

No. 25-6623

IN THE
Supreme Court of the United States

HAMED KIAN,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

**BRIEF OF MONTANA AND
12 OTHER STATES AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI* STATES

States bear primary responsibility for the criminal justice system in the United States. They have a deep interest in the stability and predictability of that system. The Court in *Williams v. Florida*, 399 U.S. 78 (1970), undertook the appropriate textual and historical analysis, then adopted a clear, supportable rule. *Amici* States write to emphasize that if the interests of *stare decisis* are overcome based on mere disagreement with the supportable but arguable result in *Williams*, the Court should be willing to revisit other criminal procedure rules from the 1960s and 1970s that have far less—indeed, no—support in text or history, and that never should have been incorporated against the States.

BACKGROUND

Fifty-six years ago, this Court undertook a detailed historical and textual analysis of the Sixth Amendment, then “conclude[d] that . . . Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were not violated by Florida’s decision to provide a six-man rather than a 12-man jury.” *Williams*, 399 U.S. at 103. Then, as now, Florida law generally provided for six-person juries in criminal cases: “Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.” Fla. Stat. § 913.10.

Consistent with this Court’s holding in *Williams*, Petitioner Hamed Kian was convicted by a six-person jury of practicing chiropractic medicine with a suspended license, a crime punishable by up to five years in prison for

each of the five counts on which he was convicted. *See* Fla. Stat. §§ 460.411(1)(b), 775.082(3)(e). Petitioner appealed his convictions, arguing, *inter alia*, that the use of a six-person jury violated his rights under the Sixth and Fourteenth Amendments. The Florida District Court of Appeal affirmed his convictions without a written opinion, 421 So.3d 439 (Fla. Dist. Ct. App. 2025), with the procedural result that the Florida Supreme Court lacked jurisdiction to review the decision.

This Court granted certiorari. As framed by Petitioner, the question presented is whether he “was deprived of his right, under the Sixth and Fourteenth Amendments, to a trial by a 12-person jury.”

SUMMARY OF ARGUMENT

A 12-person jury was the prevailing norm at the time of American Independence, but English law was rife with exceptions. In drafting the Constitution and the Bill of Rights, Congress was focused on the right to a jury trial, yet it removed a provision requiring “accustomed requisites” from a draft of the Sixth Amendment. That may very well cut both ways. *See Ramos v. Louisiana*, 590 U.S. 83, 97-98 (2020). But *Williams* considered that specific issue. 399 U.S. at 94-96. The historical record was inconclusive. *Id.* Then, after analyzing the *purpose* of the jury trial, *Williams* correctly concluded that the 12-person element wasn’t an indispensable feature. *Id.* at 97.

This Court undertook the appropriate historical and textual analysis in *Williams*, then held the Sixth Amendment did not incorporate the 12-person requirement. Petitioner disagrees with that long-established result.

But disagreement with an arguable point is no reason to depart from *stare decisis*.

To the extent the Court does overrule *Williams*, the same arguments far-more-clearly call for this Court to revisit much of the criminal procedure revolution of the 1960s and 1970s. Petitioner’s amici acknowledge as much, with Professor Amar identifying *Miranda v. Arizona*, 384 U.S. 436 (1966), as a prime candidate for reconsideration. This Court’s micromanagement of jury proceedings and the byzantine capital punishment standards set forth in *Gregg v. Georgia*, 428 U.S. 153 (1976), and its progeny are similarly ripe for reconsideration, both on the merits and as matter of incorporation.

ARGUMENT

I. That *Williams* drew a clear line in the face of evidence supporting both sides is no reason to revisit it.

This case ultimately asks whether the word “jury” in the Sixth Amendment necessarily requires a body of twelve citizens, and—if so—whether that requirement is incorporated against the States via the Fourteenth Amendment.

1. Start with history. Petitioner compiles an impressive collection of historical claims, although none are new. Pet. Br. 5-12. He correctly suggests that decisions were made by bodies of citizens far into the past. But by relying almost exclusively on tertiary sources, he muddles the question by unknowingly pointing to the inquisitorial forerunner of the grand jury as set forth in the Assize of

Clarendon, which directed inquests “by twelve of the most legal men of the hundred, and by four of the most legal men of each vill.” George Burton Adams & H. Morse Stephens eds., *Select Documents of English Constitutional History* 14-15 (1901). The resulting trial was by ordeal of water. In 1176, the Assize of Northampton adopted a preference for knights to lead the inquest. *Id.* 20-21. And it made clear that surviving the ordeal merely reduced the punishment to banishment from the kingdom rather than amputation of a hand and foot before banishment, *i.e.*, the inquest—the forerunner of the grand jury—effectively determined guilt. *Id.*

