No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES WESLEY KINCHELOE,
Petitioner,

v.

STATE OF OREGON,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Oregon charged petitioner with four felony and three Class A misdemeanor offenses.[1] The trial court instructed the jury that it could return a nonunanimous guilty verdict. After deliberations, the jury returned an 11-1 guilty verdict on one felony and 12-0 guilty verdicts on one felony and one misdemeanor.[2]

In *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), this Court held that the Sixth Amendment jury-trial right, as incorporated against the states through the Fourteenth Amendment, required a unanimous verdict to convict a defendant of a serious offense. Following that decision, the Oregon Supreme Court held that a trial court's instruction that a jury may return a nonunanimous guilty verdict violates the Sixth Amendment but that the error is harmless whenever the verdict is unanimous. The question presented is:

Does a trial court commit structural error for purposes of the Sixth Amendment to the United States Constitution, when the trial court instructs a jury in a criminal case that the jury can return a nonunanimous guilty verdict?

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[1] Class A misdemeanor offenses are punishable by a maximum incarceration term of 364 days. ORS 161.615(1).

[2] The court dismissed one misdemeanor before trial and acquitted defendant of one felony mid-trial. The jury acquitted defendant of one felony and one misdemeanor.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles Wesley Kincheloe, respectfully asks this court to issue a writ of certiorari to review the opinion and judgment in this case.

This petition is presented concomitantly with a petition for writ of certiorari from *State v. Ciraulo*, 367 Or. 350, 478 P.3d 502 (2020). The arguments presented mirror those presented in petition in *Ciraulo*. The difference between the two cases is that in *Ciraulo*, the jury's guilty verdicts were all 12-0, but here, the jury returned acquittals and nonunanimous verdicts in addition to two 12-0 verdicts.

OPINIONS BELOW

The Oregon Court of Appeals affirmed a Jackson County Circuit Court judgment convicting petitioner of first-degree rape, Or. Rev. Stat. 163.375, first-degree sodomy, Or. Rev. Stat. 163.405, and fourth-degree assault, Or. Rev. Stat. 163.160, without written opinion in *State v. Kincheloe*, 302 Or. App. 654, 458 P.3d 736 (2020).

The Oregon Supreme Court affirmed. *State v. Kincheloe*, 367 Or. 335, 338, 478 P.3d 507 (2020) (opinion attached at App. A.). In affirming petitioner's judgment of conviction, the court referenced and incorporated its decision from a companion case, *State v. Flores Ramos*, 367 Or. 292, 478 P.3d 515 (2020) (opinion attached at App. B).

JURISDICTION

This Court has jurisdiction to review the final judgment of the Oregon Supreme Court. 28 U.S.C. § 1257(a). The Oregon Supreme Court entered its judgment on December 24, 2020. This petition is timely under the Court's order extending the deadline to file a petition for a writ of certiorari to 150 days from the lower court's judgment. *Order List*, 589 U.S. ___ (Mar. 19, 2020).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

Article I, section 11, of the Oregon Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall have the right to public trial * * * provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]"

Or. Rev. Stat. § 136.450 provides:

> "The verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors."

STATEMENT OF THE CASE

1. The State of Oregon charged petitioner with, *inter alia*, first-degree rape, first-degree sodomy, and fourth-degree assault. *Kincheloe*, 367 Or. at 337. Those charges were based on the following facts:

In February of 2017, petitioner returned home while his wife, K, was sleeping. Tr 108. He went to their bedroom and began removing K's pants. Tr 108. K told petitioner to stop and that she did not want to have sexual intercourse. Tr 108. Petitioner told her to shut up. Tr 108. K pushed petitioner away. Tr 108-109. Petitioner went into the bathroom and began screaming and punching the walls. Tr 109. K was afraid that petitioner would hurt her, so she "let him have what he wanted" and submitted to sexual intercourse. Tr 109.

In May of 2017, petitioner and K were engaged in consensual intercourse when petitioner turned K onto her stomach, pinned her arms down, and inserted his penis in her anus. Tr 124. K had previously told petitioner that she did not want to engage in that manner of sexual contact, and she told petitioner to stop. Tr 124-25. Petitioner finished the sexual act. Tr 124-26.

At trial, K testified that she and petitioner were seeking a divorce, and that she was seeking custody of their children. Tr 276.

Petitioner contested the charges against him and argued that K's allegations were uncorroborated and that she had fabricated them to obtain leverage in their divorce proceedings. Tr 301-03.

2. The court instructed the jury that "10 or more jurors must agree on the verdict." *Kincheloe*, 367 Or. at 337. The trial court asked petitioner whether he wished to object to the instruction that the jury could return a nonunanimous verdict, stating, "All the defense attorneys are doing that now." Defense counsel responded, "That's fine." Tr 316. Defense counsel also asked the court to poll the jury about its verdict. Tr 317-18. The jury acquitted petitioner of first-degree rape and one count of fourth-degree assault. The poll reflected that the jury had returned an 11-1 guilty verdict on first-degree rape but returned 12-0 guilty verdicts on first-degree sodomy and fourth-degree assault. *Kincheloe*, 367 Or. at 337. The court sentenced defendant to 150 months' incarceration.

3. Petitioner appealed, arguing to the Oregon Court of Appeals that the trial court erred when it instructed the jury that it could reach a nonunanimous verdict and when it accepted a nonunanimous verdict. The Court of Appeals affirmed without written opinion. *Kincheloe*, 302 Or. App. 654.

