No. 22-5546

IN THE

Supreme Court of the United States

JHON ALBERT CARRIZALES PRETELL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

More than half a century ago, this Court held that Florida's use of six-person juries satisfies the Sixth Amendment. *Williams v. Florida*, 399 U.S. 78, 86 (1970). The Court reached that result by examining the history and purpose of the right to trial by jury and concluding that, while most founding-era juries consisted of 12 jurors, the framers enshrined no such requirement in the Constitution. Relying on *Williams*, Florida and five other states continue to use fewer than 12 jurors in at least some criminal trials. In Florida, where all noncapital crimes are tried before six-member juries, roughly 4,500 criminal convictions are pending on direct appeal.

The question presented is whether the Court should overrule *Williams* and hold that the Sixth Amendment requires that states use 12-person juries in serious criminal cases.

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STATEMENT

1. In 1877, Florida began using six-person juries to try noncapital criminal defendants. *See* Act of February 17, 1877, ch. 3010, § 6, 1877 Fla. Laws 54. That same year, the Florida Supreme Court held that the use of six-person juries neither "destroy[ed] [n]or infring[ed] the right of trial by jury." *Gibson v. State*, 16 Fla. 291, 300 (1877). Ninety years later, this Court opened another avenue to challenge the validity of Florida's six-person juries, holding that states are bound by the jury-trial guarantee in the Sixth Amendment to the federal Constitution. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). But just two years after that, this Court concluded that six-person juries satisfy that guarantee. *Williams v. Florida*, 399 U.S. 78, 86 (1970). For nearly as long as states have had a Sixth Amendment duty to provide criminal jury trials, this Court's message to the people of Florida has been clear: the jury structure that they have settled on for a century and a half fulfills that duty. Unsurprisingly then, Florida has continued its longstanding practice of using six-person juries in trials of noncapital offenses. *See* Fla. Stat. § 913.10.

2. Petitioner was tried for capital sexual battery of a child under the age of 12. *See* Fla. Stat. § 794.011(2)(a). Because child rape is not punishable by death under existing precedent, the trial court empaneled a six-person jury as dictated by Florida law.[1] *See* Fla. Stat. § 913.10. Petitioner's counsel questioned

[1] Although Florida law categorizes sexual battery of a child under 12 as a capital felony, this Court has held that the Constitution prohibits capital punishment for such crimes. *See Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

the venire panel extensively and participated in jury selection, exercising cause and peremptory challenges to various prospective jurors petitioner deemed undesirable. R. 272–302, 306–11. When the jury was empaneled, petitioner stated that he was satisfied with the jury and proceeded to trial without objection. R. 316.

At trial, the jury heard overwhelming evidence of petitioner's guilt. J.P.P., the victim, testified that she is petitioner's half-sister. Tr. 41–42 When petitioner was 19 years old and she was nine or ten, J.P.P. briefly stayed at his home. Tr. 43–44, 61, 93. During that time, petitioner brought J.P.P. to his bedroom and asked her to look for something under his bed. Tr. 44–45. He then locked the door and tried to bribe J.P.P. to engage in sexual conduct. Tr. 45–46. Despite J.P.P.'s refusal, petitioner removed her clothing, forced her on top of him, and began kissing her. Tr. 46–48. J.P.P. tried to get away, but petitioner held her down. Tr. 48. He then repeatedly penetrated her genitalia with his own, causing her pain. Tr. 50–51. He also forced his genitalia into her mouth. Tr. 49–50. Petitioner ended the assault only when someone knocked on the bedroom door. Tr. 55.

Police interviewed petitioner after he waived his *Miranda* rights. Tr. 100–01. A recording of the interview played at trial revealed that petitioner's story was largely consistent with J.P.P.'s. He lured J.P.P. to his bedroom and closed the door behind her. Tr. 104. He then demanded that J.P.P. "have sex" with him, but she refused. Tr. 104. Undeterred, petitioner eventually got J.P.P. to remove her clothes and get onto his

bed where he began kissing her. Tr. 105–06. Then, petitioner "got on top of her" but found it difficult to insert his penis because she was young enough that "her vagina still wasn't there yet." Tr. 106–07. So he slowly forced it. *Id.*

Petitioner admitted to police that J.P.P. told him the penetration was painful, but that did not stop him from continuing to "have sex" with her for 14 minutes. Tr. 107, 109. Petitioner said he stopped the assault because he "was starting to get bored," felt like he was close to ejaculating, and heard his son knocking on the bedroom door. Tr. 109–10.

