

No. 25-6623

IN THE
Supreme Court of the United States

HAMED KIAN,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF STEVEN G. CALABRESI,
SHARI S. DIAMOND, PHOEBE C. ELLSWORTH,
SAMUEL R. GROSS, VALERIE P. HANS,
STEPHAN LANDSMAN, RICHARD O. LEMPERT,
NANCY S. MARDER, STEVEN D. PENROD,
MARY R. ROSE, MICHAEL J. SAKS AND
ALISA SMITH AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

SARAH LAHLOU-AMINE
401 E. Jackson Street,
Suite 2400
Tampa, FL 33602

STEPHEN R. SENN
Counsel of Record
NICHOLAS L. SELLARS
PETERSON & MYERS, P.A.
225 East Lemon Street,
Suite 300
Lakeland, FL 33801
(863) 683-6511
ssenn@petersonmyers.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE <i>AMICI</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT.....	3
I. Dismissing the History of the Twelve-Person Jury	3
II. The Functional Equivalence Test and its Application.....	4
A. Representing a Fair Cross-Section of the Community.....	6
B. Ensuring Effective Group Deliberation....	9
C. Preventing Excessive Influence of the Jury Majority on the Minority	10
D. Ensuring Reliable Factfinding	11
E. Reaching Sound Verdicts.....	12
III. Current Jurisprudence of Jury Size	16
CONCLUSION	20
APPENDIX A — <i>AMICI</i>	1a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases:	
<i>Ballew v. Georgia</i> , 435 U.S. 223 (1978)	2, 3, 16, 17, 18, 19, 20, 21
<i>Khorrami v. Arizona</i> , 143 S. Ct. 22 (2022)	3
<i>Opinion of the Justices</i> , 431 A.2d 135 (N.H. 1981)	19
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2022)	9
<i>State v. Hamm</i> , 423 N.W.2d 379 (Minn. 1988)	19
<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	1-6, 9-12, 15-21
Constitutional Provisions:	
U.S. Const. amend. VI	1, 2, 5, 16, 17, 21
Statutes:	
U.S. Const. amend. XIV	17
Ariz. Rev. Stat. § 21-102	19
Other Authorities:	
3 <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> 469 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836)	4

Cited Authorities

	<i>Page</i>
Richard S. Arnold, <i>Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials</i> , 22 Hofstra L. Rev. 1 (1993)	4
Asch, <i>Effects of Group Pressure upon the Modification and Distortion of Judgments</i> , in READINGS IN SOCIAL PSYCHOLOGY (G. Swanson, T. Newcomb & E. Hartley et al., eds., (1952)	11
Cronin, <i>Six-Member Juries in District Courts</i> , 2 Boston B.J. No. 4, p. 27 (1958)	13
Shari S. Diamond et al., <i>Achieving Diversity on the Jury: Jury Size and The Peremptory Challenge</i> , 6 Journal of Empirical Legal Studies 425 (2009)	8
Faigman et al. (eds.), MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, chapter 6, <i>Statistical Proof</i> (2026)	5
VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986)	14
Valerie P. Hans, <i>The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision-making</i> , 4 DELAWARE LAW REVIEW 1 (2001)	10
REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, <i>INSIDE THE JURY</i> (2002)	10

Cited Authorities

	<i>Page</i>
C. Hawkins, Interaction and Coalition Realignment in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations, Aug. 17, 1960 (unpublished thesis on file at Library of Congress).....	11
Irwin A. Horowitz & Kenneth S. Bordens, <i>The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial</i> , 87 JOURNAL OF APPLIED PSYCHOLOGY 121 (2002).....	12
H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).....	11
New Jersey Experiments with Six-Man Jury, 9 Bull. of the Section of Jud.Admin. of the ABA (May 1966).....	13
Note, <i>On Instructing Deadlocked Juries</i> , 78 YALE L.J. 100 (1968).....	11
Phillips, A Jury of Six in All Cases, 30 Conn.B.J. 354 (1956).....	13
Michael J. Saks & Mollie Weighner Marti, <i>A Meta- Analysis of the Effects of Jury Size</i> , 21 LAW AND HUMAN BEHAVIOR 451 (1997).....	8, 10, 12

