

No.

IN THE SUPREME COURT OF THE UNITED STATES

GARY JEROME MILLER, 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

GARY JEROME MILLER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2025-1287

[May 14, 2026]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Michael James Linn, Judge; L.T. Case No. 562022CF002121AXXXXX.

Daniel Eisinger, Public Defender, Paul Edward Petillo and Rebecca Kelly, Assistant Public Defenders, West Palm Beach, and Edward John Abare III of Edward J. Abare III, PLLC, Vero Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Melynda Layne Melear, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

KUNTZ, C.J., MAY and FORST, JJ., concur.

* * *

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

STATEMENT OF THE CASE AND FACTS

A. Jurisdictional Statement

A six-person jury convicted appellant of grand theft, felony battery, and criminal mischief. R 331-32. It acquitted appellant of kidnapping and tampering with a witness. *Id.* The jury also found that appellant met the criteria for sentencing as an Habitual Felony Offender. T 355; R 335. He was sentenced to ten years in prison as an Habitual Felony Offender on the felony battery count, followed by five years in prison on the grand theft count. R 394-402; T 374. He was sentenced to time served on the criminal mischief count. T 373.

Appellant filed a premature notice of appeal. R 362, 381. The trial court's later-filed judgment and sentence 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.

POINT II

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO TRIAL BY A TWELVE-MEMBER JURY

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 (2024) (Gorsuch, J., dissenting from denial of certiorari).

Appellant also recognizes that this Court has rejected this claim. *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022). Nonetheless, he maintains that the correct view is set out in Justice Gorsuch's dissent in *Cunningham*. In addition, there are two cases currently pending in the United States Supreme Court raising this issue: *Parada v. United States*, No. 25-166, and *Minor v. Florida*, No. 24-7489. The Court ordered the government to respond to the petition in *Parada* and it ordered the State to respond to the

petition in *Minor*. This is some indication that the Court is once again interested in addressing the issue.

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). Appellant did not waive his right to a twelve-person 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).

Appellant's conviction by a six-member jury violates the Sixth Amendment to the United States Constitution. The conviction and sentence should be reversed with instructions to afford appellant a new trial.