Presented with this evidence, the jury returned a unanimous guilty verdict in under 22 minutes. *See* R. 148.

3. Petitioner appealed his conviction to Florida's First District Court of Appeal, arguing that the Sixth Amendment entitled him to be tried by a 12-person jury because this Court undermined *Williams* in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which held that the Sixth Amendment requires unanimous verdicts in state court as in federal court, overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972). The First District affirmed in a per curiam, summary decision. While the court briefly addressed other issues petitioner raised, the court did not address the Sixth Amendment issue, noting only that petitioner had "presented no reversible error." Pet. App. 1.

REASONS FOR DENYING THE PETITION

Petitioner contends that the Court should review the First District's summary decision and use it as a vehicle to overrule *Williams v. Florida*, 399 U.S. 78

(1970), which held that the Sixth Amendment permits six-person juries in criminal cases. As the Court has done in several recent cases, *see Khorrami v. Arizona*, 143 S. Ct. 22 (2022); *Davis v. Florida*, 143 S. Ct. 380 (2022); *Phillips v. Florida*, 142 S. Ct. 721 (2021), it should decline that invitation. Petitioner makes no serious attempt to show that overruling *Williams* is warranted under traditional principles of *stare decisis*, and it is not. Not only was *Williams* correctly decided, but overruling it would also imperil thousands of criminal convictions in Florida and five other states that for more than 50 years have relied on its rule.[2] And taking that step would be a gratuitous gesture in this appeal: given the overwhelming evidence presented below, any error would be harmless.

The petition should be denied.

I. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO RECONSIDER AND OVERRULE *WILLIAMS*.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that the Sixth Amendment permits juries comprised of six members in serious criminal cases. Although petitioner urges the Court to grant review to overrule this 53-year-old case, he does not acknowledge his heavy burden to show that the Court should do so.

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[2] *See* Ariz. Rev. Stat. § 21-102; Conn. Gen. Stat. § 54-82; Fla. Stat. § 913.10; Ind. Code § 35-37-1-1; Mass. Gen. Laws Ch. 218, § 26A; Utah Code. Ann. § 78B-1-104.

This Court does not lightly overrule precedent. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). To that end, this Court considers several factors before overruling a prior decision: the quality of the prior decision's reasoning, the workability of its holding, its consistency with other cases, post-decision developments, and reliance on the decision. *Id.* at 2478–79. Those factors favor leaving *Williams* undisturbed.

1. Petitioner is wrong to dismiss the quality of *Williams*' reasoning as a "functional approach" to jury-trial issues that this Court has since categorically "discarded." Pet. 9; *see also id.* at 18–20. On the contrary, Justice White's opinion for the Court in *Williams*—thick with scholarly footnotes—extensively canvassed the history of, and purposes behind, the jury-trial right as established by "the Framers" in the Sixth Amendment. 399 U.S. at 103. The Court devoted 13 pages to the history and development of the common-law jury and the Sixth Amendment. *See id.* at 87–99; *see also Ramos*, 140 S. Ct. at 1433 (Alito, J., dissenting) (observing that *Williams* contained "a detailed discussion of the original meaning of the Sixth Amendment jury-trial right"). *Williams* examined the history surrounding the common-law 12-person requirement. *See* 399 U.S. at 87–89, 87 nn.19–20, 88 n.23. It addressed the Court's previous cases discussing jury size. *See id.* at 90–92, 90 n.26, 91 nn.27–28, 92 nn.29–31. It discussed the history of Article III's

jury-trial provision and the accompanying ratification debates. *See id.* at 93–94, 93 nn.34–35. It analyzed the drafting history of the Sixth Amendment, including disputes over what language to use. *See id.* at 94–97, 94 n.37, 95 n.39. And it considered contemporaneous constitutional provisions and statutes regarding juries. *See id.* at 97 & nn.43–44. The upshot was that, as a matter of original meaning, the word "jury" in the Sixth Amendment did not codify any common-law practice of empaneling 12 jurors. *See id.* at 99–100.

