No. 25-5895

In the
Supreme Court of the United States

Rickey Johnson,

Petitioner,

-v-

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In its brief in opposition, the government concedes the conflict among the courts of appeal on whether a violation of the federal right to a twelve-person jury is structural error or may somehow be considered harmless. Likewise, the government does not dispute that this case presents an excellent vehicle for resolution of this conflict. It wanly attempts to minimize the circuit split as "shallow," but that characterization is no reason to deny review. The Second Circuit's decision here is in direct and open conflict with the rule in five circuits. Were petitioner in any one of those circuits, his conviction would have been vacated because the district court violated his right to a 12-person jury under Fed. R. Crim. P. 23(b). The Second Circuit has doubled down on its departure from the rule in other circuits, denying rehearing *en banc*, and there is no likelihood that the conflict will work itself out.

Tellingly, the government mostly argues the merits: that the Second Circuit was correct to hold that the error is not structural. But it fails to address the very basis of the circuit conflict, which is whether a nonconstitutional error can be structural. The government takes no position on that question, even though the circuit majority's belief that a nonconstitutional error could never be structural drove its decision below. Instead, the government suggests, without actually arguing, that the published, acknowledged disagreement on this point between the Fourth and Second Circuits does not matter because of a view expressed in a non-precedential opinion concurring in the denial of *en banc* review. Further, its merits argument is superficial and quotes selectively from this court's precedent, ignoring

that category of structural error that "def[ies] analysis by 'harmless error' methods" because its effects "are simply too hard to measure," *Weaver v. Massachusetts*, 582 U.S. 286, 296 (2017); *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) – the kind of structural error at issue here.

On the question whether this Court should finally overrule *Williams v. Florida,* 399 U.S. 78 (1970), the government does not respond to Johnson's petition specifically, but points out only that the Court has previously denied certiorari on this question. In place of a response, it submits its brief in opposition filed in the most recent denial of certiorari on this question, *Parada v. United States*, 2026 WL 79784, a case that presented vehicle issues not present here. *Parada* involved a dismissal for cause well into deliberations as allowed under Rule 23(b) and not a blatant, undisputed violation of the Rule requiring a jury of 12. Much of the government's opposition in *Parada* is directed toward this factual context and has no bearing on this case or petitioner's arguments. Only some of its merits arguments there that *Williams* should not be overruled are responsive to Johnson's petition.

As argued in our petition, *Williams* was wrong when decided and is irreconcilable with *Ramos v. Louisiana*, 590 U.S. 83 (2020). Overruling it is just a question of the right vehicle. This Court frequently grants certiorari on an issue after previous denials, when presented with the appropriate vehicle. This case is the perfect vehicle. If not for *Williams*, petitioner's conviction would have been vacated by the Second Circuit. And at a time when the validity of *Williams* is increasingly in

doubt, the Second Circuit's decision here has elevated it as a reason to deny relief even for a blatant violation of the federal right to a 12-person jury.

ARGUMENT

I. This Petition Presents A Direct Circuit Conflict On An Important, Outcome-Determinative Question: Whether Violation Of Petitioner's Right To A 12-Person Jury Is Structural Error.

A. This Case Presents A Sharp And Undisputed Circuit Conflict On A Question Of Consequence.

The government does not dispute the circuit conflict on the question whether the unlawful deprivation of a defendant's right to a jury of 12 under Rule 23(b) requires a new trial or is subject to some kind of harmless error test. Nor could it. The Second Circuit openly disagreed with the Fourth Circuit and acknowledged that its ruling was also contrary to the Sixth, Seventh, Ninth, and D.C. Circuits. The government suggests that this split is too "shallow" to bother with. Opp. 11, 15. There is nothing shallow about the conflict. Indeed, that claim typically implies some uncertainty about the longevity of the split and the possibility that further percolation will dissipate the conflict. That is not the case here.

