No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JHON ALBERT CARRIZALES PRETELL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to Florida's First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

JESSICA J. YEARY
Public Defender
Second Judicial Circuit of Florida

BARBARA BUSHARIS
Assistant Public Defender
Counsel of Record for Petitioner
Member of the Bar of this Court
Second Judicial Circuit of Florida
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
(850) 606-8500
victor.holder@flpd2.com

QUESTION PRESENTED

1. Whether the Sixth Amendment requires a twelve-person jury to try a criminal defendant accused of a felony offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONAL PROVISIONS **PAGE(S)**

PETITION FOR WRIT OF CERTIORARI

Jhon Albert Carrizales Pretell petitions for a writ of certiorari to review the decision of Florida's First District Court of Appeal.

OPINIONS BELOW

The decision of Florida's First District Court of Appeal was rendered June 8, 2022. See Pretell v. State, 339 So. 3d 506 (Fla. 1st DCA 2022). A copy of the decision is attached as Appendix A.

JURISDICTION

The First District Court of Appeal affirmed Pretell's conviction, but it did not address in its opinion Pretell's argument that his constitutional rights under the Sixth and Fourteenth Amendment were violated when he was tried by a jury made up of less than twelve people. The Florida Supreme Court is a court of limited jurisdiction with authority to hear only those matters specified in Florida's Constitution. Mallet v. State, 280 So. 3d 1091, 1092 (Fla. 2019). The Florida Supreme Court lacked jurisdiction to review the First District's opinion in Pretell because the decision did not expressly construe a provision of the federal Constitution, certify a question of great public importance, or certify a conflict with a decision of another district court of appeal. Art. V, § 3, Fla. Const. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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 defense.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The State of Florida charged Pretell with one count of capital sexual battery of a victim younger than twelve years of age by a defendant eighteen years of age or older (R 87)[1]. Under Florida law, Pretell faced a mandatory life sentence if convicted as charged. Pretell was tried by a jury made up of six members. Pretell was convicted as charged (R 168). Pretell was sentenced to life in prison with no chance for parole (R 192). Pretell did not raise the 12-person jury issue in the trial court. The 12-person jury issue was raised by Pretell for the first time on appeal as fundamental error. Pretell appealed his convictions to the First District Court of Appeal where he raised three issues: (1) the trial court committed reversible error by allowing the detective who interrogated Pretell to testify that he knew Pretell was lying during the interrogation because of cues provided by Pretell's body language; (2) the cumulative effect of multiple errors deprived Pretell of a fair trial; and (3) his Sixth Amendment right to a trial by jury was violated where he was tried by a jury of less than twelve members. The First District affirmed Pretell's conviction and sentence in Pretell.

1 Reference to the record on appeal will be in the form of "R" followed by the appropriate page number, all in parentheses.

REASONS FOR GRANTING THE PETITION

Florida violated Pretell's Sixth and Fourteenth Amendment rights when Pretell was convicted by a jury of less than twelve members.

This case tests whether the Court's holding in Williams v. Florida, 399 U.S. 78 (1970), that the Sixth Amendment right to a trial by jury does not compel a twelve-member jury is still tenable following the Court's more recent decisions in which it has discarded the functional approach to jury trials in favor of the practice of trial by jury as it existed at common law.

In Williams, the Court dismissed the common law practice of impaneling a jury of twelve members when it determined "that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that [the] refusal to impanel more than the six members provided for by Florida law did not violate [a defendant's] Sixth Amendment rights as applied to the States through the Fourteenth [Amendment]." Williams at 86. The Court undertook a functional analysis of jury size, concluding that twelve is no better than six for reaching a reliable verdict in criminal cases. Id. at 99-100.

Thereafter, the Court again rejected historical norms in assessing the issue of jury unanimity in state court criminal proceedings. Much like its analysis in Williams, the Court concluded that jury unanimity is not required under the Sixth

Amendment – at least when juries are ten or larger – because it does not materially contribute to the exercise of [jurors'] commonsense judgment." Apodaca v. Oregon, 406 U.S. 404, 410 (1972). Applying a "functional" approach again, a plurality "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one" such that "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" whether unanimity is required or not. Id. at 410-11. The various opinions, concurring and dissenting, reflected no consensus on a coherent analytical approach.