In 1215, the Fourth Lateran Council prohibited clergy from participating in trial by ordeal. That led Henry III to ban such trials in toto. Thus began the common use of petit juries. *See* Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Jury Trial 1200-1800* 3 (1985). As English law evolved over the following centuries, a twelve-man petit jury became a common mode of trying serious criminal matters.¹

By the time of Henry VII, the press of criminal cases and the attendant cost had become unmanageable. Parliament responded by authorizing justices to hear, determine, and punish non-felony offenses upon information, *i.e.*, without indictment, and without a trial

1. Kian ties the origin of the petit jury to Magna Carta, Pet. Br. 6, a link that Felix Frankfurter characterized as “one of the most revered of legal fables” and “an obstinate example of the inevitable habit of reading later ideas into earlier institutions.” Felix Frankfurter & Thomas G. Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 924-925 (1926).

by jury. 11 Hen. VII c.3 (reprinted in 2 *The Statutes of the Realm* 570 (1816, reprinted 1963)). That authority was nominally discretionary, but Sir Edward Coke’s “gloss . . . attributes to this statute ‘most grievous and heavy oppressions. . . .’” Frankfurter & Corcoran, *supra* at 924 (quoting 4 Edward Coke, *Institutes of the Laws of England* 41 (1817)). The statute was accordingly repealed after Henry VII’s death. Still, legislation continued to make “piecemeal inroads upon trial by jury,” with “Parliament gradually adopt[ing] the practice of providing that convictions . . . should be by one or more justices,” and doing so for offenses of ever-greater moment. *Id.* at 925-926. Indeed, “the practice . . . became characteristic of the jurisprudence of the country.” *Id.*

In 1671, for example, a statute made the night-time burning of ricks, houses, and barns a felony punishable by death or transportation, and subject to inquiry by three justices instead of a jury. 22 & 23 Car. II c.7 (reprinted in 5 *The Statutes of the Realm* 709 (1819, reprinted 1963)). Similarly, a 1717 statute made the unlawful exporting of wool—hardly the stuff of *malum in se*—summarily punishable by transportation if the defendant could not post bail, with return to Great Britain punishable by death. 4 Geo. 1 c.11. In short, the use of non-jury trials was not-uncommon, even where serious penalties were on the table. The practice, however, was erratic. “Down to the separation of the colonies from the mother country,” “there was no unifying consideration as to the type of criminal offense subjected to summary trial.” Corcoran & Frankfurter, *supra*, at 927.

2. In America, the colonies broke from England’s centuries of legal evolution by adopting written constitutions.

At the time of Independence, the constitutions of at least ten of those constitutions included some reference to the right to trial by jury. *See Ramos*, 590 U.S. at 90. The Pennsylvania Constitution of 1776, for example, provided “that in all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty,” and that “[t]rials shall be by jury as heretofore . . .” Similarly, the Massachusetts Constitution of 1780 provided that “the legislature shall not make any law, that shall subject any person to a capital or infamous punishment . . . without trial by jury.” The Virginia Declaration of Rights, however, was more specific. It provided “[t]hat in all capital or criminal prosecutions a man has a right . . . to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty. . . .”

The practice of governing via a written constitution continued when the States formed a national government. Given their hostility to the deprivations of the right to a jury trial under the Stamp Act of 1765, 5 Geo. 3 c.12, the Townshend Revenue Act of 1766, 7 Geo. 3 c.46, and the more-vigorously enforced Navigation Acts, the States enshrined that right in the Constitution:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. art. III, § 2, cl. 3.

Still, the ratifying conventions of a number of the States “expressed a desire, in order to prevent misconstruction or abuse of [the Constitution’s] powers, that further declaratory and restrictive clauses should be added. . . .” Joint Resolution of Sept. 25, 1789. Congress apparently concluded that Article III’s reference to “trial . . . by jury” was among the provisions that were ambiguous and in need of clarification. It accordingly proposed what became the Fifth, Sixth, and Seventh amendments:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the

right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Joint Resolution of Sept. 25, 1789.

3. As this Court undertook the criminal procedure revolution under Chief Justices Warren and Burger, it was pressed to define the scope of those rights and how they applied to the States. The mere reference to a “jury” or “trial by jury” likely wasn’t unambiguous given that Congress elaborated on the Article III jury right via three separate, highly detailed amendments. *Cf. Hurtado v. California*, 110 U.S. 516, 534-535 (1884) (applying the superfluity canon to the Fifth Amendment). Justice Story recognized another interpretive problem early in the Nation’s history: even taking common law practices as the baseline, the common law vis-à-vis juries “probably differs in all” of the States, such that the Constitution must look to “the common law of England” as it existed at the time of independence. *United States v. Wonson*, 28 F. Cas. 745, 750 (Cir. Ct. Mass. 1812). But that merely deepens the confusion given that English historical practices were rife with exceptions, *supra*, notwithstanding the superlatives and absolutes recounted by Coke and Blackstone. Still, the criminal justice system required answers. So this Court drew readily-workable lines.

