No. _____

IN THE

Supreme Court of the United States

MARK ANTHONY GONZALEZ,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Mark Gonzalez's penalty-phase jury was charged with deciding two issues that together would dictate his sentence. The jury had reached a verdict on the first of the two issues and was arguing over the second when one juror became so distressed by the discord and hostility pervading the jury room that he suffered a debilitating anxiety attack. The trial court then replaced the impaired juror with an alternate but refused defense counsel's request that the newly constituted jury be instructed to begin its penalty-phase deliberations anew.

The following questions are presented:

> (1) Whether, after the substitution of a juror midway through deliberations, a trial court's failure to instruct the reconstituted jury to deliberate anew violates the defendant's Sixth Amendment jury-trial right to a unanimous verdict after collective deliberations; and
>
> (2) Whether such a profound Sixth Amendment violation constitutes structural error.

LIST OF RELATED PROCEEDINGS

Gonzalez v. State, 616 S.W.3d 585 (Tex. Crim. App. 2020) (published part of opinion)

Gonzalez v. State, No. AP-77,066 (Tex. Crim. App. Nov. 4, 2020) (full opinion)

Ex parte Gonzalez, No. WR-86,567-01 (Bexar Cnty. Dist. Ct.) (ongoing state-collateral proceedings)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Gonzalez respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas (CCA) in his case.

OPINIONS AND ORDERS BELOW

The CCA's decision affirming Gonzalez's conviction and death sentence on direct appeal is reported in part at 616 S.W.3d 585 and is reprinted in full in the Petition Appendix at 1a–129a. Its decision denying rehearing is unpublished and is reprinted in the Petition Appendix at 130a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The CCA entered its judgment on November 4, 2020, and denied a timely motion for rehearing on March 3, 2021. This petition is timely pursuant to Supreme Court Rules 13.3 and 30.1 and this Court's order dated July 19, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

INTRODUCTION

This case presents significant and recurring questions of federal law that urgently require this Court's review, especially in light of its recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020): (1) whether, after a trial court substitutes a juror in the middle of deliberations, the court's failure to instruct the jury to restart its deliberations violates the Sixth Amendment; and (2) whether such a violation is structural error that necessitates automatic reversal.

As this Court made clear in *Ramos*, the Sixth Amendment's guarantee of a trial by an impartial jury is no hollow pledge—"the promise of a jury trial surely mean[s] *something*." *Id.* at 1395. This Court had little trouble, following centuries of common law, founding-era practices, and constitutional tradition, concluding that the Sixth Amendment's promise of a jury trial demands unanimity. *Id.* at 1395–97. Along with the collective decision-making that is the "essential feature of a jury," *Williams v. Florida*, 399 U.S. 78, 100 (1970), the unanimity requirement gives the jury-trial right its meaning, *see Ramos*, 140 S. Ct. at 1395–97.

This essence of the jury-trial guarantee comes under threat when a juror is replaced during deliberations. If the trial court does not instruct the new jury to restart deliberations, then the substitute juror is simply tossed into the fray, with no power to alter decisions that the original jury already reached and little hope of playing a real role in resolving the outstanding issues. Indeed, the outsider may well face coercion if the other jurors substantially agree on the issues that are outstanding.

A decision by such a jury does not reflect the collective deliberations or the meaningful unanimity demanded by the Sixth Amendment.

That is precisely what happened here. After Gonzalez's jury had deliberated extensively and reached a verdict on the first of two sentencing issues, the court substituted an alternate juror into deliberations. However, the court declined to instruct the new jury to restart deliberations and instead left the substitute juror powerless to affect the predetermined verdict, likely unable to influence ongoing discussions about the remaining issue, and vulnerable to coercion. By denying the requested instruction, the court deprived Gonzalez of his Sixth Amendment right to a unanimous verdict following collective deliberations and undermined the integrity of the penalty phase in a manner not susceptible to harmless-error analysis.

The questions presented warrant this Court's attention. Whether such an omission undercuts the Sixth Amendment's jury-trial protection is a matter of overriding constitutional importance across jurisdictions, particularly in the wake of *Ramos*. Moreover, whether such an omission requires reversal is a question on which lower courts need guidance, as they have adopted different approaches to assess when altering the composition of a jury during deliberations necessitates relief. Finally, this case is a strong vehicle for this Court to resolve the questions presented: It arrives at the Court on direct appeal; the CCA analyzed the Sixth Amendment issue and squarely decided the structural-error question below; the issue is outcome-determinative; and the state court's procedural ruling does not foreclose review. Accordingly, this Court should grant certiorari to assess whether this error—one that

undermines the essence of the jury-trial guarantee—is a Sixth Amendment violation that is structural in nature.

