

No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA TANSIL, 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
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Counsel of Record

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOSHUA LANE TANSIL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2022-2529

[December 14, 2023]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Scott Suskauer, Judge; L.T. Case No. 502017CF010092.

Carey Haughwout, Public Defender, and Paul Edward Petillo, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Kimberly T. Acuña, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

MAY, DAMOORGIAN and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOSHUA LANE TANSIL,
Appellant,

CASE NO.: 4D22-2529

v.

STATE OF FLORIDA,
Appellee.

/

MOTION FOR REHEARING AND MOTION TO CERTIFY A
QUESTION OF GREAT PUBLIC IMPORTANCE

Appellant Joshua Tansil, through counsel, moves for rehearing and to certify a question of great public importance. He does so for this reason:

This Court affirmed appellant's conviction and sentence without written opinion ("Per Curiam. Affirmed."). The Florida Supreme Court has no jurisdiction to review this decision. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Ordinarily, this opinion would be final and appellant could seek review directly in the United States Supreme Court raising the issue that he was entitled to a twelve-person jury. *See Hobbie v. Unemployment Appeals Commission 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.”).

But the State has argued in five pending cases in the United States Supreme Court that the petitioners’ failure to move to certify a question of great public importance on that issue meant that they did not pursue every available avenue of review in the Florida Supreme Court and therefore the United States Supreme Court has no jurisdiction. *See Jackson v. Florida*, No. 23-5570; *Crane v. Florida*, No. 23-5455; *Morton v. Florida*, No. 23-5579; *Sposato v. Florida*, No. 23-5575; *Arrellano-Ramirez v. Florida*, No. 23-5567. Accordingly, appellant moves for rehearing and to certify a question of great public importance.

Whether the Sixth Amendment requires a twelve-person jury because that is what “trial by an impartial jury” meant at the Sixth Amendment’s adoption is a question of great public importance. Therefore, this Court should grant this motion, state in its opinion that it is rejecting appellant’s argument that he was entitled to a twelve-person jury, and certify this question as one of great public importance:

DOES THE SIXTH AMENDMENT REQUIRE A TWELVE-PERSON JURY IN ALL FELONY CASES?

WHEREFORE, appellant respectfully moves this Court for rehearing and to certify a question of great public importance.

Respectfully submitted

CAREY HAUGHWOUT
Public Defender, 15th Judicial Circuit

/s/ PAUL EDWARD PETILLO
Paul Edward Petillo
Assistant Public Defender
15th Judicial Circuit of Florida
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No.: 508438

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this motion has been furnished to Kimberly Acuña, Assistant Attorney General, 1515 N. Flagler Dr., Suite 900, West Palm Beach, FL 33401 by e-service at CrimAppWPB@MyFloridaLegal.com, this 15th day of December, 2023.

/s/ PAUL EDWARD PETILLO
Paul Edward Petillo
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

January 16, 2024

JOSHUA LANE TANSIL,
Appellant(s)
v.

CASE NO. - 4D2022-2529
L.T. No. - 502017CF010092

STATE OF FLORIDA,
Appellee(s).

BY ORDER OF THE COURT:

ORDERED that Appellant's December 15, 2023 motion for rehearing and certification is denied.

DAMOORGIAN and FORST, JJ., concur.

WARNER, J., would grant.

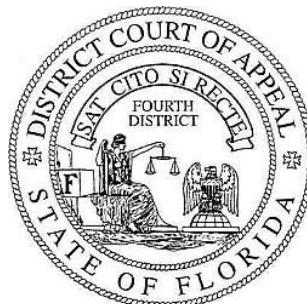
Served:

Kimberly Tollett Acuna
Attorney General-W.P.B.
Paul Edward Petillo
Palm Beach Public Defender

KR

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

Lonn Weissblum
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2022-2529 January 16, 2024



POINT II

APPELLANT WAS ENTITLED TO A TWELVE-PERSON JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND HE DID NOT WAIVE THAT RIGHT

Appellant was convicted by a jury comprised of six people. T 393 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. The standard of review of constitutional claims is *de novo*. *See A.B. v. Florida Dept. of Children & Family Services*, 901 So. 2d 324, 326 (Fla. 3d DCA 2005).

