

No. 23-6304

IN THE SUPREME COURT OF THE UNITED STATES

ONTERRIOUS V. TILLMAN, 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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REPLY BRIEF IN SUPPORT OF CERTIORARI

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.5.

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

As to the vehicle issue, Florida argues that convicting Mr. Tillman 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.

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. Tillman with a jury of six rather than 12 was harmless, such that he would not benefit from a decision overruling *Williams*. Opp.18-20.

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. Tillman 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 18-19) 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 “vitiating 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. Tillman’s conviction to stand. If anything, the available evidence suggests the deliberative process is entirely different when a larger jury is used. *Infra* pp. 6-7.

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.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.6. 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.6. *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 1402.¹

Florida relatedly relies on the “drafting history” of the Sixth Amendment to limit the jury-trial right. Opp.7. 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.9. 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

¹ Florida’s suggestion (Opp.7) 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”).

was not overruled by *Ballew*. Opp.12. 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-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.13-15) 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.16-17. 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.16. 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.10) as “reaffirm[ing]” *Williams* mention the decision only in passing or rely on

the reasoning *Ramos* rejected.²

Williams has also had negative, 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; *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. 6-7. 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.15 n.14. 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.17), but the interest asserted is the same: The need to re-try a discrete number

² Florida’s suggestion (Opp.17) 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).

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.17. 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.³ While Florida claims without support (Opp.17) 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

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

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.

Respectfully submitted,

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