

No. 23-5171

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IN THE  
**Supreme Court of the United States**

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NATOYA CUNNINGHAM,  
*Petitioner,*

*v.*

STATE OF FLORIDA,  
*Respondent.*

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

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**REPLY BRIEF FOR PETITIONER**

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The Sixth Amendment’s “promise of a jury trial” is “fundamental to the American scheme of justice.” *Ramos v. Louisiana*, 140 S.Ct. 1390, 1395 (2020). The scope of that right is controlled by “what the term ‘trial by an impartial jury’ ... meant at the time of the Sixth Amendment’s adoption.” *Id.* Tellingly, Florida does not dispute that “a mountain of evidence suggests that, both at the time of the Amendment’s adoption and for most of our Nation’s history, the right to a trial by jury for serious criminal offenses *meant* a trial before 12 members of the community.” *Khorrami v. Arizona*, 143 S.Ct. 22, 23 (2022) (Gorsuch, J., dissenting). To the contrary, Florida acknowledges that the common law *did* impose a “12-person jury requirement.” Opp.7-8.

Florida instead seeks to distract from the fundamental right at stake by raising a novel vehicle issue and highlighting the one-time cost of correcting the *Williams* error. As to the former, Florida argues that Ms. Cunningham failed to exhaust her options for state court review because she did not ask the Florida Court of Appeal to certify the question presented to the Florida Supreme Court. But this Court already addressed that argument—and ruled against Florida’s position—nearly sixty years ago. *See Nash v. Florida Indus. Comm’n*, 389 U.S. 235, 237 & n.1 (1967). Florida’s suggestion that this Court should *sub silentio* overrule *Nash* based on a ministerial change to the state Rules of Appellate Procedure is meritless. Indeed, this Court granted review of several Florida Court of Appeal decisions even after the tweak to Florida’s rules.<sup>1</sup>

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<sup>1</sup> This Court has called for a response in a half-dozen other cases raising the same question presented. *See* Nos. 23-5173, 23-5455, 23-5567, 23-5570, 23-5575, 23-5579. This case should at least be held pending resolution of those other petitions.

As to Florida’s latter argument—i.e., the fact that overruling *Williams v. Florida*, 399 U.S. 78 (1970), would require a slice of cases to be retried in a half-dozen States—this is the “usual” consequence of adopting a “new rule[] of criminal procedure,” *Ramos*, 140 S.Ct. at 1406. This Court vacated “nearly 800 decisions” following *Booker v. United States* and “[s]imilar consequences likely followed” other landmark Confrontation Clause and Fourth Amendment rulings. *Id.* Here, nearly 50 million Americans in the six affected States are currently being denied their right to a 12-person jury in nearly all circumstances. “[T]he competing interests” of a handful of States cannot outweigh “the reliance the American people place in their constitutionally protected liberties.” *Id.* at 1408 (plurality op.).

## ARGUMENT

### I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(a)

“The Florida Supreme Court ... [has] decided that it lacks jurisdiction by appeal to consider per curiam” rulings from the Florida Court of Appeal. *Nash*, 389 U.S. at 237 & n.1; *accord Persaud v. State*, 838 So. 2d 529, 531-532 (Fla. 2003) (similar). The Court of Appeal’s per curiam summary affirmance thus “marked the complete exhaustion of Florida’s appellate process” for Ms. Cunningham and “entitled [her] to seek relief in the Supreme Court of the United States.” *Callendar v. State*, 181 So. 2d 529, 532 (Fla. 1966), *cited in Nash*, 389 U.S. at 237 n.1. This Court has granted certiorari to the Florida Court of Appeal under similar circumstances and on numerous occasions. *See, e.g., Ibanez v. Florida Dep’t of Bus. & Prof’l Regul.*, 512 U.S. 136, 142 (1994) (granting certiorari when the “Court of Appeal ... affirmed the Board’s final order *per curiam* without opinion,” leaving “no

right of review in the Florida Supreme Court”); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (similar).

Florida largely ignores this case law. Instead, it argues that Ms. Cunningham has lost the opportunity to seek this Court’s review because she failed to ask the Florida Court of Appeal to “certif[y] its decision ‘to be of great public importance.’” Opp.5. But this Court already rejected this argument in *Nash*, where it acknowledged that Florida “litigants may file a suggestion that a particular question be certified,” but nonetheless concluded that Florida law did not provide litigants with “any right to call upon the State Supreme Court for review.” 389 U.S. at 237 n.1. As the Florida state-court case *Nash* cited explains, this is because “[i]nherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it *does not* pass upon a question of great public interest.” *Whitaker v. Jacksonville Expressway Auth.*, 131 So. 2d 22, 23-24 (Fla. Dist. Ct. App. 1961). In other words, under Florida law, a request for certification is akin to a request for rehearing. And “finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment” because “[s]uch latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of [this Court’s] jurisdiction.” *Market St. Ry. Co. v. Railroad Comm’n*, 324 U.S. 548, 551-552 (1945).<sup>2</sup>

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<sup>2</sup> That Ms. Cunningham was not required to seek certification makes particular sense under the facts of this case. The question presented could not possibly have been “of great public importance” in a proceeding before the Florida Supreme Court, which remains bound by *Williams*. See *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (“It is this Court’s prerogative alone to overrule one of its precedents.”).



