

No. 25–7202

IN THE SUPREME COURT OF THE UNITED STATES

KURT N. HAUSCH, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA*

PETITION FOR REHEARING

DANIEL EISINGER
Public Defender

Gary Lee Caldwell
*Assistant Public Defender
Counsel of Record*

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355–7600

gcaldwel@pd15.org
lmattocks@pd15.org
appeals@pd15.org

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
REASONS TO GRANT REHEARING	3
CONCLUSION	14
CERTIFICATE OF COUNSEL.....	14

TABLE OF AUTHORITIES

Cases

<i>Achilli v. United States</i> , 352 U.S. 1023 (1957)	8
<i>Addison v. New Hampshire</i> , 565 U.S. 1174 (2012)	5
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007)	9
<i>Carlisle v. United States</i> , 517 U.S. 416 (1996)	9
<i>Edwards v. Vannoy</i> , 593 U.S. 255 (2021)	8
<i>Flowers v. Mississippi</i> , 588 U.S. 284 (2019)	8
<i>Foster v. Texas</i> , 563 U.S. 931 (2011)	11
<i>Gondeck v. Pan Am. World Airways, Inc.</i> , 382 U.S. 25 (1965)	9
<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88 (1976)	8
<i>James B. Beam Distilling Co. v. Georgia</i> , 501 U.S. 529 (1991)	11
<i>Kent Re-cycling Servs., LLC v. Army Corps of Eng’rs</i> , 578 U.S. 1019 (2016)	1
<i>Lawrence on Behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996)	7
<i>Maples v. Thomas</i> , 562 U.S. 1286 (2011)	11
<i>Melson v. Allen</i> , 561 U.S. 1001 (2010)	1
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999)	10
<i>Perry v. New Hampshire</i> , 563 U.S. 1020 (2011)	5
<i>Perry v. New Hampshire</i> , 565 U.S. 228 (2012)	6
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020)	8
<i>Schacht v. United States</i> , 398 U.S. 58 (1970)	9
<i>Soto v. United States</i> , 543 U.S. 1117 (2005)	1
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	4
<i>United States v. Ohio Power Co.</i> , 353 U.S. 98 (1957)	passim

<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	1, 3
---	------

Rules

S. Ct. R. 44.....	13
S. Ct. R. 44.1	10
S. Ct. R. 44.2	1, 3

Constitutional Provisions

U.S. Const. amend. VI	2
-----------------------------	---

INTRODUCTION

Rehearing of the denial of certiorari is appropriate in situations involving “intervening circumstances of a substantial or controlling effect or . . . other substantial grounds not previously presented.” S. Ct. R. 44.2. One such circumstance is where the Court “has granted review of a related issue in another case.”

STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE, Ch. 15.6.(b) (11th ed. 2019) (ebook) (collecting cases); *see also, e.g., Kent Re-cycling Servs., LLC v. Army Corps of Eng’rs*, 578 U.S. 1019 (2016); *Melson v. Allen*, 561 U.S. 1001 (2010); *Soto v. United States*, 543 U.S. 1117 (2005).

This is just such a case. Petitioner was convicted of a serious felony by a Florida jury, and sentenced to 5 years in prison. But that jury only had 6 members. As articulated in his petition for certiorari, the question presented by the case was: “Whether a person charged with a felony in state court has the right to trial by a twelve-member of jury under the Sixth Amendment?” Hausch Pet. at i. The argument section was titled “*Williams v. Florida* should be overruled and the Sixth Amendment right to a jury of twelve should be restored.” *Id.* at 6 (capitalization altered). In *Williams*, of course,

this Court had held that the Sixth Amendment did not require a jury of 12 members in serious criminal cases.

On Monday, June 15, 2026 — only one business day after this Court denied the petition for a writ of certiorari in this case on June 12 — this Court granted certiorari in *Kian v. Florida*, No. 25-6623, to address the same question.

These two cases — filed in the same term, presenting essentially the same question, arising out of the same Florida practice, relying on the same authorities, and represented by the same Florida Public Defender's Office — should be resolved together. Although the ordinary 25-day period for filing a petition for rehearing has elapsed, this Court retains the authority to entertain petitions for rehearing where the interests of justice so require. *See United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam). And justice requires rehearing here because the circumstances warranting rehearing did not develop until the next business day after the 25-day re-hearing period had expired. Without the application of this Court's rehearing grace, Petitioner will remain incarcerated, convicted by a constitutionally-infirm half-jury. This Court should grant rehearing, vacate the order denying

certiorari, and hold this case pending resolution of *Kian* on the merits.

