

APPENDIX

A

316 So.3d 779

District Court of Appeal of Florida, First District.

Terry Jonathon PHILLIPS, Appellant,

v.

STATE of Florida, Appellee.

No. 1D19-470

|

April 23, 2021

Synopsis

Background: Defendant was convicted in the Circuit Court, 1st Judicial Circuit, Santa Rosa County, [David Rimmer, J.](#), of three counts of sexual battery and one count of lewd and lascivious molestation of child victim's sexual organs. Defendant appealed.

Holdings: The District Court of Appeal, [M.K. Thomas, J.](#), held that:

[1] child victim's statements in child protection interview (CPI) were testimonial in nature;

[2] error in admission of CPI was not fundamental as to two of three counts of sexual battery and one count of lewd or lascivious molestation;

[3] error in trial court's admission of CPI was fundamental as to one count of sexual battery; and

[4] defendant's trial was not a capital case.

Affirmed in part, reversed in part, and remanded.

[Makar, J.](#), filed concurring opinion.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (16)

[1] **Criminal Law** 🔑 Necessity of Objections in General

For an error to justify reversal absent a timely objection, the error must run so deeply through the trial proceedings that it affects the validity of the trial itself; the error must be entwined so closely with the verdict that one is forced to conclude that the verdict could not have been obtained without the assistance of the error.

[2] **Criminal Law** 🔑 Necessity of Objections in General

An error is deemed fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.

[3] **Criminal Law** 🔑 Out-of-court statements and hearsay in general

When hearsay evidence is offered against a defendant under an exception, requirements of Confrontation Clause must be met for evidence to be deemed admissible, regardless of whether any challenged evidence is found to meet any of the statutory exceptions to general prohibition on hearsay. *U.S. Const. Amend. 6*; *Fla. Const. art. 1, § 16*;  *Fla. Stat. Ann. §§ 90.803, 90.804*.

[4] **Criminal Law** 🔑 Availability of declarant

Where Confrontation Clause applies, admissibility of any hearsay evidence is ultimately conditioned on source of hearsay being unavailable as witness at trial and on existence of prior opportunity for defense to have cross-examined said witness. *U.S. Const. Amend. 6*; *Fla. Const. art. 1, § 16*;  *Fla. Stat. Ann. §§ 90.803, 90.804*.

[5] **Criminal Law** 🔑 Out-of-court statements and hearsay in general

Not all hearsay implicates the concerns of the Confrontation Clause; therefore, not all hearsay falls within the scope of its protections. *U.S.*

Const. Amend. 6; Fla. Const. art. 1, § 16;  Fla. Stat. Ann. §§ 90.803, 90.804.

[6] **Criminal Law** Out-of-court statements and hearsay in general

Where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated, and the admissibility of any hearsay evidence is wholly governed by the controlling laws of evidence. U.S. Const. Amend. 6; Fla. Const. art. 1, § 16;  Fla. Stat. Ann. §§ 90.803, 90.804.

[7] **Criminal Law** Availability of declarant

Where a piece of hearsay evidence bears a testimonial character, it is covered by the Confrontation Clause, and admissibility will also be dependent on unavailability and a prior opportunity for cross-examination. U.S. Const. Amend. 6; Fla. Const. art. 1, § 16;  Fla. Stat. Ann. §§ 90.803, 90.804.

[8] **Criminal Law** Out-of-court statements and hearsay in general

Hearsay is testimonial, for Confrontation Clause purposes, when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. U.S. Const. Amend. 6; Fla. Const. art. 1, § 16;  Fla. Stat. Ann. §§ 90.803, 90.804.

[9] **Criminal Law** Use of documentary evidence

Child victim's statements in child protection interview (CPI) were testimonial in nature in trial for sexual battery and lewd or lascivious molestation, and thus entry of statements violated defendant's constitutional right to confrontation; importance that only truthful statements be made was discussed with child victim early on, interviewer's professed method

of interview was very similar to a method of interrogation, CPI was along the lines of a solemn declaration of issues by child victim made for purpose of establishing past facts, and primary purpose of interview ended as evidence-gathering mission conducted by person specialized in carefully extracting said details from child victim. U.S. Const. Amend. 6; Fla. Const. art. 1, § 16.

