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In Honor of Walter O. Weyrauch: The Case for Overturning *Williams v. Florida* and the Six-Person Jury: History, Law, and Empirical Evidence

Alisa Smith

Michael J. Saks

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THE CASE FOR OVERTURNING *WILLIAMS v. FLORIDA* AND
THE SIX-PERSON JURY: HISTORY, LAW, AND
EMPIRICAL EVIDENCE

*Alisa Smith**

*Michael J. Saks***

After 700 years of common-law history and nearly 200 years of constitutional history, the Supreme Court concluded that the constitutionally permissible minimum jury size could not be inferred from the language or the history of the Constitution. The answer, said the Court in *Williams v. Florida*, could be found only through a “functional analysis” of the performance of smaller juries (that is, empirical examination of the behavior of different-sized juries). The Court implicitly abandoned that analysis in *Ballew v. Georgia*, when it held that juries with fewer than six members were unconstitutional—a decision based on nothing more than the *ipse dixit* of the Justices. This Essay sets out the historical and empirical infirmities of the *Williams* line of cases. It summarizes the jury sizes required in criminal prosecutions throughout the United States; examines the Sixth Amendment history of the jury trial; argues that this history supports the position that the Constitution intended twelve-person juries; reviews Florida’s jury trial history; and summarizes the empirical research undertaken since *Williams*. This Essay concludes that at present no sound basis exists in law for knowing the minimum size of a constitutionally permissible jury. *Williams*, having become a dead letter in *Ballew*, should either be ratified (and the theory of functional equivalence applied conscientiously) or be formally reversed to allow courts either to develop a sound theory of the constitutionality of jury size or to restore the jury to its traditional size.

* Assistant Professor of Criminology, The University of Tampa. Ph.D. 1998, The Florida State University; J.D. 1988, The Florida State University.

** Professor of Law, Professor of Psychology, and Fellow of the Center for the Study of Law, Science, and Technology, Sandra Day O’Connor College of Law, Arizona State University. Ph.D. 1975, Ohio State University; M.S.L. 1985, Yale Law School.

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I. INTRODUCTION

Only two states—Florida and Connecticut—rely on six-person juries in serious felony prosecutions. The constitutionality of Florida’s six-person jury rests exclusively on the U.S. Supreme Court’s decision in *Williams v. Florida*.¹ In *Williams*, the Court dismissed precedent and legal tradition, and found the twelve-person jury to be nothing more than a “historical accident.”² The Court therefore upheld the constitutionality of six-person juries because it found six- and twelve-person juries to be functionally equivalent.³

The *Williams* Court’s historical analysis is flawed: more thorough inquiry suggests that the Framers understood and intended the jury to be a group of twelve persons. But, even accepting the Court’s “functional” analysis as the correct test of constitutionality, the six-person jury fails—the empirical evidence never supported the speculations in

1. 399 U.S. 78 (1970); *see also* Blair v. State, 698 So. 2d 1210, 1216 (Fla. 1997) (stating that it is indisputable that a person in Florida has a right to a six-person jury); Rinaldo v. State, 861 So. 2d 510, 511 (Fla. 4th DCA 2004) (holding that a person does not have a fundamental right to a twelve-person jury); Smith v. State, 857 So. 2d 268, 270 (Fla. 5th DCA 2003) (holding that a right to a jury of at least six members is fundamental).

2. *Williams*, 399 U.S. at 101–02.

3. *Id.* at 103.

Williams, and subsequently accumulated knowledge leads to the conclusion that the performance of the six-person jury is inferior to that of the twelve-person jury.

This Essay sets out the historical and empirical infirmities of the *Williams* decision. Part II presents a summary of the number of jurors used in criminal prosecutions throughout the United States. Part III examines the Sixth Amendment history of the trial by jury and argues that the twelve-person jury was no accident. Part IV provides an overview of Florida's jury trial history. Part V describes the *Williams* Court's functional-equivalence test in detail. Part VI summarizes the empirical research undertaken since *Williams*, casting great doubt on the vitality of its holding.

II. THE CURRENT STATUS OF JURIES NATIONWIDE

Although some states reduced the size of the jury in criminal prosecutions to six persons (and Georgia attempted to reduce the size to five) following the *Williams* decision, most states currently retain twelve-person juries in felony cases. Only six states permit juries of fewer than twelve in felony prosecutions, and of those only four permit six-person juries.⁴ Indiana requires twelve-person juries for class A, B, and C felonies, and six-person juries in all other felony cases.⁵ Massachusetts provides twelve-person juries for all Superior Court cases and a de novo jury trial for all cases appealed from a guilty verdict by a six-person jury in district court cases. Thus no person accused of a felony in Massachusetts must settle for a six-person jury. Arizona provides twelve-person juries in cases where the sentence may be more than thirty years and eight-person juries in other felony cases. In Utah, eight-person juries are permitted in felony prosecutions. The only other state with six-person juries in felony cases is Connecticut. All other state and federal felony prosecutions require twelve-person juries.⁶ The states that have the death penalty, including Florida, require twelve-person juries in all capital or death cases.⁷

4. DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 233 tbl.42 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf>.

5. *Id.* Indiana has a fixed sentencing structure. Class A felonies are punishable by up to thirty years in prison, class B by up to ten years in prison, class C by up to four years in prison, and class D by up to eighteen months in prison. See IND. CODE §§ 35-50-2-4 to -7 (2007).

6. ROTTMAN & STRICKLAND, *supra* note 4, at 233 tbl.42.

7. *Id.* In Florida, a defendant may waive a twelve-person jury and agree to be tried by a smaller jury. See *State v. Griffith*, 561 So. 2d 528, 529 (Fla. 1990).

The American Bar Association's (ABA) principles for jury trials call for states to provide twelve-person juries in felony prosecutions "if a penalty of confinement for more than six months may be imposed upon conviction."⁸ Despite the ABA's recommendation and the near nationwide consensus on twelve-person juries in serious cases, Florida and Connecticut retain the six-person jury.

III. THE SIXTH AMENDMENT AND THE HISTORY OF THE JURY

The Sixth Amendment to the U.S. Constitution guarantees defendants the right to trial by jury:

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 defence.⁹

The right to trial by jury is essential to freedom and justice: "Throughout history, the right to a trial by jury has been viewed by our founding fathers, the framers of our constitution, and all citizens of the United States since its inception, as essential to the freedoms that make our society great."¹⁰ The Sixth Amendment, founded on long experience in English history and the Magna Carta, was included in the Bill of Rights to "prevent oppression by the government."¹¹ Blackstone's *Commentaries*, originally published in 1765–1769, identified trials by twelve jurors as being important to preventing government oppression: "[T]he 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 his equals and neighbours, indifferently chosen and superior to all suspicion."¹² Blackstone's summary of the development of

8. A.B.A., AM. JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS 5 princ.3 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf>.

9. U.S. CONST. amend. VI.

10. Michael Sudman, Note, *The Jury Trial: History, Jury Selection, and the Use of Demonstrative Evidence*, 1 J. LEGAL ADVOC. & PRAC. 172, 173 (1999).

11. *Id.* at 175; see also Benjamin F. Diamond, Note, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 FLA. L. REV. 905, 909–11 (2003) (discussing the development of the English jury and its influence on the American jury).