Until the Second Circuit's decision in this case, all circuits to have considered the remedy for a denial of the right to 12 jurors under the Rule 23(b) had held that such an error required automatic reversal, without regard to harmless error or prejudice. The Second Circuit alone has now decided, despite all of that agreement, to require harmless error review. When the full Circuit was asked to rehear this question *en banc,* it refused, over the dissent of five judges. Pet.App.65a. The

Second Circuit is determined, contrary to all the other circuits, to apply a different rule that denies a remedy to defendants deprived of their right to a twelve-person jury. Certainly, nothing about the lopsidedness of the split argues against review. If anything, it calls out for this Court's review, to achieve uniformity in the law where one circuit insists on applying a different standard, to the detriment of defendants in one geographical region. This Court has granted certiorari in many such cases. *E.g., United States v. Taylor,* 596 U.S. 845, 850 (2022) (granting certiorari to resolve a conflict between the Fourth Circuit and three other circuits); *Rosemond v. United States*, 572 U.S. 65, 69 & n.3 (2014) (granting certiorari to resolve a conflict between the Tenth Circuit and three other circuits); *United States v. Yermian,* 468 U.S. 63, 67 (1984) (granting certiorari to resolve a conflict between the Ninth Circuit and three other circuits).

The government nevertheless asserts that none of the circuits other than the Fourth Circuit "undertakes a structural-error analysis," suggesting that the split is really between the Second and Fourth Circuits. Opp. 15. First, this is incorrect. *United States v. Essex*, 734 F.2d 832 (D.C. Cir. 1984), the first decision in the D.C. Circuit, engaged in essentially the same analysis as *United States v. Curbelo*, 343 F.3d 273, 281, 285 (4th Cir. 2003) and the panel dissent below, holding that no prejudice need be shown because "in cases involving secret jury deliberations it is virtually impossible for a defendant to demonstrate actual prejudice." *Id.* at 845. Subsequent decisions in the D.C. Circuit followed *Essex*. *United States v. Patterson*, 26 F.3d 1127, 1129 (D.C. Cir. 1994); *United States v. Ginyard*, 444 F.3d 648, 653-54

(D.C. Cir. 2006). Nor does it matter whether every circuit engaged in the same level of analysis. Each of these circuits squarely holds that dismissal of the 12th juror in violation of Rule 23(b) is structural error or requires reversal without regard to harmless error. *Ginyard*, 444 F.3d at 655; *United States v. Araujo,* 62 F.3d 930 (7th Cir. 1995); *Patterson*, 26 F.3d 1127 (D.C. Cir. 1994); *Essex*, 734 F.2d 832; *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). The D.C. Circuit has affirmed the rule at least three times, *Ginyard,* 444 F.3d at 655, *Patterson*, 26 F.3d 1127, *Essex*, 734 F.2d 832, and the Ninth Circuit has twice. *Guerrero-Peralta*, 446 F.2d 877; *United States v. Reyes*, 603 F.2d 69, 72 (1979). There is nothing shallow about the circuits' commitment to this rule. What is important is that petitioner's conviction would have been reversed, not affirmed, in any one of these circuits.[1]

That three of the four circuits other than the Fourth Circuit issued their decisions before *Neder v. United States*, 527 U.S. 1, 7 (1999), is likewise of no moment and does not affect the depth of the conflict. Opp. 15-16.[2] *Neder* did nothing to change the analysis as to whether the violation of the right to a 12-member jury under Rule 23(b) requires reversal or is subject to harmless error review. *Neder* did not hold that *only* constitutional error can be structural error. It held only that not

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[1] In any event, even if the conflict were between only the Second and Fourth Circuits, this would not be a reason to deny review. *See, e.g. Perrin v. United States*, 444 U.S. 37, 38 & n.1 (1979) (granting certiorari to resolve a conflict between two Circuits on the interpretation of the Travel Act).

[2] Two of the D.C. Circuit's opinions, *Patterson*, 26 F.2d at 1129 and *Essex*, 734 F.2d at 845, were issued before *Neder* but the Circuit reaffirmed its structural error rule in *Ginyard*, 444 F.3d at 654-55, well after *Neder*.

every constitutional error is a structural error, a very different concept. *Id.* No wonder the Fourth Circuit in *Curbelo* rejected the argument that *Neder* changed the analysis. 343 F.3d at 280 n.6.

