No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STARQUINESHIA PALMER,
Petitioner

v.

STATE OF FLORIDA,
Respondent

On Petition for a Writ of Certiorari
to the District Court of Appeal,
First District of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Was Petitioner denied her right to a trial by jury as contemplated by the Sixth Amendment because of the decision in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) which held there is no prejudice to a defendant who is tried by a 6-person jury versus a 12-person jury for a serious criminal charge when such a conclusion is patently false and has been consistently attacked for the entire 49 years it has controlled the size of juries in Florida and Connecticut.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies in this case.

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D	Pages 1-5, 45-47 of Palmer's Amended Motion for Postconviction in Leon County, Florida, Case 2011-CF-2774
E	Palmer's Initial Brief filed in appeal 1D17-3601 in the District Court of Appeal, Fifth District of Florida
F	Jury Trial--Williams v. Florida, 399 U.S. 78 (1970), 61 *J. Crim. L. Criminology & Police Sci.* 526 (1970) https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5687&context=jclc
G	Saks, M., & Marti, M. W. (1997). A meta-analysis of the effects of jury size. *Law and Human Behavior,* 21(5), 451-467. http://homepages.law.asu.edu/~msaks/Saks%20&%20Marti%20jury%20size%20meta.pdf
H	Alisa Smith and Michael J. Saks, *In Honor of Walter O. Weyrauch: The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441 (2008). http://www.floridalawreview.com/wp-content/uploads/2010/01/Saks-BK.pdf
I	David F. Walbert, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case W. Res. L. Rev. 529 (1971) https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2856&context=caselrev
J	Current Student Project at Cornell Universities Law School - *Jury Size: Less is not More.* https://courses2.cit.cornell.edu/sociallaw/student_projects/JurySize_lessisnotmore.html

TABLE OF AUTHORITIES CITED

CASES

FEDERAL

STATE

U.S. CODE, STATE STATUTES AND RULES

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement(s) below:

OPINIONS BELOW

- The February 25, 2019 decision of the District Court of Appeal, Fifth District of Florida, Case 1D17-3601. (See Appendix A)

- The August 25, 2007 opinion of the Second Judicial Circuit, in and for Leon County, Florida, in Case 2011 denying Ground I of Petitioner's *Amended Motion for Postconviction Relief*. (See Appendix B; C: 16-18)

STATEMENT OF JURISDICTION

The District Court of Appeal, First District of Florida, decided Petitioner's case on February 25, 2019 (see Appendix A), affirming the August 25, 2007 denial of Ground I of her *Amended Motion for Post Conviction Relief* by the Second Judicial Circuit, in and for Leon County, Florida, in Case 2011-CF-2774. (See Appendix B; C: 16-18)

Petitioner's 90-day time period for filing a petition for writ of certiorari in this Court began on February 25, 2019 and ended on Sunday, May 26, 2019, making such a petition due by Tuesday, May 28, 2019 (Monday being a federal holiday). The instant petition is filed by U.S. Mail delivery with a postmark of May 28, 2019, making it timely.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution guarantees defendants the right to trial by jury:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[1]

[1] U.S. CONST. amend. VI.

STATEMENT OF THE CASE

Starquineshia Palmer (hereafter, Palmer) and Shannon Washington met as high school classmates and later entered into a dating relationship. Several years later, Ms. Washington was attending Florida Agricultural and Mechanical University (FAMU) on a basketball scholarship and resided in an off campus apartment with another basketball player. In September, 2011, during FAMU homecoming weekend, Palmer visited Ms. Washington and stayed at the apartment. During the stay, they got into an argument and Palmer fatally stabbed Ms. Washington in the neck.

The state filed an information charging Palmer with second degree murder in violation of Section 782.04(2) of the Florida Statutes. A grand jury returned an indictment for first degree murder in violation of Section 782.04(1)(a)(1) of the Florida Statutes (R. 10-11).

The state informed Palmer that it was not going to pursue the death penalty, and at a later time, her counsel agreed with the prosecutor that a 6-per jury would suffice rather than a 12-person jury.[2] This was not a situation common in Florida where the state waives the death penalty in exchange for the defendant waiving the right to a 12-person jury. The jury found Palmer guilty and the trial court sentenced her to life in prison without parole.

Palmer filed a postconviction motion in which she argued in Ground I that her two trial counsels were ineffective for waiving her right to a 12-person jury. An evidentiary hearing was held in which both of her trial counsels testified and conceded that they had been deficient in their duty to advise Palmer as to her right to a 12-person jury

[2] Florida is one of only two states in the country, Connecticut being the other, that allow a person facing an automatic life sentence if convicted, to be tried before a jury of fewer than 12 persons.

and the benefits for exercising that right (see Appendix C), however the trial court denied her claim saying she had not shown prejudice based on Florida case *Smith v. State*, 857 So. 2d 268 (Fla. 5th DCA 2003) which is a case denying a similar argument based on the decision in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). The court in *Smith* stated, "the Supreme Court in *Williams,* while recognizing the prerogative of legislatures to provide for twelve-person juries when the death penalty is sought, nonetheless takes the position that there is no evidence that a twelve-person jury is necessarily more advantageous than a six-person jury to a criminal defendant."

