No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CLARK III,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to Florida's First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth and Fourteenth Amendments require a twelve-person jury to try a criminal defendant accused of a felony offense.

2. Whether Florida violated Clark's constitutional rights to confrontation, due process, and effective assistance of counsel when it excluded him from his trial and forced him to appear via video screen.

3. Whether Florida's prison releasee reoffender statute violates the Sixth and Fourteenth Amendments because requisite sentencing enhancement facts are not required to be charged in a charging document or found by a jury beyond a reasonable doubt.

LIST OF ALL PARTIES AND RELATED CASES

James Clark III, Petitioner

State of Florida, Respondent

Related Cases:

Clark v. State, No. 1D2024-1360, 51 Fla. L. Weekly D1389a (Fla. 1st DCA July 8, 2026), 2026 WL 1968131 (Fla. 1st DCA July 8, 2026).

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PETITION FOR WRIT OF CERTIORARI

James Clark III petitions for a writ of certiorari to review the decision of Florida's First District Court of Appeal.

OPINIONS BELOW

The decision of Florida's First District Court of Appeal was rendered July 8, 2026. A copy of the decision is attached as Appendix A. Clark's motion for rehearing and written opinion was denied on August 17, 2026. A copy of the motion for rehearing and written opinion is attached as Appendix B. A copy of the First District's order denying the motion is attached as Appendix C.

JURISDICTION

The First District Court of Appeal affirmed in part and reversed in part Clark's convictions and sentences with a written opinion on July 8, 2026, but it did not address any of the constitutional issues raised. The First District remanded Clark's case for a retroactive competency evaluation by the trial court. The trial court then retroactively found Clark competent to proceed on remand, and Clark's convictions and sentences remained in place. On July 22, 2026, Clark timely moved the First District for rehearing and written opinion regarding each of the constitutional issues raised in his appeal. The First District denied that motion on August 17, 2026. The Florida Supreme Court is a court of limited jurisdiction with

authority to hear only those matters specified in Florida's Constitution. Mallet v. State, 280 So. 3d 1091, 1092 (Fla. 2019). The Florida Supreme Court lacked jurisdiction to review the First District's opinion in Clark's case because the opinion did not expressly construe a provision of the Florida or federal Constitution, certify a question of great public importance, or certify a conflict with a decision of another district court of appeal. Art. V, § 3, Fla. Const. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

STATEMENT OF THE CASE

The State of Florida charged Clark with eight counts of robbery with a firearm, one count of attempted robbery with a firearm, and nine counts of possession of a firearm by convicted felon (R 79)[1]. A defense motion to sever the charges for trial was granted in part and Clark proceeded to trial on two counts of robbery with a firearm (R 157). Clark was tried by a six-person jury and convicted of both counts as charged (R 215). Clark was sentenced to two consecutive sentences of life in prison (R 190-91). Clark appealed his convictions to the First District Court of Appeal where he raised five issues: (1) the trial court committed reversible error by failing to determine Clark's competency to stand trial prior to trial; (2) the trial court violated Clark's Fifth, Sixth, and Fourteenth Amendment rights to confrontation, due process, and effective assistance of counsel when the trial court excluded Clark from the courtroom during his trial; (3) Clark's Sixth and Fourteenth Amendment rights to a trial by jury were violated where he was tried for a felony by a jury of less than twelve members; (4) the trial court violated Clark's Sixth and Fourteenth Amendment rights when it sentenced Clark as a prison releasee reoffender (PRR) and imposed minimum mandatory life sentences; and (5) the trial court erred by admitting at trial evidence of collateral crimes allegedly committed by Clark. The First District affirmed in part and reversed in part Clark's convictions and sentences

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1 Reference to the record on appeal will be in the form of "R" followed by the appropriate page number, all in parentheses. Reference to the trial transcripts will be in the form of "T" followed by the appropriate page number, all in parentheses.

with a written opinion on July 8, 2026. The First District only addressed the competency issue in its opinion. The First District remanded Clark's case to the trial court for a retroactive competency determination. The trial court then retroactively found Clark competent to proceed on remand *nunc pro tunc* to the date of his trial, and Clark's convictions and sentences remained in place. Clark timely moved for rehearing and written opinion in the First District on July 22, 2026, so that he could seek review in the Florida Supreme Court. The First District denied the motion for rehearing and written opinion on August 17, 2026. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. Florida violated Clark's Sixth and Fourteenth Amendment rights when Clark was convicted by a jury of less than twelve members.