Cited Authorities

	<i>Page</i>
Michael J. Saks & Peter David Blanck, <i>Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts</i> , 44 STANFORD LAW REVIEW 815 (1992)	15
Michael J. Saks, <i>The Smaller the Jury, the Greater the Unpredictability</i> , 79 JUDICATURE 263 (1996)	15
Six-Member Juries Tried in Massachusetts District Court, 42 J.Am.Jud.Soc. 136 (1958)	13
Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 Geo.L.J. 120 (1962)	13
Nicole L. Waters, <i>Does Jury Size Matter? A Review of the Literature</i> (National Center for State Courts, 2004)	10, 12
Wiehl, The Six Man Jury, 4 Gonzaga L.Rev. 35 (1968)	13

INTEREST OF THE *AMICI*¹

Amici Curiae are university professors whose research, teaching and scholarship on historical, constitutional, and behavioral issues relate to jury size and jury performance. They seek to promote the use of sound social science in legislation and court decisions and, in the present instance, to improve the quality of jury decision-making. *Amici* are identified in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici support the Court's willingness to reconsider its decision in *Williams v. Florida*, 399 U.S. 78 (1970), which held that criminal cases tried to juries with fewer than twelve members do not offend the Sixth Amendment. We urge the Court to overrule *Williams*. We leave to others the historical and jurisprudential objections that can be made to the *Williams* decision and, instead, we focus on the unsound and unsupported empirical assumptions that are the fulcrum on which *Williams* turned.

Empirical evidence was needed to justify the *Williams* Court's decision because that Court took a functional view of the Sixth Amendment. For the *Williams* Court, the Sixth Amendment speaks to the importance of "relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." 399 U.S. at 87. The Court reasoned that if the decisions and

1. This brief was drafted exclusively by the named *amici* and their counsel. Neither party nor their counsel made any monetary contribution to the preparation or submission of this brief.

representativeness of six- and twelve-member juries were the same, no purpose was served by requiring twelve-person juries. Asserting, with scant empirical support, that “there is no discernable difference between the results reached” by six- and twelve-person juries, *id.* at 101, and that “in practice the difference between the 12-man and six-man jury in terms of the cross-section of the community represented seems likely to be negligible,” *id.* at 102, the Court upheld the Florida statute at issue in that case.

This *amicus* brief focuses on the empirical conclusions the *Williams* Court reached concerning juries of differing sizes, and the implications of those conclusions for the soundness of its holding. After cutting the Sixth Amendment jury-trial requirement free from its historical moorings, the Court devised a test of functional equivalence with which to evaluate the constitutionality of juries smaller than twelve. Applying that test, the Court erroneously concluded that no discernible differences exist between six-person and twelve-person juries on the critical functions of juries. To reach that conclusion, the *Williams* Court mistook anecdotes and bare assertions for research results, misread actual research, and substituted its statistical intuitions for actual statistical phenomena. Subsequent research confirms that the *Williams* holding was built on faulty empirical and statistical foundations.

Eight years later, in *Ballew v. Georgia*, 435 U.S. 223, 245 (1978), the Court implicitly recognized the errors it had made in *Williams* and, without saying so, abandoned the functional equivalence test. But, even though it implicitly abandoned the functional equivalence test, the Court did not revisit its holding in *Williams*, nor did any of

the Justices offer any rationale for accepting six-member juries as the constitutional minimum.

The states have not, however, rushed to take advantage of the permission that *Williams* and *Ballew* gave them. As Justice Gorsuch observed in his dissent to denial of certiorari in *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022), “Presently, the laws in 44 States entitle individuals charged with serious crimes to a trial before a twelve-member jury. Only 6 states . . . tolerate smaller panels—and it is difficult to reconcile their outlying practices with the Constitution.”

We review the empirical and statistical evidence, which show the unsoundness of the empirical conclusions reached in *Williams*, and the arguments refuted by research cited in *Ballew* and by more recent studies. Because its holding depended on seriously flawed assumptions, *Williams v. Florida* should be overruled, and criminal juries should, as a constitutional matter, be returned to the size required by the common law from the Fourteenth Century on and for 200 years following the enactment of the Bill of Rights.

