No. 24-6146

IN THE
SUPREME COURT OF THE UNITED STATES

JARVIS PARKER,

Petitioner,

v.

STATE OF FLORIDA.

Respondent.

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

BRIEF IN OPPOSITION

JAMES UTHMEIER
ATTORNEY GENERAL
OF FLORIDA
Tallahassee, Florida

SORRAYA M. SOLAGES-JONES
Senior Assistant Attorney General
Office of the Attorney General
State of Florida
1515 N. Flagler Drive, Suite 900
West Palm Beach, FL 33401
Tel: (561) 837-5016
sorraya.solagesjones@myfloridalegal.com
crimappwpb@myfloridalegal.com
Counsel of Record for Respondent

QUESTIONS PRESENTED

I.

For recidivist sentencing purposes, the trial court can find that a defendant was convicted of past crimes. *See Erlinger v. United States*, 602 U.S. 821, 870 (2024) (Kavanaugh, J., dissenting) ("[A] judge can find that a defendant was convicted of past crimes, including the who, what, when, and where of those crimes."). Florida's habitual felony offender (HFO) enhancement statute codifies the necessary requirements to be designated an HFO. The question presented is whether the trial court's findings to support Mr. Parker's habitual felony offender (HFO) enhancement are in line with *Erlinger*.

II.

Felon dispossession laws have long been acceptable under the Second Amendment. Simply put, misuse of firearms by those convicted of felonies, particularly dangerous felonies, does not fall under the Second Amendment's blanket of protection. The question presented is whether this Court's recent opinion in *United States v. Rahimi*, 602 U.S. 680, 698 (2024), has any impact on Florida's felon dispossession statute.

III.

More than half a century ago, this Court held that Florida's use of six-person juries satisfies the Sixth Amendment. *Williams v. Florida*, 399 U.S. 78, 86 (1970). After examining the history and purpose of the right to trial by jury, the Court concluded that the framers enshrined no twelve-juror requirement in the Constitution, even

though most founding-era juries consisted of twelve persons. Relying on *Williams*, Florida and five other states continue to use fewer than twelve jurors in at least some criminal trials. In Florida, where all noncapital crimes are tried before six-member juries, roughly 5,000 criminal convictions for noncapital crimes are currently pending on direct appeal.

As in *Guzman v. Florida*, 144 S. Ct. 2595 (2024), the question presented is whether the Court should overrule *Williams* and hold that the Sixth Amendment requires the use of twelve-person juries in serious criminal cases.

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STATEMENT

"Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke v. Raley*, 506 U.S. 20, 26 (1992). This Court has since determined that certain aspects of recidivist sentencing are to be left to the jury while other findings are to be left to the trial court. *See Erlinger v. United States*, 602 U.S. 821, 839–40 (2024). As in this case, in accordance with *Erlinger*, Section 775.084(1)(a) of the Florida Statutes permits a trial court to designate a defendant a habitual felony offender (HFO) by finding that he or she had two or more prior felonies and committed the subject offense within five years of the last prior felony conviction.

Seventy years ago, Florida began regulating the manner by which felons could possess firearms. *See* Fla. Stat. § 790.23. Since the Nation's founding, felon dispossession laws have been routinely upheld. Indeed, this Court determined that felons categorically fall outside the Second Amendment's protection. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Likewise, in *United States v. Rahimi*, 602 U.S. 680, 698 (2024), the Court left intact the notion that legislatures can enact provisions to prevent the misuse of firearms by those who pose a special danger. Certainly Mr. Parker, as a perpetrator of violent felonies involving firearms, is not entitled to Second Amendment protections as constitutionally proscribed by Florida's felon dispossession law.

In 1877, Florida began using six-person juries to try noncapital criminal defendants. *See* Act of February 17, 1877, Ch. 3010, § 6, 1877 Fla. Laws 54. That same year, the Florida Supreme Court held that the use of six-person juries neither "destroy[ed] [n]or infring[ed] the right of trial by jury." *Gibson v. State*, 16 Fla. 291, 300 (1877). Ninety years later, this Court opened another avenue to challenge the validity of Florida's six-person juries, holding that states are bound by the jury-trial guarantee in the Sixth Amendment to the federal Constitution. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). But just two years after that, this Court concluded that six-person juries satisfy that guarantee. *Williams v. Florida*, 399 U.S. 78, 86 (1970). For nearly as long as states have had a Sixth Amendment duty to provide criminal jury trials, this Court's message to the people of Florida has been clear: the jury structure that they have settled on for a century and a half fulfills that duty. Unsurprisingly then, Florida has continued its longstanding practice of using six-person juries in trials of noncapital offenses. *See* Fla. Stat. § 913.10.

Mr. Parker was charged and tried for: (1) attempted murder in the first degree (civilian victim/serious bodily injury/armed/10-20-LIFE); (2) shooting at or into occupied vehicle; and (3) possession of a firearm by a convicted felon. (R. 116–18). At no time did Mr. Parker specifically object to a six-member jury. Rather, he consented to the number of jurors as empaneled. (T. 319–20, 327–29, 332–33, 356). Video evidence and testimony revealed that Mr. Parker shot the victim while she was "halfway out of the car, halfway in the car." (T. 505, 848; State's Ex. 1 at 20:53:39–:40). Once shot, the victim fell back all the way inside the vehicle. (T. 506; State's Ex. 1 at 20:53:39–:40). A

toddler was also in the vehicle. (T. 540; State's Ex. 1). There is no question Mr. Parker fired at or into the vehicle, making contact with the victim's right side of her face and neck area. (T. 507).

The jury returned a verdict of attempted murder in the second degree (a lesser included offense), shooting at or into an occupied vehicle, and possession of a firearm by a convicted felon. (R. 116-17, 267-69, 508-09, 512-24, 818; T. 960-61, 996). The trial court adjudicated Mr. Parker a habitual felony offender (HFO) on counts 1 through 3. To reach this conclusion, the trial court determined that the date of Mr. Parker's last conviction—possession of cocaine with intent to sell or deliver—occurred on November 27, 2017, whereas the date of the subject offenses was June 13, 2021. (R. 813). Accordingly, the new felonies were committed well within five years of the date of Mr. Parker's last previous felony, qualifying Mr. Parker as an HFO under Section 775.084(1)(a)2.b. of the Florida Statutes. The trial court therefore enhanced Mr. Parker's sentence as required by Florida law and sentenced him to thirty years to run concurrently (including a twenty-five-year mandatory minimum as to count 1 and a three-year mandatory minimum as to count 3). (R. 508-09, 512–24, 818).

Mr. Parker appealed his conviction to Florida's Fourth District Court of Appeal, arguing—for the first time—that: (1) Florida's felon dispossession law infringed on his Second Amendment right by barring felons from possessing firearms; (2) the Sixth Amendment entitled him to be tried by a twelve-person jury because this Court abrogated *Williams* in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which held that the Sixth Amendment requires unanimous verdicts in state court as in federal court,

overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972); and (3) his sentencing designation as an HFO was improper because the trial court, rather than the jury, found that Mr. Parker committed his current felony within five years of the date of conviction for his last previous felony.

