

No.

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN K. DAVIS, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Thompson v. Utah*, 170 U.S. 343 (1898), the Court held that the Sixth Amendment guaranteed the right of criminal defendants to a determination of guilt by a twelve-member jury as provided by common law. The Court continued to so hold until it ruled in *Williams v. Florida*, 399 U.S. 78 (1970), that the Sixth Amendment does not forbid a criminal conviction in state court by a six-member jury. *Williams* was based not on the historical basis of the Sixth Amendment, but on then-current social science and the view that the Fourteenth Amendment applied an attenuated version of the Sixth Amendment jury trial right to the states. Also in the early 1970's, the Court held — consistently with *Williams*'s application of an attenuated Sixth Amendment to the states — that a state court jury need not be unanimous in criminal cases. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

In *Ramos v. Louisiana*, 590 U. S. 83 (2020), the Court receded from *Apodaca*, ruling that state court criminal defendants are entitled to a trial by a jury as provided by common law. Further, the social science research supporting *Williams* has been washed away by later research. In view of *Ramos* and the change in social science

research, the time has come to revisit *Williams*.

The question presented is:

Whether Petitioner was denied of his right, under the Sixth and Fourteenth Amendments, to a trial by a 12-person jury when the defendant is charged with a felony?

RELATED PROCEEDINGS

The proceeding listed below is directly related to the above-captioned case in this Court:

Davis v. State, 4D2022-2192, 2024 WL 632033 (Fla. 4th DCA Feb. 15, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Edwin K. Davis respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida.

OPINION BELOW

The decision of Florida's Fourth District Court of Appeal is reported as *Davis v. State*, 2024 WL 632033 (Fla. 4th DCA Feb. 15, 2024). It is reprinted in the appendix. 1a.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's convictions and sentences on February 15, 2024, without written opinion. 1a. The court denied Petitioner's motion for rehearing and certification on March 12, 2024. 2a.

The Florida Supreme Court is "a court of limited jurisdiction," *Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019) (citation omitted). Specifically, the state supreme court has no jurisdiction to review district court of appeal decisions entered without written opinion. *Jackson v. State*, 926 So. 2d 1262, 1266 (Fla. 2006). Hence, Petitioner could not seek review in that court. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and

to have the Assistance of Counsel for his defence.”

Section 1 of the Fourteenth Amendment of the United States Constitution provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Article I, section 22 of the Florida Constitution provides:

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.

Section 913.10, Florida Statutes, provides:

Number of jurors.—Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.

STATEMENT OF THE CASE

Petitioner, Edwin K. Davis, was charged in the Fifteenth Judicial Circuit of Florida with two counts of lewd and lascivious molestation of a child less than 12 years of age. Pursuant to Florida law, the case was tried by a six-member jury, which convicted him of all counts as charged.

After the court entered judgment of guilt and imposed a 25 year mandatory minimum prison sentence followed by probation for the rest of his life, he filed an appeal to Florida's Fourth District Court of Appeal. There, he argued for the first time that his convictions should be reversed because he was convicted by a six-member jury in violation of his Sixth Amendment right to a twelve-member jury. 3a-6a.

The district court of appeal affirmed the convictions and sentences without written opinion. 1a. Subsequently, it denied Petitioner's motion for rehearing and for certification to the state supreme court. 2a.

REASONS FOR GRANTING THE PETITION

THE REASONING OF *WILLIAMS v. FLORIDA* HAS BEEN REJECTED, AND THE CASE SHOULD BE OVERRULED.

In *Thompson v. Utah*, 170 U.S. 343, 349 (1898), the Court considered “whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less,” and concluded that “[t]his question must be answered in the affirmative.” It noted that since the time of Magna Carta, the word “jury” had been understood to mean a body of twelve. *Id.* at 349-50. Given that that understanding had been accepted since 1215, the Court reasoned, “[i]t must” have been “that the word ‘jury’ in the Sixth Amendment was “placed in the constitution of the United States with reference to [that] meaning affixed to [it].” *Id.* at 350.

In addition to the authorities cited in *Thompson*, one may note that Blackstone stated that the right to a jury of twelve is even older, and more firmly established, than the unqualified right to counsel in criminal cases. 4 William Blackstone, *Commentaries on the Laws of England*, ch. 27 (“Of Trial and Conviction”). Blackstone traced the right back to ancient feudal right to “a tribunal

composed of twelve good men and true,” and wrote that “it is the most transcendent privilege which any subject can be enjoy or wish for, that he cannot be affected in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals.” 3 Blackstone, ch. 23 (“Of the Trial by Jury”).

