No. 23-5965

IN THE SUPREME COURT OF THE UNITED STATES

CODY ENRRIQUEZ, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

On Petition for a Writ of Certiorari to
the District Court of Appeal of Florida, Fourth District

REPLY BRIEF IN SUPPORT OF CERTIORARI

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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, 1397 (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.* at 1395. 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 requirement." Opp.13.

Florida instead seeks to distract from the fundamental right at stake with meritless vehicle issues and highlighting the one-time cost of correcting the *Williams* error.

As to the vehicle issues, Florida argues that convicting Mr. Enrriquez with only six jurors was harmless error. Every Circuit to consider the issue, however, has held that failure to provide a 12-member jury is structural error, automatically requiring reversal. *See*, *e.g.*, *United States v. Curbelo*, 343 F.3d 273, 281 (4th Cir. 2003). Regardless, this Court need not reach that question, as it is most properly addressed on remand in the first instance. Florida also argues Mr. Enrriquez 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. Enrriquez 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.

As to the one-time cost of overruling *Williams v. Florida*, 399 U.S. 78 (1970)—that it 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 1407. This Court vacated "nearly 800 decisions" following *Booker v. United States* and "[s]imilar consequences likely followed" other landmark rulings. *Id*. at 1406. 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.).

I. FLORIDA'S HARMLESS ERROR ARGUMENT HAS BEEN UNIVERSALLY REJECTED BY THE U.S. COURT OF APPEALS

Florida wrongly contends that any error in convicting Mr. Enriquez with a jury of six rather than 12 was harmless, such that he would not benefit from a decision overruling *Williams*. Opp.6, 25-28.

As an initial matter, this Court need not resolve that question in order to grant review. 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 then allow the court below to address the structural error issue in the first instance on remand. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see McCoy v. Louisiana*, 138 S.Ct. 1500, 1517-1518 (2018) (Alito, J., dissenting) (whether structural error applies should be decided on remand).

Regardless, federal courts have uniformly rejected Florida's position, holding that—even when a jury has eleven members—"depriving a defendant of the verdict of twelve" is structural error requiring automatic reversal. *Curbelo*, 343 F.3d at 281; *accord Webster v. United States*, 667 F.3d 826, 833 n.3 (7th Cir. 2011) (collecting cases). This makes good sense, as a court "simply cannot know what affect" adding one more juror "might have had on jury deliberations" without diverting into "pure speculation." *Curbelo*, 343 F.3d at 281-282; *accord Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (effect of replacing defendant's existing attorney with one of their choice is unquantifiable). That logic applies with even greater force here, where Mr. Enrriquez was wrongly deprived of six additional jurors. As in other contexts where structural error applies, "the effects of the error are simply too hard to measure." *Weaver*, 582 U.S. at 295.

Florida nevertheless asserts (at 26-28) 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). Florida does not identify any court that has adopted this argument and for good reason.

Neder emphasized that the flawed instruction did not implicate a "'defect affecting the framework in which the trial proceeds'"; it was "simply an error in the

trial process itself." *Id*. at 8-9. Because the error did not "'vitiate all the jury's findings'" but only raised a question about one element, it was thus susceptible to a harmless error analysis. *Id*. at 10-13. 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 would have to agree with the existing six in order for Mr. Enrriquez's conviction to stand. If anything, the available evidence suggests the deliberative process is entirely different when a larger jury is used. *Infra* pp. 7-8.

II. THIS COURT HAS JURISDICTION

Mr. Enrriquez 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 over his petition.

