No. 18-7130

In the
Supreme Court of the United States

MATTHEW ALDEN,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the government brings criminal charges based on an allegation that the defendant sent a series of threats via text messages, does it violate the defendant's right to acquittal "except upon proof beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 364 (1970), for the trial court to instruct the jury to decide the authenticity of the text messages by a preponderance of the evidence before even considering them as evidence against the defendant, where the trial court also instructed the jury that they must find beyond a reasonable doubt that the defendant himself threatened the victim in order to convict?

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STATEMENT

1. Following a jury trial in September 2015, petitioner was convicted of intimidating a witness by sending threatening text messages, in violation of Mass. Gen. Laws. ch. 268, § 13B. Pet. App. 2, 11. The charges arose from messages that petitioner sent to his former girlfriend in January 2015, when she was a potential witness in a criminal case pending against him. Pet. App. 2. The victim reported that the text messages came from a telephone number that petitioner had used to communicate with the victim, through calls and text messages, repeatedly for over a year. *Id.* Some of the messages threatened that, if the victim went to court, she would "be sorry" and that people would "come after [her]." *Id.* One message told the victim to "keep her hoe ass mouth shut." *Id.* Another suggested that the victim should kill herself. *Id.* The victim believed that these text messages related to her role as a potential witness in the case pending against petitioner. *Id.*

At trial, petitioner testified that he did not send the messages and that, when the messages were sent, he did not have with him the cell phone from which the messages originated. Pet. App. 3. He said that he shared the cell phone with at least six other people, and that he and those six others all lived with his aunt, who had purchased the phone. Pet. App. 3. He also testified that one of the six people was his new girlfriend at the time, and that she did not like the victim. *Id.* 2-3.

2. The trial judge instructed the jury that the Commonwealth had the burden of proving each element of the offense beyond a reasonable doubt, as follows:

> In order to prove the defendant guilty of this offense the Commonwealth must prove three things or three elements beyond a reasonable doubt and unanimously. First, that the defendant either directly or indirectly made a threat to another person, made a threat to another person to physically or emotionally injure them, that other person, or made an effort to mislead or intimidate another person.
>
> Second, that the other person was a witness or a potential witness at any stage of a criminal proceeding or a person furthering a criminal proceeding or a person attending or who had made known his or her intention to attend a criminal proceeding.
>
> And then third, that the defendant did so willfully with the specific intent to impede, obstruct, delay, harm, punish or otherwise interfere with a criminal proceeding.
>
> …
>
> If the Commonwealth has proven each of the three elements beyond a reasonable doubt you should return a verdict of guilty. If any element, any one element, of the crime has not been proven by the Commonwealth beyond a reasonable doubt you must find the defendant not guilty.

Pet. App. 13-14. The judge then told jurors that he was providing "a supplemental instruction as to the text messages, if [they] conclude that there were text messages sent in this case," as follows:

> Before you can consider the content of those alleged text messages you must first be persuaded that the person on the other side of the conversation was, in fact, the defendant. The prosecution has to prove what is called by a preponderance of the evidence. It's a different standard, lower than the beyond a reasonable doubt standard. Preponderance of the evidence mean [sic] that the evidence must convince you that it is more likely true than not that the person on the other end of the conversation was, in fact, was the defendant. If you are not convinced that it is more likely true than not that the other person on the alleged conversation was, in fact, the defendant then you may not consider that conversation, in this case text messages as alleged, you may not consider that conversation at all against the defendant.
>
> So you have to make a preliminary decision as to whether or not the defendant was the person on the other end of those conversations before you may consider any of the conversation at all against the

> defendant. In making that decision you may consider all the circumstances about which you heard in the evidence regarding the conversation and other information related to it.

Pet. App. 15. The court also gave what he told jurors was a "further supplemental instruction as to the alleged text messages":

> In considering the content of the text messages, if you so decide that the government has met its burden of proving by a preponderance of the evidence that the defendant was on the other side of that conversation, you are to put aside any and all sympathy, bias or prejudice and decide the facts of this case on the evidence and on the evidence alone.

