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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

HOWARD L. "REX" DIMMIG II
PUBLIC DEFENDER
10TH JUDICIAL CIRCUIT, APPELLATE DIVISION
P. O. BOX 9000
BARTOW, FL 33830 9000
TEL: 863.534.4200
EHOVIS@PD10.ORG
APPEALFILINGS@PD10.ORG
SAPD@PD10.ORG

BENEDICT P. KUEHNE
COUNSEL OF RECORD
MICHAEL T. DAVIS
SUSAN DMITROVSKY
SPECIAL ASSISTANT PUBLIC DEFENDER
KUEHNE DAVIS LAW, P.A.
100 S.E. 2 STREET, SUITE 3105
MIAMI, FL 33131
TEL: 305.789.5989
EFILING@KUEHNELAW.COM
APPEALFILINGS@PD10.STATE.FL.US

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DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JIMMIE JEROME MANNING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-11

September 1, 2023

Appeal from the Circuit Court for Pasco County; Mary M. Handsel, Judge.

Howard L. Dimmig, II, Public Defender, and Benedict P. Kuehne and Michael T. Davis, Special Assistant Public Defenders, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and James A. Hellickson, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SLEET, C.J., and VILLANTI and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT
1700 N. TAMPA STREET, SUITE 300, TAMPA, FL 33602

October 11, 2023

CASE NO.: 2D22-0011
L.T. No.: 18-CF-4007

JIMMIE JEROME MANNING	v.	STATE OF FLORIDA
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for certification of question of great public importance and for issuance of written opinion on unaddressed point is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

mep

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

Served:

ATTORNEY GENERAL, TAMPA
HOWARD L. DIMMIG, I I, P. D.
MICHAEL TERRELL DAVIS, ESQ.
JIMMIE JEROME MANNING
BENEDICT P. KUEHNE, ESQ.
JAMES AARON HELLICKSON, A.A.G.
P.D.10 S.A.P.D.
PASCO CLERK

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NUMBER: 2018CF004007CFAXWS

JIMMIE JEROME MANNING, JR.,

Defendant.

_____/

PROCEEDINGS:	Pretrial Conference
DATE:	November 16, 2021
BEFORE:	HONORABLE MARY HANDSEL Circuit Court Judge
PLACE:	Pasco County Government Center 7530 Little Road New Port Richey, Florida 34564
REPORTER:	Heidi L. Miller Digital Court Reporter

Administrative Office of the Courts
Office of Digital Court Reporting
Pasco County Judicial Center
7530 Little Road
New Port Richey, Florida 34654
(727)847-8156

PROCEEDINGS

MR. FISCHETTI: I did want to let the Court know and I'm happy to hear any of the Court's input as well. I was doing some research as we came in here. The way Mr. Manning is charged is as a capital offense even though obviously death is not a potential punishment based on the case law and the history in these types of cases, but he is charged with a capital offense.

So in reviewing some of the things, it's my belief that unless the Defense waives the right to be a 12-member jury, that that's something that the Court would have to do. So I just wanted to bring that to the Court's attention as far as --

THE COURT: That's not true. There's case law that says that's not true. So I appreciate that you said that, but I've done enough of these that I know what the case law says. And the case law does not say that I have to do a 12-man jury. The case law says that it's six unless he can get death, and he can't get death.

So yes, it's capital. Yes, he's looking at life but it's six. So I've done this for 30 years and I've had people raise this before both as a prosecutor and a judge and the case law is pretty

clear. So, I mean, unless you have a new case from the Supreme Court, it will be six. But, you know, one way or another we still have enough jurors.

So other than the jury question are you ready to go with witnesses and evidence?

MR. FISCHETTI: Yes, Your Honor.

THE COURT: Okay. Ms. Vergos?

MS. VERGOS: Yes, Judge. We'll be ready to go.

THE COURT: We're good?

MS. VERGOS: Yes.

THE COURT: Okay. Will there be any pretrial motions that you're going to be raising, motions in limine, Counsel?

MR. FISCHETTI: Judge, there's one matter that I think, depending on the State's presentation of the evidence, that we would need to address regarding Mr. Manning's detention in Tampa. So there would be probably one matter that we would have to bring up.

THE COURT: State, are you going to bring up his detention in Tampa?

MS. VERGOS: I am.