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

Following a grueling and contentious guilt phase, a jury convicted Gonzalez of the capital murder of Bexar County Sheriff's Deputy Sergeant Kenneth Vann. The case proceeded within days to a sentencing trial before the same jury.

After the close of penalty-phase evidence, the trial court charged the jury with answering two sentencing "Special Issues," which would determine the sentence. 52 RR 41–44.[1] Special Issue 1 asked whether the State had proven beyond a reasonable doubt that Gonzalez "constitute[d] a continuing threat to society." *Id.* at 42. If at least ten jurors answered "no," then deliberations would cease, and the court would impose a life sentence. *Id.* If all twelve jurors unanimously answered "yes," then, and "only then," could the jury proceed to Special Issue 2. *Id.* Special Issue 2 asked whether sufficient mitigation existed to warrant a sentence of life in prison. *Id.* at 43. If all twelve jurors answered "no," then the court would impose death. If at least ten answered "yes," then it would impose life imprisonment without the possibility of parole. *Id.* at 43–44.[2] The court further instructed the two alternate jurors that they

[1] Trial transcripts in the Reporter's Record are cited with the volume number, "RR," and the page number(s). Documents in the Clerk's Record are cited with the volume number, "CR," and the page number(s).

[2] Under Texas law, a defendant is sentenced to death only if the jury unanimously answers "yes" to Special Issue 1 and "no" to Special Issue 2. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)–(g). To encourage vigorous debate, Texas law requires that at least ten jurors answer either "no" to Special Issue 1 or "yes" to Special Issue 2 to reach a life verdict. *See id.*; *Draughon v. State*, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992). If the jurors cannot agree to a verdict on either question, then the court imposes a life sentence. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g).

were to retire to the jury room with the twelve-person jury, but that they should "not participate in any deliberations or in any voting." *Id.* at 40.

The jury began deliberating after closing arguments and continued into the early hours of the next morning. *Cf.* 5 CR 2024 (jury note stamped October 20, 2015 at 1:34 a.m.). During those lengthy discussions, the jurors submitted notes to the court seeking clarity about the meaning of Special Issue 2, the mitigation charge. *See id.* at 2023–24. By that time, then, the twelve jurors had already unanimously reached a verdict of "yes" to Special Issue 1. *See* 52 RR 42 ("only" if jurors returned a "yes" verdict on Special Issue 1 could they proceed to Special Issue 2).

The jury paused deliberations only when the hostility in the jury room escalated so greatly that one juror began experiencing a crippling anxiety attack and had to be excused. *See id.* at 111; 53 RR 4–10. As Juror R.P. recounted to the court the following morning, "tensions got really high" in the jury room, with "everybody screaming at each other." 53 RR 6–7. Under such strain, Juror R.P. began sweating and shaking uncontrollably. *Id.* at 5. He decided that he could not continue deliberating, and, over the defense's objection, the court released him from further service. *Id.* at 8–10.[3]

At that point, in the middle of deliberations and again over the defense's objection, the court replaced Juror R.P. with an alternate juror, S.F. *Id.* at 10–11, 21. The court instructed Juror S.F. only that she would now be able to participate in

[3] In a later colloquy before the court, a different juror who favored a life sentence similarly described tensions in the jury room. *See id.* at 54–67.

deliberations and to vote. *Id.* at 10–11. The court said nothing at all to the remainder of the newly constituted jury. *See id.*

The court then denied defense counsel's request that, at minimum, the court instruct the jury to restart its penalty-phase deliberations. *Id.* at 21–22.

> [DEFENSE]: I need to object to the seating of the alternate juror. . . . And I think it's appropriate to ask that they go back to guilt/innocence with this new 12, re-deliberate that, and *certainly for them to re-deliberate the entirety of punishment*, presuming that my objection to seating this alternate juror is denied.
>
> THE COURT: That is denied.

Id. (emphasis added).

Defense counsel elaborated that Juror S.F. did not have an opportunity to vote on the already-decided first Special Issue: "The thing about it is, now we have a different 12th juror. . . . She could change the answer to [Special Issue] Number 1. . . . [W]e have a new juror which could change the answer to [Special Issue] Number 1." *Id.* at 23–24.[4] The State, understanding the crux of the defense's request, interjected that "[t]he jury may have voted on [Special Issue] Number 1 before [Juror S.F.] was on the jury . . . so she may not have voted on the first special issue." *Id.* at 25. The court rejected the notion that penalty-phase deliberations should restart, declaring, "*What has been decided should remain, period.* I don't see how you can go back and change something. She wasn't on the jury at that time." *Id.* (emphasis added). The court asked, "[W]hat are we supposed to do, go back and re-litigate the first

[4] The ensuing discussion on the defense's request to restart deliberations was interspersed with comments from the parties, the court, and the court's staff regarding a jury question. *Id.* at 22–28.

