No.

IN THE SUPREME COURT OF THE UNITED STATES

JARVIS PARKER, 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

CAROL STAFFORD HAUGHWOUT
Public Defender

Gary Lee Caldwell
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421Third Street
West Palm Beach, FL 33401
(561) 355–7600

gcaldwel@pd15.org
jcwalsh@pd15.org
appeals@pd15.org

QUESTIONS PRESENTED

1. Whether, contrary to the Due Process and Jury Clauses, the trial court erred in imposing an enhanced sentence under a statute authorizing the enhancement based on nonjury fact-findings upon proof by a preponderance of the evidence?

2. Whether Petitioner was deprived of his right to bear arms, under the Second and Fourteenth Amendments, where he was convicted of possession of a firearm by a convicted felon?

3. Whether Petitioner was derived of his right, under the Sixth and Fourteenth Amendments, to a trial by a 12-person jury when the defendant is charged with a serious felony?

RELATED PROCEEDINGS

The proceeding listed below is directly related to the above-captioned case in this Court: *Parker v. State*, 392 So. 3d 214 (Fla. 4th DCA 2024) (table).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

IN THE SUPREME COURT OF THE UNITED STATES

NO.

JARVIS PARKER, 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

Jarvis Parker 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 is reported as *Parker v. State*, 392 So. 3d 214 (Fla. 4th DCA 2024) (table). It is reprinted in the appendix. 1a.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's convictions and sentences on July 8, 2024. 1a. The court denied Petitioner's motion for rehearing, written opinion and certification on September 11, 2024. 2a.

The Florida Supreme Court is "a court of limited jurisdiction," *Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019) (citation omitted), Specifically, it has no jurisdiction to review district court of appeal decisions entered without written opinion. *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).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

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 775.084, Florida Statutes, provides in relevant part:

(1) As used in this act:

(a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for a felony or other qualified offense; or

b. Within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or

court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

…

(3)(a) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:

1. The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender or a habitual violent felony offender.

2. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.

3. Except as provided in subparagraph 1., all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

4. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

… .

6. For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. … .

…

(4)(a) The court, in conformity with the procedure established in paragraph (3)(a), may sentence the habitual felony offender as follows:

…

2. In the case of a felony of the second degree, for a term of years not exceeding 30.

(5) In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

Section 790.23, Florida Statutes, provides in relevant part:

(1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm,

ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:

(a) Convicted of a felony in the courts of this state;

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

The state charged Petitioner Jarvis Parker by amended information with: attempted first degree murder with a firearm with serious bodily injury (count I); shooting at, within or into an occupied vehicle (count II); and possession of a firearm by a convicted felon (count III). R 116–17.

At trial, the prosecution presented a video in which a man got into an altercation with two women. One of the women admitted to hitting the man with a bottle, and the video shows her rushing him and hitting him. Eventually she was shot by the man. Both women identified Petitioner as the shooter. Petitioner contended the identifications were not reliable, pointing out that, unlike the man described by the women, he did not have a scar on his face.

Petitioner was convicted by a six-member jury of the lesser offense of attempted second degree murder with a firearm and with great bodily harm as to count I, and was convicted of counts II and III as charged. R 267–69. All three convictions were second degree felonies, as noted in the judgment of guilt. R 508–09.

Second degree felonies carry a maximum sentence of 15 years in prison. § 775.082(3)(d), Fla. Stat. The court entered enhanced 30

year concurrent sentences for each count under Florida's Habitual Felony Offender statute for all three crimes, and imposed firearm-related mandatory minimum conditions of 25 years for count I and three years for count III. R 512–20.

While his direct appeal was pending in the Fourth District Court of Appeal, Petitioner moved to correct his sentence under Florida Criminal Rule 3.800(b)(2). He argued that Florida's Habitual Felony Offender statute is unconstitutional in violation of the Jury and Due Process Clauses of the state and federal constitutions. The trial court denied the motion, and denied rehearing.

Petitioner then filed his brief in the appellate court. Among other issues, he argued that: His conviction for possession of a firearm by a convicted felon violated the Second Amendment. a3–a8. He was denied his right to a twelve-member jury under the Sixth Amendment. a9–a12. And his habitual felony offender sentences violate the Sixth and Fourteenth Amendments, and the court could not rewrite the unconstitutional statute. a12–a19.

