

No.

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAND LAIDLER, JR., 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

Benjamin Hunter Eisenberg
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
beisenberg@pd15.state.fl.us
appeals@pd15.org

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BERTRAND LAIDLER, JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0234

[January 11, 2024]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Steven J. Levin, Judge; L.T. Case No. 562021CF000568A.

Carey Haughwout, Public Defender, and Benjamin Eisenberg, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Rachael Kaiman, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

CONNER, KUNTZ and ARTAU, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

ISSUE III

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

Appellant had the constitutional right to a jury trial because of his felony offense. *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970). But Appellant was convicted by a jury comprised of 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. 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*.

Appellant notes that this Court recently decided *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), which rejected a defendant's argument "that his convictions by a six-person jury violated the Sixth and Fourteenth Amendments to the United States Constitution." The defendant in Guzman appealed his case to the Florida Supreme Court, which denied review. *See Guzman v. State*, SC22-1597. Mr. Guzman filed a petition for writ of certiorari in the United States Supreme Court and the case is pending review.

Therefore, Appellant seeks to preserve this argument for further review to the United States Supreme Court.⁵

On the merits, although the United States Supreme Court held in *Williams v. Florida*, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible, *Williams* is impossible to square with the Supreme 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.

After the Sixth Amendment was enacted, a bevy of state courts interpreted it to require a twelve-person jury. *See Miller, Comment, Six of One Is Not A Dozen of the Other*, 146 U. Pa. L. Rev. 621, 643 n.133 (1998) (collecting cases from the late 1700s to the 1860s). In 1898, the United States Supreme Court added its voice to the chorus, noting that the Sixth Amendment protects a defendant’s right to be tried by a twelve-person jury. *Thompson v. Utah*, 170 U.S. 343, 349-

⁵ Appellate attorneys have the obligation to “zealously assert[] the client’s position under the rules of the adversary system.” R. Regulating Fla. Bar prtbl. 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).

350 (1898). 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. *See, e.g., Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930); *Duncan v. Louisiana*, 391 U.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 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*). Indeed, *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.

Williams’s ruling that the Sixth Amendment (as incorporated to 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. Ultimately, 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. *See* 140 S. Ct. at 1395.

Even setting aside *Williams*’s now-disfavored functionalist logic, its ruling suffered from another significant flaw: it was based on research that was out of date shortly after the opinion 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 incorrect. Indeed, the Court acknowledged as much just 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'* assumptions. 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.

Post-*Ballew* research has further undermined *Williams*. Current empirical evidence indicates “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). 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.

Appellant recognizes that the state constitution provides:

SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Art. I, § 22, Fla. Const. And he recognizes that section 913.10, Florida Statutes, provides for six jurors except in capital cases. *See also* Fla. R. Crim. P. 3.270.

But Florida's provision for a jury of six stems from the dawn of the Jim Crow era, one month after federal troops were withdrawn from the state. 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. 15 241.

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). 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.

In *Ramos*, Justice Gorsuch noted that the Louisiana non-unanimity rule arose from Jim Crow era efforts to enforce white supremacy. *Id.* at 1394; *see also id.* 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, particularly a crime punishable by up to life imprisonment, is unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution.

IN THE CIRCUIT/COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST LUCIE COUNTY, FLORIDA

- Modified
- Resentence
- Amended
- Corrected
- Mitigated
- Community Control Violator
- Probation Violator

Case Number: 562021CF000568AXXXXX

STATE OF FLORIDA

- vs -

BERTRAND LAIDLER JR

Defendant

Sexual Predator

Sex Offender

Minor Victim

Sentenced In Absentia

JUDGMENT

The Defendant, BERTRAND LAIDLER JR being personally before this Court represented by AttorneyASHLEY NICOLE MINTON, the Attorney of record, and the State represented by STEVEN RUSSELL PAKU, and having:

been tried and found guilty by Jury of the following crime(s).

- entered a plea of guilty to the following crime(s).
- entered a plea of nolo contendere to the following crime(s)
- Admitted Violation of Probation
- Found Guilty of Violation of Probation
- Admitted a Violation of Community Control
- Found Guilty of Violation of Community Control

Count	Crime	Offense Statute Number(s)	Level / Degree	OBTS Number
1	FELONY BATTERY - PRIOR CONVICTION	784.03(2)	F-3	5601264287

and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s). : AS TO COUNT(s) 1

X and being a qualified offender pursuant to Florida Statute 943.325 - 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.