The trial court then denied Petitioner's claim, saying:

> And, frankly, if you read *Smith*, probably the Court should not have conducted an evidentiary hearing on this case because there is no prejudice, and that's what the smith case found on facts very similar to what we have here. Therefore, the really clear ruling is that that motion is denied because there was no prejudice.

(See Appendix C-18)

Petitioner appealed that denial to the District Court of Appeal for the Fifth District of Florida (Case 1D17-3601), which on February 25, 2019, affirmed the decision of the trial court without comment. (See Appendix A) Without a written opinion, Petitioner could not file an appeal in the Florida Supreme Court leaving this Court as her court of last resort via a petition for writ of certiorari. Accordingly, Petitioner hereby files the instant petition for writ of certiorari seeking to have this Honorable Court answer the question presented on page i.

REASONS FOR GRANTING THE WRIT

Ground I of Palmer's postconviction motion was that her trial counsel was constitutionally ineffective under this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) for allowing her to be tried by a 6-person jury instead of a 12-person jury. (Appendices D; E-5, 6, 7) Under Florida Statute 913.10[3] and Florida Rule of Criminal Procedure 3.270[4] she had a right to be tried with a 12-person jury.

Palmer prepared her motion in *pro se*, having various law clerks work on it as they came and went from her institution and she stressed to the court below her lack of training in legal matters and limited education. In her *Motion for Appointment of Counsel* to represent her at the evidentiary hearing below, she explained her situation as follows:

> 3. The Defendant is unable to represent herself in this adversarial and complex filing without the assistance of an attorney, because her Motion for Post-Conviction Relief was drafted and written by a law clerk assigned to the Defendant's case. The Defendant did not aid nor assist the law clerk in the drafting or writing of said motion and is a layman of law.
> 4. The Defendant respectfully request [sic] that Alice Copek not be assigned as counsel to represent her, where Copek is counsel whom the Defendant has asserted ineffective assistance of counsel against.
> 5. The Defendant asserts that without meaningful presentation of the facts and matters raised in her pending motion, she would be prejudiced, and lack of counsel would create a conflict in the doctrine of fundamental fairness.
> 6. The Defendant asserts that due to her lack of education and advocacy skills that she cannot reasonably and intelligently represent herself and the issues at hand. The Defendant seeks to avoid being procedurally barred at advanced judicial levels due to he [sic] intellectual inadequacy

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[3] F.S. 913.10 – Number of jurors.—Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases. (1970 to present)

[4] Rule 3.270 – Number of Jurors – Twelve persons shall constitute a jury to try all capital cases, and 6 person. (1968 to present)

> and lack of skills and knowledge of the law. The Defendant has access to assistance from a prison law library; however, she cannot present valid argumentation without assistance of counsel.

(Appendix E-7, 8)

It is clear from her motion that she is untrained in law and that law clerk(s) at her institution prepared her motion for her. It is also clear that the law clerks who helped her have a very limited understanding of the law, as evidenced by paragraph 2 above, where she requested the lower court not appoint to represent her at her evidentiary hearing, Attorney Alice Copek, who was her trial counsel and who she argued had provided ineffective assistance during the trial phase of her case. Clearly the law clerks did not understand what happens at evidentiary hearings on postconviction motions.

Undersigned counsel brings this to the Court's attention since much of what took place during the evidentiary hearing was the questioning of Palmer towards getting her to define/defend legal points towards prevailing on her motion, something she was unable to do because of her lack of legal training.

The lower court appointed Attorney Scott Miller to represent Palmer at her evidentiary hearing, and under his questioning, she testified as follows as to Ground I:

> BY MR. MILLER
>
> . . .
>
> Q Okay. And do you know how many jurors you're entitled to in a first-degree murder case?
>
> A No, sir, I didn't.
>
> Q Do you know now?
>
> A Yes, sir, I do.
>
> Q How many?
>
> A Twelve.
>
> Q All right. when did you become aware of that fact?
>
> A About a year ago.
>
> Q While you were preparing the motion?
>
> A Yes, sir.
>
> Q Okay. And you had somebody helping you do that --
>
> A Yes, sir, I did.

Q -- a paralegal? Before the trial did anybody mention to you that you were entitled to a 12-person jury?

A No, sir.

Q Did anybody ask you to waive the 12-person jury?

A No, sir.

Q Did you ever tell anyone, I don't need a 12-person jury?

A No, sir.