[guilt/innocence] phase of the trial?" *Id.* at 26. The defense again clarified, "No, no. Not the first phase, Special Issue Number 1." *Id.* The court was unmoved: "And the same issue with what has happened already. I mean, how can you go back and change the vote or change anything?" *Id.* Once more, the State intervened: "It's been decided by the jury as it was comprised at that time." *Id.* The State wanted to focus on the pending jury question "and not speculate as to what the effect of the new juror is." *Id.* at 27. The court agreed with the State, *id.*, and, having thereby denied the defense's request to restart penalty-phase deliberations, turned to the jury's note, *id.* at 28.

Thus, the new jury received no instruction to restart its penalty-phase deliberations.

That same day, the newly constituted jury concluded deliberations. *Id.* at 72. In addition to the pre-substitution finding that Gonzalez would pose a continuing threat, the jury found the mitigation insufficient to warrant leniency, and the court polled the jury. *Id.* at 73–75. In accordance with the jury's verdicts, Gonzalez was sentenced to death. 64 RR 7.

II. The CCA's Decision

The CCA affirmed. Despite disclaiming any "magic words" requirement, it held that Gonzalez had not adequately preserved at trial his Sixth Amendment claim that the court should have instructed the reconstituted jury to deliberate anew. Pet. App. 11a–12a. Even so, recognizing that the claim presented an important issue of first impression, the court proceeded to consider it on the merits. *Id.* at 2a, 12a–17a.[5]

[5] The CCA published its opinion on the juror-substitution matter at issue here, rendering the opinion precedential, but left the remainder of its decision unpublished.

The CCA surveyed federal decisions on whether the Sixth Amendment requires an instruction to deliberate anew after a mid-deliberations juror substitution. The court identified a split in the federal case law. It described the Second, Third, Fifth, and Ninth Circuits as having "generally concluded that an instruction to deliberate anew is a vital procedural safeguard to preserve the 'essential feature' of the Sixth Amendment right to trial by jury." *Id.* at 13a–14a. In contrast, the CCA read the Fourth, Sixth, Seventh, and Eleventh Circuits as placing less emphasis on how the jury was instructed, and more on "whether the reconstituted jury was actively prevented from deliberating anew." *Id.* at 14a.

Despite acknowledging that "[a]n instruction to deliberate anew can operate as a valuable procedural safeguard to ensure that a re-formed jury deliberates with the new member," the CCA held that the failure to give such an instruction is not structural error that undermines the framework of a trial and demands reversal. *Id.* at 15a. Instead, relying on the alternates' presence during deliberations, the length of the deliberations, and the post-verdict polling, the CCA found any error harmless. *Id.* at 15a–17a.

Gonzalez's timely motion for rehearing was denied, *id.* at 130a, and this petition follows.

REASONS FOR GRANTING THE PETITION

I. Failing to Instruct a Reconstituted Jury to Deliberate Anew Strikes at the Core of the Sixth Amendment Jury-Trial Guarantee.

This Court should grant certiorari because of the importance of the Sixth Amendment right at stake, especially given the Court's renewed focus on jury

unanimity. The jury-trial right in criminal cases is among the most jealously guarded of constitutional rights, and its essence—group deliberations leading to a shared, unanimous decision—is gravely at risk when one juror replaces another during deliberations. *Ramos* settled that the Sixth Amendment unanimity requirement applies against the States. This Court should now take the next logical step and address how altering the jury's composition mid-deliberations without an instruction to deliberate anew implicates that unanimity requirement.

The jury-trial right—the sole right guaranteed in both the text of the Constitution and the Bill of Rights—is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *see* U.S. Const. art. III, § 2; U.S. Const. amend. VI. The right aims to protect the defendant's interest in a fair trial by providing a bulwark against tyranny, as well as to further the societal interest in public participation in criminal proceedings. *Duncan*, 391 U.S. at 156; *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."). Any intrusion upon this right "operat[es] upon the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