Pet. App. 15-16.

At the close of jury instructions, defense counsel objected to the court's preponderance instruction relating to the text messages, arguing that it would confuse the jury about the burden of proof. Pet. App. 17. Defense counsel asked the court to provide a specific additional instruction that the prosecution had to "prove beyond a reasonable doubt that he sent those messages." *Id.* 17. After an exchange on the subject, the court declined to provide the particular instruction defense counsel requested. Defense counsel objected. The court then provided the following instruction to the jury:

> Just so we're not—I'm not confusing you, the preliminary issue as to the admissibility of the text messages, the standard is preponderance of the evidence. So you have to first determine by a preponderance of the evidence, was the defendant the person on the other side of the conversation. Only then can you them [sic] in determining whether or not the government has proven the elements of the offense beyond a reasonable doubt.

Pet. App. 19. The jury ultimately found petitioner guilty. Pet. App. 2.

3. The Massachusetts Appeals Court affirmed the conviction. *Commonwealth v. Alden*, 93 Mass. App. Ct. 438 (2018). The Appeals Court rejected petitioner's claim that the trial court's preponderance instruction on the text messages "was reversible error because it confused the jury regarding the Commonwealth's burden of proof." Pet. App. 6. An "instruction on a preliminary determination of authorship was appropriate," the Appeals Court found, and the instruction was "an accurate statement of the law." *Id.* Moreover, the instruction did not cause confusion, because the trial judge "properly instructed the jury on the elements of the crime, including that the Commonwealth had the burden to prove beyond a reasonable doubt that it was the defendant who directly or indirectly threatened the victim." *Id.* The Appeals Court noted that "[t]hree times the judge emphasized that the Commonwealth's burden was to prove each element of the crime beyond a reasonable doubt," and that the judge also "gave a curative instruction after the defendant objected." *Id.* at 6-7.

The Appeals Court "acknowledge[d] that in this case there was a fine line between the (1) preliminary determination of the authenticity of the text messages and (2) proof of the defendant's identity as the perpetrator of the threats." Pet. App. 7. Nonetheless, the Appeals Court stated, "authenticity and identity are different legal concepts, and the judge did not err in explaining the distinction." *Id.* Although "in the context of this case, it would have been preferable to instruct the jury more directly that authorship of the threatening text messages was an element

of the offense that had to be proved beyond a reasonable doubt," the trial judge "acted within his discretion in framing the instructions as he did." *Id.* The Appeals Court concluded that, "[c]onsidering these instructions as a whole, … the defendant's substantive rights were not adversely affected by the supplemental jury instruction." *Id.*

The Supreme Judicial Court denied petitioner's application for further appellate review on September 13, 2018. Pet. App. 10.

REASONS TO DENY THE WRIT

I. The Petition Does Not Present a Federal Question Warranting the Court's Consideration.

The petition purports to raise the question of whether, where a criminal case against a defendant hinges on his authorship of text messages, a court may instruct a jury to decide such authorship by a mere preponderance of the evidence for purposes of determining guilt. Pet. i. The case does not squarely present that question, however. To the contrary, the Appeals Court below recognized that, in such circumstances, jurors must find that the defendant authored the text messages beyond a reasonable doubt to convict, and that the trial court had duly instructed the jury that, to convict, it must find beyond a reasonable doubt that the defendant himself threatened the victim. Pet. App. 6-7. The only issue was whether the trial court's jury instructions regarding authentication of text messages nevertheless could have confused the jury on the ultimate burden of proof. *See id.*

Accordingly, this petition does not present an appropriate vehicle for deciding the question presented. In any event, however, petitioner's claim that a split in authority exists on that question is incorrect. Nor does the petition identify a split of authority on the separate question—neither fairly included in petitioner's sole question presented, nor passed on below—regarding the extent to which instructional errors on the burden of proof constitute structural error.