The government also asserts that *Curbelo* was decided before this Court's decisions in *Marcus, Davila*, and *Greer*, Opp.15, suggesting – again without really arguing – that *Curbelo*'s outcome might have been different. Neither *Marcus, Davila,* nor *Greer* have any bearing on the structural error question presented in *Curbelo* and this case.

United States v. Marcus, 560 U.S. 258, 264 (2010), held that an instructional error – failing to inform the jury that a conviction could not rest on conduct before the date of the statute's enactment – was not structural because it was not "any more difficult to assess the likely consequences of that failure than with numerous other kinds of instructional errors" held non-structural, like the erroneous instruction on an element of the offense in *Neder. Marcus* specifically distinguished structural errors – like the error here – that "affect the 'framework within which the trial proceeds, . . . such that it is often 'difficult' to 'assess the effect of the error.'" *Id.* at 263. *United States v. Davila,* 569 U.S. 597, 610, 612 (2013) held that harmless error applied to a Rule 11 violation because, in response to judicial holdings that such violations required automatic reversal, that Rule had been amended to explicitly require harmless error review. Rule 23(b) contains no such provision and it has not been amended to add one, despite half a century of circuit cases holding automatic reversal is required for its violation. *Davila* does not, as the government

suggests, Opp.14, say anything to the effect that federal rule violations in general are not structural.

Nor would *Greer v. United States*, 593 U.S. 503 (2021), have affected the analysis in *Curbelo* or any of the other circuit decisions requiring automatic reversal for a Rule 23(b) violation. In *Greer*, the defendant sought to avoid plain error review by contending that an error in his plea proceeding was structural error. *Id.* at 512–13. This Court held that the error – the omission of one element of the offense in the plea allocution – was subject to harmless error in the same way that the omission of one element in jury instructions at trial was, citing *Neder*. *Id. Greer* did not address the type of structural error presented here, where "the effects of the error are simply too hard to measure." *Weaver*, 582 U.S. at 295–96.

Finally, the government quibbles with irrelevant factual differences between this case and some of the other circuit decisions requiring automatic reversal for Rule 23(b) violations. Opp. 16-17. It notes that in four of those decisions, the circuit ruled that the district court failed to establish "just cause" for the dismissal of the 12th juror, and points out that petitioner does not seek review before this Court of the district court's findings of good cause to dismiss the last two jurors.[3] This has no bearing on the question whether the undisputed, blatant violation of Rule 23(b) in

[3] Petitioner did challenge on appeal the district court's "good cause" determinations with respect to the last two jurors dismissed, in addition to the court's conclusion that it could proceed with 11 jurors over his objection. The Second Circuit upheld the good cause determinations but held that the court violated the Rule in dismissing the 12th juror without consent. There was no reason to raise the "good cause" issue here because the Second Circuit held that Rule 23(b) was violated, and the only question relates to the remedy.

this case is structural error or subject to harmless error review. On that question, the analysis is the same regardless of how the Rule is violated – the effect of losing the 12th juror cannot be measured.[4]

B. This Case Presents The Perfect Vehicle For Resolution Of This Conflict.

The government does not dispute that this case presents the perfect vehicle to resolve this conflict. The question whether the Rule 23(b) violation was structural or subject to harmless-error review was squarely presented and ruled on below. That issue was outcome-determinative. Had the Second Circuit followed the other circuits and ruled that it was structural error, petitioner's conviction would have been vacated.

C. The Government Is Wrong On The Merits

The government contends that a blatant violation of Rule 23(b) is not structural error because it is not "exceptional" and does not render the trial "fundamentally unfair." Opp. 13-14. Its merits argument is vague and superficial, selectively quoting passages of this Court's opinions on the exceptional nature of structural error while avoiding the specific issues in this case. First, it fails to address the panel majority's reasoning here: that nonconstitutional error cannot be structural error. The government does not grapple with or even take a position on that question. Opp.17. Nor does it address the reasoning of *Curbelo* and the dissent

[4] And any concern expressed in the case law about dissenting jurors "opting out at will" (Opp.16) was directed toward the inquiry into whether good cause was shown, not to whether the error was structural. *See Ginyard*, 444 F.3d at 654.