12. *Duncan v. Louisiana*, 391 U.S. 145, 151–52 (1968) (quoting WILLIAM BLACKSTONE, 4

English law and practice reflects the same history that led the U.S. Supreme Court in 1898 to determine that the term “jury” in the Sixth Amendment retained its meaning under the common law and Magna Carta:

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 . . . the supreme law of the land required that [the defendant] should be tried by a jury composed of not less than twelve persons.¹³

The Court, thereafter, consistently held that criminal trials required twelve-person juries. In 1905, this was true for petty offenses as well. In *Rassmussen v. United States*,¹⁴ the Court struck down as unconstitutional an Alaskan territorial law of Congress because the law permitted six-person juries in misdemeanor cases.¹⁵ In 1968, the Court in *Duncan v. Louisiana*¹⁶ applied the Sixth Amendment to the states, holding that state criminal prosecutions of non-petty offenses required twelve-person juries.¹⁷

Justice White, writing for a seven-member majority in *Duncan*, held trial by jury in criminal cases to be fundamental to the American scheme of justice and applied this guarantee to the states through the Fourteenth Amendment to the U.S. Constitution.¹⁸ A crime punishable by two years in prison was not a petty offense and required a jury trial.¹⁹ Although the size of the jury was not at issue in the case, implicit in the opinion was that juries numbered twelve—the opinion quoted Blackstone on the point.²⁰ The two dissenters specifically challenged the twelve-person requirement, which they viewed the majority as having embraced.²¹ But the right to twelve-person juries was a matter of fundamental principles of liberty and justice, and was based on well-settled history:

COMMENTARIES *349–50).

13. *Thompson v. Utah*, 170 U.S. 343, 350 (1898), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970), and *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37 (1990).

14. 197 U.S. 516 (1905).

15. *Id.* at 518.

16. 391 U.S. 145 (1968).

17. *Id.* at 157–58.

18. *Id.*

19. *See id.* at 147.

20. *See id.* at 151–52.

21. *Id.* at 182 (Harlan, J., dissenting).

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.²²

Until *Williams*, the Court had consistently defined “jury” to mean the common-law twelve-person jury.²³

Florida law allowed six-person juries in non-capital felony cases.²⁴ Following *Duncan*, the constitutionality of the 1967 version of Florida’s statute allowing six-person juries was challenged by the petitioner in *Williams*, who argued that a six-person jury was inconsistent with the Sixth Amendment guarantee of trial by jury.²⁵ Because the Sixth Amendment does not specify a number of impartial jurors for a constitutional panel, the *Williams* Court examined whether a twelve-person jury was a necessary ingredient of trial by jury. Although the Court found that the historical definition of a jury included trial by peers, the Court characterized the use of twelve-person juries as a “historical accident” of common law.²⁶ This characterization improperly dispensed with a 700-year history defining “jury” as comprising twelve persons. There is “more than sufficient evidence to conclude that the evolution of the modern jury as a body of twelve-persons was far from accidental.”²⁷

Contrary to the *Williams* Court’s conclusion, a great deal of common-law history—identified in *Duncan* and previous U.S. Supreme Court and state law cases—supports an interpretation that the Framers of the Constitution guaranteed a twelve-person jury through the Sixth Amendment.²⁸ Trial by jury is fundamental to the common-law system and predates the adoption of the Sixth Amendment in 1791.²⁹ In fact, the Sixth

22. *Id.* at 151 (majority opinion) (footnotes omitted).

23. Larry T. Bates, *Trial by Jury After Williams v. Florida*, 10 *HAMLIN L. REV.* 53, 55 (1987); Robert H. Miller, Comment, *Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 *U. PA. L. REV.* 621, 621 (1998).

24. See *English v. State*, 12 *So.* 689, 690 (Fla. 1893).

25. See *Williams v. Florida*, 399 *U.S.* 78, 86 (1970).

26. *Id.* at 89.

27. Miller, *supra* note 23, at 632–33.

28. See *id.* at 639–45, 681–82.

29. See generally Richard S. Arnold, Chief Judge, U.S. Court of Appeals for the Eighth Circuit, Howard Kaplan Memorial Lecture: Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials (Oct. 6, 1993), in 22 *HOFSTRA L. REV.* 1 (1993) (noting that it was taken for granted for hundreds of years that a jury should be composed of twelve people). In a lecture

Amendment is “essentially redundant” because the right to a trial by jury was provided in Article III, § 2 of the Constitution in 1789.³⁰ The right to a jury trial is the “only guarantee to appear in both the original document and the Bill of Rights.”³¹

At the Constitutional Convention, the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists. Alexander Hamilton wrote in Federalist 83:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.³²

The jury trial’s historical basis is well settled, and the number of jurors was a deliberate decision based on intrinsic value and not simply a “historical accident.”³³ The number of jurors at the time of adoption—and for centuries of common-law history preceding the Sixth Amendment—was set at twelve. When our forefathers spoke of the “trial by jury,” they assumed, based on “common-law criminal jurisprudence[,] that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’”³⁴ In *Blakely v. Washington*,³⁵ Justice Scalia rejected the argument that the Framers of the Constitution “left definition of the scope of jury power up to judges’ intuitive sense of how far is *too far*.”³⁶ The role of the jury was not left to the government: “We think that claim not plausible at all, because the very

delivered at the Hofstra University School of Law and later printed in the *Hofstra Law Review*, Judge Arnold set forth a compelling historical and empirical argument critical of the six-person jury in civil cases. See *id.* His arguments are applicable to criminal trials as well.

30. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869–70 (1994).

31. *Id.* at 870. The Constitution and the Sixth Amendment both guarantee the right to a trial in the state where the crime has been committed. See U.S. CONST. art. 3, § 2, cl. 3; U.S. CONST. amend. VI.

32. Alschuler & Deiss, *supra* note 30, at 871 (quoting THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

33. See *id.* at 869–71.

34. *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *349–50).

35. 542 U.S. 296 (2004).

36. *Id.* at 308.

reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”³⁷ Allowing the government to define the size of a jury empowers the government to all but eliminate the jury, undoing by statute what had been established by the Constitution. In *Ballew v. Georgia*,³⁸ the Court acknowledged this slippery slope by holding that Georgia’s five-person jury in criminal cases violated the Sixth and Fourteenth Amendments.³⁹

Since *Williams*, the Supreme Court has not directly confronted a challenge to the six-person jury. In *Ballew*, the Court was asked to examine whether five-person juries satisfied the Sixth Amendment guarantee of trial by jury. Although the *Ballew* Court reaffirmed *Williams*, the issue in *Ballew* did not concern the constitutionality of six-person juries. The Court, in two other cases dealing with juries, was also not confronted by a direct challenge to the infirmity of its *Williams* decision. In *Burch v. Louisiana*,⁴⁰ the Court held that a non-unanimous verdict by a six-person jury in a state criminal trial for a non-petty offense violated the Sixth Amendment,⁴¹ and in *Brown v. Louisiana*,⁴² the Court gave the decision in *Burch* retroactive effect.⁴³ The foundation for twelve-person juries was well rooted in American jurisprudence prior to the *Williams* decision. Throughout 700 years of common-law jurisprudence, no historical evidence supports juries of numbers other than twelve.

To argue that strictly adhering to the Framers’ view would require the twelve jurors to be white, male landholders avails nothing. At the time the Constitution and Bill of Rights were adopted, the qualifications of jurors were matters of state and federal legislation. Many of the disqualifying characteristics that limited jury participation to white, male property owners resulted from the “citizenship” restrictions at that time.⁴⁴ Discriminatory practices that restricted juror participation were circumscribed and later eliminated after the passage of the Fourteenth and Fifteenth Amendments:

The years following the Civil War saw four notable legal developments that affected the criminal jury. In 1868, the Fourteenth Amendment declared that no state could enact or enforce any law abridging the privileges or immunities of citizens of the United States. The amendment also forbade any state to deny to any person the equal protection of the laws. Two years later, the Fifteenth Amendment declared that “the right [of citizens of the United States] to vote shall not be

37. *Id.*

38. 435 U.S. 223 (1978).

39. *Id.* at 230–31.

