

No.

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN BISHOP, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DUSTIN ANDREW BISHOP,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2024-2202

[May 20, 2026]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Michael Carlton Heisey, Judge; L.T. Case No. 562022CF003365AXXXXX.

Daniel Eisinger, Public Defender, and Logan Tanner Mohs, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Deborah Gail Koenig, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. See Guzman v. State, 350 So. 3d 72, 73 (Fla. 4th DCA 2022), *rev. denied*, No. SC2022-1597, 2023 WL 3830251 (Fla. June 6, 2023), *cert. denied*, --- U.S. ----, 144 S. Ct. 2595, 219 L.Ed.2d 1247 (2024).

GROSS, MAY and KLINGENSMITH, JJ., concur.

* * *

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

STATEMENT OF THE CASE AND FACTS

The State charged Appellant Dustin Bishop with selling methamphetamine. [R. 13]. The State filed multiple notices of its intent to seek an enhanced penalty of Habitual Felony Offender (“HFO”) pursuant to section 775.084, Florida Statutes. [R. 31, 41].

The State’s theory of the case was that Bishop agreed to sell seven grams of methamphetamine to a confidential informant named Katrena Simmons. [T. 141]. Simmons was a convicted felon working with law enforcement. [T. 141-42]. She was searched, given money and recording devices, and made the purchase from Bishop. [T. 142-43].

The defense theory was that no sale occurred, that Simmons was biased, that officers never actually saw anything happen, and that the jury would not see Bishop on any recording. [T. 145-46]. . . .

The jury, composed of only six people, found Bishop guilty as charged of sale or delivery of methamphetamine. [R. 61, 112; T. 129-30, 347]. . . .

The trial court adjudicated Bishop guilty and sentenced him to 10 years in prison. [R. 196-200].

Bishop timely appealed. [R. 190]. . . .

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IV. Bishop was entitled to a twelve person jury under the Sixth and Fourteenth Amendments, and he did not waive that right.

Preliminary Statement

Bishop acknowledges this Court's ruling in *Guzman v. State*, 350 So. 3d 72, (Fla. 4th DCA 2022), which relied on *Williams v. Florida*, 399 U.S. 78, 86 (1970). *Guzman* and *Williams* hold that a six-person jury is constitutional. However, these holdings were wrong and should be overturned. See *Ramos v. Louisiana*, 590 U.S. 83, 112 (2020) (Sotomayor, J., concurring) (describing a similar error that was "irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision.").

In order to pursue that hope with this case, or to at least keep this case in the appellate pipeline should another case be taken, undersigned counsel asks this Court, if it is inclined to follow *Guzman* and affirm this issue, to include a citation to *Guzman* in the opinion. See *Sandoval v. State*, 884 So. 2d 214, 216 n.1 (Fla. 2d DCA 2004) ("Counsel has the responsibility to make such objections at sentencing as may be necessary to keep the defendant's case in an appellate 'pipeline.'"); see also R. Regulating Fla. Bar 4-3.1 (stating that a lawyer may assert an issue involving "a good faith argument for an extension, modification, or reversal of existing law"); *United States v. Marseille*, 377 F.3d 1249, 1257 & n.14

(11th Cir. 2004) (defendant making an argument he knows must lose for purposes of preserving it for a later court).

Standard of Review

The standard of review of constitutional claims is de novo. See *A.B. v. Fla. Dept. of Children & Family Servs.*, 901 So. 2d 324, 326 (Fla. 3d DCA 2005).

Argument

Bishop was convicted by a jury comprised of a mere six people. See [T. 129-30]. This was in violation of the Sixth and Fourteenth Amendments' guarantee of a right to a twelve-person jury when the defendant is charged with a felony.

Although the United States Supreme Court held in *Williams v. Florida*, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible, *Williams* is impossible to square with the Supreme Court's more recent ruling in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which concluded that the Sixth Amendment's "trial by an impartial jury" requirement encompasses what the term "meant at the time of the Sixth Amendment's adoption." *Id.* at 1395; U.S. Const. amend. VI.