ARGUMENT

I. Dismissing the History of the Twelve-Person Jury

The seminal Supreme Court case on the size of state criminal juries, *Williams v. Florida*, 399 U.S. 78 (1970), allowed Florida to shrink its criminal juries from twelve-person groups to panels of six. *Williams* too easily dismissed 600 years of common law history, during which twelve was the *required* number of jurors, and 200 years of American constitutional history which included the Court’s own precedents and pronouncements. Moreover,

it dismissed what in this context is the most relevant history: the original public meaning in the founding era of what constituted a jury as well as the ratification debates leading to the Constitution's adoption.²

Incorrectly finding “no indication in ‘the intent of the Framers,’” *Williams*, 399 U.S. at 99, that juries should be required to number twelve, the *Williams* majority approved criminal juries of six.

Every new doctrine requires a new foundation and the Court fashioned one in *Williams*: functional equivalence.

II. The Functional Equivalence Test and its Application

Having concluded that twelve jurors are not constitutionally required, the *Williams* Court needed to develop a test for determining the minimum number of jurors needed to satisfy the constitutional right of those accused of crimes to trial by jury. For the *Williams* Court, this turned on whether a jury of whatever size

2. For example, in the Virginia Ratification Convention, questions arose concerning the jury's attributes. Madison and others argued that several characteristics of the jury, including its size, were “incident to the trial by jury” and so it was unnecessary to enumerate every one of its attributes in the Constitution's text. Governor Edmund Randolph explained, “There is no suspicion that less than twelve jurors will be thought sufficient.” Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993) (citing 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 469 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836)).

met the goals that had motivated the Sixth Amendment. “The relevant inquiry,” Justice White wrote, “must be the function that the particular feature performs and its relation to the purposes of the jury trial,” with the most important purpose being “to prevent oppression by government.” *Id.* 99-100. Examining juries more closely, the Court identified the following functions of juries as essential: (1) representing a fair cross-section of the community, (2) ensuring effective group deliberation, (3) preventing excessive influence of the jury majority on the minority, (4) being a reliable factfinder, and (5) reaching sound verdicts. By the Court’s logic, a smaller jury must function as well as the jury that the Framers contemplated when they drafted the Sixth Amendment, namely the twelve-person jury. If a six-person jury performed as well as the twelve-person jury in these respects, it would be fair to say that the different sized juries were “functionally equivalent.”

Functional equivalence here is not a physical scientist’s equivalence. It is legal equivalence: an approximate, practical, no-discernible-differences sameness. That kind of difference-finding is quite compatible with conventional statistical hypothesis testing. *See* Faigman et al. (eds.), *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY*, chapter 6, *Statistical Proof* (2026).

The test the *Williams* Court posed for itself could be answered only by comparing the behavior of juries of six with the behavior of juries of twelve using the criteria the Court specified. If those functions were served as well by smaller juries as they were by twelve-member juries, then they were equally compatible with the Constitution’s jury trial requirements.

The *Williams* Court applied that test to six-person juries and concluded that those key jury functions were no “less likely to be achieved when the jury numbers six, than when it numbers 12[.]” *Williams*, 399 U.S. 78, 100 (1970).

In what follows, we examine the inquiry undertaken by the *Williams* court criterion by criterion.

A. Representing a Fair Cross-Section of the Community

The *Williams* Court addressed the possibility that six-person juries might deny criminal defendants the same degree of cross-sectional community representation that twelve-person juries generally conferred. The Court reasoned that:

[W]hile, in theory, the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, 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. Even the 12-man jury cannot insure representation of every distinct voice in the community.... [T]he concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one. *Williams* at 102.

The *Williams* Court’s intuition ignores important and widely understood aspects of the statistics of sampling. Jury venires are samples drawn from an eligible population. Juries, in turn, are samples of jurors drawn from venires. Assuming they are random samples, reducing the size of

juries from twelve to six can have a substantial impact on cross-sectional representation, depending on the make-up of the population.

If, say, 50% of the jury-eligible population were Black and 50% were White, then cutting the sample size in half would make no difference to how many Black jurors or White jurors would be found on randomly chosen juries in the aggregate. But, as the population skews in either direction, representation can fall dramatically. In a population that is, for example, 90% White and 10% Black, 72% (plus-or-minus some random variation) of twelve-person juries would have at least one Black juror. But on juries of six, only 47% (plus-or-minus) of juries would contain one or more Black jurors.³

3. To derive these percentages, consider drawing a sample of 1 person from a population stratified 90%/10%. The probability that the sample will consist of a member of the 10% minority is .10 and that the sample will consist of a member of the 90% majority is .90.