below: that this error is structural because there is simply no way to measure the harm of the loss of the twelfth juror. Like the majority opinion below, the government ignores this Court's precedent affirming that an error affecting the framework of the trial rather the evidence at trial – such that its effects are too difficult to measure – is one category of structural error. Finally, the government's failure to engage the specific questions here avoids confronting the bizarre outcome of the panel's reasoning. With stunning disdain for the role of the jury, two appellate judges simply reviewed the evidence, satisfied themselves that petitioner had the legal intent for the crime and was guilty, and assumed that any 12th juror would have found the same – despite the disagreement of the third panel member and a partial acquittal by the remaining 11 jurors.

The gist of the government's argument is that structural error is "exceptional" and includes only those errors rendering the trial "fundamentally unfair," quoting heavily from *Greer.* Opp.13-14. It contends that the Rule 23(b) error is neither. *Ibid.* This argument ignores this Court's precedent holding that structural error includes those affecting the framework of the trial, the effects of which are too difficult to measure. *E.g., Weaver*, 137 S. Ct. at 1908; *United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006); *Fulminante*, 499 U.S. at 310.

First, *Weaver* expressly rejected the argument that structural error must affect the fundamental fairness of the trial, a point it called "critical": "An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Weaver*, 137 S. Ct. at 1908. The fundamental fairness rationale,

Weaver explained, is only one of "three broad rationales" for holding an error structural. Another, separate rationale is that "the effects of the error are simply too hard to measure." 137 S. Ct. at 1908. An example of this type of structural error is the denial of the right to counsel of choice, where it is "impossible to know what different choices the rejected counsel would have made" and "to quantify the impact" of those choices. *Gonzalez-Lopez,* 548 U.S. at 150. *See also Fulminante*, 499 U.S. at 307-08 (non-structural trial error is that which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the other evidence presented."). This was the rationale for concluding this error was structural in both *Curbelo* and the dissent below, but the government does not cite *Weaver* once in its brief.

The government likewise declines to address the circuit majority's rationale for rejecting structural error: its conclusion that only constitutional errors can be structural. It instead asserts, as if it matters, that a majority of active judges endorsed the view, in opinions concurring and dissenting from denial of *en banc* review, that the question whether nonconstitutional error can be structural is "open" in the Second Circuit. Opp. 17. Those views were expressed in nonprecedential opinions concerning the denial of review and have no legal consequence. What matters is the precedential opinion of the Second Circuit, clearly holding that this error cannot be structural because it is not constitutional error under *Williams.* Pet.App.15a ("Because the right to twelve rather than eleven jurors that Rule 23(b) provides does not implicate the Constitution—at its bedrock or

otherwise—we review a violation of that rule for harmless error." Pet.App16a ("We agree with the dissenting opinion [in *Curbelo*] that the Supreme Court and the appellate courts 'have repeatedly made clear that structural errors necessarily must affect a defendant's constitutional rights.'")[5]

The government's refusal to address the specific grounds for the conflict allows it to avoid confronting the bizarre logic of the Second Circuit's holding. The impact of the loss of the 12th juror cannot be measured: there is no way to assess how that juror would have judged the question of petitioner's intent, how he would have interacted with the other jurors, and how persuasive he would have been – and "then to quantify the impact" of those imponderables. *Gonzalez-Lopez*, 548 U.S. at 150. Indeed, a fundamental premise of the jury system is that the jury is a black box and its deliberations cannot be subjected to judicial scrutiny. Like assessing the harm of deprivation of counsel of choice, harmless error analysis here could only have been "a speculative inquiry into what might have occurred in an alternate universe." *Id.* Ignoring this rationale for structural error led the majority below to apply an inapt and incorrect replica of harmless error review: it simply reviewed the evidence itself, decided that it proved petitioner's intent, and concluded that any 12th juror would therefore have found the same. Pet.App.19-20a. This exercise did not consider the impact of the missing juror at all but only considered the majority's

[5] Judge Menashi, the author of the panel majority opinion, emphatically rejected the attempt to "spin" that opinion as leaving this question "open" and repeated no fewer than eight times that the Circuit "held that a structural error must involve the violation of a constitutional right." Pet.App.74a,75a,76a,77a,78a, 79a (twice), 80a.

view of the evidence. In effect, two judges interposed themselves as the 12th juror and decided the case – exactly what harmless error review does not allow. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (the inquiry on harmless error review "is not whether" a guilty verdict "would surely have been rendered"); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (the inquiry is not whether the jurors were right or "whether there was enough to support the verdict" but "is rather even so, whether the error itself had substantial influence.").

