No.

IN THE SUPREME COURT OF THE UNITED STATES

MARK TODD MINOR, 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

DANIEL EISINGER
Public Defender

Gary Lee Caldwell
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421Third Street
West Palm Beach, FL 33401
(561) 355–7600

gcaldwel@pd15.org
jcwalsh@pd15.org
appeals@pd15.org

QUESTIONS PRESENTED

1. In what circumstances is a search warrant invalid because it erroneously describes the place to be searched?

2. Does the private party search doctrine apply where the "search" is made by a computer?

3. Does a state court defendant charged with a felony have the right to trial by a twelve-member of jury under the Sixth Amendment?

RELATED PROCEEDINGS

Fifteenth Judicial Circuit of Florida:

State v. Minor, 50–2021–CF–001670–AXXX-MB (December 1, 2023)

Fourth District Court of Appeal of Florida:

Minor v. State, 4D2023–3142 (March 6, 2025)

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Mark Todd Minor respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida in this case.

OPINION BELOW

The decision of Florida's Fourth District Court of Appeal is reported as *Minor v. State*, 406 So. 3d 226 (Fla. 4th DCA 2025) (table). A copy is in the appendix. 1a.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's convictions and sentences without written opinion on March 6, 2025. 1a. The court denied Petitioner's motion for rehearing, written opinion and certification to the state supreme court on March 24, 2025. 2a.

The Florida Supreme Court is "a court of limited jurisdiction," *Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019) (citation omitted), Specifically, it 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 Fourth Amendment

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury … ."

The Fourteenth Amendment

Section 1

> … . 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.

U.S. Const. Amend. XIV.

Article I, section 22 of the Florida Constitution

> 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.

Section 913.10, Florida Statutes

> 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.

§ 913.10, Fla. Stat.

STATEMENT OF THE CASE

In February 2021, a SWAT team executed a search warrant on Petitioner's family home in Greenacres Florida. Officers seized Petitioner's work phone and a desktop computer in the bedroom of Petitioner and his wife. Petitioner was taken into custody and interrogated. Evidence resulting from the search formed the basis of Petitioner's prosecution and conviction on charges of possessing or viewing child pornography.

The affidavit and warrant

The erroneous description of the place to be searched

The warrant affidavit and the warrant itself were prepared by Palm Beach County Sheriff's Detective Brian Pherson. In the affidavit, he asked for a warrant to search Petitioner's home, and contained a photograph of a house. 13a. It gave directions to reach the house by driving more than a mile east from the sheriff's substation, and identified the house as "light green in color with a gray shingle roof," with a white front door and a specific house number on the concrete facing the driveway and on a black mailbox, and said, "This is a complete description of the premises desired to be searched." 13a–14a.

The warrant said there was probable cause to search the address listed in the affidavit, and it had the same photograph as the affidavit. 44a. But the warrant gave directions to go over two miles south the sheriff's substation to reach a different house. 45a. The warrant stated: "The building is grey stone and tan with a shingle roof. The numerical '[four digit number different from Petitioner's]' is posted in black lettering affixed above the front screen door to the residence. *This is a complete description of the premises desired to be searched*." 45a (emphasis added).

The search of attached images

Pherson said in the affidavit that he received a cyber tip from the National Center for Missing and Exploited Children (NCMEC) that Facebook had reported an account associated with Petitioner's name had been used to upload nine images of apparent child pornography. 17a.

The affidavit said this chart "is primarily used when the provider detects child pornography by an automated system, like Microsoft's PhotoDNA, to confirm known child pornography. In such a case, the system keeps a data base of hash values that correspond to images previously identified as child pornography by

the criteria listed in the chart." 19a. The hash can also be used to compare with hashes of other files to match different copies of the same image. *Ibid*. It also said: "When the automated system detects such a hash value, it automatically forwards the information to NCMEC." *Ibid*.

Pherson wrote that Facebook and NCMEC reported nine files of child pornography, and he viewed the files after downloading the cyper tip report and confirmed they contained child pornography. *Ibid*. He similarly opened and viewed files after receiving a second cyber tip from NCMEC. 26a.

Pherson said he confirmed Petitioner's identity by investigating phone and email records and then conducting surveillance of Petitioner's house. 27a–28a.

The motion to suppress and the hearing

Petitioner filed an amended motion to suppress all evidence obtained as a result of the search warrant, including Petitioner's police statement.

The erroneous description of the place to be searched.

The motion contended that the warrant did not state with particularity the place to be searched and instead inaccurately gave

directions to the residence several miles from Petitioner's house. R 312–17.