Conceding that — unlike the Habitual Felony Offender issue — the Second Amendment and twelve-member jury issues had not been raised in the trial court, he contended that they were subject

to review under Florida's fundamental error doctrine. Under that doctrine, a defendant may for the first time on appeal challenge a facially unconstitutional statute, *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002), *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982), and *Edenfield v. State*, 48 Fla. L. Weekly D1113, n.1 (Fla. 1st DCA May 31, 2022) (holding that defendant could raise facial challenge to felon-in-possession statute for first time on appeal, but denying claim on the merits), and also may contend on the first time on appeal that he or she was tried by less than the number of jurors required by the jury unless he or she personally waived that right. *Compare Blair v. State*, 698 So. 2d 1210, 1217 (Fla. 1997) (finding defendant's agreement to verdict by five-member jury valid when made in a colloquy with the court "including a personal on-the-record waiver sufficient to pass muster under the federal and state constitutions," and his decision was made "toward the end of his trial, after having ample time to analyze the jury and assess the prosecution's case against him. He affirmatively chose to proceed with a reduced jury as opposed to a continuance or starting with another jury.") to *Wallace v. State*, 722 So. 2d 913 (Fla. 2d DCA 1998) (reversing on grounds of fundamental error where defendant

was tried by five-member jury and judge did not inform the defendant of his constitutionally mandated right to six-person jury).

The district court of appeal affirmed the conviction and sentence without a written opinion. 1a. Subsequently, it denied Petitioner's motion for rehearing, for written opinion and for certification to the state supreme court. 2a.

REASONS FOR GRANTING THE PETITION

I. FLORIDA'S HABITUAL FELONY OFFENDER STATUTE IS UNCONSTITUTIONAL.

Florida's Habitual Felony Offender statute provides for enhanced punishments when the judge, at a nonjury proceeding, determines, by a preponderance of the evidence, a variety of facts regarding the defendant's prior criminal record including the dates or at least two prior convictions and sentences, the date of the defendant's release from incarceration, and whether the defendant has been pardoned for those prior convictions. § 775.084(1)(a), (3)(a), (4)(a), and (5), Fla. Stat. The statute doubles the statutory maximum sentence for second degree felonies, and had that effect in this case, raising the maximum sentence for each crime from 15 years to 30 years.

This statutory procedure and Petitioner's resulting sentence are unconstitutional under the Jury and Due Process Clauses. U.S. Const. amend. VI, XIV.

Despite the general rule forbidding a sentence enhancement based on judicial fact-finding, the Court held in the 5-4 decision of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a

court may enhance a sentence based on a judge's finding of a prior conviction authorizing the enhancement.

The Court recently cast doubt on the correctness and viability of *Almendarez-Torres* in *Erlinger v. United States*, 602 U.S. 821 (2024):

> Almost immediately …, the decision came under scrutiny. *Jones*, 526 U.S., at 249, n. 10. The Court has since described *Almendarez-Torres* as "at best an exceptional departure" from "historic practice." *Apprendi*, 530 U.S., at 487. That decision, we have said, parted ways from the "uniform course of decision during the entire history of our jurisprudence." *Id.*, at 490. It was "arguabl[y] … incorrec[t]." *Id.*, at 489. And it amounted to an "unusual … exception to the Sixth Amendment rule in criminal cases that 'any fact that increases the penalty for a crime' must be proved to a jury." *Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) (quoting *Apprendi*, 530 U.S., at 490).
>
> In separate opinions, a number of Justices have criticized *Almendarez-Torres* further yet, and Justice THOMAS, whose vote was essential to the majority in that case, has called for it to be overruled. See, *e.g.*, *Mathis v. United States*, 579 U.S. 500 (2016) (THOMAS, J., concurring); *Descamps v. United States*, 570 U.S. 254, 280 (2013) (THOMAS, J., concurring in judgment); *Shepard v. United States*, 544 U.S. 13, 27 (2005) (THOMAS, J., concurring in part and concurring in judgment); see also *Jones*, 526 U.S., at 252–253 (Stevens, J., concurring); *Monge v. California*, 524 U.S. 721 (1998) (Scalia, J., joined by Souter and Ginsburg, JJ., dissenting).
>
> Still, no one in this case has asked us to revisit *Almendarez-Torres*. Nor is there need to do so today. In the years since that decision, this Court has expressly

> delimited its reach. It persists as a "narrow exception" permitting judges to find only "the fact of a prior conviction." *Alleyne*, 570 U.S., at 111, n. 1. Under that exception, a judge may "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S., at 511–512. We have reiterated this limit on the scope of *Almendarez-Torres* "over and over," to the point of "downright tedium." 579 U.S., at 510, 519. And so understood, *Almendarez-Torres* does nothing to save the sentence in this case. To determine whether Mr. Erlinger's prior convictions triggered ACCA's enhanced penalties, the district court had to do more than identify his previous convictions and the legal elements required to sustain them. It had to find that those offenses occurred on at least three separate occasions. And, in doing so, the court did more than *Almendarez-Torres* allows.

Erlinger, 602 U.S. at 837–39 (footnote omitted).