While a petition for review to the Oregon Supreme Court was pending, this court overruled *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) and *Johnson* v. *Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d

152 (1972), and concluded that "the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." *Ramos*, 140 S. Ct. at 1397.

Shortly after that decision, the Oregon Supreme Court held that "*Ramos* leaves no doubt that our state's acceptance of nonunanimous guilty *verdicts* must change and that the convictions in many such cases now on appeal must be reversed." *State v. Ulery*, 366 Or. 500, 501, 464 P.3d 1123 (2020) (emphasis added). But the court did not address whether a trial court instruction by itself constituted error under *Ramos*.

The Oregon Supreme Court then allowed review in petitioner's case and four other companion cases to decide whether a trial court's *instruction* to a jury that it could return a nonunanimous guilty verdict, over defendant's objection, violates the Sixth Amendment and, if so, whether it required reversal. *Kincheloe*, 367 Or. at 339.

4. The Oregon Supreme Court reversed in part and affirmed in part. The court concluded that petitioner's case was controlled by its opinion in *Flores Ramos*. It assumed without deciding that defendant preserved his objection to the court's nonunanimous-verdict instruction. The court reversed petitioner's nonunanimous conviction for first-degree rape. But it affirmed his convictions for first-degree sodomy and fourth-degree assault based on *Flores Ramos*.

In *Flores Ramos*, the court first held that the trial court's nonunanimous-verdict instruction "was unambiguously wrong; it expressly told the jury that it could do what the Sixth Amendment forbids." *Flores Ramos*, 367 Or. at 299. Thus, the court concluded "that the Sixth Amendment is violated when a trial court tells the jury that it can convict a defendant of a serious offense without being unanimous." *Id*.

However, second, the court held that a jury instruction permitting the jury to return a nonunanimous jury verdict did not amount to structural error. *Id*. at 334; *Kincheloe*, 367 Or. at 338-39. In so holding, the court first rejected defendant's argument that jury unanimity—like reasonable doubt and the presumption of innocence—inheres in the basic framework of how a jury makes decisions about a person's guilt for purposes of satisfying the Sixth Amendment. *Flores Ramos*, 367 Or. at 303. Next, the court rejected petitioner's argument that a nonunanimous-verdict instruction defies review by preventing jurors from appreciating the significance of their role as jurors and altering the manner in which they deliberate. *Id*. at 317.[3] Finally, the court rejected petitioner's argument that permitting

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[3] In concluding that the error was harmless, the court rejected defendant's argument that it is certain that the error affected deliberations because "had the jury been properly instructed, it would have continued deliberating past the point at which it returned its verdict on [nonunanimous conviction], because two jurors still favored acquittal on that charge." *Flores Ramos*, 367 Or. at 328. The court concluded: "The abstract possibility that a juror could have changed his or her mind after further deliberation is insufficient to prevent us from concluding that the

nonunanimous deliberations erodes public confidence and participation in the jury trial process, particularly the idea that the racist origins of Oregon's law could impact the court's current treatment of the error. *Id*. at 319 ("We cannot conclude that the error is structural . . . based on a historical circumstance that has no inherent link to the constitutional violation at issue.").

Defendant now respectfully asks this court to grant review and decide whether a trial court commits structural error when it instructs a jury in a criminal case that it can return a nonunanimous guilty verdict.

REASONS FOR GRANTING THE PETITION

A. Background Principles: the defining feature of structural error is that it affects the framework within which the trial proceeds.

Historically, reviewing courts were not obligated to conduct harmless error review and many presumed prejudice from any trial court error. *See* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2126-29 (2018). However, over time, Congress, state legislatures, and the courts developed the doctrine of harmless error to differentiate between nonprejudicial and reversible error. *Kotteakos v. United States*, 328 U.S. 750, 759, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) (adopting harmless error rule for nonconstitutional errors). This Court

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instructional error was harmless beyond a reasonable doubt." *Id*. at 330; *Kincheloe*, 367 Or. at 338-39 (applying harmless-error holding from *Flores Ramos* without further analysis).

extended that doctrine to certain constitutional errors in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

But this Court also recognized that some constitutional errors are "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Such errors are structural and are not subject to harmless error review. This Court has described three indicators that an error is structural: (1) "if the error always results in fundamental unfairness," (2) if "the effects of the error are simply too hard to measure," and (3) if "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver v. Massachusetts*, 582 U.S. ___, 137 S. Ct. 1899, 1907-08, 198 L. Ed. 2d 420 (2017).

Structural-error doctrine applies to errors at the heart of the basic constitutional guarantees that must inhere in every criminal trial. Thus, the primary feature of a structural error is that it "affects the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself." *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821 (2018) (internal quotation marks omitted).

B. The Oregon Supreme Court's decision is wrong because jury unanimity describes the basic function of how a jury makes decisions about a person's guilt for purposes of satisfying the Sixth Amendment.

In holding that a nonunanimous-verdict instruction was not structural error, the Oregon Supreme Court did not directly address whether a nonunanimous jury instruction affects the framework of the trial or is simply a lapse in the trial process itself. Instead, the court noted the types of errors that this Court has reviewed for harm rather than structural error and reasoned that this Court "has rejected the notion of structural error in many circumstances that have involved violations of indisputably fundamental constitutional protections afforded to criminal defendants." *Flores Ramos*, 367 Or. at 303.