This case tests whether the Court's holding in Williams v. Florida, 399 U.S. 78 (1970), that the Sixth Amendment right to a trial by jury does not compel a twelve-member jury is still tenable following the Court's more recent decisions in which it has discarded the functional approach to jury trials in favor of the practice of trial by jury as it existed at common law. This issue was raised by Clark for the first time on appeal and not in the trial court.

In Williams, the Court dismissed the common law practice of impaneling a jury of twelve members when it determined "that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that [the] refusal to impanel more than the six members provided for by Florida law did not violate [a defendant's] Sixth Amendment rights as applied to the States through the Fourteenth [Amendment]." Williams at 86. The Court undertook a functional analysis of jury size, concluding that twelve is no better than six for reaching a reliable verdict in criminal cases. Id. at 99-100.

Thereafter, the Court again rejected historical norms in assessing the issue of jury unanimity in state court criminal proceedings. Much like its analysis in Williams, the Court concluded that jury unanimity is not required under the Sixth Amendment – at least when juries are ten or larger – because it does not materially

contribute to the exercise of [jurors'] commonsense judgment." Apodaca v. Oregon, 406 U.S. 404, 410 (1972). Applying a "functional" approach again, a plurality "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one" such that "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" whether unanimity is required or not. Id. at 410-11. The various opinions, concurring and dissenting, reflected no consensus on a coherent analytical approach.

In Johnson v. Louisiana, 406 U.S. 356, 364 (1972), the Court addressed a tiered jury system where "less serious crimes [are] tried by five jurors with unanimous verdicts, more serious crimes required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated." In upholding a 9-3 verdict, the Court concluded that the differential jury system served a rational interest, the state legislature "obviously intend[ing] to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." Id. at 365.

The Court invalidated a five-member jury in Ballew v. Georgia, 435 U.S. 223 (1978), but no coherent framework emerged for analyzing jury size under the Sixth Amendment. Two justices (Blackmun and Stevens) posited that juries of less than six members substantially threatened the constitutional guarantee of the jury trial right, notwithstanding the cost-saving and time-saving arguments that Georgia

advanced. Their analysis reflected that most of the major premises underlying the functional approach in Williams were inaccurate. Justice White asserted that the requirement that a jury be a fair cross-section of the community would be violated with juries of less than six members. And three justices (Chief Justice Burger and Justices Powell and Rehnquist) agreed that a conviction for serious offenses by juries of five members "involves grave questions of fairness" and that "the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved." Id. at 245-46. Finally, three justices (Brennan, Stewart, and Marshall) concurred only in the holding that "the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons." Id. at 246. The Ballew Court raised five key inadequacies of a smaller jury:

> First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.
> …
> Second, the data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person… rises as the size of the jury diminishes.
> …
> Third, the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense.

> …
> Fourth, what has just been said about the presence of minority viewpoint as juries decrease in size foretells problems not only for jury decision making, but also for the representation of minority groups in the community. The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. … The exclusion of elements of the community from participation contravenes the very idea of a jury… composed of the peers or equals of the person whose rights it is selected or summoned to determine.
> …
> Fifth, several authors have identified in jury research methodological problems tending to mask differences in the operation of smaller and larger juries such that standard variances in smaller juries were greater.

Ballew at 232-39.

In Burch v. Louisiana, 441 U.S. 130 (1979), the Court again noted the less-than-satisfactory nature of its functional approach, this time considering whether a conviction for a non-petty state offense by a non-unanimous six-person jury was constitutional. The Court stated:

> As in Ballew, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved.

Id. at 137.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court rejected a functional approach to the right to a jury trial in favor of the "practice" of trial by jury as it existed "at common law":

> As we have, unanimously, explained . . . the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's]equals and neighbours . . . " 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). See also Duncan v. Louisiana, 391 U.S. 145, 151-154 (1968).