Petitioner makes no attempt to identify error in that analysis. As *Williams* observed, while the "jury at common law came to be fixed generally at 12, that particular feature of the common law jury appears to have been a historical accident," 399 U.S. at 89 (footnote omitted), and was not uniform even at common law, as the Pennsylvania colony "employed juries of six or seven," *id.* at 98 n.45 ((citing Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* 1 Select Essays in Anglo-American Legal History 367, 398 (1907)).

But even assuming uniformity in common-law practice, the Court explained that not every such practice was "immutably codified into our Constitution." *Williams*, 399 U.S. at 90; *see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2255 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so."). For example, at English common law, a jury consisted of 12 male freeholders (i.e., landowners) from the vicinage (i.e., county) of the alleged crime. 4 William Blackstone,

Commentaries on the Laws of England 343–44 (1769); *see also* Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. & Am. L. Reg. 197, 198–99 (1909) (quoting the Continental Congress's explanation of the prevailing practice of using "12 . . . countrymen and peers of [the accused's] vicinage"); William S. Brackett, *The Freehold Qualification of Jurors*, 29 Am. L. Reg. 436, 444–46 (1881) (detailing the colonies' widespread practice of following the common-law requirement that juries consist only of "freeholders"). Yet petitioner does not contend that the Sixth Amendment at any point in history mandated that a jury consist only of male landowners hailing from a particular county.

As *Williams* correctly observed, any such contention would be inconsistent with Sixth Amendment's drafting history. The Framers, the Court explained, resoundingly rejected James Madison's proposal to constitutionalize in the Sixth Amendment all the "accustomed requisites" of the common-law jury. *Williams*, 399 U.S. at 94 (quoting 1 Annals of Cong. 452 (1789) (Joseph Gales ed., 1834)). Instead, the Sixth Amendment that the Framers proposed and the people ratified required only that juries be impartial and drawn from the state and district in which the crime was committed, which departed from the common-law practice by allowing Congress to establish the relevant vicinage through its creation of judicial districts. And though one might conclude that the Framers rejected the common-law requisites of jury composition because they were implicit in the word "jury," *Williams*, 399 U.S. at 96–97 (noting the possibility); *see also Khorrami*, 143 S. Ct. at 25 (Gorsuch, J., dissenting from denial of certiorari), Madison certainly did

not think that was the case. He lamented that in removing the common-law requirements, the Framers "str[uck] . . . at the most salutary articles." *Williams*, 399 U.S. at 95 n.39 (quoting Letter from James Madison to Edmund Pendleton, Sept. 14, 1789, *in* 1 Letters and Other Writings of James Madison 491 (1865)). And Senator Richard Henry Lee "grieved" that they had left the "Jury trial in criminal cases much loosened." Letter from Richard Henry Lee to Patrick Henry, Sept. 14, 1789, https://tinyurl.com/muu5xzfa. That would seem a dramatic reaction to the mere trimming of surplusage.

2. Petitioner errs in contending (at 18) that this Court's recent decision in *Ramos* requires overruling *Williams*. *Ramos* held that the Sixth Amendment constitutionalized the common-law requirement that a jury be unanimous, thus overruling this Court's fractured decision to the contrary in *Apodaca v. Oregon*, 406 U.S. 404 (1972). In doing so, *Ramos* discounted the relevance of the Amendment's drafting history, stating that "rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified." 140 S. Ct. at 1400. The Court instead relied on the fact that the unanimity of a jury verdict was "a vital right protected by the common law," *id.* at 1395, to conclude that the Sixth Amendment protected the same.