The Fourth District *per curiam* affirmed and thereafter denied Mr. Parker's motion for rehearing, issuance of written opinion, and certification, foreclosing Mr. Parker's path to the Florida Supreme Court.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. This Court will not take up a question of federal law presented in a case "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies with equal force whether the state-law ground is substantive or procedural. *Id.* Indeed, independent and state law grounds support the state court's decision as to each unpreserved issue Mr. Parker presented in this petition.

This Court has also recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. S. Ct. R. 10; *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184, n.3 (1987). Furthermore, "erroneous factual findings or the misapplication of a properly stated rule of law" rarely warrants certiorari review. S. Ct. R. 10.

Under these standards, Mr. Parker has not identified a basis for this Court to grant his petition for certiorari. Regarding his first claim of constitutional error—that the trial court determined his HFO status in violation of *Erlinger v. United States*, 602 U.S. 821 (2024)—Mr. Parker raised the claim in a Florida Rule of Criminal Procedure 3.800(b)(2) motion during the pendency of his direct appeal. Florida law does not permit a defendant to raise this type of argument in a rule 3.800(b)(2) motion. Under

rule 3.800(b)(2), a defendant may file a motion while his direct appeal is pending, but before the defendant files his first appellate brief, "to correct a sentencing error." The term "sentencing error" encompasses "harmful errors in orders entered *as a result of* the sentencing process," *Jackson v. State*, 983 So. 2d 562, 572 (Fla. 2008) (emphasis added), not "procedural error[s]" along the way to reaching that result. *Id.* at 573. Rules like *Erlinger* "that allocate decisionmaking authority [to a particular factfinder] are prototypical procedural rules." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Because Mr. Parker's alleged HFO sentencing error arose under *Erlinger*, he could not raise it in a rule 3.800(b)(2) motion.

Consequently, to preserve his claim of *Erlinger* error, Mr. Parker was required to make a contemporaneous objection at or before sentencing. *Jackson*, 983 So. 2d at 574; *see also* Fla. Stat. § 924.051(3). Mr. Parker's failure to object constitutes waiver of this issue. *See, e.g.*, *Marshall v. State*, 789 So. 2d 969, 970 (Fla. 2001) (requiring *Apprendi* arguments to be preserved); *Luton v. State*, 934 So. 2d 7, 10 (Fla. Dist. Ct. App. 2006) (finding that to preserve an *Apprendi/Erlinger*-type claim, a defendant must "request a jury trial on sentencing, or object to the trial judge sitting as the trier of fact, prior to the sentencing hearing"); *White v. State*, 837 So. 2d 607, 607 (Fla. Dist. Ct. App. 2003), *cause dismissed*, 857 So. 2d 198 (Fla. 2003); *see also, e.g.*, *Bolen v. State*, 943 So. 2d 855, 856 (Fla. Dist. Ct. App. 2006) ("Appellant cannot affirmatively agree to the sufficiency of the State's proof of his PRR qualifications at sentencing and then later invoke rule 3.800(b)(2) to take the opposite position."). This basis for denying Mr. Parker's *Erlinger*

claim constitutes an independent and adequate state law ground that shields Mr. Parker's *Erlinger* claim from review by this Court.

In any event, the part of Florida's HFO statute that Mr. Parker challenges does not in fact violate *Erlinger*. Mr. Parker asserts that the statute runs afoul of *Erlinger* because it permits the trial court to determine whether his current felony was committed within five years of his last previous felony conviction. (Pet. at 13–14). But under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which this Court did not retreat from in *Erlinger*, it is permissible for a trial court to determine the mere fact and date of a prior conviction as it did in this case. Thus, the evidence supported the HFO designation, and the trial court made permissible findings. Finally, even if the trial court did err in making these findings, the error would have been harmless, given the lack of genuine dispute over the timing of Mr. Parker's felony convictions.

Similarly unpreserved is Mr. Parker's second constitutional claim—that Florida's felon dispossession statute violates the Second Amendment. He raised this claim for the first time on appeal. This failure to preserve again constitutes an independent and adequate state law ground to support the Florida courts' denial of his claim. On the merits, Section 790.23 of the Florida Statutes is constitutional because felons are not considered law-abiding citizens and, as such, do not retain a Second Amendment right. Similarly, section 790.23 withstands scrutiny since felons are a group that historically has been precluded from bearing arms. The Court's decision in *Rahimi* has not altered those principles.

Finally, Mr. Parker claims that he was entitled to try his case before a twelve-person jury. Here too, Mr. Parker failed to preserve his challenge to the constitutionality of the six-member jury. Nevertheless, Mr. Parker was not entitled to a twelve-member jury as the Sixth and Fourteenth Amendments do not mandate a twelve-member jury. Yet, Mr. Parker contends that the Court should review the Fourth District's decision and use it as a vehicle to overrule *Williams v. Florida*, 399 U.S. 78 (1970), which held that the Sixth Amendment permits six-person juries in criminal cases. As the Court has done in several recent cases, it should decline the invitation. *See Guzman v. Florida*, 144 S. Ct. 2595 (2024); *Pretell v. Florida*, 143 S. Ct. 1027 (2023); *Khorrami v. Arizona*, 143 S. Ct. 22 (2022); *Davis v. Florida*, 143 S. Ct. 380 (2022); *Phillips v. Florida*, 142 S. Ct. 721 (2021). Mr. Parker makes no serious attempt to show that overruling *Williams* is warranted under traditional principles of *stare decisis*, and it is not. Not only was *Williams* correctly decided; overruling it also would imperil thousands of criminal convictions in Florida and five other states that for more than fifty years have relied on its rule.[1] And taking that step would be a gratuitous gesture in this appeal: given the overwhelming evidence presented below, any error would be harmless.

[1] *See* Ariz. Rev. Stat. § 21-102; Conn. Gen. Stat. § 54-82; Fla. Stat. § 913.10; Ind. Code § 35-37-1-1; Mass. Gen. Laws Ch. 218, § 26A; Utah Code. Ann. § 78B-1-104.

On none of Mr. Parker's three claims of constitutional error does he identify any meaningful conflict among the lower courts that would provide a justification for this Court's review. The instant petition thus does not satisfy any of the requirements for certiorari review and should be denied.

I. THE CONSTITUTIONALITY OF FLORIDA'S HABITUAL FELONY OFFENDER STATUTE IS NOT IN QUESTION AS THE TRIAL COURT MADE PERMISSIBLE FINDINGS UNDER *ERLINGER V. UNITED STATES*, 602 U.S. 821 (2024)

Mr. Parker contends that Florida's Habitual Felony Offender Statute, Section 775.084 of the Florida Statutes, is unconstitutional because the trial court has the authority to make certain findings. (Pet. at 11–14).