40. 441 U.S. 130 (1979) (a unanimity case).

41. *Id.* at 139.

42. 447 U.S. 323 (1980) (a unanimity case).

43. *Id.* at 331.

44. See Alschuler & Deiss, *supra* note 30, at 877–78.

[denied or] abridged by the United States or by any State on account of race, color, or previous condition of servitude.” The Federal Civil Rights Act of 1875 provided that “no citizen . . . shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race.” And four years later, the Federal Jury Selection Act of 1879 reversed the course of earlier congressional action, facilitated discriminatory jury selection in the federal courts, and brought Reconstruction in the jury box to an end.⁴⁵

The Supreme Court has held that racial or gender discrimination in jury selection violates the Fourteenth Amendment.⁴⁶ The historical interpretation of the Sixth Amendment guarantee of a jury of twelve would not require those twelve individuals be propertied white men.⁴⁷

English history and common-law precedent should not be easily dismissed. History and precedent remain important cornerstones to constitutional interpretation as evidenced by three recent Supreme Court decisions: two identifying the primary role of the jury, and not the judge, in making findings of fact,⁴⁸ and one identifying the right of defendants to confront witnesses under the Sixth Amendment.⁴⁹ Relying heavily on history, the Court held that the jury, not the judge, should make findings of fact and that evidentiary rules introducing hearsay violated the right of confrontation. In *Jones v. United States*,⁵⁰ the Court specifically described the historical importance of trial by jury:

Identifying trial by jury as “the grand bulwark” of English liberties, Blackstone contended that other liberties would remain secure only “so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of

45. *Id.* at 887 (third alteration in original) (footnote omitted) (quoting U.S. CONST. amend. XV, § 1, and Federal Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336 (current version at 18 U.S.C. § 243 (2000))).

46. *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

47. *Cf. Arnold*, *supra* note 29, at 33 (noting that changing times justify the progression away from some characteristics of the juries of 1791—such as that jurors be white men owning real property—but may not justify decreasing from twelve to six jurors).

48. *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 478–79 (2000).

49. *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

50. 526 U.S. 227 (1999).

the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”⁵¹

IV. THE FLORIDA JURY

Article 1, § 22 of the Florida Constitution provides: “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.”⁵² Florida Rule of Criminal Procedure 3.270 and § 913.10 of the Florida Statutes require twelve-person juries “to try all capital cases” and six-person juries “to try all other criminal cases.”⁵³ In Florida, the right to a six-person jury is a fundamental, state constitutional right, and a twelve-person jury in capital cases is merely a matter of statutory law.

Because the Sixth Amendment was not incorporated by the Fourteenth Amendment to apply to the states until 1968,⁵⁴ Florida’s history of the jury trial guarantee under the state constitution is discussed separately. The Florida Constitution of 1875 adopted the principle that “[g]rand and petit jurors shall be taken from the registered voters of the respective counties. The number of jurors for the *trial of causes* in any court may be fixed by law.”⁵⁵ In 1877, the legislature passed a law stating that “twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other offences prosecuted by indictment, presentment, or information.”⁵⁶ In 1877, the Florida Supreme Court upheld the constitutionality of the legislation regulating juries, reasoning as follows: “An examination of the legislation shows that the number of jurors has been regulated by law, and that six persons are made sufficient in many of the States under similar constitutional provisions or under statutes, and these regulations have been sustained by the courts.”⁵⁷

51. *Id.* at 246 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *350).

52. FLA. CONST. art. I, § 22.

53. FLA. R. CRIM. P. 3.270; FLA. STAT. § 913.10 (2007).

54. *See Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968).

55. *Gibson v. State*, 16 Fla. 291, 300 (1877) (quoting FLA. CONST. of 1868, art. VI, § 12 (1875)). Legislative history and records for acts and bills passed before 1969 are not available. Legislative Research at the Florida State Archives, <http://dliis.dos.state.fl.us/barm/fsa/legislativeresearch.htm> (last visited Feb. 7, 2008).

56. *Gibson*, 16 Fla. at 297–98 (quoting Law of Feb. 17, 1877, ch. 3010, § 6, at 54 (repealed 1892)).

57. *Id.* at 300. In *Gibson*, the court did not cite the state law, constitutional provisions, or cases to support its reasoning. Although there is some doubt that many states reduced the number

In 1885, § 38 of Article 5 of the Florida Constitution was amended: “The number of jurors for the trial of causes in any court may be fixed by law but shall not be less than six in any case.”⁵⁸ No early opinions interpreted the twelve-person jury requirement in capital cases. In *Adams v. State*,⁵⁹ however, the Florida Supreme Court confronted a constitutional challenge to a jury of less than twelve in a non-capital murder case.⁶⁰ Adams was originally charged with capital murder. In his first trial, he was acquitted of first-degree murder and convicted of second-degree murder.⁶¹ His conviction was reversed, and he was retried and convicted of second-degree murder by a jury of six. Adams argued that his conviction was unconstitutional because he was granted only a six-person as opposed to a twelve-person jury.⁶² The Florida Supreme Court defined a “capital case” as “a case in which a person is tried for a capital crime.”⁶³ According to the court, “A capital crime is one for which the punishment of death is inflicted.”⁶⁴ Because Adams was convicted of murder in the second degree, which is punishable by imprisonment for life, the court held that he was not convicted of a capital crime and that he was not entitled to a jury of twelve.⁶⁵ Neither the *Adams* court nor any other precedent or legislative history explains why Florida retains twelve-person juries in capital cases.

After the *Williams* decision but before *Ballew*, the Florida Supreme Court adopted a revision to Rule 3.270 reaffirming § 913.10 of the 1968 Florida Statutes, which permitted six-person juries to try criminal cases.⁶⁶ Florida courts have consistently held that the right to six-person juries is

of jurors in criminal cases, there is little documented history, during the 200 years following the adoption of the Bill of Rights, on the criminal jury trial. See Alschuler & Deiss, *supra* note 30, at 867–68. There is, however, some historical evidence that the courts, particularly in the South, “def[ie]d the rule of law, particularly federal constitutional law.” Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 817 (1998). In their defiance, state courts may have reduced the number of jurors in contravention of common law and the Sixth Amendment.

58. *English v. State*, 12 So. 689, 690 (Fla. 1893) (quoting FLA. CONST. of 1885, art. V, § 38).

59. 48 So. 219 (Fla. 1908).

60. *Id.* at 224.

61. *Id.* at 220.

62. *Id.* at 224.

63. *Id.*

64. *Id.*

65. *Id.*

66. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972). Prior to the 1970 amendment to § 913.10, the statute read: “Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases.” FLA. STAT. § 913.10 (1970).

“fundamental in nature.”⁶⁷ In *Jordan v. State*,⁶⁸ for example, Jordan’s conviction was reversed because his jury was selected in an unconstitutionally discriminatory manner: “[T]he Sixth Amendment to the U.S. Constitution guarantees the accused a trial by an impartial jury. This comprehends that in the selection process there will be ‘a fair possibility for obtaining a representative cross-section of the community.’”⁶⁹

The right to a jury trial is undoubtedly, under Florida law, an “indispensable component of our system of justice.”⁷⁰ Following the U.S. Supreme Court’s decision in *Furman v. Georgia*,⁷¹ which for a time invalidated capital punishment, several Florida Supreme Court cases confronted the number-of-jurors issue in pending capital cases. In *Donaldson v. Sack*,⁷² the Florida Supreme Court decided whether individuals charged with capital crimes were still entitled to twelve-person juries.⁷³ The *Donaldson* court held that portions of the rule and statute concerning capital offenses that required twelve-person juries in capital cases were no longer applicable.⁷⁴ Capital cases were to be tried with six-person juries under the Florida Constitution.⁷⁵

More recently, however, the Florida Supreme Court held that unless the defendant agreed to a six-person jury, a twelve-person jury was required in first-degree murder cases when the maximum penalty was life imprisonment.⁷⁶ Contrarily, in *Hall v. State*,⁷⁷ the First District Court of Appeal held that it was not error to deny a twelve-person jury to Hall when death was not a possible punishment. In *Hall*, the First District certified as a matter of great public importance the following question: “Whether a 12-person jury is required in a first degree murder case where the death penalty may not be imposed as a matter of law.”⁷⁸ The Florida Supreme Court denied review, leaving this question unanswered.⁷⁹

67. See, e.g., *Smith v. State*, 857 So. 2d 268, 270 (Fla. 5th DCA 2003).

68. 293 So. 2d 131 (Fla. 2d DCA 1974).

