

No. 18-7130

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IN THE  
**Supreme Court of the United States**

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MATTHEW ALDEN,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

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On Petition for Writ of Certiorari to the  
Massachusetts Appeals Court

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**REPLY BRIEF FOR THE PETITIONER**

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## REPLY BRIEF FOR THE PETITIONER

Other than the latter half of its last argument, all of the arguments that Massachusetts advances depend on the premise that the decision below can be reconciled with the other decisions cited in the Petition by reading the decision below as having held that no error occurred. But that reading only strengthens the case for certiorari. To the extent that the decision below held that the preponderance instruction as to the sender of the Subject Messages was not error at all, this serves to deepen the decisional divide described in the Petition.

As for its final argument, Massachusetts contends that the standard of review used by the Appeals Court is the equivalent of the review for harmlessness beyond a reasonable doubt required by *Chapman v. California*, 386 U.S. 18 (1967). To the contrary, the standard of review used below is akin to the standard that applies to the collateral review of constitutional error, *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); it does not pass muster on direct review. This Court should grant certiorari to ensure that trial courts consistently inform juries in text-message prosecutions that they must acquit absent proof beyond a reasonable doubt that the defendant sent the messages at issue.

### **I. The Trial Court did not Duly Instruct the Jury that, to Convict, They Must Find Beyond a Reasonable Doubt that Mr. Alden Threatened the Victim, so the Federal Issue Presented in the Petition is Worthy of this Court's Review**

The first claim that Massachusetts makes in opposition to the Petition is that the Petition does not warrant this Court's attention because the trial court "duly

instructed the jury that, to convict, it must find beyond a reasonable doubt that the defendant himself threatened the victim.” Resp. Opp. 5. In staking its claim on this premise, Massachusetts commits the same error as the Appeals Court committed below. Viewed in context, the trial court’s preponderance instructions created a “reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.” *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citing *In re Winship*, 397 U.S. 358, 363 (1970)).

a. There is a Clear Split in Authority on the Question Presented

In his Petition, Mr. Alden cites to some cases that treat the delivery of preponderance instructions about an essential fact as structural error (*Busby* and *Nicolas*) and others indicating that such instructions are not federal constitutional error at all. (*Alden* and *Brown*). The deviation in treatment illustrated by these cases weighs heavily in favor of granting certiorari.

i. The Appeals Court Analyzed a Preponderance Instruction About an Essential Fact using a Nonconstitutional Standard of Review

The first argument about the lack of a circuit split that Massachusetts advances is that the Appeals Court did not regard the challenged instructions as error, so the decision below is consonant with other courts’ treatment of the preponderance-instruction issue. For at least two reasons, this argument fails.

First, it is perfectly fair to read the decision below as assuming that error occurred, and then deciding that the assumed error was harmless when analyzed under a nonconstitutional standard of review. The Appeals Court explicitly stated

that it was reviewing the challenged instructions “to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party”; it then analyzed the instructions under this standard, and held that “defendant's substantive rights were not adversely affected by the supplemental jury instruction.” App. 6-7. If the Appeals Court had decided that no error had occurred (as Massachusetts now suggests), then there would have been no need to analyze whether Mr. Alden’s substantive rights had been adversely affected.

Second, even if the decision below is more accurately read to have decided that there was no instructional error at all, the decision remains at odds with *Busby* and *Nicolas*. The Commonwealth’s argument to the contrary hinges on two faulty lines of reasoning that the Appeals Court followed. The first mistaken premise is that “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.” App.7. There was no “fine line” between these issues; they both asked the same question: Did Matthew Alden send the Subject Messages?

The Appeals Court’s second faulty line of reasoning relies on the idea that the trial court “explain[ed] the distinction” between authenticity and identity. App. 7. The trial court did not explain this distinction. It instead distinguished the question of who sent the Subject Messages from the elements that had to be proved beyond a reasonable doubt. App.15-16. Asked to clarify that the jury had to acquit Mr. Alden absent proof beyond a reasonable doubt that he had sent the Subject Messages, the trial court refused, and instead reinforced the distinction it had

drawn between the question of whether Mr. Alden was “the person on the other side of the conversation,” (which only had to be proved “by a preponderance of the evidence”), and “the elements of the offense” (which had to be proved “beyond a reasonable doubt”). App. 19.

