No. 24-7489

IN THE
SUPREME COURT OF THE UNITED STATES

MARK TODD MINOR,

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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QUESTIONS PRESENTED

I.

For a description of the place to be searched in a search warrant to meet the particularity requirement of the Fourth Amendment, it is sufficient if the description allows the officer, with reasonable effort, to ascertain and identify the place intended. *Maryland v. Garrison*, 480 U.S. 79, 88 (1987); *Steele v. United States*, 267 U.S. 498, 503 (1925) (citations omitted). The question presented is whether the warrant was sufficiently particular by way of the address and photograph of the location to allow the officers to ascertain and identify the target residence.

II.

When a private citizen has already conducted a search of property, the reasonableness of a subsequent government search of the same property is measured by the degree to which the search exceeded the scope of the private search. *United States v. Jacobsen*, 466 U.S. 109, 115 (1984). The question presented is whether law enforcement exceeded the scope of the searches previously conducted by a Facebook employee of the same images.

III.

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 twelve-juror requirement in the Constitution, even though most founding-era juries consisted of twelve persons.

Relying on *Williams*, Florida and five other states continue to use fewer than twelve jurors in at least some criminal trials. In Florida, where all noncapital crimes are tried before six-member juries, roughly 5,000 criminal convictions are currently pending on direct appeal.

As in *Guzman v. Florida*, 144 S. Ct. 2595 (2024), the question presented is whether the Court should overrule *Williams* and hold that the Sixth Amendment requires the use of twelve-person juries in serious criminal cases.

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STATEMENT OF THE CASE

Detective Brian Pherson of the internet crimes task force for the Palm Beach County Sheriff's Office received a cyber tip on November 2, 2020, from the National Center for Missing and Exploited Children (NCMEC) (R. 782–785). The tip indicated that files containing child pornography had been uploaded from a specific Facebook account associated with the email address markminor69@gmail.com (R. 349, 790). NCMEC also provided the birthdate, email addresses, phone number and IP addresses of petitioner Mark Minor (R. 790). Shortly after this cyber tip, Detective Pherson received a second cyber tip from NCMEC originating from Facebook with Minor's name and the same information (R. 795).

Detective Pherson subpoenaed records and received confirmation that the phone number, Gmail account, and Yahoo email belonged to Minor (R. 791–792). He looked up Minor in the driver's license database to determine his address and confirmed through surveillance that Minor resided at that address by observing Minor at the residence and learning that the vehicle and boat at the address were registered to Minor (R. 797–799).

Facebook flagged the child pornography after hash value matches to the images were automatically detected (R. 795–796). Detective Pherson explained that a hash value is a series of letters or numbers that uniquely identify a specific file (R. 786–787). The hash value is associated with an image previously identified as known child pornography in Facebook's system (R. 796).

NCMEC also keeps a log of files with hash values so that anytime a file with a unique identifier is uploaded, a hash match occurs (R. 787). The reported images are attached to the cyber tip (R. 796).

Detective Pherson applied for a search warrant at Minor's address (R. 800). Because he copied and pasted from a template, he made a mistake in drafting the directionals portion of the warrant, but the directionals in the affidavit were themselves correct (R. 802–803). The warrant was reviewed by a sergeant and assistant state attorney before being signed by a judge (R. 802).

The search warrant set out in bold on the front page that the target residence was 3098 Perry Ave., Greenacres, FL 33462 (R. 376). It included on the first page of the warrant a photograph of the house, the same photo shown in the application (R. 345, 376). The photograph centered around a black, stand-alone mailbox with the stern of a boat behind it in front of a light-colored house (R. 376). The warrant described the premises as being occupied by the Minor Family (R. 377). It gave directions on the second page of the warrant, however, to 5037 Angola Circle (R. 377).

Detective Pherson developed an "ops plan" for the SWAT team on the address and the individuals at the premises (R. 804). The ops plan included an aerial view and street view of the residence (R. 804–05, 827). Detective Pherson testified that the SWAT team has a "scout" go to the residence and make sure the scene is safe before the SWAT team and investigating detectives go there (R. 807–08). Then the SWAT team proceeds to the residence to clear it, followed by the investigative team, which

included Detective Pherson in this case (R. 808). In the execution of this warrant, nobody went to the wrong address (R. 808).