Florida also wrongly contends that—when *Nash* was decided—“there was no mechanism under Florida law for a litigant to request certification.” Opp.5 n.2. Again, *Nash* itself recognized that a litigant had the ability to “file a suggestion” that certification was appropriate. 389 U.S. at 327 n.1. Numerous cases bear that out. *See, e.g., American Cyanamid Co. v. Roy*, 466 So. 2d 1079, 1085 (Fla. Dist. Ct. App. 1984) (denying “petition for rehearing and suggestion of question of great public importance”).

Florida tries to circumvent *Nash* on the grounds that Florida’s Supreme Court made a minor amendment to its appellate rules that codified a litigant’s ability to “move for certification.” Opp.5 n.2. But Florida points to nothing suggesting the State intended such a ministerial change to have substantive implications. In reality, “the purpose of the new language ... was not to provide for a different type of reconsideration, but rather to permit a party to move for certification without being first required to move for rehearing.” *DeBiasi v. Snaith*, 732 So. 2d 14, 16 (Fla. Dist. Ct. App. 1999). The Florida Supreme Court accordingly had no occasion to reconsider the principle that underlay the *Nash* ruling—i.e., that a certification request is akin to requesting rehearing.

Florida’s authority is not to the contrary. The two cases Florida cites both dealt with the laws of *other* States and predated *Nash* (meaning *Nash* necessarily took them into consideration before weighing in on Florida law). *Gotthilf v. Sills*, for example, turned on the peculiarities of New York’s procedure for certifying interlocutory appeals of nonfinal orders. 375 U.S. 79, 80 (1963). Because Section 1257 accounts for “the structure of [the relevant state’s] judicial system” and “the particularized provisions of [that state’s] laws,” *Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 98 (1962), *Gotthilf’s*

analysis of New York law says nothing about Florida law. Similarly, *Gorman v. Washington University* dealt with a Missouri law that “expressly conferred the *right* to an en banc rehearing by the Supreme Court of Missouri.” *Local 174*, 369 U.S. at 99. Here, there was no rehearing “as a matter of right” and “no indication that the decision” below was anything “other than the final word” of the “final court” with jurisdiction to hear the case. *Id.*<sup>3</sup>

## II. THE COURT SHOULD OVERRULE *WILLIAMS*

“[T]he force of stare decisis is at its nadir” in cases “concerning [criminal] procedur[e] rules that implicate fundamental constitutional protection.” *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). Here, every factor this Court considers when evaluating precedent favors overruling *Williams*. That decision is egregiously wrong both because of its inconsistency with history and *Ramos* and because the empirical studies it relied upon were almost immediately undermined. Pet.4-9. *Williams* has had significant negative consequences, both in creating confusion in the case law and in permitting the use of six-member juries (which are less likely to be representative and reliable than 12-member bodies). Pet.8-9. And overruling *Williams* affects only

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<sup>3</sup> Florida hints at—but does not make—a harmless error argument. Opp.1-2. Florida’s silence is for good reason: depriving a defendant of a 12-person jury is structural error. *Webster v. United States*, 667 F.3d 826, 833 n.3 (7th Cir. 2011) (collecting cases). Similarly, Florida’s glancing reference (at 1-2) to the fact that Ms. Cunningham first raised her Sixth Amendment claim on appeal is irrelevant. A claim of “fundamental” constitutional error can be raised for the first time on appeal. *State v. Johnson*, 616 So. 2d 1, 3-4 (Fla. 1993).

limited reliance interests—i.e., it necessitates retrials of a finite number of pending cases.

### A. Egregiously Wrong

Florida’s chief defense of *Williams* rests on sleight of hand. Florida notes that *Williams* “devoted 13 pages to the history and development of the common-law jury and the Sixth Amendment” but concluded that “the word ‘jury’ in the Sixth Amendment did not codify” the 12-person requirement. Opp.7-8. To be clear, *Williams* came to that conclusion not because of the history but in spite of it. *Williams* rejected a test governed by “purely historical considerations” in favor of a functionalist approach, all while acknowledging that the historical record is clear that “the size of the jury at common law [was] fixed generally at 12.” 399 U.S. at 89, 99. Had *Williams* applied the proper, history-focused test laid out in *Ramos*, it could not have reached the same result.