[10] **Criminal Law** Reception of evidence

Trial court's unpreserved error in admitting child victim's statements in child protection interview (CPI), in violation of defendant's right to confrontation, was not fundamental as to two of three of the counts of sexual battery and one count of lewd or lascivious molestation, and thus reversal of those convictions was not required; sexual battery counts were supported by observations of victim's mother that victim repeatedly got yeast infections after visiting with defendant, victim's mother observed redness and irritation inside victim's vagina, male DNA was found on vaginal swab taken during victim's physical exam, and lewd or lascivious molestation count was supported by mother's observations of victim acting out sexual touching on her dolls and on herself. U.S. Const. Amend. 6; Fla. Const. art. 1, § 16.

[11] **Criminal Law** Reception of evidence

Trial court's unpreserved error in admitting child victim's statements in child protection interview (CPI), in violation of defendant's right to confrontation, was fundamental as to count of sexual battery that alleged union of defendant's penis with child victim's anus, and thus reversal of conviction was required, where allegation was not supported by other record evidence. U.S. Const. Amend. 6; Fla. Const. art. 1, § 16.

[12] **Criminal Law** Conduct of Trial in General

Criminal Law  Preferability of raising effectiveness issue on post-conviction motion

Defendant's claim that trial counsel's failure to specifically object to child protection interview (CPI) as violation of Confrontation Clause constituted ineffective assistance was not plain on face of the record, and thus was not appropriately brought in direct appeal and instead should have been brought in postconviction motion. [U.S. Const. Amend. 6](#).

[13] Criminal Law **Effective assistance**

Ineffectiveness of counsel claims are rarely cognizable on direct appeal. [U.S. Const. Amend. 6](#).

[14] Criminal Law **Conduct of Trial in General**
Criminal Law **Effective assistance**

Ineffective assistance of counsel claims are only appropriate outside of a postconviction motion when the appellant demonstrates ineffectiveness on the face of the record, indisputable prejudice, and the lack of any conceivable tactical explanation for counsel's action. [U.S. Const. Amend. 6](#).

[15] Jury **Jury of less than twelve persons**

Defendant's trial for sexual battery and lewd or lascivious molestation was not a capital case, and thus defendant was not required to have a 12-person jury, rather than a six-person jury; defendant could not be sentenced to death for crime alleged, and capital case was only one where death was possible penalty.  [Fla. Stat. Ann. §§ 775.082\(1\)\(a\), 794.011\(2\)\(a\), 913.10](#).

[16] Criminal Law **Cases and questions reserved or certified**

Court of Appeals would decline defendant's request to certify question of six-person jury on all non-capital criminal cases to Supreme Court, where there was no indication that any current re-interpretation of language would yield a different result. [Fla. Stat. Ann. § 913.10](#).

***781** On appeal from the Circuit Court for Santa Rosa County, [David Rimmer](#), Judge.

Attorneys and Law Firms

Jessica J. Yeary, Public Defender, and Victor Holder, Assistant Public Defender, Tallahassee, for Appellant.

[Ashley Moody](#), Attorney General, and [Damaris Reynolds](#), Assistant Attorney General, Tallahassee, for Appellee.

Opinion

[M.K. Thomas, J.](#)

Terry Phillips (Appellant) raises three arguments for reversal in this direct appeal of the criminal judgment and sentence against him. He argues reversible error because: 1) the admission of a videotaped copy of the child protection interview (CPI) into evidence during his jury trial violated his Sixth Amendment right to confrontation; 2) he received constitutionally ineffective assistance of counsel when his defense attorney did not object to the entry of the video on confrontation grounds; and 3) his trial was by a six-person jury—rather than one composed of twelve jurors. Appellant concludes that these errors require reversal and a new trial on all counts. Regarding his third issue, he requests that we certify a question of great public importance to the Florida Supreme Court. For the reasons explained herein, we affirm in part, reverse in part, and remand for further proceedings. We decline the request to certify a question of great public importance.

Appellant was tried on six counts. Counts one through five allege he sexually battered his daughter—a child between the ages of two and four during the abuse—in violation of  [section 794.011\(2\)\(a\), Florida Statutes](#). Count six alleged that he committed lewd and lascivious molestation of the child victim's sexual organs in violation of  [section 800.04\(5\)\(b\), Florida Statutes](#). A jury found Appellant guilty as charged on counts one, two, five, and six. Appellant was adjudicated guilty and sentenced to life in prison on counts one, two, and five, and twenty-five years in prison on count six. He now appeals these verdicts and sentences.

