No. 25-5895

IN THE SUPREME COURT OF THE UNITED STATES

RICKEY JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, notwithstanding that an 11-member jury is constitutionally permissible under Willams v. Florida, 399 U.S. 78 (1970), petitioner was entitled to automatic vacatur of his conviction based on a violation of Federal Rule of Criminal Procedure 23(b), which required petitioner's consent to proceed with an 11-member jury after the 12th juror was dismissed for good cause shortly before deliberations.

2. Whether this Court should overrule Willams, supra, and hold that the Sixth Amendment precludes a trial court from allowing an 11-member jury to return a verdict, where the court dismissed the 12th juror for good cause after the close of evidence.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y):

United States v. Johnson, 21-cr-194 (June 9, 2022)

United States Court of Appeals (2d Cir.):

United States v. Johnson, No. 22-1289 (Sept. 6, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 117 F.4th 28.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-64a) was entered on September 6, 2024. A petition for rehearing was denied on July 14, 2025 (Pet. App. 65a-102a). The petition for a writ of certiorari was filed on October 10, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on

two counts of transmitting threats in interstate commerce, in violation of 18 U.S.C. 875(c); and one count of threatening a United States official, in violation of 18 U.S.C. 115. Judgment 1-2. The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-64a.

1. In January 2021, petitioner used the social-media platform Instagram to contact Fox News host Greg Gutfeld, sending Gutfeld a series of private messages that stated, inter alia, "you will be killed." Pet. App. 4a (citation omitted). Gutfeld e-mailed the messages to Fox's director of corporate security -- with the subject line "Death threat" -- and noted that the sender's profile disclosed that he was in Manhattan. Ibid. (citation omitted). The security director then alerted the New York City Police Department (NYPD). Ibid.

In February 2021, petitioner posted three videos on Instagram featuring clips from Fox News with petitioner speaking over the audio. Pet. App. 4a-5a. In the first video, petitioner threatened to kill Gutfeld and then-Senator Joe Manchin. Id. at 5a. In a second video, petitioner spoke over a Fox News clip of Laura Ingraham and said, inter alia, "you will be killed." Ibid. (citation omitted). In the third video, petitioner spoke over a video of Representative Lauren Boebert and threatened to kill her. Id. at 5a-6a.

Following outreach from the NYPD, the United States Capitol Police notified the offices of then-Senator Manchin and Representative Boebert about petitioner's videos. Pet. App. 6a. Security patrols were stationed outside of then-Senator Manchin's West Virginia home at his request, and a Capitol Police special agent obtained Representative Boebert's schedule to provide extra security for her in Washington, although she did not request any additional security. Ibid. The NYPD arrested petitioner. Ibid.

2. A grand jury in the Southern District of New York indicted petitioner on two counts of transmitting threats in interstate commerce, in violation of 18 U.S.C. 875(c) and 2; and two counts of threatening a United States official, in violation of 18 U.S.C. 115 and 2. Superseding Indictment 1-3.

Twelve jurors and two alternates were selected for petitioner's trial, which began with opening statements and testimony from the Capitol Police special agent who had investigated the threats. Pet. App. 7a. The next morning, an alternate juror (Alternate No. 2) informed the district court that she had spent all night in the hospital and would not be able to arrive at court until the early afternoon. Ibid. Although the defense asked to wait for Alternate No. 2 to arrive, the court dismissed her and proceeded with trial. Ibid.

That same morning, the district court also considered two incidents involving Juror No. 2. Pet. App. 7a-8a. First, an NYPD

detective involved in the investigation reported that, during a recess the previous day, he had overheard Juror No. 2 saying that "the white man stole Manhattan from the Native Americans"; "Abraham Lincoln did not want to free the slaves" but did so "because the northern states had [an] interest in cheap labor"; "General Sherman and another general from the Union Army slaughtered the plains Indians" when building the intercontinental railroad; and "the white man killed the Native Americans who had tobacco farms in the United States" due to the financial interests of Englishmen in tobacco. Id. at 7a (citation and quotation marks omitted). The detective said that Juror No. 2's statements were "unprompted" and were initially directed at a group that included other jurors, but were later directed toward the detective himself as others walked away. Id. at 8a. Second, the court itself alerted the parties that on that same morning, Juror No. 2 had approached the woman who brought coffee to the jurors and started talking to her. Ibid.