Q All right. Did your lawyer ever talk to you about a 12-person jury or a six-person jury?

A No, sir. she did not.

Q All right. so the subject never even came up?

A No, sir.

(Appendix E-15, 16)

Attorney Jon Fuchs represented the State at the hearing and under his questioning during cross, Palmer testified as follows as to this issue:

BY MR. FUCHS:

Q Ms. Palmer, if I can, I'm going to try and walk these through one at a time.

As to Ground one, I believe your claim is that Ms. Copek was ineffective for failing to object to a six-person jury when the death penalty is waived; correct?

A Yes, sir.

Q And your testimony is that at no time were you informed that you could have a 12-person jury, and you never affirmatively waived that; correct?

A No, sir. I was not.

Q Okay. showing you what's been previously -- what's now into evidence. It's the transcript from the July 8, 2013, jury, and I'm referring to Page No. 4 of that.

THE COURT: The date?

MR. FUCHS: That would be the July 8th of 2013.

Looks like Page 4.

BY MR. FUCHS:

Q I ask you to take a look at that and read from roughly 7 on down, please.

(Pause)

A It says the court --

Q You can just read it to yourself, ma'am.

A Okay.

(Pause)

Q Okay. Ms. Palmer, isn't it true that on that date the Court informed you that you had the right to a six-person -- to a 12-person jury and then asked you whether you were agreeing to the six-person jury and you said yes?

A Yes, sir.

Q Okay. So you were informed?

A I was, sir.

Q And you agreed to do a 12 -- or a six-person jury; right?

A Yes, sir.

(Appendix E-16, 17)

Palmer's trial counsel was Alice Copek and she testified as to this issue as follows:

BY MR. MILLER

. . .

Q That's all right. At any stage of your representation, did you ever explain to Ms. Palmer the difference between the 12-person and six-person jury?

A No. I do -- I don't recall if we ever talked about a jury, you know, like 12 versus six --

Q Right.

A -- like, if we might -- if I. might have said, if it's capital, it's 12. But I know that I never discussed with her do you want a 12-person jury? You can demand a 12-person jury. I'm nearly positive that I never --

Q The issue never came up?

A No. And I know -- I know I never talked to Ms. Palmer and said you can demand this if you want.

Q Were you even aware that she was entitled to a 12-person jury without a death penalty?

A The way I recall it -- and I do not remember if it was in Mr. Thomas's office or if it was here in the courtroom, but when it came up and Ms. Ray had said I'm not seeking death, Andy had -- or I'm sorry -- Mr. Thomas had said, don't even think she's entitled to it. And I never -- I never researched it.

Q All right. Do you now know what the status of the law is with regards to that?

A Not entirely because it's – it seems to me that the Florida Supreme Court says if you demand -- if the defendant demands it, they get it. And then some of the DCAs are a little bit fuzzy. But the way that I read the Florida Supreme Court is that if Ms. Palmer had said, no, I want a 12-person jury, she would have been -- she would have gotten it.

Q Do you believe that would have been an advantage?

A Probably.

Q Why?

A Well, 12 -- you know, you only need one to get a hung jury. So 12 people are better than six. I mean, that's a very simplistic conception, but I haven't thought about it in detail.

Q All right. Well, let's move ahead to March of 2014. I understand there was some movement of you within the Public Defender's office.

A Correct.

Q Can you explain what that was?

A Well, as I said, I was, in July I had been assigned to Felony Division D, but I had not yet gone. And then shortly after that trial got continued, I had surgery, and was out for about six weeks. And Ms. Daniels, Nancy Daniels, the public defender at the time, was covering for me. So she continued to cover for me till -- I don't recall -- maybe October or November --

Q Okay.

A -- of 2013, and then I assumed my felony role.

Q In Division D?

A In Division D.

Q So you were carrying what kind of caseload?

A Oh, gosh. I don't recall.

Q Was it a -- was it an abbreviated caseload? Was it a full caseload? How would you describe it?

A It was a full caseload.

Q And is that in addition to handling obviously Ms. Palmer's case?

A Ms. Palmer's case, yeah.

Q Any other --

A That was the only -- no. I had -- that was the only other case I had beside D cases.

Q Okay. Now, when the trial came up in March of 2014, was there also some personal matters which were distracting you from the trial, specifically having to do with a storm or something?

A No. That was in July.

Q I'm sorry.

A That was -- in July when we were going to pick the jury, we had a tree on our house --

Q Okay.

A -- the weekend -- the week -- maybe three or four or five days before that. so we were displaced from our home until October or November, I think.

And Mr. Thomas Mr. Thomas was also in capital, and he was working on a big capital case in Wakulla, so can't say it's a personal -- any personal issues we had then. It was just that I had been -- I was pleading with Mr. Thomas, please, get on Palmer case. I need help. And he was focused on --

Q He was busy elsewhere.