It is worth noting that juries of an even smaller size – again in contravention of Rule 23(b) – could and would be affirmed under the Second Circuit's logic. The circuit majority and the government note that the Rule allows juries of 11 persons under limited circumstances, and suggest incorrectly that the difference between 11 and 12 jurors is immaterial. Pet.App.16-17a, 21a, Opp.14. But the Second Circuit's holding did not turn on that fact, and its holding is not limited to 11 jurors. Rather, the majority concluded that any violation of Rule 23(b) is subject to harmless-error analysis because only constitutional errors can be structural, and *Williams* holds that any jury size between 6 and 12 does not violate the Constitution. Pet.App.16a. So a federal court's decision to proceed with fewer than 11 jurors – say 10 or even 9 – in blatant violation of the Rule would be subject to the same harmless-error analysis, and would be affirmed so long as the circuit court considered the evidence strong enough.

The Court should grant certiorari to stop the Second Circuit's erosion of the federal right to a 12-member jury. Even if there are not yet four votes to overrule

Williams as a constitutional matter, the Second Circuit's incorrect structural error theory essentially bars relief for the denial of this important federal right. And the case offers a unique opportunity to address the significance of the federal right to a 12-person jury in a non-constitutional context.

II. Williams Should be Overruled Now Because It Is Egregiously Wrong, And Its Reach Has Expanded To Deny Defendants The Federal Right To A Jury of 12.

The government's only response to petitioner's argument that *Williams* should be overruled is to say that this Court has denied certiorari on this issue before, most recently in *Parada v. United States*, 2026 WL 79784 (U.S. Jan. 12, 2026), and to recycle its brief in opposition to *Parada*'s petition. Opp. 17-18. Yes, this Court has denied certiorari on this question before, as it has on countless issues before ultimately granting review. *See, e.g., Ramos,* 590 U.S. 83*,* Br. in Opp. to Cert, 2018 WL 7635901 at *3 (U.S. Nov. 8, 2018); *United States v. Johnson,* 574 U.S. 1069 (2015); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Parada*'s petition had vehicle issues: the government contended that it was unclear whether overruling *Williams* would change the outcome in that case. *Parada* Opp. 16-17. The government does not dispute that overruling *Williams* would change the outcome of petitioner's case.

What is more, two previous denials of certiorari resulted in dissents, which the government does not acknowledge. *See Cunningham v. Florida*, 144 S. Ct. 1287 (2024) (Gorsuch, J., dissenting from the denial of certiorari), *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from the denial of certiorari); *see*

*also id.*at 22 (noting Justice Kavanaugh's vote to grant the petition). Further, those two petitions challenged state juries of less than 12, not the use of *Williams* to deny the federal right to a 12-member jury.

On the merits, the government's argument is not responsive to petitioner's merits argument. It states that "contrary to petitioner's contention (Pet. 24-30), the Court's analysis in *Williams* extensively address the common law history of the Sixth Amendment's jury trial right." Opp.18. The government refers for elaboration to its *Parada* brief in opposition, *ibid.*, where it argued that *Williams* addressed the common law tradition requiring a jury of 12. It contended that this refuted Parada's claim that "*Williams* failed to grapple with the historical meaning of the Sixth Amendment's jury trial right" and with this Court's "long-repeated statements" that it demands a jury of 12. *Parada* Opp. 8-9.