Two interrelated features of the jury form the *sine qua non* of the jury-trial right: the jury's collective decision-making process, and the resultant unanimity of its verdict. *See Williams*, 399 U.S. at 100; *Ramos*, 140 S. Ct. at 1395–97. The jury's "essential feature . . . lies in the interposition between the accused and his accuser of

the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams*, 399 U.S. at 100.[6] That "essential feature" of fulsome group deliberations is inextricably linked with the jury-unanimity requirement that this Court hailed as historic and fundamental in *Ramos*. *See Jones v. United States*, 527 U.S. 373, 382 (1999) ("[W]e have long been of the view 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.'" (second alteration in original) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896))); *see also Ramos*, 140 S. Ct. at 1395–97. For example, twelve jurors may vote for the same outcome, but the verdict is not *meaningfully* unanimous if the jurors voted at random and just happened to agree. "[A] unanimous jury vote does not necessarily mean that unanimity in the constitutional sense has been attained. Rather, it is a consensus reached after each juror examines the evidence and the parties' arguments . . . and all of the jurors exchange their individual perceptions, experiences, and assessments." *State v. Lamar*, 327 P.3d 46, 51 (Wash. 2014).

A trial court causes a particularly grave injury to the jury-trial guarantee—both its "essential feature" of collective deliberations and the concomitant unanimity

[6] Because of the constitutional primacy of the jury's collective decision-making in reaching unanimity, this Court and others have endeavored to protect the ability of jurors to debate freely and meaningfully. *See, e.g.*, *State v. Corsaro*, 526 A.2d 1046, 1052 (N.J. 1987) (declaring it "necessary to structure a process and create an environment so that the mutual or collective nature of the jury's deliberations . . . remains intact until a final determination is reached"); *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam) (remanding for a new trial after the trial judge gave a coercive instruction); *see also, e.g.*, *United States v. Fattah*, 914 F.3d 112, 149–51 (3d Cir. 2019) (affirming the dismissal of a juror who refused to deliberate); Ariz. R. Crim. P. 24.1(c) (permitting a new trial if jurors voted by lot or received bribes for their votes).

requirement—when it replaces a juror during deliberations. In an oft-cited passage, the California Supreme Court explained,

> The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. . . . Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset [if] a new juror enters the decision-making process after the 11 others have commenced deliberations.

People v. Collins, 552 P.2d 742, 746 (Cal. 1976); *see also*, *e.g.*, *Op. of the Justs. (Alternate Jurors)*, 623 A.2d 1334, 1337 (N.H. 1993) (quoting *Collins*); *State v. Trent*, 398 A.2d 1271, 1273–74 (N.J. 1979) (adopting *Collins*'s reasoning).

A mid-deliberations substitution undercuts the jury-trial pillars of unanimity and collective decision-making in multiple ways. With respect to matters the original jury has already decided, "the resulting verdict . . . will reflect only the views of the original jurors, thereby depriving the defendant of his right to unanimity from the requisite number of jurors." *State v. Guytan*, 968 P.2d 587, 594 (Ariz. Ct. App. 1998); *see also, e.g.*, *United States v. Webster*, 162 F.3d 308, 346 (5th Cir. 1998) (same). Such verdicts are not the product of collective deliberations by the twelve jurors ultimately charged to reach a decision and thus subvert the jury's "essential feature." With respect to as-yet-undecided matters, the replacement juror is an outsider to the decision-making dynamic that has already developed, leaving him less likely to be able to influence or meaningfully participate in the discussion. *See People v. Burnette*,

775 P.2d 583, 588 (Colo. 1989); *People v. Ryan*, 224 N.E.2d 710, 712–13 (N.Y. 1966). The new juror thus often lacks "a fair opportunity" to share his "views and to persuade others." *Corsaro*, 526 A.2d at 1054; *Lamar*, 327 P.3d at 52 (expressing concern that the substitute "had no opportunity to offer his views or try to convince his fellow jurors"). Moreover, the newcomer is susceptible to coercion by the eleven-juror unit. *See, e.g.*, *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc) (recognizing that the "inherent coercive effect upon an alternate juror who joins a jury . . . is substantial"); *see also, e.g.*, *People v. Roberts*, 824 N.E.2d 250, 261 (Ill. 2005) (same). As a result, the new juror cannot fully participate in deliberations and there can be no meaningful unanimity, vitiating the Sixth Amendment jury-trial right.

These constitutional trespasses are particularly dangerous because the need to substitute a juror during deliberations arises at volatile moments. When deliberations get heated and acrimonious—when a holdout faces intimidation or pressure from the other jurors and, for example, experiences debilitating panic attacks—then the court must consider replacing the distressed juror. *See, e.g.*, *Lamb*, 529 F.2d at 1156 (recognizing that "[a] lone juror who could not in good conscience vote for conviction could be under great pressure to feign illness or other incapacity"); *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir. 1983) (noting the fear that the jurors "might bring such influence on a dissenter as to disable him and then require

an alternate").[7] The need to substitute a juror thus typically arises when the jury-trial protections, and the fairness of the trial itself, already face serious risk.