A -- his trial in Wakulla.

Q All right. Because of the tree on your house and your particular experience and lack of experience with murder cases, do you feel like you adequately advised Mrs. -- or Ms. Palmer about her right specifically to a 12-person jury?

A No.

Q All right. During the trial in March, were you --

A Oh, personal issues. I will say in March I was -- the week of this trial I was extremely sick.

Q Okay.

A Or pretty -- I shouldn't say "extremely." But I had to leave the courtroom several times because of coughing attacks.

Q All right.

A But it was maybe that weekend before that I got sick.

Q All right. And we don't need to go into your personal details about your health, but did your relative infirmity, did that interfere with your performance of your duties do you feel?

A Being sick?

Q Yes.

A I do. Yeah.

Q In what way?

A Well, I think -- I think just common sense tells you when you're sick you're not at your peak performance.

Q Okay.

A And so it was -- it was being sick, and also because of the delay in really getting hot onto the Palmer trial in March, we were up -- I was up till all hours of the night preparing the night before trial. so not getting sleep and being ill was not beneficial.

(Appendix E-17 to E-20)

During cross, Attorney Copek testified as follows on this issue:

BY MR. FUCHS:

Q Let's talk about the 12-person jury. You're saying you never had a conversation with Ms. Palmer about that?

A Uh . . .

Q And it never crossed your mind to have a conversation about that?

A No. I know I never told her, Ms. Palmer, you are entitled to a 12-person jury. Do you want one? I never had that conversation with her.

Q So when the Court asked you back in June prior to going to the jury selection in July whether it was a six-person or 12-person verdict -- or jury and you told the Court six, you said that without ever consulting your

client? Never thought to say at that time maybe I should have that conversation?

A That's correct.

Q And then you're saying that whenever you picked the jury on the 12 -- in July and the Court inquired about the fact that it's 12-person or six-person as to Ms. Palmer, and you, of course, also answered the six or 12, at that point you're saying you still hadn't ever talked to her and never crossed your mind about doing so?

A That's correct.

Q And you're saying back again in October when you were talking again about setting this for trial, the Court once again asked the question about 12 versus six, and you again said six. And at no point during any of that, you said, you know, what maybe I ought to think about maybe seeing if this is a 12-person or six-person jury and have a conversation with your client?

A That's correct. Again, the reason I didn't think of it to talk to her about it was because Mr. Thomas -- and this is -- he's far more experienced that I am and had been -- had done capital cases, and he said, I don't think she's even entitled to it, and I never -- I never followed up on that.

Q But you have no reason to believe that a 12-person jury would be anything -- any other verdict other than the fact that it was 12 instead of six?

A I'm sorry?

Q You have no reason to believe that it would be a different verdict with 12 persons other than the fact that it's 12 versus six?

A I think that's speculation. I mean, I can't ...

Q Okay. And you were sick the day of trial -- the week of the trial and coughing, no sleep. I mean, that's pretty standard with anybody that's going through a trial.

A Mm-hmm.

(Appendix E-20, 21)

Up to this point, the testimony shows that Attorney Copek never advised Palmer of the benefits of a 12-person jury over a 6-person jury so that Palmer could make a "knowing and voluntary" decision as to whether she wanted to waive her right under Florida law to be tried by a 12-person jury. Attorney Copek testified that the court asked her first whether it was going to be twelve or six person jury, with her indicating six, and the court then asking Palmer if she was waiving her right to a 12-person jury which she

said she was, clearly following counsel's lead.

Next to testify was Attorney Andy Thomas, who was second chair representing Palmer. At the time of the hearing, Mr. Thomas had become the Public Defender for the county.

BY MR. MILLER

. . .

Q Okay. And the case that we're here on, was that your case?

A It was Ms. Copek's case, but I was second from about six months before the first jury selection. I got involved superficially.

Q All right. Did you interact with Ms. Palmer, the defendant in this case?

A I did. In fact, I talked to her a little bit about her testimony, and I visited with her a number of times. we saw Ms. Palmer pretty regularly. Alice much more than me -- or Ms. Copek.

Q Okay. And did you ever talk to her about the possibility of a 12-person as opposed to a six-person jury?

A I did not.

Q And what is your understanding of the law as it relates to the 12 versus six-person jury?

A Now or then?

Q Then.

A Then? I was under the impression that *Hall*, a First District case, controlled, which basically said that if the State waived death it was not a capital case and you were not entitled to 12 jurors. And I believe that's still the First District's position. But that's what I thought. Okay?

Q Okay.

A I wouldn't have been able to tell you it was *Hall*. I'll tell you that. But I know just from reading Florida Law Weeklies I recall that's why I told Ms. Copek -- I did say that. I don't even know she's entitled to 12 anymore. Okay?

Q Okay.