If a sample of 6 is drawn from the population stratified 90%/10%, the probability that the sample will consist *entirely* of members of the 90% majority is .90 raised to the sixth power (.90 multiplied by itself six times). That equals a .53 probability that the samples (juries) would be composed entirely of members of the 90% majority. If 53% of six-person juries are composed entirely of members of the majority, the remaining 47% of six-person juries would *not* be exclusively majority and would have at least one member of the 10% minority.

Similarly, for samples of 12, the probability that a sample (jury) will consist *entirely* of members of the 90% majority is .90 to the twelfth power. That equals .28. The complementary probability, .72, is the proportion of juries that would *not* consist entirely of members of the 90% majority.

Thus, 72% of twelve-person juries would include one or more members of the minority while just 47% of the six-person juries would include one or more members of the minority.

This applies to any and every attribute (not only race but age, sex, education, wealth, social and political attitudes, and so on).

As reviewed by Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW AND HUMAN BEHAVIOR 451 (1997), empirical studies of jury composition in both experimental and actual juries have confirmed this general principle of sampling and show significant differences between six- and twelve-member juries.

A more recent study of both the jury selection process and resulting composition of 277 civil jury trials in Cook County, Illinois, provides additional empirical support. Shari S. Diamond et al., *Achieving Diversity on the Jury: Jury Size and The Peremptory Challenge*, 6 Journal of Empirical Legal Studies 425 (2009).⁴ The study found that jury size (six versus twelve) had a much greater impact on racial/ethnic representation than peremptory challenges did. Only 2.1% of twelve-person juries contained zero Black jurors, while 28.1% of six-person juries contained zero Black jurors. Similarly, 40.4% of twelve-person juries had zero Hispanic jurors compared to 66.3% of six-person juries. (Black jurors comprised 25.0% of the venire, Hispanic jurors 8.1%.)

Seated jurors are, of course, not random samples of their venires. Some potential jurors drawn randomly from the venire will be excused for cause or eliminated through

4. Peremptory challenges were systematically related to juror race/ethnicity. But “despite patterns of excuse that were systematically related to racial characteristics that attorneys are legally prohibited from using as a basis for peremptory challenge, the pool of available jurors remained essentially unchanged by peremptory challenge.” Diamond et al., at 441.

peremptory challenges. The *Williams* Court recognized this through its use of the words “in practice,” in the quotation above. But these words will not bear the weight that the Court put on them. The Diamond et al. research, above, makes clear that statistically expected differences due to shrinking juries are not made negligible because of the non-random final stage of jury selection.

Whether intended or not, replacing larger juries with smaller ones results in a greater proportion of juries that have no members of minority groups from the population, compared to larger juries. This echoes concerns recognized in *Ramos v. Louisiana*, 590 U.S. 83 (2022), and applies to all kinds of minorities, whether religious, racial, occupational, or viewpoint.

B. Ensuring Effective Group Deliberation

The *Williams* Court did not elaborate on its concern for group deliberation—be it quantity, quality, nature, or content. The Court simply stated: “[T]he number should probably be large enough to promote group deliberation....” *Williams*, 399 U.S. at 100. Nor did the *Williams* opinion offer any evidence or reasoning on the possible impact that differences in group size might have on the dynamics of deliberation.

But empirical research has addressed these issues. Studies have found that, in contrast to six-person juries, twelve-person juries deliberate longer, bring more issues to the discussion, have more vigorous discussions and disagreements, and have more accurate recall of evidence collectively during the deliberation and as individuals when tested after deliberation. The principal advantage

found for smaller groups was that the amount of speaking time was more evenly distributed among jury members. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision-making*, 4 DELAWARE LAW REVIEW 1 (2001); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (2002); Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW AND HUMAN BEHAVIOR 451 (1997); Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature* (National Center for State Courts, 2004).