It said Pherson briefed the SWAT team, but was not present when they executed the warrant at Petitioner's residence, and an officer with the search warrant in hand would not have been led to the Petitioner's home to the exclusion of any other residence R 316–17.

The court held an evidentiary hearing at which the defense introduced Google Maps documents showing how far apart the two houses were. R 1145, 1148, 777–78.

At the hearing, Pherson was the only witness. He was asked how it happened that the warrant contained a description of the other house, and replied:

> I made a mistake while composing both the affidavit and the search warrant with the directionals. Because usually in these sort of circumstances we use templates — or what they call go-bys - and I forgot to copy and paste the correct directionals from the affidavit to the search warrant. So there's two different types of directionals from the affidavit and the search warrant.

R 802–03.

Once he had the warrant, he developed an ops plan, a plan that gives information "about the address, the individuals that may

reside in the house, their criminal history, and a brief synopsis of my investigation." R 804.

He said the ops plan included aerial Google maps of the residence, he briefed the SWAT team and everyone knew which residence was the target, and they received a copy of the warrant and the application. R 807. Normally a scout is sent to the residence ahead of the SWAT team. R 807. The briefing was at a location not near the residence. R 827.

In the briefing, Pherson did not talk about the directions to the residence, and he did not lead the SWAT team there. R 827–28. The SWAT team went there on their own, then contacted Pherson and said they were there. R 828. By the time he arrived, the SWAT team had already removed the occupants from the home, and the search warrant was underway. R 828.

Pherson agreed that if the SWAT team followed the direction in the warrant it would not have arrived at Petitioner's address. R 830.

The judge's order

The court denied the motion to suppress in a written order. 3a–12a. It wrote as to the description of the place to be searched:

The Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution require a warrant to "particularly describe the place or places to be searched. Historically, the purpose of this requirement was to prevent the use of general warrants and wideranging exploratory searches." *Bennett v. State*, 150 So. 3d 842, 844 (Fla.4th DCA 2014) (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)). *See also State v. Leveque,* 530 So. 2d 512, 513 (Fla. 4th DCA 1988). The incorrect address and description on page two of the search warrant in the premises description was not sufficient to invalidate the warrant. "Independent knowledge of the premises by an officer executing a search warrant, where that knowledge was obtained from prior surveillance of the premises, may be considered in assessing whether the warrant's description of the premises is sufficiently particular." *Bennett*, at 846. *See State v. Houser*, 364 So. 2d 823, 824 (Fla. 2d DCA 1978) (citing *State v. Gallo*, 279 So. 2d 71 (Fla. 2d DCA 1973) in which the address was incorrect however, the District Court held "that this mistake did not render the search warrant invalid. The description of the residence was sufficient to lead and indeed did lead the officers directly to the house to be searched.")) Further, "[a] residence may be described with reference to its occupants, *see State v. Gallo*, 279 So. 2d 71 (Fla. 2d DCA 1973); *see also, United States v. Hassell*, 427 F.2d 348 (6th Cir. 1970), and a prior or continuing surveillance of the premises may be considered in connection with the warrant description of the place to be searched." *Carr v. State*, 529 So. 2d 805, 806 (Fla. 1st DCA 1988). "An inaccuracy in the warrant, such as an incorrect address or apartment number, does not invalidate the warrant if the place to be searched is otherwise sufficiently identified in the warrant." Id.

10a.

The search of the attached images

Petitioner's amended motion contended the warrant affidavit was based on information received via a cyber tip from NCMEC, which had received a tip from Facebook, and the personnel of neither NCMEC nor Facebook actually viewed or verified the images were indeed images of sexual performance by a child. R 313. Pherson viewed the images and based the warrant affidavit on his having personally viewed the images. R 313. Petitioner contended Pherson violated the Fourth Amendment by viewing the attached images without a warrant. R 320-21.

At the suppression hearing, Pherson confirmed he received a cyber tip from NCMEC, which reported that it had received a cyber tip from Facebook that Petitioner's account had been used to access child pornography. R 784-88.

A cyber tip is based on a hash value, a series of letters or numbers that uniquely identifies a specific file. R 786-87. Hash values "are used for companies to not actually have to have an in-person identification of said file. It's usually kept in a sort of — like a record or some sort of database where when a file is uploaded to any sort of their platforms it can be instantly flagged and a report can be generated to NCMEC." R 787. NCMEC keeps a log of files

with their hash values in which they know they've been identified as child pornography. R 787. Any time one of those files with that unique identifier hash value is uploaded, it automatically becomes what's known as a hash match. R 787.