After *Thompson*, the Court continued to cite the basic principle that the Sixth Amendment requires a twelve-person jury in criminal cases for seventy more years. In 1900, the Court explained that “there [could] be no doubt” “[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution.” *Maxwell v. Dow*, 176 U.S. 581, 586 (1900). Thirty years later, this Court reiterated that it was “not open to question” that “the phrase ‘trial by jury’ in the Constitution incorporated juries’ ‘essential elements’ as ‘they were recognized in this country and England,’ including the requirement that they “consist of twelve men, neither more nor less.” *Patton v. United States*, 281 U.S. 276, 288 (1930). And as recently as 1968, the Court remarked that “by the time our Constitution was written, jury trial in criminal cases had been in existence for several centuries and carried impressive credentials traced by many to Magna Carta,”

such as the necessary inclusion of twelve members. *Duncan v. Louisiana*, 391 U.S. 145, 151–152 (1968).

In *Williams v. Florida*, 399 U.S. 78 (1970), however, the Court retreated from this line of precedent, holding that trial by a jury of six does not violate the Sixth Amendment.

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. *Id.*, 399 U.S. at 98–99. But it concluded that such “purely historical considerations” were not dispositive. *Id.* at 99. Rather, it 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. It wrote that “currently available evidence [and] theory” suggested that function could just as easily be performed with six jurors as with twelve. *Id.* at 101–102 & n.48; *cf. Burch v. Louisiana*, 441 U.S. 130, 137 (1979) (acknowledging that *Williams* and its progeny “departed from the strictly historical requirements of jury trial”).

Petitioner submits that *Williams* cannot be squared with the history and precedents discussed above, nor with the subsequent ruling in *Ramos v. Louisiana*, 590 U. S. 83 (2020), that the Sixth Amendment’s “trial by an impartial jury” requirement encompasses what the term “meant at the Sixth Amendment’s adoption,” *id.* at 90. That term meant trial by a jury of twelve whose verdict must be unanimous. As the Court noted in *Ramos*, Blackstone recognized that under the common law, “no person could be found guilty of a serious crime unless ‘the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors[.]’” *Ibid.* (emphasis added). “A ‘verdict, taken from eleven, was no verdict’ at all.” *Ibid.*

Ramos held that the Sixth Amendment requires a unanimous verdict to convict a person of a serious offense. In reaching that conclusion, it 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.” 509 U.S. at 100.

The reasoning of *Ramos* undermines *Williams* as well. It rejected the same kind of “cost-benefit analysis” undertaken in

Williams, observing that it is not for the Court 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.’” 590 U.S. at 98. The Court wrote that the Sixth Amendment right to a jury trial must be restored to its original meaning, which included the right to jury unanimity:

Our real objection here isn’t that the *Apodaca* plurality’s cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. And Louisiana asks us to repeat the error today, just replacing *Apodaca*’s functionalist assessment with our own updated version. All this overlooks the fact that, at the time of the Sixth Amendment’s adoption, the right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren’t suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children’s children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is “important enough” to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.

Ramos, 590 U.S. at 100 (emphasis in original; footnote omitted).

The same reasoning applies to the historical right to a jury of

twelve: When the People enshrined the jury trial right in the Constitution, they did not attach a rider that future judges could adapt it based on latter-day social science views.

Further, even if one were to accept the functionalist logic of *Williams* — that the Sixth Amendment is subject to reinterpretation on the basis of social science — it invites, nay demands, that it be periodically revisited to determine whether the social science holds up. And here we encounter a serious problem: it was based on research that was out of date shortly after the opinion issued.

Williams “f[ou]nd little reason to think” that the goals of the jury guarantee, which included providing “a fair possibility for obtaining a representative[] cross-section of the community,” were “in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12.” *Id.* 399 U.S. at 100. It 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.

Since *Williams*, that determination has proven incorrect. This 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*, it observed that empirical studies conducted in the intervening years highlighted several problems with its assumptions. For example, *Ballew* noted that more recent research showed that (1) “smaller juries are less likely to foster effective group deliberation,” *id.* at 233, (2) smaller juries may be less accurate and cause “increasing inconsistency” in verdict results, *id.* at 234, (3) the chance for hung juries decreases with smaller juries, disproportionately harming the defendant, *id.* at 236; and (4) decreasing jury sizes “foretell[] problems … for the representation of minority groups in the community,” undermining a jury’s likelihood of being “truly representative of the community,” *id.* at 236–37. Moreover, the *Ballew* Court “admit[ted]” that it “d[id] not pretend to discern a clear line between six members and five,” effectively acknowledging that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id.* at 239; *see also id.* at 245–46 (Powell, J.) (agreeing that five-member juries are unconstitutional, while acknowledging that “the line between five- and six-member juries is difficult to justify”).