I. Confrontation Clause

After the mother became concerned and allegations against Appellant were reported to the authorities, the child victim participated in a forensic interview. A video of the CPI was admitted as evidence at trial. On appeal, Appellant first argues that the entry of the CPI into evidence at trial violated his constitutional right “to be confronted with the witnesses against him.” *Amend. VI, U.S. Const.*; *see also Art. I, § 16(a), Fla. Const.* (requiring that an accused shall have the right “to confront at trial adverse witnesses ...”).

***782 [1] [2]** Appellant did not raise the confrontation argument at trial, instead settling for a general “standing” objection to anything which would otherwise be hearsay. Because the confrontation argument was not raised and argued below, the issue is not preserved for appeal. *See Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005). However, an unpreserved argument is reviewable if it constitutes fundamental error. *See* § 924.051(3), *Fla. Stat.* (“An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.”). For an error to justify reversal absent a timely objection, the error must run so deeply through the trial proceedings that it affects the validity of the trial itself. *See F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). The error must be entwined so closely with the verdict that one is forced to conclude that the verdict could not have been obtained without the assistance of the error. *Id.* Further, “an error is deemed fundamental ‘when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.’ ” *Id.* (quoting *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998)).

[3] [4] Both the United States and Florida constitutions require that a criminal defendant be allowed to confront the witnesses against him. *See Amend. VI, U.S. Const.*; *Art. I, § 16, Fla. Const.* Typically, this requirement is satisfied by cross-examination of a witness during live testimony. In some instances, however, hearsay evidence may be offered against a defendant in accordance with one of several exceptions found in *sections 90.803 and 90.804, Florida Statutes*, in which case in-person cross-examination during trial may not be an option. In such instances, the requirements of the Confrontation Clause must be met for the evidence to be

deemed admissible, regardless of whether any challenged evidence is found to meet any of the statutory exceptions

to the general prohibition on hearsay. *See Crawford v. Washington*, 541 U.S. 36, 50–51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Frazier v. State*, 250 So. 3d 794, 797 (Fla. 1st DCA 2018) (explaining that, “even though the Legislature balanced the defendant’s rights, admission of the child hearsay statements under *section 90.803(23)* can still violate a defendant’s constitutional rights”). Where the Confrontation Clause applies, the admissibility of any hearsay evidence is ultimately conditioned on the source of the hearsay being unavailable as a witness at trial and on the existence of a prior opportunity for the defense to have cross-examined said witness. *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354.

[5] [6] [7] The threshold question is whether the requirements of the Confrontation Clause apply to any particular piece of hearsay evidence. As the Supreme Court has explained, not all hearsay implicates the concerns of the Confrontation Clause; therefore, not all hearsay falls within the scope of its protections. *See id.* at 51, 124 S.Ct. 1354. The “principal evil at which the Clause was directed” was the use of “ex parte examinations as evidence against the accused.” *Id.* at 50, 124 S.Ct. 1354. “Where nontestimonial hearsay is at issue,” the Confrontation Clause is not implicated, and the admissibility of any hearsay evidence is wholly governed by the controlling laws of evidence. *Id.* at 68, 124 S.Ct. 1354. However, where a piece of hearsay evidence bears a “testimonial character,” it is covered by the Confrontation Clause, and admissibility will also be dependent on unavailability and a prior opportunity for cross-examination.” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

***783** The Supreme Court has not endorsed any specific definition for what constitutes a “testimonial” statement subject to the Confrontation Clause but has offered that, “[r]egardless of the precise articulation, some statements qualify under any definition,” such as ex parte testimony offered at a preliminary hearing and statements taken by the police during an interrogation. *See Crawford*, 541 U.S. at 52, 124 S.Ct. 1354. The Supreme Court has further explained what constitutes a testimonial statement as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

 *Davis*, 547 U.S. at 822, 126 S.Ct. 2266.