A What I did not know and I now know is *Griffith*, *State v. Griffith*, a Florida Supreme Court case, which is still good law apparently, and there are districts that disagree. Under those circumstances, there is no question that we should have insisted on 12.

Q Why -- why should you have insisted on 12?

A Just calculus, mathematics. Frequently if you have a 12-person jury and you have two or three that are going one way and a majority going the other way, they'll compromise. Not just a mistrial, but they will frequently compromise. They'll decide, okay, well, this isn't first; it's second, or it's not this; it's manslaughter. And we gave away, in my view,

50 percent of our chance to get a lesser verdict.

Q Okay. Now, you're basing this upon your training and experience?

A Yes, sir.

Q Okay. And, briefly, how long have you been a lawyer?

A 32 years I believe.

Q All right. And how -- how many of those years with the Public Defender's office?

A About 20.

. . .

Q All right. But for the -- the discrepancy you just talked about between the instructions given and the ones you suggested, do you feel like you could have expected a different result in the verdict?

A We would have had a shot, a better shot than we had the way we did it. That's all I can tell you.

Q Because why?

A Well, if we'd had 12 jurors, and we'd asked for the right instruction, and I hadn't argued over the top, and we hadn't made a number of lapses in judgment, including letting Kathy Ray attack our witnesses and personalize the trial --

MR. FUCHS: Your Honor, I'm going to (indiscernible - simultaneous speaking) --

THE WITNESS: -- we had a better shot.

MR. FUCHS: -- I've got a lot of ifs, ifs, ifs --

THE WITNESS: We had a lot of good shots.

MR. MILLER: Your Honor, I'll tender the witness.

(Appendix E-21 to E-23)

During cross, Attorney Thomas made the following statement which undersigned counsel believed to be significant as to his feelings of this case and considering Mr. Thomas is now the elected Public Defender for the Second Judicial Circuit, taking over that position less than three years after representing Palmer, undersigned counsel believes it to be relevant:

BY MR. FUCHS:

Q Mr. Thomas, I notice you got pretty emotional there regarding when you're talking about the sentence that Ms. Palmer is serving.

A Yes.

(Appendix E-23)

No questions were asked of Attorney Thomas during cross as to the 12-person jury issue.

During discussion of the 12-person jury issue, the judge, on his own, produced a case for the attorneys to review as to the 12-person jury issue. This was the same judge who presided over Palmer's trial:

> THE COURT: We're going to take a few minutes. Then you can make any comments you want to make.
>
> Let me -- and I should have made copies for y'all. I apologize. I just didn't really think about it.
>
> Give y'all a chance to look over a case that I pulled up while we take a break. It's *Smith v State*, 857 So. 2d 268.[5]
>
> Do you have that, Mr. Fuchs?
>
> MR. FUCHS: I already have it, Your Honor. I'll pass it along to Mr. Miller.
>
> THE COURT: All right. We'll take about five minutes.
>
> (whereupon the proceedings stood in recess from 3:21 p.m. to 3:27 p.m.)

(Appendix E-24)

After the recess, Palmer's counsel made the following argument as to the issue:

> BY MR. MILLER:
>
> Your Honor, we would submit that due particularly to the unknowing waiver of her right to a 12-person jury, she did not receive adequate representation. She wasn't even informed about that. I mean, she may have made a cursory waiver to the Court in July, prior to the trial, and the following March, but not having been informed by counsel is the issue here, and since she wasn't informed by counsel, she could not have made that waiver knowingly and intelligently and, therefore, wasn't adequately represented.
>
> . . .
>
> Specifically as it relates to Smith versus state, Judge, that's a Fifth DCA case. The rationale is interesting. I don't know if I'd agree with it, but I'm not an appellate judge that -- certainly that's binding law if that's the only law out there on the subject. However, it's not. I think there's a conflict between that and from what my understanding is Alfonso versus

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[5] *Smith v State*, 857 So. 2d 268 (Fla. 5th DCA 2003)

State. It's 528 So. 2d 383 from the Third DCA.[6] There being a conflict in the districts, I think the Supreme Court case would take precedence, and the guiding law on that would be State versus Griffin, 561 So. 2d 528,[7] Florida Supreme Court from 1990, which I think would maintain that essentially the 12-person jury --

THE COURT: Do you have a copy of Alfonso?

MR. MILLER: And I apologize. I do not.

THE COURT: I couldn't find any case that was in conflict with Smith. Do you have a copy of that?

MR. MILLER: I do not. I just have --

THE COURT: Is it a post-conviction case?

MR. MILLER: I don't -- I don't know, Judge.

THE COURT: Okay.

MR. MILLER: But I would submit that's the binding case. And because of that, the veritas or her right to a 12-person jury, which even the Smith case indicates is statutory but not a fundamental right, is still a right, would constitute ineffective assistance. Therefore, she should receive a new trial.

