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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

DANIEL EISINGER
Public Defender

Paul E. Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600; (561) 624-6560
ppetillo@pd15.state.fl.us
appeals@pd15.org

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DONALD KIRK MCDONALD, JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2025-1091

[July 9, 2026]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Darren Steele, Judge; L.T. Case No. 432023CF001342CFAXMX.

Daniel Eisinger, Public Defender, and Alan T. Lipson, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Jessenia J. Concepcion, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GERBER, FORST and SHAW, JJ., concur.

* * *

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

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

August 6, 2026

DONALD KIRK MCDONALD, JR., Appellant(s), v. STATE OF FLORIDA, Appellee(s).	**CASE NO. - 4D2025-1091** L.T. No. - 432023001342CFAXMX

BY ORDER OF THE COURT:

ORDERED that Appellant's July 27, 2026 motions for rehearing, certification and/or to stay mandate are denied.

Served:
Crim App WPB Attorney General
Jessenia J. Concepcion
Alan Terry Lipson

AM

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.

Lonn Weissblum
4D2025-1091 August 6, 2026
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2025-1091 August 6, 2026

STATEMENT OF THE CASE AND FACTS

Charges

Defendant was charged by information with Trafficking in Methamphetamine (14 but less than 28 grams) (Count 1) and Possession of Cannabis (less than 20 grams) (Count 2) alleged to have been committed on December 6, 2023). (ER 26)

Background

MCSO Deputy NH has taken the FDLE drugs and narcotics classes which includes learning how to identify different drugs (including marijuana), how they are used and how they are sold. (T 103) He has become familiar with the odor of burnt marijuana and to distinguish that odor from raw marijuana. (T 103-04) The deputy has been involved in over a thousand marijuana investigations. (T 104) Being on road patrol, he frequently comes in contact with marijuana. (T 104)

Initial Traffic Stop

Around 1:30 AM on September 6, 2023, Deputy NH was on road patrol when he noticed that the taglight of a black SUV was out such that he could not clearly see the tag from 50 feet. (T 106) He initiated a traffic stop of the vehicle. (T 106, 112) There were three occupants - TC, the driver, JB

(defendant's girlfriend) in the rear passenger seat on the driver's side, and defendant in the rear passenger seat on the passenger side of the SUV. (T 107) The deputy approached from the passenger or right side of the vehicle, which was closest to the defendant. (T 107) The rear window was down and smoke was emitting from the window. (T 107)

Initial Contact

When Deputy NH walked up to the rear window, defendant was smoking a cigarette. (T108) There was also the odor of burnt marijuana emanating from the SUV. (T 109) After explaining the reason for the stop, the deputy asked the driver, defendant and his girlfriend for their ID and driver's license, which they produced. (T 109) Upon requesting the registration and proof of insurance from the driver, defendant informed the deputy that he borrowed the vehicle from a friend and the registration and insurance card should be in the glove compartment. The insurance card was missing. (T 110)

Defendant's Admission

Upon Deputy NH saying that he could smell marijuana emanating from the vehicle, defendant immediately volunteered: ***"Yes, I was just smoking some."*** The deputy asked if any of the occupants had medical marijuana

cards. They advised they did not. (T 110-111)

Vehicle Search

After waiting for back-up to arrive, the occupants of the SUV were removed. The deputy then conducted a search of the vehicle. (T 111-112)

He first searched the area of the rear passenger seat where defendant was sitting; a bag of marijuana was found on the floor board next to where he was seated. (State's Exhibit #1) (T 112-113) In addition, directly behind he passenger seat and to the left of where defendant was sitting, there was a blue nylon bag. (T 114,117 State's Exhibit #3) In the bag was a syringe and a clear plastic baggie of crystal Methamphetamine. (T 117-119, State's Exhibits #4 & #5)

Next to the nylon bag was a black sun glass case, on which was defendant's initials D.M. and the words "established1981" (the year of his birth). (T 114, 116, State's Exhibits # 2) Inside the sunglass case was a black and gray sock inside of which was a blue meth pipe and multiple empty small plastic baggies. (T 115-116)

On the rear seat behind where defendant was sitting and within arm's length of him, there was a black ammo box, inside of which was a brown marijuana pipe and butane lighter. (T120, 121, 122, 128, State's Exhibit #6)

Inside that ammo box was another box in which there was a clear yellow baggie of additional Methamphetamine and two marijuana bowls used for smoking marijuana. (T 121, 122, 126, State's Exhbits #11 & #12) There also was the odor of burnt marijuana inside the box. (T 122)

Three aluminum containers with additional fresh marijuana were also located in the ammo box. (T 123-25, State's Exhibits #7 & #8) In the same box, there also two items that were tied to the defendant - a black flashlight with defendant's initials and a debit card in his name. (T 127-128, State's Exhibits #9 & #10)