69. *Id.* at 134 (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

70. *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997).

71. 408 U.S. 238 (1972).

72. 265 So. 2d 499 (Fla. 1972).

73. *Id.* at 503.

74. *Id.*

75. *Id.*

76. See *State v. Griffith*, 561 So. 2d 528, 529 (Fla. 1990).

77. 853 So. 2d 546 (Fla. 1st DCA 2003).

78. *Id.* at 549.

79. See *Hall v. State*, 865 So. 2d 480 (Fla. 2003). Likewise, denial of post-conviction relief was affirmed by *Hall v. State*, 915 So. 2d 1199 (Fla. 1st DCA 2005), and habeas corpus denied by *Hall v. McDonough*, No. 5:06cv30/RS, 2006 WL 2425519, at *1 (N.D. Fla. Aug. 21, 2006).

In Florida, sexual battery of a person under age twelve by a person over eighteen is a capital offense.⁸⁰ These capital sexual battery cases are tried by six-person rather than twelve-person juries because death is not a possible penalty.⁸¹ In two recent cases, however, Justice Pariente and Judge Altenbernd of the Second District Court of Appeal raised questions about requiring twelve-person juries in cases where life in prison without the possibility of parole is a possible sentence.⁸² In *Palazzolo v. State*,⁸³ Judge Altenbernd identified evidentiary proof concerns that may justify twelve-person juries in non-death cases:

This case [involving capital sexual battery punishable by life in prison without the possibility of parole] demonstrates that the evidence in a capital sexual battery trial can often be much more tenuous than the evidence in a capital homicide trial. In almost all first-degree murder trials, there is little question that a murder occurred. In capital sexual battery cases, the proof that any crime occurred often depends exclusively upon the testimony of a child of tender years. There may be merit to a rule of procedure requiring a jury of twelve in these cases or to a procedural rule allowing the jury to receive an instruction on the penalty comparable to the instruction that the legislature attempted to mandate in section 918.10(1) [of the Florida Statutes]. These are issues, however, for resolution in the supreme court in its prospective rule-making capacity.⁸⁴

In *Adaway v. State*,⁸⁵ Justice Pariente expressed similar concerns with the fairness of six-person juries in serious felony cases:

[I]f capital sexual battery remains a capital felony, I urge this Court to consider amending Florida Rule of Criminal Procedure 3.270 to require a jury of twelve in these cases. As noted in *Palazzolo v. State*, the evidence in a capital sexual battery trial can be much more tenuous than in a murder trial, and often rests largely on the victim's testimony and hearsay statements. Unless the defense agrees to a jury of six, a twelve-person jury is required in first-degree murder cases in

80. FLA. STAT. § 794.011(2)(a) (2007).

81. *Hogan v. State*, 451 So. 2d 844, 845–46 (Fla. 1984); *Hall*, 853 So. 2d at 549; *Cooper v. State*, 453 So. 2d 67, 67–68 (Fla. 1st DCA 1984).

82. *Adaway v. State*, 902 So. 2d 746, 753, 755 (Fla. 2005) (Pariente, J., concurring); *Palazzolo v. State*, 754 So. 2d 731, 736 (Fla. 2d DCA 2000).

83. 754 So. 2d 731 (Fla. 2d DCA 2000).

84. *Id.* at 737 (citation omitted).

85. 902 So. 2d 746 (Fla. 2005).

which the maximum penalty is life imprisonment because the State is not seeking the death penalty.⁸⁶

Thus, twelve-person juries are viewed as justified by the seriousness of the penalty and the potential tenuousness of the evidence. In light of these justifications, most, if not all, felony prosecutions would seem to warrant twelve-person juries as well. Of additional concern, Florida's legislature has adopted numerous enhancement statutes (e.g., prison releasee reoffender, habitual felony offender, and violent career criminal) that significantly increase criminal penalties for felony convictions.⁸⁷ For many offenses, these enhancement statutes allow, and in some instances require (e.g., prison releasee reoffender), very long sentences, including life in prison without parole. In addition to capital sexual battery cases, many felony prosecutions rely exclusively on victim testimony (e.g., rape and robbery cases) where the evidence may be more tenuous than in a prosecution of capital murder.

These most recent discussions by the Florida courts have raised concerns about the fairness of six-person juries in serious felony prosecutions. Conspicuously absent, however, is any discussion by the courts about empirical evidence that compares six-person with twelve-person juries. This comparison, known as the functional-equivalence test, was adopted by the *Williams* Court to provide a test for the constitutionality of juries smaller than twelve. The next Part of this Essay discusses the Court's development of this test.

V. THE FUNCTIONAL-EQUIVALENCE TEST

After dismissing history, tradition, and precedent as bases for assessing the constitutional adequacy of juries with fewer than twelve members, the U.S. Supreme Court in *Williams* turned to functional equivalence to measure constitutionality: "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."⁸⁸ The Court considered a number of jury functions and fashioned a test to determine whether smaller juries performed these functions as well as the traditional twelve-person juries. If they did not, the smaller juries lacked what the U.S. Constitution required:

"Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and

86. *Id.* at 755 (Pariente, J., concurring) (citation omitted).

87. See FLA. STAT. § 921.0016(3) (2007).

88. *Williams v. Florida*, 399 U.S. 78, 99–100 (1970).

shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. *To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.*⁸⁹

According to the Court's Sixth Amendment assessment, twelve- and six-person juries were functionally equivalent, and the twelve-person requirement could not "be regarded as an indispensable component of the Sixth Amendment."⁹⁰

The *Williams* Court found that to satisfy the purpose of trial by jury, a smaller jury must accomplish the following goals as well as a twelve-person jury: foster effective group deliberations; produce accurate fact-finding; reduce the risk of convicting an innocent defendant; provide consistency and reliability in the criminal justice system; provide an adequate hearing of minority viewpoints; and represent a cross-section of the community. The Court concluded that in all of these ways the six-person jury was the functional equivalent of the twelve-person jury.⁹¹

What was the *Williams* Court's basis for this conclusion? One would think that eliminating what until then had been regarded as a constitutional right—a jury of twelve—and substituting a jury of six would require proof that functional equivalence actually existed. Instead, the Court relied upon, as one eminent empirical legal scholar put it, "scant evidence by any standards."⁹² The Court relied on (1) what it claimed were empirical studies (specifically: "experiments")⁹³ but which were not empirical studies at all; (2) actual studies, the findings of which the Court read exactly backwards; and (3) its own speculation.

To support its assertion that the outcomes of trials would not differ as a function of the size of the jury, the Court cited six "experiments" and asserted: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries."⁹⁴ Not one of these

89. *Id.* at 100 (emphasis added) (citation omitted) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

90. *Id.*

91. *Id.* at 101–02.

92. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715 (1971).

93. *Williams*, 399 U.S. at 101.

94. *Id.* at 101 & n.48.

