No.

IN THE SUPREME COURT OF THE UNITED STATES

DONALD KIRK MCDONALD, JR., PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner was deprived of his right, under the Sixth and Fourteenth Amendments, to a trial by a 12-person jury?

This is the question presented in *Kian v. Florida*, No. 25-6623, 2026 WL 1718018 (U.S. June 15, 2026) (granting petition).

PARTIES TO THE PROCEEDING

The parties to the proceeding before the Court are as follows:

Petitioner, Donald Kirk McDonald, Jr., was a criminal defendant convicted and sentenced in Martin County, Florida. He appealed to Florida's Fourth District Court of Appeal, which affirmed the judgment and sentence.

Respondent, State of Florida, prosecuted McDonald and defended the judgment and sentence on appeal in Florida's Fourth District Court of Appeal.

RELATED PROCEEDINGS

This case arises from these proceedings:

State v. Donald Kirk McDonald, Jr., No. 23-001342 (Fla. 19th Judicial Circuit).

McDonald v. State, 436 So. 3d 891 (Fla. 4th DCA 2026).

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

PETITION FOR A WRIT OF CERTIORARI

Donald Kirk McDonald, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida in this case.

OPINION BELOW

The decision of Florida's Fourth District Court of Appeal has been reported as *McDonald v. State*, No. 436 So. 3d 891 (Fla. 4th DCA). The decision is the appendix. App.2.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's conviction and sentence on July 9, 2026, and it denied his motion for rehearing August 6, 2026. App.2-3.

The Florida Supreme Court is "a court of limited jurisdiction," *Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019) (citation omitted), The court has no jurisdiction to review a district court of appeal decision entered without written opinion, like the one in the case at bar. *Jackson v. State*, 926 So. 2d 1262, 1266 (Fla. 2006). Hence, Petitioner could not seek review in that court. This Court has jurisdiction under 28 U.S.C. § 1257(a). *Ibanez v. Florida Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 142 (1994) (granting certiorari under similar circumstances).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 22 of the Florida Constitution provides:

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.

Section 913.10, Florida Statutes, provides:

Number of jurors.—Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.

STATEMENT OF THE CASE

Petitioner Donald Kirk McDonald, Jr., was convicted by a six-person jury of trafficking in methamphetamine, a felony, and possession of marijuana, a misdemeanor. App.4. He was sentenced to 20 years in prison on the trafficking offense and time served on the marijuana offense. App.9

On appeal to the Fourth District Court of Appeal, Petitioner argued that he was denied his right to a twelve-person jury under the Sixth and Fourteenth Amendments and that the statute that authorizes a jury of six, § 913.10, Fla. Stat., is unconstitutional on its face. App.10-17. Florida law permits a defendant to raise a facial challenge to a statute for the first time on appeal. *McDowell v. State*, 51 Fla. L. Weekly S245, S246 (Fla. July 16, 2026); *Harvey v. State*, 848 So. 2d 1060, 1063-64 (Fla. 2003); *State v. Johnson*, 616 So.2d 1, 3-4 (Fla. 1993).

The district court of appeal affirmed without a written opinion. App.2.

REASON FOR GRANTING THE PETITION

THE REASONING OF *WILLIAMS v. FLORIDA* HAS BEEN REJECTED, AND THE CASE SHOULD BE OVERRULED.

Petitioner was convicted of a felony by a six-member jury and he was sentenced to 20 years in state prison. The six-member jury was authorized by section 913.10 Florida Statutes. He contended on appeal that he was deprived of his right to a twelve-person jury under the Sixth and Fourteenth Amendments, and notwithstanding this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). App.10-17.

Florida's Fourth District Court of Appeal affirmed. App.2. The Florida Supreme Court had no jurisdiction to review the decision, so Petitioner seeks review in this Court. He contends that this Court's decision in *Williams* cannot be squared with the ruling in *Ramos v. Louisiana*, 590 U.S. 83 (2020), that the Sixth Amendment's "trial by an impartial jury" requirement encompasses what the term "meant at the Sixth Amendment's adoption," *id.* at 90.

What the term meant was a jury of twelve, and a "mountain of evidence" supports that. *Khorrami v. Arizona*, 143 S. Ct. 22, 23

(2022) (Gorsuch, J., dissenting from denial of certiorari). This Court has repeatedly recognized that the Sixth Amendment was understood at the time of the founding to require a 12-member jury. This Court said in *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898), that since the time of Magna Carta, the word "jury" had been understood to mean a body of twelve people. Given that 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.