The detective believed that the SWAT team had a copy of the affidavit with them along with the warrant (R. 829). The affidavit directed that the original of the affidavit and application be kept in the custody of the executing agency until further order of the court or release by the executing agency (R. 380). It set forth the address as 3098 Perry Ave., Greenacres, FL 33463 with directions to that address (R. 345–346). The description notes that "3098" is affixed in black lettering on a white background to a black mailbox (R. 346).

Detective Pherson testified at the hearing on the motion to suppress that the reported files were previously identified as known child pornography and that, based on a hash value match, Facebook generated the report to NCMEC (R. 796). He viewed the images on receipt to verify the content of the files (R. 796).

The images with hash value matches were already identified as child pornography within the system (R. 833). Detective Pherson explained in the affidavit that when an automated system flags hash values, or signatures for an individual file, like "digital DNA," the system forwards it to NCMEC (R. 351). He explained that when Facebook responds "No," it has not viewed the contents. When Facebook does not answer, an employee of Facebook has previously viewed the image and rendered an opinion that it involved a sex act involving a prepubescent minor but has not contemporaneously viewed it (R. 351). Facebook uses a label in its cyber tips: "1" to

identify sex acts; "2" to identify lewd exhibition; "A" to signal an image involving a prepubescent minor; and "B" to signal an image involving a pubescent minor (R. 350).

Minor filed an amended motion to suppress the search of his residence and argued that the description of his residence in the warrant was inaccurate, that there was insufficient probable cause, that the detective's viewing of the images referred by NCMEC violated his Fourth Amendment rights, and that his statement was coerced (R. 312–324). At the close of the hearing on the motion, Minor's counsel made arguments but did not address the claim that the detective improperly viewed the images without a warrant (R. 837–46). The trial court did not make any findings at the hearing but deferred ruling (R. 852). The written order specifically discusses the warrant description and statement but does not discuss the incorrect directions in the warrant (R. 411–420).

Minor was ultimately convicted for possession of child pornography. On appeal, he argued that the trial court erred in denying the motion to suppress because the warrant gave an incorrect description of the place to be searched and because the detective viewed the images before obtaining a warrant, that it improperly denied the motion for judgment of acquittal, that the prosecutor's closing argument gave rise to fundamental error, and that he was unconstitutionally denied a twelve-member jury. The Fourth District *per curiam* affirmed the convictions without written opinion, foreclosing Minor's path to the Florida Supreme Court.

REASONS FOR DENYING THE PETITION

I. THE WARRANT MET THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT BECAUSE THE EXECUTING OFFICERS WERE ABLE TO ASCERTAIN AND LOCATE THE PLACE TO BE SEARCHED.

The Court should deny certiorari on question I because Minor's petition is fact-bound, because it presents no conflict among the lower courts, and because the lower court's ruling was correct. Minor asserts that the warrant violated the Fourth Amendment because the description with step-by-step directions was incorrect (Pet. at 16–21). The warrant, nonetheless, was not deficient because it set out information, including the exact address and a photograph of the property with distinguishing identifiers, that allowed the executing officers to readily locate Minor's residence.

The touchstone of the Fourth Amendment is reasonableness, which is measured in objective terms by considering the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). "It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925) (citations omitted). The warrant did so in this case.

This Court's decision in *Maryland v. Garrison*, 480 U.S. 79 (1987) is instructive. In *Garrison*, the warrant directed officers to the third floor of a building at a specific address but did not specify which of the two apartments located there was the target apartment. *Id.* at 80–81. The officers searched the wrong apartment before discovering the fact that there was a second apartment in the building. *Id*. This

Court still held that the officers' conduct was consistent with a reasonable effort to ascertain and identify the place to be searched. *Id.* at 88.

A warrant is not necessarily invalidated because it erroneously describes the place to be searched. *United States v. Burke*, 784 F.2d 1090, 1092 (11h Cir. 1986). "[P]ractical accuracy rather than technical precision controls the determination of whether a search warrant adequately describes the place to be searched." *United States v. Hutchings*, 127 F.3d 1255, 1259 (10th Cir. 1997) (*quoting United States v. Occhipinti*, 998 F. 2d 791, 799 (10th Cir. 1993)). A correct street address in a warrant is sufficient to particularly describe the place to be searched even if no other description is given. *United States v. Dancy*, 947 F.2d 1232, 1234 (5th Cir. 1991).