Apprendi at 477.

In Blakely v. Washington, 542 U.S. 296 (2004), in which the Court applied Apprendi and clarified the definition of the "statutory maximum" for any offense, the Court repeated its reference to the "suffrage of twelve" and then re-emphasized the critical nature of trial by jury:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge's authority to

> sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Id. at 305-06.

The Court in Blakely focused on "the Framers' paradigm for criminal justice." Id. at 313. This shift in constitutional perspective calls into question the Court's holding in Williams, which was based on the functional approach to the right to a jury trial.

Florida courts have also questioned the Williams holding. The Florida Supreme Court noted that the empirical studies Ballew relied upon supported the use of a twelve-person jury:

> Interestingly, this analysis and the social studies on jury size and small group dynamics cited by the Court also provide support for the traditional twelve-person jury, a requirement the Court had refused to mandate in Williams v. Florida.

Blair v. State, 698 So. 2d 1210, 1216 (Fla. 1997). Building upon the Court's Ballew holding, Florida's Second District Court of Appeal cited to additional empirical studies and other scholarly sources demonstrating the superiority of the twelve-person jury in Gonzalez v. State, 982 So. 2d 77, 82-84 (Fla. 2d DCA 2008):

> Mr. Gonzalez is not alone in arguing that advances in the understanding of small group decision-making and trends in the law of other states support another examination of the *Williams* rationale. In 1995, the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States proposed that the Federal Rules of Civil Procedure be amended to require twelve-person

juries in civil cases. *See Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence,* 163 F.R.D. 91 (transmitted by the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States for Notice and Comment, September 1995). The text of the proposed committee note to follow the proposed amended rule explained:

> Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science. *Id.* at 147.

On February 14, 2005, the American Bar Association House of Delegates approved *Principles for Juries and Jury Trials,* a document prepared by the American Jury Project after an October 2004 symposium. Principle 3 is entitled "Juries Should Have Twelve Members" and calls for twelve-person juries in any criminal case that might result in a penalty of confinement of over six months. Moreover, as mentioned at the beginning of this opinion, Florida is one of only two states that now consistently allow serious felony cases to be decided by juries with as few as six members. *See* David B. Rottman & Shauna M.

Strickland, *State Court Organization 2004,* United States Department of Justice, Bureau of Justice Statistics, Table 42 at 233, available at http://www.ojp.usdoj.gov/bjs/abstract/sco04.htm (last visited Mar. 18, 2008).

The extensive development in the study of small group decision-making since 1970 is well beyond the scope of this opinion. There clearly is more scientific evidence today than in 1970 that a twelve-person jury may be superior to a six-person jury to accomplish the functions, purposes, and goals identified by the *Williams* court. Ensuing scholarship has criticized the empirical authorities upon which the *Williams* court relied, *see* Robert H. Miller, Comment, *Six of One Is Not a Dozen of the Other: A Re-Examination of Williams v. Florida and the Size of State Criminal Juries,* 146 U. Pa. L. Rev. 621, 652 (Jan. 1998), and collected more empirical studies that contradict the conclusions of the Court, *see, e.g.,* Michael Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size,* 21 L. & Hum. Behav. 451 (1997). The scholarship and evidence in this regard, however, are not undisputed, and the various scientific theories are not necessarily cohesive.

In Mr. Miller's article, *Six of One is Not a Dozen of the Other: A Re-examination of Williams v. Florida and the Size of State Criminal Juries,* the author concludes:

> As the *Ballew* Court admitted, we now know that six- and twelve-person juries are not functionally equivalent, as the *Williams* Court assumed. We know that recall of facts, testimony, and in-court observations are compromised significantly when a six-person jury is used in place of a twelve-person jury. We know that the rate of hung juries declines and the rate of conviction rises when smaller juries are used. We

> know that minority representation, community representativeness, and quality of deliberation all decrease when six-person juries are used. Finally, we know that six-person juries are less reliable than twelve-person juries, because they are less consistent in rulings on similar cases and because they decide all cases at greater variance from larger community preferences.

146 U. Pa. L. Rev. at 682-83 (footnotes omitted).

Gonzalez at 82-84 (footnotes omitted).

