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

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

DAVID W. COLLINS
Florida Bar No. 475289

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Counsel for Petitioner

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A	February 25, 2019 decision of the District Court of Appeal, Fifth District of Florida, Case 1D17-3601
B	August 25, 2007 written Order Denying Amended Motion for Postconviction Relief issued by the Second Judicial Circuit, in and for Leon County, Florida, Case 2011-CF-2774
C	Miscellaneous pages from transcript of evidentiary hearing of August 25, 2017, including oral denial of Ground I (12-person jury)
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

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-3601

STARQUINESHIA D. PALMER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
James C. Hankinson, Judge.

February 25, 2019

PER CURIAM.

AFFIRMED.

WOLF, LEWIS, and WETHERELL, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

David W. Collins of Collins Law Firm, Monticello, for Appellant.

Ashley B. Moody, Attorney General, and Virginia Harris, Assistant Attorney General, Tallahassee, for Appellee.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 2011CF2774A
SPN: 220182

vs.

STARQUINESHIA D. PALMER,

Defendant.
_____/

ORDER DENYING AMENDED MOTION
FOR POSTCONVICTION RELIEF

THIS MATTER coming on to be heard upon the Defendant's Amended Motion For Postconviction Relief filed on December 23, 2016, pursuant to Fla. R. Cr. P. 3.850, and the Court having conducted an evidentiary hearing on August 25, 2017, having reviewed the file and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the motion be denied. Based on the reasons as announced on the record, the Court finds that defendant has failed to show that she received ineffective assistance of counsel or that she was prejudiced by any alleged deficiency.

The defendant is advised that she has thirty (30) days to file an appeal to this Court's ruling.

DONE AND ORDERED this 25th day of August, 2017, in Tallahassee, Leon County, Florida.

JAMES C. HANKINSON
Circuit Judge

cc:

Jon Fuchs, Assistant State Attorney

Scott Miller, Assistant Regional Conflict Counsel

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2011-CF-2774

STATE OF FLORIDA

vs.

STARQUINESHIA PALMER,

Defendant.
_____/

DIGITAL PROCEEDINGS: POST CONVICTION HEARING

BEFORE: THE HONORABLE JAMES C. HANKINSON

DATE: August 25, 2017

LOCATION: Leon County Courthouse
Tallahassee, Florida

FOR THE STATE: JON FUCHS, ASSISTANT STATE ATTORNEY
OFFICE OF THE STATE ATTORNEY
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301

FOR THE DEFENDANT: SCOTT MILLER, ASSISTANT REGIONAL COUNSEL
CRIMINAL CONFLICT REGIONAL
COUNSEL'S OFFICE
POST OFFICE BOX 1019
TALLAHASSEE, FLORIDA 32302

TRANSCRIBED BY: JANYCE W. BOOTH, RMR, CRR
Notary Public in and for the
State of Florida at Large

JANYCE W. BOOTH, RMR
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

JANYCE W. BOOTH, RMR, CRR, OFFICIAL COURT REPORTER

I N D E X

Q Okay. And you heard Mr. Fuchs read the -- the back and forth between the judge and the defendant about the 12-person versus six-person jury.

A I -- I couldn't hear completely, but I was here, and I heard -- I heard most of it, but it was a little difficult to hear back there.

Q Okay.

A You might have to remind me.

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, I 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?

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 I 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.

Q Okay. And because of that, is there something specifically you'd say that you felt like you failed to do or

Q Who handled the jury instructions? You or Mr. Thomas?

A You mean the jury instructions that were given?

Q Who -- who's -- who spoke during the charge conference?

A I honestly don't recall.

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

THE COURT: Cross.

CROSS EXAMINATION

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.

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.

MR. MILLER: Objection. Counsel is testifying.

THE COURT: Let's not make a comment, please, Mr. Fuchs. If you have a question, ask a question.

BY MR. FUCHS:

Q You said that you represented Ms. Palmer basically from the beginning.

A Pretty -- pretty close to it.

Q Okay. And you -- you said that this was your first first-degree murder?

A Yes.

Q But you'd had numerous batteries over your career.

A Yes.

Q Numerous aggravated batteries over your career. Second-degree murders?

A I was co-counsel in a second --

Q Okay.

A Well --

Q And did you ever work in the appellate division?

A Yes.

Whereupon,

ANDY THOMAS

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q Sir, could you state your name, please?

A Andy Thomas.

Q And how are you employed?

A I'm now the elected public defender. At the time of this trial, I was chief assistant and a member of the capital team.

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?

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 Did you do any criminal defense work before that?

A Well, I was with the public defender three different times, and I was private for ten years where I was on the conflict list, and I did criminal cases. I did murder cases while I was on the conflict list. And then I was three years at CCR North doing capital post-conviction. And of all that time, I prosecuted for 11 months, and I was in private civil practical for three months. So 14 months of my experience is noncriminal.

Q All right. Now, how many murder cases have you handled?

A 10 to 15. I can't tell you exactly. But I will

Q Okay. And during the trial on this case, was this a typical performance on her part, or were there certain issues that you feel may have interfered with her performance?

A Well, the dialectic, if I can kind of just open -- just answer the question --

Q Please.

A -- in one paragraph.

I was obsessed with the Andy Wilson trial in Wakulla. Okay?

Q Okay.

A And one of the things that I find absolutely -- go out of my mind on is that a guy can kill two people and butcher somebody else and get a life sentence, and she got the same thing after this trial.

Q All right.

A And I'm telling you, if I had done in this trial what I did in Wilson's trial, that wouldn't have happened. I feel certain it wouldn't have happened.

Q Why not?

A Because I didn't have three and a half years to prepare. Alice and I were incapable of coming up with a cohesive defense after the text messages in particular came in.

As the trial went on, because she was ill and because I was catching up, I took on more and more of the

CROSS EXAMINATION

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.

Q Okay. And you've repeatedly stated regarding these jury instructions that if you had not gotten them, it would have created an appellate issue; correct?

A Say what now?

Q If you had not gotten them and you had posed them and you --

A It would have been -- it would have been a preserved appellate issue. Yes, sir.

Q Okay. And, in fact, one of the things they teach you in all of your defense kind of classes is to create those kind of appellate issues.

A We did not do that intentionally. This is not setting somebody up on post-conviction, Mr. Fuchs, if that's what you're implying.

Q And in this particular case that's exactly what we have now is an appellate issue; correct?

A I don't know what you've got, but what you've got is the truth. What you've got is we should not have done what we did.

Mr. Miller.

MR. MILLER: Yes. A statement or comment on case law in particular or both?

THE COURT: Whatever you want to argue.

MR. MILLER: Okay.

LEGAL ARGUMENT

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.

Furthermore, the jury instructions provided were not the ones that really the defense was intending to provide due to a series of circumstances involving the moving of positions, the illness of lead counsel, the confused nature of the defense. Not necessarily intentional, willful negligence, but for practical purposes, the theory the defense intended to be presented was not the one presented. And the jury instructions didn't match,

and as a result, you ended up with jury instructions that were needlessly confusing, and we would submit that would also be a basis for a new trial.

And, finally, the combined effect of the grounds that the defendant listed in her motion, One through Fourteen, even if no one thing in and of itself would rise to that level, we would submit that the cumulative effect would.

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 State. It's 528 So.2d 383 from the Third DCA.

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, 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.

THE COURT: Mr. Fuchs.

LEGAL ARGUMENT

BY MR. FUCHS:

Your Honor, my research is similar apparently to the Court's. I obviously found the Smith case. I did not find anything in conflict with it, which makes it a binding case upon this Court.

In addition, whereas Mr. Thomas passionately argued that, if they had had their jury instruction, they would have gotten a different verdict. However, again, Mr. Thomas is ignoring the facts.

The facts of this particular case are some time before the stabbing occurred, Ms. Palmer is seen going into the kitchen and grabbing a knife and taking it into the room where her and the victim are alone. In addition

case. Every good trial attorney goes back and second-guesses their performance in every trial. They wouldn't be good trial attorneys if they didn't. They wouldn't be good trial attorneys if they couldn't go back and try to think of something that maybe they should have done different or better. That's what makes trial attorneys.

Frankly, when the text messages were discovered on this phone, on Ms. Palmer's phone, in July 2013 -- I believe I have my years correct -- when we'd already picked a jury, and those text messages were discovered, totally changed the whole complexion of this case because, frankly, they made the defense case essentially impossible to defend. She clearly had decided before the killing to kill the victim in this case. It was in writing to her mother on her own phone. I don't care how good the attorney is, there's nothing a good attorney's going to do about that. That's the evidence, and that was what was presented here in this Court. Ms. Palmer was fairly tried and fairly convicted.

As to Ground One, the six-person versus the 12-person jury, I agree with what Mr. Thomas said; that at the time of this case, that law was confused. If you go back and read the Griffin case from the Supreme Court, it did appear to have resolved the issue, but then there

were, subsequent to that, First DCA cases and other DCA cases that came up with a different result. The law was in flux.

I would agree that at that point in time it was not clear what the law was on six-person, 12-person juries when the State had waived the death penalty.

As an aside, I'm not sure that that law isn't now in question given a change in the law. It is a statutory determination, not a constitutional determination. I'm not positive with the new change in the death penalty law that we don't have a different result.

But anyway I think the law is clear, and that aside, I shouldn't have thrown that in, but that was just something that's on my mind.

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, 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.

Ground Two, as to the closing argument, Ms. Ray contended in closing argument that the sudden provocation, heat-of-passion defense did not apply to manslaughter. That is what I ruled during the jury instruction -- in the charge conference. That is what I ruled. Whether that was legally wrong or not, that was something to be taken up with the Appellate Court, but Ms. Ray was not stating something that was incorrect based upon the rulings that I made.

My ruling was that the heat of passion did not apply to manslaughter. I think it was not -- I do not find that it was ineffective to fail to object to that argument. Frankly, I think it was a correct statement of the law, but even if it was not a correct statement of the law, it was not ineffective to fail to object.

More clearly I guess on the prejudice side, Ms. Palmer was found guilty of first-degree murder; so whatever Ms. Ray may have said about the effect of that instruction on manslaughter is irrelevant. It's two

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STARQUINESHIA PALMER,
DEFENDANT,

V. **CASE NO.: 2011-CF-2774**

STATE OF FLORIDA,
PLAINTIFF.
_____/

AMENDED MOTION FOR POST-CONVICTION RELIEF

COMES NOW, the Defendant, **STARQUINESHIA PALMER**, by and through herself, pursuant to Fla. R. Crim. P. Rule 3.850, submitting grounds for review, and in support thereof, Defendant respectfully submits the following:

1. The Defendant did previously file a motion for Post-Conviction Relief with Special Request to Temporarily Hold Proceedings in Abeyance on August 5, 2016, and again on September 26, 2016.
2. The said motion was denied on September 28, 2016 by order from this court, Honorable James C. Hankinson presiding, did find that the defendant had no valid basis to stay the motion. The order did dismiss the defendant's motion for post-conviction relief without prejudice where it was legally insufficient. The court construed defendant's motion as a request to extend time to file a legally sufficient motion, granting her another sixty days to file

a legally sufficient motion on or before December 22, 2016 or it would be dismissed with prejudice.

3. The Defendant does timely file her amendment and reasserts procedural history to satisfy it on this motion:

    a. The Defendant is currently serving a term of life imprisonment imposed by this court, the Second Judicial Circuit, in and for Leon County, Florida.

    b. The Defendant pled not guilty and proceeded to trial by jury on March 10, 2014, the Honorable James C. Hankinson presiding.

    c. The Defendant was found guilty by jury on March 14, 2014 to one count of Premeditated First degree Murder.

    d. The Defendant was represented by Alice Copek and Andrew Thomas at trial and sentencing. The state attorneys were Kathleen Ray and Courtney Frazier.

    e. The Defendant was sentenced on March 14, 2014; aforementioned Judge presiding and Counsel represented her.

    f. The Defendant filed a Direct Appeal, which was per curiam affirmed on October 28, 2015, represented by Nancy A. Daniels and Courtenay H. Miller.

5. The Defendant files the amendment in good faith and herein asserts her grounds for relief.

GROUND ONE

COUNSEL WAS INEFFECTIVE FOR ALLOWING THE DEFENDANT TO BE TRIED AND CONVICTED BY A SIX-PERSON JURY WHERE STATUTORY LAW REQUIRES ALL CAPITOL CASES A TWELVE-PERSON JURY

In the instant case the Defendant was only permitted a six-person jury. Neither the Defendant nor her counsel waived her statutory right to trial by a twelve-person jury. Florida law has long since held that a Defendant charged with a First Degree Murder still retains the right to a twelve-person jury, even if the Death Penalty was never sought in the case, unless it was intelligently, knowingly, and voluntarily waived in the case.

In this case the death penalty was not on the table as a punishment, and was the basis in which the state and court gave for using a six-person jury. Defense counsel did not object or say anything to correct the Court nor the State in their error, where she was the person who announced the use of six-person jury. The record does not refute that the state never sought the Death Penalty, but does show that they sought a six-person jury because the Death Penalty was never an option. The following occurred on record:

THE COURT: Are we talking about - I don't recall, are we talking about a twelve person or six person jury?

MS. COPEK: Six person, You Honor.

THE COURT: **The death penalty has been waived?**

MS. RAY: **We've never sought the death penalty in this case, Your Honor.**

(Pretrial Case Management June 20, 2013 Pg. 5 Ln. 19-25)

THE COURT: **Remind me, are we picking a six or a twelve person jury?**

MS. RAY: **Six.**

(Pretrial Case Management February 17, 2014 Pg. 2 Ln. 20-21)

Prejudice arises here where the Court, the State and Defense Counsel decided that because the Death Penalty was not sought the Defendant only required a six-person jury, and Counsel who is well versed in the law did nothing to correct this error. Regardless of what was assumed or agreed upon, the law is clear in Fla.Stat. §913.10 and Fla.R.Crim.P. Rule 3.270 which guarantee the Defendant her right to a twelve-person jury even when death penalty is waived where first degree murder is still a capitol felony. Counsel did not consult with the Defendant concerning the pros and cons of having a twelve-person jury versus a six-person jury, nor that, she had a constitutional right to a twelve-person jury. The law holds that an accused must have a jury of their peers. The Defendant was bi-sexual in a same-sex (lesbian) relationship with a well-known college basketball player. This case involved a murder, fighting, jealousy, bad tempers and drinking; so many different

opinions concerning these issues. It is probable that it would have taken more than six people to effectively decide this case. It is unknown if there were any Lesbian, Gay, Bi-Sexual, and Trans-Gender (LGBT) members on the jury. Neither the defense nor state asked any juror of their sexual orientation, who would better understand the dynamics of a same-sex relationship. There exists a reasonable probability that a twelve-person jury would have included a juror of the Defendant's peers.

Prejudice also arises where juror Babcock had an issue with same-sex relationships because she was a strong Christian (see ground eight), effectively leaving the Defendant with only five fair, impartial and unbiased jurors deciding her fate and her case.

There exists a reasonable and substantive probability that but for counsel error at permitting a six-person jury did undermine the confidence of the law, and had this prejudice not occurred, and the Defendant had the remaining six people on her jury she may not have been found guilty, changing the outcome of her trial, where it only takes one person for an acquittal. The Defendant deserves just relief in this regard.

their deficient performance did prejudice her. The Defendant deserves just relief in this regard.

GROUND FOUTEEN

THE CUMULATIVE EFFECT OF COUNSEL ERROR DEEMS THE DEFENDANT'S TRIAL AND CONVICTION FUNDAMENTALLY UNFAIR AND DEPRIVED DEFENDANT OF HER RIGHT TO DUE PROCESS OF LAW

The Defendant has asserted twelve (13) grounds in which counsel has fallen short of his constitutional duty to effectively represent the Defendant and failed to test the State's case by adequate confrontation. The errors had a cumulative effect that rendered the Defendant's trial fundamentally unfair. Had counsel performed any of these errors alone or cumulatively, the outcome of the Defendant's trial would have differed.

Counsel's failure and negligence affected the defendant's entire trial structure and resulted in a grave miscarriage of justice, requiring a new trial.

CONCLUSION

The Defendant has asserted sufficient grounds requiring relief and has shown this court that she was denied her United States Constitutional Sixth and Fourteenth Amendment rights. The Defendant requests that this Honorable Court grant her the relief she is seeking, but not limited to:

1. A new trial

2. Evidentiary Hearing

3. Any and all other relief she is duly entitled and this court deems just proper

WHEREFORE, the Defendant prays this Honorable Court grant her motion, and in the interest of justice, grant her the relief she is entitled.

Respectfully Submitted,

Starquineshia Palmer DC#156431 156431

UNNOTARIZED OATH

UNDER PENALTIES OF PERJURY, I declare that, I, **Starquineshia Palmer**, have read the motion or it has been read to me, and I understand its content; this motion is filed in good faith and is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court; and, the facts contained in this motion are true and correct. I also certify that I understand English.

December 19, 2016
Date

Starquineshia Palmer DC#156431 156431

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this **Motion for Post Conviction Relief** in the hands of Lowell Correctional Institution-Annex Legal Mail Staff for mailing to: **Clerk of Court: 301 South Monroe Street, Ste.225-L, Tallahassee, Florida 32301-1803** and to **State Attorney: 301 South Monroe Street, Ste.475, Tallahassee, Florida 32301-1861**

On this **19th** day of **December**, 2016.

Starquinesnia Palmer 156427

Starquinesnia Palmer DC#156431
Lowell Correctional Institution-Annex
1120 NW Gainesville Road
Ocala, Florida 34482

RECEIVED
DEC 19 2016
LOWELL C.I.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, FLORIDA

STARQUINESHIA PALMER
Appellant

vs. Case No.: 1D17-3601

STATE OF FLORIDA
Appellee
_____/

INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant was the defendant in the lower court and the Appellee, the State of Florida, was the prosecution. In this brief, the parties are referred to as "Appellant" and "Appellee," by proper name, or as they stood in the lower court where appropriate.

The record on appeal was served by the clerk in a single pdf file containing 216 pages numbered by the clerk to coincide with the pdf pages. The Clerk misspelled Appellant's first name on the cover sheet of the record, listing it at Starquinesha instead of Starquineshia.

Appellant will reference pages in the file with an R: followed by the relevant page number(s), for example, the first page of the transcript of the evidentiary hearing can be found at R: 106.

STATEMENT OF THE CASE AND FACTS

Appellant was indicted on one count of Premeditated First Degree Murder. She pled not guilty and proceeded to trial, where the Honorable James C. Hankinson, Circuit Judge, presided and on March 10, 2014, a jury found her guilty as charged. (R: 20)

Appellant filed a timely direct appeal in the First District Court of Appeal, Case 1D14-1711, which was denied without opinion (*per curiam affirmed*) on October 28, 2015. (R: 20)

Appellant filed the *Amended Motion for Postconviction Relief* pursuant to rule 3.850, Fla. R. Crim. P., that is the subject of the instant appeal, on December 19, 2016, raising fourteen claims, the fourteenth being a claim of cumulative effect. (R: 9-81) Appellant had filed no prior postconviction motions attacking her conviction or sentence. The following is a listing of the Grounds as listed in the motion:

GROUND ONE

COUNSEL WAS INEFFECTIVE FOR ALLOWING THE DEFENDANT TO BE TRIED AND CONVICTED BY A SIX-PERSON JURY WHERE STATUTORY LAW REQUIRES ALL CAPITOL CASES A TWELVE PERSON JURY. (R: 21-23)

GROUND TWO

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO [THE] PROSECUTOR:

A. MISSTATING THE LAW CONCERNING SUDDEN PROVOCATION DURING CLOSING ARGUMENTS. (R: 24-25)

B. INCORRECTLY DEFINING 'SUDDEN PROVOCATION' BY PERSONALLY OPINING ITS MEANING DURING CLOSING ARGUMENTS. (R: 25-29)

GROUND THREE

COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL. (R: 30-31)

GROUND FOUR

THE CUMULATIVE EFFECT OF [GROUNDS TWO AND THREE]. (R: 32-33)

GROUND FIVE

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE CONFUSING HEAT OF PASSION UPON A SUDDEN PROVOCATION JURY INSTRUCTION. (R: 34-35)

GROUND SIX

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE HEAT OF PASSION UPON SUDDEN PROVOCATION NOT BEING MADE AN OPTION ON THE VERDICT FORM. (R: 36-38)

GROUND SEVEN

COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A JUDGMENT OF ACQUITTAL AS TO THE CONFUSING JURY INSTRUCTION AND INCOMPLETE VERDICT FORM. (R: 39-41)

GROUND EIGHT

COUNSEL WAS INEFFECTIVE FOR FAILING TO STRIKE JUROR [KATHLEEN BABCOCK] FOR CAUSE. (R: 42-44)

GROUND NINE

COUNSEL WAS INEFFECTIVE FOR FAILING TO INVOKE STATUTORY IMMUNITY AND FILE PRETRIAL MOTION TO DISMISS UNDER RULE 3.190(b). (R: 45-46)

GROUND TEN

COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY QUESTION KARLA FISCHER. (R: 47-48)

GROUND ELEVEN

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S QUESTIONING OF KARLA FISCHER. (R: 49-52)

GROUND TWELVE

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO GREG PRICHARD BEING [CALLED AS A] REBUTTAL WITNESS. (R: 53-56)

GROUND THIRTEEN

COUNSEL FAILED TO SUBJECT THE STATE'S CASE TO MEANINGFUL ADVERSARIAL TESTING. (R: 57-62)

GROUND FOURTEEN

THE CUMULATIVE EFFECT OF COUNSEL'S ERRORS DEEMS THE DEFENDANT'S TRIAL AND CONVICTION FUNDAMENTALLY UNFAIR AND DEPRIVED DEFENDANT OF HER RIGHT TO DUE PROCESS OF LAW. (R: 63)

The trial court issued a "show cause" on January 12, 2017 and on February 6, 2017,[1] the State responded, requesting the court set it for evidentiary hearing (R: 82, 83-84).

On February 7, 2017, the Honorable James C. Hankinson, Circuit Judge, who presided over Appellant's trial, ordered an evidentiary hearing as to all claims. (R: 85)

On February 15, 2015, Appellant moved the court to have counsel appointed to represent her at the hearing (R: 86-88), explaining why 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 pre-

[1] The certificate of service contains a scriveners error, listing the year as 2016 instead of 2017.

judiced, 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 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.

(R: 87)

The lower court granted her motion on March 6, 2017 (R: 94), and on March 15, 2017, Scott Miller, attorney for the Office of Criminal Conflict and Civil Regional Counsel, filed his Notice of Appearance. (R: 95)

Five months later, on August 25, 2017 and September 7, 2017, evidentiary hearings were held, the Honorable James C. Hankinson, presiding. (R: 106-214). Testifying at the hearing were Appellant, Starquineshia Palmer (R: 109-153); Attorney Alice Copek (R: 153-183), who testified she represented Ms. Palmer during the trial phase of her case and this was the first time she had been lead counsel on a 1st degree murder case (R: 154); and Attorney Andy Thomas (R: 183-196) who testified he was now the elected Public Defender [for the Second Judicial Circuit] but at the time of Ms. Palmer's trial, he was the Chief Assistant Public Defender as well as a member of the capital team, and he was second [chair] on Ms. Palmer's case for the six months prior to jury selection (R: 184).

On September 7, 2017, at the conclusion of the evidentiary hearing on that date, Judge Hankinson pronounced his decision on Appellant's motion, denying each of her claims. (R: 204-214) On August 25, 2017, Judge Hankinson issued a written order, formally denying Appellant's motion, "based on the reasons as announced on the record." (R: 98)

On August 28, 2017, Appellant, through counsel, filed a timely *Notice of Appeal* (R: 99) and *Motion to Adjudge Defendant Insolvent for Purpose of Appeal* (R: 103). On August 29, 2017, Judge Hankinson granted Appellant's motion, adjudging Appellant insolvent for purposes of her appeal. (R:104)

The Office of the Public Defender was appointed to represent Appellant on her appeal, but on September 15, 2017, moved to withdraw due to conflict. (Docket 1D17-3601) Michael Jerome Titus with the Office of Criminal Conflict and Civil Regional Counsel was appointed to represent Appellant, but he filed a motion to withdraw on October 13, 2017. On November 1, 2017, this Court granted Attorney Titus' motion and declared, "Appellant is now appearing in proper person before this court. Appellant may, however, file a motion in the trial court seeking the appointment of alternate counsel." *Id.*

On December 4, 2017, Appellant filed in the lower court a *Motion for Appointment of Counsel* (docket 2011-CF-2244 in lower court), and in this Court a *Motion for Extension of time to File Initial Brief* (docket 1D17-3601). On December

6, 2017, the lower court appointed undersigned counsel to represent Appellant in the instant Appeal. (Docket 2011-CF-2244 in lower court). Appellant's Initial Brief follows.

SUMMARY OF THE ARGUMENTS

The lower court erred in denying Appellant's Ground One argument that she was denied her right to a 12-person jury for lack of prejudice based on *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) because *Williams* failed to take into consideration that it works to a defendant's favor if there is a hung jury and the chances of such are greater with a 12-person jury compared to a 6-person jury therefore the lower court's denial should be reversed and Appellant granted a new trial with a 12-person jury.

ARGUMENT

COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE APPELLANT AS TO THE BENEFITS OF BEING TRIED BY A 12-PERSON JURY OVER A 6-PERSON JURY AND ADVISE HER NOT TO WAIVE HER RIGHT TO BE TRIED BY A 12-PERSON JURY.

STANDARD OF REVIEW

Claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). The appellate court defers to the trial court's findings of fact regarding the credibility of witnesses and the weight assigned to the evidence but reviews the deficiency and prejudice prongs *de novo*. *Windom v. State*, 886 So. 2d 915, 921 (Fla. 2004) (*citing Stephens v. State,* 748 So. 2d 1028, 1034 (Fla. 1999)). "An ineffective assistance claim has two components: a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (*citation omitted*) (*quoting Strickland,* 466 U.S. at 688); see also *Hodges v. State,* 885 So. 2d 338, 345-46 (Fla. 2004) (stating and applying *Strickland* standard). The prejudice prong of the analysis "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466

U.S. at 687. Failure to establish either prong results in a denial of the claim. *Ferrell v. State,* 918 So. 2d 163, 170 (Fla. 2005) (quoting *Strickland,* 466 U.S. at 687). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689.

MERITS

Ground One of Appellant's rule 3.850 motion was that her trial counsel was ineffective for allowing her to be tried by a six-person jury instead of a twelve person jury, and she cites Florida Statute 913.10[2] and Florida Rule of Criminal Procedure 3.270[3] in support. Appellant 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

---

[2] 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)

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

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 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.

(R: 87)

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 clerk(s) who helped her has 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 was arguing had provided ineffective assistance during the trial phase of her case. Clearly the law clerk(s) who prepared the motion for Appellant did not understand what happens at evidentiary hearings on 3.850 motions. Undersigned counsel brings this to the

Court's attention since much of what took place during the evidentiary hearing was the questioning of Appellant towards getting her to define/defend legal points towards prevailing on her motion, something she was untrained to do, and any denial of relief based on such insufficiency would be a injustice, especially in light of her best effort in her *Motion for Appointment of Counsel* to not have that happen to her.

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

> 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.

(R: 110-111)

Attorney Jon Fuchs represented the State at the hearing and under his questioning during cross, Appellant 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.

(R: 141-142)

Appellant's trial counsel was Alice Copec 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.

(R: 157-161)

During cross, Attorney Copec 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.

(R: 170-172)

Up to this point, the testimony shows that Attorney Copec never advised Appellant of the benefits of a 12-person jury over a 6-person jury so that Appellant 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, and Attorney Copec testified 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 Appellant 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 Appellant.

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.