But reliance on the general notion that structural error is rare cannot substitute for analysis in a particular case. That is demonstrated by the Oregon Supreme Court's treatment of *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), in which this Court addressed an instructional error of constitutional magnitude—an instruction that misstated the concept of reasonable doubt—and held that it was structural error. The Oregon Supreme Court's opinion did not analyze how the *reasoning* in *Sullivan* might apply to an analysis of the nature of error in this case; instead, the court simply relied on this Court's opinion in *Johnson*, a case called into question by *Ramos*, to say that reasonable doubt and unanimity have no connection. *Flores Ramos*, 367 Or. at 309 ("We are bound by

the holding in *Johnson* on the relationship between reasonable doubt and unanimity."). That is, the court considered only whether unanimity and reasonable doubt were necessarily bound up together to reject the claim of structural error. It did not examine the ways in which the reasonable-doubt instruction and the unanimity instruction perform similar *functions*, each telling the jury how to proceed in fulfilling their duty to decide guilt. The Oregon Supreme Court's conclusion that reasonable doubt and unanimity are not intertwined, relying on the faulty logic of *Johnson*, is wrong.

1. Unanimity is a fundamental part of the right to trial by jury that can only be guaranteed through proper jury instruction.

The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." (Emphasis added). In *Ramos*, this Court confirmed that "[i]f the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Ramos*, 140 S. Ct. at 1396. It emphasized that "the term 'trial by an impartial jury' carried with it some meaning about the *content and requirements* of a jury trial." *Id.* (emphasis added). Thus, the phrase "trial by jury" denotes more than a process of simply returning verdicts. *Id.* at 1395 ("Imagine a constitution that allowed a

'jury trial' to mean nothing but a single person rubberstamping convictions without hearing any evidence[.]"). It necessarily guarantees a certain way in which the jury deliberates and issues a constitutional verdict—namely, through deliberations aimed at resolving the issue of guilt unanimously. *See infra* Part C.

In that way, the ancient guarantee of unanimity does not merely protect the form of the verdict—it also animates core Sixth Amendment principles and protects individuals from overzealous or corrupt prosecution. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). Those core Sixth Amendment principles flow from the jury trial right itself, not simply from the form of a verdict. Rather, those principles are animated by how the trial is conducted, which includes how the jury is instructed.

Similarly, in *Sullivan*, this Court explained that the concept of reasonable doubt also delineates *how* a jury decides guilt under the Sixth Amendment. In *Sullivan*, this Court held that a trial-court instruction that misstates the concept of reasonable doubt constitutes structural error. *Sullivan*, 508 U.S. at 281-82. First, the Court explained that an erroneous reasonable-doubt instruction violates the Sixth Amendment. *Id.* at 278. It then turned to the question of structural error and noted that the inquiry at the heart of its analysis was "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but

whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* at 279 (citing *Chapman*, 386 U.S. at 24). And the Court held that one could not escape the conclusion that the error was structural because "to hypothesize a guilty verdict that was never in fact rendered—*no matter how inescapable the findings to support that verdict might be*—would violate the jury-trial guarantee." *Id.* (emphasis added).

Digging deeper, this Court explained that structural errors have to do with "defects in the constitution of the trial mechanism," while "trial errors" have to do "with errors which occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Id.* Under that framework, the improper "reasonable doubt" instruction was structural error because it affected a fundamental aspect of the trial to an immeasurable degree:

> "Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function . . . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"

Id. at 281-82. *Sullivan* stressed that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's

findings." *Id.* at 281. Therefore, the only way to ensure that a jury verdict is the product of that constitutionally mandated process—that is, to ensure that a defendant receives a trial by jury as contemplated in the Sixth Amendment—is to require the trial court to give the jury the proper instructions before it deliberates. Absent a proper reasonable-doubt instruction, the jury cannot produce a verdict that satisfies the Sixth Amendment. *Id.* at 278 (citing *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)).

For those same reasons, the jury cannot produce a verdict that satisfies the Sixth Amendment if it receives an erroneous unanimity instruction. Both unanimity and reasonable doubt describe *how* a jury determines guilt. If a trial court tells the jury that it *does not need to be unanimous*, it should be presumed the jury followed those instructions in deliberating about defendant's guilt. *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("[a] jury is presumed to follow its instructions."). In that way, a nonunanimous instruction immediately dilutes those core Sixth Amendment principles: it makes a conviction by a subset of the jury possible; it encourages prosecutors to pursue borderline cases; and decreases the voices of minority members of the community. *See infra* Part D. The mere fortuity that the jury later reported that, despite the court's instruction, it actually had been "unanimous" is irrelevant. The damage to the Sixth Amendment has been done.

In the end, a jury has several fundamental attributes that protect an individual's rights under the Sixth Amendment. A "jury" is an impartial cross-section of the defendant's community, *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), that deliberates in private about guilt, *United States v. Olano*, 507 U.S. 725, 737-38, 113 S. Ct. 1770, 1780, 123 L. Ed. 2d 508 (1993), while employing unanimity-based deliberations, *Ramos*, proof beyond a reasonable doubt, *Sullivan*, and the presumption of innocence, *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). If the trial court affirmatively gives the jury an instruction that *contradicts* one those basic functions—

- tells the jury that it can be biased;
- that it may presume defendant is guilty;
- that it can find guilt based on a preponderance of evidence; or
- that it does not need to be unanimous,

—then the defendant has not received a "trial by jury" under the Sixth Amendment. *Duncan*, 391 U.S. at 149. And that is as structural as structural error can get.

