No. 25-166

IN THE
Supreme Court of the United States

JOSE JOYA PARADA, OSCAR ARMANDO SORTO ROMERO, MILTON PORTILLO RODRIGUEZ, AND JUAN CARLOS SANDOVAL RODRIGUEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The United States' brief in opposition is notable for what it does not say. The Government never says that *Williams* v. *Florida*, 399 U.S. 78 (1970), was rightly decided. The Government never says that the *stare decisis* factors require this Court's adherence to *Williams*. And the Government does not dispute that *Williams*'s continued vitality is a recurring and important question. Nor could it.

A "mountain of evidence suggests that, both at the time of the [Sixth] Amendment's adoption and for most of our Nation's history, the right to a trial by jury *** *meant* a trial before 12 members of the community—nothing less." *Khorrami* v. *Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from the denial of certiorari). Federal Rule of Criminal Procedure 23 nevertheless permitted "a jury of 11 persons" to convict Petitioners once the District Court excused one of the jurors for "good cause." Fed. R. Crim. P. 23(b)(3). Rule 23 cannot be reconciled with the Sixth Amendment's original meaning. But it is the direct result of this Court's decision in *Williams*—a case that was wrong the day it was decided, and whose reasoning has been fatally undermined by this Court in the years since.

The Government spends the bulk of its response extensively quoting—though not necessarily endorsing or bolstering—*Williams*. But the Government's concessions and omissions speak louder than its recitation of *Williams*'s reasoning. The Government concedes that at "common law the jury did indeed consist of 12" members. Opp. 9 (quotation marks omitted). The Government does not dispute that *Williams* dismissed common-law tradition as a "historical

accident," and defined the "relevant inquiry" as whether the "function" of the jury depends on any "particular number of [jurors]." 399 U.S. at 99-101; Opp. 8, 13. And the Government does not deny that in *Ramos* v. *Louisiana*, 590 U.S. 83 (2020), this Court repudiated "functionalist assessment[s]" of the Sixth Amendment's scope and overruled a case that relied extensively on *Williams*'s reasoning, *id.* at 100; *see* Opp. 15-16.

Unable to engage on the merits, the Government instead attempts to reframe this case as a "narrow" dispute over whether the Sixth Amendment permits an 11-person jury to return a verdict where, as here, the court dismissed the twelfth juror for good cause. Opp. 16. That is a red herring. This Court has already acknowledged that good-cause dismissals can deprive defendants of their Sixth Amendment rights. *See Patton* v. *United States*, 281 U.S. 276, 286, 292 (1930) (agreeing that defendants did not receive "a constitutional jury of twelve" where a "jury of twelve men was duly impaneled" but "one of the jurors, because of severe illness, became unable to serve," and "a verdict of guilty was rendered by the eleven jurors") (abrogated by *Williams*, 399 U.S. at 102). However the question presented is framed, Petitioners' convictions would be invalid if *Williams* were overruled.

This petition provides the Court an opportunity to "correct [*Williams*'s] error" and restore the Sixth Amendment's jury-trial right to what it "is and has

always been." *Khorrami*, 143 S. Ct. at 27. The Court should grant certiorari and reverse.

ARGUMENT

A. This Case Is The Ideal Vehicle To Resolve The Important And Recurring Question Presented.

1. The question presented is ripe for this Court's intervention. Lower courts routinely confront questions implicating *Williams*'s continued vitality. Pet. 33-34. Since *Ramos*, federal and state courts have openly questioned whether *Williams* remains good law. Pet. 33. And another petition raising the question presented is pending this Term. *Minor* v. *Florida* (No. 24-7489). The Government does not dispute these points.

The Government seeks instead to paint the question presented as oft-and-recently denied. Opp. 7. It is not. The Government offers just 4 examples—*from the past 17 years*—of cases in which this Court denied petitions seeking to overrule *Williams*. *Id.* Considering the "nearly 50 million Americans * * * currently being denied their right to a twelve-person jury," FACDL Br. 18, the four certiorari denials that the Government collects do not add up to an endorsement by this Court of the practice. Moreover, two of those denials yielded thorough dissents that the Government fails to acknowledge or address. *See Cunningham* v. *Florida*, 144 S. Ct. 1287 (2024) (Gorsuch, J., dissenting from the denial of certiorari); *Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from the denial of

certiorari); *see also id.* at 22 (noting Justice Kavanaugh's vote to grant the petition).