Under this system, files are automatically sent to NCMEC and from there to law enforcement without any private party search: "Essentially [the hash values] are used for companies to not actually have to have an in-person identification of said file. It's usually kept in a sort of — like a record or some sort of database where when a file is uploaded to any sort of their platforms it can be instantly flagged and a report can be generated to NCMEC." R 787.

Shortly after the initial cyber tip, he got another cyber tip from NCMEC with basically the same information. R 794-95.

After receiving the cyber tip, Pherson subpoenaed Petitioner's email accounts and Sprint records. R 791-92.

The cyber tips had the reported images attached to them, and Pherson opened the attachments to determine they were child pornography. R 796-97.

The tips were based on a hash match, and the cyber tips did not tick the box showing whether anyone at Facebook or NCMEC

had actually viewed the suspect files. R 813. Pherson's did not know whether, between him, Facebook and NCMEC, he was the first person to actually look at the attached images. R 813.

Defense counsel directed the court to this issue at the suppression hearing, pointing out that the amended motion included "Roman numeral III — which is that the search of the NCMEC images — or the images in the tip violated the Fourth Amendment." R 780. She argued that "without a warrant he can only go so far in a search in violation of Mr. Minor's privacy as a private entity has already done. We have no evidence whatsoever that a private entity already did that so Detective Pherson can't do it either." R 839. The prosecutor argued Pherson did not "exceed the scope of what was previously done. The suspicious nature of the package, as they described, has already been noted. So what he's doing is not a separate search." R 851

The judge's order denying the motion to suppress did not address the issue concerning the detective's warrantless act of opening and viewing the attachments.

The trial

Before trial, Petitioner filed a written motion arguing he was

entitled to a 12-member jury under the Sixth and Fourteenth Amendments. R 498–502. The defense argued the motion when the case came up for trial, and the court denied the motion and said that Petitioner preserved the issue for appeal. ST 6–8. Counsel later again raised the issue, and the court again refused to allow a 12-member jury. T 20–21.

The trial evidence showed that the SWAT team came to Petitioner's home, where officers seized a desktop computer and Petitioner's work cell phone from the bedroom shared by Petitioner and his wife. Child pornography was found on the computer and phone, and officers recorded a statement made by Petitioner while in custody. The prosecution also presented a recorded phone conversation between Petitioner and his wife. Based on the testimony of Petitioner and his wife, the defense contended that the pornography could have been downloaded by any of several adults living at the house, as well as the drug addict friends of Petitioner's daughter. Petitioner testified he was unaware of the child pornography on the desktop and the phone.

The jury found Petitioner guilty of 48 counts of child pornography concerning items on the desktop, and not guilty five

counts concerning items on the phone. R 547–73.

The court entered judgment and concurrent sentences of 640.5 months in prison on each count on December 1, 2023, R 710-14.

The appeal

Petitioner sought review in Florida's Fourth District Court of Appeal. He contended that the trial court erred in denying the motion to suppress because the warrant did not comply with the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. IV, U.S. Const. 54a–60a. The attorney general argued the warrant was sufficient to guide the officers to the place to be searched, and added a brief claim that the officers acted in good faith. In his reply brief, Petitioner disputed that the good faith exception could not apply here because the warrant was so facially deficient that the officers could not presume it to be valid, and that the error was caused by the officer himself rather than by the magistrate. 72a–83a.

As a separate point, Petitioner contended Pherson violated the

Fourth Amendment when, without a warrant, he opened the attachments forwarded to him by NCMEC in order to determine whether they contained child pornography. 61a–66a.

The attorney general argued the issue was not preserved for appeal because the trial judge did not specifically address the issue in its order denying the motion to suppress, and it argued on the merits that the detective's act of opening the attachments did not exceed the scope of a search made by Facebook, a private entity. Petitioner replied that the issue was preserved because counsel addressed the issue in the amended motion to suppress and drew the issue to the court's attention at the hearing, and, by denying the motion the judge necessarily ruled against Petitioner on this issue. 84a–85a. In this regard, Petitioner cited such cases as *Data Lease Fin. Corp. v. Barad*, 291 So. 2d 608, 611 (Fla. 1974) (holding that, although the judge did not expressly rule on the claim of waiver and estoppel he did generally rule against the petitioner, so that it must be presumed that the judge did reject petitioner's claim), *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998). (holding a party preserves an issue by bringing the issue to the judge's attention and "provid[ing] the judge an opportunity to respond to

the objection"), and *Pagidipati v. Vyas*, 353 So. 3d 1204, 1212 n.3 (Fla. 2d DCA 2022) ("Although it did not expressly address the issue, the trial court appears to have agreed, as it ruled on the merits of the motion despite Mr. Vyas's pending challenge to standing."). *Ibid*.

