No.

IN THE SUPREME COURT OF THE UNITED STATES

JIMMIE JEROME MANNING, JR.,

PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

---------□-----------------

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments guarantee the right to a trial by a 12-person jury when the defendant is charged with a felony?

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PETITION FOR A WRIT OF CERTIORARI

Jimmie Jerome Manning Jr. respectfully petitions for a writ of certiorari to review the judgment in this case of the Second District Court of Appeal of Florida.

INTRODUCTION

Does the U.S. Constitution require a jury of twelve persons to deliberate in a felony criminal case? Since the enshrinement of the right to a trial by jury in the Magna Carta and continuing late into the Twentieth Century, the answer was clear and singular: a jury of 12 is required. "[N]o person could be found guilty of a serious crime unless 'the truth of every accusation … should … be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" *Ramos v. Louisiana*, 590

U.S. __, 140 S. Ct. 1390, 1395 (2020). "A verdict, taken from eleven, was no verdict at all." *Id*. (quotation marks omitted).

This traditional 12-person jury requirement is of historical significance, confirming "what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption." *Ramos*, 140 S. Ct. at 1395. This is not a mere legislative grant, but was recognized by "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward." *Id*. This Court long before stated that because the 12-person requirement has been accepted since 1215, "[i]t must" have been "that the word 'jury'" in the Sixth Amendment was "placed in the constitution of the United States with reference to [that] meaning affixed to [it]." *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898) (emphasis added).

The Court, however, took a decidedly controversial turn in *Williams v. Florida*, 399 U.S. 78, 86 (1970), by altering the constitutional landscape to hold that 6-person juries are constitutionally permissible. *Williams* discounted the historical record by acknowledging the Framers "may well" have had "the usual expectation" in drafting the Sixth Amendment "that the jury would consist of 12" members. *Id*. at 98-99. Instead, *Williams* remarked that the "function" of a jury is decision-making made with "community participation and [with] shared responsibility"—a task it thought empirical research suggested could be as easily performed with six jurors as with twelve. *Id*. at 100-102 & n.48. But despite that rationale, only six States—including Florida—currently "tolerate smaller panels—and it is difficult to reconcile their outlying practices with the Constitution." *Khorrami v. Arizona*, 598 U.S. __, 143 S.

Ct. 22 (2022) (Gorsuch, J., dissenting from denial of certiorari).[1] As acknowledged by Justice Gorsuch, post-*Williams* research undermines the Court's earlier reliance on studies promoting the validity of smaller juries. *Id.*, at *26-27.

> An array of studies in the years since *Ballew* has done more of the same. These studies suggest that 12-member juries deliberate longer, recall information better, and pay greater attention to dissenting voices. See, *e.g.*, M. Saks & M. Marti, A Meta-Analysis of the Effects of Jury Size, 21 Law & Hum. Behav. 451, 455–466 (1997). This research continues to suggest that smaller juries are less likely to include minorities. See, *e.g.*, *id.*, at 455-457; S. Diamond, et al., Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge, 6 J. Empirical Legal Studies 425, 442 (2009) (summarizing the results of one study: "While 28.1 percent of the six-member juries lacked even one black juror, only 2.1 percent of the 12-member juries were entirely without black representation"). And this research suggests that the absence of minorities can have a striking effect on outcomes. According to one study, "there is a significant gap in conviction rates for black versus white defendants when there are no blacks in the jury pool," while "the gap in conviction rates for black versus white defendants is eliminated" when there is at least one black member of the jury pool. S. Anwar, et al., The Impact of Jury Race in Criminal Trials, 127 Q. J. Econ. 1017, 1019–1020, 1034–1035 (2012); see also S. Sommers & P. Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 Chi.-Kent L. Rev. 997, 1028–1029 (2003) (discussing an experiment showing that "White jurors on racially mixed juries were less likely to vote to convict [a] Black defendant than White jurors on all-White juries").