The only way to preserve the jury-trial right is for the trial court to instruct the new jury to restart deliberations. *See, e.g.*, *Op. of the Justs.*, 623 A.2d at 1337 (deeming such an instruction "essential to satisfying the defendant's constitutional right to a fair and impartial jury"); *State v. Lehman*, 321 N.W.2d 212, 224 (Wis. 1982) ("If the jury is instructed to begin anew with its entire process of deliberation and if the substituted alternate participates fully in those deliberations, the fundamental right of the defendant to a unanimous verdict . . . is preserved inviolate." (quoting *United States v. Barone*, 83 F.R.D. 565, 573 (S.D. Fla. 1979))); *see also, e.g.*, *United States v. Olano*, 507 U.S. 725, 740–41 (1993) (commending the prophylactic value of careful instructions in ensuring that deliberations satisfy the Sixth Amendment).[8] Charging the new jury to restart deliberations serves several constitutional ends: (1) ensuring that the original eleven jurors put aside any already-settled findings; (2) directing the original jurors to disregard the now-extraneous views of the discharged juror; and (3) safeguarding against coercion by empowering the newcomer to

[7] Concerns about precisely this sort of pressure in the jury room prompted the drafters of Federal Rules of Criminal Procedure (Rules) 23 and 24, which govern juror procedures in federal criminal trials, to reject altogether a proposal to allow for mid-deliberations juror substitutions. *See United States v. Phillips*, 664 F.2d 971, 993 (5th Cir. Unit B Dec. 1981); *see also United States v. Gambino*, 788 F.2d 938, 948–49 (3d Cir. 1986) (explaining that the Rules committee rejected the same proposal in the 1980s, heeding warnings that any such substitution procedure would face "strong constitutional objection"). When the committee later amended Rule 24 to grant trial courts the discretion to substitute jurors post-submission, the committee specified that the trial court must instruct the reconstituted jury to start deliberations afresh. *See* Fed. R. Crim. P. 24(c)(3).

[8] For these reasons, numerous jurisdictions require the deliberate-anew instruction by statute or judicial construction. *See, e.g.*, Fed. R. Crim. P. 24(c)(3); Idaho Crim. R. 24(e)(3); *see also* 50A C.J.S. *Juries* § 532 n.51 (2021) (collecting examples).

participate fully in deliberations. And, absent such an instruction, the substitution violates the Sixth Amendment. *See, e.g.*, *Martinorellan v. State*, 343 P.3d 590, 592–93 (Nev. 2015) (holding that such error is "of constitutional dimension because it impairs the right to a trial by an impartial jury").

II. This Court Should Resolve the Widespread Uncertainty About When the Failure to Instruct a Reconstituted Jury to Deliberate Anew Requires Appellate Relief.

This Court should also grant certiorari because lower courts have adopted inconsistent positions on when a mid-deliberations juror substitution, particularly in the absence of an instruction to deliberate anew, requires relief. As such substitutions become more common,[9] this Court's guidance on the appropriate test for relief is increasingly necessary to secure uniform treatment across jurisdictions. *Cf. Washington v. Recuenco*, 548 U.S. 212, 216–18 (2006) (resolving the federal question whether a Sixth Amendment sentencing error in a state prosecution was structural).

Like the CCA, five circuit courts assign no particular value to the deliberate-anew instruction when determining whether a mid-deliberations substitution warrants relief. *See United States v. Virgen-Moreno*, 265 F.3d 276, 289–90 (5th Cir. 2001) (rejecting the claim that it was "fatal error" when the trial court "did not expressly instruct the jurors to begin their deliberations anew" and denying relief); *see also, e.g.*, *United States v. Cencer*, 90 F.3d 1103, 1109–10 (6th Cir. 1996) (same);

[9] Acknowledging the costs of mistrials, more jurisdictions have begun permitting juror substitutions during deliberations. *Compare* Haw. R. Penal P. 24(c) (permitting post-submission substitutions), *with State v. Wideman*, 739 P.2d 931, 932 (Haw. 1987) (discussing a prior version of the rule that disallowed such substitutions); *see also, e.g.*, *United States v. Brown*, 784 F.3d 1301, 1303–04 (9th Cir. 2015) (discussing the evolution of the Federal Rules of Criminal Procedure to permit such substitutions).

Peek v. Kemp, 784 F.2d 1479, 1484–85 (11th Cir. 1986) (en banc) (same); *United States v. Evans*, 635 F.2d 1124, 1127–28 (4th Cir. 1980) (same); *Henderson v. Lane*, 613 F.2d 175, 176–79 (7th Cir. 1980) (same).