Nor does the Government acknowledge the vehicle issues that plagued prior cases. In previous petitions, the constitutional issue was not fully preserved, Pet. 31, the convictions at issue did not squarely implicate the Sixth Amendment, *id.*, or the case presented thorny questions of incorporation and state procedural barriers, *id.* at 32. This case presents none of those issues. *Id.* at 31-32.

2. Although this case is not complicated by traditional vehicle problems, the Government works to manufacture one based on Rule 23's good-cause standard. Opp. 17. In the Government's view, because the District Court initially empaneled 12 jurors but then "dismissed the twelfth juror for good cause after the 12-person jury ha[d] already engaged in extended deliberations," Petitioners' convictions would "not necessarily be unconstitutional if *Williams* were overruled." Opp. 16-17. That is wrong.

This Court has previously considered the scope of the jury-trial right in these precise circumstances. In *Patton* v. *United States*, 281 U.S. 276 (1930), this Court considered whether a defendant can waive the right to a twelve-member panel in a case in which one of the jurors had been excused from service—just before the conclusion of the trial—because of illness. The *Patton* Court understood that good-cause dismissal to clearly implicate the defendants' "Sixth Amendment"

right to have a jury "of twelve men, neither more nor less." *Id.* at 288.

The defendants in *Patton* had been charged with conspiring to bribe a federal prohibition agent, and a "jury of twelve men was duly impaneled." *Id.* at 286. However, a week into the trial, "one of the jurors, because of severe illness, became unable to serve further as a juror." *Id.* The parties then "stipulated" that "the trial should proceed with the remaining eleven jurors." *Id.* The "trial was concluded on the following day, and a verdict of guilty was rendered by the eleven jurors." *Id.* at 287. The defendants later appealed, arguing that they "had no power to waive their constitutional right to a trial by a jury of twelve persons." *Id.* This Court ultimately disagreed, explaining (over the course of 26 pages of the U.S. Reports) that, because a defendant can waive the right to a jury trial via guilty plea, a defendant could also waive the lesser-included right to a twelve-person jury by consenting to proceed with fewer than twelve jurors. *Id.* at 287-313. If the Government were correct that a good-cause dismissal after empanelment presents a different question than a failure to empanel 12 jurors, there would have been no reason for the *Patton* Court to spill all that ink.

In any event, the Government's contention makes no sense. To the extent the Government suggests the Sixth Amendment requires only that a 12-person jury be empaneled (such that the Framers of the Sixth Amendment did not concern themselves with precisely who delivers the verdict), that position is

impossible to square with *Ramos*, 590 U.S. 83. The unanimity of a jury's verdict matters only if the jury-trial right pertains to the jury's verdict as well as its empanelment. And to the extent the Government contends that the Sixth Amendment contains a "good cause exception" (such that the Government need not meet the constitutional requirement if it has a decent reason for failing to do so) that position is impossible to square with the remainder of this Court's Sixth Amendment jurisprudence. The Framers "understood the lesson that the jury right could be lost not only by gross denial, but by erosion." *Jones* v. *United States*, 526 U.S. 227, 248 (1999); *see also, e.g.*, *Erlinger* v. *United States*, 602 U.S. 821, 844 & n.5 (2024); *Apprendi* v. *New Jersey*, 530 U.S. 466, 483 (2000).

B. The Court Should Overrule *Williams*.

1. The Government does not offer a substantive response to Petitioners' contention that *Williams* was demonstrably erroneous the day it was decided because the common law required 12-person juries, and the scope of the Sixth Amendment jury-trial right must be interpreted by reference to the common law. *See* Pet. 18-22. Instead, the Government devotes some six pages of its opposition to extensively quoting—though not endorsing or bolstering—passages in *Williams*, *see* Opp. 8-13. That recitation does not make the opinion any more convincing.

