 1875, the Jury Clause of the 1868 constitution was amended to provide that the number of jurors “for the trial of causes in any court may be fixed by law.” See, Florida Fertilizer & Mfg. Co. v. Boswell, 34 So. 241, 241 (Fla. 1903).

The common law rule of a jury of twelve was still kept in Florida while federal troops remained in the state. There was no provision for a jury of less than twelve until the Legislature enacted a provision specifying a jury of six in Chapter 3010, section 6. See Gibson v. State, 16 Fla. 291, 297–98 (1877); Florida Fertilizer, 34 So. at 241.

The Legislature enacted chapter 3010 with the jury-of-six provision on February 17, 1877. Gibson, 16 Fla. 294. This was less than a month after the last federal troops were withdrawn from Florida in January 1877. See Jerrell H. Shofner, Reconstruction and Renewal, 1865-1877, in The History of Florida 273 (Michael Gannon, ed., first paperback edition 2018) (“there were [no federal troops] in Florida after 23 January 1877”).

The jury-of-six thus first saw light at the birth of the Jim Crow era as former Confederates regained power in southern states and state prosecutors made a concerted effort to prevent blacks from serving on jurors.

On its face the 1868 constitution extended the franchise to black men. But the historical context shows that it was part of the overall resistance to Reconstruction efforts to protect the rights of black citizens. The constitution was the product of a remarkable series of events including a coup in which leaders of the white southern (or native) faction took possession of the assembly hall in the middle of the night, excluding Radical Republican delegates from the proceedings. See Richard L. Hume, Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South, 51 Fla. Hist. Q. 1, 5-6 (1972); Shofner at 266. A reconciliation was effected as the “outside” whites “united with the majority of the body’s native whites to frame a constitution designed to continue white dominance.” Hume at 15.

The purpose of the resulting constitution was spelled out by Harrison Reed, a leader of the prevailing faction and the first governor elected under the 1868 constitution, who wrote to Senator Yulee that the new constitution was constructed to bar blacks from legislative office: “Under our Constitution the Judiciary & State officers will be appointed & the apportionment will prevent a negro legislature.” Hume, 15-16. See also Shofner 266.

Smaller juries and non-unanimous verdicts were part of a Jim Crow era

effort “to suppress minority voices in public affairs.” Khorrami v. Arizona, 2022 WL 16726030, at *5 (Gorsuch, J., dissenting); see also Ramos, 140 S. Ct. at 1417 (Kavanaugh, J., concurring) (non-unanimity was enacted “as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”). The history of Florida’s jury of six arises from the same historical context.

BK: 3615 PG: 282

<input type="checkbox"/> Probation Violator	<input type="checkbox"/> Modified	In the Circuit Court,
<input type="checkbox"/> Community Control Violator	<input type="checkbox"/> Amended	Nineteenth Judicial Circuit
<input type="checkbox"/> Re-sentence	<input type="checkbox"/> Mitigated	In and for Indian River County, Florida
<input type="checkbox"/> Sentence Absentia	<input type="checkbox"/> Corrected	

Division: Felony

Case Number(s):
312010CF000621AXXXXX

State of Florida
VS.

HECTOR NEGRON-ESPADA
Defendant.

JUDGMENT

Defendant's Attorney ADRIENNE BUCCHI
State's Attorney MICHELLE MCCARTER ,

The above Defendant, being personally before this Court and having:

been tried and found guilty by Jury/by Court of the following crime(s).
 entered a plea of guilty to the following crime(s)
 entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number	Deg of Crime		OBTS #
1	LEWD OR LASCIVIOUS MOLESTATION - OFFENDER OVER 18, VICTIM UNDER 12	800.04(5B)	F	L	3101117612

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).
 and being a qualified offender pursuant to s. 943.325, the Defendant shall be required to submit DNA samples as required by law.
 and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in open court on APRIL 4, 2023 in Indian River County, Florida.



NUNC PRO TUNC _____

CIRCUIT JUDGE ROBERT MEADOWS

BK: 3615 PG: 283

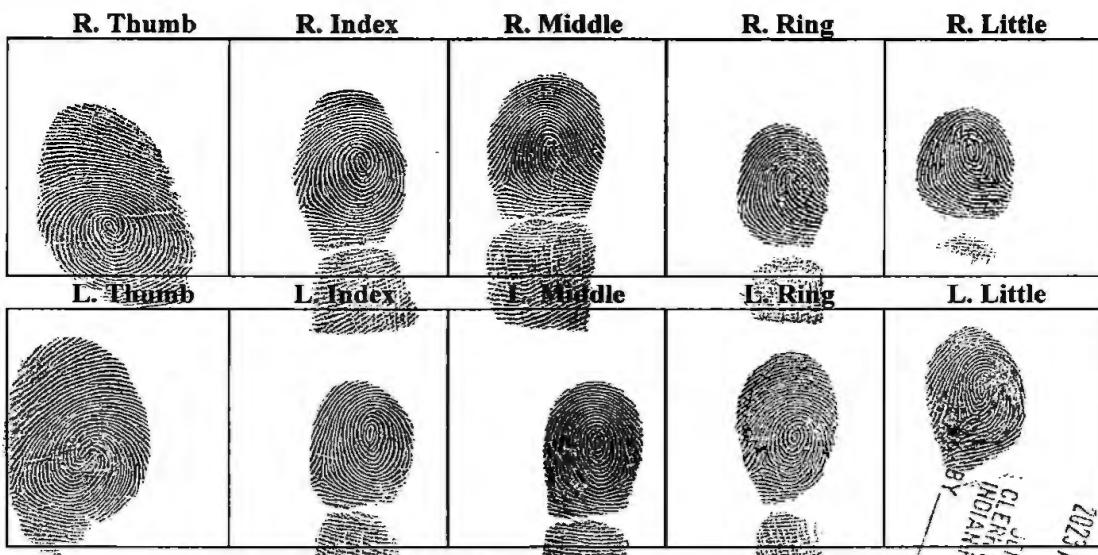
STATE OF FLORIDA

Vs.

