

IN THE
Supreme Court of the United States

MARK TODD MINOR,

Petitioner,

v.

FLORIDA,

Respondent.

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

**BRIEF OF STEVEN G. CALABRESI,
SHARI S. DIAMOND, PHOEBE C. ELLSWORTH,
SAMUEL R. GROSS, VALERIE P. HANS,
SAUL KASSIN, STEPHAN LANDSMAN,
RICHARD O. LEMPert, NANCY S. MARDER,
STEVEN D. PENROD, MARY R. ROSE, AND
MICHAEL J. SAKS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

STEPHEN R. SENN
NICHOLAS L. SELLARS
PETERSON & MYERS, P.A.
225 East Lemon Street,
Suite 300
Lakeland, FL 33801

SARAH LAHLOU-AMINE
Counsel of Record
1032 15th Street NW,
No. 407
Washington, DC 20005
(202) 729-6983
slahlou@probonoinst.org

Counsel for Amici Curiae

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE AMICI.....	1
INTRODUCTION.....	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	3
I. History of the Twelve-Person Jury	3
II. The Functional Equivalence Test and its Application.....	4
III. Current Jurisprudence of Jury Size	6
CONCLUSION	8
APPENDIX A — SOURCES.....	1a
APPENDIX B — AMICI.....	3a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases:	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	4
<i>Ballew v. Georgia</i> , 435 U.S. 223 (1978)	2, 6, 7
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	4
<i>Khorrami v. Arizona</i> , 143 S. Ct. 22 (2022)	2
<i>Opinion of the Justices</i> , 431 A.2d 135 (N.H. 1981)	7
<i>Patton v. United States</i> , 281 U.S. 276 (1930)	3
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020)	2, 4, 8
<i>State v. Hamm</i> , 423 N.W.2d 379 (Minn. 1988)	7
<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	1-8

Cited Authorities

Page

Constitutional Provisions

U.S. Const. amend. VI1, 2, 4

Rules

Rule 37.21

Other Authorities:

Richard S. Arnold, *Trial by Jury: The Constitutional
Right to a Jury of Twelve in Civil Trials*,
22 Hofstra L. Rev. 1 (1993)3-4

William Blackstone, *Commentaries on the Laws of
England* (1769)4

INTEREST OF THE AMICI¹

Amici Curiae are university professors whose teaching and scholarship have addressed historical, behavioral, and constitutional questions about jury size and jury performance. Amici are identified in Appendix B.

INTRODUCTION²

We urge the Court to grant certiorari in *Minor v. Florida*, No. 24-7489, on the question of whether the Sixth Amendment permits criminal juries smaller than twelve.

SUMMARY OF ARGUMENT

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court mistakenly concluded that by a “jury,” the Framers did not understand and mean a group of twelve. Having cut the Sixth Amendment jury-trial requirement free of its historical mooring, the Court devised a functional equivalence test to evaluate juries smaller than twelve. In applying that test, the Court misread existing data to conclude that six-person juries are functionally equal to twelve-person juries. Subsequent research confirms that *Williams* was built on faulty historical and empirical foundations.

1. This brief was drafted exclusively by the named amici and their counsel. Neither party nor their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for both parties were notified ten days prior to the due date of this brief of the intention to file this brief in accordance with Rule 37.2 of the Rules of this Court.

2. Judicial opinions are cited in the text of this Brief; a listing of selected non-judicial sources appears in Appendix A.

In *Ballew v. Georgia*, 435 U.S. 223, 245 (1978), the Court effectively abandoned functional equivalence and—in a fractured set of opinions—offered no coherent substitute. As a result, there is no consensus among state courts on what the Court’s jury-size cases mean. See *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (“Presently, the laws in 44 States entitle individuals charged with serious crimes to a trial before a 12-member jury. Only 6 states . . . tolerate smaller panels—and it is difficult to reconcile their outlying practices with the Constitution.”).

In *Ramos v. Louisiana*, 590 U.S. 83, 99-100 (2020), the Court rejected a similar functional analysis regarding the jury unanimity requirement. The Court identified the meaning of the right to trial by an impartial jury when the Sixth Amendment was adopted: “the unanimous suffrage of twelve of [the defendant’s] equals and neighbors[.]” *Id.* at 90, 92. The Court rejected efforts to compromise this “ancient guarantee” under the guise of a “cost-benefit” analysis. *Id.* at 100.

The requirement for a twelve-person jury is just as deeply rooted in the Sixth Amendment as the requirement for unanimity. *Ramos*’s reasoning thus applies equally to the faulty functional analysis of jury size in *Williams*. With *Ramos* illuminating the flawed reasoning on which *Williams* was based, this Court should grant certiorari to review and clarify the constitutional requirements for the size of state criminal juries.

