

No.

IN THE SUPREME COURT OF THE UNITED STATES

MIGEL DAVIS, 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

DANIEL EISINGER

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MIGEL DAVIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2024-2027

[February 26, 2026]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit,
Broward County; Barbara Duffy, Judge; L.T. Case No. 21009698CF10A.

Daniel Eisinger, Public Defender, and Paul Edward Petillo, Assistant
Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Kimberly T.
Acuna, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

LEVINE, CONNER and SHAW, JJ., concur.

* * *

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

STATEMENT OF THE CASE AND FACTS

A. Jurisdictional Statement

Appellant was charged with four counts of lewd or lascivious battery on a child twelve or older but less than sixteen. R 90-91. A six-person jury convicted him, and he was sentenced on each count to 357.50 months in prison. R 124, 210-221. He filed a premature notice of appeal. R 205. The trial court's later-filed sentencing orders vested jurisdiction with this Court. Fla. R. App. P. 9.110(l); *Neal v. State*, 142 So. 3d 883, 890 (Fla. 1st DCA 2014).

This Court has jurisdiction to review a criminal judgment and sentence under article V, section 4(b)(1), Florida Constitution; Florida Rule of Appellate Procedure 9.140(b)(1)(A); and sections 924.02, 924.05, and 924.06(1), Florida Statutes.

B. Defense counsel moves for a twelve-person jury.

Before trial, defense counsel filed a motion arguing that appellant was entitled to a twelve-person jury under the Sixth and Fourteenth Amendments to the United States Constitution. R 81-89. This issue was raised again before jury selection, but there was some confusion about the motion. T 14. Appellant was represented by two public defenders. One of them said they were not raising the

issue, but the other one said that they were, and that they had been told by a member of the public defender's office to raise it. T 14. The trial court stated, "You weren't going to get it anyway. How's that?" The public defender who was requesting a twelve-person jury had the last word (T 14):

MS. WEISLER: For appellate purposes, we were told to still do it.

THE COURT: I think the Florida Supreme Court ruled on it.

MS. WEISLER: I know. She [an office supervisor] said, though, to still do it.

C. The Courtroom was closed for VG's testimony.

VG was the alleged victim and the State's first witness. Before she testified, the State moved under section 918.16, Florida Statutes, to close the courtroom for her testimony. T 311. Defense counsel argued that the public defender interns should be allowed to remain in the courtroom. T 316. The judge excluded them, stating, "I'd rather err on the side of the child." T 316. Later, the State and defense counsel agreed that the public defender interns could watch by Zoom, and the trial court arranged that. T 339.

POINT II

APPELLANT WAS DEPRIVED OF HIS RIGHT TO TRIAL BY A TWELVE-MEMBER JURY

Before trial, defense counsel filed a motion arguing that appellant was entitled to a twelve-person jury under the Sixth and Fourteenth Amendments to the United States Constitution. R 81-89. This issue was raised again before jury selection, but there was some confusion about the motion. T 14. Appellant was represented by two public defenders. One of them said they were not raising the issue, but the other one said that they were, and that they had been told by a member of the public defender's office to raise it. T 14. The trial court stated, "You weren't going to get it anyway. How's that?" The public defender who was requesting a twelve-person jury had the last word (T 14):

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THE COURT: I think the Florida Supreme Court ruled on it.

MS. WEISLER: I know. She [an office supervisor] said, though, to still do it.

Appellant argues that this issue was preserved by the valiant Ms. Weisler; but in any event, the error is fundamental.

Appellant recognizes that Florida allows a jury of six in non-capital cases. Art. I, § 22, Fla. Const.; § 913.10, Fla. Stat. The Supreme Court held this does not violate the Sixth Amendment in *Williams v. Florida*, 399 U.S. 78 (1970). He submits, however, that *Williams* was incorrectly decided and is contrary to the understanding of the Sixth Amendment at the time of the Founding. See *Cunningham v. State*, 144 S. Ct. 1287–88 (2024) (Gorsuch, J., dissenting from denial of certiorari).

Appellant recognizes that this Court has rejected similar claims. See, e.g., *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). Nonetheless, he maintains that the correct view is set out in Justice Gorsuch’s dissent in *Cunningham*.

The error is fundamental. 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.”). Further, section 913.10, Florida Statutes, is unconstitutional on its face. A defendant may raise the facial constitutionality of a statute for the first time on appeal. In *State v. Johnson*, 616 So. 2d 1 (Fla. 1993); *Mincey v. State*, 889 So. 2d 211, 212 (Fla. 4th DCA 2004).

The convictions and sentences should be reversed with instructions to afford appellant a new trial.