The Court's holding in Ramos v. Louisiana, 140 S.Ct. 1390 (2020), continues the Court's trend of discarding the functional approach to jury trials and again casts doubt on the continued viability of Williams. Ramos held that the Sixth Amendment right to a jury trial requires that state court verdicts in criminal cases be unanimous, overruling contrary precedents from the early 1970s (Apodaca and Johnson). Justice Gorsuch wrote in Ramos:

> There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

Ramos at 1397.

"On similar reasoning, if the Sixth Amendment right to jury trial requires a twelve-member jury to support a criminal conviction – as is done in every federal court (and almost every state court)[2] – it isn't much of a stretch to conclude that 'it requires no less in state court.'" Phillips v. State, 316 So. 3d 779, 787 (Fla. 1st DCA 2021) (J. Makar, concurring). Following Ramos, "[i]t seems a small step from the demise of the reasoning in Apodaca and Johnson as announced in Ramos to conclude that the reasoning in Williams, upon which both decisions relied, is also in jeopardy." Phillips at 788 (J. Makar, concurring). "For that reason… the issue of jury size under the Sixth Amendment may be ripe for re-evaluation." Id.

Justice Gorsuch, again writing on the constitutional requirement of 12-member juries, wrote, "Williams was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts." Khorrami v. Arizona, 143 S.Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari). Justice Gorsuch has recently reiterated his position that the Constitution requires a jury of twelve to try criminal cases:

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2 Lessard v. State, 232 So. 3d 13, 16–17 (Fla. 1st DCA 2017) (Makar, J., concurring) ("The vast majority of states still choose twelve-person, unanimous juries to convict in serious criminal cases. Forty-five states require twelve unanimous jurors to convict for any felony (federal felony trials require twelve jurors); a few states permit six to eight for specified felonies." (footnotes omitted). The "only other state [besides Florida] with six-person juries in felony cases is Connecticut. All other state and federal felony prosecutions require twelve-person juries." Alisa Smith & Michael J. Saks, *The Case For Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 443 (2008).

For almost all of this Nation's history and centuries before that, the right to trial by jury for serious criminal offenses meant the right to a trial before 12 members of the community. [citation omitted]. Acutely concerned with individuals and their liberty, the framers of our Constitution sought to preserve this right for future generations. [citation omitted]. Yet today, a small number of States refuse to honor its promise. Consider this case: A Florida court sent Natoya Cunningham to prison for eight years on the say of just six people. Florida does what the Constitution forbids because of us. In *Williams v. Florida*, this Court in 1970 issued a revolutionary decision approving for the first time the use of 6-member panels in criminal cases. 399 U.S. 78, 103. In doing so, the Court turned its back on the original meaning of the Constitution, centuries of historical practice, and a battery of this Court's precedents. [citation omitted]. Before *Williams*, this Court had said it was not open to question that a jury should consist of twelve. Patton v. United States, 281 U.S. 276, 288 (1930). We had understood the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons. Thompson v. Utah, 170 U.S. 343, 349 (1898). Really, given the history of the jury trial right before *Williams*, it was nearly unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by any lesser number. Yet *Williams* made the unthinkable a reality. In doing so, it substituted bad social science for careful attention to the Constitution's original meaning. Pointing to academic studies, *Williams* tepidly predicted that 6-member panels would probably deliberate just as carefully as 12-member juries. [citation omitted]. But almost before the ink could dry on the Court's opinion, the social science studies on which it relied came under scrutiny. [citation omitted]. Soon, the Court was forced to acknowledge empirical data suggesting that, in fact, smaller juries are less likely to foster effective group deliberation and may not produce as reliable or accurate

> decisions as larger ones. [citation omitted]. All in all, *Williams* was an embarrassing mistake – wrong the day it was decided.

Cunningham v. Florida, 602 U.S. ___ (2024) (Gorsuch, J., dissenting from denial of certiorari).