Florida’s remaining attempts to defend *Williams* are similarly unavailing.

*First*, Florida argues that not all common-law practices regarding the jury were “codified” in the Sixth Amendment. Opp.8. *Ramos*, however, rejected this approach when it refused to distinguish between “the historic features of common law jury trial that (we think) serve ‘important enough’ functions to migrate silently into the Sixth Amendment and those that don’t.” 140 S.Ct. at 1400-1401. Instead, the question is simply what “the right to trial by jury included” “at the time of the Sixth Amendment’s adoption.” *Id.* at 1402.<sup>4</sup>

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<sup>4</sup> Florida’s suggestion (at 8-9) that the *Ramos* test requires “that a jury consist only of male landowners hailing from a particular county” was again rejected in *Ramos* itself. 140 S.Ct. at 1402

Florida relatedly relies on the “drafting history” of the Sixth Amendment to limit the jury-trial right. Opp.9-11. But as Florida concedes, *Ramos* explained that the “snippet of drafting history” that *Williams* and Florida rely upon “could just as easily support the opposite inference”—i.e., certain omitted language was unnecessary “surplusage.” 140 S.Ct. at 1400. In any event, this argument “proves too much” because ignoring common-law history would “leave the right to a ‘trial by jury’ devoid of meaning.” *Id.*

*Second*, Florida distinguishes *Ramos* because it overruled “a uniquely fractured decision,” while *Williams* garnered “a solid majority.” Opp.11. But this distinction does nothing to explain why *Ramos*’s six-vote holding can be squared with *Williams*. Indeed, *Ramos* explained that to the extent *Apodaca* established binding precedent, it should be overruled. 140 S.Ct. at 1404-1405.

*Third*, Florida defends *Williams*’s functionalist logic, including by noting that it was not overruled by *Ballew*. Opp.12-17. But *Ballew* refused to extend *Williams*’s logic to 5-member juries precisely because *Williams*’s foundations had been undermined. *Ballew v. Georgia*, 435 U.S. 223, 232-237 (1978); *see also* Pet.7-8.

Post-*Ballew* studies have repeatedly proved the *Ballew* Court right. Twelve-person juries deliberate longer and share more facts, ideas, and challenges to conclusions during higher-quality deliberations. *E.g.*, Saks & Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 *Law & Hum. Behav.* 451, 458-459 (1997) (considering 17 studies); *see generally* ABA, *Principles for Juries and*

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n.47 (majority op.) (“further constitutional amendments ... prohibit [such] invidious discrimination”).

*Jury Trials*, Principle 3 cmt., at 17-21 (2005) (collecting studies and endorsing 12-member-jury rule). Empaneling a smaller jury also decreases the probability that members of minority groups (be they racial, religious, political, or socio-economic) will serve. *See, e.g.*, Rose et al., *Jury Pool Underrepresentation in the Modern Era*, 15 J. Empirical Legal Stud. 2 (2018) (12-member juries are more likely to include racial minorities).

Florida’s contrary “scholarship” is inapposite. One article did not study six-person juries—it considered whether breaking a 12-member jury into four-person discussion groups would promote more effective deliberations. Waller et al., *Twelve (Not So) Angry Men*, 14 Grp. Processes & Intergrp. Rels. 835, 839 (2011). The others either studied (1) unconstitutional *five*-member groups, Fay et al., *Group Discussion as Interactive Dialogue or as Serial Monologue*, 11 Psychol. Sci. 481, 481 (2000) or (2) mathematical models (as opposed to testing actual people/juries), Mukhopadhaya, *Jury Size and the Free Rider Problem*, 19 J. L. Econ. & Org. 24, 27-43 (2003); Parisi & Luppi, *Jury Size and the Hung-Jury Paradox*, 42 J. Legal Stud. 399, 408 (2013); Guerra et al., *Accuracy of Verdicts*, 28 Sup. Ct. Econ. Rev. 221, 232 (2020). And while Florida cites (at 15-17) bare conviction rates across different States, it neither identifies scholarship interpreting those numbers nor attempts to control for potentially divergent features and practices of state law (e.g., frequency of guilty pleas).