Post-*Ballew* research has further undermined *Williams*. As

already noted, *Williams* itself identified the “function” of the Sixth Amendment as leaving justice to the “commonsense judgment of a group of laymen” and thus allowing “guilt or innocence” to be determined via “community participation and [with] shared responsibility.” 399 U.S. at 100–01. That function is thwarted by reducing the number of jurors to six. Smaller juries are less representative of the community, and they are less consistent than larger juries. *See, e.g.*, Shamenka Anwar, et al., *The Impact of Jury Race In Criminal Trials*, 127 Q.J. Of Econ. 1017, 1049 (2012) (finding that “increasing the number of jurors on the seated jury would substantially reduce the variability of the trial outcomes, increase black representation in the jury pool and on seated juries, and make trial outcomes more equal for white and black defendants”); Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. of Empirical Legal Stud. 425, 427 (Sept. 2009) (“reducing jury size inevitably has a drastic effect on the representation of minority group members on the jury”); Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (Summer 2020) (“Larger juries are also more inclusive and more representative of

the community. ... In reality, cutting the size of the jury dramatically increases the chance of excluding minorities.”).

Other important considerations also weigh in favor of the twelve-member jury. Twelve-member juries deliberate longer, recall evidence better, and rely less on irrelevant factors during deliberation. *See Smith & Saks, The Case for Overturning Williams v. Florida and the Six-Person Jury*, 60 Fla. L. Rev. 441, 465 (2008).

Minority views are also more likely to be thoroughly expressed in a larger jury, as “having a large minority helps make the minority subgroup more influential,” and, unsurprisingly, “the chance of minority members having allies is greater on a twelve-person jury.” Smith & Saks, 60 Fla. L. Rev. at 466. Finally, larger juries deliver more predictable results. In the civil context, for example, “[s]ix-person juries are four times more likely to return extremely high or low damage awards compared to the average.” Higginbotham et al., 104 *Judicature* at 52.

Importantly, the history of Florida’s rule can be traced to the Jim Crow era. Justice Gorsuch has observed that “[d]uring 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*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari) (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, Laws of Florida (1877). *See Gibson v. State*, 16 Fla. 291, 297–98 (1877); *Florida Fertilizer*, 34 So. at 241.

The Florida Legislature enacted chapter 3010 with the jury-of-six provision on February 17, 1877. *Gibson*, 16 Fla. 294. This was less than a month after the last federal troops were withdrawn from Florida in January 1877. *See* Jerrell H. Shofner, *Reconstruction and*

Renewal, 1865–1877, in *The History of Florida* 273 (Michael Gannon, ed., first paperback edition 2018) (“there were [no federal troops] in Florida after 23 January 1877”).

The jury-of-six thus first saw light at the birth of the Jim Crow era as former Confederates regained power in southern states and state prosecutors made a concerted effort to prevent blacks from serving on jurors.

On its face the 1868 constitution extended the franchise to black men. But the historical context shows that 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*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari); *see also* *Ramos*, 590 U.S. at 126-27 (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.

And this history casts into relief another negative consequence of having small juries: it denies a great number of citizens the “duty, honor, and privilege of jury service.” *Powers v. Ohio*, 499 U.S.

400, 415 (1991). Many consider jury service an “amazing and powerful opportunity and experience—one that will strengthen your sense of humanity and your own responsibility.” United States Courts, *Juror Experiences*.¹ Jury service, like civic deliberation in general, “not only resolves conflicts in a way that yields improved policy outcomes, it also transforms the participants in the deliberation in important ways—altering how they think of themselves and their fellow citizens.” John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Values of Institutionalized Deliberation*, 34 Pol'y Stud. J. 605, 606 (2006).

In view of the foregoing, this Court should grant the petition, recede from *Williams*, restore the ancient right to a jury of twelve and reverse Petitioner’s conviction.

¹ Available at: <https://www.uscourts.gov/services-forms/jury-service/learn-about-jury-service/juror-experiences>

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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