This puts the lie to the claim that the trial court’s instruction required the jury to “analyze authorship of the text messages twice, by two different standards . . . .” Resp. Opp. 7. Nothing the trial court said gives even the most subtle indication that the jury were to revisit the question of the Subject Messages’ author. The trial court told the jury that, if they made the preponderance finding, they could use the Subject Texts “in determining whether or not the government has proven the elements of the offense beyond a reasonable doubt.” App.19. The instructions hardly hinted that identity was subsumed in each of those essential elements.

ii. There is a Clear Split of Authority on the Treatment of  
Preponderance Instructions Regarding Facts Essential to Guilt

In arguing that the cases in the Petition can be distinguished from the instant case such as to show the lack of any circuit split, Massachusetts relies upon distinctions that are either incorrect, or that make no difference. For example, Massachusetts argues that *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011) can be distinguished from this case because this case “did not ask jurors to determine guilt based on a preponderance finding,” and *Busby* “did not involve a two-step instruction of the type considered by the Appeals Court.” Resp. Opp. 9. Both of these distinctions are false.



The jury's verdict hinged on the one question they were told to decide by a preponderance of the evidence: Who sent the Subject Messages? The trial court refused to tell the jury that they had to acquit absent proof "beyond a reasonable doubt that [Mr. Alden] sent those messages." App.17. As a result, the jury were left with no choice but to "to determine guilt based on a preponderance finding." Resp. Opp. 9. And in addition to the instruction lacking any "two-step" analysis regarding who sent the Subject Messages, the instructions in *Busby* did involve a series of steps. *Busby*, 661 F.3d at 1008-1009. If anything, the extra steps in *Busby* lowered the risk that the jury would convict on a preponderance finding.

As for *People v. Nicolas*, 8 Cal. App. 5th 1165 (2017), *review denied* (Cal. 2017), Massachusetts is correct that the instruction in that case referred to "uncharged acts," whereas the instruction here did not. But that is beside the point. Both cases involved preponderance instructions regarding essential facts. It matters not whether those facts were incorrectly referred to as "uncharged acts." And Massachusetts is wrong to claim that the instruction below provided a "reconciliation" between the two standards of proof. Neither the instructions below, nor the instructions in *Nicolas* reconcile these concepts, and both leave the firm impression that a preponderance finding was sufficient to support a conviction.

*Brown v. Greene*, 577 F.3d 107 (2d Cir. 2009) involves a preponderance instruction on the issue of identity whose content and context is nearly identical to this case. *Id.* at 119. While the legal issue was not the same, this does not render *Brown* "wholly inapposite." Resp. Opp. 10. Rather, the reasoning in the *Brown*

dissent provides persuasive support for Justice Straubb’s conclusion that the preponderance instruction was structural error. This serves to emphasize the difficulty in reconciling the *Brown* majority’s holding with the holding in *Busby*.

b. The Structural-Error Issue Deserves to be Reviewed by this Court

i. The Structural-Error Issue is Fairly Included in the Question Presented

Massachusetts takes too narrow a view of the question presented. The question is essentially whether the instruction below violated *Winship*. Pet. i. Some violations of *Winship* are structural errors, *see, e.g. Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993); *Busby*, 661 F.3d 1001, but not all *Winship* violations are structural. *See Rose v. Clark*, 478 U.S. 570, 575 n. 3 (1986) (recognizing that error under *Sandstrom v. Montana*, 442 U.S. 510 (1979) “violates due process under the rule of *In re Winship*,” and holding that such error is not structural). Because *Winship* violations include both structural, and non-structural errors, the questions of whether or not a *Winship* violation occurred “fairly include[s]” the question of whether or not the resulting error is structural. Rule 14.1(a).

