No.

IN THE SUPREME COURT OF THE UNITED STATES

FLOYD MADISON, 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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QUESTIONS PRESENTED

1. Whether, contrary to the Due Process and Jury Clauses, the trial court erred in imposing an enhanced sentence under a statute authorizing the enhancement based on nonjury fact-findings upon proof by a preponderance of the evidence?

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: *Madison v. State,* 2025 WL 716254 (Fla. 4th DCA March 6, 2025).

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Floyd Madison 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 has not yet been published in Southern Reporter, but it is reported as *Madison v. State,* 2025 WL 716254 (Fla. 4th DCA March 6, 2025). It is reprinted in the appendix. 1a.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's convictions and sentences on March 6, 2025. 1a. The court denied Petitioner's motion for rehearing and written opinion on July 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 Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

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 775.082(9)(a), Florida Statutes, provides in relevant part:

(9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

a. Treason;
b. Murder;
c. Manslaughter;
d. Sexual battery;
e. Carjacking;
f. Home-invasion robbery;
g. Robbery;
h. Arson;
i. Kidnapping;
j. Aggravated assault with a deadly weapon;
k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
o. Any felony that involves the use or threat of physical force or violence against an individual;
p. Armed burglary;
q. Burglary of a dwelling or burglary of an occupied structure; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, s. 827.071, or s. 847.0135(5);

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor, a

county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence, or a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

Section 775.084, Florida Statutes, provides in relevant part:

(d) "Violent career criminal" means a defendant for whom the court must impose imprisonment pursuant to paragraph (4)(d), if it finds that:

1. The defendant has previously been convicted as an adult three or more times for an offense in this state or other qualified offense that is:

a. Any forcible felony, as described in s. 776.08;

b. Aggravated stalking, as described in s. 784.048(3) and (4);

c. Aggravated child abuse, as described in s. 827.03(2)(a);

d. Aggravated abuse of an elderly person or disabled adult, as described in s. 825.102(2);

e. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, as described in s. 800.04 or s. 847.0135(5);

f. Escape, as described in s. 944.40; or

g. A felony violation of chapter 790 involving the use or possession of a firearm.

2. The defendant has been incarcerated in a state prison or a federal prison.

3. The primary felony offense for which the defendant is to be sentenced is a felony enumerated in subparagraph 1. and was committed on or after October 1, 1995, and:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for an enumerated felony; or

b. Within 5 years after the conviction of the last prior enumerated felony, or within 5 years after the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole, or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for an enumerated felony, whichever is later.

. . .

(c) In a separate proceeding, the court shall determine whether the defendant is a violent career criminal with respect to a primary

offense committed on or after October 1, 1995. The procedure shall be as follows:

1. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.

2. All evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

3. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable only as provided in paragraph (d).

4. For the purpose of identification, the court shall fingerprint the defendant pursuant to s. 921.241.

. . .

(d) The court, in conformity with the procedure established in paragraph (3)(c), shall sentence the violent career criminal as follows:

1. In the case of a life felony or a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment.

3. In the case of a felony of the third degree, for a term of years not exceeding 15, with a mandatory minimum term of 10 years' imprisonment.

(e) If the court finds, pursuant to paragraph (3)(a) or paragraph (3)(c), that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

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, Floyd Madison, was charged in Florida's Seventeenth Judicial Circuit with (1) the first-degree felony offense of attempted murder and (2) the second-degree felony offense of aggravated battery with a deadly weapon. R 40-41. A six-person jury convicted and the trial court sentenced Appellant to (1) Life and (2) 30 years, respectively. (R1. 293-8).

While his direct appeal was pending in the Fourth District Court of Appeal, Petitioner moved to correct his sentence under Florida Criminal Rule 3.800(b)(2). He argued that Florida's Prison Releasee Reoffender and Violent Career Criminal statutes are unconstitutional in violation of the Jury and Due Process Clauses of the state and federal constitutions. The trial court denied the motion for that specific issue.

Petitioner then filed his brief in the appellate court. Among other issues, he argued that: His prison releasee reoffender (PRR) and violent career criminal (VCC) sentences violate the Sixth and Fourteenth Amendments, and the court could not rewrite the unconstitutional statute. a3–a16. And he was denied his right to a twelve-member jury under the Sixth Amendment. a17–a26.