Prior to 1970, subjecting Bishop to a trial with only six jurors would have indisputably violated his Sixth Amendment rights. As the *Ramos*

Court observed, even Blackstone recognized that under the common law, “no person could be found guilty of a serious crime unless ‘the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors[.]” *Ramos*, 140 S. Ct. at 1395. “A ‘verdict, taken from eleven, was no verdict’ at all.” *Id.*

After the Sixth Amendment was enacted, a bevy of state courts—ranging from Alabama to Missouri to New Hampshire—interpreted it to require a twelve-person jury. See *Miller, Comment, Six of One Is Not A Dozen of the Other*, 146 U. PA. L. REV. 621, 643 n.133 (1998) (collecting cases from the late 1700s to the 1860s). In 1898, the United States Supreme Court added its voice to the chorus, noting that the Sixth Amendment protects a defendant’s right to be tried by a twelve-person jury. *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898) *overruled on other grounds* by *Collins v. Youngblood*, 497 U.S. 37, 51-52 (1990). As the *Thompson* Court explained, since the time of Magna Carta, the word “jury” had been understood to mean a body of twelve people. *Id.* Given that understanding had been accepted since 1215, the Court reasoned, “[i]t must” have been “that the word ‘jury’” in the Sixth Amendment was “placed in the constitution of the United States with reference to [that] meaning affixed to [it].” *Id.* at 350.

The Supreme Court continued to cite the basic principle that the Sixth Amendment requires a twelve-person jury in criminal cases for seventy more years. For example, in 1900, the Court explained that “there [could] be no doubt” “[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution.” *Maxwell v. Dow*, 176 U.S. 581, 586 (1900). Thirty years later, the Court reiterated that it was “not open to question” that “the phrase ‘trial by jury’” in the Constitution incorporated juries’ “essential elements” as “they were recognized in this country and England,” including the requirement that they “consist of twelve men, neither more nor less.” *Patton v. United States*, 281 U.S. 276, 288 (1930). And as recently as 1968, the Court remarked that “by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta,” such as the necessary inclusion of twelve members. *Duncan v. Louisiana*, 391 U.S. 145, 151-152 (1968).¹

¹ See also, e.g., *Capital Traction Co v. Hof*, 174 U.S. 1, 13 (1899) (“‘Trial by jury,’ in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men” but also contains other requirements); *Rassmussen v. United States*, 197 U.S. 516, 529 (1905) (“The constitutional requirement that ‘the trial of all crimes,

In 1970, however, the *Williams* Court overruled this line of precedent in a decision that Justice Harlan described as “stripping off the livery of history from the jury trial” and ignoring both “the intent of the Framers” and the Court’s long held understanding that constitutional “provisions are framed in the language of the English common law, and are to be read in the light of its history.” *Baldwin v. New York*, 399 U.S. 117, 122-24 (1970) (citation omitted) (Harlan, J., concurring in the result in *Williams*). Indeed, *Williams* recognized that the Framers “may well” have had “the usual expectation” in drafting the Sixth Amendment “that the jury would consist of 12” members. *Williams*, 399 U.S. at 98-99. But *Williams* concluded that such “purely historical considerations” were not dispositive. *Id.* at 99. Rather, the Court focused on the “function” that the jury plays in the Constitution, concluding that the “essential feature” of a jury is it leaves justice to the “commonsense judgment of a group of laymen” and thus allows “guilt or innocence” to be determined via “community participation and [with] shared responsibility.” *Id.* at 100-01. According to the *Williams* Court, both “currently available evidence [and] theory” suggested that function could just as easily be performed with six jurors as with twelve. *Id.* at 101-102 & n.48; *cf. Burch v. Louisiana*, 441 U.S. 130, 137 (1979) except in cases of impeachment, shall be by jury,’ means, as this court has adjudged, a trial by the historical, common-law jury of twelve persons”).

(acknowledging that *Williams* and its progeny “departed from the strictly historical requirements of jury trial”).