Defendant's Post Custody Statements

After being handcuffed and read his *Miranda* rights, defendant agreed to speak to the deputy. (T 128-129) He admitted that when the vehicle was first pulled over, he had been smoking marijuana. Becoming nervous, he put the marijuana pipe in the ammo box, which was directly behind him. (T 129)

Search of Occupants

The other two occupants were searched, but no Methamphetamine ws found on them. However, red and white capsules were found in his girlfriend's purse. (T 130, 147, 148, State's Exhibit 15) After this search, the defendant was place under arrest for possession of marijuana and trafficking

in Methamphetamine. (T 130)

Photographs

Photographs of the items seized taken off of the recording from the deputy's body-worn camera during the incident and as well as the video were admitted into evidence and shown to the jury. (T 132-147, State's Exhibits #13 & #14) During the video of the incident defendant disavowed any knowledge of the presence of, or control over, the Methamphetamine; rather the Methamphetamine belonged to his girlfriend. (T 142, 143, 146, 147)

Chemical Analysis

The baggies tested positive for Methamphetamine and had a combined weight of 15.08 grams. (T 157-158)

JOA

The state rested. (T 159) Defendant moved for Judgment of Acquittal on Count 2 on the gounds of insufficiency of the evidence in that the state had not presented any evidence that showed defendant possessed illicit cannabis. (T 160) The motion was denied.

Defendant rested and renewed his Motion for Judgment of Acquittal, which was denied. (T 162)

Verdict

The jury found defendant guilty as charged on Counts 1 and 2. (ER 129, T 197)

Sentence

The court sentenced defendant On Count 1 to 20 years incarceration including a 3 year minimum with 425 days credit for time served. Defendant received time served as the sentence on Count 2. (ER 181-183, T 202)

Notice of Appeal

Defendant filed a timely Notice of Appeal. (ER 144)

SUMMARY OF ARGUMENT

POINT I

Defendant was tried by a 6-person jury and received a total of 20 years incarceration. The Sixth and Fourteenth Amendments require a 12-person jury. Perhaps, the specially concurring opinion of Judge Gross in the Guzman case best sums up this issue:

> it is a stretch to say that Ramos 'effectively overruled' Williams. ***Yet if applied to the issue of jury size, the originalist analysis in Ramos would under-cut Williams's functionalist underpinnings.*** 350 So. 3d 72, at 78

ARGUMENT

POINT I.

DEFENDANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE APPELLANT WAS TRIED BY A SIX MEMBER JURY IN VIOLATION OF THE DUE PROCESS AND JURY CLAUSES OF THE UNITED STATES CONSTITUTION.

Background

Florida allows a trial by jury of six in non-capital cases. Art I, Section 22, Fla. Const; Section 913.10, Fla. Stat. Consequently, appellant was tried by a jury of six persons rather than 12 persons. Appellant contends that the VI and XIV Amendments to the United States Constitution mandates a jury of 12 persons. Accordingly structural, fundamental error occurred because appellant was deprived of his right to a 12 person jury. Nevertheless appellant acknowledges that contrary authority exists, which will be addressed herein.

Standard of Review

An appellate court reviews constitutional claims de novo. AB. v. Fla. Dep't of Child & Fam. Servs., 901 So. 2d 324, 326 (Fla. 3d DCA 2005).

Preservation

Appellant argues that Section 913.10, Fla. Stat., authorizing six- person juries, is facially unconstitutional. This issue did not need to be preserved for

appellate review, because a challenge to the facial constitutionality of a statute may be raised for the first time on appeal. N.B. v. Fla. Dep't of Child & Fams., 183 So. 3d 1186, 1187 (Fla. 3d DCA 2016).

Also the error is fundamental and structural, as the conviction in this case arose from the sheer denial of a fundamental constitutional right. Waiver of the constitutional right of trial by the required number of jurors must be made personally by the defendant. Blair v. State, 698 So. 2d 1210,1217 (Fla. 1997) (finding valid defendant's agreement to a verdict by a five person jury when made "in a colloquy at issue here, including a personal on-the-record waiver," which was sufficient to pass muster under the federal and state constitutions;" further 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.") In contrast, appellant in this case did not waive his right to a 12-person jury.

Argument

Notwithstanding the holding to the contrary in Williams v. Florida, 399 U.S. 78 (1970), appellant's convictions by a 6-person jury violated his Sixth Amendment right to a 12-person jury. See, Amend. VI & XIV to the U.S.

Constitution.