This result is supported by prior decisions from this Court involving a generalized question that could be broken down into multiple, more narrow questions. In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the general question was whether California had properly exercised personal jurisdiction over a foreign corporation, and that question fairly included the narrower question of whether California had general (as opposed to specific) jurisdiction over the foreign

corporation. *Id.* at 136 n. 16. Similarly, a general question about whether Amtrak’s prohibition against political advertising in Penn Station violated the First Amendment fairly included both the question of “whether Amtrak is a Government entity,” and the question of whether Amtrak was so “closely connected to Government” as to be subject to the First Amendment’s restrictions. *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379-380 (1995). These cases show that the question of whether *Winship* was violated fairly includes that narrower question of whether the violation was structural (*Sullivan*) or not (*Rose*).

In raising an issue under Rule 14.1(a), Massachusetts does not account for the cases showing that the question of structural error is fairly included in the more generalized question of *Winship* violations, instead relying on three cases that are clearly distinguishable. One case involves a failure to present the issue to the court below. *Jama v. Immigration & Customs Enft*, 543 U.S. 335, 352 n.13 (2005). The second involves an issue that is wholly distinct and separate from the question presented. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (question of whether courts of appeals should “routinely vacate district court final judgments at the parties’ request” does not fairly include question of whether petitioner’s motion to intervene was properly denied). And the third involves a question about an “unreasonable determination of the facts” under 28 U.S.C. §2254(d)(2) that did not fairly include the question of whether there was a legal error under a different statutory provision (28 U.S.C. §2254(d)(1)). *Wood v. Allen*, 558 U.S. 290 (2010).

Here, Mr. Alden did argue in the lower courts that structural error had occurred, App.20-23, 253, and he presented a question to this Court that encompasses both structural and non-structural error. The structural-error issue is fairly included in the question presented.

ii. The Decision Below and the Cases Cited in the Petition Show a  
Split of Authority on the Structural-Error Issue

Focusing in more specifically on the structural-error issue, Massachusetts again claims that no circuit split exists. But this claim is once more belied by the fact that the cases cited in the Petition bear close similarities that call for uniform treatment, yet they produce highly inconsistent analyses and results. The fact that “the lower court did *not* hold that the jury instructions had lowered the burden of proof,” Resp. Opp. 13 (emphasis in original), provides no refuge to Massachusetts. Instead, it serves to underscore the appropriateness of certiorari.

It cannot reasonably be disputed that the decision below, *Busby*, *Brown*, and *Nicolas* all involve a preponderance instruction being given regarding a fact that needed to be proved beyond a reasonable doubt. It cannot reasonably be disputed that none of these decisions involve curative instructions that reconcile the preponderance analysis with the need for an ultimate finding beyond a reasonable doubt. And it cannot reasonably be disputed that two of those decisions (*Busby* and *Nicolas*) treat the preponderance instructions as structural errors, and the other two (the decision below and *Green*) do not. This serves to show a divergence of opinion that calls for action from this Court.

But even if Massachusetts is somehow correct that the Petition fails to show a split on the structural-error issue, the split on the issue of whether there was any constitutional error at all still weighs heavily in favor of granting certiorari. If the decision below is allowed to stand, it will provide a basis to argue not only that a conviction based on text messages can rest on a mere preponderance finding about the messages' author, but also that any improprieties in this practice do not rise to the level of constitutional error. If only to clarify that the instructional error here was constitutional in nature, this Court should grant certiorari.

**II. This Case Provides an Excellent Vehicle for Resolving Courts' Divergent Treatment of the Question Presented because the Appeals Court Ignored a Federal Constitutional Issue of National Importance**

Sidestepping the impact that cell phones' ubiquity has on the issue of whether the question presented is an "important federal question" under Rule 10, Massachusetts opts instead to repackage arguments about the Appeals Court's treatment of this case. For example, Massachusetts notes that the decision below recognized that "authorship of the threatening text messages was an element of the offense that had to be proved beyond a reasonable doubt," and argues that, consequently, Mr. Alden could not benefit from any decision by this Court. Resp. Opp. 16. This argument completely disregards the trial court's refusal of trial counsel's request to tell the jury that the authorship of the threatening text messages was an element of the offense that had to be proved beyond a reasonable doubt. App.17-19.