C. Preventing Excessive Influence of the Jury Majority on the Minority

One specific behavioral concern associated with deliberation was addressed, namely, the ability of one or two jurors holding beliefs opposed by their peers to resist pressure to surrender unreasoningly to the majority. The Court recognized that this phenomenon is related to the possibility that a jury would become a hung jury rather than convict an accused. The Court summed up what it took to be the findings of extant research: “Studies of the operative factors contributing to small group deliberation and decision making suggest that jurors in the minority on the first ballot are likely to be influenced by the proportional size of the majority aligned against them.” *Williams*, 399 U.S. at 101, n. 49. Thus, a dissenter in a jury divided 5–1 was thought to be just as able to stand up to and reason with the majority as a minority faction in a jury divided 10–2.

The Court apparently thought the critical factor was the proportion, not the absolute number, of jurors in the

minority and majority factions. Remarkably, however, every one of the studies on which the Court purported to rely concluded the opposite of what the Court said the study found. As cited in *Williams* those studies were: Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in READINGS IN SOCIAL PSYCHOLOGY 2 (G. Swanson, T. Newcomb & E. Hartley et al., eds., (1952); C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations 13, 146, 156, Aug. 17, 1960 (unpublished thesis on file at Library of Congress); H. KALVEN & H. ZEISEL, THE AMERICAN JURY, at 462-463, 488-489 (1966); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 108 and n. 30 (and authorities cited), 110-111 (1968).

The actual findings of this research had been common knowledge among social and behavioral scientists beginning in the 1950s. For example, Asch found that the size of the minority determined its ability to argue with the majority, while the size of the majority had little if any effect. Two people were much more able to stand up to the majority, regardless of the size of the majority, than was a single person facing even a majority of three. Similarly, Kalven & Zeisel found that, “For one or two jurors to hold out to the end, it appears necessary that they had companionship at the beginning of deliberations.” KALVEN & ZEISEL, at 453.

D. Ensuring Reliable Factfinding

Without evidence, analysis, or elaboration, the *Williams* Court concluded that “the reliability of the jury as a factfinder hardly seems likely to be a function

of its size.” *Williams*, 399 U.S. at 100-101. If the Justices had in mind the *process* of factfinding—sifting through trial evidence and recalling, discussing, and debating the evidence in light of judicial instructions, to reach their conclusions—empirical research indicates that larger groups have the advantage. They more accurately recall more trial evidence; more effectively process evidence; and consider a wider range of viewpoints and discuss them more thoroughly. See Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 JOURNAL OF APPLIED PSYCHOLOGY 121 (2002); Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law and Human Behavior 451, 458-459 (1997); Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature* (National Center for State Courts, 2004).

If by “reliability of the jury as a factfinder” the Court was instead thinking of the outcomes of deliberation, to that we turn next.

E. Reaching Sound Verdicts

Perhaps the most fundamental factor influencing the *Williams* Court’s decision was the majority’s intuition that six- and twelve-person juries would not differ substantially in the verdicts they rendered and their belief that this intuition was supported by empirical evidence. According to the Court: “What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries.” *Williams*, 399 U.S. at 101.

Support for that conclusion consisted of six citations in footnote 48. As cited by the Court, those were: Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 *Geo.L.J.* 120, 128-130 (1962); Wiehl, *The Six Man Jury*, 4 *Gonzaga L.Rev.* 35, 38-39 (1968); Cronin, *Six-Member Juries in District Courts*, 2 *Boston B.J.* No. 4, p. 27 (1958); *Six-Member Juries Tried in Massachusetts District Court*, 42 *J.Am.Jud.Soc.* 136 (1958); *New Jersey Experiments with Six-Man Jury*, 9 *Bull. of the Section of Jud.Admin. of the ABA* (May 1966); Phillips, *A Jury of Six in All Cases*, 30 *Conn.B.J.* 354 (1956).

The first item's (Tamm) evidence consisted of a judge who stated that he had presided over numerous condemnation trials using five-person juries and noticed no differences compared to larger juries (Tamm, 1962). Not only is this a single subjective anecdote but it deals with a special kind of trial in which the crucial evidence was likely to be numerical.

The second item (Wiehl) did little more than quote another work that had stated that "Dean Joiner recommends the six-man jury may be just as deliberative as a jury of twelve...." (Wiehl, at 39, n. 16). Repeating someone else's speculation is not an experiment.