Section 775.084(1)(a) provides:

> "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:
>
> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.
>
> 2. The felony for which the defendant is to be sentenced was committed:
>
> a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for a felony or other qualified offense; or
>
> b. Within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a

> result of a prior conviction for a felony or other qualified offense, whichever is later.

Fla. Stat. § 775.084(1)(a).

In *Erlinger*, the defendant was charged as a felon in possession of a firearm. The federal government argued that he was subject to a mandatory-minimum sentence under the federal Armed Career Criminal Act (ACCA), which applies when a defendant "ha[s] previously committed three violent felonies . . . on separate occasions." 602 U.S. at 825. The defendant requested that a jury make the determination as to whether his crimes were committed in a single episode or on separate occasions and was denied. *Id.* at 827. The issue presented before this Court was "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." *Id.*

The Court concluded that the Fifth and Sixth Amendments to the U.S. Constitution require a jury to find beyond a reasonable doubt "[v]irtually any fact that increases a defendant's "prescribed range of penalties." 602 U.S. at 834. But the Court made clear that it was not setting aside its earlier ruling in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which allows a trial court to "determine what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 511 (2016)). The fact of a prior conviction includes the date on which the conviction was entered, because the date of the prior conviction is an essential ingredient of the prior conviction and falls within *Almendarez-Torres*, which itself involved an enhancement that turned on the date of

the defendant's conviction. *See Erlinger*, 602 U.S. at 870 (Kavanaugh, J., dissenting) ("For sentencing purposes, a judge can find that a defendant was convicted of past crimes, including the who, what, when, and where of those crimes. It is as easy as that."); *see also People v. Taylor*, 2024 WL 4984265, at *4 (N.Y. Sup. Ct. Dec. 3, 2024) (quoting *Erlinger*, 602 U.S. at 835) ("As the Supreme Court made clear, *Erlinger* does not state a new rule of U.S. Constitutional law at all. Rather, it simply reiterates the rule announced in *Apprendi* and the *Erlinger* decision 'is nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine.'").

Mr. Parker was sentenced under the provision preceding the "or" in subsection (1)(a)2.b., based upon the fact he was convicted of the current offenses within five years of the date of the conviction of his last qualifying offense.[2] *Erlinger*, 602 U.S. at 840 (observing that a trial court can determine the fact of a prior conviction and then-existing elements of that offense). As such, he can challenge only that part of section 775.084(1)(a). Because it is permissible under *Erlinger* and *Almendarez-Torres* for a trial court to determine the fact of a prior conviction, that part of section 775.084(1)(a) is constitutional.

[2] The mention of release date was expressly of no consequence to the trial court's determination. (R. 812–13). Likewise, it was Mr. Parker's burden under section 775.084(1)(a)4. to demonstrate whether he had been pardoned for any of the prior offenses. *See, e.g.*, *State v. Rucker*, 613 So. 2d 460, 462 (Fla. 1993) ("[W]here the State has introduced unrebutted evidence-such as certified copies-of the defendant's prior convictions, a court may infer that there has been no pardon or set aside.").

Assuming, *arguendo*, Mr. Parker had not waived this issue, the trial court did not err in designating Mr. Parker an HFO. To the contrary, the trial court properly made the limited finding that Mr. Parker did, in fact, commit the current offenses within five years of his convictions for the enumerated felonies of possession of cocaine with intent to deliver (two convictions), tampering with physical evidence, armed burglary of a dwelling, and possession of cannabis with intent to sell or deliver. (R. 812). *See* Fla. Stat. §§ 776.08, 775.084(1)(a)1., 2.b., 3. Under *Erlinger*, it was permissible for the trial court to identify prior convictions. 602 U.S. at 839.

In fact, the trial court in this case did not engage in "an intensely factual nature of inquiry" to determine that Mr. Parker met the HFO requirements. 602 U.S. at 828. It merely determined that Mr. Parker had committed the current offenses within five years of the date of his qualifying prior convictions. (R. 813). *Id.* at 839; *cf., e.g.*, *State v. Calvert*, 2025 WL 350294, at *1, *5 (Kan. Ct. App. Jan. 31, 2025) ("While Kansas courts have not squarely considered *Apprendi*'s application to the date of a prior conviction, we follow other courts that have held that the date of a prior conviction falls under the *Apprendi* exception for the fact of a prior conviction. So, a sentencing judge's finding that a defendant's prior theft convictions occurred within the preceding five years does not violate *Apprendi* and we affirm Calvert's conviction.") (and cases cited).

Even had Mr. Parker properly preserved the issue, any error would have been harmless given that the record supported the enhancement, and Mr. Parker had no objection to the designation, time and crime documents, or trial court findings. (R. 789, 812–13, 818). *See also, e.g.*, *United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024)

(relying on *Neder v. United States*, 527 U.S. 1, 18 (1999), and applying harmless error analysis to the failure to submit a sentencing factor to the jury).

When a fact is undisputed at trial, it is highly likely that the failure to submit that fact to the jury was harmless. *See Neder*, 527 U.S. at 19 (noting the relevance to harmless-error analysis of the fact that "a defendant did not, and apparently could not, bring forth facts contesting the omitted element"); *Galindez v. State*, 955 So. 2d 517, 522–24 (Fla. 2007). As Justice Kavanaugh correctly observed in *Erlinger*, "[i]n most (if not all) cases, the fact that a judge rather than a jury" made certain ministerial findings "will be harmless." 602 U.S. at 859 (Kavanaugh, J., dissenting); *cf. id.* at 850 (Roberts, C.J., concurring) (noting that court of appeals would have to perform harm review on remand). Those facts—in *Erlinger*, whether the ACCA predicate offenses were committed on separate occasions, and, here, the fact that Mr. Parker committed his current crime within five years of his past qualifying conviction—are "usually a straightforward question" that a properly instructed jury would have found. *Id.* at 859 (Kavanaugh, J., dissenting).

Likewise, despite Mr. Parker's request, given the posture of this case, the lack of preservation, and the trial court's compliance with *Erlinger*, it serves as a poor vehicle to revisit *Almendarez-Torres*. *See infra* pp. 21, 33–34; *Erlinger*, 602 U.S. at 861–71 (Kavanaugh, J., dissenting).

II. FLORIDA'S FELON DISPOSSESSION LAW IS FACIALLY CONSTITUTIONAL

Mr. Parker next questions the constitutional viability of Section 790.23(1) of the Florida Statutes in light of *United States v. Rahimi*, 602 U.S. 680 (2024). (Pet. at 14–17).