Next, Massachusetts cites a case where the petitioner “never hinted at” the issue it was raising in this Court when it was arguing its case below. *City & County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015). On the basis of that case, Massachusetts argues that the Appeals Court’s failure to treat the preponderance instruction as constitutional error weighs against granting certiorari. But Mr. Alden did argue below that the preponderance instruction violated *Winship*, App.20-23, 253, and the Appeals Court did pass on this argument, at least by implication, when it decided to review the instruction using a nonconstitutional standard of review. App.6. This serves to distinguish *Sheehan*, and that distinction abides whether or not the *Winship* violation caused by the preponderance instruction below was structural error.

The final argument from Massachusetts about whether this case is an appropriate vehicle for deciding the question presented is that the Appeals Court made a fact-bound determination that the preponderance instructions were not erroneous, and that this determination is consequently of little national importance. But this determination was not fact bound. If the decision below is correct, then a preponderance instruction regarding the identity a text message’s author would be appropriate in any case alleging that the transmission of that text message was a crime. Under the Appeals Court’s analysis, such a preponderance instruction would be proper no matter what particular facts are presented by a given case, and would survive appellate review even if the trial court did not reconcile the preponderance instruction with the need to prove identity beyond a reasonable doubt.

Moreover, this argument rests on the false premise that Mr. Alden does not cite to “any other case involving a jury instruction of the kind used here.” Resp. Opp. 17. *Busby*, *Brown*, and *Nicolas* all involve a preponderance instruction regarding a fact that needed to be proved beyond a reasonable doubt. This case provides an excellent vehicle for this Court to clearly communicate that *Winship* requires trial courts in cases alleging that crimes were committed by the transmission of text messages to clearly instruct the jury that they must acquit absent proof beyond a reasonable doubt that the defendant sent the messages at issue. Mr. Alden’s jury were not made to reach any such understanding.

### III. The Decision Below is Incorrect

The final argument advanced by Massachusetts is that the Appeals Court “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.” Resp. Opp. 18. Assuming the truth of this contention (despite the raft of reasons to do otherwise reviewed above), it begs the question. The Appeals Court was not charged with deciding whether the instructions did or did not confuse the jury; it was charged with deciding whether there was 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 5 (citing *Winship*, 397 U.S. at 363) (emphasis supplied). Viewed against the correct legal standard, the decision below involves a clear *Winship* violation.

- a. To the Extent that the Appeals Court's Opinion can be Read as Deciding that No Error Occurred, it is Wrong Because the Trial Court did not Deliver a Two-Step Instruction on Authenticity and Identity

In the narrowest sense, the trial court did tell the jury that “a preponderance finding was *necessary* . . . [but] not *sufficient* for a guilty verdict.” Resp. Opp. 18. After all, the trial court instructed the jury that they had to acquit Mr. Alden unless they were satisfied beyond a reasonable doubt that the content of the Subject Messages constituted willful intimidation knowingly directed at a potential witness. App. 13-14. But none of those issues were contested at trial; the content of the Subject Messages precluded such a defense. App. 2.

Mr. Alden's only defense was that he had not sent the Subject Messages. After being instructed on the essential elements listed above, App. 13-14, the jury were then told to treat identity as an issue separate and apart from those elements, and to decide identity by a preponderance of the evidence. App. 15-16. Asked to correct the resulting impression that the preponderance finding on identity was sufficient for a guilty verdict, the trial court instead reinforced the distinction it had drawn between the essential elements and the issue of identity. App. 19. Massachusetts is incorrect to claim to the contrary.