A. The Petition Does Not Identify a Split of Authority on the Question Presented.

1. The Petition's Claim of a Split of Authority Is Premised on a Mischaracterization of the Decision Below.

The petition's claim of a shallow split of authority is based on an erroneous characterization of the decision below as upholding an instruction that jurors may find the defendant guilty based on proof of a critical fact—authorship of the text messages—by a mere preponderance of the evidence. *See, e.g.*, Pet. i, 1, 6, 13, 14. But that is not what the Appeals Court held. Accordingly, the decision below does not depart from this Court's and other courts' recognition of the necessity of proof beyond a reasonable doubt for each element of a crime, and every fact necessary to establish those elements.

Far from upholding a preponderance standard for determining the identity element necessary for a conviction, the Appeals Court recognized that "authorship of the threatening text messages was an element of the offense *that had to be proved beyond a reasonable doubt*." Pet. App. 7 (emphasis added); *see, e.g.*, *Victor v.*

Nebraska, 511 U.S. 1, 5 (1994) (citing *In re Winship*, 397 U.S. 358, 363 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged")).

Indeed, the appropriate burden of proof was not at issue below. Instead, the Appeals Court considered the fact-bound question of whether the instructions could have confused the jury about the appropriate burden of proof. *See* Pet. App. 6 ("The defendant claims that the supplemental instruction was reversible error because it confused the jury regarding the Commonwealth's burden of proof. We disagree."); *Victor*, 511 U.S. at 5 ("'[T]aken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury'"; instructions deprive a defendant of due process if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." (citation omitted)). The Appeals Court found that the trial court's preponderance instruction on authorship of the text messages, in combination with the trial court's multiple instructions on reasonable doubt, required that jurors analyze authorship of the text messages twice, by two different standards—first, by a preponderance of the evidence standard, to determine authenticity, and second (if they found authenticity), by a reasonable doubt standard, to determine whether the defendant's conduct met the elements of the offense. Pet. App. 6-7. The Appeals

Court found that this two-step instruction was consistent with Massachusetts law,[1] and concluded that, considering the instructions "as a whole," the authenticity instruction did not create an unreasonable risk of confusing the jury on the appropriate burden of proof. Pet. App. 6-7.

Thus, the Appeals Court never held that a preponderance standard was appropriate for determining critical facts for deciding guilt. *Cf.* Pet. i, 1, 6, 13, 14.

2. No Split Exists.

Petitioner errs in claiming a split of authority warranting this Court's review. In short, the cited decisions from the Ninth Circuit and intermediate California appellate court are consistent with the decision below, and the cited decision from the Second Circuit does not even address the question presented. *See* Pet. 7-13 (discussing *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011); *People v. Nicolas*, 8 Cal. App. 5th 1165 (2017), *review denied* (Cal. 2017); and *Brown v. Greene*, 577 F.3d 107 (2d Cir. 2009)).

First, the Ninth Circuit's holding in *Doe v. Busby*, striking down jury instructions that "lower[ed] the burden of proof for all charged offenses," is consistent with the decision below. 661 F.3d 1001, 1022 (9th Cir. 2011). In *Busby*, the Ninth Circuit considered an instruction allowing jurors to determine by a preponderance of the evidence whether the defendant committed uncharged

[1] Petitioner does not challenge that state law determination (nor could he on a petition for certiorari, *see, e.g.*, *Webb v. Webb*, 451 U.S. 493, 494 n.1 (1981)). He also does not challenge the accuracy of the trial court's instruction in any other regard.

domestic violence, and then to infer guilt for the charged offenses based on that preponderance finding. *Id.* at 1008-09. The Ninth Circuit's conclusion that this instruction lowered the burden of proof for determining guilt does not conflict with the decision below because the jury instructions at issue in the two cases were substantially different. The challenged instruction below did not ask jurors to determine guilt based on a preponderance finding, much less as to an uncharged act, as in the Ninth Circuit case—indeed, uncharged acts were not at issue below—and the Ninth Circuit decision did not involve a two-step instruction of the type considered by the Appeals Court. Each decision turned on the specifics of the instruction at issue, so the differing conclusions reached by the two courts do not create a conflict. And the Ninth Circuit's rejection of jury instructions that lower the burden of proof for conviction is fully consistent with the Appeals Court's recognition below that authorship "was an element of the offense that had to be proved beyond a reasonable doubt." Pet. App. 7.