The Court has granted *certiorari* review of Kian v. State, 421 So. 3d 439 (Fla. 4th DCA 2025), in Kian v. Florida (No. 25-6623), where the 12-person jury requirement is at issue. Like Kian, this case presents the Court with the opportunity to clarify its jurisprudence regarding the Sixth Amendment's jury size requirement for the trial of felony offenses. The functional approach to jury size, upon which the Court's opinion in Williams stands, has seemingly been eroded by the Court's more recent opinions. The Court should now return to the longstanding precedent in place before Williams, which focused on the meaning of the word "jury" as understood by the founders at the time of the adoption of the Constitution:

> Assuming, then, that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. (Citation omitted.) This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' (Citation omitted.) In Bac. Abr. tit. 'Juries,' it is said: 'The trial per

> pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of the being devested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.' It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah – which was under the complete jurisdiction of the United States for all purposes of government and legislation – the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

Thompson v. Utah, 170 U.S. 343, 349-50 (1898).

II. Florida violated Clark's Fifth, Sixth, and Fourteenth Amendment rights when Clark was excluded from the courtroom during his trial and forced to appear remotely via video screen.

Clark did not raise this issue in the trial court and instead raised it for the first time on appeal in the First District.

At an *ex parte* pretrial conference, the trial court stated to Clark, "It's been brought to my attention that you've made statements that you may spit on your attorney so you can get a new attorney" (R 348). Clark replied, "No, I ain't never say that" (R 348). The trial court replied:

> Okay. Well, that's been brought to my attention, and so I'm going to have to make sure that I address that.
> …
> Okay. All right. Now, some of the things that we can do in regards – we can do – I've done spit masks before, I've done shock belts and spit masks before, I've done – testify from another room. I don't know if it would work at the end of a table, to have you all on each side of the end of a table, So that's something to consider.
> …
> I'm asking what it is – if there's any request regarding – for security.

(R 348, 352-53).

Clark's appointed attorney responded:

> Your honor, I think my preference would be – in considering what would be least prejudicial for Mr. Clark and the perception of a jury – of all the options, it would probably be my preference that he appear remotely; however, I would, obviously, need an opportunity to speak with him confidentially throughout the trial. So as long as

> accommodations were made for that to occur, that would be my preference.

(R 353).

The trial court sent Clark back to the jail, called in the prosecutor, and then ruled:

> There's some security concerns for Mr. Clark that I was made aware of. So at this point, it would be my intention that he's going to be testifying by video feed during the trial.
> …
> So that would be the same for jury selection as well, but we'll need to make some accommodations, and Ms. Bryan will be able to communicate with him.

(R 354-55).

Confrontation:

A defendant has a Sixth Amendment right to face-to-face confrontation with witnesses against him. Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (finding a violation of the Confrontation Clause where a screen was erected between the defendant and the testifying alleged victim so that neither could see each other). Justice Scalia authored the Coy opinion, which extolled the importance of face-to-face confrontation to the fundamental fairness of a criminal trial. "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Id. "The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality." Id. "[T]here is something

deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Id. "Given these human feelings of what is necessary for fairness, the right of confrontation contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." Id. at 1018. "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." Id. at 1019. "It is always more difficult to tell a lie about a person to his face than behind his back." Id. In the former context, even if the lie is told, it will often be told less convincingly." Id. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." Id.

Two years later in a 5-4 decision, the Court issued Maryland v. Craig, 497 U.S. 836 (1990), which found that the right to confrontation is not absolute. "[A]lthough face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a case-specific finding of necessity. Craig at 857-58. Where a defendant's right to confront a witness against him will be affected, the determination of whether a particular case requires a departure from usual procedures must be made, by the trial court, on a case-by-case basis. United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006), citing Craig at 854. Before departing

from the usual procedure, the court must hold an evidentiary hearing and determine whether it is necessary to deny face-to-face confrontation in order to further an important public policy. Yates at 1315. To reach a determination of necessity, the trial court must hear evidence. Craig at 855.

Here, there is no question that Clark's confrontation clause right to confront witnesses face-to-face was diminished by the trial court's ruling. In lieu of being present in the courtroom for face-to-face confrontation with witnesses, Clark was exiled to another room and was muted for at least part of the proceedings. He was present in the courtroom only through a video monitor. Confrontation through a video monitor is not the same as face-to-face confrontation. Yates at 1315 ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation."); Harrell v. State, 709 So. 2d 1364, 1368 (Fla. 1998) ("The State is urging this Court to conclude that the satellite procedure used in this case is the equivalent of physical, face-to-face confrontation. We decline to make such a finding."); Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (Confrontation rights "ordinarily… compel accusers to make their accusations in the defendant's presence – which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.").