“experiments” provided any evidence on the question at hand. The Phillips article was irrelevant because it addressed only the possible financial savings associated with reducing jury size⁹⁵ but not any of the criteria upon which the Court had determined constitutionality depended. Wiehl merely cited⁹⁶ Joiner who, on the basis of nothing but his own speculation, had stated that “it could easily be argued that a six-man jury would deliberate equally as well as one of twelve.”⁹⁷ The Bulletin of the Section of Judicial Administration of the American Bar Association simply reported that a test of six-person juries in Monmouth County, New Jersey, was being planned.⁹⁸ Judge Tamm reported that he had presided over many condemnation trials using five-man juries and (without providing any data or any analysis) said that he had perceived no differences.⁹⁹ Cronin reported on the use of six-person juries in forty-three civil cases in the state district court in Worcester, Massachusetts (where, incidentally, unhappy litigants had the right to a second trial, *de novo*, in front of twelve jurors in the Superior Court).¹⁰⁰ Cronin spoke to a court clerk and three attorneys involved in trials in the district court, and these four persons said that the smaller juries seemed to behave the same as larger juries.¹⁰¹ Beyond these bare assertions there were no data and no analysis. Finally, the Court relied upon an article in the Journal of the American Judicature Society that summarized the previous experience—namely, the impressions of three lawyers and a clerk.¹⁰²

On the question whether jurors in the minority were less able to resist conformity pressure from the majority in six-person juries than in twelve-person juries, the Court cited several empirical studies. Relying on these studies, the Court concluded that the critical factor was the ratio of majority to minority members, which would not change merely by cutting the jury size in half: “Studies of the operative factors contributing to small group deliberation and decisionmaking suggest that jurors in the minority on the first ballot are likely to be influenced by the proportional size of the

95. See Hon. Richard H. Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354, 356–58 (1956).

96. Hon. Lloyd L. Wiehl, *The Six Man Jury*, 4 GONZ. L. REV. 35, 38–39 (1968).

97. CHARLES W. JOINER, *CIVIL JUSTICE AND THE JURY* 83 (1962) (concluding that the deliberative process should be the same in either the six- or twelve-person jury).

98. *New Jersey Experiments with Six-Man Jury*, BULL. SEC. JUD. ADMIN. A.B.A., May 1966, at 9, 9.

99. Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 136–38 (1962).

100. Phillip M. Cronin, *Six-Member Juries in District Courts*, BOSTON B.J., Apr. 1958, at 27, 27–29.

101. *Id.* at 27–28.

102. *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUDICATURE SOC’Y 136, 136 (1958).

majority aligned against them.”¹⁰³ Thus, a minority faction in a jury divided 10–2 would be no better able to withstand majority influence than the minority faction in a jury divided 5–1. The critical factor, said the Court, was the proportion, not the absolute number, of jurors in the factions. But the empirical studies found exactly the opposite. To quote from those sources on the very pages to which the Court cited:

- [F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally.¹⁰⁴
- The results clearly demonstrate that a disturbance of the unanimity of the majority markedly increased the independence of the critical subjects. . . . Indeed, we have been able to show that a unanimous majority of 3 is, under the given conditions, far more effective than a majority of 8 containing 1 dissenter.¹⁰⁵
- Participants in a discussion are often influenced to change their opinion simply by the knowledge that an overwhelming majority disagrees with them. Consistent disapproval by the majority can shake a small minority’s faith even in judgments it believes to be right. Such pressures are most effective against a single dissenter and fall off rapidly in efficacy as the size of the dissenting coalition increases. A single ally gives most dissenters the courage to voice their true convictions.¹⁰⁶

On the question whether smaller juries would less adequately represent a cross-section of the community, the Court offered nothing more than its

103. *Williams v. Florida*, 399 U.S. 78, 101 n.49 (1970).

104. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 463 (1966).

105. S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in *READINGS IN SOCIAL PSYCHOLOGY* 2, 8 (Guy E. Swanson, Theodore M. Newcomb & Eugene L. Hartley et al. eds., rev. ed. 1952).

106. Note, *On Instructing Deadlocked Juries*, 78 *YALE L.J.* 100, 110 (1968) (footnotes omitted).

own speculation:

[W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, 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. . . . [T]he concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.¹⁰⁷

The Court would have needed to go no further than an undergraduate statistics textbook to learn something about principles of statistical sampling that could have displaced the Justices' collective intuition. The Court might then have better considered the impact of any given sample size when drawing samples from populations of any given stratification (such as the proportion of a racial minority, of libertarians, or of certain age or education groups). For example, adopting the Court's random-sampling model, we can learn that one or more members of a minority that constituted 10% of the population would be expected to appear in 72% of twelve-member juries but in only 47% of six-member juries. As Hans Zeisel commented on such an effect: "It is clear, then, that however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, and not by a 'negligible' margin."¹⁰⁸

The *Williams* Court's remarkably inadequate and erroneous analysis has been the subject of comment by scholars in a multitude of fields—statistics, psychology, sociology, and political science, as well as law.¹⁰⁹ Moreover, the lead opinion in *Ballew v. Georgia*¹¹⁰ acknowledged the failing of the *Williams* Court's analysis.

In *Colgrove v. Battin*,¹¹¹ the Supreme Court revisited the question of jury size effects and constitutionality in the context of federal civil trials. *Colgrove* cited four empirical studies,¹¹² three of which were conducted by researchers who realized that no research actually existed to support the *Williams* Court's conclusions. The fourth reported the findings of a study that the *Williams* Court had cited to support its conclusion even though

107. *Williams*, 399 U.S. at 102.

108. Zeisel, *supra* note 92, at 716.

109. See, e.g., Michael Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov.–Dec. 1974, at 18, reprinted in JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 254 (5th ed. 2002).

110. 435 U.S. 223, 231–32 (1978); see also *infra* notes 121–31 and accompanying text.

111. 413 U.S. 149 (1973).

112. *Id.* at 160.

that study did not yet actually exist.¹¹³ In citing these new studies, the Court implicitly conceded the weakness of its *Williams* opinion. The new studies on which the *Colgrove* Court relied suffer from serious methodological weaknesses, which have been thoroughly explicated in the literature.¹¹⁴ The *Colgrove* Court nevertheless relied on the studies to affirm its earlier factual conclusions.¹¹⁵

Ballew once again revisited the question of jury size, this time in the context of a state testing how small the U.S. Constitution would allow juries to shrink. In his opinion announcing the Court's unanimous holding that juries smaller than six were not constitutional, Justice Blackmun thoroughly canvassed the research literature as of that date.¹¹⁶

In *Williams*, the Court determined that "the reliability of the jury as a factfinder hardly seems likely to be a function of its size."¹¹⁷ But in *Ballew*, the Court implicitly conceded that size does matter. The *Ballew* Court unanimously held that a reduction from six to five jurors was constitutionally unacceptable and that with such juries "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree."¹¹⁸ One has to wonder how it could be that eliminating six jurors (from twelve members to six) makes no difference while eliminating one more (from six to five) triggers unanimous concern.

In analyzing whether five jurors were constitutionally sufficient, Justice Blackmun's lead opinion in *Ballew* partially summarized *Williams*'s holding that the Sixth Amendment "mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community."¹¹⁹ The Court used the twelve-person jury as a benchmark of those functions: if smaller-sized juries performed equally well then they were functionally equivalent to twelve-person juries and therefore were constitutional. If the Justices—who unanimously held in *Ballew* that juries smaller than six were deficient—were being true to the Court's *Williams*

113. *Id.* The *Williams* Court cited a mere announcement that the study was in the planning stages.

114. See, e.g., MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 37–49 (1977); Shari Seidman Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J.L. REFORM 520 (1974); Hans Zeisel & Shari Seidman Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281, 283–90 (1974).