ARGUMENT

I. History of the Twelve-Person Jury

The seminal modern constitutional case on the size of state criminal juries, *Williams v. Florida*, 399 U.S. 78 (1970), inadequately considered the relevant history, and thereby reached a mistaken conclusion. For more than six centuries of common law history, a jury was understood to consist of twelve persons. For nearly two centuries of U.S. constitutional history, this Court shared that understanding. For example, in *Patton v. United States*, 281 U.S. 276, 288 (1930), the Court stated that “it is not open to question . . . that the jury should consist of twelve men, neither more nor less.” But the Court departed from that long-standing and consistent view in *Williams*, where the Court reasoned that because the Constitution did not specify the jury’s size, and because the origins of twelve were lost in history, no particular number could be said to have been intended by the Framers.

Historical research into the question since *Williams* was decided indicates that the legal culture in which the authors of the Constitution lived understood juries to consist inherently of twelve persons. That understanding was reflected in the Virginia Ratification Convention, where Madison and others argued that several characteristics of the jury, including consisting of twelve members, were “incident to the trial by jury” and so it was unnecessary to enumerate its attributes in the Constitution’s text. As Governor Edmund Randolph explained, “There is no suspicion that less than twelve jurors will be thought sufficient.” Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in*

Civil Trials, 22 Hofstra L. Rev. 1 (1993) (citing 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 469 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836)).

Indeed, in recent cases this Court has repeatedly recognized that historically the Sixth Amendment required that “the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbours.” *Ramos*, 590 U.S. at 90 (quoting William Blackstone, *Commentaries on the Laws of England* 343 (1769)); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (same); accord *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

II. The Functional Equivalence Test and its Application

When the *Williams* Court concluded that twelve jurors were not required, it devised a test of the constitutionality of juries of varying sizes: To be constitutional, a jury must perform as well as the twelve-person unanimous jury performed. 399 U.S. at 100. This test of *functional equivalence* included evaluation of at least the following dimensions of the jury’s performance: ability to provide cross-sectional representation of the community, quality of deliberation, facilitation of dissenters’ resistance to majority pressure, factfinding accuracy, and verdicts (no altered advantage to either party). *Id.* at 100-01.

The *Williams* Court applied that test to Florida’s six-person felony juries and concluded that those jury functions were not “less likely to be achieved when the jury numbers six, than when it numbers 12[.]” *Id.* at 100.

In the nearly unanimous view of scholars from various disciplines, the application of the functional equivalence test in *Williams* was deeply flawed. In 1970, the Court had little empirical research from which to draw in conducting its inherently empirical analysis. What little it had, it misread or misinterpreted. The opinion cited studies for propositions opposite to what the studies found; mistook non-empirical works for empirical findings; and substituted judicial intuition for well-established principles of statistical sampling theory.

Consequently, the Court was mistaken in nearly every empirical conclusion reached along the way to deciding that six is functionally equal to twelve. Some of those errors became evident through studies conducted by researchers whose curiosity was stimulated by the *Williams* opinion; other errors should have been apparent at the time *Williams* was written.

The most constitutionally significant error in *Williams* was the failure to realize that juries of six are substantially less likely than juries of twelve to contain even a single member of a minority group. For example, based on statistical sampling theory, a group that constitutes 10% of a population would, all else equal, be represented on 72% of twelve-person juries but on only 47% of six-person juries. The findings of many empirical studies have been in line with the statistical models. One such study found that at least one member of a minority group (which constituted 25.8% of jurors remaining after challenges were completed) was seated on all but 2% of twelve-person juries, while 28% of six-person juries contained none of them at all.

Even assuming the Court’s historical analysis was correct, and that functional equivalence is the proper test for assessing the constitutionality of a jury’s size, the poor application of the test in *Williams* casts a cloud over the soundness of its holding that six-person criminal juries are constitutional.

III. Current Jurisprudence of Jury Size

Current jurisprudence governing the constitutionality of jury size is largely a void. Eight years after inventing the functional equivalence test, the Court tacitly abandoned it in *Ballew v. Georgia*, 435 U.S. 223 (1978). In *Ballew* the Court unanimously declared Georgia’s five-person criminal juries to be below the constitutional minimum, but none of the four opinions in the case employed the functional equivalence test to reach that conclusion. *Id.* at 245-46.