The trial court excluded Clark from trial based on concerns that Clark would spit on his court-appointed attorney. The trial court stated that statements to that effect had been brought to his attention, though the trial court did not say who brought these statements to its attention. Clark denied making any such statements, and the trial court did not offer any further information. No witness testified to hearing such a statement. The trial court then listed the things it could do to prevent Clark from spitting on his attorney. His attorney opted for, in her mind, the least prejudicial option, choosing exile to another courtroom instead of Clark wearing a "spit mask," a "shock belt," or both in front of the jury (R 353). The trial court made no finding of necessity to curtail Clark's confrontation clause rights. Even if it had, the finding would not be supported on this record, where "statements" had been brought to the court's attention by an unknown person, no testimony was taken on the subject, and Clark flatly denied making such statements. See T.H. v. State, 349 So. 3d 951, 959 (Fla. 2d DCA 2022) ("The record reflects that no hearing was held in this case. As a result, there is no evidence of a necessity that suffices to overcome the constitutional preference of face-to-face confrontation provided by the Confrontation Clause of the Sixth Amendment…"); J.T.B. v. State, 345 So. 3d 927, 932-33 (Fla. 3d DCA 2022) (listing the many federal and state courts that have found confrontation clause violations where two-way live remote video technology was used at trial in the absence of case-specific findings that the procedure was necessary to further an important public policy and the reliability of the testimony is otherwise

assured); M.D. v. State, 345 So. 3d 359 (Fla. 3d DCA 2022) (citing to Craig and requiring case-specific findings by the trial court before a juvenile delinquency hearing could be held remotely via Zoom).

Effective Assistance of Counsel:

The Sixth Amendment guarantees an indigent criminal defendant the right to effective legal counsel. Nelson v. State, 274 So. 2d 256, 258 (Fla. 4th DCA 1973), citing Anders v. California, 386 U.S. 738, 744 (1967); Strickland v. Washington, 466 U.S. 668, 686 (1984).

Here, the trial court's decision to exile Clark to another room and to essentially try him *in absentia* violated Clark's Sixth Amendment right to counsel. Clark's attorney was in the courtroom with the witnesses, judge, and jury. Clark could not communicate with his attorney in real time during some parts of the trial because his microphone was muted by the court:

> All right, Mr. Clark. What I'm going to do is you're going to be able to hear us, but I'm going to turn off so you don't accidentally talk – we're not going to be able to hear you in the courtroom unless I turn you on from this end. We're going to pick your jury here this morning and then we're going to take a break. And then I'll let you and your attorney meet in visitation and you can go over some of the questions the jury answered, things of that nature.

(T 10-11). Clark was a mere spectator at his own trial with no meaningful opportunity to consult confidentially with his attorney in real time during the

parties' opening statements, witness testimony, or the parties' closing arguments. Only after voir dire was over was he able to give any input to his attorney regarding jury selection. Clark was denied effective assistance of counsel where he could not communicate with his attorney when he needed to. This violated his Sixth Amendment right to effective counsel. Geders v. United States, 425 U.S. 80, 88 (1976) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to heard by counsel… [The defendant] requires the guiding hand of counsel at every step in the proceedings against him.) In Geders, the Court found a violation of the Sixth Amendment right to counsel where the trial court prohibited the defendant from talking to his attorney during an overnight recess in the trial. If the right to counsel is violated where a defendant is prohibited from speaking with his attorney during an overnight recess, surely the right to counsel is violated where the trial court prohibits the defendant from speaking confidentially with his attorney during his trial.

Due Process:

The right to confront witnesses is essential to due process and fair treatment and therefore necessary to satisfy the requirements of a fundamentally fair proceeding. Coy at 1019-20. The right to confrontation existed long before the constitution enshrined it, and there is no clear distinction between confrontation rights under the Sixth Amendment and those emanating from due process. Crawford

v. Washington, 541 U.S. 36, 43 (2004). In addition to being guaranteed by the Sixth Amendment, effective legal counsel is also essential to due process. See Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963).