In  *Davis*, the Supreme Court returned to the central theme of  *Crawford* in reiterating that it was the “testimonial character” of certain hearsay statements that caused them to be covered by the Confrontation Clause.  *Id.* at 821, 126 S.Ct. 2266. There, the Supreme Court was addressing statements made by a victim of domestic violence to a 911 operator during an ongoing emergency.  *Id.* at 817, 126 S.Ct. 2266. The Court concluded that the statements made during the 911 questioning simply did not rise to the level of the victim testifying as a witness, as contemplated by the Confrontation Clause.  *Id.* at 828–29, 126 S.Ct. 2266. The court in  *Davis* noted that the statements described an ongoing emergency as it was occurring, as contrasted with the questioning of the victim in  *Crawford*, which took place hours after the incident ended.  *Id.* at 827, 126 S.Ct. 2266. “[V]iewed objectively,” the statements “were necessary to be able to resolve the present emergency, rather than simply to learn (as in  *Crawford*) what had happened in the past.”  *Id.* Therefore, because “the circumstances of [the 911] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency,” the statements were found not to be a “‘weaker substitute for live testimony’ at trial.”¹  *Id.* (quoting  *United States v.*

Inadi, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)).

[8] In contrast, hearsay is testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”  *State v. Contreras*, 979 So. 2d 896, 903 (Fla. 2008) (quoting  *Davis*, 547 U.S. at 822, 126 S.Ct. 2266).  *Contreras* specifically addressed the question of whether the statements of a child victim taken during a CPI violated a defendant's right to confrontation. In finding the child hearsay at issue bore the testimonial character contemplated in the Sixth Amendment, the supreme court noted that child protection teams (CPT) are statutorily tied to local law enforcement and prosecuting agencies, and that one of the statutory purposes of CPTs is to provide testimony in court.  *Id.* This supported their conclusion that such interviews were largely motivated by a search for evidence.  *Id.* In *784 concluding the CPT statements were testimonial, the court stated:

In light of the police presence and the electronic connection, we conclude that the CPT coordinator was serving as a police proxy in this interview. This is reinforced by the statutory connection of the CPT to such investigations and prosecutions. Thus, ... this kind of interview by a CPT is indistinguishable from an ordinary police interrogation. Moreover, the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution.

 *Id.* at 905 (internal marks and citations omitted).

[9] We now turn to the circumstances of Appellant's case to determine whether entry of the child hearsay evidence against him constitutes fundamental error. The record does

not indicate—and the State does not argue—that Appellant was ever given the opportunity to confront the child victim's testimony. That said, the only question in determining whether the entry of the CPI was erroneous is whether the statements therein bore a testimonial character. If the statements were testimonial in nature, the entry of the statements was a violation of Appellant's constitutional right to confrontation.

Appellant argues that   *Contreras* is controlling. We agree. Both in pretrial hearings and at the trial, the CPI interviewer testified that there were a number of observants in a room adjacent to the interview room during the interview. Detective Leach acknowledged during testimony that he was one of the individuals observing the interview, and the interviewer testified that she went into the observation room after her initial questioning of the victim to determine whether any of the observants wanted her to conduct follow-up questioning of the victim. The State argues that   *Contreras* is distinguishable because the officer there was electronically connected to the interviewer in real time. This is a distinction without a difference. The circumstances make clear that Detective Leach could have directed a line of questioning during the interview if he felt it necessary—as was the case in   *Contreras*—regardless of his lack of a real-time connection. Whether he actually did so is immaterial, no less than if the officer in   *Contreras* had remained electronically connected to the interview without ever actually directing any questioning.

Further, the testimonial character of the CPI statements here is reinforced by the nature of the interview itself. As confirmed by the interviewer, the importance that only truthful statements be made was discussed with the victim early on. Express emphasis on truth is, of course, one of the central themes of a trial-like statement. Additionally, the interviewer's professed method of interview, as described by her trial testimony, was very similar to Detective Leach's description of his method of interrogating Appellant in several important ways, with both parties testifying that they began their respective interviews by building a rapport with their respective subject before moving to more focused questioning regarding allegations. The nature of the interview, thus, objectively indicates that the CPI was along the lines of a “solemn declaration” of issues by the child victim made for the purpose of establishing past facts. See  *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354.