In this case, the warrant listed the correct address in bold on its first page (R. 376). It also included on the top page a photograph of the premises (R. 376). The photo had a black, free-standing mailbox in the foreground with the house number affixed to it. *See United States v. Kirtdoll*, 101 F.4th 454, 457 (6th Cir. 2024) (highlighting that the warrant included a unique and unmistakable identifier of a red star affixed to the west side of the house). A boat was shown in the driveway (R. 376). The warrant stated that the premises were occupied by the Minor Family (R. 377).

In considering the sufficiency of a warrant, a court may consider an executing officer's knowledge. *Hutchings*, 127 F. 3d at 1259–60; *Burke*, 784 F.2d at 1092–93 (11th Cir. 1986). The executing officers in the instant case received information about the residence before serving the warrant. Detective Pherson briefed the SWAT team on the residence and provided an aerial and street-view map of the location (R. 804–

805, 827). The SWAT team sent out a scout to locate the property before the team headed to the property (R. 807–808). Moreover, Detective Pherson believed that the executing officers had the affidavit which included the correct directionals (R. 829).

Because the warrant in this case provided accurate information about the location of the residence on which the executing officers could rely to locate the correct house, it was not wholly deficient. This case, therefore, is unlike *Groh v. Ramirez*, 540 U.S. 551 (2004), in which the warrant did not provide any description of the type of evidence to be sought. *Groh*, 540 U.S. at 563–65. This Court in *Groh* deemed the warrant facially deficient because even a cursory glance at it would reveal a glaring deficiency in that it did not just "misdescribe a few of several items." *Id.* at 557–58. Here, though, a cursory glance at the warrant would have disclosed the correct address to Minor's residence, along with a photograph of the house and mailbox.

Even where a residence is omitted from the grant-of-authority section of a warrant, the good-faith exception may be applied. In *United States v. Watson*, 498 F.3d 429 (6th Cir .2007), the Sixth Circuit decided that the omission of the residence from the grant-of-authority was a clerical error that was not nearly as glaring as the one in *Groh* because the introductory portion of the warrant put an executing officer on notice that the search extended to the premises. *Id.* at 432–33. The court stressed that *Groh* does not impose a strict proof-reading requirement. *Id.* at 433. It reasoned that exclusion of evidence would not further the purpose of deterring police because the error was a drafting oversight. *Id.* at 434.

The good-faith exception to the exclusionary rule also applies to the circumstances of this case. *See United States v. Thomas*, 263 F.3d 805, 808 (8th 2001). The affidavit contained the correct information, the officers executing the warrant did not act in bad faith, the warrant described the premises, the officers scouted the premises before execution, and the warrant was issued by a neutral judge after being reviewed by others. *Id.*

II. THE DETECTIVE'S VIEWING OF THE IMAGES DID NOT EXCEED HE SCOPE OF THE PRIOR VIEWING OF THE SAME IMAGES BY A FACEBOOK EMPLOYEE BEFORE HASH VALUES WERE ASSIGNED TO THE IMAGES.

The Court should also deny certiorari on question II because Minor's petition is fact-bound and because the lower court's ruling was correct. Minor argues that the hash-value technology did not search the attachment when it compared hash values (Pet. at 22–25). This argument ignores that the image was first viewed by a Facebook employee before the hash value was assigned to it to compare the value to the instant images by way of technology. The detective's viewing of the same image did not exceed the scope of Facebook's search.

As a preliminary matter, because the Fourth District *per curiam* affirmed the convictions without a written opinion, it is unclear whether the court affirmed based on the merits of this argument. Florida argued on appeal that Minor had not preserved his claim that Detective Pherson violated his Fourth Amendment rights by viewing the images because the trial court never specifically ruled on this ground in the order that expressly addressed other grounds raised in the motion to suppress. *See Wallen v. State*, 984 So. 2d 655, 656 (Fla. 1st DCA 2008) (holding that the

defendant failed to preserve for review his alternative argument in the motion to suppress because he failed to get a ruling on that issue even though the court addressed the first issue raised in the motion).

Detective Pherson did not violate Minor's reasonable expectation of privacy because a Facebook employee previously viewed the images and created a hash value system to flag the images uploaded by Minor. Once an original expectation of privacy is frustrated, the Fourth Amendment does not prohibit the government from obtaining the information that was revealed to a private party. *United States v. Jacobsen*, 466 U.S. 109, 113 (1987). In *Jacobsen*, this Court determined that government agents did not infringe on the respondents' privacy rights by pushing aside crumpled paper and picking up tubes made of tape from a box because the box had already been opened by FedEx employees who had removed the tubes and plastic bags. This Court reasoned that the government could have learned nothing from the search unless there had been a flaw in the employees' recollection that the tubes contained plastic bags of white powder. *Id*. at 119.