2. Instructing the jury that it does not need to agree on a defendant's guilt dilutes the reasonable-doubt standard and contradicts the constitutional understanding of guilt.

The Oregon Supreme Court also rejected petitioner's argument that a nonunanimous instruction dilutes the constitutional reasonable doubt standard. *Flores Ramos*, 367 Or. at 308 (citing *Johnson*, 406 U.S. at 92). According to the Oregon Supreme Court, "*Johnson* held that proof beyond a reasonable doubt does

not require a conclusion that no reasonable juror could (or did) have a reasonable doubt." *Id.*

In particular, the court relied on the following passage from *Johnson*:

> "'That want of jury unanimity is not to be equated with the existence of a reasonable doubt emerges even more clearly from the fact that when a jury in a federal court, which operates under the unanimity rule and is instructed to acquit a defendant if it has a reasonable doubt about his guilt, cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial. If the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial. We conclude, therefore, that verdicts rendered by nine out of 12 jurors are not automatically invalidated by the disagreement of the dissenting three. Appellant was not deprived of due process of law.'"

Id. at 308-09 (quoting *Johnson*, 406 U.S. at 362-63). From there, the Oregon Supreme Court concluded that it was "bound by the holding in *Johnson* on the relationship between reasonable doubt and unanimity," and it "rejected the argument that defendant advances about their relationship." *Id.*

But the court's reliance on *Johnson* is problematic for a number of reasons. First, in *Ramos* this Court repudiated the holdings from *Johnson* and *Apodaca* with regard to unanimity. And second, the so-called reasonable doubt holding in *Johnson* suffers from the same deficits that led this Court to reverse the unanimity holding—it was the product of a "badly fractured" plurality decision premised on suspect legal reasoning. *Ramos*, 140 S. Ct. at 1397.

Indeed, *Johnson* did not address the Sixth Amendment guarantee of trial by jury; it accepted the premise that "this Court ha[d] never held jury unanimity to be a requisite of due process of law." *Johnson*, 406 U.S. at 359. That proposition, of course, was overruled by *Ramos*, which held that the "Sixth Amendment right to a jury trial is fundamental to the American scheme of justice and incorporated against the States under the Fourteenth Amendment." 140 S. Ct. at 1397 (internal quotation marks omitted).

But *Johnson* worked backwards from the proposition that it could rely on "a considered legislative judgment that unanimity is not essential to reasoned jury verdicts"—that is, that *legislatures* had made the *policy determination* that nonunanimous verdicts comported with due process. This Court made short work of that argument in *Ramos*, stating that "the deeper problem [in *Apodaca*] is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Ramos*, 140 S. Ct. at 1401-02. That type of functionalist assessment animated *Johnson*, and it can no longer stand after *Ramos*.

Johnson–and thus the Oregon Supreme Court as well–relied on sweeping assumptions about the way in which juries deliberate:

> "[I]t is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after

> reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt."

Johnson, 406 U.S. at 361. But in the same paragraph, *Johnson* stated that a dissenting juror who believed he had reasonable doubts but had failed to carry the majority "'should consider whether his doubt was a reasonable one . . . (when it made) no impression upon the minds of so many men, equally honest, equally intelligent with himself.'" *Id.* at 361-62 (quoting *Allen v. United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 41 L. Ed. 528 (1896)). In other words, *Johnson itself* suggested that, in a 9-3 vote situation, the fact that other jurors *lacked* reasonable doubt should tell a dissenting juror that his doubts were unreasonable.

In so doing, *Johnson* acknowledged that the doubts, or lack thereof, of some jurors could affect the doubts, or lack thereof, of other jurors. *Johnson* went on to say, "[B]efore we alter our own longstanding perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." *Id.* at 362. But the *Johnson* Court's own "longstanding perceptions" of jury behavior were themselves "unsupported assumptions." When the Court decided *Johnson*, most of social-science research on jury behavior was based on one large project from the 1950's, and the extensive research conducted

since was spurred by the Court's reasoning in *Johnson* and its related unanimity cases of that era. Dennis J. Devine et al., *Jury Decision Making*, 7 Psychol. Pub. Pol'y & L. 622, 623 (2001). And that data has shown that nonunanimous deliberations are verdict-driven rather than evidence-driven, involve less time, incorporate fewer jurors' participation, and lead to less accurate outcomes. *Id.* at 669; *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*,113 Harv. L. Rev. 1261, 1272 (2000) (collecting empirical studies and explaining that "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment").

Moreover, *Johnson*'s interpretation of the interrelationship between reasonable doubt and unanimity has been cited only once, in a string cite in a footnote to support the proposition that "[a] deadlocked jury . . . does not result in an acquittal barring retrial under *the Double Jeopardy Clause*." *Tibbs v. Florida*, 457 U.S. 31, 42 & n.17, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982) (emphasis added). Thus, the extent of this Court's reliance on that portion of *Johnson* has been, at best, footnote fodder for an unrelated principle under Double Jeopardy caselaw.