This Honorable Court has rejected this issue because it is bound by U.S. Supreme Court precedent. See, Guzman v. State, 350 So. 3d 72, 73 (Fla. 4th DCA 2022) (holding that this Court has "no authority to overrule . . . precedent from the United States Supreme Court that endorsed the use of a jury with only six members as constitutional, quoting Gonzalez v. State, 982 So. 2d 77, 78 (Fla. 2nd DCA 2008)). Nevertheless, like Justice Gorsuch, appellant maintains that ***"Florida does what the Constitution forbids."*** See, Cunningham v. State, 144 S.Ct. 1287, 1287(2024) (Gorsuch, J., dissenting from the denial of certiorari).

The Supreme Court of the United States has proven that it can and will overturn precedent when warranted. See, e.g., Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), overruling, Roe v. Wade, 410 U.S. 113 (1973). Indeed, the Supreme Court of the United States will overturn precedent when that precedent is "irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision." Ramos v. Louisiana, 590 U.S. 83, 112 (2020) (Sotomayor, J., concurring) See also, Alleyne v. United States, 570 U.S. 99, 116 n. 5 (2013) (holding "the force of stare decisis is at its nadir in cases concerning

procedural rules that implicate fundamental constitutional protections"). Thus, appellant continues to raise this good faith argument for a change in the law.

The use of 12-person juries is not an "historical accident." But see, Williams, 399 U.S. at 89-90. See also, Gibson v. State, 16 Fla. 291, 300 (1877) (holding that historically, the right to a jury trial meant "a jury, according to the common law, to be composed of twelve persons"); Robert H. Miller, Comment, Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries, 146 U. Pa. L. Rev. 621, 633 (1998) (discussing twelve-member juries in ancient Greek and Roman Trials(myth and real)); 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (stating that juries consisting of twelve people were commonplace in the English common law).

Interestingly, the number twelve may have been chosen for its religious significance. See 1 Edward Coke, The First Part of the Institutes of the Lawes of England 155 (photo reprint 1979) (1628) ("And that number of twelve is such respected in holy Writ as [twelve] apostles, [twelve] stones, [twelve] tribes, etc."). John Proffatt, Trial by Jury 112 n. 4 (San Francisco, Sumner Whitney & Co. 1877) ("[T]his number is no less esteemed by our own law than by holy writ. If the twelve apostles on their twelve thrones must try

us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal."]

When the Supreme Court of the United States gave Florida approval to continue its practice of using juries with less than twelve people in felony trials, the Court used a mode of constitutional interpretation that contravenes the original meaning of the Sixth Amendment: a functionalist approach. See, Williams, 399 U.S. at 98-103. Specifically, in Williams, the Court reasoned that it could find "no indication in the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." Id., at 99. According to the Court, "[t]he relevant inquiry must be the function that the particular feature performs and its relation to the purpose of the jury trial." Id., at 99-100. "Measured by th[at] standard," the Court held "the [twelve-person jury] requirement [for felony trials] cannot be regarded as an indispensable component of the Sixth Amendment," because "neither currently available evidence nor theory suggests that the [twelve-person] jury is necessarily more advantageous to the defendant than a jury composed of fewer members." Id., at 100-02 [footnotes omitted).

Continuing down this dark road of functionalism, the Court decided Apodaca v. Oregon, 406 U.S. 404, 406 (1972), holding that non-unanimous

jury verdicts in state criminal trials comported with the Sixth Amendment. "Justice White, writing for the plurality, applied a Williams-style inquiry focusing upon 'the function served by the jury in contemporary society' and concluded that the requirement of unanimity was not of constitutional stature'." Guzman, 350 So. 3d at 73, 76 (Gross, J., concurring specially) (quoting Apodaca, 406 U.S. at 406, 410)

But then in Ramos, the tide changed. The light of originalism began to emerge from the darkness of functionalism. The Supreme Court of the United States held 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."*** Ramos, 590 U.S. at 90. The Court wrote that the ***functionalist analysis*** relied upon in Apodaca ***was flawed.*** And further determined that a non-unanimous jury verdict did not comport with the Sixth Amendment's guarantees. Id., at 93, 100, 106 (2020).

Judge Gross, in his special concurrence in the Guzman case, noted that although the Supreme Court of the United States never explicitly questioned the Williams decision in Ramos, the Court's functionalist reasoning in Williams is on shaky ground because of the Court's decision in Ramos. Guzman, 350 So. 3d at 78, (Gross, J., concurring specially) ("it is a stretch to say that

Ramos 'effectively overruled' Williams. ***Yet if applied to the issue of jury size, the originalist analysis in Ramos would under-cut Williams's functionalist underpinnings."*** At a minimum, Ramos - which relied upon the original meaning of the Sixth Amendment rather than an analysis of the jury's role in contemporary society - suggests that Williams was wrongfully decided). [Emphasis added.]

Appellant maintains that the Court's ruling in Williams is impossible to square with the Court's ruling in Ramos. Accordingly, this Honorable should reverse appellant's convictions by a six-person jury.