But it does not follow that the Sixth Amendment codified *all* aspects of the jury trial that obtained at common law—in particular the common-law rules for jury composition such as the number of jurors, vicinage, and juror landownership. James Wilson—a

framer of the Constitution and one of the first Justices on this Court—for instance observed: "When I speak of juries, I feel no peculiar predilection for the number twelve." 2 James Wilson, *Works of the Honourable James Wilson* 305 (1804) (quoted in *Colgrove v. Battin*, 413 U.S. 149, 156 n.10 (1973)). Rather, Wilson wrote, a jury "mean[s] a convenient number of citizens, selected and impartial, who . . . are vested with discretionary powers to try the truth of facts." *Id.* at 306. Six impartial jurors acting by unanimous consent satisfy that definition. And the Court in *Williams* itself noted that its holding that a jury of six is constitutional was distinct from the requirement of unanimity, which, it observed, "unlike [jury size], may well serve an important role in the jury function"—namely, "as a device for insuring that the Government bear the heavier burden of proof." 399 U.S. at 100 n.46.

Still less does it follow that the Court should discard *Williams* as *Ramos* discarded *Apodaca*. Unlike *Williams*, which commanded a solid majority of this Court, *Apodaca* was a uniquely fractured decision that several Justices concluded was not entitled to respect under the doctrine of *stare decisis* at all. *See Ramos*, 140 S. Ct. at 1398–99 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.); *id.* at 1409 (Sotomayor, J., concurring in part) (calling *Apodaca* a "universe of one"); *id.* at 1402 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.) (concluding that *Apodaca* supplied no governing precedent). Unlike *Apodoca*'s holding that the Sixth Amendment does not require unanimous juries in state prosecutions, which subsequent cases referred to as an "exception" and struggled to explain what it "mean[t]," *Ramos*, 140 S. Ct. at 1399, *Williams* has

consistently been "adhere[d] to" and "reaffirm[ed]." *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (opinion of Blackmun, J., joined by Stevens, J.); *see also Ludwig v. Massachusetts*, 427 U.S. 618, 625–26 (1976); *Collins v. Youngblood*, 497 U.S. 37, 52 n.4 (1990); *United States v. Gaudin*, 515 U.S. 506, 510 n.2 (1995). And in *Colgrove*, this Court followed *Williams* in holding that six-person juries satisfy the Seventh Amendment's guarantee of a jury trial in civil cases. 413 U.S. at 158–60. That does not reflect a decision that has "become lonelier with time." *Ramos*, 140 S. Ct. at 1408.

3. Nor is reconsidering *Williams* warranted on the ground that the Court followed its detailed historical analysis with an assessment of the purpose of the jury trial and the functioning of a six-person jury. *See* 399 U.S. at 100–02. In *Williams*, this Court construed the purpose of the jury right to be "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," and reasoned that the difference between a jury of six and 12 is not likely to make a difference in that regard "particularly if the requirement of unanimity is retained." *Id.* at 100. The Court also found that the available data "indicate that there is no discernible difference between the results reached by" six- and 12-person juries. *Id.* at 101 & n.48 (citing studies).

Purpose may validly inform the meaning of text. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("Of course, words are given meaning by their context, and context includes the purpose of the text."). Not surprisingly, this Court's criminal-procedure precedents routinely have considered purpose—and with far less analysis

of original meaning than *Williams*—in interpreting constitutional meaning. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (Sixth Amendment requires juries selected from fair cross section of community); *Miranda v. Arizona*, 384 U.S. 436, 471–74 (1966) (law enforcement must inform detainees of Fifth Amendment rights and obtain waiver before proceeding with interrogation); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (Sixth Amendment requires court-appointed counsel for indigent defendants); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (evidence seized in violation of Fourth Amendment is inadmissible at trial); *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (prosecution must provide exculpatory evidence to defendant); *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984) (Sixth Amendment requires defense attorney to provide effective assistance); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (Eighth Amendment prohibits imposing capital punishment on mentally disabled); *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005) (Eighth Amendment prohibits imposing capital punishment for crimes committed when defendant was under 18); *Griffin v. California*, 380 U.S. 609, 614–15 (1965) (Fifth Amendment prohibits adverse inference from defendant's failure to testify). There is no basis for discounting *Williams*' reasoning simply because it also considered the "function" served by the right. 399 U.S. at 99.