REASONS TO GRANT REHEARING

1. The grant of certiorari in *Kian* is precisely the type of “intervening circumstance[] of a substantial or controlling effect” contemplated by the Rules. *See* S. Ct. R. 44.2. This Court has a practice of granting rehearing of orders denying certiorari when it subsequently grants certiorari on a “related issue in another case.” Shapiro, *supra* at Ch. 15.6.(b) (collecting cases).

The issue that the Court agreed to resolve in *Kian* is more than “related” to the issue in Petitioner’s case; the two are essentially identical. Both petitions asked this Court to overrule its decision in *Williams v. Florida*, 399 U.S. 78 (1970). That should not be surprising — the petitions were filed by the same Florida Public Defender’s Office, which has been routinely raising this issue for years.

In urging the Court to overrule *Williams*, the parties pressed the same arguments and relied on the same authorities. For example, Petitioner argued *Williams* erred in rejecting evidence regarding the history and tradition of 12-person juries. *See* Hausch

Pet. at 6-11. Mr. Kian did the same. See Kian Pet. at 11-12.

2. These two cases — filed in the same term, presenting the same question, and making the same arguments — should be resolved together. The Court has repeatedly granted rehearing in similar circumstances.

For example, in 2005, this Court granted 14 rehearing petitions in cases raising the same issue that the Court ultimately resolved in *United States v. Booker*, 543 U.S. 220 (2005).¹ Those petitioners were federal criminal defendants who — like the petitioner in *Booker* — had raised constitutional challenges to judicial fact-finding at sentencing. The Court had initially denied their petitions for certiorari. However, shortly after those denials, the Court granted certiorari in *Booker* to address the same question. See *United States v. Booker*, 542 U.S. 956

¹ See *Hawkins v. United States*, 543 U.S. 1097 (2005); *Lauersen v. United States*, 543 U.S. 1097 (2005); *Campbell v. United States*, 543 U.S. 1116 (2005); *Carbajal-Martinez v. United States*, 543 U.S. 1116 (2005); *Epps v. United States*, 543 U.S. 1116 (2005); *Jimenez-Velasco v. United States*, 543 U.S. 1116 (2005); *McDonnell v. United States*, 543 U.S. 1116 (2005); *Newsome v. United States*, 543 U.S. 1116 (2005); *Pearson v. United States*, 543 U.S. 1116 (2005); *Rideout v. United States*, 543 U.S. 1116 (2005); *Salas v. United States*, 543 U.S. 1116 (2005); *Van Alstyne v. United States*, 543 U.S. 1116 (2005); *Criston v. United States*, 543 U.S. 1117 (2005); *Soto v. United States*, 543 U.S. 1117 (2005).

(2004) (granting certiorari). The disappointed petitioners filed rehearing petitions. And after the Court clarified the law in *Booker*, it granted the rehearing petitions and granted, vacated, and remanded their cases for further consideration in light of *Booker*.²

Even when this Court has ultimately denied rehearing petitions based on later-granted cases raising the same issue, the Court has tied that denial to the ultimate disposition of the case that it granted. Take, for example, the Court's treatment of the rehearing petition in *Addison v. New Hampshire*, 565 U.S. 1174 (2012). The petition for certiorari in *Addison* had raised an issue related to eyewitness identification, but that petition was denied. Shortly thereafter, this Court granted certiorari in *Perry v. New Hampshire*, 563 U.S. 1020 (2011), which also raised an issue related to eyewitness identification. The petitioner in *Addison* sought rehearing, and the Court held that petition for several months while *Perry* was heard on the merits, denying the *Addison*

² See also, e.g., *Kent Recycling Servs., LLC v. Army Corps of Eng'rs*, 578 U.S. 1019 (2016) (granting rehearing of denial of certiorari and GVR'ing following a grant of certiorari in a case raising a related issue); *Melson v. Allen*, 561 U.S. 1001 (2010) (same); *Florida v. Rodriguez*, 461 U.S. 940 (1983) (same).

rehearing petition *only after* the Court resolved *Perry* in a manner that would not aid Addison. See *Perry v. New Hampshire*, 565 U.S. 228 (2012) (resolving the case in favor of the state).³

As these cases illustrate, rehearing of orders denying certiorari is appropriate when the Court subsequently grants certiorari on a related issue in another case. The Court should follow that rule here. Petitioner here pressed the same question on which the Court ultimately granted certiorari in *Kian*. And this Court is likely to provide critical guidance on that question when it resolves *Kian*. For that reason, rehearing is appropriate.