Second, the intermediate California appellate court's decision in *People v. Nicolas* also is consistent with the decision below. There, the defendant was convicted of vehicular manslaughter with gross negligence based on texting and answering phone calls before a crash. 8 Cal. App. 5th 1165, 1170 (2017), *review denied* (Cal. 2017). In its jury instructions, the trial court referred to the calls and texts as "uncharged acts," and instructed the jurors that, if they found the defendant had committed those acts by a preponderance of the evidence, the acts

could be considered in determining guilt. *Id.* at 1177-78. On appeal, the court found that the instruction was improper because the calls and texts were part of the charged crime—not "uncharged acts." *Id.* It thus found that the instruction "had the effect of lowering the prosecution's burden of proof" because the jury was told to apply both a preponderance standard (in the uncharged acts instruction) and a reasonable doubt standard (in the general guilt instructions) to evidence of the defendant's phone use. *Id.* at 1181-82. As with the Ninth Circuit decision, the intermediate California court's decision in *Nicolas* does not raise a conflict, because the instruction in *Nicolas* was different from the instruction at issue below. In the California case, the instruction wrongly referred to elements of the charged crime as "uncharged acts"; the instruction below included no such inaccuracy. Moreover, in the California case, the trial court instructed on the preponderance and reasonable doubt standards with no reconciliation of the two standards, leaving the jury "'with a nearly impossible task,'" *id.* at 1182; the trial court below, on the other hand, presented the two standards in two separate steps. *See supra* at 7-8. The different results in the two cases therefore do not conflict. And the two decisions are consistent in both recognizing that critical facts must be found beyond a reasonable doubt for a conviction. *See Nicolas*, 8 Cal. App. 5th at 1179; 1181-82; Pet. App. 7.

Third and finally, the Second Circuit's decision in *Brown v. Greene* is wholly inapposite. There, the Second Circuit rejected a habeas corpus petitioner's argument that trial counsel was ineffective for failing to challenge jury instructions

on burden of proof at his robbery trial. 577 F.3d 107, 108 (2d Cir. 2009). The trial court had instructed the jury to apply a reasonable doubt standard, but also instructed that "50.1 to 49.9, factual findings can be made, although they are not established beyond a reasonable doubt." *Id.* at 109. Trial counsel reasonably could have decided not to challenge this instruction, the Second Circuit held, because earlier decisions from its court had upheld similar instructions. *Id.* at 111-12. In rejecting the petition, the Second Circuit emphasized that it was deciding ***only*** the ineffectiveness issue; it did not decide if its precedents "would compel [the court] to uphold the charge if it came before [the court] in a case that did not involve the deferential standards of AEDPA and *Strickland*." *Id.* at 113 (referring to 28 U.S.C. § 2254(d)(1) and *Strickland v. Washington*, 466 U.S. 668 (1984)). Thus, the *Brown* court explicitly *did not decide* the validity of the underlying jury instructions. *See* Pet. 11 (admitting that *Brown* does not present a conflict in "a purely formal sense").

In sum, the petition fails to identify any split of authority on the question presented.

B. The Structural-Error Issue Discussed in the Petition Does Not Warrant Review.

1. The Question Presented Does Not Fairly Include the Structural-Error Issue.

The petition raises a single question: "When the government brings criminal charges based on an allegation that the defendant sent a series of text messages,

does it violate the defendant's right to acquittal 'except upon proof beyond a reasonable doubt,' *In re Winship*, 397 U.S. 358, 364 (1970), for the trial court to instruct the jury to decide whether the defendant sent those text messages by a preponderance of the evidence?" Pet. i. The petition itself also discusses another issue, however: whether the alleged instructional error is structural. *See, e.g.,* Pet. 7. This Court should decline to consider this second issue because it is not "fairly included" in the question presented. Sup. Ct. R. 14.1(a); *see Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 352 n.13 (2005) (declining to consider whether Somalia is a country because that question was not "fairly included" within question presented of whether Attorney General could remove alien to designated country).

