No. 23-6723

IN THE

Supreme Court of the United States

BRANDON KEITH OWENSBY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH 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). After examining the history and purpose of the right to trial by jury, the Court concluded that the framers enshrined no 12-juror requirement in the Constitution, even though most founding-era juries consisted of 12 persons. 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 5,600 criminal convictions are currently pending on direct appeal.

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

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Alice Guerra et al., *Accuracy of Verdicts Under Different Jury Sizes and Voting Rules*, 28 Sup. Ct. Econ. Rev. 221 (2020) 16
Annals of Cong. (1789) (Joseph Gales ed., 1834) 10
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 13
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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 (2011) 15
Chief Adm'r of Cts., *New York State Unified Court System 2017 Annual Report* (2018), https://tinyurl.com/yckheu9v 17
Chief Adm'r of Cts., *New York State Unified Court System 2018 Annual Report* (2019), https://tinyurl.com/yc7cvjhe.....17
Chief Adm'r of Cts., *New York State Unified Court System* 2019 Annual Report (2020), https://tinyurl.com/2wtwfmdm 17
Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2017-18* (2019), https://tinyurl.com/433vwfy3 16
Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2018-19* (2020), https://tinyurl.com/43zywh5n 16
Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2016-17* (2018), https://tinyurl.com/4drv24ky 16

Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. & Am. L. Reg. 197 (1909) 9
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Jud. Council of Cal., *2018 Court Statistics Report: Statewide Caseload Trends* (2018), https://tinyurl.com/5n6tj9pr 17
Jud. Council of Cal., *2019 Court Statistics Report: Statewide Caseload Trends* (2019), https://tinyurl.com/mwmby3h5 17
Jud. Council of Cal., *2020 Court Statistics Report: Statewide Caseload Trends* (2020), https://tinyurl.com/2mym3hrx.....17
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Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2018* (2019), https://tinyurl.com/2s3fsmpf.....17
Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2019* (2020), https://tinyurl.com/ywh779v3.....17

Patrick E. Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 46 (2020) 20
Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, 1 Select Essays in Anglo-American Legal History 367 (1907).....9
William Blackstone, Commentaries on the Laws of England (1769).....9
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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 assault on a law enforcement officer and resisting an officer with violence. *See* Fla. Stat. §§ 784.07(2)(a), 843.01(1). Because those crimes are not punishable by death, the trial court empaneled a six-person jury as dictated by Florida law. *See* Fla. Stat. § 913.10. Petitioner's counsel questioned the venire panel extensively and participated in jury selection, exercising cause and peremptory challenges to various prospective jurors petitioner deemed undesirable. Tr. 218–239. After jury selection, petitioner

accepted the jury as empaneled and proceeded to trial without objection. Tr. 237–39. The jury returned unanimous guilty verdicts on both counts. *See* R. 113.

3. Petitioner appealed his convictions to Florida's Fourth District Court of Appeal, arguing—for the first time—that the Sixth Amendment entitled him to be tried by a 12-person jury because this Court abrogated *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 Fourth District affirmed in a summary decision. Pet. App. 1. Petitioner did not ask the Fourth District to certify a question of great public importance under Florida Rule of Appellate Procedure 9.330(a), which, if granted, would have authorized him to seek further review in the Florida Supreme Court. Instead, he petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner contends that the Court should review the Fourth 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. But this Court lacks jurisdiction to issue a writ of certiorari to the Fourth District because petitioner failed to seek review in the Florida Supreme Court by moving the Fourth District to certify a question of great public importance. And even if the Court had jurisdiction, it should, as it has done in several recent cases, decline

the invitation to revisit *Williams*. *See Pretell v. Florida*, 143 S. Ct. 1027 (2023); *Khorrami v. Arizona*, 143 S. Ct. 22 (2022); *Davis v. Florida*, 143 S. Ct. 380 (2022); *Phillips v. Florida*, 142 S. Ct. 721 (2021). 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; overruling it also would imperil thousands of criminal convictions in Florida and five other states that for more than 50 years have relied on its rule.[1]

The petition should be denied.