For example, with respect to *Williams*'s treatment of the "common-law history," the Government concedes (at 9) that historical sources agree that "at common

law the jury did indeed consist of 12." The Government nevertheless echoes (at 8) *Williams*'s analysis on this point, including the observation that "during the colonial period," Pennsylvania and South Carolina sometimes employed juries of less than 12. But panels of less than 12 in early America were generally unique to "slave courts"—courts that existed to "try enslaved persons and free persons of color," and "the jurisprudence of early America often cast enslaved persons as outside the ambit of the constitutional order." Professor Su Br. 5-6; *see also* FACDL Br. 6-11 (discussing the history of "Florida's jury of six" in the "Racist Jim Crow Era"). That "sordid history" cuts *against* the Government, not in its favor. *Ramos*, 590 U.S. at 114 (Sotomayor, J., concurring).

Similarly, with respect to *Williams*'s discussion of prior precedent, the Government concedes (at 11-12) that early cases such as *Thompson* v. *Utah*, 170 U.S. 343 (1898) stated that "the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less," *id.* at 349. The Government repeats (at 11) *Williams*'s view that these statements were "unnecessary," but the Government does not engage with Petitioners' contention that the size of the jury was, in fact, central to the *Thompson* Court's analysis of the 8-person jury that had convicted the defendant there. *See* Pet. 20 (quoting *Thompson*'s holding that the conviction was invalid because "when Thompson committed the offense of

grand larceny in the Territory of Utah * * * the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons").

The sole passage of original text in this section of the Government's brief advances (at 10) a novel reading of Matthew Hale's *Historia Placitorum Coronae: The History of the Pleas of the Crown*. According to the Government, Hale "suggest[ed] that the jury could continue without its full complement" when "a good-cause dismissal occurs." Opp. 10. But the Government's reading is based on a single sentence—Hale's statement that "The Justices at common law may upon a just cause remove a juror after he is sworn," 2 Hale 296 (London, 1736)—and the Government candidly admits that "Hale does not specify a remedy" for this error, Opp. 10.

Other sources do. This Court itself has noted that, even in the case of "illness" (as opposed to abscondment) "the absence of one juror would result in a mistrial." *Patton*, 281 U.S. at 286. Founding Era cases similarly explain that a court should order a new trial if a juror becomes unavailable, no matter the cause. *See, e.g.*, *People* v. *Olcott*, 2 Johns. Cas. 301, 306 (N.Y. Sup. Ct. 1801) (detailing the "instances" in which a court should "discharge the jury, and remand the prisoner for another trial," and including Hale's example of "juror escape" alongside a juror "taken in a fit"); *Commonwealth* v. *Cook*, 6 Serg. & Rawle 577, 585 (Pa. 1822) (similar).

And it makes good sense for juror abscondment and juror illness to have the same remedy. In both situations, the defendant—through no fault of his own—is left with 11 jurors. And in both situations, an empaneled juror is no longer able to render a verdict despite having previously participated in the case. Rule 23 is not immunized from constitutional scrutiny through its reference to good-cause dismissals. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* 541 n.2 (Boston, Little, Brown & Co. 4th ed. 1873) ("A trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of *twelve* men. * * * Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.").

2. Next, the Government suggests (at 13-14) that *Williams* may have been right to hypothesize "that there is no discernible difference between the results reached" by juries of different sizes. Indeed, the Government goes so far as to predict that "in circumstances like those here," "any possible practical benefit of 12 jurors until the very end of deliberations was quite likely to be negligible." Opp. 14.

But "empirical research belies the conclusion that juries of fewer than twelve persons are functionally equivalent to twelve-person juries." Constitutional Accountability Center Br. 15-21. "Twelve-person juries deliberate longer and share more facts, ideas, and challenges to conclusions during higher-quality deliberations." FACDL Br. 14. "[E]ven under experimental conditions designed to engender reasonable doubt, * *

* smaller juries favor conviction at higher rates." NACDL Br. 13. Perhaps for that reason, "even those few states, including Utah and Connecticut, with fewer than twelve-person felony juries" have laws "requir[ing] a twelve-person jury in capital cases." UACDL and CCDLA Br. 8 (footnote omitted). Those laws "tacitly acknowledge that something is lost when smaller juries render verdicts." *Id.*

And there is no reason to believe the effect of Juror 9's absence was negligible here. Up until Juror 9's dismissal, the jury had been engaged in substantial deliberations; once she was dismissed, a verdict was reached "[l]ater that day." Pet. App. 17a. Had Juror 9 been the holdout, the District Court's decision to proceed with 11 jurors may well have made all the practical difference. *See, e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993) (finding structural error from deprivation of jury-trial right, where the "consequences *** are necessarily unquantifiable and indeterminate").