On the merits, Petitioner argued that the record did not show a private party search preceded Pherson's act of opening the attachments. 86a–89a.

Petitioner also argued on appeal that the trial court erred in refusing to afford him a twelve-member jury under the Sixth Amendment. 67a–71a.

The district court of appeal affirmed the conviction and sentence without opinion, 1a, and denied Petitioner's motion for rehearing and certification to the state supreme court. 2a. Petitioner now seeks review in this Court.

REASONS FOR GRANTING THE PETITION

I. THE STATE COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE WARRANT DID NOT PARTICULARY DESCRIBE THE PLACE TO BE SEARCHED.

The Constitution requires a high level of care in the issuance

of search warrants. The Fourth Amendment provides: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. IV, U.S. Const.

One need not be a scholar to observe that the warrant in this case failed to comply with the Constitution.

The affidavit had the address of Petitioner's home and accurately described it as light green with a shingle roof with a white front door and a specific four-digit house number on the concrete facing the driveway and on a black mailbox, and gave accurate directions to reach it by driving more than a mile east from the sheriff's substation. 13a–14a.

The warrant said there was probable cause that there was contraband at Petitioner's address and contained a photograph of the place. 44a. But it specifically described the other house as "the premises desired to be searched" by giving directions to go more than two miles south from the substation, and continued:

> The residence is approximately 108 feet on the left side of the street, 3rd house on the left. The building is grey stone and tan with a shingle roof. The numerical "[four digit house number different from Petitioner's]" is posted in black lettering affixed above the front screen door to

> the residence. *This is a complete description of the premises desired to be searched*.

R 1140 (emphasis added).

Anyone following this description would never have gotten to Petitioner's home.

The Court addressed a erroneous description of the place to be searched in *Maryland v. Garrison*, 480 U.S. 79 (1987), which involved the execution of a search warrant authorizing the search of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment" in Baltimore. *Id*. at 80. The officers were unaware that there were two third floor apartments, one occupied by McWebb and another by Garrison. *Ibid*. When officers arrived, they found McWebb outside and used his key to enter the building and open the locked door at the third floor stairwell. *Id*. at 81. Entering the third floor vestibule, they found Garrison in the hallway and two open doors, one to Garrison's apartment and one to McWebb's. *Ibid*. They did not realize there were two apartments until after they entered Garrison's apartment and found heroin and other contraband. *Ibid*.

In these circumstances, the Court held that the warrant and

its execution complied with the particularity requirement of the Fourth Amendment. It wrote that, although the warrant turned in hindsight out to be "broader than appropriate because it was based on the mistaken belief that there was only one apartment on the third floor of the building at 2036 Park Avenue," *id.* at 85, the question was whether that factual mistake invalidated the warrant.

The Court wrote that the validity of the warrant could not be challenged on the basis of the facts that emerged after it was issued, and that its validity had to be "assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate." *Ibid.* The Court wrote further that the officers reasonably executed the warrant because they went to the place described in the warrant and were not aware that there were two separate apartments. *Id.* at 87. As to this point, the Court noted that the result would have been different if they had known or should have known that fact beforehand:

> If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as

> soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant. The officers' conduct and the limits of the search were based on the information available as the search proceeded. While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.

Id. at 86–87 (footnote omitted).

Under *Garrison*, the warrant in the present case was invalid. The gross inaccuracy in the identification of the place to be searched was readily apparent to anyone reading the warrant. To repeat, no one following the "complete description of the premises desired to be searched" in the warrant would have gone to Petitioner's home.

The present case may be compared to *United States v. Abdalla*, 972 F.3d 838 (6th Cir. 2020), which was cited by the attorney general below. In that case, the warrant would lead an officer unerringly to the right place and it was executed by an officer who was familiar with the place.