(Appendix E-24, 25)

The lower court embraced *Smith v State*, 857 So. 2d 268 (Fla. 5th DCA 2003) in which the defendant complained that "his trial counsel was ineffective for failure to object to a six-person jury in a capital murder case, claiming that neither he nor his trial counsel agreed to waive the right to a twelve-person jury." "The State in its response to this court acknowledges that the record 'does not reflect an on-the-record waiver by defense counsel,' but argues that Smith has failed to demonstrate prejudice because his claim that a twelve-person jury would have been more susceptible to reasonable doubt than a six-person jury is 'purely speculative' and more is required by the standards established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)."

The *Smith* court, citing *Williams*, stated, "In *Williams v. Florida*, 399 U.S. 78, 90

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[6] *Alfonso v. State*, 528 So. 2d 383 (Fla. 3d DCA)

[7] *State v. Griffin*, 561 So. 2d 528 (Fla. 1990)

S.Ct. 1893, 26 L.Ed.2d 446 (1970), which originated in the Florida state courts, the United States Supreme Court rejected the argument that a criminal defendant was entitled to a twelve-person jury in a robbery prosecution and explained in some detail why a twelve-person jury is not necessarily more advantageous to a criminal defendant than a six-person jury."

The *Smith* court continued, "In summary, the Supreme Court in *Williams*, while recognizing the prerogative of legislatures to provide for twelve-person juries when the death penalty is sought, nonetheless takes the position that there is no evidence that a twelve-person jury is necessarily more advantageous than a six-person jury to a criminal defendant. Assuming arguendo in the instant case that there was in fact no agreement between the State and defense counsel, and that defense counsel simply failed to object to a six-person jury, in light of *Williams,* Smith has failed to demonstrate the requisite prejudice required by *Strickland.*"

The *Smith* court notes at the end of its opinion, "a defendant's personal waiver of this right is not required, as explained in *State v. Griffith*, 561 So. 2d 528, 530 (Fla.1990): The decision to proceed to trial with a jury of six persons, in lieu of twelve, in exchange for the state's agreement to waive the death penalty, must be considered a tactical decision.... This tactical decision should be equated with other instances wherein this Court has held a defendant's personal on-the-record waiver unnecessary for a waiver to be effective."

Palmer would point out that while a defendant's counsel can make many decisions for tactical reasons and there are certainly times when the defendant is bound by those decisions since counsel acts on defendant's behalf, when the record shows that counsel was not making a tactical decision, but testifies he or she never even thought about it, or thought about it incorrectly, it would be an injustice to hold that defendant account-

able for that decision as a "tactical" decision made by counsel towards being an advocate for his/her client.

In the instant case, Palmer clearly did not make a knowing and voluntary decision to waive her right to a 12-person jury. She was just saying what was needed to agree with what her counsel had just said, and her counsel's decision to waive the 12-person jury was clearly not a "tactical" decision made to help Palmer. It was a decision unencumbered by the thought process.

The *Smith* court ultimately denied Smith relief because he could not show prejudice in light of the decision in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). As soon as the *Williams* decision came out, it began getting attacked in the media nationwide because it was a bad decision. Five years later, this Court decided *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978), striking down a Georgia law allowing 5-person juries and holding that a 5-person jury was so small compared to larger juries like 12-person juries, that "it threatened the constitutional guarantee of the right to a trial by jury." Palmer finds it interesting that according to the supreme court in *Ballew*, a jury of five is so small that "it threatens the constitutional guarantee of the right to a trial by jury," but according to *Williams,* a jury of six is sufficient to try a defendant on the most serious crimes out there, in effect creating a bright line rule. This makes it easy to see how really bad the decision on *Williams* is.

Petitioner's appellate court, the First District Court of Appeal, addressed *Williams* just over a year ago in *Lessard v. State,* 232 So. 3d 13 (Fla. 1st DCA December 17, 2017) with Justice Makar writing an in-depth, 6-page, concurring opinion where he described the problems that have arisen since this Court's decision in *Williams v. Florida*.

> To begin, it is obvious that *Williams*, which dismissed the centuries-old common law practice of twelve-member juries as a mere "historical accident" and replaced it with an ad hoc "functional" approach, was based on dubious anecdotal assertions and demonstrably incorrect statistical and sociological principles that have plagued this body of jurisprudence ever since.[8] *Williams* held that a six-member jury in a state court criminal proceeding was functionally the same and thereby an adequate constitutional proxy for the time-worn traditional twelve-member jury. But its reasoning foundered on glaring misinterpretations of social science research and inept methodologies, so much so that one prominent commentator said that the "quality of social science scholarship displayed [in the Court's decisions on jury size] would not win a passing grade in a high school psychology class."
>
> . . .
>
> Florida is alone in using six-member juries for life felonies,