Detective Pherson's viewing of the reported images was akin to the removal of the tubes and identification of the white powder in *Jacobsen*. In both instances, law enforcement confirmed what private citizens already saw. A private citizen originally viewed the image and deemed it child pornography before Facebook's system detected a hash-value match (R.796, 833). Detective Pherson explained that the hash value is a unique number, like a digital fingerprint (R. 351, 786–787). The match indicates that the image is known child pornography.

When a law enforcement officer receives an image with a hash value match to known child pornography images, the officer knows with "'almost absolute certainty'" that the images contain child pornography, since hash values are "'specific to the makeup of a particular image's data.'" *United States v. Reddick*, 900 F.3d 636, 639 (5th Cir. 2018), quoting *United States v. Larman*, 547 F. App'x 475, 477 (Fla. 5th Cir. 2013) (unpublished). For that reason, the Fifth Circuit in *Reddick* held that the detective's search of images did not exceed the search by Microsoft Skydrive, which, through a program called PhotoDNA, scanned the hash values of the images and detected a match to images of known child pornography. *Id*. at 638. *See also United States v. Meals*, 21 F.4th 903, 908 (5th Cir. 2021) (holding that NCMEC did not exceed the scope of Facebook's search by reviewing the "identical" information that Facebook reviewed).

The *Reddick* court stressed that there was no allegation that the detective's search encompassed any file other than flagged pornography, which is also true in this case. 900 F.3d at 639. This point differentiated the case from the situation in *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016) in which the investigator viewed an email and three attachments which did not correspond to a hash value match. *Id*. at 640.

Similarly, in *United States v. Miller*, 982 F.3d 412 (6th Cir. 2019), the Sixth Circuit analogized Google's electronic inspection to the search of the box by the FedEx employee in *Jacobsen*. *Miller*, 982 F.3d at 429. In *Miller*, Google scanned the Gmail account and learned by way of hash-value technology that two uploaded files matched

child pornography *Id*. at 417. Google sent a report with the two files to NCMEC, which sent the files to a local law enforcement agency corresponding to the IP address for the email account. *Id*.

Miller claimed that the detective exceeded the scan by Google by viewing the files. *Id*. at 426. The court determined, however, that the detective had the same level of "virtual certainty" that the FedEx employee in *Jacobsen* had. *Id*. at 429–31. It pointed out that the virtual search, which undertook a pixel-by-pixel inspection, likely revealed more than a manual inspection. *I*d. at 430–31. For this reason, the court opined that the written descriptions later given by law enforcement did not exceed the hash-value match which revealed known child pornography. *Id*.

Minor claims that the private search in the instant case was like the search by the private citizen in *Walter v. United States*, 447 U.S. 649 (1980), who read labels on boxes of film instead of viewing the films. Minor misses the point that a Facebook employee had previously viewed the images at issue.

In *Walter*, FBI agents used a projector to view films contained in boxes within packages that had been mistakenly shipped to a company whose employees examined the boxes, with one employee opening a box and holding up a piece of film to try to view it. *Id*. at 651–52. The boxes were labelled with suggestive drawings and explicit descriptions of the contents that indicated the boxes contained obscene images. *Id*. This Court noted, "[p]rior to the Government screening one could only draw inferences about what was on the films." *Id*. It did not consider whether the Government could have viewed the films if the private party had done so first. *Id*. at

n.9. *Compare United States v. Simpson*, 904 F. 2d 607, 610 (11th Cir. 1990) (holding that agents' search did not exceed the scope of FedEx employees who also viewed the films in the opened package).

Here, a private citizen previously viewed the images. In *Jacobsen*, this Court articulated, "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search." *Jacobsen*, 466 U.S. at 120. The same is true here even though Facebook did not provide a specific description of the contents of the images.

A government search does not exceed a private search where the search reveals nothing of significance that the private search already disclosed. The significance of a hash match to known child pornography is that the image is the same that was previously viewed by a social media employee. *United States v. Lowers*, 715 S.Supp.3d 741, 75556 (E.D.N.C. 2024). The notion that a computer scan that searches for a hash value matches only a known hash value and reveals nothing about the particulars of an image, *see United States v. Maher*, 120 F.4th 297, 315, 317 (2d Cir. 2024), does not account for the significance of the hash-value match. The match is not to just another image with the same hash value; it is to the other image which was ascribed the same hash value because it is the same image.