When the district court questioned Juror No. 2 about his statements to the detective, the juror denied speaking to the detective, became indignant, and demanded the identification of his "accuser." Pet. App. 8a (citation omitted). The juror acknowledged speaking to the woman who delivered coffee but denied discussing the case with her. Ibid. The government requested that Juror No. 2 be dismissed for good cause on the ground that he was disruptive and would be biased against the government based on

the incident involving the detective. Ibid. The court permitted Juror No. 2 to remain on the jury pending further consideration. Ibid. Later that day, the court observed Juror No. 2 sleeping during testimony, which the juror denied when confronted by the court. Ibid.

The next morning, the district court informed the parties that Juror No. 7, who had told the court that he was unlikely to attend proceedings for a few days due to childcare issues, would be dismissed. Pet. App. 9a. Neither party objected, and Alternate No. 1 replaced Juror No. 7. Ibid. At that point, there were 12 jurors and no remaining alternates. Ibid.

The district court then revisited the situation with Juror No. 2. Although the court determined that the sleeping episode required no further action and that Juror No. 2 had not been deliberately untruthful when questioned about the incident with the detective, the court recognized that the juror had been agitated and upset by what he viewed as an unfair and inaccurate accusation. Pet. App. 9a-10a. And the court found that Juror No. 2 likely attributed the accusation to the prosecution team; that the facts supported a finding of "presumption of bias"; and that, as a factual matter, the juror was "actively biased against the government." Id. at 10a (citation omitted). The court accordingly dismissed Juror No. 2 for good cause on bias grounds. Ibid.

Federal Rule of Criminal Procedure Rule 23(b) provides that a jury generally consists of 12 members "unless this rule provides otherwise." Fed. R. Crim. P. 23(b)(1). The Rule further provides that the parties may "[a]t any time before the verdict" stipulate with the court's approval (A) to a jury consisting of fewer than 12 people; or (B) to a jury of fewer than 12 people returning a verdict "if the court finds it necessary to excuse a juror for good cause after the trial begins." Fed. R. Crim. P. 23(b)(2). The Rule also provides that, "[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b)(3).

Here, the district court proceeded with 11 jurors without obtaining a stipulation from the parties. Pet. App. 10a. After the court denied petitioner's motion for a mistrial, the parties delivered closing arguments and the 11 jurors began deliberations. Ibid. The jury found petitioner guilty on both counts of transmitting threats in interstate commerce and on the count of threatening a United States official related to then-Senator Manchin, but not guilty on the count related to Representative Boebert. Id. at 11a; see Superseding Indictment 1-3. The court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-64a. The court of appeals determined, and the parties agreed, that the district court had violated Rule 23(b) by proceeding with an 11-member jury without a stipulation from the parties, before deliberations began. Id. at 12a, 19a. But the court of appeals declined to grant petitioner automatic appellate relief on that basis. See id. at 12a-21a.

The court of appeals observed that under this Court's decision in Williams v. Florida, 399 U.S. 78 (1970), there is no constitutional right to a 12-member jury. Pet. App. 13a. It also observed that circuit precedent had accordingly reasoned that "the absolute right to a jury of twelve that [defendants] possessed prior to the 1983 amendment of Rule 23(b)" is no longer classified as a "'substantial right.'" Ibid. (citation omitted). The court then explained that a violation of Rule 23(b)'s 12-juror requirement does not amount to a "structural error" that would warrant automatic reversal, but is instead subject to standard harmless-error analysis under Federal Rule of Criminal Procedure 52(a). Id. at 13a-14a.

The court of appeals observed that this Court has only recognized a "'highly exceptional' category" of structural errors -- all of which involve the deprivation of constitutional rights that define the framework of a criminal trial, such as the right to counsel of choice, the right to self-representation, the right

to a public trial, and the right for a jury to be instructed on guilt beyond a reasonable doubt. Pet App. 14a-15a (citation omitted). The court reasoned that, if even non-"bedrock" constitutional errors are subject to harmless-error review, it follows that nonconstitutional errors are as well. Id. at 15a (citation omitted). The court rejected petitioner's argument that a violation of Rule 23(b) should be a structural error on the theory that it necessarily affects the framework of the trial, noting that Williams does not require a 12-member jury for a reliable determination of guilt. Id. at 16a-17a.