THE COURT: Okay. What's that all about?

MS. VERGOS: Judge, the Defendant after the

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

State of Florida
VS
JIMMIE JEROME MANNING JR

Case Number: **2018CF004007CFAXWS**

SENTENCING ORDER
(As To Count 1 & 2)

The Defendant, being personally before this court and accompanied the defendant's attorney of record, Daniel P Fischetti, and having been adjudicated guilty herein, and the court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

☐ and the Court having on _____ deferred imposition of sentence until this date

☐ and the Court having previously entered a judgment in this case on _____ now resentences the Defendant

☐ and the Court having placed the Defendant on probation / community control and having subsequently revoked the defendant's probation / community control. The Court found the defendant in violation of specific conditions of probation/community control, see attached affidavit.

It is The Sentence Of The Court That:

☑ The Defendant pay a fine of $ 125.72 pursuant to section 775.083, Florida Statutes, plus $ 6.28 (5% as the surcharge) required by section 938.04, Florida Statutes.

☑ The Defendant is hereby committed to the custody of the Department of Corrections.

☐ The Defendant is hereby committed to custody of the Sheriff of Pasco County, Florida.
___Option A Unless otherwise prohibited by law, the Sheriff is authorized to release the defendant on electronic monitoring or other sentencing programs subject to the Sheriff's discretion.
___Option B The Sheriff is not authorized to release the defendant on electronic monitoring or other sentencing programs.

☐ The Defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable):

☑ For a term of natural life.

☐ For a term of _____

☐ Said SENTENCE SUSPENDED for a period of _____ Subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

☐ Followed by a period of _____ Community Control / Probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

☐ However, after serving a period of _____ Imprisoned in _____ the balance of the sentence shall be suspended and the Defendant shall be placed on probation / community control for a period of _____ under the supervision of the Department of Corrections according to terms and conditions of supervision set forth in a separate order entered herein.

In the event the Defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the Defendant begins service of the supervision terms.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT
CASE NO. 2D22-0011
Lower Tribunal Case No. 2018-CF-4007CFAXWS

JIMMIE JEROME MANNING JR.,
Appellant,

versus

STATE OF FLORIDA,
Appellee.

ON DIRECT APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT, PASCO COUNTY
MARY M. HANDSEL, CIRCUIT JUDGE.

CORRECTED AND REDACTED INITIAL BRIEF OF APPELLANT JIMMIE JEROME MANNING JR.

SUSAN DMITROVSKY
Florida Bar No. 0073296
Of Counsel

BENEDICT P. KUEHNE
Florida Bar No. 233293
MICHAEL T. DAVIS
Florida Bar No. 63774
Special Assistant Public Defender, 6th Judicial Circuit, Appellate Division
P. O. Box 9000
Bartow, FL 33830-9000
efiling@kuehnelaw.com
appealfilings@pd12.state.fl.us
Counsel for Appellant Manning

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(insufficient evidence for molestation conviction where victim's out-of-court statements inconsistent with testimony and not supported by other proper corroborating evidence); *Berber v. State*, 887 So. 2d 1248 (Fla. 2004) (videotaped CPT interview of then-6-year-old admitted at trial, now 8-year-old stated defendant had touched his penis only with his hand not mouth; child hearsay inconsistent with trial testimony legally insufficient to convict where tended to refute videotaped testimony). *But see Godbolt v. State*, 319 So. 3d 773, 775 (Fla. 1st DCA 2021) (victim did not completely repudiate or recant prior out-of-court statements at trial; charges did not depend solely on hearsay statements of victim; victim's trial testimony never contradicted prior statements).

The applicable evidentiary standard does not support a finding of a competent, substantial basis for the verdicts. Considerable contradictions between the in-court testimony and inconsistencies in the girls' out-of-court statements cloud the adequacy of the evidence. A reversal and a discharge for insufficient evidence is required.

POINT 3

THE TRIAL COURT ERRED IN UTILIZING A SIX-PERSON JURY FOR A CAPITAL FELONY PUNISHABLE BY A

MANDATORY LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE.[7]

The defendant asks this Court to certify this question as a matter of great public importance in view of the evolving judicial analysis of the constitutional and statutory requirement for a 12-person jury for legislatively defined capital prosecutions. The error arising from proceeding with a six-person jury for a legislatively denominated capital offense has significant constitutional implications.