Whether an error is structural is a question distinct from—not comprised within or subsidiary to—the question of whether there has been any error at all. Indeed, the structural-error question assumes that the question of error has already been answered. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed."). At best, the structural-error question is "related to" the question presented, which is not enough to bring an issue within the scope of this Court's review. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) ("A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'") (citation omitted). That petitioner discussed the structural-error issue in the body

of his petition does not change the result. *See Wood v. Allen*, 558 U.S. 290 (2010) (declining to address argument not fairly included in question presented, despite fact that petitioner "discussed this issue in the text of [his] petition for certiorari"); *Izumi*, 510 U.S. at 427 n.5. The structural-error issue is therefore not properly before this Court.

2. The Petition Does Not Identify a Split of Authority on the Structural-Error Issue.

Even if the structural-error issue were fairly included in the sole question presented by the petition, petitioner identifies no split in authority warranting this Court's review.

The petition cites no further lower-court cases in support of a claimed need to address this structural-error issue, aside from the three cases already described above—which, in addition to not establishing a split on the main question presented, also do not establish a split regarding structural error. *See* Pet. 7-13. The Second Circuit's *Brown* decision does not address structural error at all. *See Brown*, 577 F.3d at 110-13. The Ninth Circuit and intermediate California court found structural error in *Busby* and *Nicolas*, respectively—but did so based on their holdings that jury instructions had effectively lowered the burden of proof for determining guilt. *See Busby*, 661 F.3d at 1022-23; *Nicolas*, 8 Cal. App. 5th at 1181-82. Here, by contrast, the lower court did ***not*** hold that the jury instructions had lowered the burden of proof; in fact, the court explicitly rejected petitioner's assertion that the challenged instruction "confused the jury regarding the

Commonwealth's burden of proof," and concluded that the instruction was "an accurate statement of the law." Pet. App. 6. Rejecting the claim that any error occurred, the Appeals Court had no reason to consider whether any such error would be structural. *See id.* at 6-7.

Petitioner misreads the decision below in arguing that the Appeals Court diverged from the Ninth Circuit and California intermediate appellate court because it applied a "non-constitutional standard of review" that is only appropriate in reviewing non-structural errors. Pet. 7 (citing statement in decision below that "[w]e review objections to jury instructions to determine if there was any error, and if so, whether the error affected the substantial rights of the objecting party," Pet. App. 6). The Appeals Court did consider the impact of the authentication instruction claimed to be a source of juror confusion—but it did so in assessing the effect of the allegedly confusing instruction in the larger context of the instructions as a whole. *See* Pet. App. 7 ("Considering these instructions as a whole, we are confident that the defendant's substantive rights were not adversely affected by the supplemental jury instruction."). The court thus adhered to this Court's precedent, under which a court must consider instructions as a whole to determine whether a burden of proof error *occurred at all* rather than whether any such error was *harmless*. *See Victor*, 511 U.S. at 5 (no constitutional error if "'taken as a whole, the instructions … correctly conve[y] the concept of reasonable doubt to the jury") (citation omitted). And the Appeals Court plainly did not conduct the type of

harmlessness analysis that is prohibited on structural-error review, such as one evaluating the strength of the evidence at trial. *Compare* Pet. App. 6-8 (finding no instructional error before separately turning to petitioner's sufficiency challenge), *with Neder v. United States*, 527 U.S. 1, 16-17 (1999) (after determining that omission of materiality element from jury instructions was not structural error, holding that error was harmless because evidence of materiality at trial was overwhelming).

Moreover, even if the court's reference to determining whether any such "error affected the substantial rights of the objecting party" were interpreted to prescribe a layer of harmlessness review prohibited for structural errors, it was merely dicta because the Appeals Court expressly found no instructional error. Pet. App. 6-7. It thus did not create a split of authority.

The petition thus fails to identify a conflict of authority meriting this Court's intervention on either the *Winship* question presented or the separate structural-error issue.

II. This Case Is a Poor Vehicle for Deciding the Question Presented or the Structural-Error Issue.

This case is a poor candidate for a grant of certiorari on either the question presented regarding instructional error on the burden of proof, or the separate structural-error issue discussed in the petition.