(R: 184-186, 193)

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 Appellant, undersigned counsel believes it to be significant:

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.

(R: 194)

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 court, on its own, produced a case for the attorneys to review as to the 12-person jury issue, and undersigned counsel would remind the panel that Judge Hankinson, who presided over the evidentiary hearing, also presided over Appellant'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.[4]
>
> 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.)

(R: 196)

After the recess, Appellant's counsel made the following argument as to this 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 ade-

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

quately 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 State. It's 528 So. 2d 383 from the Third DCA.[5] 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,[6] 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.

(R: 197; 198-199)

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

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

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

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 stated, "In *Williams v. Florida*, 399 U.S. 78, 90 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."

Appellant 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, but 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, in would be an injustice to hold that defendant accountable for that decision as a "tactical" decision made by counsel towards being an advocate for his/her client.

In the instant case, Appellant 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 Appellant. It was a decision unencumbered by the thought process.

The *Smith* court ultimately denies Smith relief because he cannot show

prejudice according to 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 wrong. Just five years later, the supreme court decided *Ballew v. Georgia*, 435 U.S. 223 (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." Appellant 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 the supreme court in *Williams,* a jury of six is sufficient to give her a fair and impartial trial on charges of the most serious crime defined in Florida laws, premeditated first degree murder.

This Court addressed *Williams* just months ago in *Lessard v State,* 1D15-5300 (Fla. 1st DCA 12/17/ 2017) with Justice Makar writing an in-depth, 6-page, concurring opinion as to the problems that have arisen since the supreme court's 1970 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.[7] 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, 1D15-5300 (Fla. 1st DCA 12/17/ 2017)

The lower court, in ruling on Appellant'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

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[7] 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).

> research, 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.

(R: 207-208)

Thus, the lower court denied Appellant relief on this issue because she could not show prejudice based on *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Appellant contends she was prejudiced because the *Williams* court only considered the chances of a guilty or not guilty verdict, but that is not real world. Appellant 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 you have, thus by being deprived of her right to a 12-person jury, she was prejudiced by having a lesser chance of there being a hung jury.

Thus, Appellant contends the lower court erred in denying this ground because she was prejudiced and *Williams* does not apply because it does not address the benefit a 12-person jury has of increasing her chances of there being a hung jury and the possibility if that happened of the State offering her a plea offer for a better outcome than life in prison.

CONCLUSION

Appellant has shown that the lower court erred in denying her claim for lack of prejudice and she should be granted a new trial with a 12-person jury.

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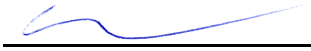
CERTIFICATES OF FONT AND SERVICE

I HEREBY CERTIFY that the font the foregoing is reproduced in 14 point proportionally spaced Times New Roman and that on this 14th day of May, 2018, I electronically filed the forgoing with the Clerk of Court, First District Court of Appeal, using the eDCA system, served the foregoing on the Office of the Attorney General, Criminal Appeals, The Capitol PL 01, Tallahassee, Florida 32399-1050 by emailing to crimapptlh@myfloridalegal.com; and served a copy by U.S. Mail service to Starquineshia Palmer, 156431, Lowell Annex, 11120 NW Gainesville Rd., Ocala, FL 34482-1479.



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Jury Trial--Williams v. Florida, 399 U.S. 78 (1970)

acceptances of guilty pleas. The effect of *McCarthy v. United States*[46] and *Boykin v. Alabama*,[47] moreover, is probably to deny habeas corpus relief to those petitioners asserting that they were coerced at the time of pleading.[48] This is so because compliance with Rule 11 insures that the voluntariness of the proceedings leading to a guilty plea is a matter of record.

McMann and its progeny go a step further by holding that allegedly coercive factors not in the record do not entitle petitioner to habeas corpus relief. In fact, the combination of *McCarthy-Boykin* with *McMann*, *Brady*, and *Parker* will make it difficult for most petitioners to obtain a hearing. That is, relief is foreclosed on the grounds that there was a coerced confession or the fear of a harsher sentence. No hearing thus need be granted to hear such claims. Furthermore, petitioners asserting the procedural incompetence of counsel or other coercive factors during the proceedings will face a complete record of the voluntariness of their plea.[49] It will therefore be easy for reviewing courts to dismiss such petitions without hearings.[50]

Hence, the administrative efficiency of the criminal justice system will be increased at the expense of defendants who may have been coerced into a plea of guilty. Notwithstanding that the Supreme Court once held that a conviction based on a coerced guilty plea is a violation of a defendant's right to due process,[51] *McMann*, *Brady* and *Parker* severely limit those factors deemed coercive. However, the constitutional rights waived in a guilty plea are too fundamental to be sacrificed involuntarily and unintelligently to administrative efficiency. If increased efficiency is the goal, the pre-pleading process could be improved to insure that all guilty pleas are voluntary and intelligent waivers of a defendant's fifth and sixth amendment rights as well as of his right to habeas corpus review. In no event should those defendants who may have been coerced into pleading guilty be denied their right to habeas corpus review because of the inadequate resources of the present system of criminal justice.

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[46] 394 U.S. 459 (1969).

[47] 395 U.S. 238 (1969).

[48] FED. R. CRIM. P. 11. Since the trial court, under Rule 11, cannot accept a guilty plea without first determining that it is voluntary, it is very unlikely that a petitioner could prevail on the assertion that he was coerced at the time of pleading.

[49] *See* notes 10 and 48 *supra*.

[50] 18 U.S.C. §2255 provides:

> Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no [habeas corpus] relief, the court shall . . . grant a hearing. . . .

Faced with a complete record of the voluntariness and the intelligence of the petitioner's plea, it will be very easy for the reviewing courts to dismiss petitions without granting a hearing.

[51] Herman v. Claudy, 350 U.S. 116 (1956).

JURY TRIAL

Williams v. Florida, 399 U.S. 78 (1970)

Under traditional rules, the game of draw poker is played with all cards initially concealed.[1] In stud poker all cards except one are shown to one's opponent. In *Williams v. Florida*[2] the Supreme Court opted for showing one's cards to one's opponents in the setting of the criminal adversary system. It also permitted the fate of the game to be constitutionally judged by a jury of six—rather than the traditional common law jury of twelve.[3]

Johnny Williams was tried and convicted by a six-man jury for the crime of robbery and sentenced to life imprisonment. Williams' only defense was alibi.[4] Under the Florida rules of criminal procedure,[5] the defendant is required, if the prosecution makes a written demand, to state whether he intends to plead an alibi. Should the defendant so plead, he must furnish the state with information as to his whereabouts at the time of the crime and a list of his alibi witnesses.

Prior to trial, Williams sought a protective order

[1] "If a criminal trial is viewed as a draw poker game with all cards to be held close to the chest until played, this [a notice-of-alibi statute] can be seen as requiring a tipping of one's hand in advance."
State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 136, 163 N.W.2d 177, 180 (1968).

[2] 399 U.S. 78 (1970).

[3] *See* Patton v. United States, 281 U.S. 276, 288–92 (1930).

[4] "Alibi is a claim that defendant was elsewhere at the time of the crime and therefore could not have committed it." State v. Baldwin, 47 N.J. 379, 388, 221 A.2d 199, 204, *cert. denied*, 385 U.S. 980 (1966).

[5] FLA. R. CRIM. P. 1.200.

excepting him from the notice-of-alibi rule on the grounds that it violated his fifth amendment privilege against self-incrimination.[6] The motion was denied.[7] In compliance with the notice-of-alibi rule, petitioner provided the prosecution with the name of his principle alibi witness, Mary Scotty. This information enabled the prosecution to obtain a pre-trial deposition of Mrs. Scotty, which was subsequently used to impeach the witness' trial testimony. Furthermore, the state's prior knowledge of the detailed time and location of Williams' alibi enabled the prosecution to further impeach Mrs. Scotty's testimony by presenting the contradictory testimony of a police officer who recalled seeing Mrs. Scotty at the time of the crime somewhere other than where she claimed she was.

Petitioner's constitutional attack on the alibi statute was two pronged. First he alleged that the statute sanctioning the right of the state to discover his alibi deprived him of due process under the fourteenth amendment.[8] Rejecting this claim, the Court emphasized the reciprocity in discovery which is permitted under the Florida rule. By the terms of the Florida statute, the state is required, upon receipt of defendant's list of alibi witnesses, to "serve upon the defendant the names and addresses ... of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause." [9] The Court apparently felt that a criminal discovery statute which imposed mutual obligations on the state and the accused did not violate the Constitution.[10] The Court also noted the rational and, indeed, compelling policy underpinning the notice-of-alibi statutes. As Mr. Justice White stated, speaking for the Court, "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." [11] Since 1927, numerous states[12] have enacted notice-of-alibi statutes[13] similar to Florida's as a means to deter defendants from using manufactured alibis as a last minute, surprise defense.[14] Such statutes have been uniformly upheld in state courts.[15]

Second, petitioner argued that the notice-of-alibi rule was unconstitutional because it violated his fifth amendment privilege against self-incrimination.[16] It is hardly questionable that the state's pretrial deposition of Mrs. Scotty, which was obtained because the defendant had complied with the Florida rule, quite possibly vitiated Williams' alibi defense and thereby indirectly incriminated him. The traditional rationale courts have employed to uphold the constitutionality of alibi statutes is couched in a literal interpretation of the fifth amendment privilege against compulsory self-incrimination, and rests on the notion that,

[6] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. V.

[7] Petitioner also unsuccessfully sought a pretrial motion to impanel a twelve-man jury instead of a six-man jury provided by Florida in all but capital cases. *See* FLA. STAT. ANN. §913.10(1) (1967).

[8] 399 U.S. at 81; U.S. CONST. amend. XIV(1) reads in part: "No state shall make or enforce any law which shall ... deprive any person of life, liberty, or property without due process of law...."

[9] FLA. R. CRIM. P. 1.200.

[10] *See* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (Traynor, J.), which permitted the state discovery of defendant's witnesses and x-rays which were to support his defense of impotence to a charge of rape. Judge Traynor pointed out that criminal discovery should not be a "one-way street." *See also* Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 91 (1965); Comment, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135 (1963); *cf.* Norton, Discovery in the Criminal Process, 61 J. CRIM. L. C. & P.S. 11 (1970).

[11] 399 U.S. at 81; *See also* State v. Martin, 2 Ariz. App. 510, 514–15, 410 P.2d 132, 136–37 (1966); State v. Stump, 254 Iowa 1181, 1193–94, 119 N.W.2d 210, 217 (1963), *cert. denied*, 375 U.S. 853 (1963); State v. Baldwin, 47 N.J. 379, 388, 221 A.2d 199, 204 (1966), *cert. denied*, 385 U.S. 980 (1966); People v. Schade, 161 Misc. 212, 216, 292 N.Y.S. 612, 617 (1936); State v. Thayer, 124 Ohio St. 1, 4, 176 N.E. 656, 657 (1931).

[12] ARIZ. R. CRIM. P. 192(B); ILL. REV. STAT. ch. 38, §114-14 (1969); IND. ANN. STAT. §§9-1631–9-1633 (1956); IOWA CODE ANN. §777-18 (1962); KAN. GEN. STAT. ANN. §62-1341 (1964); MICH. STAT. ANN. ch. 28, §1043 (1956); MINN. STAT. ANN. §630.14 (1947); N.J. R. CRIM. P. 3: 5–9 (1958); N.Y. CODE CRIM. PROC. §295-L (McKinney 1958); OHIO REV. CODE ANN. §2945.58 (Page 1964); OKLA. STAT. ANN. ch. 22, §585 (1969); PA. R. CRIM. PRAC. 312 (Supp. 1970); S.D. COMP. LAWS §23-37-5 (1969); UTAH CODE ANN. §77-22-17 (1953), VT. STAT. ANN. tit. 13, §§6561–6562 (1959), WIS. STAT. ANN. §955.07 (West 1958). *See also* 399 U.S. at 82 n. 11.

[13] *See* Annot., 30 A.L.R.2d 480–81 (1953).

[14] One empirical study indicates such statutes to be most effective in preventing fraudulent alibies. *See* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29 (1964).

[15] Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963), State v. Rider, 194 Kan. 398, 399 P.2d 564 (1965); State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968); State v. Baldwin, 47 N.J. 379, 221 A.2d 199, *cert. denied*, 385 U.S. 980 (1966); People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (1936); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607 (1940); Commonwealth v. Vecchiolli, 208 Pa. Super. 483, 224 A.2d 96 (1966); State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968).

[16] In Malloy v. Hogan, 387 U.S. 1 (1964), the fifth amendment privilege against self-incrimination was held applicable to the state through the fourteenth amendment.

under the terms of the statute, no testimony is actually compelled.[17] Whether the defendant plans to defend on the basis of alibi is wholly a matter of the defendant's unfettered choice.[18] The defendant always retains the option of abandoning his alibi defense at trial.[19] The only real compulsion involved in complying with a notice-of-alibi rule relates to the time at which the defendant must reveal his defense. As the Court in *Williams* correctly pointed out:

> At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.[20]

Moreover, even if the defendant were not required to give pretrial notice of his alibi, there is nothing to prohibit the state from seeking a continuance for purposes of investigation should the defendant proffer a last minute alibi.[21] Therefore, the notice-of-alibi rule in no way bestows any advantage on the state which it does not already possess via other, albeit indirect, means.

Another literalistic argument in support of the alibi rule's constitutionality resides in the very basic question whether giving notice of alibi is in fact incriminating. In upholding a similar New York notice-of-alibi statute,[22] the court in *People v. Schade*[23] stated the obvious: notice-of-alibi statutes seek out information which exonerates defendants rather than incriminating them.[24] Concurring with *Schade*, Mr. Chief Justice Burger in *Williams* emphasized how pretrial discovery of alibi can work to the advantage of the accused.[25] He reasoned that if the state found the accused's alibi to be sound on the basis of pretrial investigation, a needless trial could be avoided.[26] In essence, the notice-of-alibi rule would only jeopardize a defendant whose alibi is manufactured.[27]

A more fundamental issue was at stake in *Williams*, however. Over and above the literal interpretation of the fifth amendment's application to the notice-of-alibi rule, the Court's decision reflected a judicial disposition between two competing policies: that of the government's discovery of fraudulent testimony versus that of the defendant's right under the fifth amendment to remain silent.[28] The Court uniquely illustrated the tension between these two policies by comparing the adversary system to a poker game.[29] In holding that the defendant may be compelled to reveal his alibi prior to trial, the Court found that the adversary system need not be like the game of draw poker in which all cards are concealed. The Court held that the exigent concern of the state for discovery of bogus alibis is paramount to any tactical trial advantage which the accused might gain from use of a surprise alibi defense.[30] States, therefore, may constitutionally require the defendant to "tip his hand."[31]

The *Williams* case, however, will probably be more remembered for its holding that a six man jury could constitutionally convict a man to life in prison than for its discussion of alibis. The

[17] *See* State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963); State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607 (1940); State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968).

[18] 399 U.S. at 84–85.

[19] It has been held impermissible for the state to comment on the defendant's compliance with statute when at trial he elects not to use the defense. State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (1943). *But see* 399 U.S. at 110 (Black, J., dissenting).

[20] 399 U.S. at 85.

[21] *Id.*

[22] N.Y. CODE CRIM. PROC. §295-1 (McKinney 1958).

[23] 161 Misc. 212, 292 N.Y.S. 612 (1936).

[24] *Id.* at 615. *Cf.* State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968).

[25] 399 U.S. at 105–06.

[26] Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29, 32 (1964).

[27] "Certain it is that no innocent person can in any manner be injured by this statute." People v. Schade, 161 Misc. 212, 218, 292 N.Y.S. 612, 617 (1936). *See also* State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 137–38, 163 N.W.2d 177, 181 (1968).

[28] *See* Comment, 51 CALIF. L. REV. 131, 136–38 (1963). *Cf.* Shapiro v. United States, 335 U.S. 1 (1945).

[29] 399 U.S. at 82; *see* note 1 *supra* and accompanying text.

[30] State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968); Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 91 (1953).

[31] *But see* 399 U.S. at 106 (Black, J. and Douglas, J., dissenting). Both Justices Black and Douglas vigorously dissented from the majority holding on the fifth amendment issue labeling it "a most dangerous departure from the Constitution and the traditional safeguards afforded persons accused of a crime." *Id.* at 116. Implicit in Black's dissent was his traditional disdain for the Court's balancing an accused's constitutional rights against the interest of the state. *See* Cohen v. Hurley, 366 U.S. 117, 133 (1961) (Black, J., dissenting).

petitioner argued that on the basis of *Duncan v. Louisiana*[32] a jury of less than twelve violated his sixth amendment guaranty to jury trial. Although the sixth amendment does not mention the number which shall comprise a jury, nevertheless Williams' challenge was not without substantial precedent.[33]

Seventy-two years ago the Supreme Court stated unequivocally, "[t]he supreme law of the land required that [defendant] should be tried by a jury composed of not less than twelve persons." [34] Although this excerpt from *Thompson v. Utah* is only dicta,[35] it does reflect the basic historical supposition of American jurisprudence that the constitutional jury embraces twelve men.[36] Two years later in *Maxwell v. Dow*[37] the high Court again reasserted the same principle "that a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment." [38]

In *Patton v. United States*[39] the issue before the Court was whether a defendant might constitutionally waive his right to a jury of twelve for a lesser number. Although the Court in that case held that, under the circumstances, waiver of a twelve-man jury was permissible, the Court insisted "that a constitutional jury means twelve men as though that number had been specifically named. . . ." [40] Relying on these cases, as well as the mandate in *Duncan v. Louisiana*[41]—that the fourteenth amendment grants to the defendant in state criminal action a trial by jury as though he were tried in a federal court—petitioner claimed his constitutional right to be heard by a jury of twelve under federal law.[42]

Breaking from adherence to the doctrine of *stare decisis*, the Court found that a trial by a six-man jury was not unconstitutional.[43] In doing so, the Court noted that juries of less than twelve are sanctioned by numerous state statutes[44] as well as by courts.[45] The obvious purposes underlying such statutes are judicial efficiency and economic expediency.[46] To justify its rift from long established precedent, the Court took refuge in the history surrounding the evolution of the jury trial.[47] Although the Court conceded that the early common law, as well as its own decisions, recognized a jury to be comprised of twelve,[48] it found no reason beyond "historical accident" [49] why the number twelve should be constitutionally sacrosanct.

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." [50]

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[32] 391 U.S. 145 (1968) (*Held:* the fourteenth amendment guarantees a right to trial by jury in all criminal cases which—were they to be tried in a federal court—would come within the sixth amendment guaranty.)

[33] *See* authorities cited at 47 AM. JUR.2d *Jury* §124, at 726 n. 5 (1969).

[34] Thompson v. Utah, 170 U.S. 343, 350 (1898).

[35] In *Thompson* the defendant had been convicted by a twelve-man jury for a crime committed in the Territory of Utah. After Utah was admitted to the Union, Thompson was granted a new trial. Pursuant to the new state constitution, defendant was tried by eight men. The Court held this change in number as an *ex post facto* law as applied to the defendant.

[36] *See* Capital Traction Company v. Hof, 174 U.S. 1, 13–14 (1899).

[37] 176 U.S. 581 (1900) *overruled in* Duncan v. Louisiana, 391 U.S. 145 (1968).

[38] *Id.* at 586.

[39] 281 U.S. 276 (1930).

[40] *Id.* at 292.

[41] 391 U.S. 145, 149 (1968).

[42] FED. R. CRIM. P. 23(b) provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

See 399 U.S. at 127 n. 13 (Harlan, J., dissenting); Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 430 (1969), wherein the commentator raises the issue raised in the instant case. Does the *Duncan* decision require the states to afford the accused a trial by a jury of twelve pursuant to federal law?

[43] 399 U.S. at 86. *But see also Id.* at 127–28 (Harlan, J., dissenting); *Id.* at 116–17 (Marshall, J., dissenting).

[44] For a compilation, see Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 430 n. 75 (1969).

[45] *E.g.*, State v. Perrilla, 144 Conn. 228, 129 A.2d 226 (1957); Hearns v. State, 223 So.2d 738 (Fla. 1969); State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968).

[46] State *ex rel.* Sauk County District Attorney v. Gollmar, 32 Wis.2d 406, 412–13, 145 N.W.2d 670, 673 (1966).

[47] *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8 (1961).

[48] 399 U.S. at 86–99.

[49] *Id.* at 89.

[50] 399 U.S. at 129.

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A Meta-Analysis of the Effects of Jury Size

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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.

INTRODUCTION

In a series of decisions in the 1970s, the U.S. Supreme Court held that both criminal and civil juries smaller than the traditional 12 persons did not violate constitutional requirements (*Ballew v. Georgia,* 1978; *Colgrove v. Battin,* 1973; *Williams v. Florida,* 1970). The Supreme Court deemed jury size reduction constitutional on "functional" grounds. That is, it read the Constitution to say that what matters is not the size of the jury, but the way it performs. The Court reasoned that a jurisdiction may seek to save time or money if it does not harm the process or products of the jury's decision-making. If, as a matter of empirical fact, smaller juries perform the same as larger juries, then the smaller size is constitutionally valid.

In *Williams v. Florida* (1970), the Court set forth several criteria by which to test whether 6-person juries are the functional equivalent of 12-person juries: quality of deliberation, reliability of the jury's fact-finding, the verdict ratio, the ability of dissenters on the jury to resist majority pressure to conform, and the jury's capacity to provide a fair cross-sectional representation of the community. The majority of justices concluded that the size of the jury made no difference on any of these factors, at least down to sizes as small as six.

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The *Williams* Court had scant support for its conclusion that "there is no discernible difference between the results reached by the two different-sized juries" (Saks, 1977; Zeisel, 1971). The decision prompted several jury studies which examined differences between juries of 12 and 6 persons. The Court subsequently cited these studies in *Colgrove v. Battin* (1973), where, in the context of federal civil trials, it upheld the constitutionality of six-member juries. Justice Blackmun cited these same studies in *Ballew v. Georgia* (1978), as well as others, in holding that juries smaller than six persons in state criminal trials involving nonpetty offenses were unconstitutional. Enigmatically, that opinion relied on studies comparing the behavior of 12- and 6-member juries to affirm the reduction to 6 while concluding that further reduction raised serious concerns about the jury's ability to perform its functions.

The present article reports a meta-analytic review (Rosenthal, 1984, 1991a) of all relevant empirical studies conducted to determine what effect, if any, results from reducing the size of juries from the traditional 12 people down to 6.

METHOD

An extensive search was conducted of all relevant behavioral and social science and legal literature. Using our library's electronic catalog and indexes, we were able to search journals and books from 1967 to the present. We also examined references cited in relevant books, articles, and judicial opinions.

The search identified 17 empirical studies that examined differences between 6- and 12-member juries.[4] In each of these studies, jury size was the independent variable and one or several different criteria (dependent variables) were employed to test whether 6-person juries are the functional equivalent of 12-person juries. The total sample size for the 17 studies was 2,061 juries (involving approximately 15,000 individual jurors), and the dates of publication ranged from 1972 through 1990. The studies are set forth in Table 1.

Table 1 lists the features of each study, including the number of juries, type of subjects and case, setting and design of study, jury sizes compared, and trial medium. The table also reports a weight that we assigned to each study reflecting the quality of its design and the degree of success in executing that design. Studies were given weights ranging from 0 to 9 to reflect the estimated extent of internal validity achieved by the study (Rosenthal, 1991a, 1991b). The weights are used in subsequent analyses to obtain weighted effect sizes and significance tests. Unweighted analyses, of course, also are reported.

The ideal study of the effects of jury size would consist of a true experiment conducted in an actual trial court setting on real cases. Juries of different sizes

[4]Valenti and Downing (1974) is not included because its data are redundant with the later report, Valenti and Downing (1975), which we do include. Two different studies reported in Saks (1977) are denoted Saks-a and Saks-b, respectively.

Table 1. Features of the Design

Study	Number of juries	Type of subjects	Type of case	Setting	Jury sizes	Design	Trial medium	Weight
Institute of Judicial Administration (IJA)	664	Jurors	Civil	Court	6/12	Correl	Live	1
Bermant & Coppock (1973)	128	Jurors	Worker's Comp	Court	6/12	Correl	Verbal-ts	1
Kessler (1973)	16	Students	Civil	Lab	6/12	Expt	Video	0
Mills (1973)	485	Jurors	Civil	Court	6/12	Pre-post	Live	6
Beiser & Varrin (1975)	180	Jurors	Civil	Court	6/12	Pre-post	Live	6
Davis et al. (1975)	72	Students	Criminal	Lab	6/12	Expt	Audio	0
Eakin (1975)	20	Students	Civil	Lab	6/12	Expt	Aud/pap	8
Valenti & Downing-lo[a] (1975)	20	Students	Criminal	Lab	6/12	Expt	Audio	1
Valenti & Downing-hi[a] (1975)	20	Students	Criminal	Lab	6/12	Expt	Audio	1
Snortum et al. (1976)	20	HS students	Disciplinary	Lab	6/12	Expt	Paper	4
Buckhout et al. (1977)	20	Jurors	Criminal	Court	6/12	Expt	Video	0
Padawer-Singer et al. (1977)	92	Jurors	Criminal	Lab	6/12	Expt	Video	9
Saks-a (1977)	31	Students	Criminal	Lab	6/12	Expt	Paper	8
Saks-b (1977)	42	Jurors	Criminal	Lab	6/12	Expt	Video	9
Roper (1980)[b]	88	Jurors	Criminal	Court	6/12	Expt	Video	9
Kerr & MacCoun (1985)	59	Students	Criminal	Lab	6/12	Expt	Paper	8
Munsterman et al. (1990)	104	Jurors	Civil	Court	8/12	Q-expt	Live	7

[a] Low vs. high inculpatory versions of case were presented to differenct jurors; for purposes of this meta-analysis, these are treated as two different studies.

[b] Eleven 10- or 11-member juries were grouped with the 12-member juries.

Note: Type of case included worker's compensation claim; type of design included a quasi-experiment; trial medium included a verbally-read transcript and a case presented on both audio tape and paper.

would be assigned to cases in a random manner, so that the effects of different sized juries could be examined without the effects of confounds and in the most realistic possible setting. One study (Munsterman, Munsterman, & Penrod, 1990) came close to conducting this ideal experiment. Indeed, the California legislature passed a statute (California Civil Procedure Code Sec. 221 (West, 1997)) mandating such an experiment because of frustrations resulting from equivocal findings generated by flawed studies. Unfortunately, a lower level court official apparently (and remarkably) "overturned" the statute, and allowed lawyers assigned to smaller (8-person) juries to opt out of that assignment in favor of a 12-person jury. Consequently, the experiment became a quasi-experiment and the researchers had to resort to complicated statistical controls in an attempt to repair the damage.[5] In short, there still are no ideal studies of jury size effects. All of them are compromises of one kind or another. Some, however, are less compromised than others.

Studies employing stimulus cases that were so extreme that all verdicts were the same, and which therefore were inherently incapable of detecting any effects of jury size on verdicts, received a weight of zero. Uncontrolled correlational studies, which allowed the parties to self-select cases into jury size conditions, thereby tending to put more complex and higher stakes cases in front of larger juries, were given a weight of 1. One experiment in which random assignment to jury size conditions apparently failed, and therefore confounded the experimental condition with predeliberation attitudes, also was given a weight of 1. Although the flaws in these studies make them virtually uninterpretable, they provided something more than the studies to which weights of zero had been assigned. One study received a weight of 4 because, though it was a true experiment, it failed to treat the jury as the unit of analysis following deliberation, but instead treated jurors as the unit of analysis. Relatively well-controlled pre-post designs, quasi-experiments, or correlational studies with statistical adjustment of confounds were assigned weights of 6 or 7, depending on the quality of the control added. True experiments with random assignment to jury size conditions were given weights of 8 or 9, depending on the quality of the study's external validity (e.g., simulated video trials versus paper summaries, college students versus adult jurors).