The defendant was charged with two counts of § 794.011(2) (a), a legislatively defined capital felony (R:29). During the November 16, 2021 pretrial conference (SSR:469), the defense requested a 12-person jury based on the capital charges he faced (SRR:471). He never waived his right to a jury of twelve. But the trial court denied the motion and, in the process, rebuked defense counsel (SRR:471-472).

[7] Even if the court considered that the death penalty was inapplicable, the defendant did not waive his right to be tried before a twelve-person jury for a capital case, and the trial court should not have allowed the case to proceed with a six-person jury. *See Johnson v. State*, 289 So. 3d 986, 987 (Fla. 1st DCA 2020) (citing *State v. Wong*, 271 So. 3d 74, 75 (Fla. 3d DCA 2019)).

Florida law requires a twelve-person jury for "capital cases" while requiring six jurors for "all other criminal cases." *Phillips v. State*, 316 So. 3d 779, 786 (Fla. 1st DCA 2021); § 913.10, Fla. Stat. (2017). According to the Florida Legislature, a person eighteen years or older who commits a sexual battery on a person less than twelve commits a "capital felony" and may be sentenced either to death or life in prison without the possibility of parole. *Id.* (citing §§ 775.082(1)(a), 794.011(2)(a), Fla. Stat. (2017)). But, contrary to this explicit legislative prescription, the Eighth Amendment denied the imposition of the death penalty for a non-death crime, according to the Supreme Court. *Id.*; *Kennedy v. Louisiana*, 554 U.S. 407, 413, 128 S. Ct. 2641 (2008); *Buford v. State*, 403 So. 2d 943, 954 (Fla. 1981).

In *State v. Griffith*, 561 So. 2d 528, 529 (Fla. 1990), the Florida Supreme Court recognized that neither the prosecutor nor the court could "change the classification of an offense from capital to noncapital and unilaterally determine whether a defendant is entitled to trial by a twelve-person jury." *Johnson v. State*, 289 So. 3d 986, 987 (Fla. 1st DCA 2020). Because the Legislature declared in §

913.10 that a twelve-person jury is required in all "capital cases," and because § 794.011(2)(a) denominates the charged crime as a "capital felony," the plain Legislative prescription is that capital cases be tried to a twelve-person jury. *See Phillip*s, 316 So. 3d at 786.

The defendant acknowledges the Florida Supreme Court 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 786 (citing Hogan, at 845). Although sexual battery of a child under twelve remains a legislatively defined "capital felony," the Supreme Court construes the plain text of the statute to mean the crime is not a "capital case" under § 913.10 by virtue of *Buford* and *Kennedy.*

But in view of the Court's precedential rejection of judicial re-interpretations of the clear and mandatory text of legislation, it is time for the Florida Supreme Court to revisit the *Hogan* precedent. *See Hall v. State*, 853 So. 2d 546, 547 (Fla. 1st DCA 2003) (defendant not entitled to 12-person jury because death penalty not possible as a matter of law; appellate court certified ruling as question of great public importance); *Lessard v. State,* 232 So. 3d 13 (Fla. 1st DCA

2017) (declining request for certification); *Phillips v. State*, 316 So. 3d 779 (Fla. 1st DCA 2021) (same).

In his powerful concurrence in *Lessard v. State*, 232 So. 3d 13, (Fla. 1st DCA 2017), District Judge Makar states a compelling case for *Hogan*'s reconsideration, 232 So. 3d at 13:

> Florida is the only state that requires six-member juries in life-felony cases, such as [capital sexual battery], and the empirical studies continue to discredit the *Williams* [*v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970)], decision, but the relief Lessard seeks *is a jurisprudential dark horse.*

Judge Makar described the *Williams* reasoning as "foundered on glaring misinterpretations of social science research and inept methodologies, so much so that one prominent commentator said the 'quality of social science scholarship displayed [in the Court's decisions on jury size] would not win a passing grade in a high school psychology class.'" *Lessard,* 232 So. 3d at 14. *See also Adaway v. State*, 902 So. 2d 746, 755 (Fla. 2005) (Pariente, C.J., concurring with Anstead, J. (urging Fla. R. Crim. Pro. 3.270 be amended to require 12-person jury if capital sexual battery remains capital felony) (citing *Palazzolo v. State*, 754 So. 2d 731, 737 (Fla. 2d DCA

2000) (evidence in capital sexual battery trial can be much more tenuous than in murder trial, often resting largely on victim testimony and hearsay statements)).