In contrast, three circuit courts and several state high courts emphasize the importance of the instruction when addressing the propriety of relief. The Third Circuit has concluded that substituting a juror mid-deliberations comports with the Sixth Amendment only so long as the trial court gives the functional equivalent of an instruction that the reconstituted jury must start deliberations afresh. *See Claudio v. Snyder*, 68 F.3d 1573, 1575–77 (3d Cir. 1995) (noting that the absence of such a charge "compromise[s] the 'essential feature' of a trial by jury"). The Second and Ninth Circuits have reached similar conclusions, as have multiple state high courts. *See United States v. Gomez*, 219 F. App'x 703, 704–05 (9th Cir. 2007) (reversing when the trial court did not instruct the reconstituted jury to restart deliberations); *Hillard*, 701 F.2d at 1056–57 (acknowledging that a substitution undermines collective deliberations and identifying careful instructions, including the instruction to deliberate anew, as critical to preserving the jury function); *see also, e.g.*, *State v. Sullivan*, 949 A.2d 140, 142–43 (N.H. 2008) (relying on the state analogue to the federal jury-trial right to reverse when the trial court did not adequately ensure that the reconstituted jury could restart deliberations); *State v. Sanchez*, 6 P.3d 486, 495 (N.M. 2000) (presuming prejudice in the absence of the deliberate-anew instruction); *Burnette*, 775 P.2d at 589–90 (same).

This case thus presents this Court with an opportunity to introduce consistency across courts in the treatment of mid-deliberations substitutions. This Court should intervene to ensure that lower courts uniformly recognize the significance of the deliberate-anew instruction for both the collective essence of the jury-trial right and jury unanimity.[10] Without this Court's guidance, the fault lines in lower courts' consideration of these jury-right matters will persist and grow.

III. A Trial Court's Failure to Direct a Newly Constituted Jury to Restart Deliberations Is Structural Error.

A. This Court Has Identified a Class of Errors in Criminal Proceedings That Demand Automatic Reversal.

This Court has divided constitutional errors in criminal cases into two categories: trial errors and structural errors. Trial errors are discrete, isolated events whose effects can be ascertained, and they entitle a defendant to relief only upon a showing of specific prejudice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (noting that trial errors "'occur[] during [the] presentation of the case to the jury' and [that] their effect may 'be quantitatively assessed in the context of other evidence presented'" (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991))); s*ee also, e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 674 (1986) (deeming an improper restriction of the defendant's right to cross-examine a witness a trial error). The structural-error doctrine, by contrast, focuses not on measurable effect on the verdict but on ensuring that "certain basic, constitutional guarantees . . . define the

[10] Even those federal courts that have appreciated the Sixth Amendment import of the instruction to deliberate anew have focused on its effect on the collective nature of jury deliberations and have largely overlooked its implications for the right to jury unanimity. *See, e.g.*, *Claudio*, 68 F.3d at 1575–77.

framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Structural errors "affect[] the framework within which the trial proceeds," *id.* (quoting *Fulminante*, 499 U.S. at 310), and "vitiate[] *all* the jury's findings," *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Consequently, structural errors require reversal without a case-specific prejudice inquiry. *See Weaver*, 137 S. Ct. at 1907–08.

This Court has thus far identified three rationales for deeming errors structural. *Id.* at 1908. Errors are structural when their effects "are simply too hard to measure," i.e., when there is little point in asking a party to prove harm (or harmlessness). *Id.* For example, this Court has deemed the use of an unconstitutional reasonable-doubt instruction structural error. *Sullivan*, 508 U.S. at 278–82. Justice Scalia, writing for the entire Court, explained that the unconstitutional instruction meant that there was no jury verdict within the meaning of the Sixth Amendment and that it therefore made no sense to attempt to gauge the error's effect on the verdict. *Id.* at 278–80; *see also id.* at 281 (describing the impact of the error as "unmeasurable"). This Court has also categorized errors as structural when they necessarily implicate fundamental fairness. *Weaver*, 137 S. Ct. at 1908; *see also, e.g.*, *Rose v. Clark*, 478 U.S. 570, 578 (1986) (reiterating that the denial of a jury trial necessitates reversal, even where the evidence of guilt is overwhelming). Without these safeguards, "a criminal trial cannot reliably serve its function" of determining guilt, "and no criminal punishment may be regarded as fundamentally fair." *Clark*, 478 U.S. at 577–78. Lastly, this Court has found structural error when a right is denied that protects some vital interest beyond avoiding wrongful convictions.

