No.

IN THE SUPREME COURT OF THE UNITED STATES

ROY E. TERRELL, 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

1. Whether, contrary to the Due Process Clause, the trial court erred in instructing the jury on the elements of the charged crimes as defined by a statute amended after the dates of the alleged crimes?

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

RELATED PROCEEDINGS

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

Terrell v. State, 384 So. 3d 790 (Fla. 4th DCA 2024).

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IN THE SUPREME COURT OF THE UNITED STATES

NO.

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

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 *Terrell v. State*, 384 So. 3d 790 (Fla. 4th DCA 2024). It is reprinted in the appendix. 1a.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's convictions and sentences on April 3, 2024. 1a. The court denied Petitioner's motion for rehearing and certification on May 8, 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 such as the one at bar, which consists only of an unelaborated affirmance with citation to a prior case. Such a decision, termed a citation PCA, is subject to state supreme court review only if the cited case is then pending in the state supreme court. *See Persaud v. State*, 838 So. 2d 529, 531–32 (Fla. 2003) ("this Court does not have jurisdiction to review per curiam decisions of the district courts of appeal that merely affirm with citations to cases not pending review in this Court").

In the present case, the Fourth District cited only *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), *rev. denied*, No. SC2022-1597, 2023 WL 3830251 (Fla. June 6, 2023), *cert. den.* No. 23-5173 (U.S. May 28, 2024). That case was not pending in the state

supreme court at the time of the Fourth District's decision in this case, so that review in the state supreme court was unavailable. 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."

Section 794.011(1)(h), Florida Statutes (2019), provides:

(h) "Sexual battery" means oral, anal, or vaginal

> penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

In 2022, the Florida Legislature amended section 794,011 to move the definition of sexual battery to paragraph (1)(j) and to redefine the crime as follows:

> (j) "Sexual battery" means oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

Ch. 2022-165, § 4 Laws of Fla.; § 794.011(1)(j), Fla. Stat. (2022).

At the same time, the Legislature enacted the following definition of female genitals:

> (b) "Female genitals" includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Ch. 2022-165. *See* § 794.011(1)(b), Fla. Stat. (2022).

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

The state charged Petitioner Roy E. Terrell by amended information with: one count of sexual battery on a person under the age of twelve (count 1); one count of lewd and lascivious molestation of a person under the age of twelve (count 2); one count of sexual battery on a person aged twelve or older but younger than 18 (count 3); and one count of lewd and lascivious molestation of a person aged twelve or older but younger than 16. R 129-30. Counts 1 and 2 were alleged to have occurred between dates in 2013 and 2016, and counts 3 and 4 were alleged to have occurred between the 2016 date and a date in 2018. None of the counts alleged penetration.

Before jury selection, defense counsel objected to trial by a jury of six, and asked for a jury of twelve, arguing that it was a constitutional right, while recognizing that there is contrary case law. T 5-6. The court denied the request. T 6. Counsel renewed the objection before the six-member jury was sworn. T 185-86.

The alleged victim, was the daughter of Petitioner's former girlfriend. T 234.

She testified that Petitioner committed many inappropriate interactions with her before she turned twelve. These included

rubbing her vagina, putting her hand on his penis, having union with her vagina in that he touched it under her clothes without penetrating her vagina, having her put her mouth on his penis, and putting his mouth on her vagina. T 313-33.

She further testified he committed further such acts after she turned twelve: licking her vagina, putting his hand on his vagina, penetrating her vagina with his tongue, oral sex involving the penis, and penetration of her vagina with his penis. T 345-62.

In a recorded phone call, she told Petitioner that she was worried because he had not used a condom and she was sick; he replied there was no way, he was positive she was okay. T 284

When questioned by the police, Petitioner denied any wrongdoing and said the girl was angry at him because he had caught her talking to someone on the computer and using her mother's vibrator, and he found a ledger where she was charging guys. T 405-06, 412.

The state presented evidence that a bra in the girl's bedroom had seminal fluid on it, and DNA on it matched Petitioner. T 441-42.

At the trial, which was in February 2023, the assistant state

attorney prepared jury instructions which were discussed at the charge conference. T 454 (" [ASA]: And just for the record, as I wrote these, I have no objection to my own suggestions."). In the charge conference, there was no substantive discussion of the instructions on sexual battery, and no objection was made to the state's proposed instructions on sexual battery. T 453-60.