4. Petitioner is also wrong that post-decision developments have cast doubt on *Williams*' reasoning that a six-person jury fulfills the purposes of the Sixth Amendment. Petitioner quotes Justice Blackmun's opinion in *Ballew* and the opinion of a Florida intermediate appellate court to suggest that post-*Williams*

research shows that six-person juries do not function as well as 12-person juries. Pet. at 11–12, 15–17; *see also Khorrami*, 143 S. Ct. at 26–27 (Gorsuch, J., dissenting from denial of certiorari). But those do not present the kinds of overwhelming developments sufficient to "erode" *Williams*' "underpinnings," *Janus*, 138 S. Ct. at 2482—and in many ways later developments corroborate *Williams*.

To start, *Ballew* itself did not find that the purported developments warranted overruling *Williams*; it "adhere[d] to" and "reaffirm[ed]" *Williams*. 435 U.S. at 239 (opinion of Blackmun, J., joined by Stevens, J.). And the Florida intermediate appellate court petitioner relies on conceded that "[t]he scholarship and evidence in this regard, however, are not undisputed, and the various scientific theories are not necessarily cohesive." Pet. 17 (quoting *Gonzalez v. State*, 982 So. 2d 77, 83 (Fla. Dist. Ct. App. 2008)).

In fact, social-science studies amply support *Williams*' conclusions, leading some scholars to criticize courts for claiming that six-person juries are inferior. *See* Kaushik Mukhopadhaya, *Jury Size and the Free Rider Problem*, 19 J.L. Econ. & Org. 24, 24 (2003). Smaller juries are preferable to larger ones in several ways. For one, larger juries can lead to a "free riding" phenomenon where jurors pay less attention and participate less in deliberations because they think there are plenty of other jurors to do the work. *Id.* at 40. That, in turn, can lead to less accurate verdicts. *Id.*

Six-person juries, by contrast, are more likely to make decisions as a group rather than by a few outgoing jurors who dominate deliberations. *See* Bridget

M. Waller et al., *Twelve (Not So) Angry Men: Managing Conversational Group Size Increases Perceived Contribution by Decision Makers*, 14 Grp. Processes & Intergrp. Rels. 835, 839 (2011); *see also* Nicolas Fay et al., *Group Discussion as Interactive Dialogue or as Serial Monologue: The Influence of Group Size*, 11 Psych. Sci. 481, 481 (2000) (reporting similar findings in non-jury groups). A juror is likelier to find his or her voice in a smaller group setting.

Many assume that the additional jurors in a 12-person jury make it more likely that one or more jurors will prevent the conviction of an innocent defendant. But if that were true, the rates of hung-juries would be higher for 12-person juries than six-person juries. Yet empirical data shows no significant differences in the rates of hung juries between six- and 12-person juries. *See, e.g.*, Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox*, 42 J. Legal Stud. 399, 402–04 (2013) (collecting studies). And other studies show that, if required to be unanimous, six-person juries do not suffer from a meaningful increase in inaccurate verdicts. *See* Alice Guerra et al., *Accuracy of Verdicts Under Different Jury Sizes and Voting Rules*, 28 Sup. Ct. Econ. Rev. 221, 232 (2020) (concluding that unanimous six-person juries "are alternative ways to maximize the accuracy of verdicts while preserving the functionality of juries").

That reality is reflected in publicly available statistics. Far from returning higher rates of convictions, Pet. 17; *see also Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari), Florida juries convict criminal defendants at comparable—and pos-

sibly even slightly lower—rates than juries in jurisdictions that use 12 jurors. For example, between 2017 and 2019, felony juries in Florida convicted defendants at rates of 74.0%,[3] 73.3%,[4] and 72.1%,[5] respectively. In the same years, felony juries in Texas convicted at rates of 79.0%,[6] 81.0%,[7] and 78.0%;[8] felony juries in California convicted at rates of 86.0%,[9]

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[3] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2016-17* 3-21 (2018), https://tinyurl.com/4drv24ky (1,901 convictions out of 2,570 cases that went to the jury).