This Court continued to cite the basic principle that the Sixth Amendment requires a twelve-person jury in criminal cases for seventy more years. 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, this 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 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).

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 … read in the light of its history." *Baldwin v. New York*, 399 U.S. 117, 122-123 (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) (acknowledging that *Williams* and its progeny "departed from the strictly historical requirements of jury trial").

Williams's ruling that the Sixth Amendment permits a six-person jury cannot stand in light of *Ramos*. There, this 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." 590 U.S. at 100.

That reasoning undermines *Williams* as well. *Ramos* rejected the same kind of "cost-benefit analysis" this 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.'" 590 U.S. at 98. Rather, 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. 590 U.S. at 100. 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. 590 U.S. at 90 (quotation marks omitted).

Williams suffered from another flaw: it was based on research that was out of date shortly after the opinion issued. The *Williams* Court "f[ou]nd 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." 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. This Court acknowledged as much 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 233, (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, disproportionally 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.) (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."); Shamena Anwar, et al., *The Impact of Jury Race In Criminal Trials*, 127 Q.J. Of Econ. 1017, 1049 (2012) ("[I]ncreasing the number of jurors on the seated jury would substantially reduce the variability of the trial outcomes, increase black representation in the jury pool and on seated juries, and

make trial outcomes more equal for white and black defendants.").

Because "the 12-member jury produces significantly greater heterogeneity than does the six-member jury," Diamond et al., *Achieving Diversity on the Jury*, *supra*, 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. This Court recognized this in *Brown v. Louisiana*, 447 U.S. 323, 333 n.12 (1980): "If a minority viewpoint is shared by 10% of the community, a 12-member jury may be expected to include at least 1 minority representative 72% of the time, [and] a 6-member jury would contain 1 such person 47% of the time…."

Smaller juries increase the risk of convicting the innocent. *Brown*, 447 U.S. at 332 ("[A] decline in jury size leads to less accurate factfinding and a greater risk of convicting an innocent person."); *accord Ballew*, 435 U.S. at 234 ("Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."). That drastic "consequence has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent." *Ramos*, 590 U.S. at 126

(Kavanaugh, J., concurring in part) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)).

Other important considerations also weigh in favor of the twelve-person jury. Studies indicate that twelve-person 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., *Better by the Dozen*, *supra*, at 52.

Importantly, the history of Florida's rule can be traced to the Jim Crow era. Justice Gorsuch has observed that "[d]uring the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and

systematic effort to suppress minority voices in public affairs." *Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from denial of certiorari) (citations omitted). 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, Laws of Florida (1877). *See Gibson v. State*, 16 Fla. 291, 297–98 (1877); *Florida Fertilizer*, 34 So. at 241.

The Florida Legislature enacted chapter 3010 with the jury-of-six provision on February 17, 1877. *Gibson*, 16 Fla. 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"). All 14 participating

Black legislators voted against reducing the size of noncapital juries. 1877 House Journal 187-188; 1877 Senate Journal 208; Brown Jr., *Florida's Black Public Officials, 1867-1924*, at 145-148 (1998) (listing legislators).

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.

And when the Florida Legislature reduced the size of juries from twelve to six in 1877, it also reinstated the "integrity, fair character, sound judgment and intelligence" test for jury service. Ch. 3010, Laws of Fla. (1877). This discretionary standard was "used to eliminate almost every black citizen from the southern trial venire." Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges*, 76 Corn. L. Rev. 1, 89-90 (1990). So rare was it for an African American to serve on a jury that it was worthy of a news article, and this was so well into the twentieth century:

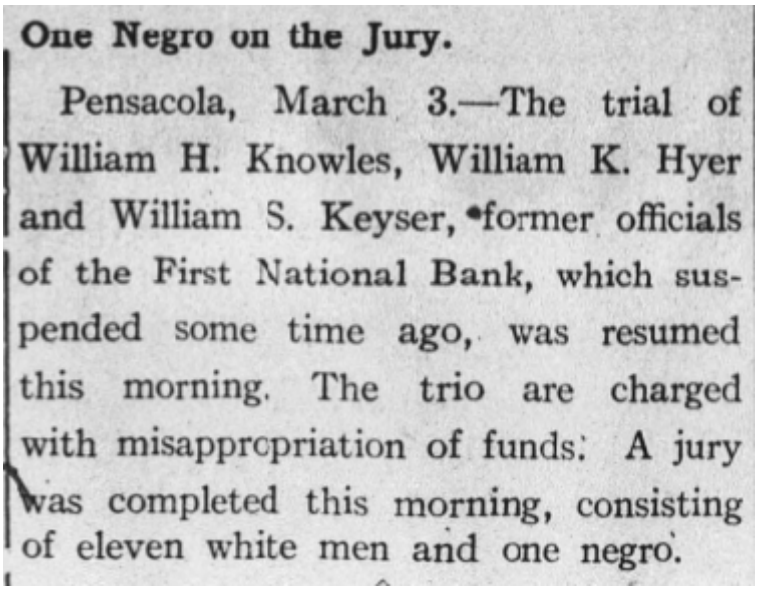
"It is strange that the presence of a negro on the jury should not have attracted sufficient attention to have caused an inquiry