I. THIS COURT LACKS JURISDICTION BECAUSE PETITIONER MADE NO ATTEMPT TO SEEK FLORIDA SUPREME COURT REVIEW.

In appeals from state-court litigation, this Court's jurisdiction is limited to reviewing decisions of the "highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). That means that this Court may review on certiorari only judgments of "a state court of last resort" or "a lower state court if the state court of last resort has denied discretionary review." *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012). If a petitioner makes no attempt to obtain review in the state court of last resort, then this Court lacks jurisdiction to grant certiorari to an intermediate appellate court. *See id.*; *Gorman v. Washington Univ.*, 316 U.S.

[1] *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.

98, 100–01 (1942) ("[N]o decision of a state court should be brought here for review . . . until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted."). Here, petitioner seeks certiorari from Florida's district court of appeal—its intermediate appellate court. But because he failed to exhaust his available options for seeking review in the Florida Supreme Court, the district court of appeal is not in fact the highest court in Florida in which he could have sought a decision.

The Florida Supreme Court has discretionary jurisdiction to review the final decision of a Florida district court of appeal in several circumstances. The court may review the decision if it expressly declared a state statute valid; expressly construed a provision of the state or federal constitution; expressly affects a class of constitutional or state officers; or expressly and directly conflicts with a decision of another district court of appeal or the Florida Supreme Court. Fla. Const. art. V, § 3(b)(3). The Florida Supreme Court may also grant review if the district court certifies its decision "to be of great public importance" or "to be in direct conflict with" another district court of appeal's decision. *Id.* § 3(b)(4). Litigants may move for such a certification within 15 days of the district court's decision. Fla. R. App. P. 9.330(a)(1), (2)(C). If the court grants the motion, the litigant may then seek discretionary review in the Florida Supreme Court.

Here, petitioner made no attempt to invoke the Florida Supreme Court's jurisdiction. Petitioner did

not, for instance, ask the Fourth District Court of Appeal to certify a question of great public importance. He instead opted to come straight to this Court. Petitioner's failure to exhaust the procedures available for review by the Florida Supreme Court deprives this Court of jurisdiction.

That the district court may have denied certification does not excuse petitioner's failure to try. What matters is the "possibility" of further review. *Gorman*, 316 U.S. at 100–01. This Court is ill-positioned to evaluate the likelihood that the district court would have exercised its discretion to certify—a matter "wholly within the province" of that court. *Rupp v. Jackson*, 238 So. 2d 86, 88 (Fla. 1970); *see also Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961) ("solely for the district court to determine").

This Court dismissed a writ of certiorari for lack of jurisdiction under similar circumstances in *Gotthilf v. Sills*, 375 U.S. 79 (1963) (per curiam). There, as here, moving the intermediate appellate court to certify the appeal to the state high court was the only available avenue to seek review in the state high court. *Id.* at 80. Yet the petitioner did not move for certification. *Id.* This Court held that it lacked jurisdiction because the petitioner had failed to exhaust that available avenue of review. *Id.* The same is true here.

This Court's footnote in *Nash v. Florida Industrial Commission*, 389 U.S. 235, 237 n.1 (1967), noting that a petitioner need not file a "suggestion" that the Florida district court of appeal certify a question before

seeking certiorari does not suggest otherwise. When *Nash* was decided, district courts could certify questions for review by the Florida Supreme Court only on their own motions; there was no mechanism for litigants to move for certification. *Id.* Even so, at least one district court permitted "any interested person" to file a "suggestion" that the court certify a question. *Whitaker v. Jacksonville Expy. Auth.*, 131 So. 2d 22, 24 (Fla. Dist. Ct. App. 1961). But that court made clear that such a "suggestion" would have "no legal effect" because, unlike a motion, it required no ruling from the court and any certification would still "in all cases be upon the court's own motion." *Id.* That was so because the rules at the time made no provision for certification upon "motion of a party to the cause." *Lipsius v. Bristol-Myers Co.*, 269 So. 2d 680, 681–82 (Fla. Dist. Ct. App. 1972). According to this Court, because such "suggestion[s]" had "no legal effect" and certification still occurred only "*upon the district court of appeal's own motion*," filing a "suggestion" was not a prerequisite to seeking certiorari. *Nash*, 389 U.S. at 237 n.1 (emphasis added).

