FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3832

DEAN BRUNO LAINHART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
Darlene F. Dickey, Judge.

December 15, 2022

PER CURIAM.

AFFIRMED.

ROBERTS and JAY, JJ., concur; B.L. THOMAS, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., concurring.

Appellant, the live-in paramour of the mother of the victim (E.S.) from the time E.S. was four or five, forced E.S. to perform oral sex on Appellant when she was less than twelve-years old. He also forced E.S. to allow Appellant to perform oral sex on E.S. before she turned twelve years of age. He then forced E.S. to engage in sexual intercourse with him soon after E.S. turned twelve. He would preface his crimes by imploring E.S. to give him just a few minutes as soon as her mother left for work.

Appellant threatened to "take away" the victim's mother if the young victim ever reported the crimes. As E.S. became older, it became necessary for Appellant to threaten her more often, as he committed other sexual crimes against her. E.S. was afraid because of Appellant's threats.

This went on for years until the Appellant and E.S.'s mother separated. Finally, when E.S. and her mother were in another state, E.S. reported Appellant's crimes and then testified at trial.

The six-person jury convicted Appellant of two counts of capital sexual battery, one count of sexual battery by a person in familial or custodial authority, and two counts of lewd and lascivious battery. The trial court previously granted a motion for judgment of acquittal on one count of capital sexual battery. The court sentenced Appellant to two mandatory terms of life in prison for capital sexual battery and lengthy prison terms for the other sexual offenses.

As I have noted previously, *see Bicking v. State,* 348 So. 3d 35, 36 (Fla. 1st DCA 2022), historically the states were permitted to execute such offenders as Appellant, but the United States Supreme Court held in *Kennedy v. Louisiana,* in a 5-4 decision in 2008, that the death penalty was no longer a valid punishment for such horrific crimes as occurred here. 554 U.S. 407 (2008). The Court in *Kennedy*, which relied in part on its plurality decision in *Coker v. Georgia,* 433 U.S. 584 (1977), held that no matter how brutal and dehumanizing a rapist victimizes a person, *even a child*, the states are not authorized to impose capital punishment for such heinous crimes. I reiterate my view that both of these decisions are wrong as they are not based on the text or the

historical underpinnings of the Eighth Amendment. This case is just another sad example of why those decisions are also wrong based on any moral theory of punishment and justice, especially where a perpetrator destroys the innocence of a young child and violates all standards of decency held by any civilized society. *Bicking,* 348 So. 3d at 43.

I agree that we should reject Appellant's argument that the trial court erred in denying the motion for judgment of acquittal on the capital-sexual battery count. The State presented competent evidence based on the testimony of E.S. and her mother that this sexual crime occurred before the victim was twelve-years old. *Bush v. State,* 295 So.3d 179, 200 (Fla. 2020). As the State correctly argues, the jury could conclude that the victim "overestimated" her age and that her mother's recollections regarding dates and the victim's age were more reliable.

I also agree that we must reject Appellant's argument that the received evidence of his possible drug use somehow tainted the verdict. It borders on preposterous that a jury would conclude that such evidence justified finding Appellant guilty of these serious sexual crimes despite any lack of competent evidence to support those verdicts.

I write to address Appellant's unpreserved argument that he was entitled to a trial by a twelve-person jury, even though the State was prohibited under federal law and Florida's statutes from seeking the death penalty for Appellant's crimes. Recently, Justice Gorsuch of the United States Supreme Court has opined that a criminal defendant, such as Appellant, is entitled to a twelve-person jury before he may be constitutionally convicted under the Sixth Amendment. *See Khorrami v. Arizona*, 21-1553, 2022 WL 16726030, at *1 (U.S. Nov. 7, 2022) (Gorsuch, J. dissenting from the denial of certiorari). In this dissent, Justice Gorsuch states that the prior precedent of *Williams v. Florida,* 399 U.S. 78 (1970), which upheld Florida's authority to rely on six-person juries fifty-two years ago, was wrongly decided.