115. *Colgrove*, 413 U.S. at 160 n.15. All four of these studies are included in the meta-analysis relied upon in Part VI below, where they are weighted to appropriately reflect their relative methodological weaknesses.

116. 435 U.S. 223, 243–45 (1978).

117. *Williams v. Florida*, 399 U.S. 78, 100–01 (1970).

118. *Ballew*, 435 U.S. at 239.

119. *Id.* at 230.

analysis, they would have asked themselves whether five-person juries failed to perform as well as twelve-person juries. They had no studies addressing *that* question. What they had, and what Justice Blackmun's opinion reviewed, were numerous studies of the differences in the performance of six-person juries compared to twelve-person juries.¹²⁰ The deficiencies in smaller juries revealed by those studies spoke almost exclusively to the validity of six-person, not five-person, juries.

Justice Blackmun's review of the research came to conclusions quite at odds with the conclusions in *Williams*. His opinion acknowledged, among other matters, that as juries grew smaller, important aspects of the quality of deliberation declined,¹²¹ accuracy of results suffered,¹²² and cross-sectional representation of the community was adversely affected.¹²³ Justice Blackmun's opinion found that the available data showed the following:

[T]he purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental

120. *Id.* at 231 n.10. The Court listed the numerous studies and other articles that were published between 1970 and 1978 on the subject of the effects of different jury sizes. Virtually all of the studies focused on the contrast between six- and twelve-person groups. The opinion also explained the deficiencies of the studies relied upon by the Court in *Williams* and *Colgrove*. *See id.* at 237–39.

121. “[R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberations. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts.” *Id.* at 232.

122. “[T]he 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.” *Id.* at 234. “[T]he 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.” *Id.* at 236.

123. The Court found that reduced jury size also reduces the presence of minority representation on jury panels:

Although the Court in *Williams* concluded that the six-person jury did not fail to represent adequately a cross-section of the community, the opportunity for meaningful and appropriate representation does decrease with the size of the panels. Thus, if a minority group constitutes 10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members, and 89% not to have two.

Id. at 237.

importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.¹²⁴

Resolving the tension in Justice Blackmun's conclusion is impossible:

While we adhere to, and reaffirm our holding in *Williams v. Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.¹²⁵

“[T]he assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six.”¹²⁶ Justice Blackmun was aware of the tensions in his opinion. The bench memo from his clerk is revealing:

Although it is not conclusive, empirical evidence now supports 3 propositions contrary to the assumptions of *Williams*: a) a jury's performance may be determined in part by its size, b) group deliberation . . . is improved by addition of members, c) the possibility of obtaining a fair cross-section increases as the size of the jury increases.¹²⁷

“[T]he assumptions of *Williams* are probably erroneous . . .”¹²⁸ The memo clearly framed the dilemma: “If the *Williams* assumptions are not re-examined, then 5 is as constitutional as 6. If the assumptions of *Williams* are incorrect, the requirements may need to be modified to be constitutional.”¹²⁹ Justice Blackmun was not only unwilling to resolve the dilemma by overturning an existing precedent (“*Williams* is on the books,” he declared in an internal memo¹³⁰), but he was also unwilling to allow the

124. *Id.* at 239.

125. *Id.*

126. *Id.*

127. Bench Memorandum to Justice Blackmun, Re: *Ballew v. Georgia* (Aug. 22, 1977), at 3, in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918–1999, Box 260, No. 76-761 (Library of Congress).

128. *Id.* at 15.

129. *Id.* at 12. We read this as a gentle way of saying that *Williams* would have to be altered or simply overturned.

130. Notes of Justice Blackmun (Aug. 29, 1977), in THE HARRY A. BLACKMUN PAPERS, *supra*

dissolution of the jury to continue (“I ask [myself] the question of what I will do when we are next confronted with a 4-man jury, then a 3-, then a 2-, then a 1-”¹³¹). His published opinion was his best effort to get the Court off the slippery slope without overturning *Williams*.

If Justice Blackmun’s contradictory opinion is an unsatisfying solution, a worse solution was offered by the seven of his colleagues who agreed with the holding but did not join in his opinion. These seven could find no way to stop the slide other than to nakedly assert their judicial will, expressed most candidly by Justice Powell, who declared peremptorily that “a line has to be drawn somewhere.”¹³² They abandoned the reasoning of *Williams* and substituted their own arbitrary pronouncement. If for over 700 years their forebears lacked any basis but an intuitive sense that twelve was the right number of jurors, the Supreme Court succeeded in adhering to its *Williams* principles for only eight years before the Justices themselves abandoned those principles in favor of their own intuitive sense that the proper number was at least six, even though they found themselves incapable of coherently explaining why.

If the Court’s approach in *Williams* was correct, and if Justice Blackmun’s opinion in *Ballew* set forth the best knowledge available at the time, it is worth asking where the facts and the analysis lead. The most straightforward answer is that, even on its own terms, *Williams* was wrongly decided. A number of state courts have recognized this as the implication of the *Ballew* opinion. In *State v. Hamm*,¹³³ the Minnesota Supreme Court noted that the *Ballew* Court “made an excellent argument that could be used to support a 12-person jury.”¹³⁴ The New Hampshire Supreme Court, based explicitly on the *Ballew* opinion, reasoned:

Although Justice Blackmun’s majority opinion in *Ballew* expressed these concerns in the context of a decision regarding a further reduction of criminal trial juries from six to five, we note that these problems may also arise in the

note 127. Justice Blackmun was loathe to overturn precedent, and no serious discussion of overturning *Williams* took place, though that option was raised by his clerk. See *supra* text accompanying note 129.

131. Notes of Justice Blackmun, *supra* note 130.

132. *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring). He was joined by Chief Justice Burger and Justice Rehnquist. Justice Brennan, joined by Justices Stewart and Marshall, concurred in the judgment but not the reasoning of the opinion, though he offered no reasons. *Id.* (Brennan, J., concurring). Justice White wrote separately, concurring in the judgment, on the unexplained basis that a reduction to five would undermine the cross-section requirement (thereby contradicting his earlier opinion in *Williams*). *Id.* at 245 (White, J., concurring).

133. 423 N.W.2d 379 (Minn. 1988) (holding on state constitutional grounds that the right to trial by jury implicitly required a twelve-person jury).

134. *Id.* at 382 n.2.

context of reducing the size of juries in civil cases from twelve to six.¹³⁵

The court advised the New Hampshire Legislature that juries smaller than twelve were not functionally equivalent and would therefore not satisfy the requirements of New Hampshire's constitution.¹³⁶ Not long after *Ballew*, in promulgating a Model Medical Malpractice Act for the states, the U.S. Department of Health and Human Services recommended twelve-person juries, particularly for their virtue of greater stability and predictability compared to groups of six persons.¹³⁷

Since the *Ballew* decision, further empirical studies have been conducted that examine differences in decisionmaking and functioning of six- and twelve-person juries. The whole body of research leads to the conclusion that six- and twelve-person juries are not functionally equivalent and thus six-person juries impair the constitutional purpose and function of the jury.

VI. THE EMPIRICAL RESEARCH

This Part summarizes the errors and evidence in relation to each of the constitutional jury size criteria defined by the Court. The task of reviewing the research literature is made easier by the meta-analysis of Saks and Marti,¹³⁸ which statistically combined and analyzed empirical studies comparing the performance of six- versus twelve-person juries.¹³⁹ In all, those 17 studies involved 2,061 juries consisting of about 15,000

135. Opinion of the Justices, 431 A.2d 135, 136 (N.H. 1981).

136. *Id.* at 136–37. Several states, including Minnesota, *Hamm*, 423 N.W.2d at 386, and Wisconsin, *State v. Hansford*, 580 N.W.2d 171, 180 (Wis. 1998), have held that their state constitutions require a twelve-person jury in criminal cases, particularly felonies. In Vermont, a supreme court committee rejected a reduction in size and maintained its legislatively required twelve-person juries in all criminal cases. Vt. Supreme Court, Report of the Jury Policy Committee, <http://www.vermontjudiciary.org/Committees/Reports/jurypolicyrpt.htm> (last visited Feb. 7, 2008).