In felony cases, and especially in a case involving a capital felony, the time is ripe to jettison the *Williams* experiment and return to the historically tested and now scientifically verified jury of twelve. Just as *Ramos* overturned an analogous decision that permitted a defendant to be convicted of a serious felony by a non-unanimous

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[1] The six States allowing felony convictions to be decided by fewer than 12-person juries are: Arizona, *see* A.R.S. § 21-102; Connecticut, *see* Conn. Gen. Stat. § 54-82; Florida, *see* Fla. R. Crim. Proc. 3.270; Indiana, *see* Ind. Code § 35-37-1-(b)(2); Massachusetts, *see* Mass. Gen. Laws, ch. 218, § 26A; and Utah, *see* Utah Code § 78B-1-104.

jury, this is an identical opportunity to restore certainty and stability to the law in situations "concerning [criminal] procedure[e] rules that implicate fundamental constitutional protection." *Alleyne v. United States*, 570 U.S. 99, 115 n.5 (2013). From a practical perspective, the *Ramos* reasoning is a persuasive indicator that *Williams* should be overruled since *Ramos* rejected precisely "the same fundamental mode of analysis" as that adopted in *Williams*. *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

The *Williams* reasoning is mistaken, disregarding history and precedent in favor of now-discredited empirical research. *Williams*'s holding prejudicially alters the likely outcomes by juries in felony cases and is especially troublesome for capital crimes. Continued adherence to *Williams* increases the odds of erroneous convictions and decreases the representative nature of juries in Florida and the other affected States. Any "reliance interest" Florida and the other States might claim in having to "retry a slice of their prior criminal cases … cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 140 S. Ct. at 1408 (plurality op.); *id*. at 1419 (Kavanaugh, J., concurring in part) (invalidating the "limited class" of convictions that violate the Sixth Amendment is a "'small price to pay for the uprooting of this weed'").

The petition for certiorari should be granted.

OPINION BELOW

The opinion of Florida's Second District Court of Appeal is reported as *Manning v. State,* 2023 Fla. App. LEXIS 6157, 2023 WL 5658829 (Fla. 2d DCA Sept.

1, 2023), and is reprinted in the appendix. App. 1. The Order denying petitioner's motion for certification of question of great public importance and for issuance of a written opinion on an unaddressed point was delivered on October 11, 2023, and is reprinted in the appendix. App. 2.

JURISDICTION

Florida's Second District Court of Appeal *per curiam* affirmed Manning's conviction and sentence on September 1, 2023. App. 1. On October 11, 2023, the Second District denied petitioner's motion for certification of the following question of great public importance: Do the Sixth and Fourteenth Amendments guarantee the right to a trial by a 12-person jury when the defendant is charged with a capital felony? App. 2, 18-34. Petitioner's request for issuance of a written opinion was also denied on that day. The appellate decision is final because the Florida Supreme Court has no jurisdiction to review a "per curiam affirmance." *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *see also Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 139 n.4 (1987) (acknowledging that "[u]nder Florida law, a per curiam affirmance issued without opinion cannot be appealed to the State Supreme Court" and therefore petitioner "sought review directly in this Court."). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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 defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

Florida Statutes, § 913.10: "Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."

STATEMENT OF THE CASE

Petitioner Jimmie Manning was convicted by a six-person jury of two capital felonies, sexual battery of a child under 12-years of age. He was sentenced to two concurrent terms of natural life in Florida State Prison. App. 6. Prior to trial, he timely requested a 12-person jury panel for the capital offenses. That request was denied. App. 3-5. Following his conviction by a six-person jury over his objection, petitioner appealed to the Second District Court of Appeal of Florida. Petitioner relied on the constitutional issue raised in District Judge Makar's concurrence in *Lessard v. State*, 232 So. 3d 13, 13-15 (Fla. 1st DCA 2017) (Makar, J. concurring with written opinion) (declining request for certification), addressing the continued vitality of *Williams v. Florida*, 399 U.S. 78 (1970) which upheld Florida's use of six-member juries in non-death penalty criminal cases. Petitioner argued he was entitled to be tried by a twelve-person jury for his capital felony offenses punishable by life

imprisonment without parole. App. 10-16. The District Court did not specifically address this or any other issue in affirming petitioner's convictions. App. 1.