Conceding that — unlike the Prison Releasee Reoffender and Violent Career Criminal issue preserved in a 3.800(b)(2) motion — the twelve-member jury issues had not been raised in the trial court, he contended that they were subject to review under Florida's fundamental error doctrine. Under that doctrine, a defendant may for the first time on appeal challenge a facially unconstitutional statute, *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002), *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982), and *Edenfield v. State*, 48 Fla. L. Weekly D1113, n.1 (Fla. 1st DCA May 31, 2022) (holding that defendant could raise facial challenge to felon-in-possession statute for first time on appeal, but denying claim on the merits), and also may contend on the first time on appeal that he or she was tried by less than the number of jurors required by the jury unless he or she personally waived that right. *Compare Blair v. State*, 698 So. 2d 1210, 1217 (Fla. 1997) (finding defendant's agreement to verdict by five-member jury valid when made in a colloquy with the court "including a personal on-the-record waiver sufficient to pass muster under the federal and state constitutions," and his decision was made "toward the end of his trial, after having ample time to analyze the jury and assess the prosecution's case against him. He affirmatively chose to

proceed with a reduced jury as opposed to a continuance or starting with another jury.") to *Wallace v. State*, 722 So. 2d 913 (Fla. 2d DCA 1998) (reversing on grounds of fundamental error where defendant was tried by five-member jury and judge did not inform the defendant of his constitutionally mandated right to six-person jury).

The district court of appeal affirmed the conviction and sentence without a written opinion. 1a. Subsequently, it denied Petitioner's motion for rehearing and written opinion. 2a.

REASONS FOR GRANTING THE PETITION

I. FLORIDA'S PRISON RELEASEE REOFFENDER AND VIOLENT CAREER CRIMINAL STATUTES ARE UNCONSTITUTIONAL.

Florida's Prison Releasee Reoffender and Violent Career Criminal statutes provide for enhanced punishments when the judge, at a nonjury proceeding, determines, by a preponderance of the evidence, a variety of facts regarding the defendant's prior criminal record including the date of the defendant's release from incarceration. § 775.082(9)(a), 775.084 Fla. Stat. The PRR statute requires the defendant to serve the maximum sentence day-for-day, no gain time. Mr. Madison is currently serving Count 1) Life (PRR) and Count 2) 30 years (VCC).

This statutory procedure and Petitioner's resulting sentence are unconstitutional under the Jury and Due Process Clauses. U.S. Const. amend. VI, XIV.

Despite the general rule forbidding a sentence enhancement based on judicial fact-finding, the Court held in the 5-4 decision of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a court may enhance a sentence based on a judge's finding of a prior conviction authorizing the enhancement.

The Court recently cast doubt on the correctness and viability of *Almendarez-Torres* in *Erlinger v. United States*, 602 U.S. 821 (2024):

> Almost immediately …, the decision came under scrutiny. *Jones*, 526 U.S., at 249, n. 10. The Court has since described *Almendarez-Torres* as "at best an exceptional departure" from "historic practice." *Apprendi*, 530 U.S., at 487. That decision, we have said, parted ways from the "uniform course of decision during the entire history of our jurisprudence." *Id.*, at 490. It was "arguabl[y] … incorrec[t]." *Id.*, at 489. And it amounted to an "unusual … exception to the Sixth Amendment rule in criminal cases that 'any fact that increases the penalty for a crime' must be proved to a jury." *Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) (quoting *Apprendi*, 530 U.S., at 490).
>
> In separate opinions, a number of Justices have criticized *Almendarez-Torres* further yet, and Justice THOMAS, whose vote was essential to the majority in that case, has called for it to be overruled. See, *e.g.*, *Mathis v. United States*, 579 U.S. 500 (2016) (THOMAS, J., concurring); *Descamps v. United States*, 570 U.S. 254, 280 (2013) (THOMAS, J., concurring in judgment); *Shepard v. United States*, 544 U.S. 13, 27 (2005) (THOMAS, J., concurring in part and concurring in judgment); see also *Jones*, 526 U.S., at 252–253 (Stevens, J., concurring); *Monge v. California*, 524 U.S. 721 (1998) (Scalia, J., joined by Souter and Ginsburg, JJ., dissenting).
>
> Still, no one in this case has asked us to revisit *Almendarez-Torres*. Nor is there need to do so today. In the years since that decision, this Court has expressly delimited its reach. It persists as a "narrow exception" permitting judges to find only "the fact of a prior conviction." *Alleyne*, 570 U.S., at 111, n. 1. Under that exception, a judge may "do no more, consistent with the

> Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S., at 511–512. We have reiterated this limit on the scope of *Almendarez-Torres* "over and over," to the point of "downright tedium." 579 U.S., at 510, 519. And so understood, *Almendarez-Torres* does nothing to save the sentence in this case. To determine whether Mr. Erlinger's prior convictions triggered ACCA's enhanced penalties, the district court had to do more than identify his previous convictions and the legal elements required to sustain them. It had to find that those offenses occurred on at least three separate occasions. And, in doing so, the court did more than *Almendarez-Torres* allows.

Erlinger, 602 U.S. at 837–39 (footnote omitted).

For the reasons set out in *Erlinger*, the time has come to push *Almendarez-Torres* overboard. There is no reason to allow governments to continue to impose enhanced sentences based on unconstitutional procedures such as Florida's Prison Releasee Reofffender and Violent Career Criminal laws.