Beginning in 1955, the Florida Legislature regulated the manner by which felons could possess firearms—specifically that felons cannot possess firearms unless and until civil rights and firearm authority have been restored. Fla. Stat. § 790.23. The purpose of section 790.23 is "to protect the public from persons, who, because of their past conduct, have demonstrated they are unfit to be trusted with dangerous instruments such as firearms." *State v. Anderson*, 764 So. 2d 848, 849–50 (Fla. Dist. Ct. App. 2000); *see also Nelson v. State*, 195 So. 2d 853, 854 n.4, 856 (Fla. 1967) (recognizing validity of similar restrictions in other jurisdictions and finding section 790.23 constitutional as a "reasonable public safeguard").

Pertinent here, section 790.23(1) provides that:

> It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:
>
> (a) Convicted of a felony in the courts of this state . . . .

Fla. Stat. § 790.23(1)(a).

For a statute to be held facially unconstitutional, the challenger must "establish that no set of circumstances exists under which the [statute] would be valid." *Rahimi*, 602 U.S. 680, 693 (2024) (internal quotation marks omitted) (rejecting a criminal

defendant's facial Second Amendment challenge to a firearm-dispossession law because the law had at least one valid application).

To determine whether an application of a firearms regulation is constitutional, the Supreme Court has laid out a two-prong test. First, a court must ask whether "the Second Amendment's plain text covers an individual's conduct." *NYSRPA v. Bruen*, 597 U.S. 1, 17 (2022). If it does, "the Constitution presumptively protects that conduct," and the court must then ask whether the government has carried its burden to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* The government can make that showing by "identify[ing] a well-established and representative historical analogue." *Id.* at 30. A "historical twin" is not required. *Rahimi*, 602 U.S. at 692. The Second Amendment does not contemplate "law[s] trapped in amber"—it instead allows States to enact regulations that "were not yet in existence" at the founding. *Id.* at 691 (internal quotation marks omitted).

Under that standard, section 790.23(1)(a) is facially constitutional. Prohibiting convicted felons from possessing arms is consistent with the Nation's historical tradition of firearm regulation. *See Rahimi*, 602 U.S. at 690 ("Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."). History shows, for instance, that "someone facing death and estate forfeiture" would not be "within the scope of those entitled to possess arms," *Folajtar v. Att'y Gen.*, 980 F.3d 897, 904–05 (3d Cir. 2020)), and death was the standard punishment for felonies at the time of the framing. *See Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019). "[I]t is difficult to conclude that

the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Id.*

There is also bountiful historical evidence that the government at the framing routinely disarmed persons considered to be dangerous. *See Rahimi*, 602 at 693–95 (explaining that at the founding, "regulations targeting individuals who physically threatened others persisted"); *United States v. Williams*, 113 F.4th 637, 650–57 (6th Cir. 2024) (exploring the history of disarming dangerous groups); *United States v. Jackson*, 69 F.4th 495, 503 (8th Cir. 2023) (Colloton, J.) (citing, among other historical examples, that "[i]n the era of the Revolutionary War, the Continental Congress, Massachusetts, Virginia, Pennsylvania, Rhode Island, North Carolina, and New Jersey prohibited possession of firearms by people who refused to declare an oath of loyalty"). "Early legislatures also ordered forfeiture of firearms by persons who committed non-violent hunting offenses." *Jackson*, 69 F.4th at 503.

Furthermore, felons were categorically excluded from firearm possession. During colonial time, several colonies had laws disarming felons. *See United States v. Johnson*, 2023 WL 2308792, at *4 (S.D. Fla. Feb. 20, 2023), *report and recommendation adopted*, 2023 WL 2302253 (S.D. Fla. Feb. 28, 2023) (citing *Folajtar*, 980 F.3d at 908 & n.11). Some classes of people, including felons, were universally excluded from exercising certain civic rights. *See Heller*, 554 U.S. at 616; *Johnson*, 2023 WL 2308792, at *5. These civic rights were limited to those of virtue, of which felons were deemed to have none. *Id.* at *6.

> Historical analysis of Colonial America, the founding era, and Antebellum America clearly confirms that there were several instances of the disarming of non-law-abiding or non-virtuous citizens at these times—so close to, and simultaneously with—the ratification of the Second Amendment. The Court finds that these examples are sufficient to show a tradition of limiting the possession of firearms to that class of citizens society, at that time, considered virtuous. The Court is confident it can rely on the historical record, discussed above, to find that today's federal prohibition on armed convicted felons found in section 922(g)(1) is consistent with the historical limitations of the Second Amendment.

Id.

Each of these regulations reflects a historical practice of disarming those who posed a risk "to an orderly society and compliance with its legal norms," *Jackson*, 69 F.4th at 503 (internal quotation marks omitted), and "demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id.* at 504; *Rahimi*, 602 U.S. at 698 (stating that the Second Amendment does not "prohibit[] the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse"). The Second Amendment right, in other words, applies only to "law-abiding" citizens. *Bruen*, 597 U.S. at 8, 26, 70 (echoing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010)).

Importantly, in *Heller*, this Court determined that felon was a category outside the scope of the Second Amendment's protection—"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." 554 U.S. at 626. Soon after, federal circuit courts that

considered facial challenges to firearm dispossession statutes overwhelmingly concluded that felons do not have a Second Amendment right to possess firearms. *See, e.g.*, *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010) (holding that statutory restrictions of firearm possession "are a constitutional avenue to restrict the Second Amendment right of certain classes of people," which includes felons); *United States v. Torres-Rosario*, 658 F.3d 110, 112–13 (1st Cir. 2011); *United States v. Stuckey*, 317 Fed. Appx. 48, 50 (2d Cir. 2009); *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011); *United States v. Moore*, 666 F.3d 313, 318-19 (4th Cir. 2012); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Khami*, 362 Fed. Appx. 501, 507–08 (6th Cir. 2010); *United States v. Irish*, 285 Fed. Appx. 326, 327 (8th Cir. 2008); *United States v. Vongxay*, 594 F.3d 1111, 1114–15 (9th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *see also, e.g.*, *Johnson*, 2023 WL 2308792, at *4 ("In this circuit, even after *Bruen*, the law is settled that this category of individual, a convicted felon, falls outside that protected sphere.").

Because a segment of section 790.23(1)(a)'s applications will unquestionably involve these (or analogous) prohibited categories of individuals, Appellant's facial challenge fails. *See Rahimi*, 602 U.S. at 698 ("[W]e do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse . . . ."). "Legislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed." *Jackson*, 69 F.4th at 504; *accord Rahimi*, 602 U.S. at 698. It was "not

unreasonable" for our legislature to echo that history in disarming felons as a class. *Jackson*, 69 F.4th at 504. Indeed, "historical analogue[s]" support the Florida Legislature's decision to ban, on a class-wide basis, felons from possessing firearms. *Bruen*, 597 U.S. at 30.