Petitioner's Motion for Certification of Question of Great Public Importance advanced his constitutional claim with reference to *Ramos v. Louisiana*, 140 S. Ct. 1390, 1391 (2020) (Sixth Amendment right to a jury trial, as incorporated against the States through the Fourteenth Amendment, required unanimous verdict to convict a defendant of a serious offense), arguing that Florida law is incompatible with prevailing U.S. Supreme Court precedent and is inconsistent with the purpose and meaning of the Sixth and Fourteenth Amendments to the U.S. Constitution. App. 18-32. Petitioner asked the Second District Court of Appeal to revisit the *State v. Hogan*, 451 So. 2d 844, 845 (Fla. 1984) line of cases interpreting the term "capital case" to mean "one where death is a possible penalty." *See Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022) (J. Gross, specially concurring) (conviction by six-person jury of sexual battery on a child under 12 years of age did not violate Sixth and Fourteenth Amendments), *rev. denied*, 2023 WL 3830251 (Fla. 2023); *Hall v. State*, 853 So. 2d 546, 547 (Fla. 1st DCA) (defendant not entitled to 12-person jury because death penalty not possible as a matter of law; appellate court certified question of great public importance), *rev. denied*, 865 So. 2d 480 (Fla. 2003); *Lessard v. State*, 232 So. 3d 13 (Fla. 1st DCA 2017) (declining requested certification). Petitioner urged the appellate court to conclude he was entitled under the Sixth and Fourteenth Amendments to a twelve-person jury. App.32.

In his concurring opinion in *Guzman*, Judge Gross wrote that "*Ramos* ... suggests that *Williams* was wrongly decided," that "Guzman has a credible argument that the original public meaning of the Sixth Amendment right to a 'trial by an impartial jury' included the right to a 12-person jury," and that "*Williams* hovers in the legal ether, waiting for further examination by the [United States] Supreme Court." *Guzman*, 350 So. 3d at 78 (emphasis and citations omitted). Considering this question to be significant, the Court directed the State of Florida to respond to at least five pending petitions asking the same question Manning poses: Whether the Sixth and Fourteenth Amendments guarantee the right to a trial by a 12-person jury when the defendant is charged with a felony? *See Crane v. Florida*, U.S. Supreme Court Case No. 23-5455 (25-year prison sentence for drug trafficking offense) (response from State of Florida requested on September 18, 2023, and filed on October 18, 2023); *Cunningham v. Florida*, U.S. Supreme Court Case No. 23-5171 (8-year prison sentence for aggravated battery and retaliation) (response from State of Florida requested on August 8, 2023, and filed on October 17, 2023); *Guzman v. Florida*, U.S. Supreme Court Case No. 23-5173 (convictions for sexual battery and lewd and lascivious behavior on a child under 12) (response from State of Florida requested on August 31, 2023, and filed on October 19, 2023; reply filed October 31, 2023); *Sposato v. Florida*, U.S. Supreme Court Case No. 23-5575 (response from State of Florida requested on September 22, 2023, and filed on October 20, 2023); *Morton v. Florida*, U.S. Supreme Court Case No. 23-5579 (response by State of Florida requested on September 28, 2023, and filed on October 25, 2023): *Arellano-Ramirez*

v. Florida, U.S. Supreme Court Case No. 23-5567 (response by State of Florida requested on September 27, 2023, and filed on October 25, 2023; reply filed November 7, 2023); *Jackson v. Florida*, U.S. Supreme Court Case No. 23-5570 (response by State of Florida requested on September 28, 2023, and filed on October 25, 2023; reply filed November 7, 2023). Identical petitions are pending in *Aiken v. Florida*, U.S. Supreme Court Case No. 23-5794, and *Enrriquez v. Florida*, Supreme Court Case No. 23-5965.

To the extent *Williams* is binding on the 12-member jury issue in a capital felony prosecution, this Court should formally overrule that precedent.

REASONS FOR GRANTING THE PETITION

THE REASONING OF *WILLIAMS v. FLORIDA* HAS BEEN REJECTED AND THE CASE SHOULD BE OVERRULED.

The Supreme Court declared in *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898), that since the time of the Magna Carta, the word "jury" has been understood to mean a body of twelve people. Because that universal understanding had been accepted since 1215, the Court reasoned, "[i]t must" have been "that the word 'jury'" in the Sixth Amendment was "placed in the constitution of the United States with reference to [that] meaning affixed to [it]." *Id*. at 350.