Justice Blackmun announced the judgment of the Court in an opinion joined only by Justice Stevens. *Id.* That opinion reviewed at length numerous studies and commentaries which together showed that the factual conclusions in *Williams* were empirically and theoretically mistaken. *Id.* Bafflingly, however, the opinion relied on those studies—comparing the performance of *six-person* juries to *twelve-person* juries—to conclude that *five-person* juries are unconstitutional. *Id.*

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, offered no analysis at all, but simply declared that “a line has to be drawn somewhere.” *Id.* (If the line is indeed arbitrary, perhaps it had already been drawn by the Framers and by history.) Justice Brennan,

joined by Justices Stewart and Marshall, concurred in the judgment but offered no analysis. *Id.* at 246. Justice White wrote alone, offering only the unsupported assertion that a reduction from six to five would violate the cross-section requirement. *Id.* at 245. (In the Court's opinion in *Williams*, he had concluded, erroneously, that a reduction from twelve to six would have no effect on cross-sectional representation.) In sum, the justices abandoned the functional equivalence test and replaced it with nothing but incoherence and *ipse dixit*. *Id.*

After *Ballew*, there is no longer any coherent framework for analyzing constitutional jury-size questions. Not surprisingly, confusion has developed among state courts. Florida's courts (e.g., the case at bar) read *Williams* to remain good law, despite abandonment of *Williams*'s test of constitutionality in *Ballew*. By contrast, the supreme courts of Minnesota (*State v. Hamm*, 423 N.W.2d 379 (Minn. 1988), superseded by state constitutional amendment requiring a jury of twelve for felonies and jury of six for misdemeanors), and New Hampshire (*Opinion of the Justices*, 431 A.2d 135 (N.H. 1981)) were persuaded by the factual analysis in Justice Blackmun's opinion in *Ballew* that six-person juries are not functionally equal to twelve-person juries, and they so ruled in the jury-size matters before them. Thus, some state courts have found the *dicta* of the Court's jury-size opinions more illuminating than the holdings. Other states might adopt various jury sizes and, with no rational guidance from this Court on how to assess the federal constitutionality of those juries, confusion will multiply.

CONCLUSION

The jury-size cases weave together erroneous empirical factfinding with mistaken history, producing an incoherent statement of the law which should be troubling to legal theorists of various perspectives – originalists, empiricists, and doctrinalists alike.

The amici urge the Court to grant certiorari and to overrule *Williams* in light of *Ramos*.

Respectfully submitted,

STEPHEN R. SENN
NICHOLAS L. SELLARS
PETERSON & MYERS, P.A.
225 East Lemon Street,
Suite 300
Lakeland, FL 33801

SARAH LAHLOU-AMINE
Counsel of Record
1032 15th Street NW,
No. 407
Washington, DC 20005
(202) 729-6983
slahlou@probonoinst.org

Counsel for Amici Curiae

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — SOURCES	1a
APPENDIX B — AMICI.....	3a

APPENDIX A — SOURCES

Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867 (1994).

American Bar Association, American Jury Project, *Principles for Juries and Jury Trials* (2023).

Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993).

Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. Empirical Legal Stud. 425 (2009).

Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001).

Richard Lempert, *Uncovering ‘Nondiscernible’ Differences: Empirical Research and the Jury-Size Cases*, 75 Mich. L. Rev. 643 (1975).

G. Thomas Munsterman, Janice T. Munsterman & Steven Penrod, *A Comparison of the Performance of Eight- and Twelve-Person Juries* (1990).

Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 Judicature 263 (1996).

Appendix A

Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law & Hum. Behav. 451 (1997).

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 (2008).

Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature* (Nat'l Ctr. State Cts., 2004).

Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971).

Hans Zeisel & Shari S. Diamond, “*Convincing Empirical Evidence*” on the Six Member Jury, 41 U. Chi. L. Rev. 281 (1974).

APPENDIX B — AMICI

Steven G. Calabresi, JD, Clayton J. and Henry R. Barber Professor of Law, Northwestern University Pritzker School of Law.

Shari S. Diamond, JD, PhD, Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University Pritzker School of Law.

Phoebe C. Ellsworth, PhD, Frank Murphy Distinguished University Professor Emerita of Law and Psychology, University of Michigan Law School.

Samuel R. Gross, JD, Thomas and Mabel Long Professor of Law Emeritus, University of Michigan Law School.

Valerie P. Hans, PhD, Charles F. Rechlin Professor of Law, Cornell Law School.

Saul Kassin, PhD, Distinguished Professor, John Jay College of Criminal Justice, The City University of New York.

Stephan Landsman, JD, Emeritus Professor of Law and Organizer and Director, Clifford Symposium on Tort Law and Social Policy Emeritus, DePaul College of Law.

Richard O. Lempert, JD, PhD, Eric Stein Distinguished University Professor Emeritus of Law and Sociology, University of Michigan.

Appendix B

Nancy S. Marder, JD, Professor of Law and Director of the Justice John Paul Stevens Jury Center, Chicago-Kent College of Law.

Steven D. Penrod, JD, PhD, Distinguished Professor, John Jay College of Criminal Justice, The City University of New York.

Mary R. Rose, PhD, Professor, Department of Sociology and Director, Human Dimensions of Organizations Program, University of Texas at Austin.

Michael J. Saks, PhD, MSL, Regents Professor, Sandra Day O'Connor College of Law and Department of Psychology, Arizona State University.