Further, regardless of whether *Almendarez-Torres*'s day has come, the Florida law and procedure are plainly unconstitutional under *Erlinger* and should not be allowed to stand. Here, the court went beyond finding the simple fact that Petitioner had been convicted of certain crimes. It made the additional fact findings required by the statute, including when he was convicted and when

he was released from prison.

Florida's Prison Releasee Reoffender and Violent Career Criminal laws are unconstitutional. Since those laws provide the basis for Petitioner's sentences, those sentences cannot stand.

Accordingly, the sentences should be reversed and remanded to the lower court for resentencing without use of the invalid statute.

II. 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.

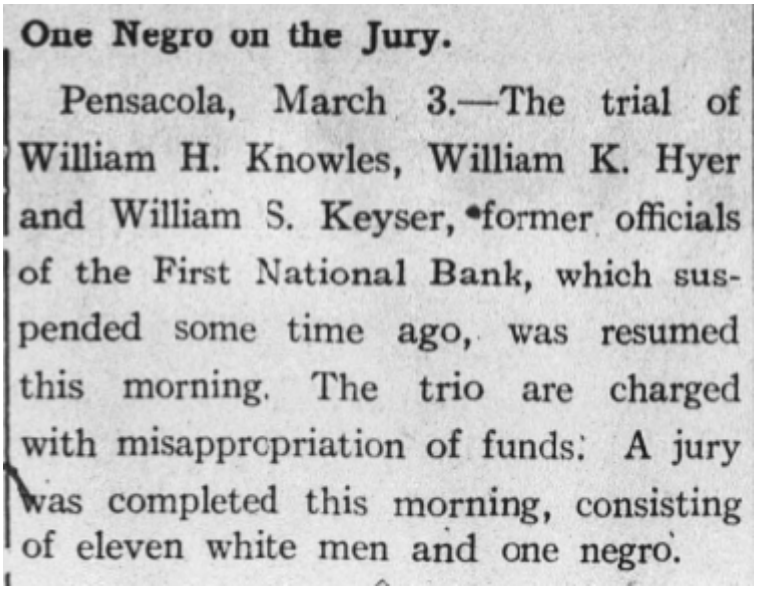
And when the Florida Legislature reduced the size of juries from twelve to six in 1877, it also re-established the "integrity, fair character, sound judgment and intelligence" test for jury service. Ch. 3010, Laws of Fla. (1877). This discretionary standard was "used to eliminate almost every black citizen from the southern trial venire." Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges*, 76 Corn. L. Rev. 1, 89-90 (1990). So rare was it for an African American to serve on a jury that it was worthy of a news article, and this was so well into the twentieth century:

"It is strange that the presence of a negro on the jury should not have attracted sufficient attention to have caused an inquiry into his eligibility as a jury man." *That Federal Jury*, Panama City Pilot, Nov. 27, 1924, at 1.

"At one point it looked as though the first negro juror in Monroe County was to be selected." *Child Molesting Trial Jury Chosen*, Key West Citizen, Dec. 11, 1952, at 1, 3.

"A negro juror was picked today to try Felix Combs, a negro roustabout, for raping a Clearwater woman. Selection of Henry Davis of Tarpon Springs marked one of the few times a negro has been selected for jury duty." *Negro Juror*, Sanford Herald, Oct. 4, 1948, at 1.

"The names of several Negroes were included in the 1950 jury list. Last fall, the county's first Negro juror served when Calvin Smith was named on the venire which heard a cattle rustling case in Circuit Court." *First Two Women are Picked for Possible Jury Duty in County*, Citrus Cnty. Chron., Feb. 16, 1950, at 1



One Negro on the Jury.

Pensacola, March 3.—The trial of William H. Knowles, William K. Hyer and William S. Keyser, former officials of the First National Bank, which suspended some time ago, was resumed this morning. The trio are charged with misappropriation of funds. A jury was completed this morning, consisting of eleven white men and one negro.

One Negro on the Jury, *DeLand Daily News*, March 3, 1915, at 3.

To top it off, the Legislature in that same session established convict leasing. Ch. 3034, Laws of Fla. (1877) (state prisoners); Ch. 2090, Laws of Fla. (1877) (county prisoners). *See* Douglas A. Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 7-8 (2008) ("By 1900, the South's judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites."); Matthew J. Mancini, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996) (noting the steady growth of Southern prison populations after the establishment of convict leasing: "Florida, with 125 prisoner in 1881, had 1,071 by 1904.").

This sad history casts into relief another negative consequence of smaller 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). Jury service is a "means of affording every citizen the chance to step into the state's shoes, to see the inner workings of the justice system, and to feel first-hand the power of self-government. In other words, the jury is a sacred, institutionalized opportunity for citizens to experience the transformative power of public deliberation." *Id*. at 619.

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.

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[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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