This Court consistently cited the fundamental Sixth Amendment principle of a 12-person jury in criminal cases for seventy more years. In 1900, the Court explained that "there [could] be no doubt" "[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution." *Maxwell v. Dow*, 176 U.S. 581, 586 (1900). Thirty years later, the Court reiterated that it was "not open to question" that "the phrase 'trial by jury'" in the Constitution

incorporated juries' "essential elements" as "they were recognized in this country and England," including the requirement that they "consist of twelve men, neither more nor less." *Patton v. United States*, 281 U.S. 276, 288 (1930). As recently as 1968, the Court remarked that "by the time our Constitution was written, jury trial in criminal cases had been in existence for several centuries and carried impressive credentials traced by many to Magna Carta," such as the necessary inclusion of twelve members. *Duncan v. Louisiana*, 391U.S.145, 151-152 (1968).

But in a dramatic departure from precedent and historical context, in 1970, the *Williams* Court overruled this precedent in a decision described as "stripping off the livery of history from the jury trial" and ignoring both "the intent of the Framers" and the Supreme Court's long held understanding that constitutional "provisions are framed in the language of the English common law [] and ... read in the light of its history." *Baldwin v. New York*, 399 U.S. 117, 122-123 (1970) (citation omitted) (Harlan, J., concurring in the result in *Williams*). *Williams* even conceded that the Framers "may well" have had "the usual expectation "in drafting the Sixth Amendment "that the jury would consist of 12" members. *Williams*, 399 U.S. at 98-99. But *Williams* concluded that such "purely historical considerations "were not dispositive. *Id*. at. 99. Instead, the Court focused on the "function" that the jury has in the Constitution, concluding that the "essential feature" of a jury is it leaves justice to the "commonsense judgment of a group of laymen" and thus allows "guilt or innocence" to be determined via "community participation and [with] shared responsibility." *Id*. at 100-01. According to the *Williams* Court, "currently available

evidence [and] theory" suggested that function could just as easily be performed with six jurors as with twelve. *Id.* at 101-102 & n.48; *cf. Burch v. Louisiana*, 441 U.S. 130, 137 (1979) (acknowledging that *Williams* and its progeny "departed from the strictly historical requirements of jury trial").

Williams's ruling that the Sixth Amendment (as incorporated into the States by the Fourteenth Amendment) permits a six-person jury cannot stand in light of *Ramos*, where the Supreme Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious offense. *Ramos v. Louisiana*, 140 S. Ct. at 1397. The Court's analysis focused squarely on what a trial by jury "meant at the time of the Amendment's adoption." *Id.* at 1395-1396. The Court overturned *Apodaca v. Oregon*, 406 U.S. 404 (1972), a decision it faulted for "subject[ing] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment." *Ramos*, 140 S. Ct. at 1401-1402.

That reasoning undermines *Williams* as well. *Ramos* rejected the same kind of "cost-benefit analysis" the Court undertook in *Williams*, observing that the Court's role is not to "distinguish between the historic features of common law jury trials that (we think) serve 'important enough functions to migrate silently into the Sixth Amendment and those that don't.'" *Ramos*, 140 S. Ct. at 1400-01. Rather, the *Ramos* Court explained, the question is whether "at the time of the Sixth Amendment's adoption, the right to trial by jury included" the particular feature at issue. *Id.* at 1402. *Ramos* emphasized that the Court had "repeatedly and over many years[] recognized that the Sixth Amendment requires unanimity." 140 S. Ct. at 1396-1397

& nn.19-20 (citing *Thompson v. Utah*, 170 U.S. 343, 351 (1898); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930)).

Adherence to the principle of *stare decisis* provides a fundamental starting point for rejecting the *Williams* mistake. "[T]he force of stare decisis is at its nadir" in cases "concerning [criminal] procedur[e] rules that implicate fundamental constitutional protection." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). In this matter, every factor considered by this Court when evaluating precedent favors overruling *Williams*, a decision that is wrong both because of its inconsistency with history and *Ramos* and in view of the empirical studies that have been undermined and devalued. The negative consequences of *Williams* include the creation of confusion in the case law and in permitting the use of six-member juries (that are less likely to be representative and reliable than 12-member bodies). Overruling *Williams* has only a limited impact on a finite number of pending cases.

As the historical record confirmed, there is no serious doubt that the ordinary understanding of the jury trial during the Revolutionary War era was that twelve jurors were required— "a verdict, taken from eleven, was no verdict at all." *Ramos,* 140 S. Ct. at 1395 (quotation marks omitted).