The two authors independently rated each study. Then they compared and discussed any differences in their ratings, which were rarely more than one or two rating points, and arrived at a consensus. Where, as here, a relatively severe scale is used and both the weighted and unweighted results suggest the same conclusions, one's confidence in the robustness of the findings is increased.

For most variables, the meta-analytic methods employed are those described by Rosenthal (1984, 1991a). We calculated aggregate effect sizes for each variable

[5]Indeed, a comparison of the potential and the reality of the Munsterman et al. study is an excellent illustration of the simplicity and strength of true experiments and the complex ambiguities introduced by other designs.

by first computing the effect size (Pearson r) for each study. We then transformed each r into its equivalent Fisher Z_r, averaged the Z_r's (in both weighted and unweighted forms), and then converted the mean Z_r back to an r. Significance tests were calculated by taking the standard normal deviate (Z) for each study. We averaged these Z's (in both weighted and unweighted forms), and then found the tabled p value associated with the aggregate Z value. In the few instances where we used a different analytic procedure, that alternative procedure is described along with the results.

RESULTS AND DISCUSSION

We present seriatim the findings with respect to each effect (dependent variable) of jury size studied. Our discussion follows the stages of the trial process, beginning with jury selection and concluding with awards.

Minority Representation

Does reduced jury size alter the ability of the jury to represent the views of minority members of the community from which it is drawn? One's minority group membership can be defined by any number of attributes, though the one that has been the greatest concern to the courts has been race. Table 2 addresses this question by comparing the proportion of small versus large juries containing at least one member of the ethnic or racial minority under study.

The first two columns of data in Table 2 give the proportions of small and of large juries that had one or more minority jurors. Note that the two Munsterman et al. studies really are one set of jury trials but, for purposes of this analysis, we have treated them as two separate studies — one which measures representation by African American jurors and the other which measures representation by Hispanic jurors. Examination of the first two data columns shows that for each of these studies, more large juries than small juries included at least one minority member. The table contains the respective numbers of juries in the samples, χ^2, p level, and effect size r for each study.

The final four columns contain data needed to compute the aggregate effect size and significance for this variable, unweighted and weighted by quality ratings, respectively. The set of data below the primary data from the studies gives the summary data for the meta-analysis, including the aggregate significance test and the effect size using several measures in addition to r. (Most of the subsequent sections of this article and their associated tables follow this same pattern of data presentation.)

Table 2. Juries Having at Least One Minority Member

	Proportion		Number of juries								
	Small	Large	Small	Large	χ^2	One-tailed p level	Effect r	Equivalent Fisher Z_r	Z	Weighted Z_r	Weighted Z
Saks-a (1977)	0.11	0.62	18	13	6.628	0.005	0.462	0.500	2.574	4.000	20.592
Saks-b (1977)	0.41	0.80	22	20	5.121	0.012	0.349	0.364	2.263	3.276	20.367
Roper (1980)	0.71	0.91	42	46	4.571	0.016	0.228	0.232	2.138	2.088	19.242
Munsterman-AA (1990)	0.80	0.91	35	69	1.778	0.091	0.131	0.132	1.333	0.924	9.331
Munsterman-H (1990)	0.69	0.81	35	69	1.424	0.116	0.117	0.118	1.193	0.826	8.351

	Unweighted		Weighted	
	Effect size	Significance	Effect size	Significance
Mean Z		4.249		4.327
p Level		< .0001		< .0001
Mean Z_r	0.269		0.278	
Effect size r	0.263		0.271	
Effect size d	0.545		0.563	
BESD equivalent	.37 → .63		.36 → .64	

The findings show, first, that the effect of jury size on minority representation is highly significant for both the weighted and unweighted analyses. Indeed, this is the largest effect of any of the variables studied. The unweighted mean is $Z = 4.25$, $p < .0001$; and the weighted mean is $Z = 4.33$, $p < .0001$. The unweighted and weighted effect sizes are $r = .269$ and $r = .278$, respectively. The table also provides the effect size d (which is the effect in terms of standard deviation units), and the correlation translated into a binomial effect size display (BESD).[6] Our BESD data indicate that the effect of reduced jury size on minority representation is equivalent to a decrease in the opportunity of representation from about 63-64% to about 36–37%.

Concerning the effects of reduced jury size on community representation, the Supreme Court concluded in *Williams v. Florida* (1970), "While in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible" (p. 102). Commentators have pointed out that the Court's intuition on this issue is inconsistent with standard sampling theory analysis (Saks, 1977, 1996; Zeisel, 1971). The results of this meta-analysis confirm that 12-person juries are more likely than 6-person juries to contain at least one member of whatever minority group is under consideration.

Deliberation Time

Does reduced jury size alter the time needed for a jury to reach a verdict? A small part of the efficiency sought by jurisdictions in reducing the size of their juries is the time thought to be saved by shorter deliberations of smaller juries. Table 3 addresses this question by comparing the average deliberation time (in minutes) of small versus large juries.

Eleven studies reported data on the length of deliberations. Only two of these studies, however, reported significance test statistics. Our aggregate significance test of the group of studies, therefore, is limited to a sign test. As shown in Table 3, the mean length of time for deliberation was longer in 10 of the 11 studies, which is significant at $p < .05$ (by a sign test). The unweighted mean for the small juries was approximately 53 min and for the larger juries 70 min.

[6] "The BESD is an intuitively appealing general purpose effect size display whose interpretation is perfectly transparent. . . . The question addressed by the BESD is: what is the effect on the success rate (e.g., survival rate, cure rate, improvement rate, selection rate, and so on) of the institution of a new treatment procedure, a new selection device, or a new predictor variable? It therefore displays the change in success rate . . . attributable to the new treatment procedure, new selection device, or new predictor variable." (Rosenthal, 1984, p. 130)

Table 3. Length of Deliberation

Study	Mean length		Number of juries		Direction
	Small	Large	Small	Large	
IJA (1972)	72.0	108.0	492	180	+
Kessler (1973)	22.2	15.3	8	8	-
Beiser & Varrin (1975)	150.0	192.0	40	52	+
Davis et al. (1975)	12.6	13.4	36	36	+
Eakin (1975)	38.3	51.0	10	10	+
Valenti & Downing-lo[a] (1975)	23.3	25.7	10	10	+
Valenti & Downing-hi[a] (1975)	12.3	38.5	10	10	+
Saks-a (1977)	43.7	45.1	18	13	+
Saks-b (1977)	32.9	47.8	22	20	+
Kerr & MacCoun (1985)[a]	5.4	5.8	31	28	+
Munsterman et al. (1990)	174.0	228.2	39	75	+

By sign test: 10 of 11, $p < .05$ two-tailed.

[a] Ten-minute time limit.

That a 12-person jury would take longer to reach a decision than a 6-person jury is not a controversial finding. The interesting question may be what to make of that time difference. Among the reasons it takes 12 people longer to reach a decision than it takes 6 people are the process inefficiencies associated with greater numbers of decision-makers (Steiner, 1972). But the time difference may also reflect more substantive deliberation: the sharing of more facts, more ideas, and more challenges to the tentative conclusions of others. Evidence consistent with this aspect of why larger juries deliberate longer is to be found in the next section, which reports findings on the accuracy of recall of trial facts. To the extent that longer deliberations contain more information, they probably are better deliberations.

All together, however, the mean time difference is not great. The mean time difference for all of the studies is less than 20 min, and the mean difference for the three studies of real juries deciding actual cases[7] is only 44 min. Moreover, that difference is inflated by one study (Institute of Judicial Administration [IJA], 1972), which suffered from confounding that put more complex cases before the larger juries and less complex cases before smaller juries. So the real difference is even smaller.

Thus, it appears that the small time savings that come from reducing the size of juries would provide slight justification for any losses in representation and quality of deliberation.

Memory for Evidence

For many kinds of decision tasks, the larger the decision-making group, the better the decisions will be because of the increased resources provided by having more group members (Steiner, 1972). Only two studies report data on this question (both reported in Saks, 1977). All findings are in the expected direction.

[7] That is, Institute of Judicial Administration (1972), Beiser and Varrin (1975), and Musterman et al. (1990).

Trial testimony was discussed more accurately in the deliberations of larger juries than in the deliberations of smaller juries. [Mean for large juries = 14.8 (n = 33) vs. mean for small juries = 12.2 (n = 40); mean unweighted Z = 1.83, p = .034, r = .217; mean weighted Z = 5.39, p < .0001, r = .218.]

Similarly, members of larger juries remembered more of the facts in evidence, measured by a postdeliberation test of their recall. [Mean for large juries = 16.5 (n = 33) vs. mean for small juries = 13.3 (n = 40); mean unweighted Z = 1.75, p = .040, r = .201; mean weighted Z = 5.35, p < .0001, r = .211.]

Though the data are limited to two studies, they suggest that larger juries more accurately recall evidence.

Hung Juries

The *Williams* Court concluded that "studies of the operative factors contributing to small group deliberation and decisionmaking suggest that jurors in the minority on the first ballot are likely to be influenced by the proportional size of the majority aligned against them" (*Williams v. Florida,* 1970, p. 101, n. 49). The Court was suggesting, for example, that a jury divided 10–2 is the psychological equivalent of a jury split 5–1. This statement, however, is contradicted by all of the studies on which the Court relied for support of its proposition. For example, one of the Court's cited sources (Kalven & Zeisel, 1966) states:

> For one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally (p. 463).

Thus, the juror who is a minority of 1 on a jury of 6 is in a much weaker psychological position to resist the majority than the juror who has one ally with whom to confront a majority of 10.

Consistent with the greater likelihood that those in larger juries who hold minority viewpoints would have attitudinal allies, and therefore be better able to resist pressure to conform, larger juries should be found, empirically, to produce more hung verdicts than would smaller juries.

Fifteen studies collected information on the number of hung juries. Examination of the first two substantive columns of Table 4 shows that in 11 of these studies the large juries produced more hung verdicts than did the small juries. The findings show that the effect of jury size on hung juries is significant for both the unweighted and weighted analyses. The unweighted mean is Z = 3.23, p = .0006; and the weighted mean is Z = 2.92, p = .0018. The unweighted and weighted effect sizes are r = .107 and r = .071, respectively.

Table 4. Verdicts for Hung (vs. Verdict)

	Proportion		Number of juries					Equivalent			
	Small	Large	Small	Large	χ^2	One-tailed p level	Effect r	Fisher Z_r	Z	Weighted Z_r	Weighted Z
IJA (1972)	0.006	0.000	339	102	0.108	0.371	-0.016	-0.020	-0.329	-0.020	-0.329
Kessler (1973)	0.250	0.125	8	8	0.000	0.500	0.000	0.000	0.000	0.000	0.000
Mills (1973)[a]	0.003	0.010	292	193	0.128	0.361	0.016	0.016	0.358	0.096	2.146
Beiser & Varrin (1975)	0.000	0.038	40	52	0.284	0.158	0.056	0.056	0.533	0.336	3.198
Davis et al. (1975)	0.110	0.170	36	36	1.391	0.119	0.139	0.139	1.179	0.000	0.000
Eakin (1975)	0.000	0.100	10	10	0.000	0.500	0.000	0.000	0.000	0.000	0.000
Valenti & Downing-lo[a] (1975)	0.000	0.200	10	10	0.556	0.228	0.167	0.169	0.745	0.169	0.745
Valenti & Downing-hi[a] (1975)	0.000	0.600	10	10	5.952	0.007	0.546	0.613	2.440	0.613	2.440
Snortum et al. (1976)	0.400	0.800	10	10	1.875	0.085	0.065	0.065	1.369	0.260	5.477
Buckhout et al. (1977)	0.400	0.400	10	10	0.000	0.500	0.000	0.000	0.000	0.000	0.000
Padawer-Singer et al. (1977)	0.087	0.217	46	46	2.106	0.073	0.151	0.152	1.451	1.216	13.059
Saks-a (1977)	0.111	0.077	18	13	0.088	0.383	-0.053	-0.053	-0.297	-0.477	-2.375
Saks-b (1977)	0.045	0.150	22	20	0.393	0.265	0.097	0.097	0.626	0.873	5.638
Roper (1980)[b]	0.050	0.240	21	33	2.244	0.031	0.204	0.207	1.498	1.449	13.480
Kerr & MacCoun (1985)[c]	0.248	0.407	161	167	8.648	0.002	0.162	0.163	2.941	0.652	23.530

	Unweighted		Weighted	
	Effect size	Significance	Effect size	Significance
Mean Z		3.231		2.919
p Level		0.0006		0.0018
Mean Z_r	0.107		0.071	
Effect size r	0.107		0.071	
Effect size d	0.215		0.142	
BESD equivalent	.45 → .55		.46 → .54	

[a] Quorum juries only (5/6, 10/12).
[b] Forty-two juries with no definitive predispositions were excluded form original analysis.
[c] Ten-minute time limit; multiple cases per jury.

It should be noted that the actual rate of hanging probably is less than that reflected in these data. In order to produce sufficient variation in dependent measures so that subtle effects of independent variables can be detected, it is common for researchers who design simulations to prepare ambiguous stimulus cases (Roper, 1980).[8] A by-product of more ambiguous trials is more hung juries. In addition, simulated trial studies often place time limits on deliberations, which cause more of them to end before a consensus is reached. Consistent with this, the experiments reported in Table 4 that used simulated trials produced more hung juries than those experiments that used actual cases. Simulated trials hung 18.6% of the time, while actual trials hung only 1.1% of the time, $t(12) = 2.54$, $p = .026$.

Thus, although larger juries are more likely to reach deadlocks than smaller juries, the real-world rate of hanging appears to be small.

Verdicts

The next analysis addresses the expectation that larger juries more consistently will produce "correct" verdicts than smaller juries. First, it is necessary to define what we mean by a "correct" verdict. We begin with the notion that a jury is, among other things, a device for sampling from the relevant community of citizens. If the jury is a substitute for the full community, it follows that the most correct verdict that could be obtained would be one rendered by the full community. Within any given experimental study, where a single simulated trial is employed, the consensus of all of the juries observing the particular simulated trial is the best available estimation of what the full community would decide regarding that trial.

Note that only simulated trials using mock juries permit a test of this prediction because only they present a single trial (usually by videotape) repeatedly to different juries, thereby yielding an estimate of the larger community as well as from individual juries concerning the same trial.

Statistical sampling theory predicts that larger samples (larger juries) will come closer than smaller samples (smaller juries) to reflecting the community's verdict preference. Accordingly, if the majority of verdicts in any given study favored guilt, we would expect a greater proportion of large juries than small juries to favor guilt. If the majority of verdicts in any given study favored acquittal, we would expect a greater proportion of large juries than small juries to favor acquittal. Because larger juries are more likely to be a better sample of the community than smaller juries, they should provide a better indication of — a more accurate reflection of — what the whole eligible community would decide (Mashaw, Goetz, Broadman, Schwartz, Verkuil, & Carrow, 1978).

However plausible the theory, our meta-analysis of the 10 relevant studies of simulated trials finds no significant effects (Table 5).

[8]On the rare occasions when researchers fail to do so, the result is an artifactual finding of no effect (see Diamond, 1974).

Table 5. Verdicts Toward "Correct" Result[a]

Study	Proportion Small	Proportion Large	Number of juries Small	Number of juries Large	χ^2	One-tailed p level	Effect r	Equivalent Fisher Z_r	Z	Weighted Z_r	Weighted Z
Kessler (1973)	1.000	1.000	6	7	0.000	0.500	0.000	0.000	0.000	0.000	0.000
Davis et al. (1975)	1.000	1.000	36	36	0.000	0.500	0.000	0.000	0.000	0.000	0.000
Valenti & Downing-lo[a] (1975)	0.800	0.750	10	8	0.556	0.456	-0.176	-0.180	-0.745	-0.178	-0.745
Valenti & Downing-hi[a] (1975)	0.900	0.500	10	4	5.952	0.015	-0.652	-0.780	-2.440	-0.779	-2.440
Buckhout et al. (1977)[b]	1.000	1.000	6	6	0.000	0.500	0.000	0.000	0.000	0.000	0.000
Padawer-Singer et al. (1977)	0.600	0.530	42	36	0.137	0.356	-0.042	-0.042	-0.370	-0.378	-3.330
Saks-a (1977)	0.688	0.833	16	12	0.194	0.330	0.083	0.082	0.441	0.658	3.527
Saks-b (1977)	0.571	0.706	21	17	0.266	0.303	0.084	0.084	0.516	0.758	4.645
Roper (1980)[b]	0.590	0.594	39	32	0.043	0.583	0.025	0.024	0.208	0.216	1.876
Kerr & MacCoun (1985)[c]	0.470	0.560	121	99	1.235	0.133	0.075	0.075	1.111	0.600	8.890

	Unweighted Effect size	Unweighted Significance	Weighted Effect size	Weighted Significance
Mean Z		-0.404		0.643
p Level		0.655		0.261
Mean Z_r	-0.074		0.020	
Effect size r	-0.074		0.020	
Effect size d	-0.148		0.040	
BESD equivalent	.54 → .46		.49 → .51	

[a] Excluding hung juries.
[b] All jurors voted for one or another degree of homicide.
[c] N reflects multiple cases seen by each of the 59 juries.

Awards

Sampling theory makes the straightforward prediction that smaller samples produce larger standard errors around the mean. The Central Limit Theorem tells us that in drawing repeated random samples from a population with mean and standard deviation σ, the sampling distribution that results will have a standard error of $\sigma/\sqrt{n}$, where n is the size of the samples. Thus, if a sample size is cut in half, the variability will increase by 41%.[9] Put most simply, the smaller the sample (the smaller the jury), the greater the variability among the awards they will make.

Applied problems, of course, provide settings for applying theoretical principles that are less than pristine. The major risk here of departure from the statistical model is that, in nearly every jurisdiction, juries are not assembled at random from the pool. For example, lawyers and judges have the opportunity to exclude certain people from juries in a nonrandom fashion. Notwithstanding that distortion, however, the bulk of jurors seated are a more or less random sample of the population of jurors brought into the pool, and therefore the essential point remains: smaller samples (smaller juries) should be expected to produce distributions of awards that show more variability, more unpredictability.

Only four studies involved civil trials and provided data on awards. Only three of these studies provided mean and median award sizes; a fourth provided only mean awards. Table 6 presents these data. None of the four studies provided a measure of dispersion, which would have provided the most direct and illuminating data on the effect of jury size on civil awards. Thus, this most important question about the effects of jury size on civil awards remains untested.

In examining Table 6, the data from the IJA (1972) study probably should be disregarded. Strong evidence exists to believe that that study suffered from serious confounding, such that the larger juries were presented with more complex cases involving larger disputed amounts, while the smaller juries were presented with less complex cases involving smaller disputed amounts (Saks, 1977; Zeisel & Diamond, 1974).[10]

The remaining data in the table suggest, or confirm, the following lessons. The means are greater than the medians, indicating that these distributions were positively skewed — many smaller awards, a small number of large awards. This is typical of distributions of civil damage awards in both actual and simulated juries (see review of such data in Saks, 1992).[11] The simplest explanation for this is that the low end of the distribution has an obvious floor, zero, while the high end has no ceiling at all.

[9]Reducing the sample size by one half increases the standard error by the square root of two, or 1.41, that is, a 41% increase.

[10]In previous analyses, the IJA (1972) data have been discounted by way of the weight given to them or by our providing a similar caution in the text.

[11]Indeed, the phenomenon is so common that researchers in this area regularly resort to one or another kind of transformation to unskew the distributions for analysis purposes. See review and discussion in Wissler, Evans, Hart, Morry, & Saks (1997).

Table 6. Awards in Civil Cases

Study		Average award ($)		Number of juries	
		Small	Large	Small	Large
Mills (1973)[a]	Mean	30,100	24,640	110	62
	Median	7,740	6,360		
Beiser & Varrin (1975)	Mean	52,070	33,189	20	36
	Median	16,950	22,050		
Munsterman et al. (1990)	Mean	7,645	3,677	20	26
	Median	7,500	2,769		
IJA (1972)	Mean	8,600	24,300	344[b]	106[b]

[a] Auto negligence cases: large juries: 4,400; small: 6,662. Other civil cases: large juries: 14,750; small: 12,915.
[b] Calculated based on data showing proportion of cases that settled.

A comparison between the mean award sizes for the smaller and the larger juries (among the three better studies) suggests that smaller juries give larger awards.

Assuming the finding is reliable, what could explain it? Sampling theory alone will not suffice. Sampling theory predicts that the distributions of awards will be symmetrical, though, as discussed above, the distribution of awards from smaller juries will show greater dispersion than the distribution of awards from larger juries. But sampling distributions tend to be normal even when the underlying population distribution is skewed.

In addition to sampling phenomena, consider the logic of the social psychological phenomenon of group polarization (Myers & Lamm, 1976). Groups tend to shift in the direction of, and magnify, the group norm that is present. Because the preferences of members of smaller juries are more dispersed, high awards are more likely in smaller groups to appear to be group norms toward which the group shifts as a result of deliberation (Myers & Kaplan, 1976). An experiment by Snortum, Klein, & Sherman (1976) tends to confirm the inordinate power of a single juror in smaller juries. Into simulated 6- and 12-person juries Snortum et al. planted a single confederate who took a position far removed from that of most of the other jurors. In 12-person juries, the single outlier was able to transform the control group's 24% guilty votes into 45% guilty, while in 6-person juries the shift was far more pronounced, from 30% to 72%. It is not hard to see a similar effect occurring for awards as for verdicts.

The data in Table 6 are insufficient to permit us to conduct significance tests, or to put much confidence in the reliability of this finding, but the pattern makes sense in light of statistical and social psychological theory and data.

CONCLUSIONS

The evidence shows that the size of the jury affects jury decision processes. The meta-analysis reported has found: Smaller juries are more likely to contain no members of minority groups. Twelve-person juries spend more time in deliberation. Twelve-person juries deadlock somewhat more often. And, at least on the strength of the two studies that tested the issue, 12-person juries accurately recall more trial testimony. These effects may be multiplied across the roughly 160,000 jury trials conducted each year in the United States.

In holding that juries smaller than 12 are constitutional, the Supreme Court set aside 600 years of common law tradition and two centuries of constitutional history, including the reversal of its own precedents (*Capital Traction Co. v. Hof,* 1899; *Patton v. United States,* 1930; *Rassmussen v. United States,* 1905; *Thompson v. Utah,* 1898; generally, see Arnold, 1993). Less than a decade after *Williams,* some members of the Supreme Court may have realized their error. Despite its holding reaffirming the constitutionality of the six-person jury, the opinion in *Ballew v. Georgia* (1978) nevertheless reviewed in detail the empirical and statistical studies relevant to the question of the effects of jury size.

Recognition of the harmful effects of shrunken juries has led some authorities to begin to move the jury back to its original size. For example, the New Hampshire Supreme Court relied on the *Ballew* Court's review of relevant empirical research in providing an advisory opinion to the New Hampshire Senate finding that smaller juries would violate the New Hampshire State Constitution (*Opinion of the Justices,* 1981). Although the New Hampshire Supreme Court adopted the same functional analysis that the U.S. Supreme Court had in *Williams,* with the guidance of *Ballew* it reached the opposite conclusion.

Additionally, in an explicit effort to stabilize damage awards, the Model Medical Malpractice Act promulgated by the Reagan Administration called for the use of 12-person juries in medical malpractice cases. Similarly, revisions of Rule 48 of the Federal Rules of Civil Procedure gradually have been increasing the number of jurors who deliberate and decide a case. In 1995 the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended a further change in Rule 48, namely, a provision requiring that federal trial courts "shall seat a jury of twelve members." However, by the end of 1996, the Judicial Conference rejected that proposed rule change.

Having framed the issue of jury functioning to call for an empirical inquiry, the Supreme Court reached conclusions that are not supported by the data. A careful examination of the relevant studies finds significant differences in jury behavior as a function of jury size. In light of these data and the judgments of other authorities, mentioned above, the Supreme Court might profitably revisit this issue. Were it to do so, and adhere to its now dominant legal analysis (articulated in *Williams v. Florida,* 1970) concerning the test for constitutionality of juries smaller than 12 persons, it seems that smaller juries, certainly juries of 6 persons, are not likely to be held constitutional. Alternatively, the U.S. Congress and state legislatures may recognize the error and correct it. Federal and state courts are constitutionally permitted, but not required, to use smaller juries. The findings of this meta-analysis

suggest that juries will perform better, and therefore justice will be served better, when juries are restored to their traditional 12.

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THE CASE FOR OVERTURNING *WILLIAMS v. FLORIDA* AND THE SIX-PERSON JURY: HISTORY, LAW, AND EMPIRICAL EVIDENCE

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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 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.

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I. INTRODUCTION

Only two states—Florida and Connecticut—rely on six-person juries in serious felony prosecutions. The constitutionality of Florida's six-person jury rests exclusively on the U.S. Supreme Court's decision in *Williams v. Florida*.[1] In *Williams*, the Court dismissed precedent and legal tradition, and found the twelve-person jury to be nothing more than a "historical accident."[2] The Court therefore upheld the constitutionality of six-person juries because it found six- and twelve-person juries to be functionally equivalent.[3]

The *Williams* Court's historical analysis is flawed: more thorough inquiry suggests that the Framers understood and intended the jury to be a group of twelve persons. But, even accepting the Court's "functional" analysis as the correct test of constitutionality, the six-person jury fails—the empirical evidence never supported the speculations in

1. 399 U.S. 78 (1970); *see also* Blair v. State, 698 So. 2d 1210, 1216 (Fla. 1997) (stating that it is indisputable that a person in Florida has a right to a six-person jury); Rinaldo v. State, 861 So. 2d 510, 511 (Fla. 4th DCA 2004) (holding that a person does not have a fundamental right to a twelve-person jury); Smith v. State, 857 So. 2d 268, 270 (Fla. 5th DCA 2003) (holding that a right to a jury of at least six members is fundamental).

2. *Williams*, 399 U.S. at 101–02.

3. *Id.* at 103.

Williams, and subsequently accumulated knowledge leads to the conclusion that the performance of the six-person jury is inferior to that of the twelve-person jury.

This Essay sets out the historical and empirical infirmities of the *Williams* decision. Part II presents a summary of the number of jurors used in criminal prosecutions throughout the United States. Part III examines the Sixth Amendment history of the trial by jury and argues that the twelve-person jury was no accident. Part IV provides an overview of Florida's jury trial history. Part V describes the *Williams* Court's functional-equivalence test in detail. Part VI summarizes the empirical research undertaken since *Williams*, casting great doubt on the vitality of its holding.

II. THE CURRENT STATUS OF JURIES NATIONWIDE

Although some states reduced the size of the jury in criminal prosecutions to six persons (and Georgia attempted to reduce the size to five) following the *Williams* decision, most states currently retain twelve-person juries in felony cases. Only six states permit juries of fewer than twelve in felony prosecutions, and of those only four permit six-person juries.[4] Indiana requires twelve-person juries for class A, B, and C felonies, and six-person juries in all other felony cases.[5] Massachusetts provides twelve-person juries for all Superior Court cases and a de novo jury trial for all cases appealed from a guilty verdict by a six-person jury in district court cases. Thus no person accused of a felony in Massachusetts must settle for a six-person jury. Arizona provides twelve-person juries in cases where the sentence may be more than thirty years and eight-person juries in other felony cases. In Utah, eight-person juries are permitted in felony prosecutions. The only other state with six-person juries in felony cases is Connecticut. All other state and federal felony prosecutions require twelve-person juries.[6] The states that have the death penalty, including Florida, require twelve-person juries in all capital or death cases.[7]

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4. DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 233 tbl.42 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf.