In support of its arguments, Massachusetts cites no cases with instructions that come close to approaching the preponderance instructions' tendency to lower the burden of proof, and each case that Massachusetts does cite has curative instructions distinguishing it from this case. In *Victor*, the instructions required an



“abiding conviction,” and correctly defined the phrase “moral evidence,” which served to ameliorate the risk that the jury would understand the phrase “moral certainty” to have diluted the reasonable-doubt standard. *Victor*, 511 U.S. at 14-17.

In *Estelle v. McGuire*, 502 U.S. 62 (1991), the “clear connection” required by an instruction about prior bad acts limited the jury’s consideration of those acts to the issues of “intent, identity, motive, or plan.” *Id.* at 74-75 (citing Fed. Rule Evid. 404(b)). And in *Jones v. United States*, 527 U.S. 373 (1999), a case involving plain-error review, there was an instruction that a jury could only reach a verdict recommending certain sentences by “unanimously vot[ing] in favor of such specific penalty.” *Id.* at 391. The argument was that, by implication, this instruction indicated that a “lesser sentence’ option did not require jury unanimity.” *Id.* The most significant problem with this argument was “an unambiguous charge that any sentencing recommendation be unanimous.” *Id.* at 392.

Mr. Alden’s jury received no “unambiguous charge” to acquit him absent proof beyond a reasonable doubt that he had sent the Subject Messages. They received no explanation of the “clear connection” between authenticity and identity in the circumstances of this case, and no indication that they were to revisit the question of who sent the Subject Messages after making the preponderance finding prescribed by the trial court. There is a pronounced divide between the tendency of the preponderance instructions in this case to dilute the reasonable-doubt standard, and the effectiveness of the instructions that tempered the problematic remarks in *Victor*, *Estelle*, and *Jones*. Those cases are not apt.

b. The Appeals Court’s Treatment of the Federal Constitutional Issue Presented Below Comes Nowhere Close to the Declaration of Harmlessness Beyond a Reasonable Doubt Required by *Chapman*

“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman*, 386 U.S. at 24. The final argument by Massachusetts is that the Appeals Court’s tepid holding — “the defendant’s substantive rights were not adversely affected” — measures up to this weighty standard. But the Appeals Court’s review resembles a less rigorous standard of review than is applicable here.

The standard applied below (“whether the error affected the substantial rights of the objecting party,” App. 6), is basically the same as the standard under the “federal harmless-error statute,” which requires courts to disregard “defects which do not affect the substantial rights of the parties.” *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (quoting 28 U.S.C. § 2111); *see also* Fed. R. Crim. P. 52(a). In *Chapman*, this Court took note of 28 U.S.C. § 2111, and decided that, despite the enactment of that statute, there had been an “absence of appropriate congressional action” regarding the standard of review applicable to federal constitutional errors on direct appeal. 386 U.S. at 21, 22 n. 5. This goes to show that the standard of review applied below is appropriate only on collateral review of constitutional errors, and direct review of nonconstitutional errors. *Brecht*, 507 U.S. at 631-632.

Even if the preponderance instructions were not structural error, and even if the structural-error issue is beyond the scope of the Petition, this Court should

grant certiorari to correct the error that occurred below. Prosecutions for crimes by text message will inevitably continue to become more frequent, and authorship is bound to be a contested issue in a great many of those cases. The Constitution cannot withstand the application of such a lax standard of review to so central a question as whether the jury are satisfied, beyond any reasonable doubt, that the defendant committed the acts comprising the offense with which he stands charged.

There is an untenable likelihood that Mr. Alden's jury failed to apply this standard. They very well may have made no more than a preponderance finding regarding his identity as the Subject Messages' author. Lest this error be repeated in the countless witness intimidation, harassment, solicitation, manslaughter and other charges that are bound to be brought on the basis of text messages, this Court should grant certiorari.

### CONCLUSION

For the foregoing reasons, the Court should grant this petition for certiorari to determine whether it violates the defendant's constitutional right to acquittal absent proof beyond a reasonable doubt when the government charges the defendant with committing a crime by sending text messages, and the trial court instructs the jury to decide whether the defendant sent those text messages by a preponderance of the evidence.

Respectfully submitted,

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