No.

IN THE SUPREME COURT OF THE UNITED STATES

KURT N. HAUSCH, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

KURT N. HAUSCH,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2024-2983

[November 13, 2025]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Michael J. Linn, Judge; L.T. Case No. 2023CF001214A.

Daniel Eisinger, Public Defender, and Gary L. Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Briana P. Reed, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GROSS, GERBER and SHEPHERD, JJ., concur.

* * *

Not final until disposition of timely-filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

December 11, 2025

KURT N. HAUSCH, Appellant(s) v. STATE OF FLORIDA, Appellee(s).	**CASE NO. - 4D2024-2983** L.T. No. - 2023CF001214 A

BY ORDER OF THE COURT:

ORDERED that Appellant's November 18, 2025 motion for rehearing and written opinion is denied.

Served:
Crim App WPB Attorney General
Gary Lee Caldwell
Stephen Charles Hooper
Briana Paige Reed

TP

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.

4D2024-2983 December 11, 2025

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

4D2024-2983 December 11, 2025

II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO A TWELVE-MEMBER JURY IN VIOLATION OF THE DUE PROCESS AND JURY CLAUSES OF THE FEDERAL CONSTITUTION.

Florida law provides for six-member juries in non-capital cases. § 913.10, Fla. Stat; Art. I, § 22, Fla. Const. Appellant contends that his trial by a six-member jury violates the Jury, Due Process, and Privileges and Immunities Jury Clauses of the federal constitution, so that structural, fundamental constitutional error occurred because he was deprived of this right. Amend. VI, XIV, U.S. Const.

This issue involves a pure question of law involving interpretation of the constitution so that review is de novo. *See State v. McAdams*, 193 So. 3d 824, 829 (Fla. 2016) (holding review is de novo as to issue involving a pure question of law requiring interpretation of constitution). It also involves a claim of fundamental error, which is also reviewed de novo. *Nabeack v. State*, 364 So. 3d 1116, 1117 (Fla. 4th DCA 2023).

Appellant acknowledges contrary authority, as discussed below. He further acknowledges that the Supreme Court has recently denied review of this issue over Justice Gorsuch's dissent.

See Cunningham v. Florida, 144 S. Ct. 1287–88 (2024) (Gorscuch, J., dissenting from denial of certiorari).

Williams v. Florida, 399 U.S. 78 (1970), held that state court juries as small as six were constitutionally permissible, despite the determination in *Thompson v. Utah,* 170 U.S. 343, 349–50 (1898), that the jury guaranteed by the Sixth Amendment consists "of twelve persons, neither more nor less."

Thompson held that the Sixth Amendment enshrined the right to a jury of twelve as provided at common law. *Id*. at 349–50. In addition to the authorities cited there, one may note that Blackstone stated that the right to a jury of twelve is even older, and more firmly established than the unqualified right to counsel in criminal cases. 4 William Blackstone, *Commentaries on the Laws of England*, ch. 27 ("Of Trial and Conviction").[1] Blackstone traced the right back to ancient feudal right to "a tribunal composed of twelve good men and true," and wrote that "it is the most transcendent privilege which any subject can be enjoy or wish for, that he cannot be affected in his property, his liberty or his person, but by the

[1] Found at https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf

unanimous consent of twelve of his neighbours and equals." 3 Blackstone, ch. 23 ("Of the Trial by Jury").[2]

Thus, at the time of the amendment's adoption, the essential elements of a jury included "twelve men, neither more nor less." *Patton v. United States*, 281 U.S. 276, 288 (1930).

Williams itself has now come into question in light of *Ramos v. Louisiana*, 590 U.S. 83 (2020), which concluded that the Sixth Amendment's jury requirement encompasses what the term "meant at the Sixth Amendment's adoption." *Id.* at 90. (Of course, the requirement that the jury be composed of men has been overturned by a subsequent amendment – the Equal Protection Clause of the Fourteenth Amendment. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).)