Weaver, 137 S. Ct. at 1908. Because violating such a right subverts a value unrelated to the reliability of the trial, the effect on the verdict is irrelevant. *Id.*

This Court and others have treated the violation of the jury-unanimity requirement as structural error. *See Ramos*, 140 S. Ct. at 1408 (reversing a state-court decision upholding a non-unanimous guilty verdict and noting that "[n]o one . . . suggests that the error was harmless"); *Burch v. Louisiana*, 441 U.S. 130, 137–39 (1979) (same); *see also, e.g.*, *United States v. Curbelo*, 343 F.3d 273, 280–81 (4th Cir. 2003) (holding that the denial of a unanimous jury is structural error); *United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. Unit B Dec. 1981) (requiring reversal when it was "impossible to determine" whether the jury's verdict was unanimous), *modified*, 680 F.2d 352 (5th Cir. 1982). A non-unanimous jury verdict, like one not found beyond a reasonable doubt, is no verdict at all for Sixth Amendment purposes. *Cf. Sullivan*, 508 U.S. at 278–80. Further, the effect of a non-unanimous verdict is unascertainable. *Curbelo*, 343 F.3d at 281 ("We simply cannot know what [e]ffect a twelfth juror might have had on jury deliberations."). Finally, the denial of such a consequential right necessarily implicates fundamental fairness. *See, e.g.*, *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (reversing convictions based on a non-unanimous verdict "to prevent a miscarriage of justice").

B. The Omission Challenged Here Fits Comfortably Within the Category of Structural Error.

Contrary to the CCA's view, after *Ramos* it should be evident that the Sixth Amendment violation in Gonzalez's case is not subject to harmless-error review. This conclusion follows for several reasons: (1) the infringement upon the jury-trial

guarantee means that there was no verdict for Sixth Amendment purposes; (2) a harmless-error analysis is impossible given the black box of jury deliberations; (3) such error undercuts the fundamental fairness of the trial; and (4) the jury-trial right protects rights in addition to a trial's fairness. Everything about the denial of a deliberate-anew instruction is comparable to other jury-right deprivations that have been treated as structural error. This error, too, requires automatic reversal.

First, the failure to so direct the jury is structural error because of the illogic of a harmless-error inquiry. The challenged instructional error strikes at the marrow of the jury-trial right, leaving no jury verdict within the meaning of the Sixth Amendment upon which harmless-error review can operate. Accordingly, there can be no review of whether, absent the error, the verdict would have been the same. *See Sullivan*, 508 U.S. at 278–81; *see also Neder*, 527 U.S. at 31–34 (Scalia, J., concurring in part and dissenting in part) (explaining that conducting harmless-error review without a jury verdict that satisfies the Sixth Amendment amounts to courts usurping the jury function).

Second, the error is structural because of the futility of a harmless-error inquiry. *See Weaver*, 137 S. Ct. at 1908. This Court has shielded jury deliberations from scrutiny to preserve the "absolute privacy" needed for jurors "to engage in the full and free debate necessary to the attainment of just verdicts." *Tanner v. United States*, 483 U.S. 107, 124 (1987) (quoting S. Rep. No. 93-1277, at 13–14 (1974)). Deliberations are ideally a black box, wholly confidential and insulated from later review. *See id.* at 120–21. Given these strict constraints, the questions relevant to

specific prejudice—whether the original jurors arrived at any decisions or substantially agreed on outstanding issues before the substitution; whether those jurors revisited their decisions afterward and gave the new juror a meaningful opportunity to influence them—are unanswerable. *See, e.g.*, *United States v. Acevedo*, 141 F.3d 1421, 1426 n.9 (11th Cir. 1998) (calling it "impossible" to ascertain post-verdict "the actual extent of the . . . prejudicial influence" in the jury room); *Johnson v. State*, 53 So. 3d 1003, 1008 (Fla. 2010) (per curiam) (recognizing that a mid-deliberations substitution is structural error because harmless-error analysis "is nearly impossible to perform" and is "itself fraught with potential to contaminate the jury process"). Indeed, any attempt to assess harm would be mere conjecture. *See Curbelo*, 343 F.3d at 281; *cf. Gonzalez-Lopez*, 548 U.S. at 150 (rejecting harmless-error analysis when the inquiry would require pure speculation).