The third item (Cronin) reported on the use of six-person juries in 43 civil cases in a state district court in Massachusetts. The author spoke to a court clerk and three attorneys involved in trials, all four of whom said the smaller juries did not seem to them to behave differently. Again, the evidence is unsystematic, subjective and anecdotal.

The fourth item (Six-Member Juries) was a summary of the third item.

The fifth item (New Jersey Experiments) was an announcement that a future test of six-person juries was being planned for Monmouth County, New Jersey. This provided no relevant evidence.

The final item (Phillips) was an article discussing possible monetary savings likely to accrue from reducing jury size. This does not concern any of the criteria the Court deemed relevant to the constitutionality of juries.

None of these “experiments” has anything useful to say on the question of whether there is a discernable difference between the verdicts of six- and twelve-person juries.

Again, a consideration of the statistics of sampling might have sharpened the Court’s perception. Most people recognize that larger samples are more reliable than smaller ones. Larger samples will more nearly reflect the population being sampled (including a population of jurors); random errors are more likely to cancel each other out; and the obtained data across samples will be more consistent.

For example, VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 167 (1986), describe how this difference manifests in the context of damage awards rendered by the two different sized juries. Their normative baseline is the mean award that would be rendered in a civil case if every member of the community from which the jury was drawn had heard the case and rendered a verdict:

“[O]ver two-thirds of the twelve-person juries will have . . . damage awards close to the community average, compared to just half of the six-person juries. The six-person juries are four times as likely to have extremely low or extremely high . . . damage awards.” What these findings tell us is that while the means of the two distributions would be the same, they will differ in their variability. Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263 (1996). Looking only at the average award sizes, substantial differences would not be expected to emerge. The unreliability, and the difference between larger and smaller juries, lies in the variability associated with the different-sized groups. There will be more variability (error around the community mean) in the verdicts of six-member juries than in the verdicts of twelve-member juries. The six-person juries are more likely than the twelve-person juries to produce deviant decisions (outliers).

These phenomena also hold true for outcomes that are categorical (like criminal or civil liability verdicts) as well as continuous (like damage awards). Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STANFORD LAW REVIEW 815 (1992).

In sum, both statistical principles and empirical research show that *Williams* was mistaken regarding every conclusion it reached along the way to deciding that six is functionally equivalent to twelve on the dimensions the Court thought most important. Some of those errors became evident through studies conducted by researchers whose curiosity was stimulated by the *Williams* opinion; other errors would have been apparent at the time

Williams was decided if the Court had acquired and understood the evidence potentially available to it. If the *Williams* Court had not made so many incorrect assumptions, a fair application of its functional equivalence test would have led the Court, even in 1970, to conclude that six-person juries are not the constitutional equal of twelve-person juries.

III. Current Jurisprudence of Jury Size

There is little current jurisprudence on the constitutionality of different jury sizes. Eight years after inventing the functional equivalence test, the Court tacitly abandoned it in *Ballew v. Georgia*, 435 U.S. 223 (1978). In *Ballew*, the Court unanimously declared Georgia's five-person criminal juries to be below the constitutional minimum, even if limited to misdemeanors. None of the four opinions in the case embraced the functional equivalence test to reach that conclusion and none offered an alternative rationale for affirming the constitutionality of six-member juries.

Justice Blackmun announced the judgment of the Court in an opinion joined fully only by Justice Stevens. *Id.* at 245-46. That opinion reviewed at length numerous studies and commentaries which together showed that the factual conclusions in *Williams* were empirically and conceptually mistaken. *Id.* Puzzlingly, however, Justice Blackmun's opinion relied on those same studies—most of them comparing the performance of *six-person* juries to *twelve-person* juries—to conclude that *five-person* juries run afoul of the Sixth Amendment: “[T]he assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six.” *Id.* at 239.

Justice Brennan, joined by Justices Stewart and Marshall, offered no analysis but said they joined Justice Blackmun’s “*opinion* insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons.” *Id.* at 246 (emphasis added) They apparently wrote separately because they believed that the case should have been dismissed rather than remanded; they thought the obscenity statute that *Ballew* allegedly violated was unconstitutional.