5. *Id.* Indiana has a fixed sentencing structure. Class A felonies are punishable by up to thirty years in prison, class B by up to ten years in prison, class C by up to four years in prison, and class D by up to eighteen months in prison. *See* IND. CODE §§ 35-50-2-4 to -7 (2007).

6. ROTTMAN & STRICKLAND, *supra* note 4, at 233 tbl.42.

7. *Id.* In Florida, a defendant may waive a twelve-person jury and agree to be tried by a smaller jury. *See* State v. Griffith, 561 So. 2d 528, 529 (Fla. 1990).

The American Bar Association's (ABA) principles for jury trials call for states to provide twelve-person juries in felony prosecutions "if a penalty of confinement for more than six months may be imposed upon conviction."[8] Despite the ABA's recommendation and the near nationwide consensus on twelve-person juries in serious cases, Florida and Connecticut retain the six-person jury.

III. THE SIXTH AMENDMENT AND THE HISTORY OF THE JURY

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.[9]

The right to trial by jury is essential to freedom and justice: "Throughout history, the right to a trial by jury has been viewed by our founding fathers, the framers of our constitution, and all citizens of the United States since its inception, as essential to the freedoms that make our society great."[10] The Sixth Amendment, founded on long experience in English history and the Magna Carta, was included in the Bill of Rights to "prevent oppression by the government."[11] Blackstone's *Commentaries*, originally published in 1765–1769, identified trials by twelve jurors as being important to preventing government oppression: "'[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.'"[12] Blackstone's summary of the development of

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8. A.B.A., AM. JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS 5 princ.3 (2005), *available at* http://www.abanet.org/juryprojectstandards/principles.pdf.

9. U.S. CONST. amend. VI.

10. Michael Sudman, Note, *The Jury Trial: History, Jury Selection, and the Use of Demonstrative Evidence*, 1 J. LEGAL ADVOC. & PRAC. 172, 173 (1999).

11. *Id*. at 175; *see also* Benjamin F. Diamond, Note, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 FLA. L. REV. 905, 909–11 (2003) (discussing the development of the English jury and its influence on the American jury).

12. Duncan v. Louisiana, 391 U.S. 145, 151–52 (1968) (quoting WILLIAM BLACKSTONE, 4

English law and practice reflects the same history that led the U.S. Supreme Court in 1898 to determine that the term "jury" in the Sixth Amendment retained its meaning under the common law and Magna Carta:

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that . . . the supreme law of the land required that [the defendant] should be tried by a jury composed of not less than twelve persons.[13]

The Court, thereafter, consistently held that criminal trials required twelve-person juries. In 1905, this was true for petty offenses as well. In *Rassmussen v. United States*,[14] the Court struck down as unconstitutional an Alaskan territorial law of Congress because the law permitted six-person juries in misdemeanor cases.[15] In 1968, the Court in *Duncan v. Louisiana*[16] applied the Sixth Amendment to the states, holding that state criminal prosecutions of non-petty offenses required twelve-person juries.[17]

Justice White, writing for a seven-member majority in *Duncan*, held trial by jury in criminal cases to be fundamental to the American scheme of justice and applied this guarantee to the states through the Fourteenth Amendment to the U.S. Constitution.[18] A crime punishable by two years in prison was not a petty offense and required a jury trial.[19] Although the size of the jury was not at issue in the case, implicit in the opinion was that juries numbered twelve—the opinion quoted Blackstone on the point.[20] The two dissenters specifically challenged the twelve-person requirement, which they viewed the majority as having embraced.[21] But the right to twelve-person juries was a matter of fundamental principles of liberty and justice, and was based on well-settled history:

COMMENTARIES *349–50).

13. Thompson v. Utah, 170 U.S. 343, 350 (1898), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970), *and overruled on other grounds by* Collins v. Youngblood, 497 U.S. 37 (1990).

14. 197 U.S. 516 (1905).

15. *Id.* at 518.

16. 391 U.S. 145 (1968).

17. *Id.* at 157–58.

18. *Id.*

19. *See id.* at 147.

20. *See id.* at 151–52.

21. *Id.* at 182 (Harlan, J., dissenting).

> The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.[22]

Until *Williams*, the Court had consistently defined "jury" to mean the common-law twelve-person jury.[23]

Florida law allowed six-person juries in non-capital felony cases.[24] Following *Duncan*, the constitutionality of the 1967 version of Florida's statute allowing six-person juries was challenged by the petitioner in *Williams*, who argued that a six-person jury was inconsistent with the Sixth Amendment guarantee of trial by jury.[25] Because the Sixth Amendment does not specify a number of impartial jurors for a constitutional panel, the *Williams* Court examined whether a twelve-person jury was a necessary ingredient of trial by jury. Although the Court found that the historical definition of a jury included trial by peers, the Court characterized the use of twelve-person juries as a "historical accident" of common law.[26] This characterization improperly dispensed with a 700-year history defining "jury" as comprising twelve persons. There is "more than sufficient evidence to conclude that the evolution of the modern jury as a body of twelve-persons was far from accidental."[27]

Contrary to the *Williams* Court's conclusion, a great deal of common-law history—identified in *Duncan* and previous U.S. Supreme Court and state law cases—supports an interpretation that the Framers of the Constitution guaranteed a twelve-person jury through the Sixth Amendment.[28] Trial by jury is fundamental to the common-law system and predates the adoption of the Sixth Amendment in 1791.[29] In fact, the Sixth

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22. *Id*. at 151 (majority opinion) (footnotes omitted).

23. Larry T. Bates, *Trial by Jury After* Williams v. Florida, 10 HAMLINE L. REV. 53, 55 (1987); Robert H. Miller, Comment, *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, 621 (1998).

24. *See* English v. State, 12 So. 689, 690 (Fla. 1893).

25. *See* Williams v. Florida, 399 U.S. 78, 86 (1970).

26. *Id*. at 89.

27. Miller, *supra* note 23, at 632–33.

28. *See id.* at 639–45, 681–82.

29. *See generally* Richard S. Arnold, Chief Judge, U.S. Court of Appeals for the Eighth Circuit, Howard Kaplan Memorial Lecture: Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials (Oct. 6, 1993), *in* 22 HOFSTRA L. REV. 1 (1993) (noting that it was taken for granted for hundreds of years that a jury should be composed of twelve people). In a lecture

Amendment is "essentially redundant" because the right to a trial by jury was provided in Article III, § 2 of the Constitution in 1789.[30] The right to a jury trial is the "only guarantee to appear in both the original document and the Bill of Rights."[31]

> At the Constitutional Convention, the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists. Alexander Hamilton wrote in Federalist 83:
>
> > The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[32]

The jury trial's historical basis is well settled, and the number of jurors was a deliberate decision based on intrinsic value and not simply a "historical accident."[33] The number of jurors at the time of adoption—and for centuries of common-law history preceding the Sixth Amendment—was set at twelve. When our forefathers spoke of the "trial by jury," they assumed, based on "common-law criminal jurisprudence[,] that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'"[34] In *Blakely v. Washington*,[35] Justice Scalia rejected the argument that the Framers of the Constitution "left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*."[36] The role of the jury was not left to the government: "We think that claim not plausible at all, because the very

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delivered at the Hofstra University School of Law and later printed in the *Hofstra Law Review*, Judge Arnold set forth a compelling historical and empirical argument critical of the six-person jury in civil cases. *See id.* His arguments are applicable to criminal trials as well.

30. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869–70 (1994).

31. *Id*. at 870. The Constitution and the Sixth Amendment both guarantee the right to a trial in the state where the crime has been committed. *See* U.S. CONST. art. 3, § 2, cl. 3; U.S. CONST. amend. VI.

32. Alschuler & Deiss, *supra* note 30, at 871 (quoting THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

33. *See id.* at 869–71.

34. Blakely v. Washington, 542 U.S. 296, 301 (2004) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *349–50).

35. 542 U.S. 296 (2004).

36. *Id.* at 308.

reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."[37] Allowing the government to define the size of a jury empowers the government to all but eliminate the jury, undoing by statute what had been established by the Constitution. In *Ballew v. Georgia*,[38] the Court acknowledged this slippery slope by holding that Georgia's five-person jury in criminal cases violated the Sixth and Fourteenth Amendments.[39]

Since *Williams*, the Supreme Court has not directly confronted a challenge to the six-person jury. In *Ballew*, the Court was asked to examine whether five-person juries satisfied the Sixth Amendment guarantee of trial by jury. Although the *Ballew* Court reaffirmed *Williams*, the issue in *Ballew* did not concern the constitutionality of six-person juries. The Court, in two other cases dealing with juries, was also not confronted by a direct challenge to the infirmity of its *Williams* decision. In *Burch v. Louisiana*,[40] the Court held that a non-unanimous verdict by a six-person jury in a state criminal trial for a non-petty offense violated the Sixth Amendment,[41] and in *Brown v. Louisiana*,[42] the Court gave the decision in *Burch* retroactive effect.[43] The foundation for twelve-person juries was well rooted in American jurisprudence prior to the *Williams* decision. Throughout 700 years of common-law jurisprudence, no historical evidence supports juries of numbers other than twelve.

To argue that strictly adhering to the Framer's view would require the twelve jurors to be white, male landholders avails nothing. At the time the Constitution and Bill of Rights were adopted, the qualifications of jurors were matters of state and federal legislation. Many of the disqualifying characteristics that limited jury participation to white, male property owners resulted from the "citizenship" restrictions at that time.[44] Discriminatory practices that restricted juror participation were circumscribed and later eliminated after the passage of the Fourteenth and Fifteenth Amendments:

> The years following the Civil War saw four notable legal developments that affected the criminal jury. In 1868, the Fourteenth Amendment declared that no state could enact or enforce any law abridging the privileges or immunities of citizens of the United States. The amendment also forbade any state to deny to any person the equal protection of the laws. Two years later, the Fifteenth Amendment declared that "the right [of citizens of the United States] to vote shall not be

37. *Id*.
38. 435 U.S. 223 (1978).
39. *Id.* at 230–31.
40. 441 U.S. 130 (1979) (a unanimity case).
41. *Id.* at 139.
42. 447 U.S. 323 (1980) (a unanimity case).
43. *Id.* at 331.
44. *See* Alschuler & Deiss, *supra* note 30, at 877–78.

> [denied or] abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Federal Civil Rights Act of 1875 provided that "no citizen . . . shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race." And four years later, the Federal Jury Selection Act of 1879 reversed the course of earlier congressional action, facilitated discriminatory jury selection in the federal courts, and brought Reconstruction in the jury box to an end.[45]

The Supreme Court has held that racial or gender discrimination in jury selection violates the Fourteenth Amendment.[46] The historical interpretation of the Sixth Amendment guarantee of a jury of twelve would not require those twelve individuals be propertied white men.[47]

English history and common-law precedent should not be easily dismissed. History and precedent remain important cornerstones to constitutional interpretation as evidenced by three recent Supreme Court decisions: two identifying the primary role of the jury, and not the judge, in making findings of fact,[48] and one identifying the right of defendants to confront witnesses under the Sixth Amendment.[49] Relying heavily on history, the Court held that the jury, not the judge, should make findings of fact and that evidentiary rules introducing hearsay violated the right of confrontation. In *Jones v. United States*,[50] the Court specifically described the historical importance of trial by jury:

> Identifying trial by jury as "the grand bulwark" of English liberties, Blackstone contended that other liberties would remain secure only "so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of

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45. *Id*. at 887 (third alteration in original) (footnote omitted) (quoting U.S. CONST. amend. XV, § 1, and Federal Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336 (current version at 18 U.S.C. § 243 (2000))).

46. J.E.B v. Alabama *ex rel*. T.B., 511 U.S. 127, 129 (1994); Batson v. Kentucky, 476 U.S. 79, 89 (1986).

47. *Cf.* Arnold, *supra* note 29, at 33 (noting that changing times justify the progression away from some characteristics of the juries of 1791—such as that jurors be white men owning real property—but may not justify decreasing from twelve to six jurors).

48. Ring v. Arizona, 536 U.S. 584, 588–89 (2002); Apprendi v. New Jersey, 530 U.S. 466, 478–79 (2000).

49. Crawford v. Washington, 541 U.S. 36, 42 (2004).

50. 526 U.S. 227 (1999).

> the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."[51]

IV. THE FLORIDA JURY

Article 1, § 22 of the Florida Constitution provides: "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law."[52] Florida Rule of Criminal Procedure 3.270 and § 913.10 of the Florida Statutes require twelve-person juries "to try all capital cases" and six-person juries "to try all other criminal cases."[53] In Florida, the right to a six-person jury is a fundamental, state constitutional right, and a twelve-person jury in capital cases is merely a matter of statutory law.

Because the Sixth Amendment was not incorporated by the Fourteenth Amendment to apply to the states until 1968,[54] Florida's history of the jury trial guarantee under the state constitution is discussed separately. The Florida Constitution of 1875 adopted the principle that "'[g]rand and petit jurors shall be taken from the registered voters of the respective counties. The number of jurors for the *trial of causes* in any court may be fixed by law.'"[55] In 1877, the legislature passed a law stating that "'twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other offences prosecuted by indictment, presentment, or information.'"[56] In 1877, the Florida Supreme Court upheld the constitutionality of the legislation regulating juries, reasoning as follows: "An examination of the legislation shows that the number of jurors has been regulated by law, and that six persons are made sufficient in many of the States under similar constitutional provisions or under statutes, and these regulations have been sustained by the courts."[57]

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51. *Id.* at 246 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *350).

52. FLA. CONST. art. I, § 22.

53. FLA. R. CRIM. P. 3.270; FLA. STAT. § 913.10 (2007).

54. *See* Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968).

55. Gibson v. State, 16 Fla. 291, 300 (1877) (quoting FLA. CONST. of 1868, art. VI, § 12 (1875)). Legislative history and records for acts and bills passed before 1969 are not available. Legislative Research at the Florida State Archives, http://dlis.dos.state.fl.us/barm/fsa/legislativeresearch.htm (last visited Feb. 7, 2008).

56. *Gibson*, 16 Fla. at 297–98 (quoting Law of Feb. 17, 1877, ch. 3010, § 6, at 54 (repealed 1892)).

57. *Id*. at 300. In *Gibson*, the court did not cite the state law, constitutional provisions, or cases to support its reasoning. Although there is some doubt that many states reduced the number

In 1885, § 38 of Article 5 of the Florida Constitution was amended: "'The number of jurors for the trial of causes in any court may be fixed by law but shall not be less than six in any case.'"[58] No early opinions interpreted the twelve-person jury requirement in capital cases. In *Adams v. State*,[59] however, the Florida Supreme Court confronted a constitutional challenge to a jury of less than twelve in a non-capital murder case.[60] Adams was originally charged with capital murder. In his first trial, he was acquitted of first-degree murder and convicted of second-degree murder.[61] His conviction was reversed, and he was retried and convicted of second-degree murder by a jury of six. Adams argued that his conviction was unconstitutional because he was granted only a six-person as opposed to a twelve-person jury.[62] The Florida Supreme Court defined a "capital case" as "a case in which a person is tried for a capital crime."[63] According to the court, "A capital crime is one for which the punishment of death is inflicted."[64] Because Adams was convicted of murder in the second degree, which is punishable by imprisonment for life, the court held that he was not convicted of a capital crime and that he was not entitled to a jury of twelve.[65] Neither the *Adams* court nor any other precedent or legislative history explains why Florida retains twelve-person juries in capital cases.

After the *Williams* decision but before *Ballew*, the Florida Supreme Court adopted a revision to Rule 3.270 reaffirming § 913.10 of the 1968 Florida Statutes, which permitted six-person juries to try criminal cases.[66] Florida courts have consistently held that the right to six-person juries is

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of jurors in criminal cases, there is little documented history, during the 200 years following the adoption of the Bill of Rights, on the criminal jury trial. *See* Alschuler & Deiss, *supra* note 30, at 867–68. There is, however, some historical evidence that the courts, particularly in the South, "def[ied] the rule of law, particularly federal constitutional law." Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 817 (1998). In their defiance, state courts may have reduced the number of jurors in contravention of common law and the Sixth Amendment.

58. English v. State, 12 So. 689, 690 (Fla. 1893) (quoting FLA. CONST. of 1885, art. V, § 38).

59. 48 So. 219 (Fla. 1908).

60. *Id.* at 224.

61. *Id.* at 220.

62. *Id.* at 224.

63. *Id.*

64. *Id.*

65. *Id.*

66. *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 65 (Fla. 1972). Prior to the 1970 amendment to § 913.10, the statute read: "Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases." FLA. STAT. § 913.10 (1970).

"fundamental in nature."[67] In *Jordan v. State*,[68] for example, Jordan's conviction was reversed because his jury was selected in an unconstitutionally discriminatory manner: "[T]he Sixth Amendment to the U.S. Constitution guarantees the accused a trial by an impartial jury. This comprehends that in the selection process there will be 'a fair possibility for obtaining a representative cross-section of the community.'"[69]

The right to a jury trial is undoubtedly, under Florida law, an "indispensable component of our system of justice."[70] Following the U.S. Supreme Court's decision in *Furman v. Georgia*,[71] which for a time invalidated capital punishment, several Florida Supreme Court cases confronted the number-of-jurors issue in pending capital cases. In *Donaldson v. Sack*,[72] the Florida Supreme Court decided whether individuals charged with capital crimes were still entitled to twelve-person juries.[73] The *Donaldson* court held that portions of the rule and statute concerning capital offenses that required twelve-person juries in capital cases were no longer applicable.[74] Capital cases were to be tried with six-person juries under the Florida Constitution.[75]

More recently, however, the Florida Supreme Court held that unless the defendant agreed to a six-person jury, a twelve-person jury was required in first-degree murder cases when the maximum penalty was life imprisonment.[76] Contrarily, in *Hall v. State*,[77] the First District Court of Appeal held that it was not error to deny a twelve-person jury to Hall when death was not a possible punishment. In *Hall*, the First District certified as a matter of great public importance the following question: "Whether a 12-person jury is required in a first degree murder case where the death penalty may not be imposed as a matter of law."[78] The Florida Supreme Court denied review, leaving this question unanswered.[79]

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67. *See, e.g.*, Smith v. State, 857 So. 2d 268, 270 (Fla. 5th DCA 2003).
68. 293 So. 2d 131 (Fla. 2d DCA 1974).
69. *Id.* at 134 (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)).
70. Blair v. State, 698 So. 2d 1210, 1213 (Fla. 1997).
71. 408 U.S. 238 (1972).
72. 265 So. 2d 499 (Fla. 1972).
73. *Id.* at 503.
74. *Id.*
75. *Id.*
76. *See* State v. Griffith, 561 So. 2d 528, 529 (Fla. 1990).
77. 853 So. 2d 546 (Fla. 1st DCA 2003).
78. *Id.* at 549.
79. *See* Hall v. State, 865 So. 2d 480 (Fla. 2003). Likewise, denial of post-conviction relief was affirmed by *Hall v. State*, 915 So. 2d 1199 (Fla. 1st DCA 2005), and habeas corpus denied by *Hall v. McDonough*, No. 5:06cv30/RS, 2006 WL 2425519, at *1 (N.D. Fla. Aug. 21, 2006).

In Florida, sexual battery of a person under age twelve by a person over eighteen is a capital offense.[80] These capital sexual battery cases are tried by six-person rather than twelve-person juries because death is not a possible penalty.[81] In two recent cases, however, Justice Pariente and Judge Altenbernd of the Second District Court of Appeal raised questions about requiring twelve-person juries in cases where life in prison without the possibility of parole is a possible sentence.[82] In *Palazzolo v. State*,[83] Judge Altenbernd identified evidentiary proof concerns that may justify twelve-person juries in non-death cases:

> This case [involving capital sexual battery punishable by life in prison without the possibility of parole] demonstrates that the evidence in a capital sexual battery trial can often be much more tenuous than the evidence in a capital homicide trial. In almost all first-degree murder trials, there is little question that a murder occurred. In capital sexual battery cases, the proof that any crime occurred often depends exclusively upon the testimony of a child of tender years. There may be merit to a rule of procedure requiring a jury of twelve in these cases or to a procedural rule allowing the jury to receive an instruction on the penalty comparable to the instruction that the legislature attempted to mandate in section 918.10(1) [of the Florida Statutes]. These are issues, however, for resolution in the supreme court in its prospective rule-making capacity.[84]

In *Adaway v. State*,[85] Justice Pariente expressed similar concerns with the fairness of six-person juries in serious felony cases:

> [I]f capital sexual battery remains a capital felony, I urge this Court to consider amending Florida Rule of Criminal Procedure 3.270 to require a jury of twelve in these cases. As noted in *Palazzolo v. State*, the evidence in a capital sexual battery trial can be much more tenuous than in a murder trial, and often rests largely on the victim's testimony and hearsay statements. Unless the defense agrees to a jury of six, a twelve-person jury is required in first-degree murder cases in

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80. FLA. STAT. § 794.011(2)(a) (2007).

81. Hogan v. State, 451 So. 2d 844, 845–46 (Fla. 1984); *Hall*, 853 So. 2d at 549; Cooper v. State, 453 So. 2d 67, 67–68 (Fla. 1st DCA 1984).

82. Adaway v. State, 902 So. 2d 746, 753, 755 (Fla. 2005) (Pariente, J., concurring); Palazzolo v. State, 754 So. 2d 731, 736 (Fla. 2d DCA 2000).

83. 754 So. 2d 731 (Fla. 2d DCA 2000).

84. *Id.* at 737 (citation omitted).

85. 902 So. 2d 746 (Fla. 2005).

> which the maximum penalty is life imprisonment because the State is not seeking the death penalty.[86]

Thus, twelve-person juries are viewed as justified by the seriousness of the penalty and the potential tenuousness of the evidence. In light of these justifications, most, if not all, felony prosecutions would seem to warrant twelve-person juries as well. Of additional concern, Florida's legislature has adopted numerous enhancement statutes (e.g., prison releasee reoffender, habitual felony offender, and violent career criminal) that significantly increase criminal penalties for felony convictions.[87] For many offenses, these enhancement statutes allow, and in some instances require (e.g., prison releasee reoffender), very long sentences, including life in prison without parole. In addition to capital sexual battery cases, many felony prosecutions rely exclusively on victim testimony (e.g., rape and robbery cases) where the evidence may be more tenuous than in a prosecution of capital murder.

These most recent discussions by the Florida courts have raised concerns about the fairness of six-person juries in serious felony prosecutions. Conspicuously absent, however, is any discussion by the courts about empirical evidence that compares six-person with twelve-person juries. This comparison, known as the functional-equivalence test, was adopted by the *Williams* Court to provide a test for the constitutionality of juries smaller than twelve. The next Part of this Essay discusses the Court's development of this test.

V. THE FUNCTIONAL-EQUIVALENCE TEST

After dismissing history, tradition, and precedent as bases for assessing the constitutional adequacy of juries with fewer than twelve members, the U.S. Supreme Court in *Williams* turned to functional equivalence to measure constitutionality: "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial."[88] The Court considered a number of jury functions and fashioned a test to determine whether smaller juries performed these functions as well as the traditional twelve-person juries. If they did not, the smaller juries lacked what the U.S. Constitution required:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and

86. *Id.* at 755 (Pariente, J., concurring) (citation omitted).

87. *See* FLA. STAT. § 921.0016(3) (2007).

88. Williams v. Florida, 399 U.S. 78, 99–100 (1970).

> shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. *To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community*.[89]

According to the Court's Sixth Amendment assessment, twelve- and six-person juries were functionally equivalent, and the twelve-person requirement could not "be regarded as an indispensable component of the Sixth Amendment."[90]

The *Williams* Court found that to satisfy the purpose of trial by jury, a smaller jury must accomplish the following goals as well as a twelve-person jury: foster effective group deliberations; produce accurate fact-finding; reduce the risk of convicting an innocent defendant; provide consistency and reliability in the criminal justice system; provide an adequate hearing of minority viewpoints; and represent a cross-section of the community. The Court concluded that in all of these ways the six-person jury was the functional equivalent of the twelve-person jury.[91]

What was the *Williams* Court's basis for this conclusion? One would think that eliminating what until then had been regarded as a constitutional right—a jury of twelve—and substituting a jury of six would require proof that functional equivalence actually existed. Instead, the Court relied upon, as one eminent empirical legal scholar put it, "scant evidence by any standards."[92] The Court relied on (1) what it claimed were empirical studies (specifically: "experiments")[93] but which were not empirical studies at all; (2) actual studies, the findings of which the Court read exactly backwards; and (3) its own speculation.

To support its assertion that the outcomes of trials would not differ as a function of the size of the jury, the Court cited six "experiments" and asserted: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries."[94] Not one of these

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89. *Id.* at 100 (emphasis added) (citation omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

90. *Id.*

91. *Id.* at 101–02.

92. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715 (1971).

93. *Williams*, 399 U.S. at 101.

94. *Id.* at 101 & n.48.

"experiments" provided any evidence on the question at hand. The Phillips article was irrelevant because it addressed only the possible financial savings associated with reducing jury size[95] but not any of the criteria upon which the Court had determined constitutionality depended. Wiehl merely cited[96] Joiner who, on the basis of nothing but his own speculation, had stated that "it could easily be argued that a six-man jury would deliberate equally as well as one of twelve."[97] The Bulletin of the Section of Judicial Administration of the American Bar Association simply reported that a test of six-person juries in Monmouth County, New Jersey, was being planned.[98] Judge Tamm reported that he had presided over many condemnation trials using five-man juries and (without providing any data or any analysis) said that he had perceived no differences.[99] Cronin reported on the use of six-person juries in forty-three civil cases in the state district court in Worcester, Massachusetts (where, incidentally, unhappy litigants had the right to a second trial, de novo, in front of twelve jurors in the Superior Court).[100] Cronin spoke to a court clerk and three attorneys involved in trials in the district court, and these four persons said that the smaller juries seemed to behave the same as larger juries.[101] Beyond these bare assertions there were no data and no analysis. Finally, the Court relied upon an article in the Journal of the American Judicature Society that summarized the previous experience—namely, the impressions of three lawyers and a clerk.[102]

On the question whether jurors in the minority were less able to resist conformity pressure from the majority in six-person juries than in twelve-person juries, the Court cited several empirical studies. Relying on these studies, the Court concluded that the critical factor was the ratio of majority to minority members, which would not change merely by cutting the jury size in half: "Studies of the operative factors contributing to small group deliberation and decisionmaking suggest that jurors in the minority on the first ballot are likely to be influenced by the proportional size of the

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95. *See* Hon. Richard H. Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354, 356–58 (1956).

96. Hon. Lloyd L. Wiehl, *The Six Man Jury*, 4 GONZ. L. REV. 35, 38–39 (1968).

97. CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 83 (1962) (concluding that the deliberative process should be the same in either the six- or twelve-person jury).

98. *New Jersey Experiments with Six-Man Jury*, BULL. SEC. JUD. ADMIN. A.B.A., May 1966, at 9, 9.

99. Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 136–38 (1962).

100. Phillip M. Cronin, *Six-Member Juries in District Courts*, BOSTON B.J., Apr. 1958, at 27, 27–29.

101. *Id.* at 27–28.

102. *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUDICATURE SOC'Y 136, 136 (1958).

majority aligned against them."[103] Thus, a minority faction in a jury divided 10–2 would be no better able to withstand majority influence than the minority faction in a jury divided 5–1. The critical factor, said the Court, was the proportion, not the absolute number, of jurors in the factions. But the empirical studies found exactly the opposite. To quote from those sources on the very pages to which the Court cited:

- [F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally.[104]

- The results clearly demonstrate that a disturbance of the unanimity of the majority markedly increased the independence of the critical subjects. . . . Indeed, we have been able to show that a unanimous majority of 3 is, under the given conditions, far more effective than a majority of 8 containing 1 dissenter.[105]

- Participants in a discussion are often influenced to change their opinion simply by the knowledge that an overwhelming majority disagrees with them. Consistent disapproval by the majority can shake a small minority's faith even in judgments it believes to be right. Such pressures are most effective against a single dissenter and fall off rapidly in efficacy as the size of the dissenting coalition increases. A single ally gives most dissenters the courage to voice their true convictions.[106]

On the question whether smaller juries would less adequately represent a cross-section of the community, the Court offered nothing more than its

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103. Williams v. Florida, 399 U.S. 78, 101 n.49 (1970).

104. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 463 (1966).

105. S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, *in* READINGS IN SOCIAL PSYCHOLOGY 2, 8 (Guy E. Swanson, Theodore M. Newcomb & Eugene L. Hartley et al. eds., rev. ed. 1952).

106. Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 110 (1968) (footnotes omitted).

own speculation:

> [W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. . . . [T]he concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.[107]

The Court would have needed to go no further than an undergraduate statistics textbook to learn something about principles of statistical sampling that could have displaced the Justices' collective intuition. The Court might then have better considered the impact of any given sample size when drawing samples from populations of any given stratification (such as the proportion of a racial minority, of libertarians, or of certain age or education groups). For example, adopting the Court's random-sampling model, we can learn that one or more members of a minority that constituted 10% of the population would be expected to appear in 72% of twelve-member juries but in only 47% of six-member juries. As Hans Zeisel commented on such an effect: "It is clear, then, that however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, and not by a 'negligible' margin."[108]

The *Williams* Court's remarkably inadequate and erroneous analysis has been the subject of comment by scholars in a multitude of fields—statistics, psychology, sociology, and political science, as well as law.[109] Moreover, the lead opinion in *Ballew v. Georgia*[110] acknowledged the failing of the *Williams* Court's analysis.

In *Colgrove v. Battin*,[111] the Supreme Court revisited the question of jury size effects and constitutionality in the context of federal civil trials. *Colgrove* cited four empirical studies,[112] three of which were conducted by researchers who realized that no research actually existed to support the *Williams* Court's conclusions. The fourth reported the findings of a study that the *Williams* Court had cited to support its conclusion even though

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107. *Williams*, 399 U.S. at 102.

108. Zeisel, *supra* note 92, at 716.

109. *See, e.g.*, Michael Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov.–Dec. 1974, at 18, *reprinted in* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 254 (5th ed. 2002).

110. 435 U.S. 223, 231–32 (1978); *see also infra* notes 121–31 and accompanying text.

111. 413 U.S. 149 (1973).

112. *Id.* at 160.

that study did not yet actually exist.[113] In citing these new studies, the Court implicitly conceded the weakness of its *Williams* opinion. The new studies on which the *Colgrove* Court relied suffer from serious methodological weaknesses, which have been thoroughly explicated in the literature.[114] The *Colgrove* Court nevertheless relied on the studies to affirm its earlier factual conclusions.[115]

Ballew once again revisited the question of jury size, this time in the context of a state testing how small the U.S. Constitution would allow juries to shrink. In his opinion announcing the Court's unanimous holding that juries smaller than six were not constitutional, Justice Blackmun thoroughly canvassed the research literature as of that date.[116]

In *Williams*, the Court determined that "the reliability of the jury as a factfinder hardly seems likely to be a function of its size."[117] But in *Ballew*, the Court implicitly conceded that size does matter. The *Ballew* Court unanimously held that a reduction from six to five jurors was constitutionally unacceptable and that with such juries "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree."[118] One has to wonder how it could be that eliminating six jurors (from twelve members to six) makes no difference while eliminating one more (from six to five) triggers unanimous concern.

In analyzing whether five jurors were constitutionally sufficient, Justice Blackmun's lead opinion in *Ballew* partially summarized *Williams*'s holding that the Sixth Amendment "mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community."[119] The Court used the twelve-person jury as a benchmark of those functions: if smaller-sized juries performed equally well then they were functionally equivalent to twelve-person juries and therefore were constitutional. If the Justices—who unanimously held in *Ballew* that juries smaller than six were deficient—were being true to the Court's *Williams*

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113. *Id.* The *Williams* Court cited a mere announcement that the study was in the planning stages.

114. *See, e.g.*, MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 37–49 (1977); Shari Seidman Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J.L. REFORM 520 (1974); Hans Zeisel & Shari Seidman Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. CHI. L. REV. 281, 283–90 (1974).

115. *Colgrove*, 413 U.S. at 160 n.15. All four of these studies are included in the meta-analysis relied upon in Part VI below, where they are weighted to appropriately reflect their relative methodological weaknesses.

116. 435 U.S. 223, 243–45 (1978).

117. Williams v. Florida, 399 U.S. 78, 100–01 (1970).

118. *Ballew*, 435 U.S. at 239.

119. *Id.* at 230.

analysis, they would have asked themselves whether five-person juries failed to perform as well as twelve-person juries. They had no studies addressing *that* question. What they had, and what Justice Blackmun's opinion reviewed, were numerous studies of the differences in the performance of six-person juries compared to twelve-person juries.[120] The deficiencies in smaller juries revealed by those studies spoke almost exclusively to the validity of six-person, not five-person, juries.

Justice Blackmun's review of the research came to conclusions quite at odds with the conclusions in *Williams*. His opinion acknowledged, among other matters, that as juries grew smaller, important aspects of the quality of deliberation declined,[121] accuracy of results suffered,[122] and cross-sectional representation of the community was adversely affected.[123] Justice Blackmun's opinion found that the available data showed the following:

> [T]he purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental

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120. *Id.* at 231 n.10. The Court listed the numerous studies and other articles that were published between 1970 and 1978 on the subject of the effects of different jury sizes. Virtually all of the studies focused on the contrast between six- and twelve-person groups. The opinion also explained the deficiencies of the studies relied upon by the Court in *Williams* and *Colgrove*. *See id.* at 237–39.

121. "[R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberations. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." *Id.* at 232.

122. "[T]he data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes." *Id.* at 234. "[T]he data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense." *Id.* at 236.

123. The Court found that reduced jury size also reduces the presence of minority representation on jury panels:

> Although the Court in *Williams* concluded that the six-person jury did not fail to represent adequately a cross-section of the community, the opportunity for meaningful and appropriate representation does decrease with the size of the panels. Thus, if a minority group constitutes 10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members, and 89% not to have two.

Id. at 237.

> importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.[124]

Resolving the tension in Justice Blackmun's conclusion is impossible:

> While we adhere to, and reaffirm our holding in *Williams v. Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.[125]

"[T]he assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six."[126] Justice Blackmun was aware of the tensions in his opinion. The bench memo from his clerk is revealing:

> Although it is not conclusive, empirical evidence now supports 3 propositions contrary to the assumptions of *Williams*: a) a jury's performance may be determined in part by its size, b) group deliberation . . . is improved by addition of members, c) the possibility of obtaining a fair cross-section increases as the size of the jury increases.[127]

"[T]he assumptions of *Williams* are probably erroneous . . . ."[128] The memo clearly framed the dilemma: "If the *Williams* assumptions are not re-examined, then 5 is as constitutional as 6. If the assumptions of *Williams* are incorrect, the requirements may need to be modified to be constitutional."[129] Justice Blackmun was not only unwilling to resolve the dilemma by overturning an existing precedent ("*Williams* is on the books," he declared in an internal memo[130]), but he was also unwilling to allow the

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124. *Id.* at 239.

125. *Id.*

126. *Id.*

127. Bench Memorandum to Justice Blackmun, Re: Ballew v. Georgia (Aug. 22, 1977), at 3, *in* THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918–1999, Box 260, No. 76-761 (Library of Congress).

128. *Id*. at 15.

129. *Id*. at 12. We read this as a gentle way of saying that *Williams* would have to be altered or simply overturned.

130. Notes of Justice Blackmun (Aug. 29, 1977), *in* THE HARRY A. BLACKMUN PAPERS, *supra*

dissolution of the jury to continue ("I ask [myself] the question of what I will do when we are next confronted with a 4-man jury, then a 3-, then a 2-, then a 1-"[131]). His published opinion was his best effort to get the Court off the slippery slope without overturning *Williams*.

If Justice Blackmun's contradictory opinion is an unsatisfying solution, a worse solution was offered by the seven of his colleagues who agreed with the holding but did not join in his opinion. These seven could find no way to stop the slide other than to nakedly assert their judicial will, expressed most candidly by Justice Powell, who declared peremptorily that "a line has to be drawn somewhere."[132] They abandoned the reasoning of *Williams* and substituted their own arbitrary pronouncement. If for over 700 years their forebears lacked any basis but an intuitive sense that twelve was the right number of jurors, the Supreme Court succeeded in adhering to its *Williams* principles for only eight years before the Justices themselves abandoned those principles in favor of their own intuitive sense that the proper number was at least six, even though they found themselves incapable of coherently explaining why.

If the Court's approach in *Williams* was correct, and if Justice Blackmun's opinion in *Ballew* set forth the best knowledge available at the time, it is worth asking where the facts and the analysis lead. The most straightforward answer is that, even on its own terms, *Williams* was wrongly decided. A number of state courts have recognized this as the implication of the *Ballew* opinion. In *State v. Hamm*,[133] the Minnesota Supreme Court noted that the *Ballew* Court "made an excellent argument that could be used to support a 12-person jury."[134] The New Hampshire Supreme Court, based explicitly on the *Ballew* opinion, reasoned:

> Although Justice Blackmun's majority opinion in *Ballew* expressed these concerns in the context of a decision regarding a further reduction of criminal trial juries from six to five, we note that these problems may also arise in the

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note 127. Justice Blackmun was loathe to overturn precedent, and no serious discussion of overturning *Williams* took place, though that option was raised by his clerk. *See supra* text accompanying note 129.

131. Notes of Justice Blackmun, *supra* note 130.

132. Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring). He was joined by Chief Justice Burger and Justice Rehnquist. Justice Brennan, joined by Justices Stewart and Marshall, concurred in the judgment but not the reasoning of the opinion, though he offered no reasons. *Id.* (Brennan, J., concurring). Justice White wrote separately, concurring in the judgment, on the unexplained basis that a reduction to five would undermine the cross-section requirement (thereby contradicting his earlier opinion in *Williams*). *Id.* at 245 (White, J., concurring).

133. 423 N.W.2d 379 (Minn. 1988) (holding on state constitutional grounds that the right to trial by jury implicitly required a twelve-person jury).

134. *Id.* at 382 n.2.

> context of reducing the size of juries in civil cases from twelve to six.[135]

The court advised the New Hampshire Legislature that juries smaller than twelve were not functionally equivalent and would therefore not satisfy the requirements of New Hampshire's constitution.[136] Not long after *Ballew*, in promulgating a Model Medical Malpractice Act for the states, the U.S. Department of Health and Human Services recommended twelve-person juries, particularly for their virtue of greater stability and predictability compared to groups of six persons.[137]

Since the *Ballew* decision, further empirical studies have been conducted that examine differences in decisionmaking and functioning of six- and twelve-person juries. The whole body of research leads to the conclusion that six- and twelve-person juries are not functionally equivalent and thus six-person juries impair the constitutional purpose and function of the jury.

VI. THE EMPIRICAL RESEARCH

This Part summarizes the errors and evidence in relation to each of the constitutional jury size criteria defined by the Court. The task of reviewing the research literature is made easier by the meta-analysis of Saks and Marti,[138] which statistically combined and analyzed empirical studies comparing the performance of six- versus twelve-person juries.[139] In all, those 17 studies involved 2,061 juries consisting of about 15,000

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135. Opinion of the Justices, 431 A.2d 135, 136 (N.H. 1981).

136. *Id.* at 136–37. Several states, including Minnesota, *Hamm*, 423 N.W.2d at 386, and Wisconsin, State v. Hansford, 580 N.W.2d 171, 180 (Wis. 1998), have held that their state constitutions require a twelve-person jury in criminal cases, particularly felonies. In Vermont, a supreme court committee rejected a reduction in size and maintained its legislatively required twelve-person juries in all criminal cases. Vt. Supreme Court, Report of the Jury Policy Committee, http://www.vermontjudiciary.org/Committees/Reports/jurypolicyrpt.htm (last visited Feb. 7, 2008).

137. *See* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 15 n.43 (1997).

138. *See generally* Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451 (1997) (reviewing empirical studies to consider the effects of reducing jury size from twelve to six). A meta-analysis is a method of statistically combining studies to determine the essential finding of the body of research, the strength of that effect, and the other variables that interact with and moderate the basic effect. *See generally* MORTON HUNT, HOW SCIENCE TAKES STOCK: THE STORY OF META-ANALYSIS (1997) (examining the history, use, and controversies of meta-analysis); ROBERT ROSENTHAL, META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH (rev. ed. 1991) (evaluating general meta-analysis procedures and results).

139. *See* Saks & Marti, *supra* note 138, at 452.

individual jurors.[140] Nine studies analyzed actual juries and eight studies analyzed experimental mock juries.[141]

A. *Community Representation*

On the issue of the ability of different-sized juries to provide a fair cross-sectional representation of the community, the *Williams* Court offered nothing but *ipse dixit*:

> [W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. . . . [T]he concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.[142]

As we have seen, this assumption conflicts with well-established and widely recognized statistical principles of sampling.[143]

Empirical studies confirmed the predictions of statistical theory. Larger juries were more likely to contain at least one minority group member, while smaller juries were more likely to have no minority representation at all. Not one study contradicted this result, which was the single strongest finding from the meta-analysis.[144] Minorities, no matter how they are defined, are represented in a smaller percentage of six-person as compared to twelve-person juries.

B. *Quality of Group Deliberation*

On the issue of whether the amount or quality of group deliberation was vitiated by reduction in the size of the jury, the Court offered neither evidence nor reasoning. Instead, the Court merely speculated: "[W]e find little reason to think that [the goals of quality deliberation] are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is

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140. *Id.*

141. *Id.* at 453.

142. Williams v. Florida, 399 U.S. 78, 102 (1970).

143. *See supra* note 108 and accompanying text.

144. Saks & Marti, *supra* note 138, at 457. The difference between smaller and larger juries in minority group representation on juries of the different sizes was significant at $p < .0001$. That means that there is less than 1 chance in 10,000 that the two different-sized juries perform equally well in this respect.

retained."[145] Nor did the Court define precisely which dimensions of deliberation are critically important, though presumably this criterion relates to the *process* of the group interaction—in contrast to the *product* of decisions, which is a separate criterion.

Studies of jury size effects have examined length of deliberation, accuracy of collective discussion of case facts during deliberation, and accuracy of individual recall measured by questionnaires after deliberation.[146] Perhaps unsurprisingly, all but one study has found that larger juries deliberate longer than smaller juries.[147] The mean time difference for studies of actual juries (in contrast to mock juries) is forty-four minutes.[148] Only two studies compared the accuracy of recall of evidence. These studies found that members of larger juries more accurately recall evidence both during deliberation[149] and in individual recall afterwards.[150]

In a study published too late to be included in the meta-analysis, Horowitz and Bordens assigned 567 jury-eligible men and women to six- and twelve-person juries, showed the juries a videotaped civil trial, and asked the juries to deliberate to verdicts.[151] The punitive awards of six-person juries varied more than those of twelve-person juries.[152] Twelve-person juries deliberated longer, recalled more probative information, and relied less than six-person juries on evaluative statements and non-probative evidence.[153]

Perhaps the most notable disadvantage of larger juries over smaller juries is that talking time is more evenly divided among members of smaller juries compared to larger juries—in larger juries, the talkative talk even more and the less talkative talk even less.[154] This very real

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145. *Williams*, 399 U.S. at 100.

146. *See generally* Saks & Marti, *supra* note 138 (reviewing the studies of jury size).

147. This is significant at $p < .05$. *See id.* at 457–58.

148. *Id.* at 458.

149. $p < .0001$. *Id.* at 458–59.

150. $p < .0001$. *Id.*

151. Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. APPLIED PSYCHOL. 121, 124 (2002).

152. *Id.* at 126.

153. *Id.* at 126–27.

154. SAKS, *supra* note 114, at 11. One set of commentators has turned this finding into something of a caricature of the deliberation, arguing that in twelve-person juries, but not in six-person juries, the single voice of the foreperson dominates the group and its decision. Adam M. Chud & Michael L. Berman, *Six-Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743, 757 (2000). That is a misleading image of what takes place in juries. In decision-making groups, including juries, even the single most talkative member is out-talked by the others, coalitions of viewpoints form, and dissenters are not silenced but become the focus of discussion, are asked to

disadvantage must nevertheless be balanced against the advantages of larger juries: more total discussion, more vigorous and contentious discussion, more human resources brought to the discussion, more accurate recall of evidence, and (very likely) more stable and consistent verdicts.

C. *Ability of Jurors in the Minority to Resist Majority Pressure*

On this question, the *Williams* Court purported to rely on a number of studies to conclude that a juror or jurors holding views not shared by the majority would be no more vulnerable to majority pressure in a jury of six than in a jury of twelve.[155] As discussed above, the Court misread those studies as saying that the key to conformity pressure is in the ratio of the size of the majority to the minority, when those studies in fact found essentially the opposite: The absolute size of the dissenting minority—most importantly, whether a dissenter had allies—was the critical factor.[156]

If the basic research is correct, minority factions require at least two jurors (each of whom has the other as an ally) if they are to withstand the social pressure of the majority. All else equal, the rate of hung juries would be greater in larger compared to smaller juries. The empirical findings are consistent with this expectation: of the fifteen studies that lent themselves to analysis of this question, results were in the expected direction in eleven, and the overall result of the meta-analysis was highly significant.[157]

An additional, more recent study by Limon and Boster looked at minority views in relation to the majority in six- versus twelve-person juries.[158] In their examination of argument quality, minority size, and influence of the majority, they concluded—consistent with the great bulk of other research in this area—that a "minority that was large . . . was able to influence the majority. Overall, having a large minority helps make the minority subgroup more influential compared to a small minority."[159] Because the chance of minority members having allies is greater on a twelve-person jury, more minority views will be represented and be able to withstand majority pressure.

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explain and defend their views, thus raising their talking quotient. Moreover, most presiding jurors conduct themselves as facilitators of the deliberation, rather than as leaders of the substantive debate, so that many of their verbalizations consist of procedural suggestions.

155. Williams v. Florida, 399 U.S. 78, 101–02 (1970).

156. *See supra* notes 103–06 and accompanying text.

157. $p < .0018$. Saks & Marti, *supra* note 138, at 459–61.

158. *See* M. Sean Limon & Franklin J. Boster, *The Impact of Varying Argument Quality and Minority Size on Influencing the Majority and Perceptions of the Minority*, 49 COMM. Q. 350, 359–60 (2001).

159. *Id.* at 359.

D. *Factfinding Reliability*

In discussing the effect that reduced jury size would have on trial outcomes, the *Williams* Court concluded that jury size made no difference, citing six irrelevant sources in support.[160] Researchers cannot say whether the result reached by a jury is correct or incorrect. Researchers can, however, examine consistency in trial outcomes reached by smaller versus larger juries. The operational definition used by the meta-analysis, therefore, is that a group type (large versus small) is said to be more consistent when more of its verdicts are in line with the outcome preference of the grand total of all juries evaluating a given trial (which is the best estimate of the total eligible population's outcome preference). Only mock jury studies lend themselves to this kind of analysis because only these studies present the same trial to numerous different juries.

Statistical theory predicts that conclusions will be more consistent when generated by larger samples than by smaller samples. Social psychological research and theory predict that increasing group size improves group decisions up to the point where process inefficiencies begin to detract more than the added human resources contribute; the location of that tipping point depends on the kind of task the group confronts.[161] The jury deliberation task is of a kind that would be expected to benefit from increases in size up to fairly large sizes.[162] The empirical studies reviewed by the meta-analysis tend in a direction consistent with this prediction but do not reach statistical significance.[163] So we cannot, based on the studies included in the meta-analysis, say that verdicts are more consistent when rendered by larger juries.

A study by Davis and his fellow researchers published too late to be included in the meta-analysis found that six-person juries were generally more inconsistent in their verdicts: in the civil context, smaller juries will show more variability in their awards and will on average give larger awards than twelve-person juries.[164]

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160. *See supra* notes 94–102 and accompanying text.

161. *See* IVAN D. STEINER, GROUP PROCESS AND PRODUCTIVITY 67 (1972).

162. As explained in considerable detail in Steiner's work, *see id.*, increases in group size and their concomitant resource advantages are partially offset by the gradually increasing complexity of the group process required to incorporate the members' resources into the group's decision-making. At some point, the benefits brought by the next additional member are exceeded by the additional organization burden. Eventually, the benefit of size peaks and the group process costs exceed the benefit of the resources gained.

163. $p = .261$. Saks & Marti, *supra* note 138, at 461, 462 tbl.5.

164. James H. Davis et al., *Effects of Group Size and Procedural Influence on Consensual Judgments of Quantity: The Example of Damage Awards and Mock Civil Juries*, 73 J. PERSONALITY

Commentators sometimes argue for smaller juries on the grounds that they will save money and time. Because cost and efficiency are irrelevant to the constitutional analysis of the Sixth Amendment and are excluded from the Court's functional criteria in *Williams*, we discuss this issue only in the margin.[165]

& SOC. PSYCHOL. 703, 707–08 (1997).

165. Efficiency plays no part in the analysis of jury functioning because it was not one of the jury functions identified by the Supreme Court in *Duncan* or *Williams*. The reason is perhaps obvious, though it has been articulated in numerous cases and contexts. *See, e.g.*, Jones v. United States, 526 U.S. 227, 246 (1999) (noting that delays or inconveniences are acceptable prices for a fair jury system). The balance of cost versus fair trial always favors the latter. Efficiency and inconvenience have no bearing on the interpretation of the Sixth Amendment:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. . . .
>
> . . . [T]he State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

Blakely v. Washington, 542 U.S. 296, 313–14 (2004) (citation omitted) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES, *350).

Justice Scalia succinctly observed in *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring), that efficiency was not important to the drafters of the jury trial guarantee: "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." The Arkansas Supreme Court likewise rejected the state's argument that twelve-person juries were simply not economical in misdemeanor cases: "A panel of six jurors for misdemeanor trials may seem economical and, therefore, desirable at first blush because less serious offenses are involved. However, many misdemeanors including the DWI offense at hand are serious and carry with them maximum jail terms of one year and substantial fines." Byrd v. State, 879 S.W.2d 435, 438 (Ark. 1994). In the balance of interests, economic desirability and efficient process must yield to defendants' rights to a fair jury trial, particularly when punishment ranges from maximum terms of five years to life in prison. *See Jones*, 526 U.S. at 231–32, 246.

Nevertheless, consider some facts relevant to the cost efficiency argument. Forty-eight states provide juries with more than six jurors in serious felony cases without an arduous burden falling on those states' citizens. In most of the United States, only 3%–5% of cases result in jury trials. In Florida, fewer than 2% of felony cases go to trial. The Bureau of Justice Statistics has compiled data on annual judicial expenditures and reported that Florida had a total combined budget for circuit and county courts of $331 million, only a fraction of which is spent on juries. ROTTMAN & STRICKLAND, *supra* note 4, at 83 tbl.17. Trial statistics by year and county are maintained by the Florida State Courts. *See* Florida Trial Statistics, http://trialstats.flcourts.org/TrialCourtStats.aspx (last visited Feb. 7, 2008). Based on statistics from 2004, 193,268 felony cases were filed. Only

VII. CONCLUSION

In 1970 in *Williams v. Florida*, the U.S. Supreme Court found that the minimum jury size under the U.S. Constitution could not be determined by a plain reading of the Constitution. The intent of the Framers was indiscernable. An unbroken line of previous Supreme Court cases reading the jury requirement to mean twelve persons and more than 700 years of common-law juries were of no consequence. Instead, said the Court, the constitutionally permissible size of juries had to be determined through an empirical test of the functional equivalence of juries smaller than twelve: smaller juries that performed as well as twelve-person juries were to be regarded as constitutional.

This Essay argues that the understanding and intent of the Framers can be inferred from the long common-law history of the jury that was accepted as sound by the Framers as well as from their unanimous contemporary practice. For the Framers, a jury was synonymous with a group of twelve, and therefore the Constitution requires a jury to be composed of twelve persons.

If, however, the functional-equivalence test is the proper test, there must be a meaningful burden to convincingly establish that a smaller-sized jury is indeed the functional equivalent of a twelve-person jury. The *Williams* Court did an astonishingly poor job in its analysis of those facts—relying on non-studies, reading actual studies backwards, and concocting speculative (and easily refuted) theories to conclude that six equals twelve. A reexamination of the evidence originally invoked by *Williams* coupled with subsequent research, much of which Justice Blackmun cited in the lead opinion in *Ballew v. Georgia*, made clear that six-person juries failed to perform as well as twelve-person juries on most of the essential criteria specified by the Court.

Only eight years after *Williams*, the *Ballew* Court abandoned the functional-equivalence test. The majority of Justices in *Ballew* made no attempt to apply the test to Georgia's five-person felony juries, and two of the Justices concluded incomprehensibly that studies *showing that six-person juries were not equivalent to twelve-person juries* indicated that *five*-person juries "seriously impaired" the purpose and functioning of

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3,681 cases went to jury trial. Of those 3,681 cases, 322 cases (3 were capital cases) were resolved by plea (one can assume that at some point after jury selection the cases were resolved), an additional 123 cases involved juries in capital cases, which are entitled to twelve-person juries under current law. Excluding the capital cases, there were 3,555 felony jury trials in Florida. Requiring twelve-person juries in these 1.8% of cases will not undermine judicial efficiency or create excessive costs.

juries in criminal trials "to a constitutional degree."[166] In place of the functional-equivalence test, the Justices substituted their own naked intuition that a six-person jury was the minimum size of a constitutional jury. No legal authority, empirical evidence, or reasoning supported this conclusion. It was pure *ipse dixit*. In this post-*Ballew* world, *Williams* is no longer good law.

For this complex of reasons, no sound basis exists to determine the constitutionally permissible minimum jury size. *Williams*, having become a dead letter in *Ballew*, should either be ratified and the functional-equivalence test applied conscientiously or should be formally reversed—allowing courts either to develop a sound theory of the constitutionality of jury size or simply to restore the jury to the size that had been recognized for 700 years of common-law history and 183 years of U.S. constitutional history.

166. *See* Ballew v. Georgia, 435 U.S. 223, 239 (1978).

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The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams v. Florida*

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NOTES

The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida

I. INTRODUCTION

MANY FACTORS are relevant to an analysis of a judicial decision. Some of the more important approaches emphasize: (1) how the new legal rules are related to preexisting law; (2) the personal or psychological reasons for the judge's decision;[1] (3) the institutional context of the court, in an effort to elucidate important strengths and weaknesses in the legal system as a whole;[2] (4) nonscientific appraisals of the practical, social effects of the legal rules

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[1] There are many problems involved in relating the judge's personality, history, cognitive structure, etc., to the decision he reaches in a particular case. Present models of individual behavior are not sufficiently sophisticated to deal with such broad questions. Even if there were a model that adequately described the judge, there would be enormous problems involved in gathering the personal data necessary to use the model in a given case. The problems that arise in both model-construction and data-gathering are discussed in Lewis, *Systems Theory and Judicial Behavioralism*, 21 CASE W. RES. L. REV. 361 (1970), which focuses particularly on a study of Justice Black.