4. Petitioner asks this Court to reconsider one such line: this Court’s conclusion in *Williams* “that the 12-man panel is not a necessary ingredient of ‘trial by jury,’ and

that respondent's refusal to impanel more than the six members provided for by Florida law did not violate [a defendant's] Sixth Amendment rights." 399 U.S. at 86.

In *Williams*, this Court explained that English and American history "revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Id.* at 87. "That same history, however, affords little insight into the considerations that gradually led the size of that body to be generally fixed at 12." *Id.*

Turning to the Constitution itself, the Court explained that "[t]he relevant constitutional history [also] casts considerable doubt on the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.* at 92. "Indeed, pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage.' *Id.* at 93. "That concern, as well as the concern to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments." *Id.* at 93-94. Not surprisingly, there was great focus on the "vicinage" requirement. *See id.* at 93-98. Yet there was no evidence that the number of jurors was considered significant, and a requirement for preserving the "accustomed requisites" was rejected.

The Court thus reached three conclusions. "First, even though the vicinage requirement was as much a feature

of the common-law jury as was the 12-man requirement, the mere reference to ‘trial by jury’ in Article III was not interpreted to include that feature.” *Id.* at 96. “Indeed, as the subsequent debates over the Amendments indicate, disagreement arose over whether the feature should be included at all in its common-law sense, resulting in the compromise described above” regarding vicinage. *Id.* “Second, provisions that would have explicitly tied the ‘jury’ concept to the ‘accustomed requisites’ of the time were eliminated.” *Id.* “Such action is concededly open to the explanation that the ‘accustomed requisites’ were thought to be already included in the concept of a ‘jury.’” *Id.* “But that explanation is no more plausible than the contrary one: that the deletion had some substantive effect.” *Id.* “Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit ‘vicinage’ requirement, the latter explanation is, if anything, the more plausible.” *Id.* “Finally, contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect.” *Id.*²

This Court reaffirmed that conclusion three years later in *Colgrove v. Battin*, 413 U.S. 149 (1973). The Court explained that “Constitutional history does not reveal a single instance where concern was expressed for preservation of the traditional number 12.” *Id.* at 156 n.10. Thus, notwithstanding the Seventh Amendment’s

2. The difference between the jury provision in the well-known Virginia Declaration of Rights, *supra*, and the Sixth Amendment reinforces this Court’s conclusion.

“preserv[ing] the right of trial by jury as at common law,” the Court concluded the Framers were concerned with the “right of trial by jury . . . rather than the various incidents of trial by jury” such as a panel of 12 jurors. *Id.* at 155-156.

The Constitution’s silence regarding the number of jurors speaks volumes—there is no magic number. Moreover, there is no basis for incorporating such an imaginary number to the states as a fundamental right under the Due Process Clause.

5. The question having been decided, “*stare decisis* is the preferred course,” and this Court “will not overturn a past decision unless there are strong grounds for doing so.” *Janus v. AFSCME*, 585 U.S. 878, 916-917 (2018). The Court’s cases “identify factors that should be taken into account in deciding whether to overrule a past decision.” *Id.* at 917. Those factors include “the nature of the error,” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 268 (2022), “the quality of [the prior precedent’s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision,” *Janus*, 585 U.S. at 917.

Despite incanting some of those factors, Petitioner’s analysis boils down to mere disagreement with the line this Court drew in *Williams*. His brief brings nothing new to the table. Rather, Petitioner merely catalogues resources that were equally available to this Court in *Williams* and *Colgrove*, and pleads for the opposite result. Indeed, Petitioner makes no effort to grapple with the textual and historical analysis in *Williams*. His unhappiness with the line the Court drew doesn’t demonstrate error; it doesn’t

demonstrate poor reasoning; it doesn't undercut the workability of the Court's line; and it doesn't undercut the States' reliance on that line. Perhaps the current Court would reach a different result if writing on a clean slate. *See Ramos*, 590 U.S. at 96-98. But that's no ground for overruling precedent.

II. If the Court intends to reopen *Williams*, it should be willing to reopen the far-less-reasoned cases of the criminal procedure revolution.

To be clear: Petitioner asks the Court to re-open a clear, bright-line rule that resolved a question on solid historical grounds while acknowledging that the history was inconclusive. He then asks the Court incorporate a new, opposite rule against the States. Of course, when a precedent is overruled, it tends not to fall alone. *See Dobbs*, 597 U.S. at 265. Acknowledging as much, Petitioner's amici try to ringfence the carnage and buttress rules they support. *See Br. of Akhil Reed Amar*. But if reversals based on changed views are the course the Court intends to set, the course should be steered true, without deviation for the faint-hearted. Textualism, federalism, and fairness demand the Court also re-open much of the so-called criminal procedure revolution.

