

No.

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON KEITH OWENSBY, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
Public Defender

Paul Edward Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600
ppetillo@pd15.state.fl.us
appeals@pd15.org

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BRANDON KEITH OWENSBY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2022-3404

[November 15, 2023]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Sherwood Bauer, Jr., Judge; L.T. Case No. 432021CF000298A.

Carey Haughwout, Public Defender, and Nancy Jack, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Heidi L. Bettendorf, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. As to appellant's contention that he was entitled to a twelve-person jury, *see Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), *rev. denied*, No. SC2022-1597, 2023 WL 3830251 (Fla. June 6, 2023), *cert. pending*, No. 23-5173 (U.S. July 21, 2023).

WARNER, GROSS and DAMOORGIAN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

the jury that Bravo and Lower's testimony should be believed simply because they were police officers, and to express to the jury the prosecutor's personal opinion that the deputies were credible witnesses. In *Landry*, 620 So. 2d at 1101, this Court found that where the "case came down to a swearing match between the officers and appellant's witness, the error cannot be considered harmless." See also *Cisneros*, 678 So. 2d at 889–90 (we cannot say beyond a reasonable doubt that these impermissible arguments did not contribute to the guilty verdict).

Here, the error is fundamental because the State's case hinged upon Bravo and Lower's credibility. They were the only eyewitnesses to the events who testified at trial, and the State presented no video or body camera footage of what happened at the house, or in the backyard. The prosecutor's bolstering of the officers' credibility was fundamental error that caused Appellant's conviction. This Court must reverse the defendant's conviction and sentence and remand for a new trial.

V. Appellant was entitled to a twelve-person jury under the Sixth and Fourteenth Amendments and he did not waive that right.

A. Standard of review

Appellant was convicted of felonies by a jury comprised of a mere six people. He argues that the Sixth and Fourteenth Amendments guarantee the right to a twelve-person jury when the defendant is charged with an offense

punishable by more than six months in jail. See *State v. Horwitz*, 191 So. 3d 429 (Fla. 2016); *A.B. v. Florida Dept. of Children & Family Services*, 901 So. 2d 324, 326 (Fla. 3d DCA 2005).

B. Preservation

Appellant can raise this issue for the first time on appeal because the issue isn't whether he preserved this issue by objecting in the trial court; the issue is whether he personally waived his constitutional right to a twelve-person jury, and he did not. For example, even if defense counsel had no objection to a five-person jury, but the trial court did not secure the defendant's personal waiver of his or her right to a six-person jury, the case would present reversible error on appeal. *Wallace v. State*, 722 So. 2d 913, 914 (Fla. 2d DCA 1998); *Gamble v. State*, 696 So. 2d 420, 420 (Fla. 5th DCA 1997); *Blair v. State*, 698 So. 2d 1210, 1217-18 (Fla. 1997); see also *Johnson v. State*, 994 So. 2d 960, 963-64 (Fla. 2008) (holding that defendant must personally waive constitutional right to have jury decide prior-convictions element in felony DUI case; defense counsel's stipulation that trial court act as factfinder is insufficient). In short, the defendant himself or herself must agree to be tried by a jury with fewer jurors than constitutionally required. Appellant acknowledges this Court came to a different conclusion

in *Albritton v. State*, 48 Fla. L. Weekly D922 (Fla. 4th DCA May 3, 2023). But this Court may have overlooked *Wallace, Gamble, Blair, and Johnson*.

In addition, Appellant acknowledges that this Court rejected this argument in *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), and that the Florida Supreme Court has denied review of *Guzman* in *Guzman v. State*, No. SC22-1597. However, in rejecting Guzman's argument, this Court cited *State v. Khorrami*, 1 CA-CR 20-0088, 2021 WL 3197499 (Ariz. Ct. App. July 29, 2021). *Guzman*, 350 So. 3d at 73. At the time of this Court's decision, Khorrami's petition for writ of certiorari in the United States Supreme Court was pending. The petition was subsequently denied, over dissents by Justice Kavanaugh and Justice Gorsuch, who wrote an opinion stating that he would grant the writ. *Khorrami v. Arizona*, 21-1553, 2022 WL 16726030 (U.S. Nov. 7, 2022). This Court should compare Justice Gorsuch's opinion that a twelve-person jury is constitutionally required with the First District's recent opinion that said that that position was "nearly frivolous." *Brown v. State*, 48 Fla. L. Weekly D775, D777 n.1 (Fla. 1st DCA Apr. 12, 2023)).