DB/CA/DC

Page 1 of 1

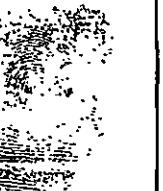
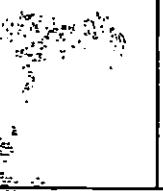
4M

CASE NUMBER 2021CF000568 A

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 Defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

Circuit Judge STEVEN J LEVIN

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

Fingerprints taken by:

Name

976

DEPUTY

Title

I HEARBY CERTIFY that the above and forgoing fingerprints are the fingerprints of the Defendant

BERTRAND LAIDLER JR and that they were placed thereon by said Defendant in my presence in open Court this date.

DONE AND ORDERED in Open Court at St. Lucie County, Florida, on Wednesday, January 4, 2023

Nunc Pro Tunc To:

Circuit Judge STEVEN J LEVIN

STATE OF FLORIDA

-VS-

BERTRAND LAIDLER JR

Defendant

IN THE NINETEENTH JUDICIAL
CIRCUIT COURT, IN AND FOR
SAINT LUCIE COUNTY

CASE NUMBER 562021CF000568A

DC NUMBER K80382

ORDER OF COMMUNITY CONTROL

This cause coming before the Court to be heard, and you, the defendant, being now present before the court, and you having

COUNT 1. FELONY BATTERY- PRIOR CONVICTION

SECTION 1: JUDGMENT OF GUILT

The court hereby adjudges you to be guilty of the above offense(s).

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld and that you be placed on Community Control for a period of _____. under the supervision of the Department of Corrections, subject to Florida law.

SECTION 2: ORDER WITHHOLDING ADJUDICATION

Now, therefore, it is ordered and adjudged that the adjudication of guilt is hereby withheld and that you be placed on Community Control for a period of _____ under the supervision of the Department of Corrections, subject to Florida law.

SECTION 3: INCARCERATION DURING PORTION OF SUPERVISION SENTENCE

It is hereby ordered and adjudged that you be:

committed to the Department of Corrections for a term of ____ prison with credit for ____ jail time, followed by Community Control for a period of ____ under the supervision of the Department of Corrections, subject to Florida law.
or

confined in the County Jail for a term of 200 DAYS with credit for 85 DAYS jail time. After you have served all of the term, you shall be placed on Community Control for a period of 18 MONTHS, FOLLOWED BY 1 YEAR PROBATION under the supervision of the Department of Corrections, subject to Florida law.
Or

confined in the County Jail for a term of ____ with credit for ____ jail time, as a special condition of supervision.

IT IS FURTHER ORDERED that you shall comply with the following standard conditions of supervision as provided by Florida law:

- (1) You will report to the probation officer as directed.
- (2) You will pay the State of Florida the amount of **\$40.00** per month, as well as 4% surcharge, toward the cost of your supervision in accordance with s. 948.09, F.S., unless otherwise exempted in compliance with Florida Statutes.
- (3) You will remain in a specified place. You will not change your residence or employment or leave the county of your residence without first procuring the consent of your officer.
- (4) You will not possess, carry or own any firearm. You will not possess, carry, or own any weapon without first procuring the consent of your officer.
- (5) You will live without violating any law. A conviction in a court of law is not necessary for such a violation of law to constitute a violation of your probation, community control, or any other form of court ordered supervision.
- (6) You will not associate with any person engaged in any criminal activity.
- (7) You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician, an advanced practice registered nurse, or a physician assistant. Nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.
- (8) You will work diligently at a lawful occupation, advise your employer of your probation status, and support any dependents to the best of your ability, as directed by your officer.
- (9) You will promptly and truthfully answer all inquiries directed to you by the court or the officer, and allow your officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions your officer may give you.
- (10) You will pay restitution, court costs, and/or fees in accordance with special conditions imposed or in accordance with the attached orders.
- (11) You will submit to random testing as directed by your officer or the professional staff of the treatment center where you are receiving treatment to determine the presence or use of alcohol or controlled substances.
- (12) You will submit a DNA sample, as directed by your officer, for DNA analysis as prescribed in ss. 943.325 and 948.014, F.S.
- (13) You will submit to the taking of a digitized photograph by the department. This photograph may be displayed on the department's website while you are on supervision, unless exempt from disclosure due to requirements of s. 119.07, F.S.