The court of appeals acknowledged that its approach differed from the Fourth Circuit's structural-error approach to a Rule 23(b) error in United States v. Curbelo, 343 F.3d 273 (2003), but stated that it disagreed with that court's decision. Pet. App. 15a-16a. It observed, however, that other decisions declining to analyze prejudice in that context predated this Court's emphasis on the limits of structural-error doctrine in Neder v. United States, 527 U.S. 1 (1999). Pet. App. 15a n.3. The court also acknowledged petitioner's argument that Williams was wrongly decided, but noted that it was bound to follow this Court's precedent. Id. at 18a.

Applying harmless-error analysis to the circumstances of this case, the court of appeals found that the Rule 23(b) violation here was harmless. Pet. App. 19a-21a. The court observed that petitioner did not deny that he had posted the videos at issue and

sent the messages at issue, and that his "only defense was that he 'was not seriously threatening to kill anyone' and that '[n]o reasonable person would view [his] statements as reasonable threats, because they . . . were vague and general.'" Id. at 19a (citation omitted; first set of brackets in original). The court found that "the evidence overwhelmingly showed otherwise" because the videos contained explicit death threats. Ibid.; see id. at 20a-21a (discussing evidence). And the court did not view the split verdict as an indication of a "close case," noting a basis for treating the video threatening Representative Boebert differently from the counts on which the jury found guilt. Id. at 19a, 21a & n.8.

Judge Chin dissented. Pet. App. 39a-64a. In his view, violations of Rule 23(b) are structural error, warranting automatic reversal. Id. at 45a-59a. Alternatively, he would have deemed the error here prejudicial. Id. at 59a-64a.

4. The court of appeals denied a petition for rehearing en banc. Pet. App. 66a-67a. Judge Lohier, joined by Judge Bianco and in part by Judges Kahn, Lee, Robinson, Pérez, and Nathan, concurred in the denial of rehearing. Id. at 68a-73a. In the portion of his opinion joined by all of those judges, Judge Lohier stated that "the question of whether a structural error must implicate a defendant's constitutional rights remains an open one in th[e Second] Circuit because the panel opinion's statements

bearing on a hypothetical structural error that is non-constitutional are clearly dicta." Id. at 68a. The remainder of Judge Lohier's concurrence in the denial of rehearing en banc explained that precedents of this Court and the Second Circuit established that a violation of Rule 23(b) does not affect a defendant's constitutional or substantial rights. Id. at 68a-69a.

Judge Menashi (the author of the original panel opinion), joined by Judges Livingston, Sullivan, and Park, authored a separate concurrence in the denial of rehearing, explaining that the panel opinion was correct and reading the panel opinion to hold that structural errors must be constitutional errors. Pet. App. 74a-84a. Judge Merriam, joined by Judges Lee, Robinson, Pérez, and Nathan, dissented from the denial of rehearing. Id. at 85a-96a. In Judge Merriam's view, structural errors need not be constitutional in nature, and the Rule 23(b) violation in this case was a structural error warranting automatic reversal. Ibid.

Judge Chin filed a statement with respect to the denial of rehearing en banc reiterating the views expressed in his panel dissent and indicating that had he not been in senior status, he would have voted for rehearing en banc. Pet. App. 97a-102a.

ARGUMENT

Petitioner contends (Pet. 13-22) that a violation of Federal Rule of Criminal Procedure 23(b) is a structural error that warrants automatic reversal regardless of prejudice, or the lack

thereof. The court of appeals correctly rejected that argument, and any shallow circuit disagreement on that issue does not warrant review by this Court. Petitioner further contends (Pet. 22-36) that this Court should overrule its decision in Williams v. Florida, 399 U.S. 78 (1970), and hold that the Sixth Amendment right to a trial by jury necessarily requires a 12-person jury. Williams is correct, and petitioner fails to provide a sound reason to reexamine it now. This Court has repeatedly denied petitions for writs of certiorari pressing similar arguments. See Parada v. United States, 2026 WL 79784 (Jan. 12, 2026) (No. 25-166); Cunningham v. Florida, 144 S. Ct. 1287 (2024) (No. 23-5171); Khorrami v. Arizona, 143 S. Ct. 22 (2022) (No. 21-1553); Phillips v. Florida, 142 S. Ct. 721 (2021) (No. 21-6059); Logan v. Florida, 552 U.S. 1189 (2008) (No. 07-7264) (cited by McDonald v. City of Chicago, 561 U.S. 742, 868 n.12 (2010) (Stevens, J., dissenting)). The same result is warranted here.