Appellate attorneys have the obligation to "zealously assert[] the client's position under the rules of the adversary system." R. Regulating Fla. Bar prmbl. As part of this obligation, "[c]ounsel has the responsibility to make such [arguments] as may be necessary to keep the defendant's case in an

appellate ‘pipeline.’” *Sandoval v. State*, 884 So. 2d 214, 217 n. 1 (Fla. 2d DCA 2004); see also *Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020) (“Appellate counsel acted in good faith and did not deserve the court’s criticism [for arguing that existing law should be reversed].”); R. Regulating Fla. Bar 4-3.1 (a lawyer may assert an issue involving “a good faith argument for an extension, modification, or reversal of existing law”); *United States v. Marseille*, 377 F.3d 1249, 1257 n. 14 (11th Cir. 2004) (defendant making an argument he knows must lose for purposes of preserving it for a later court). Therefore, although acknowledging this Court is bound by *Guzman*, Appellant asserts that the Office of the Public Defender Fifteenth Judicial Circuit intends to petition the United States Supreme Court for a writ of certiorari on this issue and Appellant hereby seeks to preserve this argument for further review.

C. The Sixth and Fourteenth Amendments guarantee the right to a twelve-person jury when the defendant is charged with a felony.

The Supreme Court held in *Williams v. Florida*, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible. But *Williams* is impossible to square with the Court’s ruling in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which concluded 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. This full-scale embrace of the fixed-meaning canon, see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted."), means that trial by a six-person jury violates the Sixth and Fourteenth Amendments to the United States Constitution.

Although there is no legal significance to the United States Supreme Court's denial of a petition for writ of certiorari in *State v. Khorrami*, 1 CA-CR 20-0088, 2021 WL 3197499 (Ariz. Ct. App. July 29, 2021),¹ there are differences between Florida's and Arizona's systems that may account for the denial of the writ. In Arizona, criminal defendants are guaranteed "a twelve-person jury in cases when the sentence authorized by law is death or imprisonment for thirty years or more.... Otherwise, a criminal defendant may be tried with an eight-person jury." *State v. Khorrami*, 2021 WL 3197499, at *8 (citations omitted). Florida juries are smaller (six versus eight), and those smaller juries are mandated in every case except capital cases.

¹ See *Ramos v. Louisiana*, 140 S.Ct. 1390 n. 56 (2020) at n.56 ("[t]he significance of a denial of a petition for certiorari ought no longer ... require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim") (citations omitted).

In addition, the origin of Florida's rule is disturbing. In his dissent in *Khorrami*, Justice Gorsuch observed: "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." *Khorrami v. Arizona*, 2022 WL 16726030, at *5 (Gorsuch, J., dissenting) (citations omitted). He noted, however, that Arizona's law was likely motivated by costs not race. *Id.* But Florida's jury of six did arise in that Jim Crow era context of a "deliberate and systematic effort to suppress minority voices in public affairs." *Id.* The historical background is as follows:

In 1875, the Jury Clause of the 1868 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. See *Gibson v. State*, 16 Fla. 291, 297–98 (1877); *Florida Fertilizer*, 34 So. at 241.

The 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 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 effected as 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.

Smaller juries and non-unanimous verdicts were part of a Jim Crow era effort “to suppress minority voices in public affairs.” *Khorrami v. Arizona*, 2022 WL 16726030, at *5 (Gorsuch, J., dissenting); see also *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring) (non-unanimity was enacted “as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”). The history of Florida’s jury of six arises from the same historical context.