Specifically, the Florida Court of Appeal affirmed Mr. Enrriquez's conviction in a per curiam decision. Pet.App.2. The decision read in relevant part: "With respect to his argument that he was entitled to a twelve-person jury, we affirm. *See Guzman v. State*, 350 So. 3d 72, 73 (Fla. 4th DCA 2022), *rev. pending*, No. SC22-1597." Pet.App.2. *Guzman* presented the same 12-member jury question as this case. *Guzman v. State*, 350 So. 3d 72, 73-74 (Fla. Dist. Ct. App. 2022). And when the Court of Appeal "cites as controlling authority a decision … pending review in" the Florida Supreme Court, the court may exercise its 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.2; *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. Enrriquez 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.4 Under these circumstances, the Florida Supreme Court denying Mr. Enrriquez's petition after denying review in *Guzman* is not an indication the Court lacked jurisdiction when Mr. Enrriquez actually filed his petition for review.

Contrary to Florida's argument (Opp.8-9), *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987), does not hold that the case cited by the District Court (here, *Guzman*) must first be accepted for review by the Florida Supreme Court. *Harrison* merely holds that if the Florida Supreme Court denies review of the cited case (here, *Guzman*), it will also deny review of the citing case (here, *Enrriquez*). And if the court accepts review of the cited case, it will accept review of the citing case.[1] The Florida Supreme Court's decision in *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), is one example of this. That case was awaiting a decision on jurisdiction for nine months (from January 2014 to September 2014). Inmates who lost their appeal on the authority of the district court decision sought review in the Florida Supreme Court even before that court had accepted review of *Atwell*. When the Florida

[1] This makes sense because the purpose of jurisdiction under *Jollie* is to avoid disparate treatment of appellate cases based on the timing of opinions. *See Jollie*, 405 So. 2d at 419.

Supreme Court accepted review of *Atwell*, the Court accepted review of these "tag cases" as well. *E.g.*, *LeCroy v. State*, 137 So. 3d 557 (Fla. Dist. Ct. App. 2014), *review granted*, *decision quashed*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016); *Hegwood v. State*, 132 So. 3d 862 (Fla. Dist. Ct. App. 2014), *review granted*, *decision quashed*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016); *Wallace v. State*, 134 So. 3d 473 (Fla. Dist. Ct. App. 2014), *review granted*, *decision quashed*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016).

Florida's contention (Opp.6-12) that Mr. Enrriquez 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. As explained above, the Florida Supreme Court did have jurisdiction when Mr. Enrriquez petitioned for review because *Guzman* was pending, then declined to take up the question presented in both cases. This Court has held there is no requirement for a litigant to avail itself 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"); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (similar). 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, 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).

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.10 n.3. 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 the State intended such a ministerial change to have 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 that underlay the *Nash* ruling—i.e., a certification request is akin to a request for rehearing. Florida's authority is not to the contrary. The two cases Florida cites both involve other States and predated *Nash* (meaning the Nash Court necessarily took them into consideration). *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 law. 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.*

IIi. 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.7-9 *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 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 *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.13. 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 historical evidence). 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.16. *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.[2]

Florida relatedly relies on the "drafting history" of the Sixth Amendment to limit the jury-trial right. Opp.10. But *Ramos* explained that the "snippet of drafting history" *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.17. 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.7-9.

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-*

[2] Florida's suggestion (Opp.15) 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").

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) (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).

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.21-22) 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 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.23-24. 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 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.24. 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 *Ramos* necessarily rejected *Williams's* approach. The cases Florida cites (Opp.12) as "reaffirm[ing]" *Williams* mention the decision only in passing or rely on the reasoning *Ramos* rejected.[3]

Williams has also had negative, real-world consequences, as a "drop in jury

[3] Florida's suggestion (Opp.20) that interpreting the Sixth Amendment requires 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. And the Sixth Amendment should be more protective: It protects "human liberty" rather than "property." *Stogner v. California*, 539 U.S. 607, 632 (2003).

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; *see also supra* pp. 7-8. "[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's response to the "reliability" concern is based on inapposite studies. *Supra* pp. 11-12. And Florida does not dispute 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.23 n.16. 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 the reliance interests here "far outstrip" those in *Ramos* (Opp.25), but the interest asserted is the same: The need to re-try a discrete number of nonfinal 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.25. 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.[4] While Florida claims without support (Opp.25) 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 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* n.1 in the petition.

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

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