1. a. Federal Rule of Criminal Procedure 23(b) sets the default number of jurors at 12, Fed. R. Crim. P. 23(b)(1); allows an 11-person jury without stipulation if a juror is excused for good cause after deliberations commence, Fed. R. Crim. P. 23(b)(3); and provides that the parties may "[a]t any time before the verdict" stipulate with the court's approval to a smaller jury either from the beginning or when "the court finds it necessary to excuse a juror for good cause after the trial begins," Fed. R.

Crim. P. 23(b)(2). The Rule is consistent with this Court's holding in Williams, supra, that "the constitutional guarantee of a trial by 'jury'" does not "necessarily require[] trial by exactly 12 persons, rather than some lesser number." 399 U.S. at 86.

As all parties agreed on appeal, the district court violated Rule 23(b) in petitioner's case. To permit the case to proceed with only 11 jurors (shortly) before the beginning of deliberations, the court should have obtained the stipulation of the parties. But that error does not automatically entitle petitioner to a new trial. Instead, under Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see 28 U.S.C. 2111 (directing that appellate courts give no "regard to errors or defects which do not affect the substantial rights of the parties").

That requirement of prejudice ensures that the "significant 'social costs'" that result from reversing criminal verdicts -- "including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time[,] * * * and the frustration of 'society's interest in the prompt administration of justice'" -- will not be imposed without justification. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citation omitted). As this Court has made clear, the "general

rule" is that even "a constitutional error does not automatically require reversal of a conviction." Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

This Court has recognized a "very limited" set of errors that are so intrinsically harmful to the framework of a prosecution that they require automatic vacatur of the defendant's conviction without regard to any case-specific showing of prejudice. Neder v. United States, 527 U.S. 1, 8 (1999) (citation omitted); see United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149 (2006). That "highly exceptional" category of errors includes, for example, the "denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proven beyond a reasonable doubt." Greer v. United States, 593 U.S. 503, 513 (2021).

Only errors that "affect the 'entire conduct of the proceeding from beginning to end'" and "'necessarily render'" the trial "'fundamentally unfair or an unreliable vehicle for determining guilt or innocence'" are classified as structural. Greer, 593 U.S. at 513 (brackets and citations omitted). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred' are not 'structural errors.'" United States v. Marcus, 560 U.S. 258, 265 (2010) (citation omitted).

The error here -- proceeding with 11 jurors after the close of evidence but shortly before deliberations, without petitioner's consent -- is not comparable to the structural errors identified by this Court. Far from suggesting that an 11-member jury is "fundamentally unfair," Rule 23(b) permits such juries in certain circumstances. Indeed, if the district court had waited just a few hours (i.e., until deliberations began) to dismiss Juror No. 2 for cause, the Rule would have allowed it to do so without petitioner's consent. See Fed. R. Crim. P. 23(b)(3).

Because Rule 23(b) contemplates that verdicts will at times be rendered by fewer than 12 jurors, deliberation by an 11-person jury due to a Rule 23(b) error cannot be considered the type of error that has "deprive[d] [petitioner] of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence" and rendered the criminal punishment "fundamentally unfair." Neder, 527 U.S. at 8-9 (citation and quotation marks omitted); see Greer, 593 U.S. at 513. That is consistent with the precedent of this Court, which has itself rejected the notion that a jury with fewer than 12 members is unreliable or unfair to defendants, see Williams, 399 U.S. at 100-102, and has declined to find structural error in the violation of a Federal Rule of Criminal Procedure "not * * * impelled by the Due Process Clause or any other constitutional requirement," United States v. Davila, 569 U.S. 597, 610 (2013).

b. As the court of appeals noted (Pet. App. 15a-16a), a split panel of the Fourth Circuit in United States v. Curbelo, 343 F.3d 273 (2003), deemed a Rule 23(b) error to be structural. But petitioner does not explain why any shallow disagreement as to the remedy for a preserved (as opposed to forfeited) claim of a form of infrequently arising error warrants this Court's review. See United States v. Cotton, 535 U.S. 625, 633-634 (2002) (recognizing that unpreserved claims of structural error do not automatically warrant relief). Moreover, Curbelo was decided before this Court's most recent structural-error decisions, such as Marcus, Davila, and Greer. The majority opinion in Curbelo therefore did not address how a Rule 23(b) error would fit within the "exceptional" category of error that necessarily render the trial fundamentally unfair or unreliable, Greer, 593 U.S. at 513 (citation omitted); see Curbelo, 343 F.3d at 292 (Wilkins, C.J., dissenting).