Exclusion would not be warranted in this case. At the time of Detective Pherson's search in November of 2020, the only Florida court to write on the issue held that a hash value match permitted a subsequent viewing by law enforcement.

See Morales v. State, 274 So. 3d 1213, 1218 (Fla. 1st DCA 2019). Federal circuits also agreed at that time that hash-value matches permitted viewing by detectives receiving cyber tips from NCMEC. *See Maher*, 120 F.4th at 322 (finding that the good faith exception applied because, at the time the detective conducted the search in July of 2020, the only two federal circuits to have considered the private search doctrine in the context of hash value scans decided that the officers did not exceed the private searches when they conducted a visual inspection of the images).

III. SIMILAR TO *GUZMAN V. FLORIDA*, 144 S. CT. 2595 (2024), THIS CASE DOES NOT WARRANT REVIEW.

Lastly, Minor implores the Court to recede from *Williams v. Florida*, 399 U.S. 78, 86 (1970), and recognize a right to a twelve-member jury. (Pet. at 26–37). A nearly identical argument was before this Court just last year in *Guzman v. Florida*, 144 S. Ct. 2595 (2024). There, the Court denied review. Florida adopts the arguments it made in *Guzman* and applies those arguments herein as nothing in the legal landscape has changed since *Guzman* nor is there anything about the instant case which necessitates a different result.

A. The Court Should Reject Petitioner's Invitation to Reconsider and Overrule *Williams*.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that the Sixth Amendment permits juries comprised of six members in serious criminal cases. Although Minor urges the Court to grant review to overrule this fifty-five-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.

Minor is wrong to dismiss the quality of *Williams*' reasoning as "functionalist logic." (Pet. at 31). 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 thirteen 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"). This Court in *Williams* examined the history surrounding the common-law twelve-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 twelve jurors. *See id.* at 99–100.

Minor makes no attempt to identify error in that analysis. As *Williams* observed, although 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 twelve 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 Minor 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 this Court in *Williams* correctly observed, any such contention would be inconsistent with the Sixth Amendment'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://ti-nyurl.com/muu5xzfa. Those would seem dramatic reactions to the mere trimming of surplusage.

Minor errs in contending that this Court's recent decision in *Ramos* requires overruling *Williams*. (Pet. at 29–30). In *Ramos*, the Court 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—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 (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); *U.S. 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.

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 twelve 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 twelve-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. U.S.*, 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.

Minor 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. Minor 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 twelve-person juries. (Pet. at 32–37); *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 twelve-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 twelve-person juries

than six-person juries. Yet empirical data shows no significant differences in the rates of hung juries between six- and twelve-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 unanimous, 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 twelve jurors. For example, between 2017 and 2019, felony juries in Florida convicted defendants at rates of 74.0%,[1] 73.3%,[2] and 72.1%,[3] respectively. In the same years,

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See Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2016-17 3-21* (2018), https://ti-nyurl.com/4drv24ky (1,901 convictions out of 2,570 cases that went to the jury).

[2] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2017-18 3-21* (2019), https://ti-nyurl.com/433vwfy3 (1,784 convictions out of 2,434 cases that went to the jury).

[3] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2018-19 3-21* (2020), https://ti-nyurl.com/43zywh5n (1,621 convictions out of 2,248 cases that went to the jury).

felony juries in Texas convicted at rates of 79.0%,[4] 81.0%,[5] and 78.0%;[6] felony juries in California convicted at rates of 86.0%,[7] 85.0%,[8] and 84.0%;[9] and felony juries in New York convicted at rates of 74.6%,[10] 73.7%,[11] and 75.2%.[12] Minor'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 twelve-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.[13] It is thus not true, as Minor would have it, that *Williams*' assessment of the six-person jury's effectiveness "has proven incorrect." (Pet. at 31).

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

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

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

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

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

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

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

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

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

[13] Relying on studies purporting to show that smaller juries result in fewer minority jurors, Minor suggests that six-person juries threaten the right to a jury drawn from a fair cross-section of the community. (Pet. at 23); *see also Khorrami*, 143
(footnote continued)

Minor adds insult to error in suggesting that Florida's six-person jury rule was adopted "to suppress minority voices." (Pet. at 35). Beyond noting that the rule dates from Reconstruction, however, Minor 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. Minor 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. at 33). 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.