Finally, even if the reasonable doubt discussion in *Johnson* was not expressly overruled in *Ramos*, this Court should overrule it now. The questionable persistence of *Johnson* led the Oregon Supreme Court to fail to reach a crucial

question in this case, and it will continue to confuse matters until this Court makes clear that *Johnson* has gone the way of *Apodaca*, reasonable-doubt holding and all.

C. Erroneously instructing the jury that it may reach a nonunanimous verdict in violation of the Sixth Amendment right to jury trial defies harmless-error review because there is no way to measure the effect of the error.

The structural-error doctrine applies when "the effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 1908. For example, racial discrimination in grand-jury composition is structural error even though a defendant is subsequently convicted of the charged offenses because "that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S. Ct. 61, 88 L. Ed. 2d 598 (1986). "Just as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race . . . a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race." *Id.*

Similarly, in the context of an erroneous denial of a defendant's choice of counsel, this Court explained that the error was "unquantifiable" because "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument"

and will affect whether the defendant "cooperates with the prosecution, plea bargains, or decides instead to go to trial." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The Court concluded, "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id*.

As in the context of racial discrimination in grand-jury composition and denial of choice of counsel, a reviewing court cannot reconstruct the effect of a nonunanimous jury instruction. A nonunanimous jury is more likely—perhaps by a factor of three—to reach a guilty verdict. *Jury Decision Making*, *supra*, at 628. In contrast, juries instructed to reach unanimity deliberate longer and have more confidence in the outcomes of their decisions. James H. Davis *et al*., The *Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1, 9, 12 (1975).

When a jury must deliberate to a unanimous verdict, the majority must convince an uncertain or holdout juror of the majority position to reach a verdict. However, in a *nonunanimous* deliberative system, the majority—by design—can ignore the dissenter as if that person were not on the jury at all, effectively granting the state two extra peremptory strikes. *See Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring) ("In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors."). Furthermore,

under the nonunanimous system, an uncertain or dissenting juror would know going into deliberations that it was incumbent upon that juror to persuade the other jurors to continue deliberations or join the dissenter's position, and that the majority could simply cut off discussion and reach a verdict.

Similarly, the error affects the defendant's initial approach to the case in immeasurable ways. In a unanimous model, a defense attorney may prioritize keeping one juror to be a holdout against a guilty verdict. Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 Chicago Kent L. Rev. 549, 562 (1992) (describing importance of group dynamics on "scientific jury selection" noting favorable use of such tactics to secure a hung jury). The arguments and presentation of evidence may change as well, because to defeat a guilty verdict, a defendant must ensure that at least three jurors retain a reasonable doubt, not just one.

Finally, in the context of a constitutional error such as this, if it were not structural error, the state would bear the heavy burden of proving that the error was harmless beyond a reasonable doubt. But the sanctity of the jury room is an absolute bar to such proof; post-deliberative questioning cannot reconstruct the conscious or subconscious impact of such an erroneous instruction, just as it could not in *Sullivan*. For example, if a court erroneously instructed a jury that "beyond a reasonable doubt" meant more likely than not, a reviewing court could not

conclude that the error was harmless on the basis that the jury returned a verdict form that said, "We the jury find the defendant guilty beyond a reasonable doubt." Those post-deliberative remarks from the jury would not properly indicate what the jury *understood* and how it actually deliberated. Instead, the state would need to be able to point to evidence in the record that showed that the jury correctly understood reasonable doubt before it deliberated and that it actually employed that understanding during deliberations. For those same reasons, a reviewing court could also not conclude that a nonunanimous-instruction error is harmless if a 12-0 verdict follows. Nothing about the jury's post-deliberative public remarks about the nature of a verdict sufficiently establishes what the jury actually understood and how it actually deliberated—only jury instructions can fill that void. *Sullivan*, 508 U.S. at 278 ("[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings."). Because such an error is not susceptible to harmless-error review, it must be treated as structural error.

Faced with the impossibility of measuring the effects of the instructional error at issue here, the Oregon Supreme Court chose the only other option: it avoided that part of the analysis. The court explained that *Weaver* "does not offer a clear rubric for evaluating whether an error is structural." *Flores Ramos*, 367 Or. at

303-04. And then it concluded without legal support that "one of the bases for holding an error structural mentioned in *Weaver*—that the effects of the error are 'simply too hard to measure,' often will have only a modest role to play in the analysis." *Id*. at 304. It completed its sidestep around *Weaver* by reasoning that

> "[b]ecause the content of jury deliberations will remain unknown to the reviewing court—which can therefore never be certain about which path the jury took to its decision or what evidence jurors thought important—nearly all trial errors are capable of producing effects that are difficult to measure. Yet the Supreme Court has elsewhere recognized that many significant constitutional errors, despite having effects that are difficult to measure, are not structural."

Id. In other words, the Oregon court acknowledged that the state could not prove that the error had no effect on the jury's deliberative process. But it employed a false syllogism that because *any* error could, potentially, impact a jury's deliberations, and not every error is structural, an error that affirmatively misinforms the jury about how it deliberates need not be—and here, is not—structural.

Of course, the instructional error at issue here is not analogous to an errant piece of evidence, even if that error had a constitutional dimension. When an appellate court evaluates harm from an error, it must consider how the error affected the jury's ultimate decision. But not every error affects the fundamental nature of the jury's decision-making process. A unanimity instruction is *the*

method that the Sixth Amendment requires to ensure that the jury deliberates properly and accurately. Like reasonable doubt, there is no substitute.