Based on Justice Gorsuch's own analysis, "while scholars may debate the precise moment when the common-law jury came to be fixed at 12 members, this much is certain: By the time of the Sixth Amendment's adoption, the 12-person criminal jury was 'an

institution with a nearly four-hundred-year-old tradition in England.'" *Khorrami*, 2022 WL 16726030, at *1 (Gorsuch, J. dissenting from the denial of certiorari) (citation omitted). And yet, the Amendment's drafters, our Nation's founders, the First Congress of the United States, and the states that ratified the Amendment, declined to incorporate this "four-hundred-year-old tradition" in the constitutional document itself. Quite the contrary, they went so far as to *remove* language specifying that the jury-trial right in the Sixth Amendment must include its "accustomed requisites," that would likely have eliminated any grounds for deviating from a rigid rule that only twelve-person juries can reach verdicts with integrity and reliability. *Id.* (citing *Williams,* 399 U.S. at 92).

In my view, respectfully, *Williams* was correctly decided. And *Williams* in conjunction with *State v. Hogan,* 451 So. 2d 844 (Fla. 1984), which held there was no requirement of twelve-person jury in capital sexual-battery prosecution, require that we reject Appellant's meritless argument that he was entitled to a trial by a twelve-person jury, preserved or not.

But given his life sentence for his heinous crimes, I think we should address his argument.

The Sixth Amendment Does Not Mandate Twelve-Person Juries

In *Khorrami,* the state of Arizona asserted that:

> Khorrami also minimizes the enormous impact that disturbing *Williams'* holding would have in Arizona, Connecticut, Florida, Indiana, Massachusetts, and Utah. Announcing a new 12-member jury requirement in criminal cases would invalidate constitutional provisions and laws (that have no racist origins) in these six States, and *could force the States to retry thousands of cases pending on direct appeal.*

Brief in Opposition at 5, *Khorrami*, 2022 WL 16726030 (emphasis added).

Arizona noted that the Supreme Court should allow this issue to "percolate," noting that only two decisions had addressed the question, "both providing little analysis," citing *Wooford v. Woods,* 969 F.3d 685, 707 n. 27 (6th Cir. 2020) and *Phillips v. State,* 316 So. 3d 779, 788 (1st DCA 2021) (Makar, J. concurring). Brief in Opposition at 4, *Khorrami*, 2022 WL 16726030.

Needless to say, as Arizona noted in its brief, the impact of the United States Supreme Court's holding that Florida's six-person jury was unconstitutional in non-capital cases would be catastrophic in terms of criminal procedure, devastating to any notion of finality, and injurious to the rights of criminal victims, such as the rape victim here, who would be compelled to testify yet again at trial (and at deposition).

> The real-world impact of a departure from *Williams'* holding would also be enormous. Florida, the third most-populous state in the nation with roughly 22 million people, has approximately 3,500 criminal cases awaiting finality at any given time. Florida employs a six-member jury for *all* non-capital cases . . . . Consequently, Florida could be forced to retry *thousands of non-capital cases involving serious offenses* if the Court were to overrule *Williams*.

Brief in Opposition at 27, *Khorrami*, 2022 WL 16726030 (emphasis added).

And of course, were this judicial upheaval to occur, the next shoe to fall would be the assertion that the right applied *retroactively* on collateral review, potentially subjecting the state to enormous costs and pressures, and crime victims to suffer, in many thousands of criminal cases. In other words, no Florida non-capital criminal verdict of guilt (or those of five other states') would be final, should this occur.

Past rape victims would not be spared future demands to sit for yet more depositions, more trials, more trauma, more cross-examination, and more misery, all to ensure that a prior lawful verdict rendered unanimously by six citizens was in no way illegitimate or unreliable by any objective measure. And after all these verdicts were vacated and the case re-tried, if that were even

possible, the public would be told that for fifty-two years, with the support of the United States Supreme Court, the state "got it wrong after all," and that the entire non-capital judicial process of Florida was invalid. Such a result would decrease confidence in the integrity of judicial procedures and subject crime victims to unjustified suffering.