3. Rehearing is also appropriate here because it would advance “the interests of justice” by ensuring “uniformity in the application of the principles” that will be announced and applied in *Kian*, such that “this case might be disposed of consistently.” *Ohio Power Co.*, 353 U.S. at 99.

Indeed, where cases on this Court’s certiorari docket raise the same issue in the same term, the Court “will typically” hold them on

³ See also, e.g., *Smith v. Florida*, 567 U.S. 954 (2012) (denying rehearing only after holding the petition for several months as the Court considered a case raising a related issue).

its docket and resolve the cases together. *See Shapiro, supra* at Ch.6.31.(e). The Court follows that practice so that cases that raise the same issue in the same term may equally benefit from the “intervening development[]” of this Court’s “own decisions,” through an order granting certiorari, vacating the judgment below, and remanding the case so that “the court below” can “fully consider” the intervening decision. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-68 (1996) (per curiam). A grant of rehearing of the denial of certiorari in this case would allow the Court to follow that practice here.

Reconsideration would also avoid piecemeal litigation and the need for further collateral proceedings after *Kian* is resolved. Granting rehearing and holding the case is more efficient than requiring Petitioner to pursue post-conviction remedies and potentially return to this Court again on the same question. *See Ohio Power Co.*, 353 U.S. at 107 (Harlan, J., dissenting) (explaining rehearing of a denial of certiorari is appropriate where rehearing “serve[s] to avoid . . . delay and expense” in “a criminal case presenting a question that could again be raised in proceedings below and then brought to this Court in due

course on certiorari”) (citing *Achilli v. United States*, 352 U.S. 1023 (1957)).

Moreover, if this Court resolves *Kian* in favor of Mr. Kian, post-conviction relief for Petitioner is not guaranteed. Petitioner sought certiorari on direct review of his criminal conviction and sentence. The denial of certiorari made that conviction and sentence final. And that finality will complicate any further relief that he seeks. See, e.g., *Edwards v. Vannoy*, 593 U.S. 255, 259 (2021) (holding jury-unanimity rule of *Ramos v. Louisiana*, 590 U.S. 83 (2020), does not apply retroactively on federal collateral review). Collateral review is complex, and there are many barriers to relief. A grant of rehearing would ensure that Petitioner receives the benefit of a new rule announced in *Kian*. To deny him the opportunity for reconsideration would be to let the calendar, rather than the Constitution, determine his fate.

In plain terms, grant of rehearing would advance the basic goal of this Court: “equal justice under law.” *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019).

4. Although the ordinary 25-day period for filing a petition for

rehearing has elapsed, *see* S. Ct. R. 44.1, this Court can still grant the petition. Because that time limit is a “procedural rule[] adopted by the Court for the orderly transaction of its business,” it is “not jurisdictional” and “can be relaxed by the Court in the exercise of its discretion.” *Bowles v. Russell*, 551 U.S. 205, 211-12 (2007) (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)).

This Court retains the authority to entertain untimely petitions for rehearing where “the interests of justice” so require. *See, e.g., Ohio Power Co.*, 353 U.S. at 99. And “the interest in the evenhanded administration of justice” can “outweigh[] the interest in finality” served by that 25-day period where — without rehearing — like cases will not be disposed of in like ways. *Carlisle v. United States*, 517 U.S. 416, 450 (1996) (Stevens, J., dissenting); *see also Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 27–28 (1965) (per curiam) (granting motion for leave to file untimely rehearing petition more than three years after denial of certiorari because intervening decisions left petitioner’s case “stand[ing] completely alone”).

In *Ohio Power Co.*, for instance, this Court *sua sponte* vacated its own order denying a timely petition for rehearing — nearly a year

and a half after the original denial of certiorari — so that the case could be “disposed of consistently” with other cases raising the same issue. *Id.* 353 U.S. at 98. Even the dissent in *Ohio Power Co.* agreed that “the Court’s inherent power over its judgments” included the authority to take action that “would otherwise be out of time under the Rules.” *Id.* at 104 (Harlan, J., dissenting). And the dissent’s central objection was that the majority had exercised this authority in a civil case, not a criminal one. *Compare, e.g., id.* at 99 (majority insisting that its power to grant untimely rehearing petitions has been “exercised . . . both in civil and criminal cases”); *with, e.g., id.* at 105-06 (dissent collecting cases in which the Court has granted untimely rehearing petitions, noting that most were criminal cases, and opining that “the granting of untimely relief in criminal cases presents considerations not found in civil cases”).