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, offered no analysis, but simply declared that “a line has to be drawn somewhere.” *Id.* at 245-46 (If the line is indeed arbitrary, perhaps it had already been drawn at twelve by history and by the Framers.) Furthermore, Justice Powell made a point of criticizing Justice Blackmun’s use of statistical and empirical research to reach his conclusion—the clearest indication of abandoning the functional equivalence test.

Justice White, who had authored *Williams*, now wrote alone, offering only the unsupported assertion that a reduction from six to five would violate the cross-section requirement. *Id.* at 245. (In *Williams*, he had concluded that a reduction from twelve to six would have no effect on cross-sectional representation.)

In sum, no Justice explicitly endorsed the test of functional equivalence; no Justice explicitly rejected it; and no justice offered any alternative to it.⁵

5. After being assigned to write the Court’s opinion in *Ballew*, Justice Blackmun’s law clerk brought him a stack of research studies revealing that six-person groups functioned, for the most part, significantly less well than twelve-person groups on the criteria that *Williams* had specified. The law clerk offered

Without the functional equivalence test, *Williams's* rationale justifying juries smaller than twelve is gone. *With* the functional equivalence test, empirical and statistical information do not support the constitutionality of juries smaller than twelve. Yet, despite the absence of any justification for the reduction of juries to sizes smaller than twelve, lower courts view juries as small as six to be constitutional because in *Williams* the Supreme Court said so.

that *Williams* had been wrongly decided and would need to be overruled. Justice Blackmun replied that *Williams* was “on the books” and therefore would not be overruled. However, he also shared his worry that the next jury-size case would be about four jurors, and then three, and then

Justice Blackmun—a *summa cum laude* mathematics graduate from Harvard College who spent eight years as general counsel at the Mayo Clinic—surely did not read the studies as providing empirical support for the *Williams* holding. Nor would he have thought that studies comparing groups of size six to groups of size twelve indicated that deficiency began with (untested) groups of size five. Of course, once he appreciated that juries of size six were deficient, he would recognize that juries of five almost certainly would be also.

Consequently, Justice Blackmun might have placed the research studies so prominently in his opinion to show that five-person juries were deficient by showing that six-person juries were deficient. In so doing, of course, he was also showing—without calling for its overruling—that *Williams* had been decided in error. Indeed, while showing the world that *Williams* was in error, Justice Blackmun also wrote that, “we adhere to, and reaffirm our holding in *Williams v. Florida*” *Ballew*, 435 U.S. at 239.

However one might wish to characterize all of this, it would seem to have little to do with the functional equivalence test. See memos exchanged between Justice Blackmun and his law clerk in the Harry A. Blackmun Papers, Box 735, Library of Congress.

Since, after *Ballew*, there is no longer any coherent framework for analyzing constitutional jury-size questions, a degree of chaos has developed among state courts. Florida's courts, as in the case at bar, read *Williams* as remaining good law, despite the failure to reiterate *Williams*'s test of constitutionality in *Ballew* and the absence of any discussion comparing five-member juries to any other benchmark, be that juries of six or of twelve. Other states have provided for juries of other sizes (e.g., Arizona uses eight jurors where the possible sentence is less than 30 years, otherwise twelve jurors. Ariz. Rev. Stat. § 21-102.B).

By contrast, the supreme courts of Minnesota (*State v. Hamm*, 423 N.W.2d 379 (Minn. 1988), superseded by state constitutional amendment requiring a jury of twelve for felonies and a jury of six for misdemeanors) and New Hampshire (*Opinion of the Justices*, 431 A.2d 135 (N.H. 1981)) were persuaded by the factual analysis in Justice Blackmun's opinion in *Ballew* showing that six-person juries are *not* functionally equal to twelve-person juries, and they so ruled in the jury-size matters before them. Thus, some state courts have found the *dicta* of the Court's jury-size opinions more illuminating than the holdings.

With no coherent guidance from this Court on how to assess the federal constitutionality of those juries, confusion likely will multiply.

CONCLUSION

Williams v. Florida created a test of constitutionality that turned on statistical and empirical evidence relating to the likely representativeness and performance of different-sized juries. The *Williams* Court purported to rely on that test in assessing the constitutionality of six-person juries. Had it conducted its test proficiently, statistical theory would have played a greater role than empirical evidence in its judgment because there was almost no empirical evidence systematically comparing juries of the two sizes when *Williams* arose. None of the “experiments” the Court thought it found had anything informative to offer. But statistical sampling principles alone, had they been considered, would almost certainly have led the Court to conclude that six-person juries do not measure up to twelve-person juries on the issues it thought important.