But it is no longer the case under Florida law that certification may occur only on the district court's own motion; the Florida Rules of Appellate Procedure were amended in 1988 to permit certification of a question of great public importance on a litigant's motion. *See In re The Fla. Bar Rules of App. P.*, 536 So. 2d 240, 241 (Fla. 1988). Far from a "minor" "ministerial change," Reply Brs. at 4–5 in 23-5455, 23-5567, 23-5570, 23-5575, 23-5579 & Reply Br. at 4 in 23-5171,

that negates the exact ground this Court gave for its footnote in *Nash*. Now, *Gotthilf*'s rule requiring a petitioner to move for certification in the intermediate appellate court when that is the only means of seeking review in the state high court squarely applies.

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

Even if this Court had jurisdiction, petitioner has not justified revisiting *Williams*' holding 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.

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 "disfavored functionalist logic." Pet. 7; *see also id.* at 5–6. 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 the Sixth Amend-

ment'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. Those would seem dramatic reactions to the mere trimming of surplusage.

2. Petitioner errs in contending that this Court's recent decision in *Ramos* requires overruling *Williams*. Pet. 6. *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 in *Ramos* 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" to settled incorporation doctrine 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 text. *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 cites Justice Blackmun's opinion in *Ballew* and subsequent research to suggest that empirical evidence shows that six-person juries do not function as well as 12-person juries. Pet. at 7–9; *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 for good reason: post-*Williams* scholarship is, at most, mixed on this point.

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). Put differently, a juror is more likely 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 unani-

mous, 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, *see Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari), Florida juries convict criminal defendants at comparable—and possibly 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%,[2] 73.3%,[3] and 72.1%,[4] respectively. In the same years, felony juries in Texas convicted at rates

[2] *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).

[3] *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).

[4] *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).

of 79.0%,[5] 81.0%,[6] and 78.0%;[7] felony juries in California convicted at rates of 86.0%,[8] 85.0%,[9] and 84.0%;[10] and felony juries in New York convicted at rates of 74.6%,[11] 73.7%,[12] and 75.2%.[13] Petitioner's implication that Florida juries are steamrolling criminal defendants relative to other jurisdictions thus lacks support in the data. Instead, the data reflect 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.[14] It is thus not

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

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

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

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

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

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

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

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

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

[14] Relying on studies purporting to show that smaller juries result in fewer minority jurors, petitioner suggests that six-person juries threaten the right to a jury drawn from a fair cross-

true, as petitioner would have it, that *Williams*' assessment of the six-person jury's effectiveness "has proven incorrect." Pet. 7.

5. Petitioner adds insult to error in suggesting (at 10) that Florida's six-person jury rule was adopted "to suppress minority voices." Beyond noting that the rule dates from Reconstruction, however, petitioner cites no evidence suggesting that is so, and makes no attempt to explain how a rule establishing the size of juries without regard to race could be a covert instrument of racism.

Florida history in fact shows quite the opposite. Petitioner believes it nefarious that "[t]he common law rule of a jury of twelve was still kept in Florida while federal troops remained in the state," but that Florida then reduced the size of certain juries to six in 1877, after the departure of federal troops that had occupied Florida after the Civil War. Pet. 11. But petitioner fails to note that, even after that, Florida also retained 12-person juries in capital cases, Act of February 17, 1877, ch. 3010, § 6, 1877 Fla. Laws 54, a fact quite inconsistent with petitioner's charge of racism. And in any event, petitioner does not contend that any part of Florida's *current* constitution, which was adopted in 1968 and provides that "the number of jurors, not fewer than six, shall be fixed by law," Fla. Const. art. I, § 22, was motivated by racial animus. *See Abbott v.*

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section of the community. *See* Pet. 8–9; *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).

Perez, 138 S. Ct. 2305, 2324 (2018) ("Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.").

6. Finally, petitioner does not so much as acknowledge, let alone dispute, that overruling *Williams* would have sweeping consequences for the citizens of Arizona, 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 5,600 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 thousand.

As a last point on reliance, overruling *Williams* would not affect only 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). Petitioner fails to establish sufficient grounds for this Court's taking the extraordinary step of invalidating thousands of criminal and civil judgments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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