Williams’s ruling that the Sixth Amendment (as incorporated to the States by the Fourteenth) permits a six-person jury cannot stand in light of *Ramos*. There, the Supreme Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious offense. In reaching that conclusion, the *Ramos* Court overturned *Apodaca v. Oregon*, 406 U.S. 404 (1972), a decision that it faulted for “subject[ing] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment.” *Ramos*, 140 S. Ct. at 1401-02.

That reasoning undermines *Williams* as well. *Ramos* rejected the same kind of “cost-benefit analysis” the Court undertook in *Williams*, observing that it is not the Court’s role to “distinguish between the historic features of common law jury trials that (we think) serve ‘important enough’ functions to migrate silently into the Sixth Amendment and those that don’t.” *Ramos*, 140 S. Ct. at 1400-01. Ultimately, the *Ramos* Court explained, the question is whether “at the time of the Sixth Amendment’s adoption, the right to trial by jury included” the particular feature at issue. *Id.* at 1402. As the history summarized above establishes, there can be no serious doubt that the common understanding of the jury trial during the

Revolutionary War era was that twelve jurors were required: “a verdict, taken from eleven, was no verdict at all.” See *id.* at 1395 (quotation marks omitted).

Even setting aside *Williams*’s now-disfavored functionalist logic, its ruling suffered from another significant flaw: it was based on research that was out of date shortly after the opinion issued.

Specifically, the *Williams* Court “[f]ound little reason to think” that the goals of the jury guarantee—including, among others, “to provide a fair possibility for obtaining a representative[] cross-section of the community”—“are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12.” *Williams*, 399 U.S. at 100. The Court theorized that “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.” *Id.* at 102.

In the time since *Williams*, that determination has proven incorrect. Indeed, the Court acknowledged as much just eight years later in *Ballew v. Georgia*, 435 U.S. 223 (1978), when it concluded that the Sixth Amendment barred the use of a five-person jury. Although *Ballew* did not overturn *Williams*, the *Ballew* Court observed that empirical studies conducted in the handful of intervening years highlighted several problems

with *Williams*' assumptions. For example, *Ballew* noted that more recent research showed that (1) "smaller juries are less likely to foster effective group deliberation," *id.* at 232, (2) smaller juries may be less accurate and cause "increasing inconsistency" in verdict results, *id.* at 234, (3) the chance for hung juries decreases with smaller juries, disproportionately harming the defendant, *id.* at 236; and (4) decreasing jury sizes "foretell[] problems ... for the representation of minority groups in the community," undermining a jury's likelihood of being "truly representative of the community," *id.* at 236-37.

Moreover, the *Ballew* Court "admit[ted]" that it "d[id] not pretend to discern a clear line between six members and five," effectively acknowledging that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id.* at 239; see also *id.* at 245-46 (Powell, J., concurring) (agreeing that five-member juries are unconstitutional, while acknowledging that "the line between five- and six-member juries is difficult to justify").

Post-*Ballew* research has further undermined *Williams*. Current empirical evidence indicates that "reducing jury size inevitably has a drastic effect on the representation of minority group members on the jury." Diamond et al., *Achieving Diversity on the Jury: Jury Size and the*

Peremptory Challenge, 6 J. OF EMPIRICAL LEGAL STUD. 425, 427 (Sept. 2009); see also Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (Summer 2020) (“Larger juries are also more inclusive and more representative of the community. ... In reality, cutting the size of the jury dramatically increases the chance of excluding minorities.”). Because “the 12-member jury produces significantly greater heterogeneity than does the six-member jury,” Diamond et al., at 449, it increases “the opportunity for meaningful and appropriate representation” and helps ensure that juries “represent adequately a cross-section of the community.” *Ballew*, 435 U.S. at 237.

Other important considerations also weigh in favor of the twelve-member jury. For instance, studies indicate that twelve-member juries deliberate longer, recall evidence better, and rely less on irrelevant factors during deliberation. See Smith & Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury*, 60 FLA. L. REV. 441, 465 (2008). Minority views are also more likely to be thoroughly expressed in a larger jury, as “having a large minority helps make the minority subgroup more influential,” and, unsurprisingly, “the chance of minority members having allies is greater on a twelve-person jury.” *Id.* at 466. Finally, larger juries deliver more predictable results. In the civil context, for example, “[s]ix-

person juries are four times more likely to return extremely high or low damage awards compared to the average.” Higginbotham et al., at 52.