With most states still choosing 12-person, unanimous juries to convict in serious criminal cases, Florida and Connecticut are the anomalies. *Lessard*, 232 So. 3d at 17. Florida is one of only two states that use six jurors to decide the outcome of capital cases when life is a mandatory sentence upon conviction. *See Gonzalez v. State*, 982 So. 2d 77, 78 n.2 (Fla. 2d DCA 2008). S*ee also* 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).

The Florida Supreme Court recently underscored the judicial deference to the textual language used by the Legislature. The precedential development presents a significant and important statewide question concerning the legislative definition of a capital case as applied to the defendant and other similarly situated capital case defendants. The Florida Supreme Court declared in *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-47 (Fla.

2020), that

> In interpreting the statute, we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), quoted in Scalia & Garner, *Reading Law* at 69).

This Court should certify this or a similar question of great importance to the Florida Supreme Court:

> **SHOULD DEFENDANTS IN FLORIDA CHARGED WITH CAPITAL SEXUAL BATTERY OF A CHILD BE TRIED BY A TWELVE-PERSON JURY?**

CONCLUSION

Because the child hearsay statements were inadmissible, the convictions should be vacated and remanded for a new trial. The defendant's capital sexual battery convictions should be vacated for insufficient evidence, and the case should be remanded for a new trial, or the offenses of conviction reduced to lewd and lascivious

molestation. Alternatively, the defendant's convictions should be vacated, and the case remanded for a new trial based on the absence of a constitutional foundation for denying the defendant a 12-person jury for capital sexual battery.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rules 9.045 and 9.210(a)(2) of the Florida Rules of Appellate Procedure. It is printed in Bookman Old Style 14-point font and contains 12,840 words.

CERTIFICATE OF SERVICE

I certify the foregoing was filed with the Florida e-Filing portal and emailed August 17, 2021, to:

Jeffrey Siegal
Assistant Attorney General
Concourse Center #4
3507 Frontage Rd., Suite 200
Tampa, FL 33607
Tel: 813.287.7900
Fax: 813.281.5500
Jeffrey.Siegal@myfloridalegal.com
crimapptpa@myfloridalegal.com

Howard L. "Rex" Dimmig, II
Public Defender
10th Judicial Circuit
Appellate Division
P. O. Box 9000
Bartow, FL 33830-9000
Tel: 863.534.4200
Fax: 863.534.4355
appealfilings@pd10.org
MWilliamson@pd10.org

Respectfully submitted,

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT
CASE NO. 2D22-0011
Lower Tribunal Case No. 2018-CF-4007CFAXWS (Pasco County)

JIMMIE JEROME MANNING JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

APPELLANT'S MOTION FOR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE AND FOR ISSUANCE OF WRITTEN OPINION ON UNADDRESSED POINT

Appellant Jimmie Jerome Manning, Jr., pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure, seeks issuance of a written opinion on the unaddressed point challenging a six-person jury for a capital felony, as well as the certification of that same question of great public importance from the *per curiam* decision rendered on September 1, 2023 (attached). Rehearing in the form of a written opinion or certification is necessary so the Florida Supreme Court can revisit the constitutional authority requiring 12-person juries for all capital felonies. The constitutional parameters of jury composition in criminal cases is a question of great public importance that is being considered by the U.S. Supreme Court in

two pending certiorari petitions. Whether the Sixth and Fourteenth Amendments to the U.S. Constitution guarantee the right to a trial by a 12-person jury when charged with a capital felony is a fundamental question that is ripe for review by the Florida Supreme Court. The precedent supporting a reduced-size jury of six in *Williams v. Florida*, 399 U.S. 78 (1970), has been effectively invalidated by *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), recognizing that the Sixth Amendment's "trial by an impartial jury" requirement encompasses what the term "meant at the Sixth Amendment's adoption." *Id.* at 1395. What that term meant then, as now, is a jury of twelve. As the U.S. Supreme Court stated in *Ramos*, Blackstone recognized that under the common law, "no 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[.]" 140 S. Ct. at 1395. "A 'verdict, taken from eleven, was no verdict' at all." *Id.*