Florida Supreme Court precedent, too, is decidedly in favor of a textualist construction of the Constitution at the time of its adoption. The Florida Supreme Court utilizes judicial deference to textual language as acknowledged in *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-47 (Fla. 2020).

The foundation for the *Williams* jettisoning of the "jury of twelve" guarantee relied on empirical research that was outdated almost as soon as the opinion was issued. Tellingly, the *Williams* Court "f[ou]nd little reason to think" that the goals of the jury guarantee—including, among others, "to provide a fair possibility for obtaining a representative[] cross-section of the community"—"are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12." *Id.* at 100. The Court theorized that "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." *Id.* at 102.

In the time since *Williams*, the available evidence conclusively shows the Court's empirical rationale was materially inaccurate. The Court acknowledged as much eight years later in *Ballew v. Georgia*, 435 U.S. 223 (1978), when it concluded that the Sixth Amendment barred the use of a five-person jury. Although *Ballew* did not overturn *Williams*, *Ballew* observed that empirical studies conducted in the handful of intervening years highlighted several problems with *Williams*' assumptions. For example, *Ballew* noted that more recent research showed that (1) "smaller juries are less likely to foster effective group deliberation," *id.* at 233, (2) smaller juries may be less accurate and cause "increasing inconsistency" in verdict results, *id.* at 234, (3) the chance for hung juries decreases with smaller juries, disproportionally harming the defendant, *id.* at 236, and (4) decreasing jury sizes "foretell[] problems ... for the representation of minority groups in the community," thereby undermining a jury's likelihood of being "truly representative of the

community." *Id.* at 236-37. Moreover, the *Ballew* Court "admit[ted]" that it "d[id] not pretend to discern a clear line between six members and five," effectively acknowledging that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id.* at 239; *see also id.* at 245-246 (Powell, J.) (agreeing that five-member juries are unconstitutional, while acknowledging that "the line between five and six-member juries is difficult to justify").

Post-*Ballew* research further undermined *Williams*. Current empirical evidence indicates that "reducing jury size inevitably has a drastic effect on the representation of minority group members on the jury." Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. of Empirical Legal Stud. 425, 427 (Sept. 2009); *see also* Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (Summer 2020) ("Larger juries are also more inclusive and more representative of the community .... In reality, cutting the size of the jury dramatically increases the chance of excluding minorities."); Shamena Anwar, et al., *The Impact of Jury Race In Criminal Trials*, 127 Q.J. of Econ. 1017, 1049 (2012) (finding that "increasing the number of jurors on the seated jury would substantially reduce the variability of the trial outcomes, increase black representation in the jury pool and on seated juries, and make trial outcomes more equal for white and black defendants."). Because "the 12-member jury produces significantly greater heterogeneity than does the six-member jury," Diamond et al., *Achieving Diversity on the Jury*, *supra*, at 449, it increases "the opportunity for meaningful and appropriate representation" and helps ensure that

juries "represent adequately a cross-section of the community." *Ballew*, 435 U.S. at 237.

Given Florida's use of 6-person juries not just in felony cases but also in those defined by the Florida Legislature as "capital," Florida has strayed even further from the foundational root of what a "trial by jury" means. The Florida Legislature recognizes that 12-person juries are more rights protective by requiring them in death penalty cases, using the nomenclature of "capital cases." § 913.10, Fla. Stat.; *see also* Fla. R. Crim. P. 3.270 (same).

At every stage throughout his prosecution, petitioner sought to protect and invoke his right to a jury of twelve. He moved to empanel a 12-person jury. App. 4-5. He challenged that denial on appeal. App. 10-17. Undeterred when his appeal was affirmed, he asked the appellate court to certify the 12-member jury issue to the Florida Supreme Court. App. 32. Having been deprived of his constitutional right to a jury of twelve for his capital felony trial, he now looks to this Court to reconcile this fundamental right of every criminal defendant with the Sixth Amendment guarantee. Petitioner never expressly or intelligently waived his right to a constitutionally empaneled jury. *Patton*, 281 U.S. at 312.