In view of the foregoing, a jury of six at a criminal trial for any felony offense is unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution. This Court must reverse Appellant’s convictions and remand for a new trial before a twelve-person jury.



Recorded in Martin County, FL 1/5/2023 10:17 AM
Carolyn Timmann, Clerk of the Circuit Court & Comptroller
CFN#2996449 BK 3353 PG 1350 PAGE 1 of 15

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY FLORIDA

STATE OF FLORIDA
vs.

BRANDON OWENSBY
Defendant.

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX
OBTS#: 4302103205

Judgment

PROBATION VIOLATOR
 COMMUNITY CONTROL VIOLATOR
 MODIFICATION

RESENTENCE
 RETRIAL
 AMENDED

The defendant, BRANDON OWENSBY, being personally before the court represented by SHANE MANSCHIP, the attorney of record and the state represented by MARCUS JOHNSON and having

been tried and found guilty by jury/by court of the following crime(s):

CNT#	Statute	Statute Description	Level/Degree
1	784.07(2a)	ASSAULT ON LAW ENFORCEMENT OFFICER OR FIREFIGHTER	Misdemeanor/FIRST DEGREE
3	843.01	RESISTING OFFICER WITH VIOLENCE	Felony/THIRD DEGREE

The PROBATION COMMUNITY CONTROL previously ordered in this case is revoked.
 PRIOR ADJUDICATION on _____
 It is ordered that the defendant is hereby Guilty of the above crime(s).
 It is ordered that the defendant is hereby Adjudication Withheld of the above crime(s).
 and being a qualified offender pursuant to s. 943.325, the defendant shall be required to submit DNA samples as required by law.

DONE and ORDERED at Martin County, Florida this Tuesday, December 20, 2022.

CIRCUIT JUDGE SHERWOOD BAUER JR

2022 DEC 29 AM 9:52

FILED FOR RECORD
MARTIN CO., FL

Page 1 of 15

STATE OF FLORIDA
IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY FLORIDA

STATE OF FLORIDA
vs.
BRANDON OWENSBY
Defendant.

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX

Sentence

(As to Count 1)

The defendant, being personally before this court, accompanied by the defendants' attorney of record, SHANE MANSCHIP, 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.

(Check applicable provision)

- and the court having on deferred imposition of sentence until this date 12/20/2022.
- 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

IT IS THE SENTENCE OF THE COURT that:

- The Defendant is hereby committed to the custody of the COUNTY JAIL.
- The defendant pay a fine pursuant to section 775.083, Florida Statutes, plus a 5% surcharge pursuant to section 950.25 Florida Statutes, as indicated on the Fine/Costs/Fee Page.
- The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

TO BE IMPRISONED:

- For a term of 365.00 days

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

STATE OF FLORIDA
IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY FLORIDA

STATE OF FLORIDA
vs.
BRANDON OWENSBY
Defendant.

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX

Sentence

(As to Count 3)

The defendant, being personally before this court, accompanied by the defendants' attorney of record, SHANE MANSIP, 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.

(Check applicable provision)

- and the court having on deferred imposition of sentence until this date 12/20/2022.
- 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

IT IS THE SENTENCE OF THE COURT that:

- The Defendant is hereby committed to the custody of the PRISON.
- The defendant pay a fine pursuant to section 775.083, Florida Statutes, plus a 5% surcharge pursuant to section 950.25 Florida Statutes, as indicated on the Fine/Costs/Fee Page.
- The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

TO BE IMPRISONED:

- For a term of 8.00 years

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

- Followed by: 2.00 Year(s) Probation

STATE OF FLORIDA

vs.

BRANDON OWENSBY
Defendant.

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX

Special Provisions

(As to Count 3)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm/Weapon

It is further ordered that the _____-year minimum imprisonment provisions of section 775.087, Florida Statutes, is hereby imposed for the sentence specified in this court.

It is further ordered that the _____-year minimum sentence provisions of section 784.07(2)(d), Florida Statutes, are hereby imposed for the sentence.

Drug Trafficking

It is further ordered that the _____-year mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this court.