In *Ballew v. Georgia*, none of the Justices embraced the functional equivalence test, though none explicitly repudiated it. Assuming the rationale of *Williams* is no longer good law, nothing remains to justify the halving of the American jury. Further, if the test the *Williams* Court used somehow survives, statistics and research show that the decision should be overruled.

As detailed above, because smaller juries generally perform less well than larger juries on judicially specified critical dimensions, wherever smaller juries are employed, cross-sectional representation on any and every attribute is diminished, decisions are less reliable, more variable, more unpredictable, and have greater potential to produce aberrant verdicts than had been the norm with twelve-person juries.

There is now no coherent Sixth Amendment jurisprudence that guides decisions on jury size. The inconsistencies across jurisdictions and reduced efficacy of juries that *Williams* and *Ballew* left in their wake could contribute insidiously to reduced public confidence in the institution of the jury trial.

What is to be done?

The functional equivalence test could be resurrected, employed with seriousness, and its results observed. At the time of the *Williams* decision there were few adequate studies relevant to the question of the functional effects of differing jury sizes. By the time of *Ballew* there were enough to see that juries of six were inadequate. The ensuing decades have seen further work in this area, which can be employed in applying the test. Today, it is clear that both statistics and empirical research show that six-person juries are inferior to twelve-person juries.

But the Court has nudged aside, if not abandoned, the functional equivalence test. Consequently, the traditional jury of twelve has been sliced in half with no theory of any kind to support the slicing. This Court could attempt to find and adopt a new, coherent, and workable theory justifying severe reductions in jury size. But we know of none.

For the foregoing reasons, we submit that the Court should forthrightly acknowledge that *Williams* was wrongly decided, overrule that decision, and recognize once again that the Constitution requires twelve-member criminal juries.

Respectfully submitted,

SARAH LAHLOU-AMINE
401 E. Jackson Street,
Suite 2400
Tampa, FL 33602

STEPHEN R. SENN
Counsel of Record
NICHOLAS L. SELLARS
PETERSON & MYERS, P.A.
225 East Lemon Street,
Suite 300
Lakeland, FL 33801
(863) 683-6511
ssenn@petersonmyers.com

Counsel for Amici Curiae

APPENDIX

TABLE OF APPENDICES

	<i>Page(s)</i>
APPENDIX A – <i>AMICI</i>	1a

APPENDIX A — *AMICI*

Steven G. Calabresi, JD, Clayton J. and Henry R. Barber Professor of Law, Northwestern University Pritzker School of Law.

Shari S. Diamond, JD, PhD, Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University Pritzker School of Law, and Research Professor, American Bar Foundation.

Phoebe C. Ellsworth, PhD, Frank Murphy Distinguished University Professor Emerita of Law and Psychology, University of Michigan.

Samuel R. Gross, JD, Thomas and Mabel Long Professor of Law Emeritus, University of Michigan Law School.

Valerie P. Hans, PhD, Charles F. Rechlin Professor of Law, Cornell Law School.

Stephan Landsman, JD, Emeritus Professor of Law and Organizer and Director, Clifford Symposium on Tort Law and Social Policy Emeritus, DePaul College of Law.

Richard O. Lempert, JD, PhD, Eric Stein Distinguished University Professor Emeritus of Law and Sociology, University of Michigan.

Nancy S. Marder, JD, Professor of Law and Director of the Justice John Paul Stevens Jury Center, Chicago-Kent College of Law.

Appendix A

Steven D. Penrod, JD, PhD, Distinguished Professor,
John Jay College of Criminal Justice, The City University
of New York.

Mary R. Rose, PhD, Professor, Department
of Sociology and Director, Human Dimensions of
Organizations Program, University of Texas at Austin.

Michael J. Saks, PhD, MSL, Regents Professor,
Sandra Day O'Connor College of Law and Department
of Psychology, Arizona State University.

Alisa Smith, JD, PhD, Professor of Legal Studies,
University of Central Florida.