For the reasons set out in *Erlinger*, the time has come to push *Almendarez-Torres* overboard. There is no reason to allow governments to continue to impose enhanced sentences based on unconstitutional procedures such as Florida's Habitual Felony Offender law.

Further, regardless of whether *Almendarez-Torres*'s day has come, the Florida law and procedure are plainly unconstitutional under *Erlinger* and should not be allowed to stand. Here, the court went beyond finding the simple fact that Petitioner had been

convicted of certain crimes. It made the additional fact findings required by the statute, including when he was convicted and when he was released from prison.

Florida's Habitual Felony Offender law is unconstitutional. Since it provides the basis for Petitioner's sentences, those sentences cannot stand.

Accordingly, the sentences should be reversed and remanded to the lower court for resentencing without use of the invalid statute.

II. FLORIDA'S BROAD FELON-IN-POSSESSION STATUTE VIOLATES THE SECOND AMENDMENT.

Count III of the amended information alleged that Appellant "on the 13th day of June, A.D. 2021, … having previously been convicted on November 30, 2012 of the Felony crime of Burglary Dwelling Armed … , did then and there have in his care, custody, possession or control a firearm, to-wit: a firearm of undetermined caliber, and during the commission thereof, [he] actually possessed or carried that firearm on his person" in violation of section 790.23(1), Florida Statues. R 117.

Section 790.23(1) makes it a crime for one previously

convicted of a felony to "own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device." Here, the prosecution proceeded on the statutory provision making it a crime for a convicted felon to have a firearm, regardless of the manner in which that person bears the firearm.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008)], the Court wrote that at the time of the Founding the right to keep arms was "a common way of referring to possessing arms, for militiamen *and everyone else*." *Id.* at 583 (emphasis in original). The right to "bear arms" refers to carrying a weapon for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person. *Id.* at 584.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Court wrote that, to justify a regulation on the right to bear arms, "the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17. The

Court emphasized this rule by repeating it at page 24 of *Bruen*.

The Court shed light on the application of this rule in *United States v. Rahimi*, 602 U.S. 680 (2024).

In *Rahimi*, the Court noted the historical evolution of surety laws allowing for the limitation of a persons' right to bear arms based on an individualized determination that the person presented a physical threat to a person seeking the surety. *Id.* at 695–97. It also noted the parallel development of "going armed" laws" forbidding arming oneself "to the Terror of the people." *Id.* at 697.

Based on these developments, the Court wrote: "Taken together, the surety and going armed laws confirm what common sense suggests: When *an individual poses a clear threat of physical violence to another*, the threatening individual may be disarmed." *Id.* at 698 (emphasis added).

Rahimi involved a statute providing that a person could be deprived of the right to possess a firearm based on an individualized judicial determination that he or she presented a "a credible threat to the physical safety" of a specific person. *Id.* at 688–89. The Court determined that the law's "prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly

within the tradition the surety and going armed laws represent." *Id.* at 688.

Unlike the narrow application of the statute in *Rahimi* with its individualized determination of dangerousness, section 790.23(1) has broad application, covering almost 10% of the adult population of Florida. In 2023, the Census Bureau put the total population of Florida at 22.6 million (an estimated 5% growth since 2020), of which 19.4% was under the age of 18, for a total adult population of over 18 million in 2023.[1] As of 2020, there were an estimated 1.6 million non-incarcerated convicted felons in Florida.[2]

This broad statute does not comport with the historical restrictions on the right to bear arms allowed by the Second Amendment. The Court should grant review to determine whether section 790.23(1) is constitutionally viable in light of *Rahimi*.

---

[1] https://www.census.gov/quickfacts/fact/table/FL/PST045223 (last visited December 5, 2024).

[2] ABC News, "Florida convicted felons allowed to vote for 1st time in presidential election after completing sentences" (Oct. 25, 2020). https://abcnews.go.com/Politics/convicted-florida-felons-allowed-vote-1st-time-presidential/story?id=73822173 (last visited December 5, 20204).

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

In *Thompson v. Utah*, 170 U.S. 343 (1898), the Court considered "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," and concluded that "[t]his question must be answered in the affirmative." *Id.* at 349. It noted that since the time of Magna Carta, the word "jury" had been understood to mean a body of twelve. *Id.* at 349–50. Because 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.

In addition to the citations as to this point in *Thompson*, one may note that Blackstone indicated that the right to a jury of twelve is even older, and more firmly established, than the unqualified right to counsel in criminal cases. 4 William Blackstone, *Commentaries on the Laws of England*, ch. 27 ("Of Trial and Conviction"). Blackstone traced the right back to the ancient feudal

system of trial by "a tribunal composed of twelve good men and true," and wrote that "it is the most transcendent privilege which any subject can be enjoy or wish for, that he cannot be affected in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, ch. 23 ("Of the Trial by Jury").