The fallacy of the argument that requiring a unanimous twelve-person jury verdict produces a more just result reflecting greater confidence in judicial proceedings, was recently exposed; in fact, the result did not produce justice or a more-admirable system of criminal justice in the eyes of the victims' families and the public. In Broward County, purportedly a single juror decided that the families of fourteen murdered schoolchildren and three adult victims, and the people of Florida, were not entitled to see the ultimate penalty imposed on the school shooter who pleaded guilty.[*] *See Jury Rejects Death Sentence for Stoneman Douglas*

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[*] In 2016, the Florida Supreme Court held that under Florida's constitution, unanimous jury recommendations were required to sentence a convicted murderer to death. *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016) (rejecting a vigorous dissent by Justice Canady, joined by Justice Polston, *id.* at 77–83). In the dissenting opinion, Justice Canady wrote that the requirements under the federal constitution and the holding in *Hurst v. Florida,* 136 S. Ct. 616 (2016), only required that a jury in Florida must determine aggravating factors beyond a reasonable doubt, such as whether a murder was "especially heinous, atrocious, or cruel" under section 921.141(6), Fla. Stat. This finding went only to whether the defendant was *eligible* to receive a death sentence, as there was no requirement under federal or state constitutional law that a jury must unanimously determine whether the defendant *deserved* the death penalty, which is essentially a moral question of mercy. Following the majority's erroneous holding, however, the Legislature then amended the statute to conform to the unanimity requirement on *both determinations* under section 921.141(3)(a) & (b), Florida Statutes (2016).

The Florida Supreme Court's erroneous decision in *Hurst* was reversed by a later Florida Supreme Court decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), which held that under the Sixth

School Shooter in all 17 murders, So. Fla. Sun-Sentinel, Oct. 13, 2022 (reporting that juror foreman voted for death penalty and said there was "one [juror] with a hard no" and two others eventually concurred).

Did this result from a non-unanimous twelve-person jury better ensure "the integrity of the Nation's judicial proceedings?" *Khorrami*, 2022 WL 16726030, at *27 (Gorsuch, J. dissenting from the denial of certiorari).

Not so in the eyes of some of the murder-victims' families. *See They Did Not Receive Justice Today: Families stunned, angered, disgusted by jury decision to spare life of Parkland Gunman*, So. Fla. Sun-Sentinel, Oct. 13, 2022 (quoting victims-families' reaction to the twelve-person jury rejecting the death penalty for the

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Amendment, a jury is not required to make a unanimous recommendation in its advisory opinion whether a convicted murderer merited the death penalty. In *Poole,* the supreme court held that under the federal constitution there is *no requirement that a jury even play a role in determining whether a defendant deserved to be sentenced to death*, once the jury has unanimously determined that at least one aggravating factor has been proven to exist beyond a reasonable doubt:

> In sum, because the section 921.141(3)(b) *selection* finding is not a "fact" that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an element. And because it is not an element, *it need not be submitted to a jury*. *See Hurst v. Florida*, 136 S. Ct. at 621 (defining "element").

State v. Poole, 297 So. 3d 487, 504 (Fla. 2020), *reh'g denied, clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020), and *cert. denied sub nom. Poole v. Fla.*, 141 S. Ct. 1051 (2021) (emphasis added).

Thus, had the erroneous decision in *Hurst* not been rendered and the statute amended, in response to the decision, no unanimous jury recommendation would be required to impose a death sentence.

Parkland gunman: "There are 17 victims . . . and they did not receive justice today;" "This should have been the death penalty 100 percent;" "I sent my daughter to school and she was shot eight times. I am so beyond disappointed and frustrated with this outcome. I just don't understand this;" and "I'm disgusted with our legal system . . . . As a country we need to stand up and say that's not OK.").

In fact, whether the requirement of a unanimous twelve-person jury verdict produces a more just result was adamantly rejected by the families of the murdered children:

> Thursday, suffering family members came forward to express *anguish and anger at a justice system they say failed*. [One] mother . . . sobbed into her husband's arms as they walked out of the courtroom. [One] father, *was irate over the jury's decision* and sat shaking his head throughout the lengthy reading by the judge. "She should not have been extinguished by this monster," he said after the verdicts were read. "[S]he deserved better." Several of the family members pointed out that the gunman shot their loved one multiple times, and wondered how someone who could do that isn't worthy of the death penalty.