[4] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2017-18* 3-21 (2019), https://tinyurl.com/433vwfy3 (1,784 convictions out of 2,434 cases that went to the jury).

[5] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2018-19* 3-21 (2020), https://tinyurl.com/43zywh5n (1,621 convictions out of 2,248 cases that went to the jury).

[6] Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2017* Court-Level - 20 (2018), https://tinyurl.com/mtrp379s.

[7] Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2018* Court-Level - 21 (2019), https://tinyurl.com/2s3fsmpf.

[8] Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2019* Court-Level 23 (2020), https://tinyurl.com/ywh779v3.

[9] Jud. Council of Cal., *2018 Court Statistics Report: Statewide Caseload Trends* 69 (2018), https://tinyurl.com/5n6tj9pr.

85.0%,[10] and 84.0%;[11] and felony juries in New York convicted at rates of 74.6%,[12] 73.7%,[13] and 75.2%.[14] Petitioner's implication that Florida juries are steamrolling criminal defendants relative to other jurisdictions thus lacks support in the data. This data set instead reflects what multiple studies have shown: six- and 12-person juries similarly serve to "interpos[e] between the accused and his accuser . . . the commonsense judgment of a group of laymen." *Williams*, 399 U.S. at 100.[15] It is thus not true, as petitioner would have it, that "six- and twelve-person juries are not functionally equivalent." Pet. 17.

5. Petitioner does not so much as acknowledge, let alone dispute, that overruling *Williams* would have sweeping consequences for the citizens of Arizona,

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[10] Jud. Council of Cal., *2019 Court Statistics Report: Statewide Caseload Trends* 69 (2019), https://tinyurl.com/mwmby3h5.

[11] Jud. Council of Cal., *2020 Court Statistics Report: Statewide Caseload Trends* 55 (2020), https://tinyurl.com/2mym3hrx.

[12] Chief Adm'r of Cts., *New York State Unified Court System 2017 Annual Report* 48 (2018), https://tinyurl.com/yckheu9v.

[13] Chief Adm'r of Cts., *New York State Unified Court System 2018 Annual Report* 42 (2019), https://tinyurl.com/yc7cvjhe.

[14] Chief Adm'r of Cts., *New York State Unified Court System 2019 Annual Report* 38 (2020), https://tinyurl.com/2wtwfmdm.

[15] Relying on studies purporting to show that smaller juries result in fewer minority jurors, petitioner says that six-person juries threaten the right to a jury drawn from a fair cross-section of the community. *See* Pet. 11–12; *see also Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari). Even if that were true, the fair-cross-section requirement applies only to the venire, not the petit jury. *Lockhart v. McCree*, 476 U.S. 162, 173–74 (1986).

Connecticut, Florida, Indiana, Massachusetts, and Utah, who have for decades relied on *Williams* in using criminal juries of less than 12 jurors.

Florida is the third most populous state in the country and tries all noncapital crimes before six-person juries. Currently, roughly 4,500 criminal convictions are pending on direct appeal in Florida. Overruling *Williams* would force the use of public resources to conduct thousands of retrials on top of the trials already pending and might well result in the release of convicted criminals into the public.

The states' reliance interests here far outstrip the already "massive" and "concrete" reliance interests in *Ramos*. 140 S. Ct. at 1438 (Alito, J., dissenting). There, only two states allowed nonunanimous jury verdicts, and overruling *Apodaca* affected only those convictions that were actually obtained by nonunanimous verdicts. The affected convictions numbered somewhere in the hundreds. *Id.* at 1406. Here, by contrast, six states use juries with less than 12 jurors in at least some criminal prosecutions. And all convictions from those juries would suddenly be suspect. In Florida, that is *every* conviction that is not a capital case, which amounts to several thousands.