3. Turning to "legal developments," the Government maintains (at 14-16) that *Williams* has not been undermined by this Court's subsequent decisions. But the Government, once again, offers an incomplete response to Petitioners' arguments. *See* Pet. 22-25.

For example, while the Government discounts the import of Justice Blackmun's discussion in *Ballew* of "recent empirical data" that undermines *Williams*'s reasoning, Opp. 14-15, the Government does not dispute that five Justices in *Ballew* acknowledged the

arbitrary nature of *Williams*'s holding. *See Ballew* v. *Georgia*, 435 U.S. 223, 239 (1978) (Blackmun, J., joined by Justice Stevens) ("We do not pretend to discern a clear line between six and five"); *id.* at 245-246 (Powell, J., joined by Chief Justice Burger and Justice Rehnquist) (agreeing that a jury of five "involves grave questions of fairness," and observing that "the line between five- and six-member juries is difficult to justify").

Similarly, the Government attempts to distinguish *Ramos* by counting votes. The Government insists (at 16) that "one of the key reasons why *Ramos* refused to accord stare decisis effect to *Apodaca*—*Apodaca*'s unusual fracture * * * —is not present in *Williams*." But the very same fracture is on full display in *Ballew*, 435 U.S. 223, where "no opinion * * * garnered a majority," Opp. 14. And, in any event, *Apodaca* and *Williams* are tightly linked. *See Ramos*, 590 U.S. at 152 (Alito, J., dissenting) (noting that Justice White authored both opinions and that "in *Apodaca*, he built on the analysis in *Williams*").

Moreover, the Government does not dispute that, in *Ramos*, this Court repudiated attempts to define the jury-trial right through "functionalist assessment[s]" rather than history and tradition. *Ramos*, 590 U.S. at 90-91, 100; Opp. 15-16. Yet, in *Williams*, the Court had concluded that the "relevant inquiry" in interpreting the Sixth Amendment "*must* be the function" a jury performs, and whether that function is "less likely to be achieved when the jury numbers six, than

when it numbers 12." 399 U.S. at 99-100 (emphasis added). That is precisely the "muddy yardstick" *Ramos* rejected. 590 U.S. at 99.

4. Having completed its reprint of *Williams*, the Government ends its brief. But there are other components of the *stare decisis* analysis. And Petitioners have shown that these factors favor overruling *Williams*. *See* Pet. 28-30.

Overruling *Williams* would not be unduly disruptive. "In the federal system," "Rule 23(b)(3) serves little practical purpose that couldn't be served by alternatives that comport with the historical jury-trial right." NACDL Br. 19. Contrary to the Rules' Committee's analysis, Advisory Committee's Notes on 1983 Amendments to Fed. R. Crim. P. 23, 18 U.S.C. App., p. 1568, courts have ample tools to address the loss of a juror during deliberations. Alternate jurors can be summoned back to the courtroom, deliberations can be postponed, or remote proceedings can be held. *See* NACDL Br. 19-21 (discussing the rules and procedures that govern each option).

There would likely be some retrials in the state courts, but the fact that "overruling *Williams* would require a slice of cases to be retried in a half-dozen States is the 'usual' consequence of adopting a 'new rule of criminal procedure.'" FACDL Br. 18 (quoting *Ramos*, 590 U.S. at 108). And the changes to those states' systems would bring practice back into line with the public's expectations. Because "[j]uries depicted in popular culture show twelve individuals,"

criminal defendants are "occasionally troubled when they do not see twelve people sitting in the jury box on their case." UACDL and CCDLA Br. 16-17.

In the end, there is simply no reason to let *Williams* stand. The Government is not "prepared to say [that it] secured [Petitioners'] conviction[s] constitutionally under the Sixth Amendment." *Ramos*, 590 U.S. at 111. This Court should not "perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.*

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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