[2] The institutional context of the court can be analyzed from a number of perspectives. *See generally* L. VON BERTALANFFY, GENERAL SYSTEMS THEORY; FOUNDATIONS, DEVELOPMENT, APPLICATIONS (1969). One of the issues in this category is the sufficiency of the adversary proceeding. The presentations are made by two or more lawyers before judges, and rarely are any of these persons expert in fields other than the law. The efficacy of such a format is questionable, but one cannot hastily conclude that another body would be more capable. One alternative is to leave more decision making to the legislature, but there is no guarantee that a legislature will make an intelligent investigation before it acts. And even when such an investigation is made, there are strong tendencies for legislators to disregard the results and follow either their own visceral feelings or the most expedient political route. *See, e.g.*, J. KAPLAN, MARIJUANA: THE NEW PROHIBITION at ix-xii (1970).

Legal problems are often treated superficially, and this seems partially the fault of the law schools. The schools are one of the most important institutions in the legal system, but they provide little education beyond the mere art of manipulating legal rules. Many persons have suggested that they should become more social science oriented to remedy this deficiency. *See, e.g.*, S. FOX, SCIENCE AND JUSTICE (1968); Derham, *Legal Education — A Challenge to the Profession*, 43 AUSTL. L.J. 530 (1969); Traynor, *What Domesday Books for Emerging Law?*, 15 U.C.L.A.L. REV. 1105 (1968). Some law schools have already initiated new courses that depart radically from the narrow, traditional approach. For example, Yale Law School has instituted a program of Law and Modernization whose goal is to combine political, social, and economic developments into a policy of social change through the use of law. *See* Yale University, Bulletin of Yale University: Yale Law School (1970).

of the case and of alternative legal rules;[3] and (5) scientific and quasi-scientific analyses of the effects of alternative legal positions.[4]

The case of *Williams v. Florida*[5] — which held that a jury of six persons is constitutionally sufficient in a criminal trial — can be fruitfully analyzed from most of these perspectives. Only the first approach (a comparison of the decision with preexisting law) would be of little value. The issue of jury size is a relatively isolated one and does not fit easily into a general legal doctrine. Moreover, because the Court squarely rejected earlier cases which said that 12 jurors were required by the Constitution,[6] there is no room to reconcile the *Williams* holding with other decisions. For any of the other approaches, *Williams* provides excellent material for an informative study. Statements peripheral to the case shed some light on the values of the Justices that were not articulated in the actual opinion, but which probably affected their decisions.[7] Also,

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[3] This category refers to any hypothesis about the impact of the decision that seems plausible but does not rely on empirical data. These hypotheses are simple to create since they require no experimental work and draw only from one's intuitive notions about human behavior. It is unwise to base a decision on such superficial grounds. For example, the longstanding American dogma about the effects of pornography has recently been undercut by an empirical study. Kant & Goldstein, *Pornography*, 4 PSYCHOL. TODAY, Dec. 1970, at 58. Actual behavior may often be the opposite of one's intuitive conceptions. *See generally* Moynihan, *Eliteland*, 4 PSYCHOL. TODAY, Sept. 1970, at 35.

[4] For example, instead of guessing at the effects of Mapp v. Ohio, 367 U.S. 643 (1961), on the police and on judicial administration, Stuart Nagel has studied the actual impact of the decision on these institutions. *See* Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283. *See also A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969) (special edition). For a general discussion of such empirical testing, see THE IMPACT OF SUPREME COURT DECISIONS (T. Becker ed. 1969).

An appraisal of the role of the social sciences in the legal process is difficult. These disciplines rarely provide the conclusive, quantitative results typical of the natural sciences. It is still an open question whether the problems in analyzing human behavior pose ultimate differences from those arising in the natural sciences. Ernest Nagel, among others, believes that the difference is only one of the degree of quantitative complexity, rather than unavoidable, qualitative differences. *See generally* E. NAGEL, THE STRUCTURE OF SCIENCE; PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION (1961); A. KAPLAN, THE CONDUCT OF INQUIRY; METHODOLOGY FOR BEHAVIORAL SCIENCE (1964).

[5] 399 U.S. 78 (1970).

[6] In order to hold that the sixth amendment allowed the six-man jury, the Court rejected six centuries of common law tradition and numerous Supreme Court pronouncements. *Id.* at 125-29 (Harlan, J., concurring). For previous Court decisions embodying the prior law, see Patton v. United States, 281 U.S. 276, 288 (1930); Rassmussen v. United States, 197 U.S. 516, 519 (1905); Maxwell v. Dow, 176 U.S. 581, 586 (1900); Thompson v. Utah, 170 U.S. 343, 349 (1898).

[7] There is some indication that a primary reason for the decision was to lessen the states' burden of maintaining their systems of criminal administration. Chief Justice Burger believes that "jury trials [slow] the wheels of justice" and apparently supports

the quality of the analysis accorded the six-man jury problem raises questions about the adequacy of our legal institutions to deal with difficult behavioral questions.[8]

Yet the fifth approach, a scientific appraisal of the potential social impact of *Williams*, is probably the most important.[9] A functional analysis of jury size is a prerequisite to a practical assessment of *Williams*. Such an analysis is equally crucial to the strictly legal issue because the Court explicitly held that the constitutionality of the six-man jury would turn on the operational importance of the

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their abolition. N.Y. Times, Sept. 8, 1970, at 1, col. 3. *But cf.* The Plain Dealer (Cleveland, Ohio), Nov. 15, 1970, at 11, col. 1.

[8] The question here is whether the Justices, their clerks, and the attorneys are capable of correctly using available knowledge. The Court's analysis of the behavioral problem in *Williams* — whether a six-man jury would return the same verdicts as a 12-man jury — did not make full use of available theory or data. *See* notes 23-31 *infra* & accompanying text. The Court's use of statistics has often been open to criticism. For example, an explanation of the defects in the Court's guidelines for jury discrimination cases is given in Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

The quality of the arguments presented by the attorneys in *Williams* raises further questions about the institutional context of the Court. Counsel for Johnny Williams allocated a little over one page to the constitutionality of the six-man jury and did not intimate that a jury's size might affect its verdict. No functional comments whatsoever were made. *See* Brief for Petitioner 8-9, Williams v. Florida, 399 U.S. 78 (1970). Without proof of a verdict differential, there is no apparent prejudice to the defendant, and consequently his claim could only rest on history.

The six-man jury issue was not even mentioned in an amicus curiae brief. It is especially odd that the NAACP did not challenge the smaller jury. With a six-man jury, racial discrimination in the selection of jurors becomes even more difficult to prove than it presently is. Since only half as many jurors are used, statistical fluctuations become more pronounced and actual discrimination requires showings of very egregious imbalance. *Cf.* Finkelstein, *supra.*

This lack of attention to the question has at least two possible explanations. One can be drawn from Justice Harlan's belief that no one thought the Court would find the six-man jury constitutional. *See* 399 U.S. at 122 (concurring opinion). If he was correct, no one would have been motivated to investigate the question in any depth. The other explanation points to the deficiencies in the traditional skills of the lawyer in dealing with behavioral problems. This explanation places the ultimate criticism on the legal system as a whole.

[9] Any one problem in the analysis of a case is closely intertwined with all the others. The impact of a decision is never independent of the institutional context of the Court, the law itself, or innumerable other considerations. To focus on one aspect alone always raises the problem of reductionism, and some scientists believe that the failure to countenance the entire whole can only produce colorable conclusions. *See, e.g.*, L. VON BERTALANFFY, *supra* note 2. Nevertheless, the scientist always must steer between the overly narrow focus which loses its relevance and the overly broad focus that can lead to no substantial conclusions. It seems fully justified to concentrate on a functional evaluation of the six-man jury. The effect of *Williams* on the accused is certainly broad enough to be valuable, yet sufficiently defined to allow meaningful conclusions. Moreover, a functional analysis of the reduced jury was a critical element in the legal decision itself. *See* text accompanying note 72 *infra.*

number of jurors:[10] If size played a relevant role in view of the purposes of the jury, 12 would remain the constitutional requirement. Thus, the *Williams* test gives due weight to the importance of function and demands a thorough evaluation of how the verdicts of six- and 12-man juries would compare. In its evaluation of this question, the Court concluded that there would be no difference between the two. Consequently, the smaller number fulfilled the purposes of the right to a jury trial as well as the traditional, larger jury, and was found constitutional.

Accepting the constitutional test enunciated by the Court,[11] the threshold question is whether the *Williams* analysis of jury size is sufficiently accurate from a functional perspective. The present study answers this question in the negative. Neither the reasoning of the opinion nor the references relied upon support the Court's conclusion that either jury would return the same verdicts. Moreover, additional empirical evidence, not taken into account in the opinion, implies that the smaller jury will indeed convict different defendants. Because the constitutionality of the six-man jury rested upon the Court's incorrect analysis, the *Williams* holding is clearly threatened.

In reappraising the six-man jury problem, a brief discussion will first be made of the elements of the jury that are relevant to its role in the legal system. Next, the Court's evaluation of how jury size affects this role will be criticized. After pointing out the deficiencies in the *Williams* opinion, a more rigorous, scientific comparison of the two kinds of juries will be made. Because this analysis will demonstrate a meaningful difference in the behavior of the two juries, the study will conclude with a reexamination of the narrower legal issue — whether the reduced jury satisfies the Court's test of constitutionality.

II. The Supreme Court's Analysis of the Role of the Jury and the Importance of Jury Size

The Supreme Court rejected the force of common law history as an absolute command in *Williams* and instead directed its inquiry

[10] *See* text accompanying note 72 *infra.*

[11] This study will show that *Williams* was decided erroneously under a correct application of the Court's own constitutional test. One could go further and dispute the test enunciated by the Court, but that step will not be taken here. Among other reasons for this reluctance is the problem of the Court's broad discretion in choosing tests. Once a constitutional question arises, the Justices are essentially unrestrained in deciding which of the numerous types of tests to apply. For a further discussion of this point, see note 74 *infra* & accompanying text.

to a functional appraisal of jury size. If the six-man jury performed differently than a jury of 12, its constitutionality would turn on two further questions. First, did this difference mean that the smaller number frustrated the purposes of the jury, or was the change unobjectionable? Second, if the reduction in size did derogate from the purposes of the jury, did the Constitution alone demand that the traditional size be retained? Before these questions can be resolved, the role of the jury in the legal system must be defined. In this section, the Supreme Court's view of the purposes of a jury trial will be examined. Then, the way the Court evaluated the six-man jury in light of these purposes will be critiqued.

A simplistic adumbration of the jury's function would be misleading because of the conceptual difficulties that surround the problem. Even from a strictly legal perspective, a number of constitutional rules provide a web of restraints that are relevant to the jury in criminal cases.[12] Yet, as complicated as are the legal factors, the philosophical and behavioral problems are much more difficult. Jurisprudential ideas about the jury as a decision-maker have run the entire range of possibilities. The jury has been described as anything from a sacrosanct body of rational factfinders to a group of unpredictable, irrational commoners.[13] Unfortunately, because there

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[12] In a state criminal trial, these rules have their origin in the sixth and 14th amendments. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Bumper v. North Carolina, 391 U.S. 543, 545 (1968).

[13] According to the classical notion, the jury observes the trial, makes logical conclusions regarding the evidence, and then applies the relevant legal rules to those conclusions. *See generally* J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827). Modern psychologists, however, place less emphasis on the rational, conscious side of man. *See generally* C. HALL & G. LINDZEY, THEORIES OF PERSONALITY (1957). For an explication of the jury from a more realistic modern stance, see Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 387-401 (1954).

One school believes the jury is incapable of using the law in a "proper," rational manner:

> There are therefore three unknown elements which enter into the general verdict: (a) the facts; (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. . . . The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracles of Delphi. . . .
>
> As to the second element . . . the *law*, it is a matter upon which the jury is necessarily ignorant. The jurors are taken from the body of the country, and it is safe to say that the last man who would be called or allowed to sit would be a lawyer. They are second-hand dealers in law, and must get it from a judge. . . . Indeed, can anything be more fatuous than the expectation that the law which the judge so carefully . . . expounds to the layman in the jury box will become operative in their minds in its true form? Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258-59 (1920).

English and American literature are replete with tales of the jury, and a large por-

are few thorough studies of the jury,[14] there are no conclusive grounds for adopting any one particular view.

In the course of deciding actual cases, the Supreme Court has avoided being caught in most of the perplexing "extralegal" problems. It is possible to extract from past decisions a few concise factors that the Court has deemed essential to the jury's place in the legal process. Of course, the ultimate function of the jury is to resolve the question of the defendant's guilt. And a jury is preferred over other means because it provides the defendant with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[15] This safeguard is secured by the "interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[16] When a change in the number of jurors is made, the Court believes that the jury's task of resolving guilt is unimpaired if a few features are protected.[17] These critical factors are: (1) the requirement of group deliberation; (2) the prevention of outside intimidation; and (3) the assurance of a fair possibility of obtaining a representative cross-section of the community.[18]

Williams concludes that the change to six jurors does not affect these factors and that smaller juries would return the same verdicts as traditional juries. Several theoretical reasons are given to support this conclusion, and it is also claimed that empirical evidence corroborates the theoretical arguments. But an examination of the opinion will show that the Court's conclusion is unwarranted. First,

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tion of these reflect a very cynical impression. *See, e.g.*, Carroll, *Trial of the Knave of Hearts*, in LAW IN ACTION 491 (A. Curiae ed. 1947).

[14] The most extensive study of the jury was performed at the University of Chicago. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), *reviewed*, Kaplan, 115 U. PA. L. REV. 475 (1967). A comment on jury research is made in Erlanger, *Jury Research in America*, 4 LAW & SOC'Y REV. 345 (1970).

[15] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[16] Williams v. Florida, 399 U.S. 78, 100 (1970).

[17] The Court's view of the purpose of the jury will be accepted as final. The reluctance to criticize that view is based on several considerations. Even on the basis of the Court's interpretation, it can be shown that *Williams* was decided wrongly. Also, the principal aspects of the jury that are relied upon in this study are well entrenched (for example, the idea that the verdict should be representative of community thought). In addition, a complete explication of the jury's role opens a morass for which there presently are no final answers. *See* notes 13-14 *supra* & accompanying text. Consequently, a criticism of the Court's position might not lead to a better resolution of the question.

[18] Williams v. Florida, 399 U.S. 78, 100 (1970).

the Court considers whether the probability of finding at least one juror who insists on acquittal is greater with the larger jury, and consequently the chances of escaping conviction are greater. The Court rebuts this argument by asserting that the opposite is equally true — the probability of finding one person determined to convict is also greater with 12 jurors, so acquittal likewise seems more difficult to obtain.[19] The Court's reasoning has a superficial appeal, but it is true only if the available jurors[20] are equally divided on the question of the defendant's guilt. In the more likely situation where the available jurors are not equally divided,[21] the probabilities of selecting an innocent-prone and a guilty-prone juror are not the same, as implicitly assumed in *Williams*. The Court's reasoning is completely undercut by this fact. Moreover, the compound probability of selecting several jurors of one leaning or the other varies as the size of the jury is varied. Consequently, it seems that the overall probabilities of conviction and acquittal are changed when the number of jurors is reduced.[22]

More important than this error in logic is the Court's failure to draw on the available empirical evidence describing the behavior of small groups in the process of seeking consensus.[23] There is little validity to ostensibly logical views of jury behavior in the absence of empirical verification.[24] *Williams* does purport to rely upon several "studies" to infer "there is no discernible difference between the results reached by the two different-sized juries,"[25] but the references cited[26] do not support this conclusion. In one of the articles, the clerk of a civil court summed up his general impressions and stated that the verdicts of the smaller juries " 'in practically every case

[19] *Id.* at 101.

[20] For a discussion of who is an available juror, see note 43 *infra.*

[21] In the University of Chicago jury study, the petit jury was equally divided before deliberation only 10 times out of more than 200 cases. These figures imply that the available jurors are usually divided unequally as well. (Various statistical methods could be used to prove this conclusion, but a proof will not be included here.)

[22] The probablistic impact of the six-man jury (as to likelihood of conviction and acquittal) is fully explained at notes 35-63 *infra* & accompanying text.

[23] *See* articles cited notes 50-59 *infra.*

[24] *See* notes 3-4 *supra.*

[25] 399 U.S. at 101 (footnote omitted).

[26] Cronin, *Six-Member Juries in District Courts*, 2 BOST. B.J. 27 (1958); *New Jersey Experiments with Six-Man Jury*, 9 BULL. OF THE SECTION OF JUD. AD. OF THE ABA (May 1966); Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956); *Six-Member Juries Tried in a Massachusetts District Court*, 42 J. AM. JUD. SOC'Y 138 (1958); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 134-36 (1962); Wiehl, *The Six Man Jury*, 4 GONZAGA L. REV. 35, 40-41 (1968).

[were] fairly comparable to those of the twelve member juries and by the same token they [were] just as quick to find for the defendants.' "[27] Of course, such a totally unscientific opinion is of no merit in a rigorous attempt to compare the behavior of the two juries.[28] It is devoid of any records of trial results and reflects nothing more than the impressions of the court clerk. The other articles cited discuss the obvious fact that reduced juries are somewhat cheaper and more expeditious, but they provide no analysis of the verdicts that are returned.

Finally, the Court argues that reduction of the number of jurors does not affect the outcome since the *proportion* of jurors that the defendant must persuade in order to escape conviction would be the same with each size jury.[29] Again, this reasoning implicitly assumes that the available jurors are equally divided on the issue of the defendant's guilt. In the much more common case where the jurors are not equally divided, a variation in jury size affects the probabilities of obtaining the different proportions of favorable and unfavorable jurors.[30] Because the probabilities of obtaining different ratios of conviction-prone jurors are changed when the jury size is changed, the Court's own logic (which assumes that the verdict is determined by proportion alone) implies that the outcome of the trial is affected as well.

In another aspect of the problem, the Court dismisses the question of the representational quality of the jury. It states that a jury of 12 does not ensure representation of all voices in the community, and consequently a jury of six should not be much worse.[31] The failure to investigate the effect of diminished representation more deeply is a fatal defect in *Williams*. It will be shown that the change in representation is crucial to the defendant's fate; this factor must be precisely taken into account before valid conclusions can be made about the importance of jury size.

In addition to the behavioral issues that were raised in *Williams*, there are many Supreme Court decisions concerning the right to a

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[27] Tamm, *supra* note 26, at 135 (quoting from a letter to Judge Tamm).

[28] Even if the court clerk had compiled statistics comparing the verdicts of the two juries, any conclusions based on such data would be very dubious. To use such data properly, one would have to know exactly what differences existed between the trials that took place in each of the two categories. Problems of *ceteris paribus* would contaminate any inferences, unless it were shown that the trials were "sufficiently" comparable.

[29] 399 U.S. 101 n.49.

[30] *See* notes 21-22 *supra* & accompanying text.

[31] 399 U.S. at 102.

jury representative of the community[32] and to a fair trial.[33] The opinion does not refer to any of these cases, but the reason for this neglect seems rather clear. The Court believed the six- and 12-man juries would return the same verdicts; consequently, no harmful consequences could befall the defendant from the reduction in jury size. Unless the six-man jury increases a defendant's chances of conviction, he has no claim of prejudice to a constitutional right analogous to the rights protected in these other cases.[34] These cases are relevant only if it is first shown that the smaller jury functions differently, and to the detriment of the defendant.

To summarize the Court's analysis of jury size, one can only say that the reasoning is superficial and the conclusions are unsupported. Consequently, an *ab initio* study of the behavioral issue must be made. This will be done in the next section, and the constitutionality of the six-man jury will be reassessed in section IV.

III. Evaluation of the Performance of the Six-Man Jury

The behavioral question before the Court in *Williams* was very narrow. If both a six-man jury and a 12-man jury were hypothetically used in each criminal trial, would the verdicts ever differ? Many difficulties would impede a general study of how the final verdict is related to the trial, but a relatively simple model can deal with the concise question in *Williams*. This simplification is possible because the most complex facets of the jury can be held con-

[32] *See, e.g.*, Carter v. Jury Comm'n, 396 U.S. 320, 331-38 (1970) and the cases cited therein.

[33] *See, e.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963).

[34] Usually these cases do not refer to an actual increase in the chances of conviction, but just vaguely refer to the requirements of a fair trial. The difficulty in showing the impact on the defendant is a prime cause of the Court's nebulous approach in these cases. This difficulty is discussed in Estes v. Texas, 381 U.S. 532, 578-80 (1965) (Warren, C.J., concurring).

Actual harm to the defendant probably does not have to be shown in cases of jury representation. Although a defendant has no right to representation of all classes on his particular jury, he does have the right to a jury selected from a general pool where no class has been deliberately excluded or invidiously under-represented. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965). Since the leading case of Strauder v. West Virginia, 100 U.S. 303 (1880), a violation of this right invalidates a conviction. That Court may have believed minority defendants were subjected to an unjustly high chance of conviction, but this possibility has never been relied upon as the grounds for reversal.

A jury pool can also be challenged on the grounds that it was selected in a manner such that the probabilities of conviction were higher than with a more representative pool. *See* Fay v. New York, 332 U.S. 261, 278-81 (1947) (a claim that the "blue-ribbon" jury was conviction-prone was considered a valid challenge, but was rejected there as unproven).

stant while only the size of the jury is varied. The advantages of this approach are most easily appreciated if the jury is first discussed in a very general context, and then in the limited context of size alone.

The broadest possible inquiry would question whether the jury is really a desirable part of our legal process.[35] An answer to this problem would require very accurate knowledge of the jury's decision-making function and of its other short and long term social effects.[36] The complexities involved in such an unrestricted evaluation become quite clear if the adjudication process is viewed as a composite of several phases: (1) the events that transpire within the courtroom, including the law expounded by the judge; (2) the individual jurors' reactions to these courtroom proceedings; and (3) the establishment of a verdict by deliberation. As to the first of these phases, there is clearly a connection between what has occurred outside the court (the alleged crime) and the trial proceedings themselves, but little can be said about the particulars of that connection.[37] As to the second phase, the jurors react to the events in the courtroom in essentially unknown ways.[38] Because our present knowledge inadequately describes what happens in these first

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[35] This question has played a part in various decisions. *See, e.g.*, Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

[36] The significance of short term effects (problems of "behaving") and long term effects (problems of "becoming") are discussed in Gerard, *Neurophysiology: An Integration (molecules, neurons, and behavior)*, in 3 HANDBOOK OF PHYSIOLOGY 1919 (J. Field ed. 1960).

[37] One problem in creating past reality is introduced by the inherent inaccuracies of our senses. Heinlein's "fair witness" (who is trained to be a completely objective, error-free purveyor of observed phenomena) may represent man's potential, *see* R. HEINLEIN, STRANGER IN A STRANGE LAND 98-100 (Berkeley Medallion ed. 1968), but most persons today are infected with the tendency to misperceive their surroundings. Marshall, *The Evidence*, 2 PSYCHOL. TODAY, Feb. 1969, at 48. *See also* Warren & Warren, *Auditory Illusions and Confusions*, 223 SCIENTIFIC AMERICAN, Dec. 1970, at 30.

There is also an ontological problem because what happens in court is simply not going to be the same as what actually happened. There is obviously a difference between the sensory stimuli that impinge on a person present at an actual event and those that impinge on one who observes a courtroom reconstruction of that event. The ultimate effect this difference has on the juror's opinion of guilt is unpredictable.

Another difficulty is the problem of conveying the *nonphysical* aspects of the case (such as emotion) into the courtroom. In one unusual approach to the problem, a court held that an attorney has the right, and possibly the duty, to cry during the trial. Ferguson v. Moore, 98 Tenn. 342, 350-52, 39 S.W. 341, 343 (1897).

For a discussion and references regarding recreation of history in the trial court, see *In re* Fried, 161 F.2d 453, 462 n.21 (2d Cir.), *cert. denied*, 331 U.S. 858 (1947); United States v. Rubenstein, 151 F.2d 915, 920 n.4 (2d Cir.), *cert. denied*, 326 U.S. 766 (1945).

[38] *Cf.* notes 1, 13 *supra* and note 41 *infra.*

two phases, there is a great deal of uncertainty in the adjudication process. It is impossible to make definitive conclusions about the overall behavior of the jury, or about the factors that determine the verdict. But the third phase, jury deliberation, is much simpler, and there are studies available that describe what happens during this stage of the process.[39]

These difficulties are raised only to underscore a single point. The impact of the *Williams* variable, the number of jurors, can be evaluated accurately without reference to the first two phases of the adjudicative process. Because the task here is to analyze the jury's reaction to the courtroom proceedings alone,[40] the problems inherent in correlating the first phase to the out-of-court events are irrelevant. The sole aim is to show what differences might arise in the verdicts if a jury of six rather than 12 were used. Nothing in the trial itself is changed, other than the size of the jury. Ultimately, it might be very informative to correlate verdicts to the "real world" events surrounding the alleged crime, but a complete evaluation of *Williams* does not require such thoroughness. Also, differences in the six-man case can be examined independently of how each juror arrives at his predeliberation opinion of the defendant's guilt (the second phase) because an individual juror's predeliberation reaction to the trial is not affected by the size of the jury.[41] A juror would carry the same feelings into the jury room regardless of

[39] *See* notes 49-61 *infra* & accompanying text.

[40] The term "trial" will be used in this study to denote any one set of proceedings observed by the jury. Thus, a trial is defined to include only those events in the courtroom that affect the jurors' opinions. It is not meant to include anything that occurs after the jurors depart for deliberation. This definition is more limited than the genral meaning of the word, which would include everything that happens through the pronouncement of the verdict.

By concentrating on one unique set of courtroom events, a predictive model can attain a high degree of scientific merit. The entire *ceteris paribus* problem is circumvented by this approach. In the terminology of the three-phase formulation, all the difficulties of the first phase have been avoided by simply keeping the events constant for each application of the model. The way in which the trial proceedings are related to the alleged crime is not a factor.

[41] The juror's initial reaction, before deliberation, is assumed to be a function only of his mental constitution and what happens in the courtroom. The juror's feelings towards the defendant's guilt or innocence, at the moment he enters the jury room, is taken to be independent of the size of the jury.

Even this apparently self-evident statement has several assumptions buried within it. Attorneys might alter their behavior (consciously or otherwise) before the smaller jury. Likewise, the witnesses might be affected by the smaller juries in some subtle way, with a consequent modification of their behavior while testifying. The juror himself might experience a slightly different emotional state just because he is a member of a six-man group, rather than a 12-man group. And this difference could manifest itself by affecting his reaction to the trial. All such effects are assumed to be statistically insignificant, although this study does not test this assumption empirically.

the total number of jurors. Thus, the factors in the first two phases can, and must, be considered constant in assessing the importance of a change in the jury size alone. If the effects that ensue solely from a reduction in the number of jurors is shown, the impact of *Williams* will be perfectly defined — regardless of how the in-court proceedings are related to their historical referent, or what may be the psychological basis for a juror's reaction to the trial.

The framework for analysis, then, is simple. A criminal trial takes place, and two questions are asked: What would be the outcome if a jury of six had sat in judgment? And what would be the outcome if a jury of 12 had sat in judgment? First, a model of the jury will be developed that copes with each unique trial.[42] To emphasize that specific trials are being examined initially, the subscript "t" will be used with each variable. After the model for the individual case is completed, the impact of the change in jury size on defendants as a whole will be assessed. Very briefly, the model will tie the courtroom proceedings to the final verdicts in three distinct steps: (1) a parameter will be used to characterize the jurors' reactions to the trial and statistically describe the petit jury just prior to deliberation; (2) an analysis of jury deliberation will be made on the basis of empirical studies; and (3) this analysis will be applied to the predeliberation description of the jury to predict the verdicts.

A. *The Relationship Between the Trial and the Predeliberation Jury*

If each potential juror[43] had actually observed the trial, a certain fraction of them would be inclined to consider the defendant guilty at the conclusion of the courtroom proceedings, immediately prior to deliberation. This fraction will be denoted by f_t.[44] Conversely, $1-f_t$ is the fraction of the entire pool that would be inclined to believe the defendant innocent just before deliberation begins.[45] This

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[42] The term "trial," as used in this study, is defined in note 40 *supra.*

[43] The jury pool spoken of here is not strictly the number of persons eligible to serve on the jury. It includes only those persons who would not be excused or eliminated during the *voir dire* examination for the particular prosecution being considered.