As a last point on reliance, overruling *Williams* would not merely affect criminal cases. In *Colgrove*, this Court relied on *Williams* in holding that the Seventh Amendment permits six-person juries in *civil* trials. 413 U.S. at 158–60. Consequently, nearly 90% of federal civil verdicts would also be in jeopardy. *See* Fed. R. Civ. P. 48(a); Patrick E. Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 46, 50 (2020) (finding that

only roughly 12% of federal civil trials use 12-person juries).

II. THIS CASE IS A POOR VEHICLE.

At any rate, this case is a poor vehicle for reconsidering *Williams*. This Court generally avoids deciding legal issues when doing so will have no effect on the litigants in the case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Yet even if the Court granted the petition and overruled *Williams*, petitioner would not obtain relief because the error would be harmless.

A constitutional error at trial generally does not require automatic reversal. *Chapman v. California*, 386 U.S. 18, 22 (1967). An error usually requires reversal only if it was likely to have affected the outcome of the trial. *Id.* Thus, "most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999). If the defendant had the assistance of counsel in a trial with an impartial adjudicator, "there is a strong presumption" that any errors are subject to harmless-error analysis. *Id.*

The only exception to the general rule subjecting constitutional errors to harmless-error analysis is for so-called "structural errors." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). But the exception applies only to a "very limited class" of errors. *Neder*, 527 U.S. at 8. Those errors fall under three categories—none of which would include empaneling fewer than 12 jurors. First, an error may be structural when the violated right protects some interest other than preventing erroneous convictions. *Weaver*, 137 S. Ct. at 1908. But petitioner himself contends that "accuracy of the re-

sults" at trial is the interest protected by the purported 12-person requirement. Pet. 12. Second, errors are structural when they are inherently harmful such that they always result in fundamental unfairness. *Weaver*, 137 S. Ct. at 1908. Smaller juries, however, cannot be said to *always* result in unfairness—in many cases they will have no effect or may even benefit the defendant. Third, an error is structural if the effect of the error is impossible to determine. *Id.* But as this Court held in *Neder*, the effect of violating a defendant's Sixth Amendment jury right is not always impossible to determine because a court can review the record and, if the evidence is "overwhelming" and "uncontroverted," determine beyond a reasonable doubt what the jury would have done. 527 U.S. at 9.

In *Neder*, an element of the charged offense was omitted from the jury instructions such that the jury did not find every element of the offense. *See id.* at 8. Even though that error deprived the defendant of his Sixth Amendment jury right because the omission meant a jury never convicted him of the charged offense, the Court held that the error was harmless. *Id.* at 15, 19–20. Because the record contained "overwhelming" and "uncontroverted" evidence of the omitted element, the Court found beyond a reasonable doubt that the jury would have found the omitted element. *See id.* at 9, 19–20. Similarly, this Court has subjected other deprivations of a Sixth Amendment jury to harmless-error analysis. *See Washington v. Recuenco*, 548 U.S. 212, 221–22 (2006) (subjecting a judge's unconstitutional finding of a fact that increased the maximum possible sentence to harmless-error analysis); *Hurst v. Florida*, 577 U.S. 92, 102–03 (2016) (remanding to determine whether depriving

defendant of the right to have a jury find aggravating factors necessary for a death sentence was harmless).

Were *Williams* overruled, the same reasoning would apply here. A court can review the trial record and evaluate whether the evidence was "overwhelming" and "uncontroverted" such that there is no reasonable doubt that an additional six jurors would have had no effect on the outcome. If anything, the case for harmless-error review is stronger here than in *Neder* as an appellate court at least has the benefit of a jury finding as to each element of the offense.

The State would prove any error here harmless beyond a reasonable doubt. The evidence at trial was "overwhelming" and "uncontroverted." The child testified in detail about petitioner's sexual attack on her. And petitioner confessed all the relevant details to the police. Presented with that evidence, petitioner's jury needed less than 22 minutes to unanimously find him guilty. Changing the size of the jury would not have altered that outcome. Thus, petitioner would not be entitled to reversal of his conviction whether or not the Court overruled *Williams*. So even if the Court wished to take the drastic step of overruling a 53-year-old precedent, the Court should at least do so in a case where the decision will affect the ultimate outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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