After *Thompson*, the Court continued to cite the basic principle that the Sixth Amendment requires a twelve-person jury in criminal cases for another seventy 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 *Williams v. Florida*, 399 U.S. 78 (1970), however, the Court retreated from this line of precedent, holding that trial by a jury of six does not violate the Sixth Amendment.

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. *Id.*, 399 U.S. at 98–99. But it concluded that such "purely historical considerations" were not dispositive. *Id.* at 99. Rather, it 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. It wrote that "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").

Petitioner submits that *Williams* is contrary to the history and precedents discussed above, and cannot be squared with the subsequent 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. That term meant trial by a jury of twelve whose verdict must be unanimous. As the Court noted in *Ramos*, 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[.]" *Ibid.* (emphasis added). "A 'verdict, taken from eleven, was no verdict' at all." *Ibid.*

Ramos held that the Sixth Amendment requires a unanimous verdict to convict a person of a serious offense. In reaching that conclusion, it 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." 509 U.S. at 100.

The reasoning of *Ramos* undermines the reasoning on which

Williams rests. *Ramos* rejected the same kind of "cost-benefit analysis" undertaken in *Williams*, observing that it is not for the Court 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. The Court wrote that the Sixth Amendment right to a jury trial must be restored to its original meaning, which included the right to jury unanimity:

> Our real objection here isn't that the *Apodaca* plurality's cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. And Louisiana asks us to repeat the error today, just replacing *Apodaca*'s functionalist assessment with our own updated version. All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.

Ramos, 590 U.S. at 100 (emphasis in original; footnote omitted).

The same reasoning applies to the historical right to a jury of twelve: When the People enshrined the jury trial right in the Constitution, they did not attach a rider that future judges could adapt it based on latter-day social science views.

Further, even if one were to accept the functionalist logic of *Williams* — that the Sixth Amendment is subject to reinterpretation on the basis of social science — it invites, nay demands, that it be periodically revisted to determine whether the social science holds up. And here we encounter a serious problem: it was based on research that was out of date shortly after the opinion issued.

Williams "f[ou]nd little reason to think" that the goals of the jury guarantee, which included providing "a fair possibility for obtaining a representative[] cross-section of the community," were "in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12." *Id.* 399 U.S. at 100. It 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.

Since *Williams*, that determination has proven incorrect. This 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*, it observed that empirical studies conducted in the intervening years highlighted several problems with its 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*. As already noted, *Williams* itself identified the "function" of the Sixth Amendment as leaving justice to the "commonsense judgment of a group of laymen" and thus allowing "guilt or innocence" to be determined via "community participation and [with] shared responsibility." 399 U.S. at 100–01. That function is thwarted by reducing the number of jurors to six. Smaller juries are perforce less representative of the community, and they are less consistent than larger juries. *See, e.g.,* Shamena Anwar, et al., *The Impact of Jury Race In Criminal Trials*, 127 Q.J. Of Econ. 1017, 1049 (2012) (finding that "increasing 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"); Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. of Empirical Legal Stud. 425, 427 (Sept. 2009) ("reducing jury size inevitably has a drastic effect on the representation of minority group members on the jury"); 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.").

Other important considerations also weigh in favor of the twelve-member jury. 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." Smith & Saks, 60 Fla. L. Rev. 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., 104 Judicature 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 v. Arizona*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari) (citations omitted). He noted, however, that Arizona's law was likely motivated by costs not race. *Id*. But Florida's jury of six did arise in that Jim Crow era of a "deliberate and systematic effort to suppress minority voices in public affairs." *Id*. 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").

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 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, 15–16. *See also* Shofner 266.

Smaller juries and non-unanimous verdicts were part of a Jim Crow era effort "to suppress minority voices in public affairs." *Khorrami v. Arizona*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari); *see also Ramos*, 590 U.S. at 126–27 (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.

And this history casts into relief another negative consequence of having small 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*.[3] Jury service, like civic deliberation in general, "not only resolves conflicts in a way that yields improved policy outcomes, it also transforms the participants in the deliberation in important ways—altering how they think of themselves and their fellow citizens." John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Values of Institutionalized Deliberation*, 34 Pol'y Stud. J. 605, 606 (2006).

In view of the foregoing, this Court should grant the petition, recede from *Williams*, restore the ancient right to a jury of twelve and reverse Petitioner's conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

---

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

CAROL STAFFORD HAUGHWOUT
Public Defender

GARY LEE CALDWELL
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421Third Street
West Palm Beach, FL 33401
(561) 355–7600
gcaldwel@pd15.org
jcwalsh@pd15.org
appeals@pd15.org