Lessard v State, 232 So. 3d 13 (Fla. 1st DCA 12/17/ 2017)

The lower court, in ruling on Palmer's issue, stated the following:

> I think the law is pretty clear that at this point in time that a person is entitled to a 12-person jury unless the death penalty is legally impossible, not just that the -- not just that the state has waived it. However, that was not the case in 2014. I do not think it was ineffective assistance of counsel not to assert that she was entitled to a 12-person jury. That ruling can be argued.
>
> However, I think the *Smith* case, which is, based upon my research,

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[8] See Shawn Kolitch, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 Lewis & Clark L. Rev. 673, 689 (2006) (noting that the Supreme Court's newfound functional approach was flawed because its "interpretation of the available empirical data was questionable from the beginning, and illustrates many of the difficulties the Court faces when attempting to support its holdings with empirical data"); Robert H. Miller, *Six of One Is Not A Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 622 (1998) (discussing "the critical ways in which the Court's misinterpretation and misapplication of social-science research in *Williams* and its progeny triggered the 'unthinkable' dismantling of an irrevocable constitutional cornerstone") (footnote omitted); *Baldwin*, 399 U.S. at 126 ("The Court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty. Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six? The uncertainty that will henceforth plague the meaning of trial by jury is itself a further sufficient reason for not hoisting the anchor to history.") (Harlan, J., dissenting).

> still controlling law, 857 So. 2d 268, Fifth DCA, with facts almost on point with what we have here. And, frankly, if you read smith, probably the Court should not have conducted an evidentiary hearing on this case because there is no prejudice, and that's what the Smith case found on facts very similar to what we have here. Therefore, the really clear ruling is that that motion is denied because there was no prejudice.

(Appendix E-29, 30)

Florida's courts have their hands tied because of the ruling in *Williams*, and could not have granted Petitioner relief if they had wanted to because such claims necessarily are raised as ineffective assistance of counsel, necessitating a showing of prejudice which *Williams* wrongly says doesn't exist. Palmer contends she was indeed prejudiced because the *Williams* court only considered the chances of a guilty or not guilty verdict, but that is not real world. Palmer wants the best chance of not being found guilty and that includes both being found not guilty and a hung jury, and the chances of a hung jury are much greater the more jurors there are because of the greater discussions and interaction by more members of the community as anticipated by the Framers of the Sixth Amendment. Palmer was prejudiced, and does satisfy the second prong of *Strickland,* but the trial court was controlled by *Williams* and it progeny.

Numerous articles began appearing from the moment *Williams* was decided, condemning the decision as wrong. Petitioner could present here to the point of *ad nauseam*, quotations from such articles, but for the sake of judicial efficiency, Petitioner instead has selected to include sever in her Appendix for the Court to review in their entirety and in context. Respondents in this cause will have the opportunity to present articles contradicting what Petitioner has presented, but quite frankly, undersigned counsel has been unable to found a single article written in the almost 50 years since *Williams* was decided that supports the decision. The decision is so bad, that the law school at one Ivy League school (Cornell), includes is as a school project because it is so

bad. (See Appendix J) If ever there was a situation were it was absolutely clear a case needs to be reconsidered, it is this one.

Below is information on the articles Petitioner has chosen to include.

> The Court's apparent disregard for the venerable traditions embedding the twelve-man jury within our jurisprudence is disturbing. From a legal standpoint, the rule of *stare decisis* commits the law to consistency. In juxtaposing deviation from precedent to affirmation of it, the law can justify the former only by demonstrating a pressing social need for reform or an injustice resulting from the application of the old rule. It is debatable whether the common law jury of twelve can be condemned under either of the above characteristics. From a strictly empirical standpoint, one thing is certain about the twelve-man jury. It works. As Mr. Justice Harlan concluded in his dissent: "The decision in *Williams* ... casts aside workability and relevance and substitutes uncertainty."[9]

Jury Trial--Williams v. Florida, 399 U.S. 78 (1970), 61 *J. Crim. L. Criminology & Police Sci*. 526 (1970) (See Appendix F)

> In a series of opinions in the 1970s, the U.S. Supreme Court concluded that juries smaller than 12 persons would be constitutional if they performed no differently than traditional 12-person juries. In a meta-analysis, we examined the effects of jury size on the criteria the court specified as the basis for making such comparisons. A search for all relevant empirical studies identified 17 that examined differences between 6- and 12-member juries. The total sample for the 17 studies was 2,061 juries involving some 15,000 individual jurors. Among other findings, it appears that larger juries are more likely than smaller juries to contain members of minority groups, deliberate longer, hang more often, and possibly recall trial testimony more accurately.