Finally, Minor 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, which have for decades relied on *Williams* in using criminal juries of less than twelve jurors.

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).

Florida is the third most populous state in the country and tries all noncapital crimes before six-person juries. Currently, roughly 5,000 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 twelve 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 twelve-person juries).

B. This Case is a Poor Vehicle.

As in *Guzman*, the case *sub judice* is a poor vehicle for reconsidering *Williams*. This Court generally avoids deciding legal issues when doing so will have no effect on the litigants in the case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Yet even if the Court granted the petition and overruled *Williams*, Minor would not obtain relief because the error would be harmless.

A constitutional error at trial generally does not require automatic reversal. *Chapman v. California*, 386 U.S. 18, 22 (1967). An error usually requires reversal only if it was likely to have affected the outcome of the trial. *Id.* Thus, "most constitutional errors can be harmless." *Neder v. U.S.*, 527 U.S. 1, 8 (1999). If the defendant had the assistance of counsel in a trial with an impartial adjudicator, "there is a strong presumption" that any errors are subject to harmless-error analysis. *Id.*

The only exception to the general rule subjecting constitutional errors to harmless-error analysis is for so-called "structural errors." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). But the exception applies only to a "very limited class" of errors. *Neder*, 527 U.S. at 8. Those errors fall under three categories—none of which would include empaneling fewer than twelve jurors. First, an error may be structural when the violated right protects some interest other than preventing erroneous convictions. *Weaver*, 137 S. Ct. at 1908. But Minor himself argues that accuracy is the interest protected by the purported twelve-person requirement. (Pet. at 32–34). Second, errors are structural when they are inherently harmful such that they always result in fundamental unfairness. *Weaver*, 137 S. Ct. at 1908. Smaller

juries, however, cannot be said to *always* result in unfairness—in many cases they will have no effect or may even benefit the defendant. Third, an error is structural if the effect of the error is impossible to determine. *Id.* But as this Court held in *Neder*, the effect of violating a defendant's Sixth Amendment jury right is sometimes possible to determine because a court can review the record and, if the evidence is "overwhelming" and "uncontroverted," determine beyond a reasonable doubt what the jury would have done. 527 U.S. at 9.

In *Neder*, an element of the charged offense was omitted from the jury instructions such that the jury did not find every element of the offense. *See id.* at 8. Even though that error deprived the defendant of his Sixth Amendment jury right because the omission meant a jury never convicted him of the charged offense, the Court held that the error was harmless. *Id.* at 15, 19–20. Because the record contained "overwhelming" and "uncontroverted" evidence of the omitted element, the Court found beyond a reasonable doubt that the jury would have found the omitted element. *See id.* at 9, 19–20. Similarly, this Court has subjected other deprivations of a Sixth Amendment jury to harmless-error analysis. *See Washington v. Recuenco*, 548 U.S. 212, 221–22 (2006) (subjecting a judge's unconstitutional finding of a fact that increased the maximum possible sentence to harmless-error analysis); *Hurst v. Florida*, 577 U.S. 92, 102–03 (2016) (remanding to determine whether depriving defendant of the right to have a jury find aggravating factors necessary for a death sentence was harmless).

Were *Williams* overruled, the same reasoning would apply here. A court can review the trial record and evaluate whether the evidence was "overwhelming" such that there is no reasonable doubt that an additional six jurors would not have affected the outcome. If anything, the case for harmless-error review is stronger here than in *Neder* as an appellate court at least has the benefit of a jury finding as to each element of the offense.

The State would prove any error here harmless beyond a reasonable doubt. The evidence at trial was "overwhelming." Minor had an account on the computer and the images were downloaded from a website for which Minor had a subscription (T. 377-378). Minor admitted to his wife that he did not know why he kept all of the material (T. 470-471). Changing the size of the jury would not have altered that outcome. Thus, Minor would not be entitled to reversal of his conviction whether or not the Court overruled *Williams*. So even if the Court wishes to take the drastic step of overruling a fifty-five-year-old precedent, the Court should at least do so in a case where the decision will affect the ultimate outcome.

CONCLUSION

Based on the foregoing, Minor's petition for writ of certiorari should be denied.

Respectfully submitted,

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