Unsurprisingly, then, Mr. Parker cites no case in which a court has held that a felon-dispossession law is facially unconstitutional under the Second Amendment.[3] On the contrary, Florida and federal courts have overwhelmingly upheld the validity of felon-dispossession laws even after *Bruen*. *See, e.g.*, *United States v. Meyer*, 2023 WL 3318492, at *3 (S.D. Fla. May 9, 2023) (citing over 30 recent federal cases, and observing that "every federal judge who has considered this question since *Bruen* has upheld the continued validity of" the federal ban on felons possessing firearms)); *Foster v. United States*, 2023 WL 8650258, at *1 (M.D. Fla. Dec. 14, 2023) ("Because *Bruen* did not express an opinion as to the constitutionality of felon-in-possession laws," decisions upholding such laws "remain[] binding."); *Edenfield v. State*, 379 So. 3d 5, 6–10 (Fla.

[3] Rather, a survey of other jurisdictions echoes the constitutionality of felon dispossession statutes. *See State v. Parras*, 531 P.3d 711, 714, 717 (Or. Ct. App.), *review denied*, 538 P.3d 577 (Or. 2023) (resolving that statute prohibiting possession of firearms by felons is consistent with historical tradition of firearm regulation; "numerous facial challenges to felon in possession statutes were raised nationwide" but "[n]o state law banning felons from possessing guns has ever been struck down" and "no federal ban on felons possessing guns has been struck down"); *People v. Alexander*, 308 Cal. Rptr. 3d 380, 385 (Cal. Ct. App.), *review denied* (2023) (determining that statute prohibiting felons from possessing firearms is constitutional because "according to *Heller* and *Bruen* only law-abiding citizens are included among 'the people' whose right to bear arms is protected by the Second Amendment.") (emphasis added); *State v. Craig*, 826 N.W.2d 789, 794, 798 (Minn. 2013) (discussing federal courts' rejection of facial challenges to felon-in-possession statutes and finding its ineligible-person statute constitutional); *Pohlabel v. State*, 268 P.3d 1264, 1267 (Nev. 2012) (finding that state can prohibit felons from possessing firearms).

Dist. Ct. App. 2023), *reh'g denied*, 375 So. 3d 930 (Fla. Dist. Ct. App. 2023), *review denied*, 2023 WL 8710101 (Fla. Dec. 18, 2023).

At any rate, this very case involves not merely a felon, but a dangerous felon. Mr. Parker was previously convicted of armed burglary of a dwelling. (R. 117); *see Rahimi*, 602 U.S. at 740 (Barrett, J., concurring) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." (internal quotation marks omitted)); *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting) (explaining that "[h]istorically, limitations on the right were tied to dangerousness" and that "[v]iolence was one ground for fearing danger, as were disloyalty and rebellion"). And the conduct that led to Mr. Parker's current set of charges only underscores that he was and remains dangerous. Aside from the felon-in-possession charge on appeal here, Mr. Parker was convicted of attempted murder in the second degree and shooting at or into an occupied vehicle. (R. 116–17, 267–69, 508–09, 512–24, 818; T. 960–61, 996). At a minimum, Mr. Parker cannot assert a Second Amendment right to possess a firearm during the commission of a violent felony.

III. SIMILAR TO *GUZMAN v. FLORIDA*, 144 S. CT. 2595 (2024), MR. PARKER'S CHALLENGE TO FLORIDA'S SIX-PERSON JURY DOES NOT WARRANT REVIEW

Lastly, Mr. Parker implores the Court to recede from *Williams v. Florida*, 399 U.S. 78, 86 (1970) and recognize a right to a twelve-member jury. (Pet. at 18-30). A nearly identical argument was before this Court just last year in *Guzman v. Florida*, 144 S. Ct. 2595 (2024). There, the Court denied review. Florida adopts the arguments it made in *Guzman* and applies those arguments herein as nothing in the legal landscape

has changed since *Guzman* nor is there anything about the instant case which necessitates a different result.

A. The Court Should Reject Petitioner's Invitation to Reconsider and Overrule *Williams*

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that the Sixth Amendment permits juries comprised of six members in serious criminal cases. Although Mr. Parker urges the Court to grant review to overrule this fifty-five-year-old case, he does not acknowledge his heavy burden to show that the Court should do so.

This Court does not lightly overrule precedent. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). To that end, this Court considers several factors before overruling a prior decision: the quality of the prior decision's reasoning, the workability of its holding, its consistency with other cases, post-decision developments, and reliance on the decision. *Id.* at 2478-79. Those factors favor leaving *Williams* undisturbed.

Mr. Parker is wrong to dismiss the quality of *Williams*' reasoning as "functionalist logic." (Pet. at 23). On the contrary, Justice White's opinion for the Court in *Williams*—thick with scholarly footnotes—extensively canvassed the history of, and purposes behind, the jury-trial right as established by "the Framers" in the Sixth Amendment. 399 U.S. at 103. The Court devoted thirteen pages to the history and development of the common-law jury and the Sixth Amendment. *See id.* at 87–99; *see*

also Ramos v. Louisiana, 140 S. Ct. 1390, 1433 (2020) (Alito, J., dissenting) (observing that *Williams* contained "a detailed discussion of the original meaning of the Sixth Amendment jury-trial right"). This Court in *Williams* examined the history surrounding the common-law twelve-person requirement. *See* 399 U.S. at 87–89, 87 nn.19–20, 88 n.23. It addressed the Court's previous cases discussing jury size. *See id.* at 90–92, 90 n.26, 91 nn.27–28, 92 nn.29–31. It discussed the history of Article III's jury-trial provision and the accompanying ratification debates. *See id.* at 93–94, 93 nn.34–35. It analyzed the drafting history of the Sixth Amendment, including disputes over what language to use. *See id.* at 94–97, 94 n.37, 95 n.39. And it considered contemporaneous constitutional provisions and statutes regarding juries. *See id.* at 97 & nn.43–44. The upshot was that, as a matter of original meaning, the word "jury" in the Sixth Amendment did not codify any common-law practice of empaneling twelve jurors. *See id.* at 99–100.

Mr. Parker makes no attempt to identify error in that analysis. As *Williams* observed, while the "jury at common law came to be fixed generally at 12, that particular feature of the common law jury appears to have been a historical accident," 399 U.S. at 89 (footnote omitted), and was not uniform even at common law, as the Pennsylvania colony "employed juries of six or seven," *id.* at 98 n.45 (citing Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* 1 Select Essays in Anglo-American Legal History 367, 398 (1907)).

