No. 23-5455

IN THE

Supreme Court of the United States

JOHN A. CRANE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

CAREY HAUGHWOUT
Public Defender
PAUL EDWARD PETILLO
Assistant Public Defender
OFFICE OF THE PUBLIC DEFENDER
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
421 Third Street
West Palm Beach, FL 33401

ALEX W. MILLER
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

LEAH FUGERE*
WILMER CUTLER PICKERING HALE AND DORR LLP
350 S. Grand Avenue
Suite 2400
Los Angeles, CA 90071

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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 the common law *did* impose a "12-person jury requirement." Opp.8-9.

Florida seeks to distract from the fundamental right at stake by raising meritless vehicle issues and highlighting the one-time cost of correcting the *Williams* error. As to the former, Florida argues Mr. Crane failed to exhaust his options for state court review because he did not ask the Florida Court of Appeal to certify the question presented to the Florida Supreme Court. But Mr. Crane properly petitioned the Florida Supreme Court for review, and this Court already rejected Florida's certification argument 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. Similarly, Florida's harmless error argument ignores that (1) every Circuit to consider the issue has held that failure to provide a 12-member jury is structural

error and, regardless, (2) harmlessness is most properly addressed on remand.[1]

As to Florida's latter argument—i.e., 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 rulings. *Id.* Here, nearly 50 million Americans 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. BOTH OF FLORIDA'S VEHICLE ARGUMENTS HAVE BEEN REJECTED

A. Jurisdiction

Mr. Crane obtained a decision from the "highest court of a State in which a decision could be had," 28 U.S.C. § 1257(a), because he unsuccessfully petitioned the Florida Supreme Court to review the Court of Appeal's decision affirming his conviction at a time when Florida's high court had jurisdiction, Pet.App.2.

Specifically, the Florida Court of Appeal summarily affirmed Mr. Crane's conviction in a per curiam order.

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[1] This Court called for a response in other cases raising the same question presented. *See* Nos. 23-5171, 23-5173, 23-5567, 23-5570, 23-5575, 23-5579. This case should at least be held pending resolution of those petitions.

Pet.App.1. The decision read in full: "*Affirmed. See Guzman v. State*, 350 So. 3d 72, 73 (Fla. 4th DCA 2022), *rev. pending*, No. SC22-1597." Pet.App.1. *Guzman* presented the 12-member jury question. *Guzman* v. *State*, 350 So. 3d 72, 73-74 (Fla. Dist. Ct. App. 2022). When the Court of Appeal "cites as controlling authority a decision … pending review in" the Florida Supreme Court, the latter has discretionary jurisdiction to take up the case. *Jollie* v. *State*, 405 So. 2d 418, 420 (Fla. 1981). That is the situation here—the Court of Appeal cited *Guzman*, which was then properly pending in the Florida Supreme Court. Pet.App.1; *see also Guzman* v. *State*, 2023 WL 3830251, at *1 (Fla. June 6, 2023); Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1155 n.9 (1994) ("A case is pending if it has been properly filed and is awaiting review."). Mr. Crane thus could—and did—invoke the Florida Supreme Court's jurisdiction by filing a petition for review. *Jollie*, 405 So. 2d at 420; Pet.App.1-2. Under these circumstances, the Florida Supreme Court dismissing Mr. Crane's petition *after* denying review in *Guzman* is not an indication the Court lacked jurisdiction *when* Mr. Crane filed his petition for review.[2]

Florida's contention (Opp.5-6) that Mr. Crane should have instead sought certification in the Court of Appeal because "the Florida Supreme Court generally lacks jurisdiction ... to review summary decisions" simply ignores the *Jollie* rule. Here, the Florida Supreme Court *did have* jurisdiction when Mr. Crane petitioned for review because *Guzman* was pending, then declined to take up the question presented in both cases. There is

[2] *Guzman* is also pending before this Court. *See* No. 23-5173. Florida does not dispute that this Court has jurisdiction to consider *Guzman*.

no requirement to avail oneself of more than one path to review so long as the higher court would have jurisdiction under the path the litigant did take. *E.g.*, *Chesapeake & O. Ry. Co.* v. *Mihas*, 280 U.S. 102, 104 (1929). "[I]t would be unreasonable to require an application to the Appellate Court for a certificate of importance and appeal when Supreme Court" had already denied a petition for review of the same question. *Id.* That is precisely what Florida demands here.

Regardless, this Court rejected in *Nash* the certification argument Florida now presses, and has granted certiorari to the Florida Court of Appeal under similar circumstances. *E.g.*, 389 U.S. at 237 n.1 (seeking certification not required); *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"). As the Florida case *Nash* cited explains, "[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, Florida law makes requesting certification akin to requesting 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).

Florida tries to circumvent *Nash* because Florida's Supreme Court later made a minor amendment to its appellate rules that codified a litigant's ability to "move for

certification." Opp.6 n.2. But *Nash* recognized litigants could already "file a suggestion" that certification was appropriate, 389 U.S. at 327 n.1, and Florida points to nothing suggesting such a ministerial change had substantive implications. Instead, "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 underlying *Nash*—i.e., a certification request is akin to requesting rehearing.