Controlled Substance Within 1,000 Feet of School/Park/Community Center

It is further ordered that the 3-year minimum imprisonment provisions of section 893.13, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual/Felony Offender

The Defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender

The defendant is adjudicated a habitual violent felony offender and has been sentenced to the extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____-year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act

It is further ordered that the defendant shall serve a minimum of _____-years before release in accordance with section 775.0923, Florida Statutes.

Capital Offense

It is further ordered that the defendant shall serve no less than life imprisonment in accordance with the provisions of section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun

It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this court.

Continuing Criminal Enterprise

It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this court.

Taking a Law Enforcement Officer's Firearm

It is further ordered that the 3-year minimum provisions of section 775.0875(1), Florida Statutes, are hereby imposed for the sentence specified in this court.

Leaving the Scene of an Accident with Death

It is further ordered that the 4-year minimum sentence provisions of section 316.027(2)(c), Florida Statutes, are hereby imposed for the sentence specified in this court.

Prison Releasee Re-Offender

It is further ordered that there is a 5 year mandatory minimum imprisonment on count 3 and _____ year mandatory minimum on count _____ pursuant to section 775.082 (9) (a) Florida Statutes. The requisite findings were stated on the record in open court.

✓

(Count 2 - Nolle Prossed 10/26/22)

Page 6 of 15

STATE OF FLORIDA

vs.

BRANDON OWENSBY
Defendant.

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX

Other Provisions:

Retention of 947.16(3),
Florida Jurisdiction The court retains jurisdiction over the defendant pursuant to section Statutes
(1983).

Jail Credit It is further ordered that the defendant shall be allowed a total of 365 days ^{Count #1} 571 ^{Count #3} /days credit for time incarcerated before imposition of this sentence.

Credit for Time Served
in Resentencing after
Violation of Probation or
Community Control It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply original jail time credit and shall compute and apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on case/count

(Offenses committed before October 1, 1989)

It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count

(Offenses committed between October 1, 1989, and December 31, 1993)

The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(6).

The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1).

It is further ordered that the defendant shall be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to section 921.0017. Florida Statutes, on case/count _____. (Offenses committed on or after January 1, 1994)

Consecutive/Concurrent It is further ordered that the sentence imposed for this count _____ shall run (CHECK ONE) _____ Consecutive to _____ Concurrent with the sentence
Set for in count _____ of this case.

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX

As to Other Counts

All Counts concurrent with each other.

Consecutive/Concurrent
As to Other Convictions

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (CHECK ONE)
 Consecutive to Concurrent with the sentence
 any active sentence being served.
 specific sentences: _____

STATE OF FLORIDA

UCN: 432021CF000298CFAXMX
Case Number: 21000298CFAXMX

vs.

BRANDON OWENSBY
Defendant.

Other Provisions (continued)

In the Event the above sentence is to the Department of Corrections, the Sheriff of Martin County, Florida is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendants right to be assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends/orders:

DEFENDANT IS SENTENCED AS A PRISON RELEASEE RE-OFFENDER

DEFENDANT IS SENTENCED AS A HABITUAL FELONY OFFENDER

SPECIAL CONDITIONS:

MENTAL HEALTH EVALUATION AND TREATMENT

SUBSTANCE ABUSE EVALUATION AND TREATMENT

NO ALCOHOL OR ILLEGAL DRUGS

RANDOM URINE ANALYSIS AT DEFENDANT'S EXPENSE

CURFEW 8:00 PM - 6:00 AM

PLUS ALL STANDARD CONDITIONS OF DOC PROBATION

PAY COSTS OVER DOC PROBATION

DONE and ORDERED at Martin County, Florida this 20th day of December, 2022.

CIRCUIT JUDGE SHERWOOD BAUER JR

CERTIFICATE OF CLERK

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US
Mail/Courthouse Box/Email to the Defense Counsel this 29 day of December, 2022

Carolyn Timmann, Clerk of the Court

By Carol Timmann
Deputy Clerk