Although petitioner claims (Pet. 9-10) that the court of appeals' decision holding that a Rule 23(b) error is not structural "created a clear conflict with five other circuits," he focuses principally on Curbelo. None of the other decisions cited by petitioner (Pet. 9-12)[1] undertakes a structural-error analysis, and with one exception each case predated the limitations on

[1] See United States v. Araujo, 62 F.3d 930, 937 (7th Cir. 1995); United States v. Patterson, 26 F.3d 1127, 1129 (D.C. Cir. 1994); United States v. Essex, 734 F.2d 832, 845 (D.C. Cir. 1984); United States v. Taylor, 498 F.2d 390, 392 (6th Cir. 1974); United States v. Guerrero-Peralta, 446 F.2d 876, 877 (9th Cir. 1971).

structural-error classification explicated in Neder, 527 U.S. at 7-15, and cases that followed -- as the court of appeals itself explained. Pet. App. 16a n.4. As lower courts have appropriately recognized post-Neder, this Court's "jurisprudence is increasingly wary of recognizing new structural errors," and, "[i]n recent years, the Court has routinely rejected arguments that additional specific categories of errors should be considered structural." United States v. Brandao, 539 F.3d 44, 60 (1st Cir. 2008).

Moreover, "[i]n nearly all of [the] cases" petitioner cites -- including the only post-Neder case, United States v. Ginyard, 444 F.3d 648, 654-655 (D.C. Cir. 2006) -- "the district court failed to establish sufficient 'just cause' for excusing a juror before proceeding with an 11-member jury, as required by Rule 23(b)," and "[t]he appellate decisions overturning the verdicts in these cases reflect the importance of preventing jurors -- particularly those who might have 'dissenting views' -- from simply 'opt[ing] out at will,'" Curbelo, 343 F.3d at 292-293 (Wilkins, C.J., dissenting).[2] No similar concerns are implicated here.

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[2] See Araujo, 62 F.3d at 934 ("[T]he record lacks the requisite support for the district court's determination that [the juror] should [have] be[en] dismissed for just cause."); Patterson, 26 F.3d at 1129 ("[T]he judge below made no attempt to learn the precise circumstances or likely duration of the twelfth juror's absence."); Essex, 734 F.2d at 843 ("[T]he court denied defendant her right to the unanimous verdict of 12 jurors without any finding that anything did 'happen' to any one of them so that he was 'unable' to participate."); Ginyard, 444 F.3d at 655 ("Because the record does not support the finding of good cause necessitating

Petitioner does not seek review of the district court's determination that good cause existed to dismiss Juror No. 2 (or any other juror) based on the court's finding that that juror developed an actual bias against the government during the trial. See Pet. App. 10a. And the appropriate dismissal of a biased juror that occurred slightly before deliberations, see pp. 14-15, supra, bears little resemblance to situations in which courts have dismissed impaneled jurors without just cause -- and certainly cannot be said to have "necessarily render[ed petitioner's] criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder, 527 U.S. at 9.

c. Petitioner further contends (Pet. 13, 15-18) that the Court should decide whether nonconstitutional errors can ever be structural. But a majority of the active judges on the court of appeals made clear that they view that question as open in the Second Circuit. Pet. App. 68a, 90a. Accordingly, this Court's intervention on that broader question is unwarranted in this case.

2. Petitioner does not dispute that, under Williams, the Sixth Amendment allowed an 11-person jury to return the verdict at his trial. Petitioner contends (Pet. 22-36), however, that Williams should be overruled because it "is an egregiously wrong decision" that is inconsistent with historical practice and this Court's precedents. For the reasons stated in the government's

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dismissal, the district court abused its discretion in dismissing the holdout juror.").

brief in opposition to the petition for a writ of certiorari in Parada v. United States, No. 25-166, petitioner's request to overturn Williams lacks merit. Br. in Opp., Parada, supra, at 7-16 (filed Dec. 8, 2025).[3] As described in that brief, see id. at 8-11, and contrary to petitioner's contention (Pet. 24-30), the Court's analysis in Williams extensively addressed the common-law history of the Sixth Amendment's jury trial right. And as further explained in that brief, see Br. in Opp., Parada, supra, at 14-16, and contrary to petitioner's contention (Pet. 22-26, 32), this Court's decision in Williams has not been undermined by its later decisions in Ramos v. Louisiana, 590 U.S. 83 (2020), and Ballew v. Georgia, 435 U.S. 223 (1978) (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2026

[3] Petitioner is being served with a copy of the government's brief in Parada.