Florida's authority is not to the contrary. The two cases Florida cites involve *other* States and predated *Nash* (meaning the *Nash* Court necessarily considered them). *Gotthilf* v. *Sills* turned on the peculiarities of New York's procedure for certifying interlocutory appeals of nonfinal orders, and—unlike here—the state high court did not have direct jurisdiction over the petitioner's request for review. 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's. Similarly, *Gorman* 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." *Id.*

B. Harmless Error

Florida contends (Opp.20-23) that Mr. Crane would not benefit from a decision overruling *Williams*, but because the magnitude of the constitutional error was

necessarily "not addressed by the Court of Appeals," the proper course would be to grant the petition and allow the court below to consider harmlessness on remand. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Regardless, federal courts roundly reject Florida's position, holding that "depriving a defendant of the verdict of twelve" is structural error requiring automatic reversal. *United States* v. *Curbelo*, 343 F.3d 273, 281 (4th Cir. 2003). A court "simply cannot know what affect" adding one more juror "might have had on jury deliberations" without diverting into "pure speculation." *Id.* at 281-282.

Florida asserts (Opp.21-22) that conviction by 50% of the constitutionally required 12 is analogous to the instructional error in *Neder* v. *United States*, 527 U.S. 1, 7 (1999). But *Neder* emphasized the flawed instruction neither implicated a "'defect affecting the framework in which the trial proceeds,'" nor "'vitiate[d] *all* the jury's findings.'" *Id.* at 8-13. Not so here. Florida does not even attempt to explain how a court could account for the views of a half-dozen unknown individuals, all of whom must agree with the existing six for Mr. Crane's conviction to stand.

II. THE COURT SHOULD OVERRULE *WILLIAMS*

"[S]tare 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*.

A. Egregiously Wrong

Florida's chief defense of *Williams* rests on sleight of hand. Florida notes *Williams* "devoted 13 pages to the history and development of the common-law jury and the Sixth Amendment" but concluded "the word 'jury' in the Sixth Amendment did not codify" the 12-person requirement. Opp.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 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; *accord Khorrami*, 143 S.Ct. at 23-24 (Gorsuch, J., dissenting) (summarizing history). Had *Williams* applied the *Ramos* test, it could not have reached the same result.

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

First, Florida argues that the Sixth Amendment did not "codif[y]" all common-law jury practices. Opp.9. *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.[3]

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[3] Florida's suggestion (Opp.9-10) 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 n.47 ("further constitutional amendments … prohibit [such] invidious discrimination").

Florida relatedly relies on the "drafting history" of the Sixth Amendment. Opp.10-12. But *Ramos* explained that the "snippet of drafting history" *Williams* and Florida cite "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.12. But this distinction does nothing to square *Ramos*'s six-vote holding 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 it was not overruled by *Ballew*. Opp.13-18. 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 share more ideas and challenges to conclusions during longer, 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 Jury Trials*, Principle 3 cmt., at 17-21 (2005) (endorsing 12-member-jury rule). 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).

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 deliberation. Waller et al., *Twelve (Not So) Angry Men*, 14 Grp. Processes & Intergrp. Rels. 835, 839 (2011). The others 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 (Opp.15-17) conviction rates across States, it neither identifies scholarship interpreting those numbers nor attempts to control for divergent features and practices of state law (e.g., frequency of guilty pleas).

Finally, Florida argues there is nothing "nefarious" about the fact that Florida law changed the minimum jury size from 12 to six a few weeks after federal troops left following Reconstruction. Opp.17-18. But 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 Florida identifies no reason the racist political forces that held sway in late 19th century Florida were any different. It responds that the State "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. A split *Ballew* Court struggled to apply the functionalist approach, with members acknowledging that the six-member line had little justification. Pet.7-8. And *Ramos* necessarily rejected *Williams*'s approach. The cases Florida cites (Opp.12) as "reaffirming" *Williams* mention the decision only in passing or rely on the reasoning *Ramos* rejected.[4]

Williams has also had real-world consequences, as a "drop in jury size" poses a threat to the "representativeness" of the jury and the "reliability" of the verdict. ABA, *Principles for Juries and Jury Trials*, Principle 3 cmt., at 19-20. "[T]hat smaller panels tend to skew jury composition 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 does not dispute a 12-member jury will sweep in a broader cross-section of the community, arguing only that the "fair-cross-section requirement applies" to the jury pool, not the jury itself. Opp.18 n.15. But the available evidence establishes that 12-member juries at least increase 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.

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[4] Interpreting the Sixth Amendment does not require a change in Seventh Amendment jurisprudence. The latter'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 preclude adopting attributes of the common-law jury. And the Sixth Amendment *should* be more protective: It protects "liberty" rather than "property." *Stogner* v. *California*, 539 U.S. 607, 632 (2003).

C. Reliance

Florida argues the reliance here "far outstrip[s]" that in *Ramos* (Opp.19), but asserts the same interest: re-trying 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 the *number* of convictions affected distinguishes this case from *Ramos*. Opp.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.[5] While Florida claims without support (Opp.19) that it would have to conduct "several thousand" retrials, this Court granted certiorari in *Ramos* despite Louisiana's 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 "similar consequences likely followed" *Crawford* and *Gant*. *Ramos*, 140 S.Ct. at 1406.

Ultimately, 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.

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

CONCLUSION

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

Respectfully submitted.

CAREY HAUGHWOUT
Public Defender
PAUL EDWARD PETILLO
Assistant Public Defender
OFFICE OF THE PUBLIC DEFENDER
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
421 Third Street
West Palm Beach, FL 33401

ALEX W. MILLER
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

LEAH FUGERE*
WILMER CUTLER PICKERING HALE AND DORR LLP
350 S. Grand Avenue
Suite 2400
Los Angeles, CA 90071

** Not admitted in California. Admitted to practice in Colorado. Supervised by members of the firm who are members of the California bar.*

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