With respect to the *Winship* question presented, petitioner himself could gain no benefit from a resolution of the question in his favor. Petitioner argues that, in

criminal cases involving text messages, "it is essential that the jury be made to understand that, even if they think it is more likely than not that the defendant sent the text messages at issue, they must still acquit the defendant unless they are convinced of that fact beyond a reasonable doubt." Pet. 14. But as discussed above (*see supra* at 6-8), nothing in the decision below is inconsistent with that view; to the contrary, the court expressly recognized that such a jury finding was necessary. *See* Pet. App. 7 (recognizing that "authorship of the threatening text messages was an element of the offense that had to be proved beyond a reasonable doubt"). Thus, to the extent this Court wishes to address whether an instruction permitting jurors to decide critical facts by a preponderance of the evidence for determining guilt would be constitutional, any conclusion on the question presented would not result in relief for petitioner.[2]

For two reasons, this case is also a poor vehicle for considering in what circumstances an improper instruction relating to the burden of proof is a structural error. First, the Appeals Court did not consider that question. As described above (*see supra* at 13-14), the Appeals Court concluded that the challenged instruction was not erroneous. For that reason, the court did not consider whether any error was structural; indeed, the concept of structural error does not appear in the

[2] That "question" is also not worth this Court's attention because the Court has already held that such an instruction would be improper. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) ("The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements.") (citations omitted); *Winship*, 397 U.S. at 363.

opinion at all. *See* Pet. App. 1-9. That alone counsels against this Court's consideration of the issue. *See City & County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) ("The Court does not ordinarily decide questions that were not passed on below.").

Second and relatedly, if this Court wished to decide the structural error question, the Court would first have to reverse the Appeals Court's fact-bound determination that the trial court's instructions, considered as a whole, would not have confused the jury about the burden of proof. That fact-bound question is not worthy of this Court's review; the petition neither claims a split regarding this juror confusion issue nor even cites any other case involving a jury instruction of the kind used here, *see* Pet. 1-17. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (emphasizing importance of not granting certiorari "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant … certiorari to review evidence and discuss specific facts.").

III. The Decision Below Is Correct.

A. The Appeals Court's Fact-Bound Conclusion that the Instructions Did Not Confuse the Jury About the Commonwealth's Burden to Prove Guilt Beyond a Reasonable Doubt Was Sound.

This Court should not grant the petition for the further reason that the Appeals Court below did not err. It reasonably concluded that the instructions in

this case did not confuse the jury about the Commonwealth's burden to prove guilt beyond a reasonable doubt.

The analysis of the Appeals Court is fully consistent with this Court's requirement to consider jury instructions "as a whole" to determine whether "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor*, 511 U.S. at 6. The Appeals Court observed that the trial judge "properly instructed the jury on the elements of the crime, including that the Commonwealth had the burden to prove beyond a reasonable doubt that it was the defendant who directly or indirectly threatened the victim"; that the judge three times emphasized the Commonwealth's burden to prove each element beyond a reasonable doubt; and that the judge provided an additional instruction on the burden of proof after the defendant objected. Pet. App. 6-7. In essence, the trial court appropriately instructed the jurors that a preponderance finding was ***necessary*** before even considering the key evidence (the text messages) against the defendant, but, in context, made clear that such a finding was not ***sufficient*** for a guilty verdict. Although the Appeals Court acknowledged that the challenged instruction could have been phrased more clearly—"it would have been preferable to instruct the jury more directly that authorship of the threatening text messages was an element of the offense that had to be proved beyond a reasonable doubt"—the court reasonably

concluded that, "[c]onsidering [the] instructions as a whole," there was no error. Pet. App. 7.