In Johnson v. Louisiana, 406 U.S. 356, 364 (1972), the Court addressed a tiered jury system where "less serious crimes [are] tried by five jurors with unanimous verdicts, more serious crimes required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated." In upholding a 9-3 verdict, the Court concluded that the differential jury system served a rational interest, the state legislature "obviously intend[ing] to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." Id. at 365.

The Court invalidated a five-member jury in Ballew v. Georgia, 435 U.S. 223 (1978), but no coherent framework emerged for analyzing jury size under the Sixth Amendment. Two justices (Blackmun and Stevens) posited that juries of less than six members substantially threatened the constitutional guarantee of the jury trial right, notwithstanding the cost-saving and time-saving arguments that Georgia advanced. Their analysis reflected that most of the major premises underlying the functional approach in Williams were inaccurate. Justice White asserted that the requirement that a jury be a fair cross-section of the community would be violated with juries of less than six members. And three justices (Chief Justice Burger and Justices Powell and Rehnquist) agreed that a conviction for serious offenses by juries of five members "involves grave questions of fairness" and that "the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved." Id. at 245-46. Finally, three justices (Brennan, Stewart, and Marshall) concurred only in the holding that "the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons." Id. at 246. The Ballew Court raised five key inadequacies of a smaller jury:

> First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the

> common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.
> …
> Second, the 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.
> …
> Third, the 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.
> …
> Fourth, what has just been said about the presence of minority viewpoint as juries decrease in size foretells problems not only for jury decision making, but also for the representation of minority groups in the community. The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. … The exclusion of elements of the community from participation contravenes the very idea of a jury… composed of the peers or equals of the person whose rights it is selected or summoned to determine.
> …
> Fifth, several authors have identified in jury research methodological problems tending to mask differences in the operation of smaller and larger juries such that standard variances in smaller juries were greater.

Ballew at 232-39.

In Burch v. Louisiana, 441 U.S. 130 (1979), the Court again noted the less-than-satisfactory nature of its functional approach, this time considering whether a

conviction for a non-petty state offense by a non-unanimous six-person jury was constitutional. The Court stated:

> As in Ballew, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved.

Id. at 137.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court rejected a functional approach to the right to a jury trial in favor of the "practice" of trial by jury as it existed "at common law":

> As we have, unanimously, explained . . . the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the 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 [the defendant's]equals and neighbours . . . " 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). See also Duncan v. Louisiana, 391 U.S. 145, 151-154 (1968).

Apprendi at 477.

In Blakely v. Washington, 542 U.S. 296 (2004), in which the Court applied Apprendi and clarified the definition of the "statutory maximum" for any offense, the Court repeated its reference to the "suffrage of twelve" and then re-emphasized the critical nature of trial by jury:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Id. at 305-06.

The Court in Blakely focused on "the Framers' paradigm for criminal justice." Id. at 313. This shift in constitutional perspective calls into question the Court's holding in Williams, which was based on the functional approach to the right to a jury trial.

Florida courts have also questioned the Williams holding. The Florida Supreme Court noted that the empirical studies Ballew relied upon supported the use of a twelve-person jury:

> Interestingly, this analysis and the social studies on jury size and small group dynamics cited by the Court also provide support for the traditional twelve-person jury, a requirement the Court had refused to mandate in Williams v. Florida.

Blair v. State, 698 So. 2d 1210, 1216 (Fla. 1997). Building upon the Court's Ballew holding, Florida's Second District Court of Appeal cited to additional empirical studies and other scholarly sources demonstrating the superiority of the twelve-person jury in Gonzalez v. State, 982 So. 2d 77, 82-84 (Fla. 2d DCA 2008):

> Mr. Gonzalez is not alone in arguing that advances in the understanding of small group decision-making and trends in the law of other states support another examination of the *Williams* rationale. In 1995, the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States proposed that the Federal Rules of Civil Procedure be amended to require twelve-person juries in civil cases. *See Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence,* 163 F.R.D. 91 (transmitted by the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States for Notice and Comment, September 1995). The text of the proposed committee note to follow the proposed amended rule explained:
>
> > Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are

> strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science. *Id.* at 147.