But even assuming uniformity in common-law practice, the Court explained that not every such practice was "immutably codified into our Constitution." *Williams*, 399 U.S. at 90; *see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2255 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so."). For example, at English common law, a jury consisted of twelve male free-holders (i.e., landowners) from the vicinage (i.e., county) of the alleged crime. 4 William Blackstone, *Commentaries on the Laws of England* 343–44 (1769); *see also* Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. & Am. L. Reg. 197, 198–99 (1909) (quoting the Continental Congress's explanation of the prevailing practice of using "12 . . . countrymen and peers of [the accused's] vicinage"); William S. Brackett, *The Freehold Qualification of Jurors*, 29 Am. L. Reg. 436, 444–46 (1881) (detailing the colonies' widespread practice of following the common-law requirement that juries consist only of "freeholders"). Yet Mr. Parker does not contend that the Sixth Amendment at any point in history mandated that a jury consist only of male landowners hailing from a particular county.

As this Court in *Williams* correctly observed, any such contention would be inconsistent with the Sixth Amendment's drafting history. The Framers, the Court explained, resoundingly rejected James Madison's proposal to constitutionalize in the Sixth Amendment all the "accustomed requisites" of the common-law jury. *Williams*, 399 U.S. at 94 (quoting 1 Annals of Cong. 452 (1789) (Joseph Gales ed., 1834)). Instead, the Sixth Amendment that the Framers proposed, and the people ratified required only

that juries be impartial and drawn from the state and district in which the crime was committed, which departed from the common-law practice by allowing Congress to establish the relevant vicinage through its creation of judicial districts. And though one might conclude that the Framers rejected the common-law requisites of jury composition because they were implicit in the word "jury," *Williams*, 399 U.S. at 96–97 (noting the possibility); *see also Khorrami v. Arizona*, 143 S. Ct. 22, 25 (2022) (Gorsuch, J., dissenting from denial of certiorari), Madison certainly did not think that was the case. He lamented that in removing the common-law requirements, the Framers "str[uck] . . . at the most salutary articles." *Williams*, 399 U.S. at 95 n.39 (quoting Letter from James Madison to Edmund Pendleton, Sept. 14, 1789, *in* 1 Letters and Other Writings of James Madison 491 (1865)). And Senator Richard Henry Lee "grieved" that they had left the "Jury trial in criminal cases much loosened." Letter from Richard Henry Lee to Patrick Henry, Sept. 14, 1789, https://tinyurl.com/muu5xzfa. Those would seem dramatic reactions to the mere trimming of surplusage.

Mr. Parker errs in contending that this Court's recent decision in *Ramos* requires overruling *Williams*. (Pet. at 21–22). In *Ramos*, the Court held that the Sixth Amendment constitutionalized the common-law requirement that a jury be unanimous, thus overruling this Court's fractured decision to the contrary in *Apodaca v. Oregon*, 406 U.S. 404 (1972). In doing so, *Ramos* discounted the relevance of the Amendment's drafting history, stating that "rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and

the States ratified." 140 S. Ct. at 1400. The Court instead relied on the fact that the unanimity of a jury verdict was "a vital right protected by the common law," *id.* at 1395, to conclude that the Sixth Amendment protected the same.

But it does not follow that the Sixth Amendment codified all aspects of the jury trial that obtained at common law—in particular the common-law rules for jury composition such as the number of jurors, vicinage, and juror landownership. James Wilson—a framer of the Constitution and one of the first Justices on this Court—for instance observed: "When I speak of juries, I feel no peculiar predilection for the number twelve." 2 James Wilson, *Works of the Honourable James Wilson* 305 (1804) (quoted in *Colgrove v. Battin*, 413 U.S. 149, 156 n.10 (1973)). Rather, Wilson wrote, a jury "mean[s] a convenient number of citizens, selected and impartial, who . . . are vested with discretionary powers to try the truth of facts." *Id.* at 306. Six impartial jurors acting by unanimous consent satisfy that definition. And the Court in *Williams* itself noted that its holding that a jury of six is constitutional was distinct from the requirement of unanimity, which, it observed, "unlike [jury size], may well serve an important role in the jury function"—namely, "as a device for insuring that the Government bear the heavier burden of proof." 399 U.S. at 100 n.46.

Still less does it follow that the Court should discard *Williams* as *Ramos* discarded *Apodaca*. Unlike *Williams*, which commanded a solid majority of this Court, Apodaca was a uniquely fractured decision that several Justices concluded in *Ramos* was not entitled to respect under the doctrine of *stare decisis* at all. *See Ramos*, 140 S. Ct. at 1398–99 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, and Sotomayor,

JJ.); *id.* at 1409 (Sotomayor, J., concurring in part) (calling *Apodaca* a "universe of one"); *id.* at 1402 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.) (concluding that *Apodaca* supplied no governing precedent). Unlike *Apodoca*'s holding that the Sixth Amendment does not require unanimous juries in state prosecutions, which subsequent cases referred to as an "exception" to settled incorporation doctrine and struggled to explain what it "mean[t]," *Ramos*, 140 S. Ct. at 1399, *Williams* has consistently been "adhere[d] to" and "reaffirm[ed]." *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (opinion of Blackmun, J., joined by Stevens, J.); *see also Ludwig v. Massachusetts*, 427 U.S. 618, 625–26 (1976); *Collins v. Youngblood*, 497 U.S. 37, 52 n.4 (1990); *United States v. Gaudin*, 515 U.S. 506, 510 n.2 (1995). And in *Colgrove*, this Court followed *Williams* in holding that six-person juries satisfy the Seventh Amendment's guarantee of a jury trial in civil cases. 413 U.S. at 158–60. That does not reflect a decision that has "become lonelier with time." *Ramos*, 140 S. Ct. at 1408.

Nor is reconsidering *Williams* warranted on the ground that the Court followed its detailed historical analysis with an assessment of the purpose of the jury trial and the functioning of a six-person jury. *See* 399 U.S. at 100–02. In *Williams*, this Court construed the purpose of the jury right to be "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," and reasoned that the difference between a jury of six and twelve is not likely to make a difference in that regard "particularly if the requirement of unanimity is retained." *Id.* at 100. The Court also found that the available data "indicate that there is no discernible difference

between the results reached by" six- and twelve-person juries. *Id.* at 101 & n.48 (citing studies).

Purpose may validly inform the meaning of text. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("Of course, words are given meaning by their context, and context includes the purpose of the text."). Not surprisingly, this Court's criminal-procedure precedents routinely have considered purpose—and with far less analysis of original meaning than *Williams*—in interpreting constitutional text. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (Sixth Amendment requires juries selected from fair cross-section of community); *Miranda v. Arizona*, 384 U.S. 436, 471–74 (1966) (law enforcement must inform detainees of Fifth Amendment rights and obtain waiver before proceeding with interrogation); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (Sixth Amendment requires court-appointed counsel for indigent defendants); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (evidence seized in violation of Fourth Amendment is inadmissible at trial); *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (prosecution must provide exculpatory evidence to defendant); *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984) (Sixth Amendment requires defense attorney to provide effective assistance); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (Eighth Amendment prohibits imposing capital punishment on mentally disabled); *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005) (Eighth Amendment prohibits imposing capital punishment for crimes committed when defendant was under 18); *Griffin v. California*, 380 U.S. 609, 614–15 (1965) (Fifth Amendment prohibits adverse inference from defendant's failure to testify). There is no

basis for discounting *Williams*' reasoning simply because it also considered the "function" served by the right. 399 U.S. at 99.