Bishop recognizes that the state constitution provides:

SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Art. I, § 22, Fla. Const. And he recognizes that section 913.10, Florida Statutes, provides for six jurors except in capital cases. See *also* Fla. R. Crim. P. 3.270.

But Florida’s provision for a jury of six stems from the dawn of the Jim Crow era, one month after federal troops were withdrawn from the state. The historical background is as follows:

In 1875, the Jury Clause of the 1868 constitution was amended to provide that the number of jurors “for the trial of causes in any court may be fixed by law.” See *Florida Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241, 241 (Fla. 1903).

The common law rule of a jury of twelve was still kept in Florida while federal troops remained in the state. There was no provision for a jury of less than twelve until the Legislature enacted a provision specifying a jury of six in Chapter 3010, section 6. See *Gibson v. State*, 16 Fla. 291, 297–98 (1877) (quoting and discussing Chapter 3010, section 6, Laws of Florida

(1877)); *Florida Fertilizer*, 34 So. at 241 (noting that previously all juries had twelve members).

The Legislature enacted chapter 3010 with the jury-of-six provision on February 17, 1877. *Gibson*, 16 Fla. at 294. This was less than a month after the last federal troops were withdrawn from Florida in January 1877. See JERRELL H. SHOFNER, *Reconstruction and Renewal, 1865-1877*, in THE HISTORY OF FLORIDA 273 (Michael Gannon, ed., first paperback edition 2018) (“there were [no] federal troops” in Florida after 23 January 1877”).

The jury-of-six thus first saw light at the birth of the Jim Crow era as former Confederates regained power in southern states and state prosecutors made a concerted effort to prevent Blacks from serving on jurors.

On its face the 1868 constitution extended the franchise to Black men. But the historical context shows that that it was part of the overall resistance to Reconstruction efforts to protect the rights of Black citizens. The constitution was the product of a remarkable series of events including a coup in which leaders of the white southern (or native) faction took possession of the assembly hall in the middle of the night, excluding Radical Republican delegates from the proceedings. See Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case*

Study of Republican Factionalism in the Reconstruction South, 51 Fla. Hist. Q. 1, 5-6 (1972); SHOFNER, at 266. A reconciliation was effected as the “outside” whites “united with the majority of the body’s native whites to frame a constitution designed to continue white dominance.” Hume at 15.

The racist purpose of the resulting constitution was spelled out by Harrison Reed, a leader of the prevailing faction and the first governor elected under the 1868 constitution, who wrote to Senator Yulee that the new constitution was constructed to bar Blacks from legislative office:

Under our Constitution the Judiciary & State officers will be appointed & the apportionment will prevent a negro legislature.

Hume, at 15-16. See *also* SHOFNER, at 266.

In *Ramos*, Justice Gorsuch noted that the Louisiana non-unanimity rule arose from Jim Crow era efforts to enforce white supremacy. *Ramos*, 140 So. Ct. at 1394; see *also id.* at 1417 (Kavanaugh, J., concurring) (non-unanimity was enacted “as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”). The history of Florida’s jury of six arises from the same historical context.

In view of the foregoing, a jury of six at a criminal trial is unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution. See U.S. Const. amend. VI, U.S. Const. amend. XIV.

Finally, Bishop did not waive his Sixth Amendment right to a twelve-person jury. A defendant may waive his right to a constitutional jury, but the “express and intelligent consent of the defendant” is required. *Patton*, 281 U.S. at 312. See also *Johnson v. State*, 994 So. 2d 960, 964 (Fla. 2008) (holding Johnson’s general silence “did not constitute a valid waiver” to “his right to a jury trial”).

This Court should reverse the judgment and sentence and remand for a new trial with a twelve-person jury, as required by the Sixth and Fourteenth Amendments to the United States Constitution.