Third, the error is structural because it undercuts the fundamental fairness of the trial. *See Weaver*, 137 S. Ct. at 1908. The error impinges upon one of the most crucial protections of the accused, *see Duncan*, 391 U.S. at 155–56, and indeed compromises "the structural integrity of the criminal tribunal itself," *see Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986); *cf. State v. Poindexter*, 545 S.E.2d 414, 416 (N.C. 2001) (finding state-law error *per se* when the defendant was convicted by an eleven-person jury because "[a] trial by a jury that is improperly constituted is so fundamentally flawed that the verdict cannot stand"). When there can be no certainty that the jury deliberated properly or that the new jury reached a unanimous verdict

on every matter confided to its judgment, then no verdict of guilt is reliable, and no punishment is fundamentally fair. *See Clark*, 478 U.S. at 577–78.

Finally, the error is structural because the jury-trial right protects not only the defendant's interest in a fair trial, but also a broader societal interest in public involvement in the criminal process. *See Blakely*, 542 U.S. at 306. Accordingly, the question of impact on the verdict is immaterial. *See Weaver*, 137 S. Ct. at 1908.

That other constitutional errors striking at the same or closely related interests warrant automatic reversal confirms that the error here is structural. As discussed previously, depriving a defendant of a unanimous verdict by the requisite number of jurors demands reversal. *See Curbelo*, 343 F.3d at 280–81; *cf. Ramos*, 140 S. Ct. at 1408. Whether that deprivation is due to instructional error or some other cause is immaterial. *Cf. United States v. Lapier*, 796 F.3d 1090, 1098 (9th Cir. 2015) (rejecting harmless-error analysis when there was a genuine possibility that instructional error led to a non-unanimous verdict). Relatedly, this Court has treated the violation of the jury's ability to deliberate freely as structural error. *See Jenkins*, 380 U.S. at 445–46 (remanding for a new trial without considering prejudice after the trial judge gave a coercive jury instruction). Because the impact of a failure to instruct a reconstituted jury to start anew mimics the impact of other errors that are structural, this error must likewise be structural.

The error here is not simply the improper exclusion of evidence or some unlawful comment by an attorney, but the trial court's failure to safeguard Gonzalez's Sixth Amendment right to a unanimous jury verdict following open and free group

deliberations. A newly constituted jury instructed to restart its deliberations can be presumed to have done so. *See Olano*, 507 U.S. at 740–41. In such circumstances, the jury-trial guarantee may well withstand the mid-deliberations substitution. But the trial court in this case never informed the jurors that they had to begin again. In so erring, the court transformed the nature of the error, depriving Gonzalez of his Sixth Amendment jury-trial right. Such error necessarily demands reversal, and this Court should grant certiorari because the CCA was wrong to conclude otherwise.

IV. This Case Is a Strong Vehicle for This Court to Address the Questions Presented.

This case provides an excellent vehicle for this Court to resolve the questions presented. Despite having to substitute a juror into lengthy, heated deliberations, the trial court plainly refused to instruct the reconstituted jury to deliberate anew. The Sixth Amendment issue was squarely presented below and analyzed by the CCA. Then, after surveying in depth the federal precedent, the CCA resolved the structural-error question on the merits. And as this case comes to the Court on direct appeal, it does not present the problems that encumber cases on post-conviction review, such as questions about retroactivity.

Moreover, the questions presented are outcome-determinative. Even an unpreserved error is still subject to "fundamental error" review under Texas law. *See Proenza v. State*, 541 S.W.3d 786, 794 (Tex. Crim. App. 2017) (recognizing that even unpreserved claims are reviewable on appeal either when they "are of such a 'fundamental' nature that they are worth reaching on appeal whether they were preserved at trial or not" or "when the harm resulting from the error is sufficiently

'fundamentally' egregious"). Should this Court conclude that the failure to instruct the new jury to restart deliberations is a Sixth Amendment violation that constitutes structural error, then the error should qualify as fundamental under Texas law. *See Sanchez v. State*, 182 S.W.3d 34, 62–64 (Tex. App. 2005) (holding that the possibility of a non-unanimous verdict—and the absence of jury instructions to avoid such a verdict—was fundamental error and remanding for a new trial); *cf. United States v. Neal*, 101 F.3d 993, 999 (4th Cir. 1996) (noting that "[e]rrors that are not susceptible to harmless error review . . . necessarily affect substantial rights").

Finally, the CCA's ruling on preservation presents no impediment to this Court's review. The ruling is neither independent of federal law, nor adequate to bar federal review, especially as the trial court understood and rejected defense counsel's request for an instruction to deliberate anew. *See Osborne v. Ohio*, 495 U.S. 103, 123–24 (1990) (rejecting the adequacy of a procedural bar when the defendant made his objection known and the trial court understood the objection). This Court therefore has jurisdiction over Gonzalez's Sixth Amendment claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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