• (14) You will report in person within 72 hours of your release from incarceration to the probation office in Saint Lucie County, Florida, unless otherwise instructed by the court or department. (This condition applies only if section 3 on the previous page is checked.) Otherwise, you must report immediately to the probation office located at 2806 South US HWY 1, Fort Pierce, FL 34982.

SPECIAL CONDITIONS

1. Batters Intervention Program within 15 days
2. Mental health evaluation and treatment within 30 days
3. Automatic early termination after 18 months (after completion of community control) all costs paid, all conditions met, no violations
4. No early termination of community control
5. No contact with victim
6. Do not come within 1 mile of victim

AND, IF PLACED ON COMMUNITY CONTROL, YOU WILL COMPLY WITH THE FOLLOWING CONDITIONS, IN ADDITION TO THE STANDARD CONDITIONS LISTED ABOVE AND ANY OTHER SPECIAL CONDITIONS ORDERED BY THE COURT:

(15) You will report to your officer as directed, at least one time a week, unless you have written consent otherwise.
(16) You will remain confined to your approved residence except for one half hour before and after your approved employment, public service work, or any other special activities approved by your officer.
(17) You will maintain an hourly accounting of all your activities on a daily log, which you will submit to your officer on request.

(18) You will submit to electronic monitoring, follow the rules of electronic monitoring, and pay for the cost of the electronic monitoring service.

Effective for offenders whose crime was committed on or after September 1, 2005, there is hereby imposed, in addition to any other provision in this section, mandatory electronic monitoring as a condition of supervision for those who:

- Are placed on supervision for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older; or
- Are designated as a sexual predator pursuant to s. 775.21; or
- Has previously been convicted of a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older.

You are hereby placed on notice that should you violate your probation or community control, and the conditions set forth in s. 948.063(1) or (2) are satisfied, whether your probation or community control is revoked or not revoked, you shall be placed on electronic monitoring in accordance with F.S. 948.063.

Effective for offenders who are subject to supervision for a crime that was committed on or after May 26, 2010, and who has been convicted at any time of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed in s. 943.0435(1)(h)1.a.(I), or a similar offense in another jurisdiction, against a victim who was under the age of 18 at the time of the offense; the following conditions are imposed in addition to all other conditions:

(a) A prohibition on visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer. The court may also designate additional locations to protect a victim. The prohibition ordered under this paragraph does not prohibit the offender from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in s. 775.0861 or picking up or dropping off the offender's children or grandchildren at a child care facility or school.

(b) A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume to

appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court.

Effective for offenders whose crime was committed on or after October 1, 2014, and who is placed on probation or community control for a violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, in addition to all other conditions imposed, is prohibited from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program. Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

YOU ARE HEREBY PLACED ON NOTICE that the court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision. If you violate any of the conditions of your probation, you may be arrested and the court may revoke your probation, adjudicate you guilty if adjudication of guilt was withheld, and impose any sentence that it might have imposed before placing you on probation or require you to serve the balance of the sentence.

IT IS FURTHER ORDERED that when you have been instructed as to the conditions of probation, you shall be released from custody if you are in custody, and if you are at liberty on bond, the sureties thereon shall stand discharged from liability. (This paragraph applies only if section 1 or section 2 is checked.)

IT IS FURTHER ORDERED that you pay:

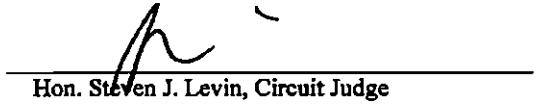
Court Costs, Fees, and Fines, as imposed at sentencing, in the total amount of: \$ See court cost sheet.

Payments processed through the Department of Corrections will be assessed a 4% surcharge pursuant to s. 945.31, F.S. Pursuant to s. 948.09, F.S., you will be assessed an amount of \$2.00 per month for each month of supervision for the Training Trust Fund Surcharge.

IT IS FURTHER ORDERED that the clerk of this court file this order in the clerk's office and provide certified copies of same to the officer for use in compliance with the requirements of law.

DONE AND ORDERED, on 1/17/23

NUNC PRO TUNC 01/04/23


Hon. Steven J. Levin, Circuit Judge

I acknowledge receipt of a copy of this order and that the conditions have been explained to me and I agree to abide by them.

Date: _____

Defendant

Instructed by: _____
Supervising Officer