

No.

IN THE SUPREME COURT OF THE UNITED STATES

KEITH LAMAR RODGERS, 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

KEITH LAMAR RODGERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0701

[February 29, 2024]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Lawrence M. Mirman, Judge; L.T. Case No. 562019CF001399A.

Carey Haughwout, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

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

PER CURIAM.

Affirmed.

MAY, FORST and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

POINT III -- APPELLANT WAS ENTITLED TO A TWELVE-PERSON JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS; HE DID NOT WAIVE THAT RIGHT AND HAVING A SIX-PERSON JURY WAS FUNDAMENTALLY ERRONEOUS

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. He also maintains that it was fundamental error to deprive him of his right to a twelve-person jury, as the Florida Statute which provides for six-person juries in non-capital, criminal prosecutions is facially unconstitutional. The standard of review of constitutional claims is de novo. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993); Simpson v. State, 5D23-0128, 2023 WL 4981373 at *7 (Fla. 5th DCA August 4, 2023); 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 is not 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,³ 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), rev. denied, No. SC22-1597 (Fla. June 6, 2023). The Guzman appellant will be seeking review in the United States Supreme Court. Appellant raises this issue to keep his case in the appellate pipeline. See Hollingsworth v. State, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020), rev. denied, 2020 WL 5902598 (Fla. Oct. 5, 2020) (“Appellate counsel acted in good faith and did not deserve the court's criticism [for arguing that existing law should be reversed].”); Sandoval v. State, 884 So. 2d 214, 216 n.1 (Fla. 2d DCA 2004) (“Counsel has the responsibility to make such objections at sentencing as may be necessary to keep the defendant's case in an appellate ‘pipeline.’”); see also R. Regulating Fla. Bar 4-3.1 (stating that 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.

³ See New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 2132 (2022) (the meaning of the Constitution “is fixed according to the understandings of those who ratified it”); 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.”).

2004) (defendant making an argument he knows must lose for purposes of preserving it for a later court).

In rejecting the Guzman appellant'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, the Khorrami appellant'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, 359 So. 3d 408, 410 n.1 (Fla. 1st DCA 2023).)

Although there is no legal significance to the denial of a petition for writ of certiorari,⁴ there are differences between Florida's and Arizona's systems that may account for the denial of the writ.

⁴See 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).

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.

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.

Appellant's conviction by a six-person jury violates the Sixth and Fourteenth Amendments. As Justice Gorsuch stated:

For almost all of this Nation's history and centuries before that, the right to trial by jury for serious criminal offenses meant the right to a trial before 12 members of the community. In 1970, this Court abandoned that ancient promise and enshrined in its place bad social science parading as law. That mistake continues to undermine the integrity of the Nation's judicial proceedings and deny the American people a liberty their predecessors long and justly considered inviolable.

Khorrami v. Arizona, 2022 WL 16726030, at *5 (Gorsuch, J., dissenting).

Appellant maintains this Court has authority to review the error in denying him a six-person jury for his attempted first degree murder with a firearm trial, inasmuch as the denial was fundamental error. Westerheide v. State, 831 So. 2d 93, 105 (Fla. 2002); See State v. Johnson, 616 So. 2d at 3; Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982); Simpson v. State, 5D23-0128, 2023 WL 4981373 at *7. This is because Appellant, having only six jurors as fact-finders, was denied his Sixth Amendment right to trial by jury, as the right to jury trials were understood at the time of the amendment's adoption, *i.e.* twelve-person juries. Ramos v. Louisiana, 140 S. Ct. at 1395. Additionally, this fundamental error extends to section 913.10, Florida Statutes (1970), the law authorizing six-person juries in non-capital, criminal

prosecutions in Florida, and, based on the foregoing arguments, this statute is facially unconstitutional under the same Sixth Amendment argument. Id.

There are divergent views on this issue. Compare Brown, 359 So. 3d at 410 n.1 (issue is “nearly frivolous”), with State v. West. 30 Fla. L. Weekly Supp. 607a (Fla. 11th Cir. Dec. 2, 2022) (but for Guzman the court would rule that Sixth Amendment requires twelve-person jury in noncapital felony), with Guzman, 350 So. 3d at 78 (Gross, J., concurring) (“Guzman has a credible argument that the original public meaning of the Sixth Amendment right to a “trial by an impartial jury” included the right to a 12-person jury.”) (emphasis in original). Therefore, this Court should certify the following question as one of great public importance:

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

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: 562019CF001399AXXXX

STATE OF FLORIDA

- VS -

KEITH LAMAR RODGERS

Defendant

Sexual Predator

Sex Offender

Minor Victim

Sentenced in Absentia

JUDGMENT

The Defendant, KEITH LAMAR RODGERS being personally before this Court represented by Attorney JAMES REGAN, the Attorney of record, and the State represented by DONALD R RICHARDSON, 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	ATTEMPTED FIRST DEGREE MURDER WITH A FIREARM- DISCHARGE OF FIREARM RESULTING IN and 775.087 GREAT BODILY HARM	782.04(1)(a), 777.04	F-L	5601249144
<p><input checked="" type="checkbox"/> <u>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</u></p>				
<p><input type="checkbox"/> and being a qualified offender pursuant to Florida Statute 943.325 - defendant shall be required to submit DNA samples as required by law</p>				
<p><input type="checkbox"/> and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.</p>				

DB/CA/DC/DOC

vb

Page 1 of 1

Case Number: 562019CF001399

The Defendant in open Court was advised of the right to appeal from this Sentence by filing a Notice of appeal within 30 days from the date with the Clerk of this Court and the Defendant's right to assistance of counsel in taking the appeal at the expense of the State on showing of indigence.