Mr. Parker is also wrong that post-decision developments have cast doubt on *Williams*' reasoning that a six-person jury fulfills the purposes of the Sixth Amendment. Mr. Parker cites Justice Blackmun's opinion in *Ballew* and subsequent research to suggest that empirical evidence shows that six-person juries do not function as well as twelve-person juries. (Pet. at 23–26); *see also Khorrami*, 143 S. Ct. at 26–27 (Gorsuch, J., dissenting from denial of certiorari). But those do not present the kinds of overwhelming developments sufficient to "erode" *Williams*' "underpinnings," *Janus*, 138 S. Ct. at 2482—and in many ways later developments corroborate *Williams*.

To start, *Ballew* itself did not find that the purported developments warranted overruling *Williams*; it "adhere[d] to" and "reaffirm[ed]" *Williams*. 435 U.S. at 239 (opinion of Blackmun, J., joined by Stevens, J.). And for good reason: post-*Williams* scholarship is, at most, mixed on this point.

In fact, social-science studies amply support *Williams*' conclusions, leading some scholars to criticize courts for claiming that six-person juries are inferior. *See* Kaushik Mukhopadhaya, *Jury Size and the Free Rider Problem*, 19 J.L. Econ. & Org. 24, 24 (2003). Smaller juries are preferable to larger ones in several ways. For one, larger juries can lead to a "free riding" phenomenon where jurors pay less attention and participate less in deliberations because they think there are plenty of other jurors to do the work. *Id.* at 40. That, in turn, can lead to less accurate verdicts. *Id.*

Six-person juries, by contrast, are more likely to make decisions as a group rather than by a few out-going jurors who dominate deliberations. *See* Bridget M. Waller et al., *Twelve (Not So) Angry Men: Managing Conversational Group Size Increases Perceived Contribution by Decision Makers*, 14 Grp. Processes & Intergrp. Rels. 835, 839 (2011); *see also* Nicolas Fay et al., *Group Discussion as Interactive Dialogue or as Serial Monologue: The Influence of Group Size*, 11 Psych. Sci. 481, 481 (2000) (reporting similar findings in non-jury groups). Put differently, a juror is more likely to find his or her voice in a smaller group setting.

Many assume that the additional jurors in a twelve-person jury make it more likely that one or more jurors will prevent the conviction of an innocent defendant. But if that were true, the rates of hung-juries would be higher for twelve-person juries than six-person juries. Yet empirical data shows no significant differences in the rates of hung juries between six- and twelve-person juries. *See, e.g.*, Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox*, 42 J. Legal Stud. 399, 402–04 (2013) (collecting studies). And other studies show that if required to be unanimous, six-person juries do not suffer from a meaningful increase in inaccurate verdicts. *See* Alice Guerra et al., *Accuracy of Verdicts Under Different Jury Sizes and Voting Rules*, 28 Sup. Ct. Econ. Rev. 221, 232 (2020) (concluding that unanimous six-person juries "are alternative ways to maximize the accuracy of verdicts while preserving the functionality of juries").

That reality is reflected in publicly available statistics. Far from returning higher rates of convictions, *see Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari), Florida juries convict criminal defendants at comparable—and possibly even slightly lower—rates than juries in jurisdictions that use twelve jurors. For example, between 2017 and 2019, felony juries in Florida convicted defendants at rates of 74.0%,[4] 73.3%,[5] and 72.1%,[6] respectively. In the same years, felony juries in Texas convicted at rates of 79.0%,[7] 81.0%,[8] and 78.0%;[9] felony juries in California convicted at rates of 86.0%,[10] 85.0%,[11] and 84.0%;[12] and felony juries in New York

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[4] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2016-17 3-21* (2018), https://tinyurl.com/4drv24ky (1,901 convictions out of 2,570 cases that went to the jury).

[5] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2017-18 3-21* (2019), https://tinyurl.com/433vwfy3 (1,784 convictions out of 2,434 cases that went to the jury).

[6] *See* Fla. Off. of State Cts. Adm'r, *Florida's Trial Courts Statistical Reference Guide FY 2018-19 3-21* (2020), https://tinyurl.com/43zywh5n (1,621 convictions out of 2,248 cases that went to the jury).

[7] Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2017 Court-Level* - 20 (2018), https://tinyurl.com/mtrp379s.

[8] Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2018* Court-Level - 21 (2019), https://tinyurl.com/2s3fsmpf.

[9] Off. of Ct. Admin., *Annual Statistical Report for the Texas Judiciary Fiscal Year 2019* Court-Level 23 (2020), https://tinyurl.com/ywh779v3.

[10] Jud. Council of Cal., *2018 Court Statistics Report: Statewide Caseload Trends* 69 (2018), https://tinyurl.com/5n6tj9pr.

[11] Jud. Council of Cal., *2019 Court Statistics Report: Statewide Caseload Trends* 69 (2019), https://tinyurl.com/mwmby3h5.

[12] Jud. Council of Cal., *2020 Court Statistics Report: Statewide Caseload Trends* 55 (2020), https://tinyurl.com/2mym3hrx.

convicted at rates of 74.6%,[13] 73.7%,[14] and 75.2%.[15] Mr. Parker's implication that Florida juries are steamrolling criminal defendants relative to other jurisdictions thus lacks support in the data. Instead, the data reflect what multiple studies have shown: six- and twelve-person juries similarly serve to "interpos[e] between the accused and his accuser . . . the commonsense judgment of a group of laymen." *Williams*, 399 U.S. at 100.[16] It is thus not true, as Mr. Parker would have it, that *Williams*' assessment of the six-person jury's effectiveness "has proven incorrect." (Pet. at 23).

Mr. Parker adds insult to error in suggesting that Florida's six-person jury rule was adopted "to suppress minority voices." (Pet. at 27). Beyond noting that the rule dates from Reconstruction, however, Mr. Parker cites no evidence suggesting that is so, and makes no attempt to explain how a rule establishing the size of juries without regard to race could be a covert instrument of racism.

Florida history in fact shows quite the opposite. Mr. Parker believes it nefarious that "[t]he common law rule of a jury of twelve was still kept in Florida while federal troops remained in the state," but that Florida then reduced the size of certain juries to

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[13] Chief Adm'r of Cts., *New York State Unified Court System 2017 Annual Report* 48 (2018), https://tinyurl.com/yckheu9v.

[14] Chief Adm'r of Cts., *New York State Unified Court System 2018 Annual Report* 42 (2019), https://tinyurl.com/yc7cvjhe.

[15] Chief Adm'r of Cts., *New York State Unified Court System 2019 Annual Report* 38 (2020), https://tinyurl.com/2wtwfmdm.