[44] The variable f_t does not involve the difficulties that usually apply to behavioral concepts. *See generally* A. KAPLAN, *supra* note 4, at 34-83. It is a statistical fraction that theoretically could be obtained by counting heads.

The only assumption necessary for this study is that an f_t value exists, at least in the abstract. It is not necessary to be able to measure an f_t value in reality. *See* text accompanying notes 76-79 *infra.*

[45] Only the slightest predilection towards conviction or acquittal is sufficient for this

characterization of the complete group of potential jurors is also sufficient to depict the petit jury because the petit jury is simply a statistical subset of these potential jurors. Thus, the single parameter, f_t, correlates the trial itself to a description of the jury's leanings before it begins deliberation (within the statistical limits involved in randomly selecting a jury from the pool at large).[46] In other words, both the entire complex of events within the trial and the personalities of the jurors are distilled into this one variable.

Because a particular jury is merely a randomly drawn subset of all the potential jurors, the probabilities of obtaining petit juries with various fractions of conviction-prone members can be easily calculated. Stated in another way, one fact is known about each juror as he leaves the jury box to begin deliberation: The probability that he believes the defendant to be guilty is exactly equal to the value of f_t. This one parameter determines the likelihood of a majority of jurors being conviction-prone, so that

$$M_{t,\,6} = \sum_{i=4}^{6} \left\{ (f_t)^i\,(1-f_t)^{6-i} \times \frac{6!}{i!\,(6-i)!} \right\}, \text{ and}$$

$$M_{t,\,12} = \sum_{i=7}^{12} \left\{ (f_t)^i\,(1-f_t)^{12-i} \times \frac{12!}{i!\,(12-i)!} \right\}.$$

$M_{t,\,6}$ and $M_{t,\,12}$ denote the probability that a majority[47] of the petit jurors that are drawn will be conviction-prone prior to deliberation. As yet, this characterization says nothing about the verdicts. The M_t formulations can be used to predict the final verdicts, however, if the deliberation process is adequately described.

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categorization. It seems unlikely, then, that there would be a sufficient number of purely neutral persons to vitiate the assumption that "guilty-prone jurors" plus "acquittal-prone jurors" equals nearly 100 percent. Moreover, the empirical evidence shows no tendency for "neutrals" to emerge. *See* studies cited notes 50-59 *infra.*

[46] Of course, attorneys are not random in selecting jurors. The statistical approach taken here is valid, however, because of the way the "pool" was defined. *See* note 43 *supra.*

[47] The strict majority ignores all the equally divided juries (where there are three and three, or six and six, favoring conviction and acquittal). These special cases will be reckoned with later. *See* note 62 *infra.*

B. *The Deliberation Process*

A verdict of guilty or innocent requires unanimity in nearly all criminal cases.[48] To predict the verdicts on the basis of M_t, a connection must be found between the initial position of the majority and the final unanimous verdict that evolves through deliberation. The *Williams* opinion refers to several studies to support the contention that deliberation subjects the jurors in the minority to coercive psychological pressures from the majority.[49] But the Court fails to draw from a large number of other studies that are much more akin to jury deliberations. These studies suggest that the initial majority will persuade the minority to capitulate in a very large number of the cases. This notion of "majority persuasion" is predicated upon many studies of small group behavior plus the relatively small amount of empirical information concerning jury behavior per se:

(1). Experiments considering group persuasion and conformity have always shown the majority to have an influence on the minority. The extent of the minority's capitulation is a function of many variables such as group cohesiveness and group purpose, but even very weak interactions among the members of the groups produce some coercive effect.[50]

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[48] *See* Williams v. Florida, 399 U.S. 78, 138-39 (1970). The Court is deciding whether unanimity is a constitutional requirement at the time of this writing. State v. Johnson, 230 So.2d 825 (La.), *prob. juris. noted*, 400 U.S. 900 (1970) (No. 5161); State v. Apodaca, 462 P.2d 691 (Ore. Ct. App. 1969), *cert. granted*, 400 U.S. 901 (1970) (No. 5338). The role of unanimity is discussed in note 70 *infra.*

[49] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 462-63, 488-89 (1966); Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in READINGS IN SOCIAL PSYCHOLOGY (1952); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 108, 110-11 (1968); C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberation, 13, 146, 156, Aug. 17, 1970 (unpublished thesis on file at Library of Congress).

[50] *See* D. CARTWRIGHT & A. ZANDER, GROUP DYNAMICS 139-50 (3d ed. 1968); Kelley & Thibaut, *Experimental Studies of Group Problem Solving and Process*, in HANDBOOK OF SOCIAL PSYCHOLOGY 735, 767-68, 771-72 (G. Lindzey ed. 1954). Some of the studies that have investigated group conformity and majority rule are: Asch, *Studies of Independence and Conformity: I. A. Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGR., No. 9 (1956) ("stooges" giving incorrect response to perception of simple physical stimuli caused subject to change his opinion); Flament, *Processus d'Influence Sociale et Réseaux de Communication*, 6 PSYCHOL. FRANCAISE 115 (1961) (change of opinion of number of points of light seen in the experimental apparatus); Flament, *Influence Sociale et Perception*, 58 ANNÉE PSYCHOL. 377 (1958); Gerard, *The Effect of Different Dimensions of Disagreement on the Communication Process in Small Groups*, 6 HUM. RELAT. 249 (1953) (opinions of group members were studied during discussions of hypothetical legislative bills); Jenness, *Social Influences in the Change of Opinion*, 27 J. ABNORM. SOC. PSYCHOL. 279 (1932) (estimation of number of beans in a jar before and after group discussion); Luchins, *Social Influences on Perception of Complex Drawings*, 21 J. SOC. PSYCHOL. 257 (1945) ("stooges" interpretations of pictures affected views of subjects, who were children);

(2). Experiments on group pressure have dealt with both complex and simple stimuli. In some, conformity behavior has distinctly occurred where the stimulus is simple — as in choosing which of two lines is longer,[51] or determining how many lights are visible on a board.[52] Yet other studies indicate that a complex stimulus or the possibility of a complex response produces an even greater tendency to conform[53] (possibly because the mental conceptualization of the events is so malleable).[54] A criminal trial certainly provides such complexity, and consequently majority persuasion should be especially pronounced.

(3). Where some factor intrudes to produce unusual pressures towards conformity, the minority responds with a greater proclivity to change sides.[55] The charge by the judge and the jury's feeling of a social duty to reach unanimity can create just this kind of pressure[56] and further increase the prevalence of majority persuasion.

(4). Certain types of group structures seem especially conducive to uniformity phenomena. In particular, a group-centered discussion (rather than leader-centered)[57] or a group typified by participatory leadership (rather than supervisory leadership)[58] evinces

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Thorndike, *The Effect of Discussion upon the Correctness of Group Decisions, When the Factor of Majority Influence is Allowed For*, 9 J. SOC. PSYCHOL. 343 (1938) (individual opinions on social and aesthetic issues were registered before and after group discussion); Wheeler & Jordan, *Change of Individual Opinion to Accord with Group Opinion*, 24 J. ABNORM. SOC. PSYCHOL. 203 (1929) (very weak, subtle majority opinion influenced subjects' opinions on social policies).

[51] *See* Asch, *supra* note 50.

[52] *See* Flament, *Processus d'Influence Sociale et Réseaux de Communication*, 6 PSYCHOL. FRANCAISE 115 (1961).

[53] *See* Coleman, *Task Difficulty and Conformity Pressures*, 57 J. ABNORM. SOC. PSYCHOL. 120 (1958); Flament, *Ambiguté du Stimulu, Incértitude de la Résponse, et Processus d'Influence Sociale*, 59 ANNÉE PSYCHOL. 73 (1959); Luchins, *Social Influences on Perception of Complex Drawings*, 21 J. SOC. PSYCHOL. 257 (1945).

[54] *See* Flament, *Aspects Rationnels et Génétiques des Changements d'Opinions Sous Influence Sociale*, 3 PSYCHOL. FRANCAISE 186 (1958).

[55] *See* Back, *Influence Through Social Communication*, 46 J. ABNORM. SOC. PSYCHOL. 9 (1951); Festinger, *Informal Social Communication*, 57 PSYCHOL. REV. 271 (1950); Gerard, *supra* note 50.

[56] The pressure to conform can be exerted on the jury by the judge's charge. The famous *Allen* charge represents the outer limits of pressure acceptable in most courts. *See* Allen v. United States, 164 U.S. 492, 501-02 (1896). The value of such pressure must be balanced in the judge's mind against the value of letting a few jurors prohibit a final conclusion. The protection that may be afforded a defendant by such adamant holdouts was stressed in Huffman v. United States, 297 F.2d 754, 759 (5th Cir.), *cert. denied*, 370 U.S. 955 (1962) (dissenting opinion).

[57] *See* Bovard, *Group Structure and Perception*, 46 J. ABNORM. SOC. PSYCHOL. 398 (1951).

[58] *See* Preston & Heintz, *Effects of Participatory versus Supervisory Leadership on Group Judgment*, 44 J. ABNORM. SOC. PSYCHOL. 345 (1949).

greater majority persuasion. There is no empirical evidence on the matter, but it seems likely that the jury would be characterized by both of the above structural typologies.

(5). The available evidence dealing directly with the jury corroborates the hypothesis that deliberation generally obeys the rule of majority persuasion.[59]

The above studies demonstrate that majority persuasion typifies jury deliberations.[60] In fact, the study dealing specifically with the jury shows that this behavior occurs in about 97 percent of all cases.[61] In any case where majority persuasion holds true, the pre-

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[59] The small percentage of hung juries in criminal trials is itself substantial evidence of conformity behavior because it shows that unanimity was usually attained. Although there is some uncertainty about the precise number of hung juries, a figure of 5.5 percent seems to be fairly accurate. H. KALVEN & H. ZEISEL, *supra* note 14, at 57 n.2.

The only empirical evidence obtained directly from an investigation of jury behavior shows the prevalence of minority capitulation. In a sample of 225 criminal trials, the minority position on the first ballot became the ultimate verdict in only 3 percent of the cases; the jury was hung in an additional 4 percent of the cases. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 747-48 (1959) (these figures are directly derived from Broeder's statistics). These first ballot votes were taken "immediately," *id.* at 47, so they should fairly represent the jurors' predilections just before deliberation (which is the point in time at which f_t is defined).

[60] More experimentation might be desirable to further investigate the deliberation process.

There are several points that should be mentioned about the empirical studies used to show the prevalence of majority persuasion:

(1) The studies performed outside of an actual trial context (*see* studies cited notes 49-57 *supra*) are not necessarily conclusive in jury situations. Because any number of factors could differentiate the performance of juries from other small groups, the most persuasive data must come from studies of the jury itself.

(2) In the jury study, the pole of the jurors' opinions was taken "immediately." *See* note 59 *supra.* But this point of time does not correspond exactly to that point used in the model. The model assumed that no interaction whatsoever had occurred when these predilections were ascertained (thus precluding any majority persuasion effects). In the jury study data some slight interaction seems to have occurred before the jurors were polled, although the experimenters do not describe the circumstances in any detail. *See* Broeder, *supra* note 59, at 747. A more exact study would be necessary to determine whether significant majority persuasion had occurred before balloting.

(3) Majority persuasion was observed in about 93 percent of the cases in the jury study (in 3 percent of the cases, the minority prevailed; in 4 percent the jury hanged). *See* note 59 *supra.* The hung jury cases can be brought within the scope of the model, *see* note 62 *infra*, but the few cases where the minority triumphs remain anamolies. Even where minority persuasion prevails, however, the different size juries would again yield different results since the probabilities of various juror distributions would still depend on jury size.

(4) It has been assumed that each juror has some type of predilection that provides a basis for classification. Thus, the guilty-prone plus the innocent-prone jurors total 100 percent. *See* note 45 *supra.* This assumption is not contradicted by any evidence, but it could be better corroborated.

Thus, the empirical basis is not absolutely conclusive. But it is very strong, and there are no prohibitive deficiencies in the data.

[61] *See* notes 59 *supra* & 62 *infra.*

deliberation jury (characterized by M_t) can be directly related to the final verdict.

C. *The Probability of Conviction as a Function of f_t*

In a case where majority persuasion exists, the majority position before deliberation evolves into the final, unanimous verdict. Consequently, the probabilities of conviction for the two sizes of jury, $P_{t,\,6}$ and $P_{t,\,12}$, are exactly the same as $M_{t,\,6}$ and $M_{t,\,12}$ if a correction is first made for those petit juries where the members initially are equally split between conviction and acquittal.[62]

$$P_{t,\,6} = \sum_{i=4}^{6} \left\{ (f_t)^i (1-f_t)^{6-i} \times \frac{6!}{i!\,(6-i)!} \right\} + \frac{6!}{2 \times 3!\,3!} (f_t)^3 (1-f_t)^3, \text{ and}$$

$$P_{t,\,12} = \sum_{i=7}^{12} \left\{ (f_t)^i (1-f_t)^{12-i} \times \frac{12!}{i!\,(12-i)!} \right\} + \frac{12!}{2 \times 6!\,6!} (f_t)^6 (1-f_t)^6$$

The model is complete at this point, and quantitative results can be obtained by calculating the formulas.[63]

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[62] There are two obvious ways to treat the cases where the initial jury feeling is equally divided:

(1) assume each such case ends in a hung jury; or

(2) assume half the cases become guilty verdicts and the other half acquittals.

As has been stressed throughout this study, such assumptions are of little merit in the absence of empirical verification. But even though there is scant evidence relating to the problem of initially divided juries, the first possibility can be rejected because of the results it yields. If each such case ended in a hung jury, a much greater number of hangings would be expected than actually occur. (The mathematical explanation of this fact is omitted because it becomes very involved.) Thus, the second assumption appears more likely, simply through the process of elimination. The 10 cases where there is evidence on this point agree exactly with the second assumption (five cases become acquittals, five convictions). *See* H. KALVEN & H. ZEISEL, *supra* note 14, at 488. Mathematically this assumption means

$$S_{t,\,6} = \frac{6!}{2 \times 3!3!} (f_t)^3 (1\text{-}f_t)^3 \text{ and}$$

$$S_{t,\,12} = \frac{12!}{2 \times 6!6!} (f_t)^6 (1\text{-}f_t)^6,$$

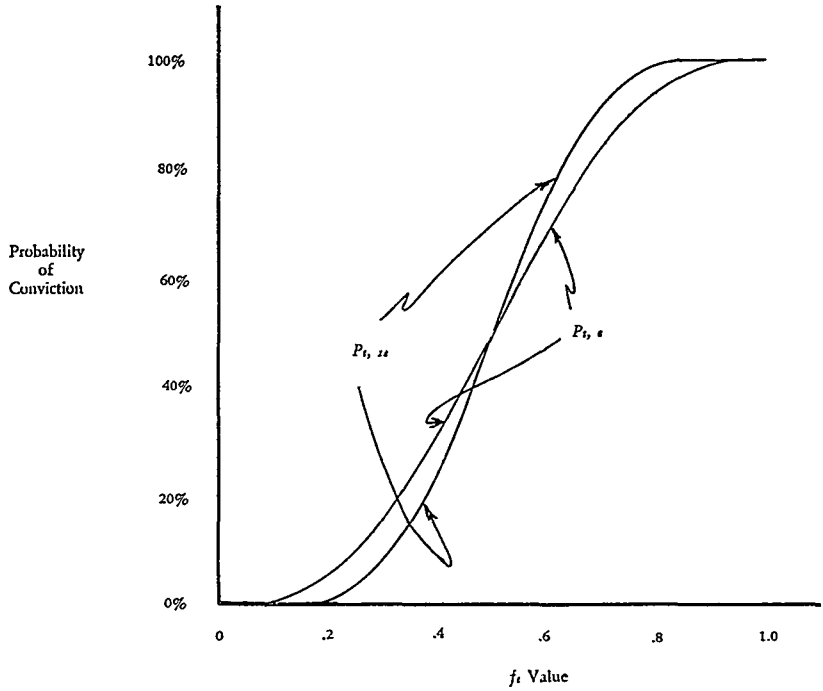
where $S_{t,\,6}$ and $S_{t,\,12}$ denote the contribution to the conviction probabilities from these special cases.

[63] The model predicts no hung juries (as a consequence of the assumption of majority persuasion and the treatment given the initially split juries, *see* note 62 *supra*), but this does not mean the results are inaccurate. A trial ending in a hung jury is not dispositive of the defendant's case and this must be reflected in the model. The assumption is that the defendant is retired if the jury hangs. The probabilities of conviction

FIGURE 1

		f_t Values										
		0	.1	.2	.3	.4	.5	.6	.7	.8	.9	1.0
Probability of Conviction (%)	$P_{t,\,6}$	0	1	6	16	32	50	68	84	94	99	100
	$P_{t,\,12}$	0	0	1	8	25	50	75	92	99	100	100

FIGURE 2



To use the table of probabilities, first locate the desired f_t value at the top. This parameter measures what fraction of all the potential jurors would be guilty-prone if each one were to observe the trial. The probability of convicting the defendant (expressed in percent) with either size jury is located in the respective box below

— $P_{t,\,6}$ and $P_{t,\,12}$ — actually represent the ultimate likelihood of conviction after any necessary retrials. The results of the model could be easily adjusted if a particular jurisdiction departed from this practice.

the f_t value. The graph is interpreted by first locating the f_t value on the horizontal axis. The conviction probability for either jury is found by seeing what value on the vertical axis corresponds to the desired f_t point on the appropriate curve.

It is evident from these numerical results that serious differences exist between the six- and 12-man juries. For nearly all values of f_t, the size of the jury is substantially related to the probability of conviction. If f_t is larger than .5, the defendant has a greater chance of acquittal with a six-man jury; if it is less than .5, the six-man jury increases the likelihood of conviction. For example, when f_t equals .4, use of the six-man jury increases the defendant's chances of conviction from 25 percent to 32 percent, and when f_t equals .2, his chances of conviction are six times as great (6 percent versus 1 percent).

Thus, the Court's conclusion that both juries would return the same verdict is erroneous. The number of jurors significantly affects the likelihood of conviction, and all that remains is to evaluate this functional difference in terms of the *Williams* test of constitutionality.

IV. Constitutionality of Six-Man Juries

The holding in *Williams* is predicated upon a belief that juries of six and 12 persons return the same verdicts. Because that premise is incorrect, the issue of constitutionality must be reevaluated in light of the improved analysis of jury size that has been made here. First, the functional results obtained for each particular trial, t, will be extended to a more general level. Then these extended results will be interpreted in terms of the jury's purpose and the Court's test of constitutionality.

When the number of jurors is reduced from 12 to six, the decreased representation makes the defendant's fate more a matter of the chance involved in selecting the petit jury. Consequently, the actual verdict is less likely to reflect the opinion of a "representative cross section of the community."[64] Whether the defendant is adversely affected by the reduced representation depends upon the value of f_t, but no connection has yet been made between f_t values and the defendant's original conduct. It has been emphasized, in fact, that f_t is exactly determined only after the courtroom proceedings have unfolded and the jury is prepared to begin deliberation.[65]

[64] Williams v. Florida, 399 U.S. 78, 100 (1970).

[65] *See* text accompanying notes 43-46 *supra*.

The complexity of the trial creates uncertainties in f_t that are fully eliminated only after the in-court proceedings are completed.

Nevertheless, it is justifiable to assume that each defendant may be characterized in advance of his trial by a relatively narrow range of f_t values. This assumption only means that the conduct and mental state of the accused at the time of the alleged crime are highly correlated to his probability of conviction. In other words, the uncertainties in the trial (those factors that are independent, or partially independent of the defendant's original conduct and mental state) are assumed to have only slight effects on the chances of conviction.[66] Therefore, each defendant is associated with some small, distinct range of f_t values *in advance* of the trial (the average value of this f_t range will be denoted by f_o), as well as being characterized by an f_t value after trial. From a general perspective, there are two separate groups of defendants (those with values of f_o less than .5, and those with values of f_o greater than .5) whose members are determined solely by their out-of-court behavior, without looking to the actual events that transpire in the trial. The quantitative results that have been obtained are still completely applicable — f_o simply takes the place of f_t in the equations and figures 1 and 2.

This extended formulation is sufficient to permit an evaluation of jury size in light of the purposes of the jury — an evaluation that must be made before the *Williams* test can be applied. The jury fulfills its role by interjecting community opinion into the legal process. It is the province of the jury alone to decide the question of guilt,[67] and this issue is settled ideally when the opinion of the community is translated into the verdict.[68] The role of the jury is impaired whenever the verdict becomes less representative.

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[66] No empirical proof of this assumption is offered here. The alternative — that a strong correlation fails to exist between a defendant's conduct and his chances of conviction — seems too contrary to our concept of the legal system to warrant a lengthy refutation here. If a strong correlation did not exist, it would mean that the courts adjudged the defendant's guilt on a fairly random basis. This issue lies at a very basic level of the legal process, and merits serious evaluation in a more general context than that of the present study.

[67] *See generally* Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

The issue of a judge pressuring the jury to return a verdict (rather than hang) was discussed in note 56 *supra*. Several cases have dealt with a judge's encroachment on the jury's task of returning the final verdict. For example, Starr v. United States, 153 U.S. 614 (1894), held that the judge cannot direct a verdict of conviction in a criminal trial without violating the sixth amendment.

[68] The jury should be "a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). In other words, the actual verdict returned should be as close as possible to the typical verdict that would be returned by all the possible

In terms of the present study the interrelationship of the verdicts and the representation problem is straightforward. The f_o value of the defendant depicts the entire group of potential jurors (who presumably reflect the opinion of the community)[69] from which the petit jury is taken. f_o is determined by the opinion each potential juror would have on the question of guilt if he were to watch the trial of the defendant. If the purposes of the jury are fulfilled, the verdict must be a function only of the defendant's behavior and the representative opinions of the community. The f_o value must predict with absolute certainty whether the jury convicts or acquits.[70]

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jury subsets of the full community if each one had viewed the trial.

A difficult question is what constitutes the full community. The court has found no constitutional barrier to exclusions on the basis of citizenship, age, educational attainment, intelligence, character, or judgement. *See* Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970). Also, an exemption (rather than exclusion) that effectively eliminates some class of persons from jury service is permissible. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (affirmed conviction where state practice of exempting women yielded a very small proportion of women in the jury pool). As exemplified by *Hoyt*, the Court has been reluctant to impose strict cross-sectional requirements on any area other than race. This approach is not necessarily bad, since the primary interest is to secure a *verdict* representative of the community. A cross section on the basis of sex, occupation, political views, or the like is not an end in itself, but only a means to the ultimate goal of attaining representative verdicts. If one could show that women jurors tend to convict differently than men, the *Hoyt* holding would be unjustifiable.

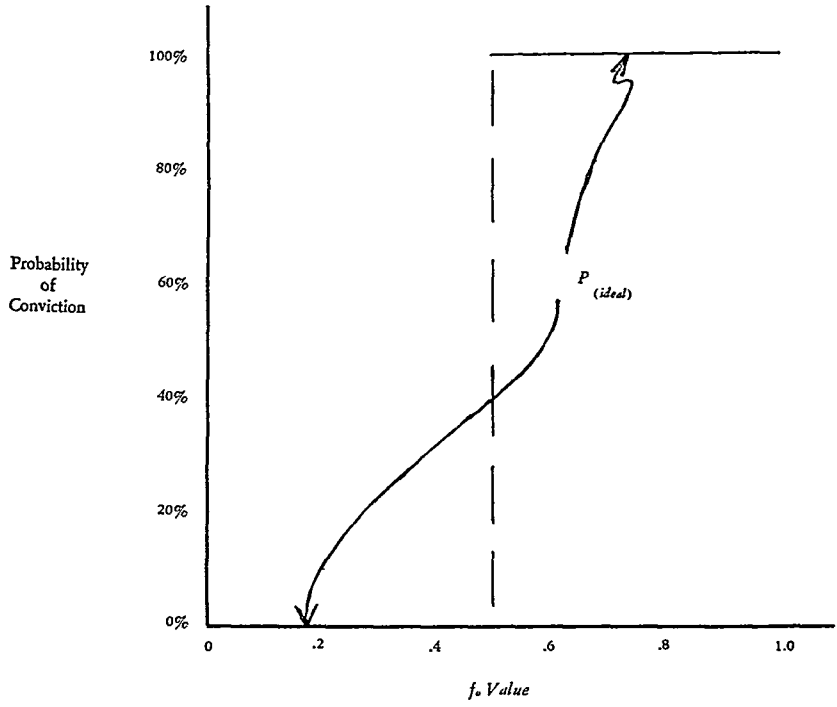
Once the problem of defining the community has been settled and the jury pool is selected, the crucial question is how to ensure that the actual verdict is representative of what would be the typical verdict. This problem is discussed in note 70 *infra.*

[69] *See* notes 43, 68 *supra.*

[70] After determining the requirements of a representative jury pool, there is still a question of what the ideal trial would be to ensure the greatest likelihood of attaining the ideal decision of the jury — a verdict typical of the verdicts that would be returned by each subset of the pool. *See* note 68 *supra.* The ideal would be to perform the trial over and over for each subset and actually take the typical verdict. This is clearly a practical impossibility, but because majority persuasion typifies jury deliberations, we can make practical approximations to the ideal. Whenever $f_o < .5$, the typical verdict would be acquittal, and the converse is true when $f_o > .5$. It is a simple consequence of statistics that f_o would be known more and more accurately as the number of persons polled is increased. Thus, with one trial alone f_o would be known more accurately if the number of jurors were increased. In terms of figure 2, the goal is to "square-off" the probability of conviction curve until the branch to the left of $f_o = .5$ lies on the bottom line where $P = 0$ (so that acquittal is certain when $f_o < .5$) and the branch to the right of $f_o = .5$ lies on the top where $P = 1$ (so that conviction is certain certain when $f_o > .5$). Instead of being reduced from 12 jurors to six, the size of the jury should be increased if its purpose is to be fulfilled. If the actual verdicts conformed to this ideal, figure 2 would appear as on page 550.

The requirement of unanimity should also be evaluated. If the jury were increased to about 25, one might guess that unanimity would be very difficult to attain. Even for the traditional jury of 12, however, the value of unanimity seems questionable. In only 7 percent of the cases studied was there any difference between the results rendered under the requirement of unanimity and what would have occurred if a majority decision had been taken as the verdict. In 3 percent of the cases, the result is especially significant because the minority eventually prevailed (the remaining 4 percent ended with hung juries). *See* Broeder, *supra* note 59, at 747-48. It is important to remember,

As f_o becomes less determinative of the verdict, the verdict is less an expression of the opinion of the community. The representative quality of the jury is impaired in exactly this manner when the jury size is reduced because such a reduction makes f_o less determinative of the final outcome of the trial.[71] The statistical fluctuations in the selection of the petit jury render the defendant's fate more a matter



however, that the data on majority persuasion in the deliberation process is not conclusive. *See* note 60 *supra*. One could discuss the value of unanimity endlessly, but the absence of empirical support would render such an analysis relatively worthless.

[71] The discussion here emphasizes the harmful effects of the six-man jury that befall those defendants for whom f_o is less than .5. If the 12-man jury is retained this group would have less chance of conviction, although the other group of defendants (those with an f_o greater than .5) would be subjected to a higher chance of conviction. This latter group, however, does not have a legitimate argument against the 12-man jury. The mere fact that a jury of six would provide a greater chance of escaping conviction is not meaningful by itself. A defendant seeking six jurors (since he believes his f_o value to be greater than .5) would be basing his argument on a circumvention of the role of the jury, not a fulfilment of its role. The jury should transform the opinion of the community into the final verdict, but the smaller jury would reduce such a defendant's chances of conviction only because it is less representative of the community and thus more subject to deviations from the ideal verdict. The group of defendants with an f_o value less than .5 claims the right to 12 jurors on the grounds that their fate will more likely be a true reflection of the community opinion and consequently a greater fulfillment of the purposes of the jury trial.

of chance — and less a product of his behavior and the community's values — as the number of jurors is lowered.