In this case, Appellant did not receive a trial by a jury as the term was meant at the Sixth Amendment's adoption, or at the time of the Fourteenth Amendment's adoption for that matter, as he was not tried by a jury of twelve. This is a structural error to which harmless error does not apply under the principles set out in

[2] Found at https://lonang.com/wp-content/download/Blackstone-CommentariesBk3.pdf

Weaver v. Massachusetts, 582 U.S. 286, 295-96 (2017), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

The undersigned acknowledges that this Court has rejected this argument. *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), *rev. denied* SC2022–1597 (Fla. June 6, 2023), *cert. denied* No. 23–5173 (U.S. May 28, 2024). *See also Salmon v. State*, 387 So. 3d 393 (Fla. 1st DCA 2024). He further acknowledges that section 913.10, Florida Statutes, provides for six person juries in all non-capital criminal cases, and that this provision is authorized by Article I, section 22 of the Florida Constitution.

Although defense counsel did not raise the issue, the error is fundamental and structural, as the conviction arose from a sheer denial of a fundamental constitutional right. Waiver of the constitutional right of trial by the proper number of jurors must be made personally by the defendant. *See Blair v. State*, 698 So. 2d 1210, 1217 (Fla. 1997) (finding valid defendant's agreement to verdict by five-member jury valid when made "in a colloquy at issue here, including a personal on-the-record waiver," and 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.”). A new trial should be ordered.

II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO A TWELVE-MEMBER JURY IN VIOLATION OF THE DUE PROCESS AND JURY CLAUSES OF THE FEDERAL CONSTITUTION.

Appellee says the issue is not preserved for appeal. AB 12. Appellant agrees. That is why he has raised this issue as one of fundamental error.

In this regard, Appellant recognizes that this Court wrote in *Albritton v. State*, 360 So. 3d 1145 (Fla. 4th DCA 2023), when denying a jury-of-twelve claim:

> The defendant did not raise this argument in the trial court. Therefore, the defendant did not preserve this argument. *See Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005) (proper preservation requires a litigant to make a timely, contemporaneous objection to place the trial court on notice that error may have been committed and provide the trial court with an opportunity to correct the error at an early stage of the proceedings).

Id. at 1147.

Appellant respectfully submits that this statement in *Albritton* is flawed.

First, it is contrary to *Blair v. State*, 698 So. 2d 1210, 1217 (Fla. 1997) (finding valid defendant's agreement to verdict by five-member jury valid when made "in a colloquy … including a personal on-the-record waiver" was "sufficient to pass muster under the

federal and state constitutions," and Blair's 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.") and *Wallace v. State*, 722 So. 2d 913 (Fla. 2d DCA 1998) (reversing on grounds of fundamental error where appellant was tried by five-member jury and judge did not inform the defendant of his right to six-person jury).

Under those cases, the waiver of a constitutionally-required number of jurors must be made by the defendant personally after being informed of the right being relinquished.

Second, the *Harrell* case cited in *Albritton* involved a run-of-the-mill pleading issue. It did not involve the denial of a fundamental constitutional right.

Third, the Sixth Amendment jury right is tightly bound with the Due Process Clause of the Fourteenth Amendment, *see Erlinger v. United States*, 602 U.S. 821, 831 (2024), and issues of due process rights and other issues of the facial constitutionality of a statute may be raised as fundamental error. *See, e.g., Edenfield v. State*, 379 So. 3d 5, 7 n.1 (Fla. 1st DCA 2023) (conviction based on

facially invalid statute is fundamental error); *State v. Johnson*, 616 So. 2d 1, 3–4 (Fla. 1993) (holding a defendant may raise the constitutionality of a sentencing statute for the first time on appeal); *Mincey v. State*, 889 So. 2d 211, 212 (Fla. 4th DCA 2004) (same); *Chang v. State*, 50 Fla. L. Weekly D1073, D1079, 2025 WL 1386670 (Fla. 2d DCA May 14, 2025) ("Consideration of improper sentencing factors constitutes a due process violation that results in fundamental error."); *Reed* (erroneous jury instruction on contested element constitutes fundamental error); *Santiago-Gonzalez v. State*, 301 So. 3d 157, 175 (Fla. 2020) (fundamental error may apply where there has been "a denial of due process"); *Wallace*.

In the present case, fundamental error occurred and the convictions and sentences should be reversed with instructions to afford Appellant a new trial.