[16] Relying on studies purporting to show that smaller juries result in fewer minority jurors, Mr. Parker suggests that six-person juries threaten the right to a jury drawn from a fair cross-section of the community. (Pet. at 23); *see also Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari). Even if that were true, the fair-cross-section requirement applies only to the venire, not the petit jury. *Lockhart v. McCree*, 476 U.S. 162, 173–74 (1986).

six in 1877, after the departure of federal troops that had occupied Florida after the Civil War. (Pet. at 27–28). But petitioner fails to note that, even after that, Florida also retained twelve-person juries in capital cases, Act of February 17, 1877, ch. 3010, § 6, 1877 Fla. Laws 54, a fact quite inconsistent with petitioner's charge of racism. And in any event, petitioner does not contend that any part of Florida's current constitution, which was adopted in 1968 and provides that "the number of jurors, not fewer than six, shall be fixed by law," Fla. Const. art. I, § 22, was motivated by racial animus.

Finally, Mr. Parker does not so much as acknowledge, let alone dispute, that overruling *Williams* would have sweeping consequences for the citizens of Arizona, Connecticut, Florida, Indiana, Massachusetts, and Utah, who have for decades relied on *Williams* in using criminal juries of less than twelve jurors.

Florida is the third most populous state in the country and tries all noncapital crimes before six-person juries. Currently, roughly 5,000 criminal convictions are pending on direct appeal in Florida. Overruling *Williams* would force the use of public resources to conduct thousands of retrials on top of the trials already pending and might well result in the release of convicted criminals into the public.

The states' reliance interests here far outstrip the already "massive" and "concrete" reliance interests in *Ramos*. 140 S. Ct. at 1438 (Alito, J., dissenting). There, only two states allowed nonunanimous jury verdicts, and overruling *Apodaca* affected only those convictions that were actually obtained by nonunanimous verdicts. The affected convictions numbered somewhere in the hundreds. *Id.* at 1406. Here, by contrast, six states use juries with less than twelve jurors in at least some criminal

prosecutions. And all convictions from those juries would suddenly be suspect. In Florida, that is *every* conviction that is not a capital case, which amounts to several thousand.

As a last point on reliance, overruling *Williams* would not affect only criminal cases. In *Colgrove*, this Court relied on *Williams* in holding that the Seventh Amendment permits six-person juries in civil trials. 413 U.S. at 158–60. Consequently, nearly 90% of federal civil verdicts would also be in jeopardy. *See* Fed. R. Civ. P. 48(a); Patrick E. Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 46, 50 (2020) (finding that only roughly 12% of federal civil trials use twelve-person juries).

B. This Case is a Poor Vehicle

As in *Guzman*, the case *sub judice* is a poor vehicle for reconsidering *Williams*. This Court generally avoids deciding legal issues when doing so will have no effect on the litigants in the case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Yet even if the Court granted the petition and overruled *Williams*, Mr. Parker would not obtain relief because the error would be harmless.

A constitutional error at trial generally does not require automatic reversal. *Chapman v. California*, 386 U.S. 18, 22 (1967). An error usually requires reversal only if it was likely to have affected the outcome of the trial. *Id.* Thus, "most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999). If the defendant had the assistance of counsel in a trial with an impartial adjudicator, "there is a strong presumption" that any errors are subject to harmless-error analysis. *Id.*

The only exception to the general rule subjecting constitutional errors to harmless-error analysis is for so-called "structural errors." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). But the exception applies only to a "very limited class" of errors. *Neder*, 527 U.S. at 8. Those errors fall under three categories—none of which would include empaneling fewer than twelve jurors. First, an error may be structural when the violated right protects some interest other than preventing erroneous convictions. *Weaver*, 137 S. Ct. at 1908. But Mr. Parker himself argues that accuracy is the interest protected by the purported twelve-person requirement. (Pet. at 23–25). Second, errors are structural when they are inherently harmful such that they always result in fundamental unfairness. *Weaver*, 137 S. Ct. at 1908. Smaller juries, however, cannot be said to *always* result in unfairness—in many cases they will have no effect or may even benefit the defendant. Third, an error is structural if the effect of the error is impossible to determine. *Id.* But as this Court held in *Neder*, the effect of violating a defendant's Sixth Amendment jury right is sometimes possible to determine because a court can review the record and, if the evidence is "overwhelming" and "uncontroverted," determine beyond a reasonable doubt what the jury would have done. 527 U.S. at 9.

In *Neder*, an element of the charged offense was omitted from the jury instructions such that the jury did not find every element of the offense. *See id.* at 8. Even though that error deprived the defendant of his Sixth Amendment jury right because the omission meant a jury never convicted him of the charged offense, the Court held that the error was harmless. *Id.* at 15, 19–20. Because the record contained

"overwhelming" and "uncontroverted" evidence of the omitted element, the Court found beyond a reasonable doubt that the jury would have found the omitted element. *See id.* at 9, 19–20. Similarly, this Court has subjected other deprivations of a Sixth Amendment jury to harmless-error analysis. *See Washington v. Recuenco*, 548 U.S. 212, 221–22 (2006) (subjecting a judge's unconstitutional finding of a fact that in-creased the maximum possible sentence to harmless-error analysis); *Hurst v. Florida*, 577 U.S. 92, 102–03 (2016) (remanding to determine whether depriving defendant of the right to have a jury find aggravating factors necessary for a death sentence was harmless).

Were *Williams* overruled, the same reasoning would apply here. A court can review the trial record and evaluate whether the evidence was "overwhelming" such that there is no reasonable doubt that an additional six jurors would not have affected the outcome. If anything, the case for harmless-error review is stronger here than in *Neder* as an appellate court at least has the benefit of a jury finding as to each element of the offense.

The State would prove any error here harmless beyond a reasonable doubt. The evidence at trial was "overwhelming." Video evidence and testimony revealed that Mr. Parker shot the victim in the face/neck. (T. 505–06, 540, 848; State's Ex. 1). Changing the size of the jury would not have altered that outcome. Thus, Mr. Parker would not be entitled to reversal of his conviction whether or not the Court overruled *Williams*. So even if the Court wished to take the drastic step of overruling a fifty-five-year-old precedent, the Court should at least do so in a case where the decision will affect the ultimate outcome.

CONCLUSION

Based on the foregoing, Mr. Parker's petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES UTHMEIER
ATTORNEY GENERAL
OF FLORIDA
Tallahassee, Florida

By:/s/Sorraya M. Solages-Jones
SORRAYA M. SOLAGES-JONES
Senior Assistant Attorney General
Office of the Attorney General
State of Florida
1515 N. Flagler Drive, Suite 900
West Palm Beach, FL 33401
Tel: (561) 837-5016
sorraya.solagesjones@myfloridalegal.com
crimappwpb@myfloridalegal.com
Counsel of Record for Respondent, State of Florida