The State counters that the primary purpose of a CPI is to determine the need for treatment of a child. Although no reasonable person could deny that the sexual abuse of a child is an emergency, the “ongoing emergency” examined in  *Davis* *785 was a present and immediate threat to physical safety. This record does not support that there was such an immediate threat at the time of the victim's interview. Even if it could be said that the initial purpose of the interview was treatment-oriented, its purpose ended as an evidence gathering mission. The CPI continued in asking the victim for detail regarding the abuse and continued in asking for any other instances of abuse well after the presence of abuse (and the need for treatment) had been confirmed. This probing for additional and specific detail confirms that, at the least, the primary purpose of the interview ended as an evidence-gathering mission conducted by a person specialized in carefully extracting said details from a child victim. Objectively speaking, the record indicates that the CPI was a highly specialized form of interrogation done for the purpose of establishing past facts as described in  *Davis*. This makes the statements testimonial.

That said, because Appellant was not given a prior opportunity to cross-examine the child victim, had Appellant objected the entry of the CPI against him at trial would have been erroneous as a violation of his constitutional right to confrontation. Thus, the question now becomes whether in the absence of an objection the error is fundamental as applied to Appellant's four convictions. Regarding counts one, five, and six, we conclude that the entry of the CPT tape did not constitute fundamental error.

[10] Counts one and five were independently supported by the victim's mother's testimony that the victim repeatedly got yeast infections after visiting with Appellant. In addition, she observed redness and irritation inside the victim's vagina and testified to non-testimonial hearsay statements made by the victim describing digital penetration by Appellant. Male DNA was also found on the vaginal swab taken during the victim's physical exam, indicating penile union. Regarding count six, the mother testified to her observations of the victim acting out sexual touching on her dolls and on herself, which could be taken as evidence that someone was doing the same to her. This circumstantial evidence served to confirm Appellant's acknowledgements of sexual activity with the child, as testified to by Detective Leach. The entirety of the record considered, we must conclude that it cannot be said

that verdicts on counts one, five, and six “could not have been obtained without the assistance of the alleged error.”

[11] Count two—which alleged union of Appellant's penis with the victim's anus—is not supported by other record evidence. Had the CPI not been entered into evidence, no grounds on which the jury could have logically found guilt on count two existed. That said, we must conclude that Appellant's trial on count two was permeated with the invalidity of the erroneous admission of the CPI tape. Therefore, the error on count two is fundamental.

The foregoing considered, Appellant's judgment and sentence on counts one, five, and six are affirmed because, even if the admission of the CPI was error, it was not fundamental as to these counts. As to count two, because the only evidence presented was contained in the CPI, the error must be deemed fundamental as that conviction could not have been obtained without it. Thus, Appellant's judgment and sentence as to count two is reversed.

II. Ineffective Assistance of Counsel

[12] [13] [14] Appellant next argues that his trial counsel acted ineffectively in failing to specifically object to the CPI on confrontation grounds. Ineffectiveness claims are rarely cognizable on direct appeal. *786 *Sims v. State*, 260 So. 3d 509, 512 (Fla. 1st DCA 2018). Such claims are only appropriate outside of a postconviction motion when “the appellant demonstrates ineffectiveness on the face of the record, ‘indisputable prejudice,’ and the lack of any conceivable tactical explanation for counsel's action.” *Id.* (citing *Morales v. State*, 170 So. 3d 63, 67 (Fla. 1st DCA 2015)). We disagree with Appellant that his ineffective assistance claim is plain on the face of the record. Thus, it is not appropriately brought in his direct appeal and must instead be brought in a postconviction motion.

III. Jury Empanelment

[15] For his final issue, Appellant argues that the empaneling of a six-person jury for his trial was erroneous. Appellant is correct that Florida law requires a twelve-person jury for all “capital cases” while requiring six for “all other criminal cases.”² § 913.10, Fla. Stat. (2017). Furthermore, a person eighteen or older who commits a sexual battery upon a person less than twelve has committed a “capital felony” and may

be sentenced either to death or life in prison without the possibility of parole. §§ 775.082(1)(a), 794.011(2)(a), Fla. Stat. (2017). However, the Supreme Court has declared that a defendant cannot be sentenced to death for a sexual battery or the crime of rape of a child, leaving life in prison as the only possible sentence. See *Kennedy v. Louisiana*, 554 U.S. 407, 413, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); *Buford v. State*, 403 So. 2d 943, 954 (Fla. 1981).