1. Professor Amar identifies the most obvious candidate: *Miranda v. Arizona*, 384 U.S. 436 (1966). In that case—wholly unmoored from the Constitution's text and the Nation's historical practice—the Court “concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him

to speak where he would not otherwise do so freely.” *Id.* at 467. Acting prophylactically “to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination,” the Court simply declared *ex cathedra* that “the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.” *Id.* That pronouncement became the basis for ever increasing contortions to defend a “constitutional rule” that wasn’t actually a constitutional right, the scope of which is governed only by policy and cost-benefit considerations. *See Vega v. Tekoh*, 597 U.S. 134, 136, 143-144, 152 (2022). Equally important, the incorporation of such a non-right against the states via the Due Process Clause is completely unsupported and unsupportable.

It’s no answer that *Miranda* is chanted endlessly in episodes of Law & Order, or that it may expand some rights. *See* Amar Br. 15-17. *Miranda* and its progeny “flagrantly offend[] fundamental principles of separation of powers, and arrogate[] . . . prerogatives reserved to the representatives of the people.” *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting). It violates the basic tenet of our republic that the people have the power to regulate themselves—via Congress and their State legislatures—in the absence of a constitutional prohibition. Justice Scalia and Justice Thomas thus found *Miranda* unworkable, “an illegitimate exercise of . . . authority to review state court judgments,” and reflecting “judicial arrogance,” such that it should be overruled. *Id.* at 461, 465. In short, the argument for overruling *Miranda* is far stronger than what Petitioner suggests justifies overruling *Williams*.

2. Even confined to the realm of jury mechanics, Petitioner invites widespread revanchment. For example, on the same day this Court issued *Williams*, a plurality held that the jury right attaches “where imprisonment for more than six months is authorized.” *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality op.). The plurality identified no textual support, conceded that it was simply “drawing a line,” and acknowledged that historical practice included examples contrary to that line. 399 U.S. at 71, 73. That’s the same weak sauce this Court found insufficient in *Ramos*, 590 U.S. at 94 (recounting the “badly fractured set of opinions” in *Apodaca v. Oregon*, 406 U.S. 404 (1972)). And, once again, how can such an atextual and ahistorical rule be incorporated against the states as a fundamental right under the Due Process Clause?

3. The micromanagement of capital jury procedures and the substantive availability of capital punishment are particularly ripe for re-opening. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976). At common law, the jury’s judgment of guilt in a capital case dictated the punishment. Indeed, in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the plurality acknowledged that as of 1791, “the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses,” including murder and rape. *Id.* at 289. Lesser included offenses were the mechanism for reduced sentences until the States adopted discretionary capital sentencing. *See id.* at 291. Yet, suddenly, centuries of practice were unconstitutional, even if they had been softened by State legislatures. Justice Rehnquist cogently pointed out the lack of originalist support for such judicial micromanagement of State criminal law. *Id.* at 308-324 (Rehnquist, J., dissenting); *see also, e.g.,* An Act for the

Punishment of Crimes Against the United States, 1 Stat. 112 (1790) (persons guilty of treason, willful murder, piracy, or robbery “shall suffer death”). Yet functionalism prevailed. A plurality undertook a different, even more pernicious form of micromanagement in *Coker v. Georgia*, 433 U.S. 584 (1977), holding that a violent, serial rapist categorically could not be subject to capital punishment. Then thirty years later, a bare majority bootstrapped contortions-on-contortions to conclude the byzantine “standards” this Court had imposed on capital punishment in *Gregg* and its progeny were too “difficult” for a jury to apply to a child rapist. *Kennedy v. Louisiana*, 554 U.S. 407, 439-441 (2008).

If “*Apodaca* [sat] uneasily with 120 years of preceding caselaw,” *Ramos*, 590 U.S. at 106, cases like *Gregg*, *Woodson*, *Coker*, and *Kennedy* outright defy it, with the upshot of denying the people’s right to legislate for their own protection. The incorporation against the states of these atextual and ahistorical “rights” bears more than a whiff of substantive due process.³

CONCLUSION

The *Williams* Court properly reviewed the historical and textual evidence, acknowledged its lack of clarity, and drew a clear rule by looking at the historical purpose of the jury. That some might reach a different result if writing on a clean slate is not grounds to overrule that precedent. But if the Court does so, it should be even-more-receptive

3. See Thomas Hogan, *The Selective Unincorporation Doctrine* (2026), <https://dx.doi.org/10.2139/ssrn.7365499>, at 23-33 and 47-51.

to overruling the criminal procedure precedents of the 1960s and 1970s.

Respectfully submitted,

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