Saks, M., & Marti, M. W. (1997). A meta-analysis of the effects of jury size. *Law and Human Behavior,* 21(5), 451-467. (See Appendix G)

> After 700 years of common-law history and nearly 200 years of constitutional history, the Supreme Court concluded that the constitutionally permissible minimum jury size could not be inferred from the language or

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[9] 399 U.S. at 129.

the history of the Constitution. The answer, said the Court in *Williams v. Florida*, could be found only through a "functional analysis" of the performance of smaller juries (that is, empirical examination of the behavior of different-sized juries). The Court implicitly abandoned that analysis in *Ballew v. Georgia*, when it held that juries with fewer than six members were unconstitutional—a decision based on nothing more than the ipse dixit of the Justices. This Essay sets out the historical and empirical infirmities of the *Williams* line of cases. It summarizes the jury sizes required in criminal prosecutions throughout the United States; examines the Sixth Amendment history of the jury trial; argues that this history supports the position that the Constitution intended twelve-person juries; reviews Florida's jury trial history; and summarizes the empirical research undertaken since *Williams*. This Essay concludes that at present no sound basis exists in law for knowing the minimum size of a constitutionally permissible jury. *Williams,* having become a dead letter in *Ballew*, should either be ratified (and the theory of functional equivalence applied conscientiously) or be formally reversed to allow courts either to develop a sound theory of the constitutionality of jury size or to restore the jury to its traditional size.

Alisa Smith and Michael J. Saks, *In Honor of Walter O. Weyrauch: The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441 (2008). (See Appendix H)

> Williams provides the germ for a wide range of comments, but the most salient question is the functional importance of jury size. A functional analysis is clearly relevant to an evaluation of the potential impact of the case, and is equally crucial to the Court's test of constitutionality. The Court concluded that the six-man jury would return the same verdicts as the traditional jury, but this conclusion is unsupportable. A thorough analysis shows that the problem of diminished representation requires a much more careful treatment than that accorded it by the Court. A proper treatment of representation, in conjunction with a description of the deliberation process, shows that the six-man jury convicts different persons. This difference is not a meaningless or arbitrary distinction, but reflects a substantial derogation from the performance of the 12-man jury. The test laid down in Williams indicates that the reduced jury is unconstitutional if the smaller size impairs its performance. Consequently, a correct application of the Court's test would hold that a jury of six persons is unconstitutional.

David F. Walbert, *The Effect of Jury Size on the Probability of Conviction: An Evaluation*

of Williams v. Florida, 22 Case W. Res. L. Rev. 529 (1971). (See Appendix I)

> Six-person juries are the product of a 1970 Supreme Court decision, *Williams v. Florida* (399 U.S. 78), that is now severely criticized both for the empirical studies on which the Court relied and the Court's analysis of those studies. In fact, modern empirical research in sampling theory and group dynamics suggests that six-person juries are less representative of their respective communities than twelve-person juries and less deliberative and thoughtful than their larger cousins.

Current Student Project at Cornell Universities Law School - *Jury Size: Less is not More.* (See Appendix J)

According to the above, a 6-person jury is arguably unconstitutional, but at the very minimum, it unarguably puts a defendant at a reduced chance of avoiding conviction compared to what he or she would have with a 12-person jury. Thus, the conclusion in *Williams* that a defendant has no better advantage with a 12-person jury than he or she does with a 6-person jury is incorrect, and for 49 years this case has been controlling law in Florida, and it would be naive to presume it has not led to the conviction of many innocent people, who are now serving life sentences with no chance of parole.

This is especially egregious in cases involving capital sexual battery where there is only one sentence, life in prison, yet the proof at trial is more often than not a child's word over an adult's word with no hard evidence. Florida does not allow a defendant charged with capital sexual battery to be tried by a 12-person jury. He or she has to be tried by a 6-person jury, just one more person than the number this Court ruled is unconstitutional in *Ballew v. Georgia*.

The decision in *Williams* has been prejudicing Florida's citizens for 49 years and it is long past time to correct it. Not only has it deprived people like Petitioner who has been denied her right to a 12-person jury based on *William's* flawed conclusion as to prejudice, but it also has allowed prosecutors to get defendant's to trade their right to

be tried by a jury that is constitutional according to the Six Amendment, to instead be tried by a jury that is unconstitutional in return for the state not seeking the death penalty. How many innocent people are serving life sentences in Florida's prisons right now because of that. Florida should join the other states in the country and require 12-person juries for all felony trials.

Petitioner contends she is entitled to a new trial by a 12-person jury and this Court should grant this petition for certiorari and rehear *Williams*.

CONCLUSION

Petitioner has shown that the decision in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) is flawed and should be clarified or reversed as to its holding that a 6-person jury is constitutional under the Sixth Amendment and there is no prejudice to a defendant who is tried by a 6-person jury as opposed to being tried by a 12-person jury, and accordingly, the instant petition for writ of certiorari should be granted.

Respectfully submitted this 28th day of May, 2019.

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