A. REQUIRED STATEMENT FOR WRITTEN OPINION.

I express a belief, based on a reasoned and studied professional judgment, that a written opinion on an issue not addressed by the panel will provide a legitimate basis for supreme court review of an

express construction of a provision of the U.S. Constitution, as authorized by Rule 9.030(a)(2)(A)(ii) of the Florida Rules of Appellate Procedure. Florida precedent allowing 6-person juries in non-murder capital cases, *State v. Hogan*, 451 So. 2d 844, 845 (Fla. 1984), 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, thus providing a timely and justified opportunity for Florida Supreme Court review. *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 old 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 ruling as 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 request for certification).

The Supreme Court is currently considering whether to grant certiorari review on this very question in two pending petitions

originating from Florida courts. In both cases, the U.S. Supreme Court directed the State of Florida to respond to the petitions, a signal that the Court considers the question to be significant. *E.g.*, *Crane v. State of Florida*, U.S. Supreme Court Case No. 23-5455 (on September 18, 2023, Court requested State of Florida to respond to the petition); *Cunningham v. State of Florida*, U.S. Supreme Court Case No. 23-5171 (on August 8, 2023, Court directed State of Florida to respond to the petition). Both certiorari petitions ask the same question that is at issue in this case: 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?

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" had been understood to mean a body of twelve people. Given that that 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.

The Supreme Court continued to cite the basic principle that

the Sixth Amendment requires a twelve-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 Supreme 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).

In 1970, however, the *Williams* Court overruled this line of precedent in a decision that Justice Harlan 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*). Fundamentally, *Williams* recognized 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. Rather, the Court focused on the "function" that the jury plays 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, both "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) permits a six-person jury cannot stand in light of *Ramos*. There, the Supreme Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious offense. In reaching that conclusion, the *Ramos* Court overturned *Apodaca v. Oregon*, 406 U.S. 404 (1972), a decision that it faulted for "subject[ing] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment." 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 it is not the Court's role 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.'" 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.

As the history summarized above establishes, there can be no serious doubt that the common 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." *See* 140 S. Ct. at 1395 (quotation marks omitted).

Florida Supreme Court precedent is decidedly in favor of a textualist construction of the Constitution as of the time of its adoption. The Florida Supreme Court recently underscored the judicial deference to the textual language used by the Legislature. The Court's precedential undertaking presents a significant and important statewide question concerning the legislative definition of a capital case as applied to the defendant and other similarly situated capital case defendants. The Florida Supreme Court declared in *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-47 (Fla. 2020)

> In interpreting the statute, we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and

> common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), quoted in Scalia & Garner, *Reading Law* at 69).

Even setting aside *Williams*'s disfavored functionalist logic, its ruling suffered from another flaw: it was based on research that was out of date shortly after the opinion was issued. Specifically, 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*, that determination has proven woefully inaccurate. The Supreme 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*, the *Ballew* Court

observed that empirical studies conducted in the handful of intervening years highlighted several problems with *Williams*'s 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," 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 245-46 (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 has 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."). 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.

A written opinion on this important question allows the Florida Supreme Court to evaluate precedent and practical issues arising from a 6-person jury system. Studies indicate that twelve-member juries deliberate longer, recall evidence better, and rely less on

irrelevant factors during deliberation. *See* Smith & Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury*, 60 Fla. L. Rev. 441, 465 (2008). Minority views are also more likely to be thoroughly expressed in a larger jury, as "having a large minority helps make the minority subgroup more influential," and, unsurprisingly, "the chance of minority members having allies is greater on a twelve-person jury." *Id.* at 466. Finally, larger juries deliver more predictable results. In the civil context, for example, "[s]ix-person juries are four times more likely to return extremely high or low damage awards compared to the average." Higginbotham et al., *Better by the Dozen*, *supra*, at 52.

Smaller juries and non-unanimous verdicts resulted from the prevalence of Jim Crow era efforts "to suppress minority voices in public affairs." *Khorrami v. Arizona*, 598 U.S. __, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting) ("During the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs.").

This is Florida's history just waiting for Florida Supreme Court

reevaluation. 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 still kept in Florida while federal troops remained in the state. There was no provision for a jury of less than twelve until the Legislature enacted a provision specifying 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.