into his eligibility as a jury man." *That Federal Jury*, Panama City Pilot, Nov. 27, 1924, at 1.

"At one point it looked as though the first negro juror in Monroe County was to be selected." *Child Molesting Trial Jury Chosen*, Key West Citizen, Dec. 11, 1952, at 1, 3.

"A negro juror was picked today to try Felix Combs, a negro roustabout, for raping a Clearwater woman. Selection of Henry Davis of Tarpon Springs marked one of the few times a negro has been selected for jury duty." *Negro Juror*, Sanford Herald, Oct. 4, 1948, at 1.

"The names of several Negroes were included in the 1950 jury list. Last fall, the county's first Negro juror served when Calvin Smith was named on the venire which heard a cattle rustling case in Circuit Court." *First Two Women are Picked for Possible Jury Duty in County*, Citrus Cnty. Chron., Feb. 16, 1950, at 1



One Negro on the Jury.

Pensacola, March 3.—The trial of William H. Knowles, William K. Hyer and William S. Keyser, former officials of the First National Bank, which suspended some time ago, was resumed this morning. The trio are charged with misappropriation of funds. A jury was completed this morning, consisting of eleven white men and one negro.

One Negro on the Jury, *DeLand Daily News*, March 3, 1915, at 3.

To top it off, the Legislature in that same session established convict leasing. Ch. 3034, Laws of Fla. (1877). "In 1877, newly-elected Governor George Franklin Drew officially created a penal system of convict leasing, under which private corporations leased or subleased prisoners of the state to access a large labor force. Unlike the contract systems of other states, Florida's new lease system absolved the state of any responsibility for convicts." Carson Eckhard, *Ragged Battalions, Plotting Liberty: Convict Leasing and the Construction of Carceral Capitalism in Florida*, 1875-1925, 27-28

(2021) (B.A. thesis, University of Pennsylvania).[1]

"By 1900, the South's judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites." Douglas A. Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 7-8 (2008); *see also* Matthew J. Mancini, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996) (noting the steady growth of Southern prison populations after the establishment of convict leasing: "Florida, with 125 prisoner in 1881, had 1,071 by 1904."); Carson Eckhard, *"If he dies, it is but a small loss": whiteness as property and convict leasing in Florida 1875–1925*. Ethnic and Racial Studies, Vol. 49, Issue 10, 2177 (2026) ("By the 1890s, leasing incarcerated people had become a major source of revenue, and the state legislature was advertising the opportunity to bid on convict labor across the South.").

This sad history casts into relief another negative consequence

[1] Available at: https://amc.sas.upenn.edu/sites/default/files/uploads/Eckhard_Paper.pdf

of smaller juries: it denies a great number of citizens the "duty, honor, and privilege of jury service." *Powers v. Ohio*, 499 U.S. 400, 415 (1991). Many consider jury service an "amazing and powerful opportunity and experience—one that will strengthen your sense of humanity and your own responsibility." United States Courts, *Juror Experiences*.[2]

"[J]ury service is more than a noble civic duty. Participating in the jury process can be an invigorating experience for jurors that changes their understanding of themselves and their sense of political power and broader civic responsibilities." Gastil et al, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION, Oxford University Press 4 (2010). Jury service is a "means of affording every citizen the chance to step into the state's shoes, to see the inner workings of the justice system, and to feel first-hand the power of self-government. In other words, the jury is a sacred, institutionalized opportunity for citizens to experience the transformative power of public deliberation." John Gastil & Phillip J. Weiser, *Jury Service as*

[2] Available at: https://www.uscourts.gov/services-forms/jury-service/learn-about-jury-service/juror-experiences

an Invitation to Citizenship: Assessing the Civic Values of Institutionalized Deliberation, 34 Pol'y Stud. J. 605, 619 (2006).

This Court should grant the petition, recede from *Williams*, restore the ancient right to a jury of twelve and reverse Petitioner's convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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