The court then instructed the jury on sexual battery using the elements of the 2022 statute rather than the elements of the crime as it existed at the time of the alleged crimes at bar:

> Count 1, Sexual battery on a child under 12 by a perpetrator 18 or older. To prove the crime of sexual battery upon a person less than 12 years of age, the State must prove the following three elements beyond a reasonable doubt: One, A, Roy Terrell committed an act upon or with [alleged victim] in which the sexual organ of the Defendant penetrated or had union with the anus, female genitals, or mouth of the victim. Or B, Roy Terrell committed an act upon or with [alleged victim] in which the anus or female genitals of [alleged victim] were penetrated by an object. Two, at the time, [alleged victim] was less than 12 years of age. Three, at the time, Roy Terrell was 18 years of age or older.
>
> …
>
> Female genitals includes the labia minora, the labia majora, clitoris, vulva, hymen and vagina.

T 529; R 201.

> Count 3, sexual battery on a child familial or custodial authority. To prove the crime of engaging in an act that constitutes sexual battery upon or with a child 12 years of age or older, but younger than 18 years of age by a person in a familial or custodial authority, the State must prove the following three elements beyond a reasonable doubt: Roy Terrell engaged in any act that constituted sexual battery. Two, at the time, [alleged victim] was 12 years of age or older, but younger than 18 years of age. Three, at the time, Roy Terrell was in a position of familial or custodial authority to [alleged victim].
>
> Sexual battery means, A, the sexual organ of Roy Terrell penetrated or had union with the anus, female genitals or mouth of [alleged victim] or B, the anus or female genitals of [alleged victim] were penetrated by an object.
>
> …
>
> Female genitals includes the labia minora, the labia majora, clitoris, vulva, hymen and vagina.

T 531-32 (emphasis added); R 207-08.

The jury convicted Petitioner of all charges, making specific findings that "there was sexual penetration between" Petitioner and the alleged victim in its verdict as to counts 2, 3 and 4. R 235-38.

After the court entered judgment of guilt and imposed two consecutive life sentences followed by two other long prison sentences, Petitioner filed an appeal to Florida's Fourth District Court of Appeal.

There, he argued for the first time that the jury instructions violated the Due Process, Jury and Ex Post Facto Clauses in that they applied the 2022 statute retroactively to crimes committed in the previous decade, and the error was subject to review under Florida's fundamental error doctrine. Under that doctrine, a conviction will be reversed due to an erroneous jury instruction on the elements of the crime unless the defense has conceded the element. *See, e.g., Reed v. State*, 837 So. 2d 366 (Fla. 2002) (reversing on grounds of fundamental due to trial court's unobjected-to erroneous instruction on element of malice as to charge of aggravated child abuse); *State v. Spencer*, 216 So. 3d 481, 486–87 (Fla. 2017) (for purposes of fundamental error analysis of a jury instruction, an element is disputed unless except where "a defendant expressly concedes" the element). 3a-10a.[1]

[1] After the denial of rehearing and issuance of the mandate in Petitioner's case, a panel of the Fourth District issued an opinion reversing a defendant's sexual battery conviction on grounds of fundamental error in circumstances identical to those in the present case. As in the present case, without objection, the trial court instructed the jury on the 2022 sexual battery statute despite the fact that the alleged crime occurred between a date in 2019 and one in 2020. The panel ruled that, despite the absence of an objection, the error amounted to reversible error under Florida's fundamental error doctrine. *See Flores v. State*, 4D2023-1837, 2024

Petitioner also argued that he was denied his Sixth Amendment right to a trial by a twelve-member jury. He conceded that the court had denied a similar argument in . *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022). 11a-14a.

The district court of appeal affirmed the convictions and sentences, writing only: "Affirmed. *See Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022)." 1a. Subsequently, it denied Petitioner's motion for rehearing and for certification to the state supreme court. 2a.

WL 3514130 (Fla. 4th DCA July 24, 2024). Petitioner will move to recall the mandate in his case in the Fourth District for the purpose of reconsideration of the retroactivity issue in view of *Flores*, and will inform the Court of the resolution of his motion.

REASONS FOR GRANTING THE PETITION

1. THE CONVICTIONS FOR SEXUAL BATTERY VIOLATE THE DUE PROCESS CLAUSE BECAUSE THEY ARE BASED ON RETROACTIVE APPLICATION OF AMENDMENTS TO THE SEXUAL BATTERY STATUTE.

The Ex Post Facto Clause prohibits retroactive laws are that aggravate a crime, or make it greater than it was, when committed, and those that alter the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. U.S. Const. Art. I, § 10. *Calder v. Bull*, 3 U.S. 386, 390 (1798) (Chase, J.); *Carmell v. Texas*, 529 U.S. 513, 522 (2000).