On February 14, 2005, the American Bar Association House of Delegates approved *Principles for Juries and Jury Trials,* a document prepared by the American Jury Project after an October 2004 symposium. Principle 3 is entitled "Juries Should Have Twelve Members" and calls for twelve-person juries in any criminal case that might result in a penalty of confinement of over six months. Moreover, as mentioned at the beginning of this opinion, Florida is one of only two states that now consistently allow serious felony cases to be decided by juries with as few as six members. *See* David B. Rottman & Shauna M. Strickland, *State Court Organization 2004,* United States Department of Justice, Bureau of Justice Statistics, Table 42 at 233, available at http://www.ojp.usdoj.gov/bjs/abstract/sco04.htm (last visited Mar. 18, 2008).

The extensive development in the study of small group decision-making since 1970 is well beyond the scope of this opinion. There clearly is more scientific evidence today than in 1970 that a twelve-person jury may be superior to a six-person jury to accomplish the functions, purposes, and goals identified by the *Williams* court. Ensuing scholarship has criticized the empirical authorities upon which the *Williams* court relied, *see* Robert H. Miller, Comment, *Six of One Is Not a Dozen of the Other: A Re-Examination of Williams v.*

Florida and the Size of State Criminal Juries, 146 U. Pa. L. Rev. 621, 652 (Jan. 1998), and collected more empirical studies that contradict the conclusions of the Court, *see, e.g.,* Michael Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size,* 21 L. & Hum. Behav. 451 (1997). The scholarship and evidence in this regard, however, are not undisputed, and the various scientific theories are not necessarily cohesive.

In Mr. Miller's article, *Six of One is Not a Dozen of the Other: A Re-examination of Williams v. Florida and the Size of State Criminal Juries,* the author concludes:

> As the *Ballew* Court admitted, we now know that six- and twelve-person juries are not functionally equivalent, as the *Williams* Court assumed. We know that recall of facts, testimony, and in-court observations are compromised significantly when a six-person jury is used in place of a twelve-person jury. We know that the rate of hung juries declines and the rate of conviction rises when smaller juries are used. We know that minority representation, community representativeness, and quality of deliberation all decrease when six-person juries are used. Finally, we know that six-person juries are less reliable than twelve-person juries, because they are less consistent in rulings on similar cases and because they decide all cases at greater variance from larger community preferences.

146 U. Pa. L. Rev. at 682-83 (footnotes omitted).

Gonzalez at 82-84 (footnotes omitted).

The Court's holding in Ramos v. Louisiana, 140 S.Ct. 1390 (2020), continues the Court's trend of discarding the functional approach to jury trials and again casts doubt on the continued viability of Williams. Ramos held that the Sixth Amendment right to a jury trial requires that state court verdicts in criminal cases be unanimous, overruling contrary precedents from the early 1970s (Apodaca and Johnson). Justice Gorsuch wrote in Ramos:

> 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.

Ramos at 1397.

"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 court)[2] – it isn't much of a stretch to conclude that 'it

2 Lessard v. State, 232 So. 3d 13, 16–17 (Fla. 1st DCA 2017) (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

requires no less in state court.'" Phillips v. State, 316 So. 3d 779, 787 (Fla. 1st DCA 2021) (J. Makar, concurring). Following Ramos, "[i]t 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." Phillips at 788 (J. Makar, concurring). "For that reason… the issue of jury size under the Sixth Amendment may be ripe for re-evaluation." Id.

This case presents the Court with the opportunity to clarify its jurisprudence regarding the Sixth Amendment's jury size requirement for the trial of felony offenses. The functional approach to jury size, upon which the Court's opinion in Williams stands, has seemingly been eroded by the Court's more recent opinions. The Court should now return to the longstanding precedent in place before Williams, which focused on the meaning of the word "jury" as understood by the founders at the time of the adoption of the Constitution:

> Assuming, then, that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury

---

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).

> constituted, as it was at common law, of twelve persons, neither more nor less. (Citation omitted.) This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' (Citation omitted.) In Bac. Abr. tit. 'Juries,' it is said: 'The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of the being devested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.' 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 when Thompson committed the offense of grand larceny in the territory of Utah – which was under the complete jurisdiction of the United States for all purposes of government and legislation – the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

Thompson v. State of Utah, 170 U.S. 343, 349-50 (1898).

CONCLUSION

Pretell respectfully requests that the Court grant a writ of certiorari to review the judgment of Florida's First District Court of Appeal.

/s/ Barbara Busharis
BARBARA BUSHARIS
Assistant Public Defender
Office of the Public Defender,
Second Judicial Circuit of Florida
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301

Member of the Bar of this Court

INDEX TO APPENDICES