Appellant reasons that because section 913.10 requires a twelve-person jury in all “capital cases,” and because section 794.011(2)(a) labels Appellant's crime as a “capital felony,” it is the clear intent of the Legislature that his crime be tried by a twelve-person jury. That said, Appellant acknowledges that the Florida Supreme Court has previously rejected this argument. See *State v. Hogan*, 451 So. 2d 844, 845 (Fla. 1984). In *Hogan*, the court interpreted the term “capital case” to mean “one where death is a possible penalty.” *Id.* at 845. Therefore, even though sexual battery of a child under twelve is labelled a “capital felony,” it is not a “capital case” under section 913.10 by virtue of *Buford* and *Kennedy*. See *id.*³ Because capital sexual battery is not a capital case under section 913.10, a six-person jury is required. See *Id.* at 845–46. Accordingly, we affirm Appellant's third issue.

[16] The Florida Supreme Court possesses discretionary jurisdiction regarding questions of great public importance passed to it by certification from a district court. See Fla. R. App. P. 9.030(a)(2)(A)(v). Appellant cites our respected colleague's concurring opinion in *Lessard v. State* in support of his argument that the jury question is one of great public importance which this Court should certify. 232 So. 3d 13 (Fla. 1st DCA 2017) (Makar J., concurring) (questioning the decision in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which upheld Florida's use of six-member juries in all non-capital cases, based on current research and evidence). Although the subject matter is related, the legal issue examined in *Lessard* and the issue here are different. The propriety of Florida's general use of six-person juries is a fair question for debate. It *787 is a legislative question, and, as explained in Judge Makar's *Lessard* concurrence, it is a constitutional issue.

 *Hogan* centered—as does this case—on the statutory interpretation of the phrase “capital cases” in [section 913.10](#).

 *Hogan*’s resolution of the issue was straightforward and consistent with previous supreme court precedent.

 *Hogan*’s interpretation of the language in [section 913.10](#) is not outlandish or controversial, and that interpretation is an entirely separate issue from the questions now raised regarding the Florida Legislature’s decision to use six-person juries in any non-capital case (and regarding the U.S. Supreme Court’s decision to affirm that choice under the U.S. Constitution). Thus, there is no indication that any current re-interpretation of said language would yield a result different from  *Hogan*’s. That said, we decline Appellant’s request to certify any question to the supreme court.

IV. Conclusion

Appellant’s convictions are affirmed regarding counts one, five, and six. However, we agree with Appellant that his conviction on count two must be reversed because the violation of his right to confrontation constituted a fundamental error. The case is remanded for a retrial on count two, should the State choose to try him a second time.

The foregoing considered, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this opinion.

[Bilbrey, J.](#), concurs; [Makar, J.](#), concurs with written opinion.

[Makar, J.](#), concurs with opinion.

I fully concur but write to update my observation in [Lessard v. State](#) that reconsideration of the Supreme Court’s jury size decision in  *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which upheld the use of six-member juries in state court criminal cases, was a “jurisprudential dark horse.” 232 So. 3d 13, 13 (Fla. 1st DCA 2017) (Makar, J., concurring).

Since that observation four years ago, the Supreme Court issued its decision last year in  *Ramos v. Louisiana*, which held that the Sixth Amendment right to jury trial requires that state court verdicts in criminal cases be unanimous, overruling its precedents from the early 1970s to the contrary.

 — U.S. —, 140 S. Ct. 1390, 206 L.Ed.2d 583 (2020) (abrogating  *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) and  *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)). Justice Gorsuch stated:

There can be no question either that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is “fundamental to the American scheme of justice” and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. *So if the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.*

 140 S. Ct. at 1397 (footnotes omitted) (emphasis added). On similar reasoning, if the Sixth Amendment right to jury trial requires a twelve-member jury to support a criminal conviction—as is done in every federal court (and almost every state *788 court)¹—it isn’t much of a stretch to conclude that “it requires no less in state court.”

Of note, Justice White—who authored the now-abrogated lead opinions in both  *Apodaca* and  *Johnson*—relied on his decision in  *Williams* to uphold non-unanimous verdicts in both cases. See  *Apodaca*, 406 U.S. at 406-411, 92 S.Ct. 1628 and  *Johnson*, 406 U.S. at 364, 92 S.Ct. 1620. As in  *Williams*, his view in  *Apodaca* was a functional one, saying that notwithstanding the fact that a twelve-member, unanimous jury was of ancient origin and “an accepted feature of the common-law jury by the 18th century,”  406 U.S. at 407-08, 92 S.Ct. 1628, the functions the jury “performs in contemporary society” do not require unanimity.  *Id.* at 407, 92 S.Ct. 1628. In other words, the world has changed since the time of the Founding, so the jury’s “function” can be reevaluated and a less-than-unanimous standard judicially announced.