But *this* petitioner never made that argument, not at Pet. 24-30 and not anywhere. To the contrary, Johnson argued in his petition that "*Williams* recognized the long common law history of the 12-member jury and 'that sometime in the 14th century the size of the jury at common law came to be fixed generally at 12,'" but "*Williams* just didn't think this was important." Pet. 26-27 (quoting *Williams,* 399 U.S. at 87-89). Because *Williams* found no satisfying reason for the number 12, it disregarded this feature as a "historical accident." Pet. 27, (quoting *Williams*, 399 U.S. at 89-90). And Johnson argued in his petition that "*Williams* likewise acknowledged this Court's longstanding precedent reaffirming the Sixth Amendment right to a jury of 12 [citing *Thompson* and *Patton*] but dismissed the

reasoning of these cases as relying 'solely on the fact that the common-law jury consisted of 12.'" Pet. 27.

Put simply, then, petitioner's argument is not that *Williams* ignored the common law history and the public meaning of the jury trial right – *Williams* acknowledged that this included the right to a jury of 12 – but that it disregarded that history and public meaning in place of the Court's own view that the numerical requirement served no important "function." *Williams*, 399 U.S. at 99. Indeed, *Williams* posed "the relevant inquiry" as "the function that the particular performs and its relation to the purposes of the jury trial." *Id.* This functionalist reasoning was rejected in *Ramos*, 590 U.S. 83, which held that the only relevant inquiry is what "the right to a jury trial meant" at the time of the Sixth Amendment's adoption. *Id.* at 90.

The government utterly fails to grapple with the reasoning of *Ramos,* which virtually mandates overruling *Williams*. Instead, its *Parada* brief in opposition mostly rehashes *Williams*' reasoning, *Parada* Opp. 8-12, which *Ramos* rejected. The government attempts to sidestep the actual holding of *Ramos* by suggesting that *Ramos* overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972) because it was thinly reasoned, whereas *Williams* fully articulated its reasoning. *Parada* Opp.15-16. It is true that *Apodaca* had little reasoning of its own and that *Ramos* criticized *Apodaca* for that. *Ramos*, 590 U.S. at 106. But *Ramos* did not stop there, as the government would have it. *Parada* Opp. 15-16. *Apodaca* had adopted the rationale of *Williams*, *see Ramos*, 590 U.S. at 157 (Alito, J. dissenting), and the state of Louisiana in

Ramos fully presented the *Williams* arguments on which *Apodaca* rested. *Ramos* at 97-100. *Ramos* explicitly rejected those arguments, both that the drafting history of the Amendment deleted unanimity and that jury unanimity did not serve an "important enough" function. *Id.* On the flimsiness of *Apodaca's* reasoning, *Ramos* said: "Our real objection isn't that [*Apodaca*'s] cost benefit was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist approach in the first place." *Id.* at 100. It is the public meaning of the jury right at the time of adoption that the founders "chose to enshrine" and which this Court is "entrusted to preserve." *Id.*

That this public meaning included the right to 12 jurors is so well-established – as even *Williams* acknowledged – that it can't really be disputed. The government takes a small stab at it, though, with a quibble about a passage from Matthew Hale's *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736). *Parada* Opp.10. It contends that despite Hale's statement that a jury of 12 must be sworn, his later passage stating that "the Justices at common law may upon just cause remove a juror after he is sworn" suggested that the jury could proceed with 11 jurors. *Parada* Opp.10. But the government admits that Hale did not say that the trial could continue after a juror removal for cause and, until *Williams*, the result of a removal for cause was a mistrial. *See, e.g.*, *Patton v. United States*, 281 U.S. 276, 286 (1930) (even in the case of dismissal for "illness," "the absence of one juror would result in a mistrial); *People v. Olcott*, 2 Johns, Cas, 301, 306 (N.Y. Sup. Ct. 1801) (in such cases the court should "discharge the jury, and remand the

prisoner for another trial"); *Commonwealth v. Cook*, 6 Serg. & Rawle 577, 585 (Pa. 1822). And before *Williams*, Rule 23(b) required a mistrial if the jury were reduced below 12 for any reason, absent the consent of the parties to proceed with 11 jurors after a removal for cause. Fed. R. Crim. P. 23, Advisory Committee Notes, 1944 Adoption and the 1983 Amendments. That judges could always remove a juror for good cause says nothing about whether the reduced jury can deliver a verdict.

None of the government's merits arguments provide a reason for denying certiorari.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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