This is not a case like *Neder v. United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999), where the Court was satisfied that the omission of a jury instruction on a single element did not qualify as structural error; in that case, because the jury had been properly instructed as to the fundamental framework of a trial—the roles of the judge and jury, the burden of proof, a missing element of an offense did not "vitiate all the jury's findings" as to the *other* elements, a reviewing court could discretely consider that "the omitted element was *uncontested* and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id*. at 17. That makes sense as far as it goes; though the verdict lacked a finding as to one element, the jury has properly deliberated and unanimously found all of the facts put to it beyond a reasonable doubt.

Neder provoked an impassioned dissent by Justice Scalia, joined by two other justices, that would have placed *Neder* in the same category as *Sullivan*. In dissent, Justice Scalia denounced what has been called "first-guessing" by an appellate court, noting that the constitutional violation at issue was the failure to have a jury decide an essential fact, an error that could not be corrected by having an appellate court engage in the same behavior:

> "The difference between speculation directed toward confirming the jury's verdict (*Sullivan*) and speculation directed

> toward making a judgment that the jury has never made (today's decision) is more than semantic. . . . It is [that] sort of allocation of decisionmaking power that the *Sullivan* standard protects. The right to render the verdict in criminal prosecutions belongs exclusively to the jury; reviewing it belongs to the appellate court. 'Confirming' speculation does not disturb that allocation, but 'substituting' speculation does."

Neder, 527 U.S. at 38 (Scalia, J., dissenting).

Neder may be appropriate when a defendant stipulates to an element or otherwise removes it from a jury's consideration. And *Neder* principles could apply to instructional errors that misstate the law. *See Hedgpeth v. Pulido*, 555 U.S. 57, 58, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008). A reviewing court can evaluate the degree to which a specific element or piece of evidence was at issue. And in some situations when a necessary instruction is omitted, a court may be able to infer from other instructions that that omission did not affect the outcome of the jury's deliberations. *See Romano v. Oklahoma*, 512 U.S. 1, 13, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). But that is as far as it should go. Applying *Neder* may work when a reviewing court is confident that the error had no effect on the outcome; but it cannot work when, as in this case, the trial court affirmatively *misinformed* the jury about the deliberative process.

D. Oregon's nonunanimous jury instruction has undermined public confidence in the right to trial by jury by intentionally suppressing the voices of racial minorities on juries, as it was designed to do.

Public confidence in the fairness of the jury trial process, and indeed the legal system itself, is central to the jury trial right:

> "The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. . . . The purpose of the jury system is to *impress upon the criminal defendant and the community as a whole* that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."

Powers v. Ohio, 499 U.S. 400, 411, 413, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (emphasis added). This court has reaffirmed the importance of public confidence in the jury system repeatedly and emphatically. In the context of excluding potential jurors based on race, the Court has warned that a constitutional violation "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.* at 412.[4] In the context of excluding potential *grand* jurors based on race, the Court held that such a violation "'strikes at the fundamental values of our judicial system and our society as a whole.'" *Vasquez*, 474 U.S. at 262 (internal citations omitted). So too does administering a nonunanimous-verdict instruction created for the purpose of systemically silencing

[4] The Supreme Court noted in *Weaver* that, although the Court has not yet explicitly labeled improper exclusion of a potential juror as "structural," the Court has nevertheless treated it as such by granting "automatic reversal" in those cases without analyzing prejudice. 137 S. Ct. at 1911-12 (citing *Batson v. Kentucky*, 476 U.S. 79, 100, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

the voices of racial and ethnic minorities in their own community's jury trials. *Ramos*, 140 S. Ct. at 1394.

Over a century ago, the Court explained that "[t]he very object of the jury system is to *secure unanimity by a comparison of views*, and by arguments among the jurors themselves." *Allen*, 164 U.S. at 501 (emphasis added). The nonunanimous-verdict instruction, however, tells both individual jurors and the public that a juror may "close his ears to the arguments of men who are equally honest and intelligent as himself." *Id.* at 501-02. Indeed, the instruction was intended for that very purpose. *Ramos*, 140 S. Ct. at 1394. Thus, even where the ultimate verdict is unanimous, the error in instructing a jury that it need not be unanimous—that jurors may "close [their] ears" to other viewpoints as soon as 10 of their number vote to convict—erodes the public confidence that a jury fully and fairly considered all concerns raised before it and found guilt beyond a reasonable doubt. As Justice Brennan wrote, "*The very lifeblood of courts is popular confidence that they mete out evenhanded justice* and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 498 (1977) (emphasis added).

When the court upholds a verdict obtained through discriminatory practices, it strikes at the core egalitarian ideals of the American legal system itself. It tells people of color—and all those subject to the authority of the courts—that they should have little faith in judicial outcomes and that the jury system is not for their benefit. In *Ramos*, Justice Kavanaugh reviewed the racist origin and continuing impact of the nonunanimous jury instruction regime and concluded, "That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system." *Id.* at 1418 (Kavanaugh, J., concurring in part). *See also Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) ("Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'") (quoting *Powers*, 499 U.S. at 411); *Flowers v. Mississippi*, 588 U.S. __, 139 S. Ct. 2228, 2242, 204 L. Ed. 2d 638 (2019) ("*Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.").