This Court has regularly engaged in just this type of analysis regarding instructions that it similarly determined were flawed but not unconstitutional. In *Victor*, for example, the Court considered the constitutionality of instructions defining reasonable doubt in part with the phrases "moral certainty" and "substantial doubt." 511 U.S. at 7, 19. As to "moral certainty," the Court did "not condone the use" of the phrase, which might be "ambiguous in the abstract," but found that "the rest of the instruction … lends content to the phrase." *Id.* at 14, 16. The Court also found the phrase "substantial doubt" to be "somewhat problematic," but concluded that "the context makes clear that 'substantial' is used in the sense of existence rather than magnitude of the doubt," and thus a juror would not be confused. *Id.* at 20. *See also, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991) (concluding that, "[w]hile the [disputed] instruction was not as clear as it might have been," there was not a "'reasonable likelihood' that the jury would have concluded that th[e] instruction, read in the context of other instructions, authorized the use of propensity evidence pure and simple"); *Jones v. United States*, 527 U.S. 373, 392 (1999) (in rejecting claim that trial court's instructions suggested that defendant would receive lesser sentence if jurors could not reach unanimous sentencing recommendation, noting that "the District Court could have used the phrase 'unanimously' more frequently," but "when read alongside" other relevant

instructions, "the passages identified by petitioner do not create a reasonable likelihood that the jury believed that deadlock would cause the District Court to impose a lesser sentence").

Moreover, to the extent petitioner suggests that a two-step jury instruction of the type used below should be considered ***per se*** confusing, that view is inconsistent with the case-by-case, fact-based approach that this Court has taken to evaluating jury-confusion claims. *See, e.g.*, *Jones*, 527 U.S. at 390 (proper standard for reviewing "claims that allegedly ambiguous instructions caused jury confusion" is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution") (citation omitted); *Estelle*, 502 U.S. at 72. This fact-based approach makes sense, given the significant difference that particular word choices, the order of instructions, verdict forms, and other context can make to the appropriateness of a jury charge, as reflected in *Victor*, *Estelle*, and *Jones*. Here, as the Appeals Court correctly concluded, that broader context reasonably refuted petitioner's claim of juror confusion.

B. Any Harmlessness Analysis by the Appeals Court Was Consistent with the Decisions of this Court.

As discussed above, the Appeals Court did not address the structural-error issue raised in the petition. *See supra* at 16-17. And the Appeals Court's single-sentence reference to whether any flaw in the jury instructions had affected the defendant's substantial rights was consistent with analyzing whether a burden of proof error *occurred at all* rather than whether any such error was *harmless*. *See*

supra at 14-15. But even if the Appeals Court's decision were understood to include a harmlessness analysis, that was appropriate because the purported error here is not structural under this Court's precedent.

This Court has held that structural errors "'are the exception and not the rule.'" *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (citation omitted). Harmless-error analysis applies to instructional errors as long as "the error at issue does not categorically 'vitiat[e] all the jury's findings.'" *Id.* (citation omitted).

Here, petitioner challenges the trial court's instruction *about authorship of the text messages* only; there is thus no reason to believe that the instruction affected the jury's findings as to any other factual issue, including its implicit finding beyond a reasonable doubt "'that *the defendant* either directly or indirectly made a threat,'" Pet. App. 9, n.5 (quoting instruction with added emphasis). That circumstance distinguishes this case from *Sullivan*, in which the trial judge provided an unconstitutional definition of reasonable doubt that necessarily tainted ***all*** of the jury's findings. 508 U.S. at 281. This Court applied similar reasoning in distinguishing *Sullivan*, and applying harmless-error analysis, in *Hedgpeth*, 555 U.S. at 61 (jury instructed on multiple theories of guilt, one of which was improper), and *Neder*, 527 U.S. at 11 (jury instruction omitted element of the offense). Other opinions of this Court upholding harmless-error review of instructional errors also support a finding of no structural error here. *See, e.g.*, *California v. Roy*, 519 U.S. 2, 4 (1996) (misstatement of element of the offense); *Pope v. Illinois*, 481 U.S. 497, 504

(1987) (same); *Rose v. Clark*, 478 U.S. 570, 578 (1986) (improper burden-shifting on element of the offense).

Thus, insofar as the Appeals Court's decision can be interpreted as passing upon the structural-error issue, the court did not err in finding no structural error here.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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April 9, 2019