The Florida Legislature enacted chapter 3010 with the jury-of-six provision on February 17, 1877. *Gibson*, 16 Fla. 294. This was less than a month after the last federal troops were withdrawn from 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 thus first saw light at the birth of the Jim Crow era as former Confederates regained power in southern states and state prosecutors made a concerted

effort to prevent blacks from serving on jurors.

On its face, the 1868 constitution extended the franchise to black men. But the historical context shows that it was part of the overall resistance to Reconstruction efforts to protect the rights of black citizens. The constitution was the product of a remarkable series of events including a 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 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 the resulting constitution was spelled out 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 blacks 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.

Issuing a written opinion on the constitutionality of six-person juries for capital felonies will enable the Florida Supreme Court to review an important decision that expressly construes a provision of the United States Constitution. The time to grapple with the Williams legacy is now.

B. REQUESTED CERTIFICATION TO THE FLORIDA SUPREME COURT OF A QUESTION OF GREAT PUBLIC IMPORTANCE.

The following question of great public importance should be certified to the Florida Supreme Court:

> 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?

By: *S/ Benedict P. Kuehne*
BENEDICT P. KUEHNE
Florida Bar No. 233293

C. GRANTING REHEARING TO ISSUE A WRITTEN OPINION OR CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE.

This appeal involves an issue of great public importance to the fundamental principles of constitutional construction and the definition of what is meant by a trial by jury. The Florida Supreme

Court should be given an opportunity to revisit *Williams* in light of the U.S. Supreme Court's recognition that the *Williams* Court relied on misinformation and a strained analysis when approving six-person juries in criminal cases.

CERTIFICATE OF COMPLIANCE

This filing complies with the requirements of Rules 9.045 and 9.210(a)(2) of the Florida Rules of Appellate Procedure. It is printed in Bookman Old Style 14-point font and contains 2,953 words as counted by MS Word.

Respectfully submitted,

S/ Benedict P. Kuehne
BENEDICT P. KUEHNE
KUEHNE DAVIS LAW, P.A.
Florida Bar No. 233293
Special Assistant Public Defender
Polk County Courthouse 3rd Floor
225 North Broadway
P. O. Box 9000-PD
Bartow, FL 33831
Tel: 863.534.4200
ben.kuehne@kuehnelaw.com
efiling@kuehnelaw.com

HOWARD L. "REX" DIMMIG, II
Public Defender
10th Judicial Circuit
Appellate Division
P. O. Box 9000
Bartow, FL 33830-9000
Tel: 863.534.4200
Fax: 863.534.4355
MWilliamson@pd10.org
appealfilings@pd10.org
SAPD@pd10.org

CERTIFICATE OF SERVICE

I CERTIFY the foregoing was efiled through the Florida eFiling Portal and served to all counsel on September 18, 2023, to:

James A. Hellickson
Assistant Attorney General
Concourse Center #4
3507 Frontage Rd., Suite 200
Tampa, FL 33607
Tel: 813.287.7900
Fax: 813.281.5500
James.Hellickson@myfloridalegal.com
Ana.Lopez@myfloridalegal.com
CrimAppTPA@myfloridalegal.com

Howard L. "Rex" Dimmig, II
Public Defender
10th Judicial Circuit
Appellate Division
P. O. Box 9000
Bartow, FL 33830 9000
Tel: 863.534.4200
Fax: 863.534.4355
appealfilings@pd10.org
mwilliamson@pd10.org

S/ Benedict P. Kuehne
BENEDICT P. KUEHNE

HOWARD L. "REX" DIMMIG II
PUBLIC DEFENDER
10TH JUDICIAL CIRCUIT, APPELLATE DIVISION
P. O. BOX 9000
BARTOW, FL 33830 9000
TEL: 863.534.4200
EHOVIS@PD10.ORG
APPEALFILINGS@PD10.ORG
SAPD@PD10.ORG

BENEDICT P. KUEHNE
COUNSEL OF RECORD
MICHAEL T. DAVIS
SUSAN DMITROVSKY
SPECIAL ASSISTANT PUBLIC DEFENDER
KUEHNE DAVIS LAW, P.A.
100 S.E. 2 STREET, SUITE 3105
MIAMI, FL 33131
TEL: 305.789.5989
EFILING@KUEHNELAW.COM
APPEALFILINGS@PD10.STATE.FL.US