*Finally*, Florida argues that there is nothing “nefarious” about the fact that Florida law changed the minimum jury size from 12 to six a few weeks after the departure of federal troops following Reconstruction. Opp.17-18. But Florida does not dispute that at least some States “restricted the size of juries ... to suppress minority voices in public affairs,” *Khorrami*, 143 S.Ct. at

27 (Gorsuch, J., dissenting), and identifies no reason to think that the racist political forces that held sway in late 19th century Florida were any different. It responds that “Florida ... retained 12-person juries in capital cases.” Opp.18. But that 12-member juries are warranted in cases where the defendant faces death only supports that 12-member juries are more rights-protective than six-person juries.

### **B. Significant Negative Consequences**

*Williams* has had negative jurisprudential consequences. In *Ballew*, a split Court struggled to apply the functionalist approach, with multiple members acknowledging that the six-member line had little foundation in law or fact. Pet.7-8. And, of course, *Ramos* necessarily rejected *Williams*’s approach. *Supra* pp. 5-7. The cases Florida cites (at 11-12) as “reaffirming” *Williams* mention the decision only in passing or rely on the reasoning *Ramos* rejected.<sup>5</sup>

*Williams* has also had negative, real-world consequences, as a “drop in jury size” poses a threat to both the “representativeness” of the jury and the “reliability” of the verdict. ABA, *Principles for Juries and Jury Trials*, Principle 3 cmt., at 19-20; *see also supra* pp. 7-8. “[T]hat smaller panels tend to skew jury composition

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<sup>5</sup> Florida’s suggestion (at 19) that interpreting the Sixth Amendment would *require* a change in Seventh Amendment jurisprudence is meritless. The Seventh Amendment’s reference to “Suits at common law”—which “is not directed to jury characteristics, such as size, but rather the kind of cases for which jury trial is preserved,” *Colgrove v. Battin*, 413 U.S. 149, 152 (1973)—could well preclude adopting attributes of the common-law jury in that context. There is good reason for the Sixth Amendment to be more protective than the Seventh: It protects “human liberty” rather than “property.” *Stogner v. California*, 539 U.S. 607, 632 (2003).

and impair the right to a fair trial ... is a sad truth borne out by hard experience.” *Khorrami*, 143 S.Ct. at 27 (Gorsuch, J., dissenting).

Florida’s response to the “reliability” concern is based on inapposite studies. *Supra* pp. 8. And Florida does not dispute that a 12-member jury will sweep in a broader cross-section of the community than a six-member body. It argues only that the “fair-cross section-requirement applies” to the jury pool, not the jury itself. Opp.17 n.15. But the available evidence establishes that the 12-member-jury requirement at least increases the odds that jurors will embody the cross-section of humanity in the venire—an outcome *Williams* wrongly dismissed as “unrealistic,” 399 U.S. at 102.

### C. Reliance

Florida argues that the reliance interests here “far outstrip” those in *Ramos*. Opp.18. To the contrary, the chief reliance interest asserted is the same: The need to re-try a discrete number of non-final felony convictions. Almost any new rule of criminal procedure will “affect[] significant numbers of pending cases across the whole country.” *Ramos*, 140 S.Ct. at 1406.

Florida also contends that the *number* of convictions affected distinguishes this case from *Ramos*. Opp.18-19. To be clear, this case would affect only those felony proceedings where a trial has been held and the case is not yet final on appeal—a number that is currently historically low due to the COVID-19 pandemic.<sup>6</sup> While Florida claims (at 19) that it would have to conduct “several

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<sup>6</sup> *E.g.*, Florida Office of the State Courts Administrator, *FY2021-22 Statistical Reference Guide 3-20 to 3-22* (2023), <https://tinyurl.com/22tn3z32>.

thousand” retrials, Florida provides no source and this Court granted certiorari in *Ramos* despite Louisiana’s similar argument that requiring jury unanimity “could ... upset” “[t]housands of final convictions.” Opp.4, *Ramos*, No. 18-5924 (U.S.). Moreover, this Court vacated “nearly 800 decisions” following *Booker* and a “similar consequence[] likely followed when *Crawford v. Washington* overturned prior interpretations of the Confrontation Clause or *Arizona v. Gant* changed the law for searches incident to arrests.” *Ramos*, 140 S.Ct. at 1406 (citations omitted).

In the end, Florida ignores “the most important” “reliance interest” of all—that “of the American people” “in the preservation of our constitutionally promised liberties.” *Ramos*, 140 S.Ct. at 1408 (plurality op.). Nearly 50 million Americans are currently denied a right the Framers intended all to enjoy, even while Florida recognizes that a 12-member jury is so important and fundamental that it is a necessary safeguard in death-penalty cases. This Court alone has authority to step in and protect the rights of those millions. It should do so.



**CONCLUSION**

The petition should be granted or held. *See supra* n.1.

Respectfully submitted.

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