137. See Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 15 n.43 (1997).

138. See generally Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451 (1997) (reviewing empirical studies to consider the effects of reducing jury size from twelve to six). A meta-analysis is a method of statistically combining studies to determine the essential finding of the body of research, the strength of that effect, and the other variables that interact with and moderate the basic effect. See generally MORTON HUNT, *HOW SCIENCE TAKES STOCK: THE STORY OF META-ANALYSIS* (1997) (examining the history, use, and controversies of meta-analysis); ROBERT ROSENTHAL, *META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH* (rev. ed. 1991) (evaluating general meta-analysis procedures and results).

139. See Saks & Marti, *supra* note 138, at 452.

individual jurors.¹⁴⁰ Nine studies analyzed actual juries and eight studies analyzed experimental mock juries.¹⁴¹

A. Community Representation

On the issue of the ability of different-sized juries to provide a fair cross-sectional representation of the community, the *Williams* Court offered nothing but *ipse dixit*:

[W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, 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. . . . [T]he concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.¹⁴²

As we have seen, this assumption conflicts with well-established and widely recognized statistical principles of sampling.¹⁴³

Empirical studies confirmed the predictions of statistical theory. Larger juries were more likely to contain at least one minority group member, while smaller juries were more likely to have no minority representation at all. Not one study contradicted this result, which was the single strongest finding from the meta-analysis.¹⁴⁴ Minorities, no matter how they are defined, are represented in a smaller percentage of six-person as compared to twelve-person juries.

B. Quality of Group Deliberation

On the issue of whether the amount or quality of group deliberation was vitiated by reduction in the size of the jury, the Court offered neither evidence nor reasoning. Instead, the Court merely speculated: “[W]e find little reason to think that [the goals of quality deliberation] are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is

140. *Id.*

141. *Id.* at 453.

142. *Williams v. Florida*, 399 U.S. 78, 102 (1970).

143. *See supra* note 108 and accompanying text.

144. Saks & Marti, *supra* note 138, at 457. The difference between smaller and larger juries in minority group representation on juries of the different sizes was significant at $p < .0001$. That means that there is less than 1 chance in 10,000 that the two different-sized juries perform equally well in this respect.

retained.”¹⁴⁵ Nor did the Court define precisely which dimensions of deliberation are critically important, though presumably this criterion relates to the *process* of the group interaction—in contrast to the *product* of decisions, which is a separate criterion.

Studies of jury size effects have examined length of deliberation, accuracy of collective discussion of case facts during deliberation, and accuracy of individual recall measured by questionnaires after deliberation.¹⁴⁶ Perhaps unsurprisingly, all but one study has found that larger juries deliberate longer than smaller juries.¹⁴⁷ The mean time difference for studies of actual juries (in contrast to mock juries) is forty-four minutes.¹⁴⁸ Only two studies compared the accuracy of recall of evidence. These studies found that members of larger juries more accurately recall evidence both during deliberation¹⁴⁹ and in individual recall afterwards.¹⁵⁰

In a study published too late to be included in the meta-analysis, Horowitz and Bordens assigned 567 jury-eligible men and women to six- and twelve-person juries, showed the juries a videotaped civil trial, and asked the juries to deliberate to verdicts.¹⁵¹ The punitive awards of six-person juries varied more than those of twelve-person juries.¹⁵² Twelve-person juries deliberated longer, recalled more probative information, and relied less than six-person juries on evaluative statements and non-probative evidence.¹⁵³

Perhaps the most notable disadvantage of larger juries over smaller juries is that talking time is more evenly divided among members of smaller juries compared to larger juries—in larger juries, the talkative talk even more and the less talkative talk even less.¹⁵⁴ This very real

145. *Williams*, 399 U.S. at 100.

146. See generally Saks & Marti, *supra* note 138 (reviewing the studies of jury size).

147. This is significant at $p < .05$. See *id.* at 457–58.

148. *Id.* at 458.

149. $p < .0001$. *Id.* at 458–59.

150. $p < .0001$. *Id.*

151. Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. APPLIED PSYCHOL. 121, 124 (2002).

152. *Id.* at 126.

153. *Id.* at 126–27.

154. SAKS, *supra* note 114, at 11. One set of commentators has turned this finding into something of a caricature of the deliberation, arguing that in twelve-person juries, but not in six-person juries, the single voice of the foreperson dominates the group and its decision. Adam M. Chud & Michael L. Berman, *Six-Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743, 757 (2000). That is a misleading image of what takes place in juries. In decision-making groups, including juries, even the single most talkative member is out-talked by the others, coalitions of viewpoints form, and dissenters are not silenced but become the focus of discussion, are asked to

disadvantage must nevertheless be balanced against the advantages of larger juries: more total discussion, more vigorous and contentious discussion, more human resources brought to the discussion, more accurate recall of evidence, and (very likely) more stable and consistent verdicts.

C. *Ability of Jurors in the Minority to Resist Majority Pressure*

On this question, the *Williams* Court purported to rely on a number of studies to conclude that a juror or jurors holding views not shared by the majority would be no more vulnerable to majority pressure in a jury of six than in a jury of twelve.¹⁵⁵ As discussed above, the Court misread those studies as saying that the key to conformity pressure is in the ratio of the size of the majority to the minority, when those studies in fact found essentially the opposite: The absolute size of the dissenting minority—most importantly, whether a dissenter had allies—was the critical factor.¹⁵⁶

If the basic research is correct, minority factions require at least two jurors (each of whom has the other as an ally) if they are to withstand the social pressure of the majority. All else equal, the rate of hung juries would be greater in larger compared to smaller juries. The empirical findings are consistent with this expectation: of the fifteen studies that lent themselves to analysis of this question, results were in the expected direction in eleven, and the overall result of the meta-analysis was highly significant.¹⁵⁷

An additional, more recent study by Limon and Boster looked at minority views in relation to the majority in six- versus twelve-person juries.¹⁵⁸ In their examination of argument quality, minority size, and influence of the majority, they concluded—consistent with the great bulk of other research in this area—that a “minority that was large . . . was able to influence the majority. Overall, having a large minority helps make the minority subgroup more influential compared to a small minority.”¹⁵⁹ Because the chance of minority members having allies is greater on a twelve-person jury, more minority views will be represented and be able to withstand majority pressure.

explain and defend their views, thus raising their talking quotient. Moreover, most presiding jurors conduct themselves as facilitators of the deliberation, rather than as leaders of the substantive debate, so that many of their verbalizations consist of procedural suggestions.

155. *Williams v. Florida*, 399 U.S. 78, 101–02 (1970).

156. *See supra* notes 103–06 and accompanying text.

157. $p < .0018$. Saks & Marti, *supra* note 138, at 459–61.

158. *See* M. Sean Limon & Franklin J. Boster, *The Impact of Varying Argument Quality and Minority Size on Influencing the Majority and Perceptions of the Minority*, 49 COMM. Q. 350, 359–60 (2001).

159. *Id.* at 359.