In *Abdalla*, as at bar, the warrant listed both the correct

address and an incorrect address Unlike at bar, however, the warrant in *Abdalla* accompanied the correct address with detailed "step-by-step directions along with a detailed description of Abdalla's residence. So the warrant's singular incorrect address posed almost no chance of a mistaken search." *Id.* 972 F.3d at 842. Also unlike at bar, the agent who prepared the affidavit led officers directly to Abdalla's house, and "an executing officer's knowledge may be a curing factor." *Id.* at 843 , 846-47. These facts were crucial to the court's decision:

> All in all, the warrant (1) provided detailed directions to Abdalla's New Hope Road address, (2) described a "white double wide trailer with a green front porch and a black shingle roof," along with an American flag on the front porch and an "auto detail sign" in the driveway, and (3) identified the correct address and county, except for one sentence on the final page. (R. 20-1, Search Warrant, Page ID # 57, 59.) It is nearly unfathomable, given those particular identifiers and Agent Gooch's familiarity with the residence, that officers would have arrived at an incorrect address and then found a residence so resembling the warrant's description that they would have performed a mistaken search. So we are unpersuaded by Abdalla's claim that the warrant failed to describe his residence with particularly and granted officers overly broad authority to search multiple residences.

Id. at 847.

In Petitioner's case, by contrast, the warrant (1) provided

detailed directions to the other residence — miles from Petitioner's home, R 1140; (2) gave a detailed description of the other residence as the place to be searched, R 1140; (3) merely cited Petitioner's address with a photograph without detailed directions or a detailed description, R 1139; and (4) was not executed by the detective who investigated the case and prepared the affidavit and warrant. R 828.

In this case, there was an utter failure to comply with the Fourth Amendment.

It would be appropriate for the Court to grant certiorari review in this case in order the consider the important Fourth Amendment issues it raises.

II. THE DETECTIVE VIOLATED THE FOURTH AMENDMENT BY OPENING THE ATTACHMENTS WITHOUT A WARRANT.

"It has, of course, been settled since *Burdeau v. McDowell*, 256 U.S. 465, that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." *Walter v. United States*, 447 U.S. 649, 656 (1980). On the other hand, the Fourth Amendment does come into play if a governmental search exceeds the scope of a

prior private party search. *Id.* at 659.

In *Walter*, a private party's employees opened packages and found they contained film boxes. The employees "examined the boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes, and attempted without success to view portions of the film by holding it up to the light." *Id.* at 651–52. The employees called the FBI, and FBI agents then viewed the films without obtaining a warrant. *Id.* at 652. In the opinion for the Court by Justice Stevens with Justice Stewart concurring, it was held that the act of viewing the films exceeded the scope of the private party search. *Id.* at 658–59. Justice Marshall concurred in the judgment, and, in a concurrence joined by Justice Brennan, Justice White wrote that he agreed that "the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party." *Id.* at 660.

Subsequently, in *United States v. Jacobsen*, 466 U.S. 109 (1984), employees of a shipping company inspected a damaged box and found inside it a tube contaning zip-lock bags which

themselves contained a white powder. Returning the bags to the tube and the tube to the box, they called DEA. A DEA agent opened the bags, removed a trace of the powder and performed a field test positive for cocaine. *Id.* at 111–12.

The Court held that the agent's act of removing the bags did not exceed the scope of the private party search, which had already infringed on the owner's privacy interests. *Id.* at 120–22. It then wrote that the field test "could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder." *Id.* at 122. It concluded that a "test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy," so that there the field test did not violate the Fourth Amendment. *Id.* at 123–24.

In the present case, there was a plain violation of the Fourth Amendment. The evidence was that software concluded that the items had a hash value on a computer list of contraband pornography.

Pherson said the hash values "are used for companies to not

actually have to have an in-person identification of said file. It's usually kept in a sort of — like a record or some sort of database where when a file is uploaded to any sort of their platforms it can be instantly flagged and a report can be generated to NCMEC." R 787.

The hash values are thus like the external covers of the film boxes in *Walter*. Just as in *Walter*, where the private party did not actually open the boxes, so did no private party actually inspect the attachments here. There was no private party search such as to allow Pherson's act of opening and viewing the contents.

Further, unlike the field test in *Jacobsen*, the act of viewing the images would do more than merely reveal whether they were contraband. While the field test could not reveal anything else about the white powder — "not even whether the substance was sugar or talcum powder" — viewing the images would reveal their actual content, such as whether they were private family photographs or images of letters to the editor. Opening the attachments was a complete intrusion into Petitioner's privacy interests, and this illegal search formed the basis for the search warrant leading to the evidence on which the prosecution case rested. In these circumstances, the state court erred in denying the

motion to suppress.

III. 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. Because 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 as to this point 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 the ancient feudal system of trial by "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, and cannot be squared 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 the reasoning on which *Williams* rests. *Ramos* 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 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

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

Respectfully submitted,

DANIEL EISINGER
Public Defender

GARY LEE CALDWELL
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421Third Street
West Palm Beach, FL 33401
(561) 355–7600
gcaldwel@pd15.org
jcwalsh@pd15.org
appeals@pd15.org