Circuit Judge Lawrence Miron

Finger Prints of Defendant

1. Right Thumb	2. Right Index	3. Right middle	4. Right Ring	5. Right Little
				
1. Left Thumb	2. Left Index	3. Left middle	4. Left Ring	5. Left Little
				

Fingerprints taken by: D/S Evans #622, Deputy Sheriff
Name and Title

I hereby CERTIFY that the above and foregoing fingerprints are the finger prints of the Defendant,
Keith Lamar Rodgers, and that they were placed thereon by the Defendant in my
presence in open court on this date.

DONE AND ORDERED in Open Court in St. Lucie County, Florida this 03-07-2023.

Nunc Pro Tunc To:

Circuit Judge Lawrence Miron

Violation of Probation, Previously Adjudged Guilty
 Violation of Community Control, Previously Adjudged Guilty
 Resentenced
 Modified
 Amended
 Mitigated
 Corrected

Case Number 562019CF001399AXXXXX
OBTS Number 5601249144

Defendant **KEITH LAMAR RODGERS**

SENTENCE

(As to Count 1)

The Defendant, being personally before this Court, accompanied by the Defendant's Attorney of record JAMES REGAN and having been adjudicated guilty, 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 Defense 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 resentence the Defendant.

and the Court having placed the Defendant on _____ and having subsequently revoked the Defendant's _____.

It Is The Sentence Of Court that:

The defendant pay a fine of _____ pursuant to section 775.083, Florida Statutes, plus _____ as the 5% surcharge required on 938.04, Florida Statutes.

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

The Defendant is hereby committed to the custody of the Sheriff of St. Lucie County Florida.

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.):

X For a term of Natural Life.

For a term of Natural Life with a 25 year mandatory minimum

For a term of _____

The SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If 'split' sentence complete the _____ Followed by a period of _____ on Community Control under the supervision of the appropriate Paragraph. _____ Department of Corrections according to the terms and conditions of supervision as set forth in a separate order.

_____ Followed by a period of _____ probation under the supervision of the Department of Corrections according to the terms and conditions of supervision as set forth in a separate order.

_____ However, after serving a period of imprisonment in PRISON, the balance of the sentence will be suspended and the Defendant will be on Probation/Community Control under the supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control as set forth in a separate order.

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.

562019CF001399AXXXX

SPECIAL PROVISIONS
(As to Count 1)

By appropriate notation, the following provisions apply to the sentence imposed
Mandatory/ Minimum Provisions:

- Firearm** **It is further ordered that the 25 YEARS minimum mandatory imprisonment provisions of section 775.087, Florida statutes, is hereby imposed for the sentence specified in this count**
- Drug Trafficking** It is further ordered that the _____ minimum imprisonment provisions of section 893.135, Florida Statutes, is hereby imposed for the sentence specified in this court, and that the Defendant pay a fine of \$_____, pursuant to section 893.135, Florida Statutes, plus \$_____, as a 5% surcharge.
- Law Enforcement** It is further ordered that the _____ minimum mandatory imprisonment provision of section 784.07, Florida Statutes, is hereby imposed for the sentence specified in this count.
- Controlled Substance Within 1,000 Feet of School** It is further ordered that the 3 year minimum imprisonment provision of section 893.13(1)(c), Florida Statutes, is hereby imposed for the sentence 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** The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of sections 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 as stated on the record in open court.
- Violent Career Criminal** The Defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(d), Florida Statutes. A minimum of _____ must be served prior to release. The requisite findings of the Court as set forth in a separate order or stated on the record in open court. (For crimes committed on or after May 24, 1997.)
- Capital Offense** It is further that the Defendant shall serve no less than 25 years in accordance with provisions of section 775.082(1), Florida Statutes. (For first degree murder committed prior to May 25, 1994, and for any other capital felony committed prior to October 1, 1995.)
- Prison Releasee** Defendant is adjudged a prison releasee reoffender in accordance with the provision of section 775.082(9), FL Statutes.
- Sexual Predator** Defendant is adjudged a sexual predator in accordance with provision of section 775.21, Florida Statutes.
- Other Provisions: Jail Credit** **It is further ordered that the Defendant shall be allowed a total of 1,390 DAY(S) as 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 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 or arrest as a violator following release from prison to the date of resentencing. The Department of Correction 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), Florida Statutes.
- 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)), Florida Statutes.
- It is further ordered that the Defendant be allowed _____ 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)
- It is further ordered that the sentence imposed for this count shall run _____ with the sentence set forth in count _____ of this case.

- Violation of Probation, Previously Adjudged Guilty
- Violation of Community Control, Previously Adjudged Guilty
- Resentenced
- Modified
- Amended
- Mitigated
- Corrected

Case Number: 562019CF001399AXXXX

Defendant: KEITH LAMAR RODGERS

Other provisions, continued:

Consecutive/Concurrent
To Other Convictions

It is further ordered that the composite term of all sentences imposed for the counts specified in this order will run
(check one) Consecutive To Concurrent To

Concurrent with the following:

(check one)

any active sentence being served.

specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of St. Lucie County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections and 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 Defendant's right to the assistance of counsel in taking the appeal at the expense of the state upon a showing of indigency.

In imposing the above sentence, the Court further recommends / orders

DONE AND ORDERED in Open Court at St. Lucie County, Florida, on March 7 2023.

Nunc Pro Tunc to:

Circuit/County Judge LAWRENCE MIRMAN