This Court should examine and correct the constitutional harm resulting from Florida's implementation of a 6-person jury system in felony cases. The undisputed historical basis for Florida moving to the smaller juries was the direct result of the post-Civil War reconstruction and Jim Crow laws designed to reduce minority participation. In 1875, the Jury Clause of the 1868 Florida Constitution was amended

to provide that the number of jurors "for the trial of causes in any court may be fixed by law." *See Florida Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241, 241 (Fla. 1903). The common law rule of a jury of twelve was a staple of Florida's justice system so long as federal troops remained. But a jury of fewer than twelve was authorized almost immediately after the withdrawal of federal troops, when the Legislature enacted a jury of six in Chapter 3010, section 6, Laws of Florida (1877). *See Gibson v. State*, 16 Fla. 291, 297-98 (1877); *Florida Fertilizer*, 34 So. at 241. This radical development occurred within one month of the last federal troops departing Florida in January 1877. *See* Jerrell H. Shofner, *Reconstruction and Renewal, 1865-1877*, in *The History of Florida* 273 (Michael Gannon, ed., first paperback edition 2018) ("there were [no federal troops] in Florida after 23 January 1877"). The jury-of-six was a product of the Jim Crow era as former Confederate authorities resumed control of the government apparatus. State prosecutors worked in tandem with the legislature to limit the participation of Black Americans in the judicial system.

On its face, the 1868 Florida Constitution extended the franchise to black men. But the reality of Florida's historical context shows it was part of the overall resistance to Reconstruction efforts to protect the rights of black citizens. The post-Confederacy Constitution was the product of a highly disturbing series of racial events including an outright coup in which leaders of the white southern (or "native") faction took possession of the assembly hall in the middle of the night, excluding "Radical Republican" delegates from the proceedings. *See* Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case Study of*

Republican Factionalism in the Reconstruction South, 51 Fla. Hist. Q. 1, 5-6 (1972); Shofner, at 266. A reconciliation was made possible only when the "outside" whites "united with the majority of the body's native whites to frame a constitution designed to continue white dominance." Hume, at 15.

The purpose of Florida's resulting Constitution was made alarmingly clear by Harrison Reed, a leader of the prevailing faction and the first governor elected under the 1868 Constitution, who wrote to Senator Yulee that the new Constitution was constructed to bar Black Americans from legislative office: "Under our Constitution the Judiciary & State officers will be appointed & the apportionment will prevent a negro legislature." Hume, 15-16. *See also* Shofner 266.[2]

Other important considerations weigh in favor of the protections afforded by the broader community participation in the twelve-member jury. Empirical research examined the impact of petit-jury racial composition on trial outcomes using data from all felony trials in which jury selection began in Sarasota and Lake Counties, Florida, between 2000 and 2010. Shamena Anwar, Patrick Bayer, Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials,* The Quarterly Journal of

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[2] Against that obvious racist backdrop, Florida notes that it retained 12-person juries in capital cases, essentially conceding that 12-person juries are more rights protective by using them for death-eligible crimes. But even here, recent actions by the Florida Legislature demonstrate that Florida's status as an outlier in jury matters is even more extreme, additionally justifying this Court's involvement. Florida now allows non-unanimous jury decisions in death penalty cases, § 921.141, Florida Statutes (2023), veering once again from this Court's *Ramos* precedent for jury unanimity. *Ramos*, 140 S. Ct. at 1401-02. And the Legislature decided again that capital sexual battery, the same offense for which petitioner was charged and convicted, is eligible for imposition of the death penalty, § 921.1425, Florida Statutes (2023), despite the Court's ruling in *Coker v. Georgia*, 433 U.S. 584 (1977).

Economics, Vol. 127, Issue 2, May 2012, Pages 1017–1055, https://doi.org/10.1093/qje/qjs014. The study concluded that (1) juries formed from all-white jury pools convict black defendants significantly (16%) more often than white defendants, and (2) this gap in conviction rates is entirely eliminated when the jury pool includes at least one black member. The findings implied that the application of justice is highly uneven and raises obvious concerns about the fairness of trials in jurisdictions with a small proportion of black persons in the jury pool.

Petitioner asks this Court to do what the Florida Supreme Court and the Florida Legislature have been unwilling to do. The time to grapple with the *Williams* legacy is now. As expressly construed in the United States Constitution, the Sixth and Fourteenth Amendments guarantee the right to a trial by a 12-person jury when the defendant is charged with a felony crime.

CONCLUSION

The petition for a writ of certiorari should be granted.

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