D. Factfinding Reliability

In discussing the effect that reduced jury size would have on trial outcomes, the *Williams* Court concluded that jury size made no difference, citing six irrelevant sources in support.¹⁶⁰ Researchers cannot say whether the result reached by a jury is correct or incorrect. Researchers can, however, examine consistency in trial outcomes reached by smaller versus larger juries. The operational definition used by the meta-analysis, therefore, is that a group type (large versus small) is said to be more consistent when more of its verdicts are in line with the outcome preference of the grand total of all juries evaluating a given trial (which is the best estimate of the total eligible population's outcome preference). Only mock jury studies lend themselves to this kind of analysis because only these studies present the same trial to numerous different juries.

Statistical theory predicts that conclusions will be more consistent when generated by larger samples than by smaller samples. Social psychological research and theory predict that increasing group size improves group decisions up to the point where process inefficiencies begin to detract more than the added human resources contribute; the location of that tipping point depends on the kind of task the group confronts.¹⁶¹ The jury deliberation task is of a kind that would be expected to benefit from increases in size up to fairly large sizes.¹⁶² The empirical studies reviewed by the meta-analysis tend in a direction consistent with this prediction but do not reach statistical significance.¹⁶³ So we cannot, based on the studies included in the meta-analysis, say that verdicts are more consistent when rendered by larger juries.

A study by Davis and his fellow researchers published too late to be included in the meta-analysis found that six-person juries were generally more inconsistent in their verdicts: in the civil context, smaller juries will show more variability in their awards and will on average give larger awards than twelve-person juries.¹⁶⁴

160. See *supra* notes 94–102 and accompanying text.

161. See IVAN D. STEINER, *GROUP PROCESS AND PRODUCTIVITY* 67 (1972).

162. As explained in considerable detail in Steiner's work, *see id.*, increases in group size and their concomitant resource advantages are partially offset by the gradually increasing complexity of the group process required to incorporate the members' resources into the group's decision-making. At some point, the benefits brought by the next additional member are exceeded by the additional organization burden. Eventually, the benefit of size peaks and the group process costs exceed the benefit of the resources gained.

163. $p = .261$. Saks & Marti, *supra* note 138, at 461, 462 tbl.5.

164. James H. Davis et al., *Effects of Group Size and Procedural Influence on Consensual Judgments of Quantity: The Example of Damage Awards and Mock Civil Juries*, 73 J. PERSONALITY

Commentators sometimes argue for smaller juries on the grounds that they will save money and time. Because cost and efficiency are irrelevant to the constitutional analysis of the Sixth Amendment and are excluded from the Court's functional criteria in *Williams*, we discuss this issue only in the margin.¹⁶⁵

& SOC. PSYCHOL. 703, 707–08 (1997).

165. Efficiency plays no part in the analysis of jury functioning because it was not one of the jury functions identified by the Supreme Court in *Duncan* or *Williams*. The reason is perhaps obvious, though it has been articulated in numerous cases and contexts. *See, e.g.*, *Jones v. United States*, 526 U.S. 227, 246 (1999) (noting that delays or inconveniences are acceptable prices for a fair jury system). The balance of cost versus fair trial always favors the latter. Efficiency and inconvenience have no bearing on the interpretation of the Sixth Amendment:

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. . . .

. . . [T]he State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

Blakely v. Washington, 542 U.S. 296, 313–14 (2004) (citation omitted) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES, *350).

Justice Scalia succinctly observed in *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring), that efficiency was not important to the drafters of the jury trial guarantee: "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." The Arkansas Supreme Court likewise rejected the state's argument that twelve-person juries were simply not economical in misdemeanor cases: "A panel of six jurors for misdemeanor trials may seem economical and, therefore, desirable at first blush because less serious offenses are involved. However, many misdemeanors including the DWI offense at hand are serious and carry with them maximum jail terms of one year and substantial fines." *Byrd v. State*, 879 S.W.2d 435, 438 (Ark. 1994). In the balance of interests, economic desirability and efficient process must yield to defendants' rights to a fair jury trial, particularly when punishment ranges from maximum terms of five years to life in prison. *See Jones*, 526 U.S. at 231–32, 246.

Nevertheless, consider some facts relevant to the cost efficiency argument. Forty-eight states provide juries with more than six jurors in serious felony cases without an arduous burden falling on those states' citizens. In most of the United States, only 3%–5% of cases result in jury trials. In Florida, fewer than 2% of felony cases go to trial. The Bureau of Justice Statistics has compiled data on annual judicial expenditures and reported that Florida had a total combined budget for circuit and county courts of \$331 million, only a fraction of which is spent on juries. ROTTMAN & STRICKLAND, *supra* note 4, at 83 tbl.17. Trial statistics by year and county are maintained by the Florida State Courts. *See Florida Trial Statistics*, <http://trialstats.flcourts.org/TrialCourtStats.aspx> (last visited Feb. 7, 2008). Based on statistics from 2004, 193,268 felony cases were filed. Only

VII. CONCLUSION

In 1970 in *Williams v. Florida*, the U.S. Supreme Court found that the minimum jury size under the U.S. Constitution could not be determined by a plain reading of the Constitution. The intent of the Framers was indiscernable. An unbroken line of previous Supreme Court cases reading the jury requirement to mean twelve persons and more than 700 years of common-law juries were of no consequence. Instead, said the Court, the constitutionally permissible size of juries had to be determined through an empirical test of the functional equivalence of juries smaller than twelve: smaller juries that performed as well as twelve-person juries were to be regarded as constitutional.

This Essay argues that the understanding and intent of the Framers can be inferred from the long common-law history of the jury that was accepted as sound by the Framers as well as from their unanimous contemporary practice. For the Framers, a jury was synonymous with a group of twelve, and therefore the Constitution requires a jury to be composed of twelve persons.

If, however, the functional-equivalence test is the proper test, there must be a meaningful burden to convincingly establish that a smaller-sized jury is indeed the functional equivalent of a twelve-person jury. The *Williams* Court did an astonishingly poor job in its analysis of those facts—relying on non-studies, reading actual studies backwards, and concocting speculative (and easily refuted) theories to conclude that six equals twelve. A reexamination of the evidence originally invoked by *Williams* coupled with subsequent research, much of which Justice Blackmun cited in the lead opinion in *Ballew v. Georgia*, made clear that six-person juries failed to perform as well as twelve-person juries on most of the essential criteria specified by the Court.

Only eight years after *Williams*, the *Ballew* Court abandoned the functional-equivalence test. The majority of Justices in *Ballew* made no attempt to apply the test to Georgia's five-person felony juries, and two of the Justices concluded incomprehensibly that studies *showing that six-person juries were not equivalent to twelve-person juries* indicated that *five-person juries* "seriously impaired" the purpose and functioning of

3,681 cases went to jury trial. Of those 3,681 cases, 322 cases (3 were capital cases) were resolved by plea (one can assume that at some point after jury selection the cases were resolved), an additional 123 cases involved juries in capital cases, which are entitled to twelve-person juries under current law. Excluding the capital cases, there were 3,555 felony jury trials in Florida. Requiring twelve-person juries in these 1.8% of cases will not undermine judicial efficiency or create excessive costs.

juries in criminal trials “to a constitutional degree.”¹⁶⁶ In place of the functional-equivalence test, the Justices substituted their own naked intuition that a six-person jury was the minimum size of a constitutional jury. No legal authority, empirical evidence, or reasoning supported this conclusion. It was pure *ipse dixit*. In this post-*Ballew* world, *Williams* is no longer good law.

For this complex of reasons, no sound basis exists to determine the constitutionally permissible minimum jury size. *Williams*, having become a dead letter in *Ballew*, should either be ratified and the functional-equivalence test applied conscientiously or should be formally reversed—allowing courts either to develop a sound theory of the constitutionality of jury size or simply to restore the jury to the size that had been recognized for 700 years of common-law history and 183 years of U.S. constitutional history.

166. See *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).