Jury Rejects Death Sentence for Stoneman Douglas School Shooter in all 17 murders, So. Fla. Sun-Sentinel, Oct. 13, 2022.

I do not write to impugn that jury's non-unanimous recommendation but only note the response of the victims and other evidence which does not reflect a public view that the decision of the twelve-person jury reflected integrity in Florida's judicial proceedings.

In his dissent, Justice Gorsuch cites *Ballew v. Georgia,* which struck down a five-person jury structure, where the court found that the use of smaller petit juries "'[redounds] to the detriment of the defense.'" *Khorrami,* 2022 WL 16726030 at *1 (Gorsuch, J. dissenting from the denial of certiorari) (citing *Ballew,* 435 U.S. 423, 232-33 (1978) (alteration in original). Thus, Justice Gorsuch reasoned that, based on studies, imposing a rigid twelve-person jury structure on all fifty states would produce a more-neutral

decision-making process that operates to ensure a more favorable process, or at least one assumes a more neutral process, for criminal defendants, such as the child rapist in this case.

But if this were true, why did the drafters not only neglect to specify this tradition in the text of the Sixth Amendment, but *deleted* language that would have unquestionably imposed the tradition on every state in the Nation? And as Justice Gorsuch wrote in *Bostock v. Clayton County of Georgia,* it is the *text* that controls proper interpretation of law, not the intent of the drafters of statutes or constitutional text:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years . . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. *Only the written word is the law, and all persons are entitled to its benefit.*

140 S. Ct. 1731, 1737 (2020) (emphasis added).

In my view, the sovereign state of Florida, composed of approximately 22 million persons, is also entitled to the protections of the "written word" in the Sixth Amendment, and thus granted the flexible authority to rely on juries composed of six citizens as the Court upheld in *Williams,* or eight as in Arizona, or any other number of jurors more than five. And it is not the "extratextual considerations" such as common-law traditions that might have been incorporated into the text, *but were not*, which can negate this textual promise of flexibility in our federalist system of national governance.

The use of a twelve-person jury does not necessarily result in better decision making. And as noted in *Williams,* the larger jury composed of twelve members also allows one to vote to convict and prevent an acquittal. 399 U.S. at 101 (1970).

Although it may be speculation, it is not idle speculation to assume that the drafters of the Sixth Amendment knew well that flexibility in jury composition was an attractive alternative:

> . . . Indeed, as the subsequent debates over the Amendments indicate, disagreement arose over whether the feature should be included at all in its common-law sense, resulting in the compromise described above. Second, provisions that would have explicitly tied the 'jury' concept to the 'accustomed requisites' of the time were eliminated. Such action is concededly open to the explanation that the 'accustomed requisites' were thought to be already included in the concept of a 'jury.' But that explanation is no more plausible than the contrary one: that the deletion had some substantive effect. Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit 'vicinage' requirement, the latter explanation is, if anything, the more plausible. Finally, contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect. Thus, the Judiciary bill, signed by the President on the same day that the House and Senate finally agreed on the form of the Amendments to be submitted to the States, provided in certain cases for the narrower 'vicinage' requirements that the House had wanted to include in the Amendments. And the Seventh Amendment, providing for jury trial in civil cases, explicitly added that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'

Williams, 399 U.S. at 96–97 (1970) (footnote omitted). Thus,

> . . . Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant

> inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, *the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment*.

Id. at 99–100 (emphasis added).

As Appellant acknowledges, his unpreserved argument that he was entitled to trial before a twelve-person jury is meritless under both federal and state precedent. And even if I were writing on a blank slate, in my view, the United States Supreme Court correctly decided *Williams*. Thus, we correctly affirm the judgment and sentence below.

Jessica J. Yeary, Public Defender, and Ross Scott Haine, II, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Robert "Charlie" Lee, Assistant Attorney General, Tallahassee, for Appellee.