The denial of Clark's right to face-to-face confrontation and the denial of his ability to communicate confidentially with his attorney during his trial denied him his constitutional right to due process under the Fifth and Fourteenth Amendments.

III. Florida violated Clark's Sixth and Fourteenth Amendment rights when he was sentenced to a minimum mandatory sentence under Florida's prison releasee reoffender statute without the necessary facts being charged in the charging document and found by a jury beyond a reasonable doubt.

Clark raised this issue by filing a motion to correct sentencing error pursuant to rule 3.800(b)(2), Florida Rules of Criminal Procedure, in the trial court (R 721) and then raising the denial of that motion as error during the direct appeal in Florida's First District. The motion to correct sentencing error is attached as Appendix D.

Section 775.082(9)(a)3, Florida Statutes, allows a defendant who has been convicted of an enumerated felony within three years of his release from prison to be classified as a prison releasee reoffender and to be sentenced to a mandatory minimum sentence once the trial court finds the requisite facts by a preponderance of the evidence. § 775.082(9)(a)3, Fla. Stat.

At sentencing, the State requested that the trial court sentence Clark as a PRR (T 934-36). The trial court reviewed Clark's Florida Department of Corrections records and then found by a preponderance of the evidence that Clark qualified as a PRR (T 934-38). Classifying Clark as a PRR increased his minimum sentence from 86.25 months in prison to life in prison (R 212). The trial court then sentenced Clark to two consecutive sentences of life in prison under the PRR minimum mandatory statute (T 937-38).

Clark's PRR sentences are unconstitutional because the trial court and not the jury found the requisite facts necessary to establish that Clark was a PRR and because the trial court did so by a preponderance of the evidence and not beyond a reasonable doubt. Additionally, the requisite PRR facts were not alleged in the charging document (R 79-83).

Alleyne v. United States, 133 S.Ct. 2151 (2013), held that the Sixth Amendment to the United States Constitution requires that any fact that increases the mandatory minimum sentence for an offense must be charged in the charging document, submitted to the jury, and found beyond a reasonable doubt. Florida's PRR statute mandates that a judge sentence a defendant to the statutory maximum for the offense with no gain time. It raises the sentencing floor or minimum for the offense from a defendant's criminal punishment code lowest permissible sentence to the statutory maximum for the offense. Alleyne, therefore, requires that a jury determine the requisite PRR-qualifying facts. This includes whether Clark was previously released from prison and, if so, the date of his release from prison.

The Court's recent decision in Erlinger v. United States, 144 S.Ct. 1840 (2024), also mandates that the facts necessary to qualify a defendant as a PRR must be found by a jury beyond a reasonable doubt. On September 26, 2024, in its answer brief on the merits in the Florida Supreme Court in Maye v. State, SC23-1184, the State of Florida conceded that Erlinger applied to Florida's PRR statute. In that answer brief on the merits the State wrote, "Based on Erlinger, however, the PRR

finding must be made by a jury." State's Answer Brief on the Merits in Maye v. State, SC23-1184, pages 43-45.

Here, Clark's Sixth and Fourteenth Amendment rights were violated when the trial court found by a preponderance of the evidence that Clark was a prison releasee reoffender. Clark's classification as a PRR increased his sentencing floor from 86.25 months to life in prison. The factual findings qualifying Clark as a PRR should have been charged in the charging document and found by a jury beyond a reasonable doubt.

CONCLUSION

Clark respectfully requests that the Court grant a writ of *certiorari* to review the judgment of Florida's First District Court of Appeal.

/s/ Barbara Busharis
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INDEX TO APPENDICES

Appendix A:

Decision of Florida's First District Court of Appeal dated July 8, 2026.

Appendix B:

Clark's Motion for Rehearing and Written Opinion filed on July 22, 2026.

Appendix C:

First District's Order Denying Clark's Motion for Rehearing and Written Opinion dated August 17, 2026

Appendix D:

Clark's Motion to Correct Sentencing Error filed in the trial court