HECTOR NEGRON-ESPADA

Case: 312010CF000621AXXXXX

FINGERPRINTS OF DEFENDANT



Fingerprints taken by

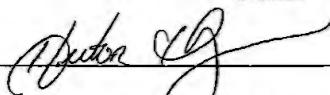
Cintia SPP4

Name

Deputy

Title

Defendant:



DONE AND ORDERED in open court at Vero Beach, Indian River County, Florida, this 4 day of April, 2023.

I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, and that they were placed thereon by said Defendant in my presence in open court this date.


ROBERT MEADOWS
Judge

BK: 3615 PG: 284

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

Defendant: HECTOR NEGRON-ESPADA

Case: 312010CF000621AXXXXX

SENTENCE
(As to Count 1)

The Defendant, being personally before this court, accompanied by the defendant's attorney of record, ADRIENNE BUCCHI and having been adjudicated guilty herein, and the court having given Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause bring shown.

(check one if applicable)

- and the Court having on _____ deferred imposition of sentence until _____.
- and the Court having previously entered a judgment in this case on _____ now resentsences the Defendant.
- and the Court having placed Defendant on probation/ community control and having subsequently revoked the Defendant's probation/ community control.

It Is the Sentence of the Court That:

- The Defendant pay a fine of \$_____ pursuant to section 775.083, Florida Statutes, plus \$_____ as the 5% surcharge required by section 960.25, Florida Statutes
- The Defendant is hereby committed to the custody of the Department of Corrections.
- The Defendant is hereby committed to the custody of the Sheriff of Indian River County, Florida.
- The Defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.
- The Defendant is hereby sentenced

- Probation
- Drug Offender Probation
- Community Control
- Sex Offender Probation

To Be Imprisoned (Check one, unmarked sections are inapplicable):

- For a term of natural life.
- For a term of _____ Year(s) _____ Month(s) _____ Day(s) as a condition of Probation Community Control
- Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "Split" sentence, complete the appropriate paragraph.

- Followed by a period of _____ Year(s) _____ Month(s) _____ Day(s) on probation/ community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.
- However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the Defendant shall be placed on probation/ community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order.

In the event the Defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the Defendant begins service of the supervision terms.

BK: 3615 PG: 285

Defendant:
HECTOR NEGRON-ESPADA

Case:
312010CF000621AXXXXX

SPECIAL PROVISIONS

(As to Count 1)

By appropriate notation, the following provisions apply to the sentence imposed:

Minimum/Mandatory Provisions:

Firearm It is further ordered that the _____ year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking It is further ordered that the _____ minimum mandatory imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance (within 1000 ft. of school) It is further ordered that the 3-year minimum imprisonment provision of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with section 775.0823, Florida Statutes.

Short-Barreled Rifle Shotgun, Machine Gun It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.

Prison Releasee Reoffender The defendant is adjudicated a prison releasee reoffender and has been sentenced to an extended term of _____ years as such in accordance with the provisions of section 775.082(9)(a), Florida Statutes. In accordance with section 775.082(b) the defendant must serve 100 percent of that portion of the total sentence.

Criminal use of Personal Identification Information It is further ordered that the 3 year mandatory minimum imprisonment provision of section 817.568(2)(b), Florida Statutes hereby imposed for the sentence specified in this court.

Other Provisions:

Continuing Criminal Enterprise It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Taking a Law Enforcement Officer's Firearm It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this court.

Retention of Jurisdiction The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983)

BK: 3615 PG: 286

Defendant:
HECTOR NEGRON-ESPADA

Case:
312010CF000621AXXXXX

Jail Credit It is further ordered that the defendant shall be allowed a total of 5 years and 66 days as credit for time incarcerated before imposition of this sentence All Cts. Or Ct. _____

Credit for Time Served in Resentencing after Violation of Probation or Community Control It is further ordered that the defendant be allowed _____ days time served between the date of arrest as a violator following release from prison to the date of re-sentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on case/count _____ (Offenses committed before October 1, 1989).

It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of re-sentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count _____ (Offenses committed between October 1, 1989, and December 31, 1993).

The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(6).

The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1)).

It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of re-sentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to section 921.0017, Florida Statutes, on case/count _____ (Offenses committed on or after January 1, 1994)

Consecutive/Concurrent As To Other Counts It is further ordered that the sentence imposed for this count shall run (check one) Consecutive to Concurrent with sentence set forth in count _____ of this case.

Consecutive/Concurrent As To Other Convictions It is further ordered that the composite term of all sentencing imposed for the counts specified in this order shall run (check one) consecutive to concurrent with the following: (check one)

Any active sentence being served.

Specific sentences: _____.

BK: 3615 PG: 287

Defendant:
HECTOR NEGRON-ESPADA

Case:
312010CF000621AXXXXX

Other Provisions:

In the event the above sentence is to the Department of Corrections, the Sheriff of Indian River County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other document specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends NO POSSIBILITY OF PAROLE, ALL COSTS/ FEES REDUCED TO A CIVIL LIEN.

DONE AND ORDERED in open court on APRIL 4, 2023 at Indian River County, Florida.

NUNC PRO TUNC


HONORABLE ROBERT MEADOWS

FILED FOR RECORD
ONLY DIVISION
2023 APR 19 AM 9:57
CLERK, JEFFREY R. SMITH
INDIAN RIVER CIRCUIT COURT
BY _____
D.C.