

No.

IN THE SUPREME COURT OF THE UNITED STATES

NELSON OMAR TORRES, 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

NELSON OMAR TORRES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2025-0323

[May 20, 2026]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Michael James Linn, Judge; L.T. Case No. 562021CF002198AXXXXX.

Daniel Eisinger, Public Defender and Summer Ivy Hill, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Nathaniel LeBlanc, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. 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).

GROSS, MAY and KLINGENSMITH, JJ., concur.

* * *

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

ISSUE IV

APPELLANT WAS ENTITLED TO A TWELVE-
PERSON JURY UNDER THE SIXTH AND
FOURTEENTH AMENDMENTS AND HE DID
NOT WAIVE THAT RIGHT

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 sentence should be reversed with instructions to afford Appellant a new trial.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse and remand to vacate Appellant's convictions for battery, assault, and tampering.

If Appellant's tampering conviction stands, then he should receive a resentencing, providing the 60 days credit for the assault