Although the Court has determined that the Ex Post Facto Clause does not directly forbid instructions that apply such a law retroactively, it has determined that the retroactive application of such a statute may violate the Due Process Clause in *United States v. Marcus*, 560 U.S. 258 (2010). *Id.* at 260.

In that case, the defendant was charged with forced labor and sex trafficking over a two year period. *Id.* at 260. During that period, a law was passed altering the altering the scope of the criminal conduct subject to prosecution. *Ibid.* The defendant argued

for the first time on appeal that the charge and the indictment allowed a conviction on the basis of acts occurring before the new statute went into effect, and that his conviction therefore violated the Ex Post Facto Clause. *Ibid*.

The Second Circuit held that the plain error occurred because it was possible that the jury convicted the defendant exclusively on the basis of pre-enactment acts in violation of the Ex Post Facto Clause because the jurors "had not been given instructions regarding the date of enactment," and that a new trial is necessary " 'whenever there is any possibility, *no matter how unlikely,* that the jury could have convicted based exclusively on pre-enactment conduct.' " *Id*. at 261 (emphasis in *Marcus*). Using this standard, the Second Circuit ordered a new trial, and the Court granted certiorari review to determine the scope of the federal plain error rule. *Id*. at 262.

In addition to determining the standard of review, the Court wrote that the issue turned on the jury instructions: "The error at issue in this case created a risk that the jury would convict respondent solely on the basis of conduct that was not criminal when the defendant engaged in that conduct. A judge might have

minimized, if not eliminated, this risk by giving the jury a proper instruction." *Id.* at 263–64.

Viewing the claim as a one involving a jury instruction issue, the Court treated the issue as one of due process:

> Marcus argues that, like the Second Circuit, we should apply the label "*Ex Post Facto* Clause violation" to the error in this case, and that we should then treat all errors so labeled as special, "structural," errors that warrant reversal without a showing of prejudice. See Brief for Respondent 27–29. But we cannot accept this argument. As an initial matter, we note that the Government has never claimed that the TVPA retroactively criminalizes preenactment conduct, see Brief for United States 16, and that Marcus and the Second Circuit were thus incorrect to classify the error at issue here as an *Ex Post Facto* Clause violation, see *Marks v. United States,* 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government" (citation omitted)). Rather, if the jury, which was not instructed about the TVPA's enactment date, erroneously convicted Marcus based exclusively on noncriminal, preenactment conduct, Marcus would have a valid due process claim. Cf. *Bouie v. City of Columbia,* 378 U.S. 347, 353–354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (applying Due Process Clause to *ex post facto* judicial decisions). In any event, however Marcus' claim is labeled, we see no reason why this kind of error would automatically "affec[t] substantial rights" without a showing of individual prejudice.

Id. at 264–65.

The Court then remanded the case for consideration of

whether the error affected the defendant's substantial rights. *Id.* at 266–67.

In the present case, the constitutional error is more serious than in *Marcus*. The jury instruction allowed retroactive application of the new statute to conduct that occurred entirely before its enactment.

Before 2022, at the time of the alleged crimes in this case, sexual battery was defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." § 794.011(1)(h), Fla. Stat. (2019). (emphasis added).

But the jury was instructed, T 529, 531-32; R 201, 207-08, to apply the 2022 version of the statute which referred to the more expansive act of "female genital penetration," with "female genitals" defined broadly as including "the labia minora, labia majora, clitoris, vulva, hymen, and vagina." Ch. 2022-165. *See* § 794.011(1)(b), Fla. Stat. (2022); § 794.011(1)(b) and (j), Fla. Stat. (2022).

The statutory change had the result of making the crime of attempted sexual battery (that is, penetration of the female genitals

without vaginal penetration) into the more aggravated crime of sexual battery, and it allowed conviction on different testimony or evidence of penetration of female genitals rather than penetration of the vagina. Hence, the instruction amounted to retroactive application of the statute in violation of Petitioner's constitutional rights.

In view of the foregoing, Petitioner asks that this Court grant certiorari and reverse his convictions for sexual battery.

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

In *Thompson v. Utah*, 170 U.S. 343 (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." *Id.* at 349. 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 citations in *Thompson*, one may note that Blackstone indicated 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 another seventy 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* is contrary to 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 revisted 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, disproportionally 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 perforce less representative of the community, and they are less consistent than larger juries. *See, e.g.,* Shamena 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*.[2] 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.

[2] 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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