It seems a small step from the demise of the reasoning in  *Apodaca* and  *Johnson* as announced in  *Ramos* to

conclude that the reasoning in  *Williams*, upon which both decisions relied, is also in jeopardy. For that reason, it is less of a “jurisprudential dark horse” that the issue of jury size under the Sixth Amendment may be ripe for re-evaluation.²

All Citations

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Footnotes

- 1  *Davis* also notes that a conversation which initially begins as non-testimonial has the potential to evolve into a testimonial interrogation after the purpose of determining the need for emergency assistance has been achieved.  *Davis*, 547 U.S. at 828, 126 S.Ct. 2266.
- 2 The Florida Constitution requires that the number of jurors be fixed by law. [Art. I, § 22, Fla. Const.](#)
- 3  *Hogan* addressed identical statutory language as is at issue here, however, the language was previously listed under [section 910.13, Fla. Stat.](#) See  *Hogan*, 451 So. 2d at 845.
- 1 *Lessard*, 232 So. 3d at 16–17 (Makar, J., concurring) (“The vast majority of states still choose twelve-person, unanimous juries to convict in serious criminal cases. Forty-five states require twelve unanimous jurors to convict for any felony (federal felony trials require twelve jurors); a few states permit six to eight for specified felonies.” (footnotes omitted). The “only other state [besides Florida] with six-person juries in felony cases is Connecticut. All other state and federal felony prosecutions require twelve-person juries.” Alisa Smith & Michael J. Saks, [THE CASE FOR OVERTURNING WILLIAMS V. FLORIDA AND THE SIX-PERSON JURY: HISTORY, LAW, AND EMPIRICAL EVIDENCE](#), 60 Fla. L. Rev. 441, 443 (2008).
- 2 In this case, the appellant questions the ongoing vitality of  *Williams*, and seeks assurance that he will benefit from “any decision receding from or overruling  *Williams*,” which is relief that is unavailable in this proceeding.

APPENDIX

B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

TERRY JONATHAN PHILLIPS,

Appellant/Petitioner,

CASE NO.: 1D19-0470

LT NO: 2017CF1747

v.

STATE OF FLORIDA,

Appellee/Respondent.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF FLORIDA
SUPREME COURT

Appellant/Petitioner, through the undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.120(a)-(c), hereby invokes the discretionary jurisdiction of the Florida Supreme Court to review the April 23, 2021, decision of this Court. Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, allows the Florida Supreme Court to exercise its discretionary jurisdiction where the decision of a district court of appeal expressly construes a provision of the federal constitution. The First District's decision in the instant case expressly construes a provision of the Sixth Amendment of the United States Constitution.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, at

RECEIVED, 05/24/2021 08:54:31 AM, Clerk, First District Court of Appeal

crimapptlh@myfloridalegal.com, this 24th day of May, 2021.

Respectfully submitted,

/s/ Victor Holder

VICTOR HOLDER

Assistant Public Defender

Florida Bar No. 71985

Leon County Courthouse

301 South Monroe Street, Suite 401

Tallahassee, FL 32301

(850) 606-8500

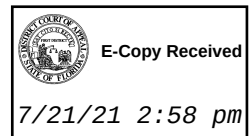
victor.holder@flpd2.com

ATTORNEY FOR

APPELLANT/PETITIONER

APPENDIX

C



Supreme Court of Florida

WEDNESDAY, JULY 21, 2021

CASE NO.: SC21-788

Lower Tribunal No(s).:

1D19-470;

572017CF001747CFAXMX

TERRY JONATHON PHILLIPS vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, LAWSON, COURIEL, and GROSSHANS, JJ.,
concur.

A True Copy

Test:

A handwritten signature in dark ink, appearing to read "John A. Tomasino", written over a horizontal line.

John A. Tomasino

Clerk, Supreme Court



CASE NO.: SC21-788

Page Two

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Served:

TRISHA MEGGS PATE

VICTOR HOLDER

JEFFREY PAUL DESOUSA

HON. DAVID HAROLD RIMMER

HON. KRISTINA SAMUELS, CLERK

HON. DONALD C. SPENCER, CLERK