Despite this well-established Supreme Court caselaw, the Oregon Supreme Court dismissed the public effects of racist origin and legacy of the nonunanimous instruction as immaterial to the question of structural error. It understood the issue to be confidence only in a *specific* type of verdict, writing, "If the jury were

permitted to convict a defendant without being unanimous, there undoubtedly would be some cases where the jury's vote breaks down along racial or ethnic lines. But that does not explain why public confidence in unanimous verdicts—where that potential verifiably was not realized—should be undermined." *Id.* at 318. It further rested its determination on a footnote in this Court's opinion in *Ramos* that noted, "[A] jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1401, n. 44. The Oregon court drew from that footnote the proposition that the racist history of the nonunanimous jury regime should have no bearing on the question of whether the jury instruction constituted structural error. *Flores Ramos*, 367 Or. at 319.

But the Oregon Supreme Court's interpretation misunderstands the role of public confidence in the structural error analysis. For purposes of structural error, as this Court has said repeatedly, the question is confidence in the system *as a whole*. As this Court explained in the context of the constitutional right to open trials,

> "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus *enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system*."

Press-Enter. Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (emphasis added). In other words, the structural error analysis considers not just confidence in an individual *verdict*, but confidence in the legal system as a whole. When the people have watched the courts put the stamp of approval on verdicts obtained, year after year, with a 'trial by jury' that failed to require the jury to follow one of the fundamental guarantees in that right; when they have watched the courts "tolerate[] and reinforce[] a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects," their confidence in the operation of the system as a whole has been eroded despite the fact that in *some* cases the system has produced an outcome that appears valid. *See Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring).

And, as this Court recognized in *Ramos*, the nonunanimous jury instruction was and always has been a tool of racial discrimination designed to exclude the voices and opinions of people of color. In Louisiana, "[w]ith a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless,'" while in Oregon, the constitutional amendment was passed "to dilute 'the influence of racial, ethnic, and religious minorities on

Oregon juries.'" *Id.* at 1394. Indeed, Oregon's demographics have always virtually guaranteed that, like in Louisiana, white jurors could always outvote Black jurors.[5]

Oregon's own demographics and experiences further demonstrate why the persistence of verdicts obtained under the nonunanimous-jury regime, even where obtained with a 12-0 vote, continue to erode confidence in the jury-trial right. In Oregon, Black people are drastically overrepresented in the criminal and prison systems. Black Oregonians are twice as likely to be stopped and searched by police as white Oregonians.[6] "A Black Oregonian in the Portland metro area is 4.9 times as likely to be arrested for second-degree trespass as a white Oregonian." *State v. Bledsoe*, 311 Or. App. 183, 192 (2021) (James, J., concurring). Black Oregonians are eight times more likely to be held in jail pending trial, five times more likely to have a case prosecuted after an arrest, and five times more likely to be convicted

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[5] When Oregon adopted the 10-2 verdict system in 1934, the state was 98% white and 0.2% Black. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790-1990, and By Hispanic Origin, 1970-1990, For the United States, Regions Divisions, and States*, Table 52 (Oregon), U.S. Census Bureau (2005) (available at https://www.census.gov/content/dam/Census/library/workingpapers/2002/demo/POP-twps0056.pdf). In 2000, Oregon was 83% white and 2% Black. U.S. Census Bureau, *Oregon: 2000—Census 2000 Profile*, Table DP-1 (Profile of General Demographic Characteristics: 2000) (2002) (available at https://www.census.gov/prod/2002pubs/c2kprof00-or.pdf).

[6] Noelle Crombie, "Portland police more likely to arrest, search black people than white, analysis shows," OregonLive, Dec. 2, 2019 (available at https://www.oregonlive.com/crime/2019/12/portland-police-more-likely-to-arrest-search-black-people-than-white-analysis-shows.html).

than white Oregonians.[7] Currently, Black Oregonians comprise only 2% of the population, but are 10% of the prison/jail population.

Oregon's demographics mean that, on average, only two of any 12-person jury would be Black—but because Black people are convicted of crimes at far higher rates than white people (often by juries that were nonunanimous or on which Black people were otherwise underrepresented), even fewer Black people are eligible to serve on juries. *See* ORS 10.030 (anyone who has been convicted of a felony in the past 15 years or served any part of a felony sentence in the last 15 years is ineligible for criminal jury service).

Currently-available data demonstrates that the nonunanimous jury regime has disproportionately affected Black defendants and communities, further eroding faith in the right to jury trial as a whole. *Declaration of Michaela Gore*, The Ramos Project (April 21, 2020) (attached at App. C.) In the cases on direct appeal with nonunanimous jury verdicts, 15% involved Black defendants, despite the fact that Black people are only 2.2% of Oregon's population and were 6.5% of the felony convictions in the preceding six years. *Id.* at 5. In the context of state post-conviction relief, white defendants were only 63% of those seeking post-conviction relief from a nonunanimous jury verdict, even though white people comprise 75%

[7] Maxine Bernstein, "Blacks continue to be overrepresented in nearly every step of Multnomah County's criminal justice system, report finds," OregonLive, Nov. 25, 2019 (available at https://www.oregonlive.com/crime/2019/11/blacks-continue-to-be-overrepresented-in-nearly-every-step-of-multnomah-countys-criminal-justice-system-report-finds.html).

of Oregon's population; by contrast, Black people are 2% of Oregon's population, but Black defendants comprised 16% of those seeking post-conviction relief from nonunanimous jury verdicts. *Id.* at 6.