So if there is any distinction to draw, out-of-time rehearing should be more readily available in criminal cases like this one than in civil cases like *Ohio Power Co.*, because “the stakes are higher in criminal cases, where liberty or even life may be at stake.” *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (internal quotation marks omitted); *see also James B. Beam Distilling Co. v. Georgia*,

501 U.S. 529, 541 (1991) (op. of Souter, J.) (discussing the finality interests in civil and criminal cases).

More recently, in 2011, this Court permitted a capital defendant to file an untimely petition for rehearing three months after the original denial of certiorari. The petitioner in that case had filed a petition for certiorari in January 2011, asking the Court to consider issues relating to the ineffectiveness of state post-conviction counsel. His petition for certiorari was denied that same month. However, a few months later, in March 2011, the Court granted a petition for certiorari in a case raising a related issue. *See Maples v. Thomas*, 562 U.S. 1286 (2011). In April 2011, well after the rehearing period had expired, Foster filed an application for a stay of execution, and a motion for leave to file a petition for rehearing. This Court granted both requests. *See Foster v. Texas*, 563 U.S. 931 (2011). After considering the petition for rehearing and calling for a response, the Court ultimately denied rehearing in May of 2011. But, as illustrated by the Court's order granting the motion for leave to file out of time, timeliness did not pose a barrier to relief.

This case presents circumstances that justify the exercise of this

Court’s “inherent power over its judgments” to consider an untimely petition. *Ohio Power Co.*, 353 U.S. at 104 (Harlan, J., dissenting). Petitioner could not have anticipated the “intervening circumstance[]” of a grant of certiorari in the time that is contemplated by the Rules. See S. Ct. R. 44. The Court had recently denied a petition raising the identical issue in *Minor v. Florida*, No. 24–7489, after it was rescheduled a number of times in the September 2025 to February 2026 timeframe. What is more, this Court took other actions which seemed to confirm its decision not to hear the 12-person jury issue this term, denying certiorari in a number of other cases presenting the same question. See *Parada v. United States*, 146 S.Ct. 1477 (cert denied January 12, 2026); *Casseus v. Florida*, 146 S.Ct. 1610 (cert denied Feb. 23, 2026); *Perez Rojas v. Florida*, 146 S.Ct. 1584 (cert denied February 23, 2026); *Clemons v. Florida*, 146 S.Ct. 1793 (cert denied March 9, 2026); *Gray v. Florida*, No. 25-7224, 2026 WL 1377017 (U.S. May 18, 2026) (cert denied). The Court even denied rehearing in a case where the petitioner had — like Mr. Kian — asked to be held for *Parada* and *Minor*. See *Moehle v. Florida*, 146 S.Ct. 195 (2025) (cert denied Oct. 6, 2026), *rehearing denied Moehle v. Florida*, 146 S.Ct. 1443 (Jan. 12,

2026). Given all this, when the 25-day period for rehearing expired (on June 12, the Friday before the grant in *Kian*), Petitioner had no way of anticipating that the Court would ultimately grant certiorari in *Kian* the next week. And as of June 12 he had no basis for claiming intervening circumstances such as to form the basis for rehearing

Without a grant of rehearing, Petitioner must remain imprisoned, convicted by a jury of 6 which heard sharply conflicting evidence about the underlying incident in which Petitioner and the alleged victim were both cut. That a man's fate in such a contested case would be decided by anything less than a common-law jury of twelve would have astonished the Founders. And one presumes they would have expected *Kian* and Petitioner — similarly-situated in so many ways — to be protected equally by the Constitution's guarantees.

Even if the Court is not prepared to grant rehearing of the denial of certiorari at this time, it should at minimum hold this petition pending the resolution of *Kian* and thereafter enter an appropriate order. Holding the petition would preserve the Court's ability to act consistently once *Kian* is decided, without prejudice to either party.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant rehearing of its order denying the petition for certiorari, vacate that order, and hold this case in abeyance pending the resolution of *Kian v. Florida* (No. 25-6623).

Respectfully submitted,

DANIEL EISINGER
Public Defender

GARY LEE CALDWELL
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600
gcaldwel@pd15.org
lmattocks@pd15.org
appeals@pd15.org

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

/s/ Gary Lee Caldwell
Gary Lee Caldwell