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*.

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.

Appellant acknowledges that this Court rejected this argument in *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022). Guzman has sought review in the Florida Supreme Court. *Guzman v. State*, No. SC22-1597. Therefore, if this Court affirms, appellant requests that this Court cite *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), *rev. pending*, No. SC22-1597. This will provide appellant an avenue for supreme court review under *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), and will avoid the randomness of the review process. *See id.* at 421 (recognizing that “no litigant can guide the district court’s selection of the lead case” and the citation PCA can avoid the randomness of the review process).

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 Gorsuch, who wrote an opinion

stating that he would grant the writ, and Justice Kavanaugh. *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).)

Although there is no legal significance to the denial of a petition for writ of certiorari,² 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

² See *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) at n.56 (“The 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.”) (cleaned up).

are smaller (six versus eight), and those smaller juries are mandated in every case except capital cases.

And the origin of Florida's rule is disturbing. In his dissent, 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.

If this Court affirms, it should cite *Guzman*.

IN THE CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2017CF010092AMB

DIV: X

OBTS NUMBER:

STATE OF FLORIDA

v.

JOSHUA LANE TANSIL,
W/M,
08/10/1981, [REDACTED]

PROBATION VIOLATOR
 COMMUNITY CONTROL VIOLATOR
 RETRIAL
 RESENTENCE

JUDGMENT

The above defendant, being personally before this Court represented by ADAM M BROFSKY ESQ
(attorney)

<input checked="" type="checkbox"/> Having been tried and found guilty of the following crime(s):	<input type="checkbox"/> Having entered a plea of guilty to the following crime(s):	<input type="checkbox"/> Having entered a plea of nolo contendere to the following crime(s):
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COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE
1	ATT SECOND DEGREE MURDER WITH A DEADLY WEAPON	782.04((2) AND 775.082	1F

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY 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.

and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE STAYED The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on probation and/or Community Control under the supervision of the Dept. Of Corrections (conditions of probation set forth in separate order).

SENTENCE DEFERRED The Court hereby defers imposition of sentence until

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Palm Beach County, Florida, this 19 day of April, 2022.

Amie D. Tunc 4/13/22

CIRCUIT COURT JUDGE

FILED
Circuit Criminal Department

APR 13 2022

000229

JOSEPH ABRUZZO
Clerk of the Circuit Court & Comptroller
Palm Beach County

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SENTENCE
(As to Count(s) 1)

Defendant: Joshua Tansil
Case Number: 17CF10092AMB

OBTS Number: _____

The Defendant, being personally before this Court, accompanied by the defendant's attorney of record, A. Brofsky, 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 Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of \$ _____ pursuant to § 755.083, Florida Statutes, plus \$ _____ as the 5% surcharge required by section 938.04, Florida Statutes.

The Defendant is hereby committed to the custody of the

Department of Corrections
 Sheriff of Palm Beach County, Florida

Department of Corrections as a youthful offender
For a term of 20 years. It is further ordered that the Defendant shall be allowed a total of 1035 days as credit for time incarcerated prior to imposition of this sentence. It is further ordered that the composite term of all sentences imposed for the counts specified in the order shall run

consecutive to concurrent with (check one) the following:

Any active sentence being served.
 Specific sentences: _____

The instant sentence is based upon the Court having previously placed the Defendant on probation and having subsequently revoked the Defendant's probation for violation(s) of condition(s) _____.

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

The Sentencing Court objects to the Defendant being placed into the Youthful Offender Basic Training Program pursuant to Florida Statute §958.045.

Pursuant to §322.055, 322.056, 322.26, 322.274, Florida Statutes, The Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of the Court is Ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

DONE AND ORDERED in Open Court at West Palm Beach, Palm Beach County, Florida this 16 day of August, 2022.

FILED
Circuit Criminal Department

AUG 16 2022

CIRCUIT JUDGE