Thus, a change to six jurors from the traditional number of 12 derogates from the goals of a trial by jury. The constitutionality of the six-man jury depends upon how this fact fits into the test laid down in *Williams*. This test requires a combined evaluation of history, purpose, and function. It looks

> to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry . . . [is] the function which the particular feature [that is, the historical feature, which here of course is the requirement of 12 jurors] performs and its relation to the purposes of the jury trial.[72]

The *Williams* test clearly specifies that the operational significance of size is critical to the constitutionality of the six-man jury. There is no indication, however, of the weight that should be accorded the functional difference between the six-man jury and the traditional jury. Thus, one reading would preserve the historical feature when its loss would detract from the purposes of the jury in any way whatsoever. This reading of the test would clearly mean that the six-man jury is unconstitutional. A second interpretation would require some "substantial" impairment of these purposes before the historical precedent would become a constitutional requirement. If the latter reading is taken, the effect required to show a substantial departure from the performance of the traditional jury is as yet unknown. It has been shown, however, that six jurors never fulfill the purpose of the jury as well as the 12 required at common law. Over a large portion of the f_o range, the six-man jury significantly changes the probability of conviction and this change invariably constitutes a derogation from the ideal, representative verdict.[73] Because of the vagueness of the Court's stan-

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[72] 399 U.S. at 99-100.

[73] A completely rigorous assessment of substantiality requires knowledge of the relative number of defendants corresponding to each f_o value. Otherwise, it cannot be shown how many persons suffer a particular degree of prejudice. An accurate experiment measuring f_o by dealing directly with all available jurors would be extremely complex, if possible at all. An excellent surrogate is to study the predilections of the petit jurors, and then infer the relative frequency of various f_o values. This procedure is very accurate if a fairly large number of cases is used. The available data does not completely subdivide the juror predilections, but it is sufficiently refined to allow a few critical conclusions. *See* H. KALVEN & H. ZEISEL, *supra* note 14, at 487. Most importantly, it can be inferred from the first ballot votes (the measure of the predilections of the petit jurors) that a significant fraction of defendants are scattered through the range where f_o is greater than .0, but less than .5. Thus, the possibility of prejudice

dard, it is still not clear whether these differences are substantial, but a positive answer seems by far the most logical. If even greater differences were required — differences such as might occur with a jury of two or three persons — the correlaton between representative verdicts and actual verdicts would be quite low. f_0 would determine the verdict with relatively little certainty, although ideally it should do so with absolute certainty. The six-man jury lies midway between this kind of total frustration and the performance of the traditional jury — an area where the label of substantial seems perfectly fitting.

Thus, the *Williams* test was misapplied. If the Court had abided by the test it laid down, the six-man jury would have been declared unconstitutional. Even if the requirement of substantiality is read into the test, the smaller jury seems to be constitutionally proscribed.

It is worthwhile at this point to comment on another important consequence of the Court's test. The decision to use history as a guideline for a functional analysis involves a great deal of discretion and subjectivity on the part of the Justices.[74] And once laid down, the Court's test essentially forecloses arguments from analogous areas of the law. The constitutionality of the six-man jury must be resolved within the rubric of the *Williams* test, and other constitutional rulings are largely irrelevant. Only if *Williams* had provided no other test in the place of a purely historical approach

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to a defendant in this range is not just an abstract possibility, but a real and inevitable consequence of using the six-man jury.

[74] When a constitutional claim is raised, there is no guidance in the Constitution to the type of test that should be applied. Consequently, the Justices have virtually unrestrained latitude in choosing the appropriate test for the occasion. For example, Chief Justice Marshall often used a strictly textual type of constitutional interpretation; he would argue that a logical reading of the words alone demanded his conclusion. But this type of interpretation is as ultimately ad hoc as any other. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall argued that if the Supreme Court's appellate and original jurisdiction were not mutually exclusive, part of article III would be meaningless. But he explicitly rejected this "self-evident" principle when the occasion suited him. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 297-99 (1821).

Another example is the variety of tests under the due process clause of the 14th amendment. In certain circumstances a statute will be upheld against a challenge under the due process clause if the state can show any debatable basis for its value. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963). In other cases the state must show a compelling interest to justify its regulations. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). Obviously these differences are read into the Constitution by the judges alone. The 14th amendment provides only one standard, not an entire array of standards that vary according to the kind of case being decided.

would other aspects of constitutional law provide the criteria for deciding the case.[75]

There is one question, however, that falls outside the Court's test, and that is whether a defendant must show actual harm in his own case to secure reversal. In some cases, the Court has looked to the facts for an indication of some actual prejudice to the petitioner before reversing his conviction.[76] In others, the conviction has been examined in the abstract and reversed without proof of actual prejudice if the possibility of prejudice seemed sufficient.[77] The difficulty in making a persuasive showing of actual prejudice is a factor in the Court's decision to waive the burden of such a showing.[78] A defendant challenging the six-man jury has a valid claim of prejudice only if his f_o value is less than .5. In practice a large percentage of defendants would have f_o values less than .5,[79] and consequently the chances of prejudice are significant. But because of the complexity of finding what f_o value exists in a particular case, a defendant probably could not show convincingly that his value was less than .5. In view of the high probability of prejudice and the practical difficulties of proving prejudice in a given case, a defendant convicted by a six-man jury should not have to show that his f_o value was less than .5 to obtain reversal. The requirement of showing actual harm would be an unrealistic burden to thrust on the defendant in this situation.

V. CONCLUSION

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

[75] The jury representation cases would be quite relevant under these circumstances. *See* note 68 *supra.*

[76] *See, e.g.*, Stroble v. California, 343 U.S. 181 (1952).

[77] *See, e.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963).

[78] *See* Estes v. Texas, 381 U.S. 532, 578-80 (1965), (Warren, C.J., concurring).

[79] This can be inferred from the existence of a significant number of trials where a substantial portion of the petit jury was innocent-prone at the first ballot. *See* H. KALVEN & H. ZEISEL, *supra* note 4, at 487; *cf.* note 73 *supra.*

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

Student Projects

for further study:

- Michael Saks & Alisa Smith, *The Case for Overturning* Williams v. Florida *and the Six-person Jury: History Law and Empirical Evidence* (2008).
- Shari Seidman Diamond, et. al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge* (2009).
- Bernard Grofman, *The Slippery Slope: Jury Size and Jury Verdict Requirements—Legal and Social Science Approaches* (1980).
- Fully Informed Jury Association: http://fija.org/
- Online Jury Research Update:

Jury Size: Less in not More

Compiled by Evan Moore and Tali Panken

INTRODUCTION: George Zimmerman and the Panel of Six

Last year, national news organizations picked up the sensational and racially charged story of the shooting of Trayvon Martin by George Zimmerman, a neighborhood watch volunteer who claimed

immunity under Florida's Stand Your Ground law. Coverage of jury selection and deliberation during Zimmerman's murder trial frequently mentioned that the jury was comprised of just six individuals, all women (five white, one black). Many commentators and observers were surprised that Florida criminal trial juries were composed of just six members, instead of the traditional twelve.[i] Florida is an outlier since most states do not use juries of six for criminal trials; six is now the norm in civil trials, however, in the majority of states.

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.

CASE LAW

DEPARTURE FROM 700 YEARS OF PRECEDENT: *Williams v. Florida*[ii] and the Jury of Six

During the 1960s, court reform movements pressed to both increase the efficiency and decrease the cost of court proceedings. One primary target was the traditional jury of twelve peers, and by the late 1960s Florida passed a law that provided for juries of six in civil and criminal trials.

Williams was convicted of armed robbery in Florida by a jury of six and sentenced to life in prison. On appeal, he argued that the Sixth Amendment provided for jury trial according to its characteristics under English and American common law, consisting of twelve peers.

The Supreme Court affirmed Williams' conviction. It first determined that modern juries were not bound to their common law form, and then adopted a functional equivalence test for any reduction in jury size from the traditional twelve. Relying on little more than intuition, the Court found that a six-person jury was unlikely to be any less representative of the community than a twelve-person one by a sample size reduction of 50% close to the lower bound. Furthermore, it conflated empirical and non-empirical studies to find that the jury's deliberation and fact-finding abilities would not be significantly affected in six-person form.

The non-empirical research the Court cited in support of six-person juries included:

- Six-Member Juries Tried in Massachusetts District Court, 42 J.Am.Jud.Soc. 136 (1958);
- Note, On Instructing Deadlocked Juries, 78 Yale L.J. 100, 108 and n. 30 (and authorities cited), 110-111 (1968); and
- C. Joiner, Civil Justice and the Jury 31, 83 (1962) (concluding that the deliberative process should be the same in either the six- or 12-man jury).

FIVE IS NOT ENOUGH: *Ballew*

A. Summary

In 1978, the Supreme Court further reconsidered the constitutional requirements of jury sizein *Ballew v. Georgia.* Ballew was charged for two counts of misdemeanors for distributing obscene materials in violation of Georgia law. He went to trial in the Criminal Court of Fulton County, Georgia, where the

court tried misdemeanor cases before five-person juries. Ballew's request for a twelve-person jury was denied, and he was found guilty by the trial court jury. On appeal, Ballew raised a Sixth Amendment challenge against the five-person jury, but he was unsuccessful. The Supreme Court granted certiorari and considered whether a five-person jury in a state criminal trial was valid under the Sixth and Fourteenth Amendments.

While the Court upheld the constitutionality of a six-person jury in *Williams*, it purposefully did not address whether a jury with fewer than six individuals was constitutional.In Ballew, the Supreme Court was determined to answer whether a jury with fewer than six individuals "inhibite[ed] the functioning of the jury as an institution to a significant degree, and, if so, whether any state interest counterbalances and justifies this disruption." After reviewing contemporary empirical research, the Court in *Ballew* held that a jury with fewer than six members seriously impaired the "purpose and functioning" of a jury in criminal trials.

B. Empirical Data presented by Ballew

First, the Court looked at contemporary research demonstrating that smaller juries were less likely to facilitate effective group deliberation.

- A study by Thomas and Fink showed that group size was an important variable in the qualities of group deliberation. After reviewing 31 studies of small groups where group size was the independent variable, they found that there were no conditions under which smaller groups showed superior skills in group performance and group productivity. (Thomas & Fink, Effects of Group Size, 60 Psych.Bull.371, 373 (1963) available at http://psycnet.apa.org/journals/bul/60/4/371/).
- In smaller groups, members are less likely to make critical contributions to solve a given problem. (Faust, Group versus Individual Problem-Solving , 59 J.Ab. & Soc.Psych 68, 71 (1959) at http://psycnet.apa.org/journals/abn/59/1/68/)
- In smaller groups, members are less likely to overcome their biases and obtain an accurate result. (Barlund, A Comparative Study of Individual, Majority, and Group Judgment, 58 J.Ab & Soc.Psych. 55, 59 (1959).

Second, the Court found that smaller juries were less likely to reach accurate results.

- Nagel & Neef- Statistical studies show that the risk of Type 1 errors (convicting an innocent person) increase as the size of the jury decreases. Conversely, the risk of Type 2 errors (the error of not convicting a guilty person) increases as the size of the jury increases. Nagel and Neef determined that the optimal size for reducing both errors should be a function of the two types of errors, weighing the Type 1 error as 10 times more significant that a Type 2 error. They concluded that the optimal jury size was 6-8 members. (Nagel & Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction Require to Convict, 1975 Wash.U.L.Q. 933)

Third, the likelihood of a hung jury decreases as the juries reduce in size; this disadvantages the defense. Hung juries generally only occur where one or two jurors are unconvinced of guilt.

- Zeisel- Zeisel estimated that the number of hung juries in 6-person juries (2.4%) is half the amount of hung juries in 12-person juries (5%).(Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U.Chi.L.Rev. 710 (1972)).

Fourth, the Court was troubled by the fact that jury members from minority groups are less likely to be represented in smaller groups:

"Thus, if a minority group constitutes 10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members." (citing Michael Saks, *Ignorance of Science is No Excuse* (1974))

C. Commentary

Justice Powell, in his concurrence, questioned whether Blackman's use of statistical research was necessary. He also wrote, "Neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process."

In *Gonzalez v. Florida*, the Calebresi Amici Brief raises several issues with the *Ballew* decision. *Ballew* abandoned the functional equivalence test used in *Williams* in favor of a bright-line rule that six-person juries were constitutional, but five-person juries were unconstitutional. However, this bright-line rule seems arbitrary given that the Court relied on studies showing that the six-person juries perform worse than twelve-personjuries. Here are some of the studies comparing six-and twelve-person juries which were cited by the Court in *Ballew*:

- Davis, Kerr, Atkins, Holt, & Mech, The Decision Processes of 6-and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 J. of Personality & Soc. Psych. 1 (1975)
- Friedman, Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors, 26-2 Am.Stat. 21 (Apr.1972)
- Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L.Rev 326 (1972)
- Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U.Mich.J.L. Reform 671 (1973)
- Note, An Empirical Study of Six-and Twelve-Member Jury Decision-Making Processes, 6 U.Mich.J.L. Reform 712 (1973)

Critics have wondered why Blackmun did not overturn the holding in *Williams* given the social science evidence that six-person juries do not deliberate as well as twelve-person juries. Perhaps the social scientists who conducted these studies with six-person juries were naïve to believe that the Supreme Court would overturn a constitutional holding based on empirical evidence.

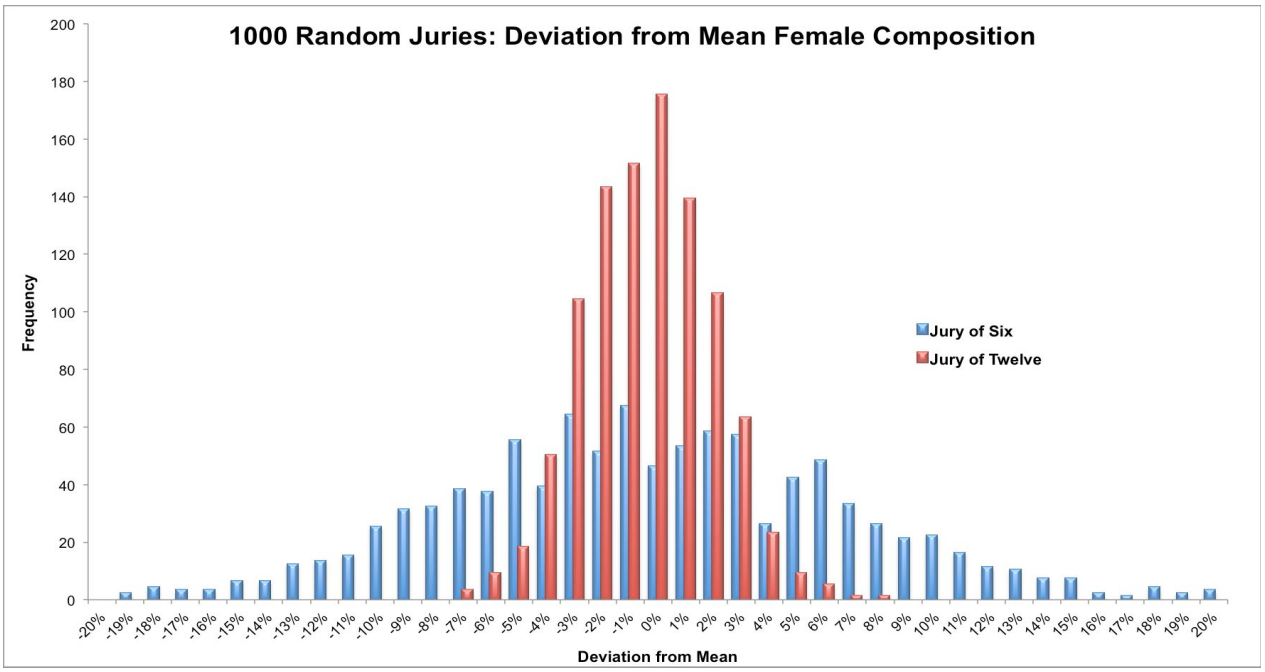
FURTHER RESEARCH

REPUBLIC OF THE COURTROOM: Jury Size and Population Representativeness

One of the persistent concerns with juries, traceable back to the Magna Carta and the Star Chamber, is that they be composed of one's peers, or in the language of the Sixth Amendment, that they be impartial. As Shari Diamond puts it, the jury is supposed to be a representative sample of the community.[iii] Sampling theory suggests, and Lempert confirms in his "Uncovering 'Nondiscernible Differences: Empirical Research and the Jury Size Cases"[iv], that larger juries are more likely to include individuals of diverse backgrounds, beliefs, and experiences than smaller ones. The question becomes one of degree;

specifically, how much less representative of a community population is a jury of six likely to be than a jury of twelve?

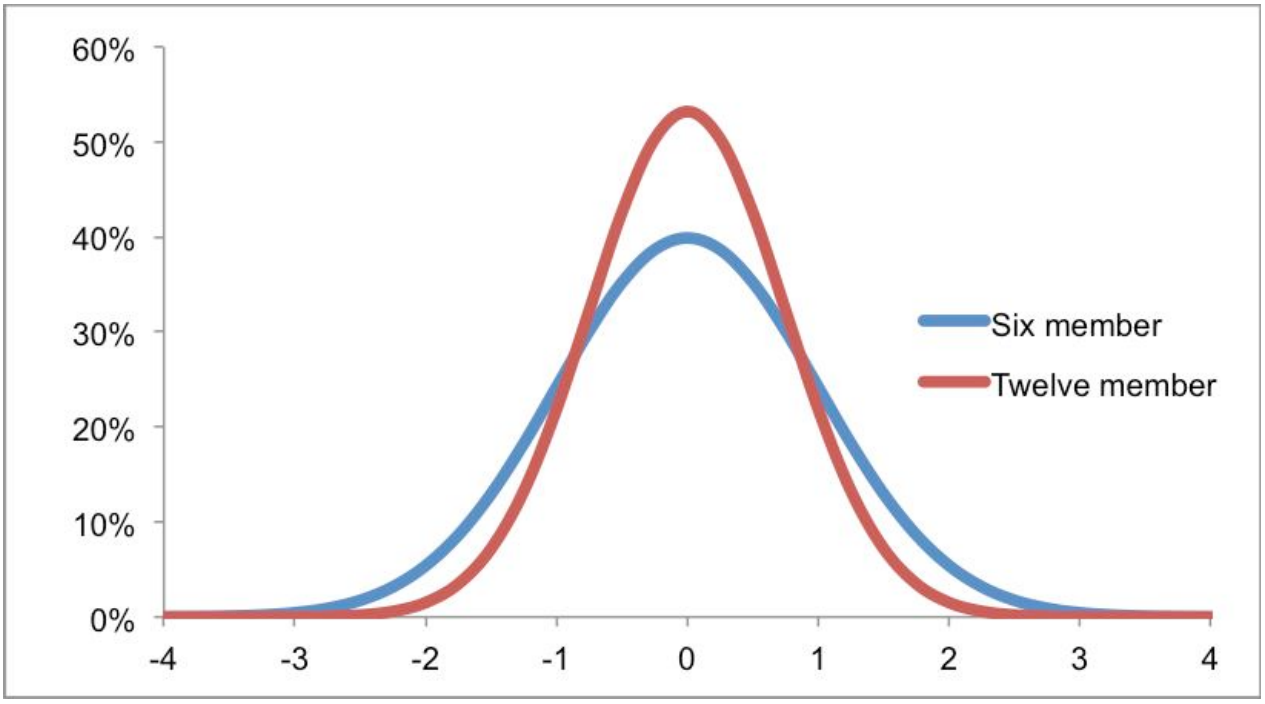
Many observers expressed surprise at the homogeneity of the Zimmerman jury.[v] While there was some consternation that the jury only included one minority member, Seminole County, FL, is just 11% African American. The chance of at least one African American being on the jury of six was 51%, or roughly 1 in 2.[vi] The jury's greater statistical oddity was that all six members were female, of which there was less than a 2% chance. Modern empirical sampling theory demonstrates that juries of six members are much more susceptible to outlier effects, such as an all-female jury. The chart below shows a normally distributed, randomly drawn 1000-jury sample and the deviation from the mean of those juries in terms of the number of women. The less peaked distribution for six-member juries is a visual depiction of samples with a greater chance of outliers than those for twelve-member juries, which cluster around the female population mean.



Six-member juries can produce clearly visible effects that would be remotely unlikely in a twelve-member jury. In the Zimmerman case, recall that there was less than a 2% chance that all jurors would be female. In a twelve-member jury, however, that chance drops to less than .04%, from 1-in-51 odds to 1-in-2,558. Furthermore, the likelihood of an African American juror climbs from 51% to 76%. Other minority groups present in the community also demonstrate much greater chance of representation in the jury as its size increases, and it may be presumed, while it is much more difficult to categorize than race or ethnicity, that a broad array of experiences and backgrounds are also better represented.[vii]

Finally, representativeness of a community may include its composition, but it may also include reflection of the community's views. Michael Saks has studied view representativeness at length, and he finds that as jury size decreases, verdict and award unpredictability increase. For every halving of the sample size (jury), variability in outcome will increase by 41%. Verdict and award predictability is significant if we assume that the overall population has a distinct view of the correct verdict and award amount. Since twelve-member juries tend to reduce outlier awards and conform more strictly to the mean population verdict decision and award than six-member juries, twelve-member juries are more representative of their

community in the trial outcome reached. For reference, the visual effect of jury size on a normal distribution of awards is shown below, although the actual curve varies somewhat from the standard normal distribution.[viii]



JURY DELIBERATION: A Function of Number

The empirical studies used by the Court in *Ballew* represents foundational research on the topic of jury size and jury deliberation. In 1997, Michael Saks (whose empirical work influenced the *Ballew* opinion) and Mollie Marti conducted a meta-analysis of 17 studies that examined the differences between six- and twelve-person juries. For the most part, this study confirmed the empirical work presented in *Ballew.* Saks and Marti found that larger juries were more likely to contain members of minority groups, have a hung jury, and accurately recall trial testimony (an indicator of juror accuracy).

Modern research on this topic has continued to examine how having juries with diverse racial compositions affects jury deliberation. Some researchers hypothesized that minority jurors would be less likely to participate in less-diverse groups, but at least one study showed that diversity did not affect the participation levels of minority jurors. Cornwell, York, and Hans analyzed data from 2,189 jurors on criminal cases in four jurisdictions to consider what conditions influence participation in jury deliberations. They suggest that "full participation by jurors from diverse backgrounds" is beneficial for jury fact-finding. To gather statistics about juror participation, the researchers relied on jurors' self reports about their participation. Results showed that Black jurors participated at high levels regardless of the group's diversity.

Sommers found that the racial composition of juries affected the deliberative content. Coders evaluated the deliberative content of the mock juries and found that White jury members were more likely to raise novel facts in diverse jury deliberations than all-White jury deliberations. Also, uncorrected factual errors were less frequent in diverse groups than in all-White groups. Black participants were more likely to raise novel, race-related issues than White participants in diverse groups. Sommers concluded that diversity affected White participants' informational processes and how they interpreted and weighted the

evidence. (Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation* (2006)).

Table 2
Group-Level Analyses of Deliberation Content

Measure	Diverse group	All-White group
Deliberation length, in min	50.67_a	38.49_b
No. of case facts discussed	30.48_a	25.93_b
No. of factual inaccuracies	4.14_a	7.28_b
No. of uncorrected inaccurate statements	1.36_a	2.49_b
Amount of "missing" evidence cited	1.87	1.07
No. of race-related issues raised	3.79_a	2.07_b
No. of mentions of racism	1.35	0.93
% of time mention of racism met with objection	$22\%_a$	$100\%_b$

Note. Values with different subscript letters differ significantly at $p \leq .05$; $n = 15$ diverse groups and 14 all-White groups.

Measure	**Diverse Group**	**All-White group**
Deliberation length (in min)	50.67	38.49
No. of case facts discussed	30.48	25.93
No. of uncorrected inaccurate statements	1.36	2.49
No. of race-related issues raised	3.79	2.07

Larger group sizes mean that there is a larger representative sample. In addition to increasing the likelihood of diversity, a larger jury is more likely to have a wider range of talents, skills for performing specialized tasks, and knowledge. As group sizes increase, there is an increasing organization and division of labor amongst the members. (Thomas & Fink, *Effects of Group Size* (1963)). Also, Hans conducted an experiment where she asked judges and juries to watch a mock trial in which mtDNA was at issue and then take a quiz testing how well they understood the scientific evidence. She found that college-educated jurors were more competent at fact-finding than jurors who were not college educated. Jurors outperformed judges on a question about the maternal heritage of mtDNA, which highlights the value of juror deliberation. (Hans, 44,*Judges, Juries, and Scientific Evidence* (2007)). If larger juries make it more likely that there will be a juror with a background in science, one can infer that larger juries are more likely to be capable of handling scientific evidence presented at trial. This is supported by an experiment with mock jurors which found that twelve-person juries recalled more probative evidence and relied less on non-probative evidence than six-person juries. (Horowitz and Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial* (2002)).

Additionally, it should be noted that efficiency is one justification for using smaller juries. Most research indicates that, on average, larger juries spend a longer time in deliberation than smaller juries. Saks and Marti report that the unweighted mean length of deliberation time was 53 minutes for small juries and 70 minutes for large juries. While this finding supports the efficiency justification for smaller juries, it is possible that the greater deliberation time indicates a more thoughtful and collaborative review of the trial testimonies and evidence. Smaller juries thus might save a marginal amount of time but result in reduced deliberation. Below is a chart of the mean length of deliberation time for small and large juries in different studies:

Table 3. Length of Deliberation

	Mean length		Number of juries		
Study	Small	Large	Small	Large	Direction
IJA (1972)	72.0	108.0	492	180	+
Kessler (1973)	22.2	15.3	8	8	–
Beiser & Varrin (1975)	150.0	192.0	40	52	+
Davis et al. (1975)	12.6	13.4	36	36	+
Eakin (1975)	38.3	51.0	10	10	+
Valenti & Downing-lo[a] (1975)	23.3	25.7	10	10	+
Valenti & Downing-hi[a] (1975)	12.3	38.5	10	10	+
Saks-a (1977)	43.7	45.1	18	13	+
Saks-b (1977)	32.9	47.8	22	20	+
Kerr & MacCoun (1985)[a]	5.4	5.8	31	28	+
Munsterman et al. (1990)	174.0	228.2	39	75	+
By sign test: 10 of 11, $p < .05$ two-tailed.					

[a] Ten-minute time limit.

Endnote Resources:

[i] Florida death penalty cases use a full 12-member jury.

[ii] 399 U.S. 78, 1970.

[iii] Diamond, Shari. "Zimmerman trial: Time to reconsider six-member jury", Miami Herald. http://www.miamiherald.com/2013/07/14/3497719/zimmerman-trial-time-to-reconsider.html

[iv] 73 Mich. L. Rev. 643.

[v] *See, e.g.*, http://www.theatlantic.com/national/archive/2013/06/why-the-george-zimmerman-trials-all-female-jury-is-news/277103/

[vi] Probabilities exclude, for simplicity's sake, jury selection and peremptory challenge effects. Probabilities and distributions were calculated for this project.

[vii] Lempert. "Nondiscernable Differences".

[viii] Saks, Michael. "The smaller the jury, the greater the unpredictability." 79 *Judicature* 263.