That data strongly indicates that Black people were convicted by nonunanimous juries at a substantially higher rate than white people. Community mistrust in the legal system, then, is based on many years of disparate treatment that resulted in a greater proportion of convictions and denied minorities a voice on the jury. *See Flowers*, 139 S. Ct. at 2228 (re-affirming *Batson* and emphasizing right of *every* American, regardless of race, to have a voice on a jury). The nonunanimous jury regime has degraded faith in one of the most fundamental components of the American legal system, whether the verdicts it produced were unanimous or nonunanimous. The severity of that degradation demonstrates that the nonunanimous jury instruction constituted structural error that must be reversed in all cases.

E. This Court's recent decision in *Edwards v. Vannoy* supports petitioner's argument that the nonunanimous jury instruction constitutes structural error because it links jury unanimity to other structural error issues and because issues of finality do not arise in this procedural posture.

In *Edwards v. Vannoy*, this Court held that no new rule of criminal procedure would apply retroactively on federal collateral review, including the *Ramos* jury-unanimity rule. *Edwards v. Vannoy*, 593 US ___, ___ S Ct ___, 2021

WL 1951781, slip op. at 2, 15 (May 17, 2021). The Court explained that, because such "landmark and historical criminal procedure decisions . . . do not apply retroactively on federal collateral review," no new rule could rise to a *greater* level of importance to warrant retroactivity. *Id.* at 14-15.

The "landmark" cases in whose company this Court placed *Ramos* include two particularly analogous legal issues that are both treated as error requiring automatic reversal: denial of the right to a jury trial in state court (*Duncan*) and prohibition of racial discrimination in jury selection (*Batson*). *Duncan* and *Batson*, along with *Ramos* and several others, "fundamentally reshaped criminal procedure throughout the United States and significantly expanded constitutional rights of criminal defendants." *Id*. at 8. The Court saw "no good rationale for treating *Ramos* differently . . . ." *Id*. The dissent would have lifted *Ramos* above even those cases and applied it retroactively, writing, "The unanimity rule, as *Ramos* described it, is as 'bedrock' as bedrock comes." *Id*. at 22.

The importance of the finality of judgments weighed significantly in the Court's holding. *Id*. at 5. Justice Gorsuch explained that finality is "essential to the operation of our criminal justice system" and that once a judgment is "final," it "establishes what is correct in the eyes of the law." *Id*. at 18 (Gorsuch J. concurring). To define what "finality" actually means, Justice Gorsuch explained that "everyone accepts that, in our criminal justice system today, a judgment

becomes final only after the completion of a trial and the appellate process. Including the opportunity to seek certiorari from this Court on questions of federal law." *Id*. at 16.

Edwards supports petitioner's argument that the error in this case is structural because it placed *Ramos* in the context of other structural-error cases and because finality concerns are not implicated here. First, treating *Ramos* like *Duncan* and *Batson* would require automatic reversal, without resorting to harmless-error analysis. *Duncan* extended the jury-trial right to state court defendants. As discussed earlier, *Batson* is a neat fit for this legal issue and requires automatic reversal under this Court's caselaw; indeed, the original nonunanimous-jury rule was designed to negate the presence of minorities on a jury. *See Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring) ("In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors."). And we know from *Ramos* itself that there is no trial by jury without a unanimous jury. *Id.* at 1396. Thus, where the right to a jury trial and the right to a jury free of racial discrimination mandate automatic reversal if not respected, the similarly "momentous and consequential" right to jury unanimity similarly requires reversal when violated.

Second, the finality interests that support *Edwards* also support applying a structural error framework here, where defendant's judgment is not final. As

Justice Gorsuch explained, the burden of retrying older cases is heavy, not just on account of the volume of cases, but also because many older cases may be impossible to retry. The passing of years and decades will almost certainly mean that evidence will no longer be available. But the same is not true of cases on direct appeal. ORAP 3.25 (requiring trial courts to secure evidence and transmit the record for direct appeal). And, though the effect on the lives and liberty of individual defendants will be dramatic, the effect on the judicial system will be minimal: our office records indicate that there are roughly 200 cases on direct appeal that present this issue, and many of those have mixed unanimous and nonunanimous verdicts that will require some degree of retrial anyway. Reviewing the nonunanimous jury instruction as structural error in that limited universe of cases will reduce the ongoing burden on the courts and the victims by ensuring that principles of finality are respected.

As this Court limits federal collateral review, it is more important that state courts ensure a fair trial on the first go-round. For that reasons, this Court should make clear that structural error applies to fundamental constitutional rules to ensure that states do not "perpetuate something we all know to be wrong only because [they] fear the consequences of being right." *Ramos*, 140 S. Ct. at 1408. Yet, that is exactly what Oregon has done, cabining the impact of an unconstitutional scheme that it perpetuated for nearly 100 years.

This Court should grant defendant's petition for a writ of certiorari because this case presents this court with the opportunity to further refine its structural error doctrine, clarify whether the reasonable-doubt holding in *Johnson* survived *Ramos*, and decide whether the jury-unanimity rule creates a procedural rule that requires jurors to deliberate with the proper understanding of the concept of unanimity *before* returning a verdict.

CONCLUSION

For the foregoing reasons, petitioner respectfully asks this court to grant this petition for a writ of certiorari.

Dated this 20th day of May, 2021.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES WESLEY KINCHELOE,
Petitioner,
v.
STATE OF OREGON,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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