No. 21-5327

IN THE

Supreme Court of the United States

MARK ANTHONY GONZALEZ,

Petitioner

v.

THE STATE OF TEXAS,

Respondent.

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

STATE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In Petitioner's trial for the capital murder of a peace officer, the original jury reached a verdict of guilty in about an hour. The issue in this case developed during the punishment phase, when a Texas jury is to answer two questions: whether there is a likelihood the defendant will commit future crimes of violence, and whether there is any evidence that mitigates for a sentence of life imprisonment rather than death.

Hours into the jury deliberations in the punishment phase, one juror said he was no longer able to serve as a juror. He told the court in chambers he had gone to a hospital the night before with panic attacks, and he was no longer able to handle the stress of deliberating with the other jurors. The judge accepted his explanation, allowed him to withdraw, and instructed one of two alternate jurors that she was now officially a member of the jury and should join in the deliberations.

Now Petitioner claims the jury should have been instructed to begin deliberations anew once the new juror was in place. Since no such instruction was given, the defense claims Petitioner did not receive a unanimous verdict at punishment. The reason this claim is wrong in this case is that a unanimous jury reached verdicts at every stage: at guilt the original jury reached a verdict; at punishment Petitioner's re-constituted jury answered both questions, as shown by their polling after the verdict. If the original jury had already agreed on an answer

to the first punishment question, that was a unanimous jury chosen and accepted by all parties. Petitioner enjoyed the full protection of the Sixth Amendment at every stage of trial.

STATEMENT OF THE CASE

I. The Crime

In late May of 2011, Petitioner called a friend he hadn't seen in a few years. The two met about four o'clock in the afternoon, by which time Petitioner was drinking beer. 35 RR 10-11, 24-25. He was also carrying his semi-automatic rifle with an oversized cartridge drum. 35 RR 18-19. While Petitioner's friend worked changing tires on a big truck, Petition and another acquaintance fired the weapon at a post until the acquaintance's wife told them to stop. 35 RR 24-25.

Then Petitioner and his friend went to a bar and continued to drink. 35 RR 50. Petitioner also took Xanax at some point. 35 RR 28. When the bar closed at two o'clock in the morning the two agreed to go in their separate trucks to a nearby Denny's to eat. 35 RR 54. On the way, though, as the friend turned off toward Denny's, Petitioner saw a marked patrol car stopped at a red light. 35 RR 56-57. The car was driven by Sheriff's Deputy Sergeant Kenneth Vann. 33 RR 61. Petitioner pulled up next to it. There was no apparent altercation or even interaction – the deputy's gun was snapped in its holster and his right hand resting on the car's computer keyboard – but Petitioner picked up his assault rifle from the seat next to

him and fired approximately forty-six times at the officer. (The sounds were caught on audio from a nearby security camera.) 33 RR 190, 34 RR 57. The medical examiner later testified she couldn't count the number of bullet wounds, because they overlapped. But she described Sgt. Vann's upper torso as "pulpified." 38 RR 241, 271-271.

Almost immediately afterwards, Petitioner called his friend waiting at Denny's and said, "I just killed a cop. Don't tell nobody, not even your wife." 35 RR 67.

II. Trial Court Proceedings

The case lingered in the Bexar County (San Antonio) District Court for several years. The case finally went to trial, with jury selection beginning in August 2015 and trial starting in October. The jury saw the photos of the crime scene, saw video of Petitioner's truck passing in the street just before the red light, and heard from his friend Steve Starling recounting what Petitioner had said to him immediately after the crime. The jury reached a guilty verdict after about an hour of deliberations.

It was in the punishment phase that the issue in this appeal arose, which will be more thoroughly set out below. But the jury did answer the punishment questions in such a way that the trial court assessed a death sentence. 53 RR5 73-74.

III. Appeal

Direct appeal to the Court of Criminal Appeals, the highest criminal court in

Texas, was automatic. Petitioner raised 28 points of error on appeal, including this one. The Court heard argument and issued an opinion. The opinion found this claim not preserved but addressed the substance as well, and overruled it. The Court also overruled all of Petitioner's other points, affirming the conviction and sentence in a unanimous opinion. *Gonzalez v. State*, 616 S.W.3d 585 (Tex. Crim. App. 2020).

ISSUES BEFORE THIS COURT AND RESPONSE

Petitioner presents two questions to this court:

> (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.

The answer to both questions is no. Petitioner received a fair trial and unanimous jury verdicts.

SUMMARY OF THE ARGUMENT

Petitioner claims he was denied a unanimous jury verdict because an alternate juror was placed on the jury during punishment deliberations. But this juror had sat through all the deliberations and listened to them closely, per the trial court's order. When she joined the jury she was fully prepared to participate, and her vote on the punishment verdicts had the same weight as those of all the other jurors. Petitioner received unanimous verdicts.

ARGUMENT

The fact that distinguishes this case from other cases involving jury substitutions is that the two alternate jurors were allowed to be in the jury room during all deliberations. The alternates were told not to participate, but the court's written jury instructions included a specific provision for the alternates: "The alternate jurors must attentively listen to all deliberations as it is always uncertain if and when we might need to utilize one or both of them." 52 RR 40.

So when alternate juror S.F. was added to the jury, she wasn't walking into an unfamiliar room full of strangers. She had heard all the previous deliberations. She was not, as the petition claims, "an outsider to the decision-making dynamic that has already developed…" Petition at 11. She had observed that dynamic and listened closely to the discussions. And she would have been perfectly free to say, "Let's revisit that first issue."

Petitioner's reliance on *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), is misplaced. Mr. Ramos received an explicitly non-unanimous verdict, 10-2 in favor of guilt, which was enough for a felony conviction in Louisiana. This Court held otherwise. *Ramos*, 140 S. Ct. at 1397, 1408 (requiring unanimous verdict in criminal trials in Louisiana). This Petitioner, by contrast, received unanimous verdicts at every decision point of the trial.

I. The Punishment Questions

As this Court knows well, in the punishment phase of a death penalty trial in Texas, jurors are instructed to answer two questions: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Mark Gonzalez, would commit criminal acts of violence that would constitute a continuing threat to society?" and "Taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal culpability of the defendant, is there a sufficient circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" Tex. Code of Criminal Procedure 37.071 Sec. 2(b). In this case the jury unanimously answered "yes" to the first question and "no" to the second. 53 RR 73-74.

The jury was polled after each verdict. On punishment every juror including the substituted alternate said the answer to each question was her verdict. 53 RR 74-75. This refutes the claim the alternate was "tossed into the fray, with no power to alter decisions that the original jury had already reached…" Petition at 2. This juror affirmed that the answers to both questions were her verdict. She also signed an affidavit soon after the trial saying the same thing, that this was her verdict, without other influences.

The petition cites *United States v. Virgen-Moreno*, 265 F.3d 276, 289-90 (5th

Cir. 2001), in which a similar issue was argued. But *Virgen-Moreno* also held placing an alternate juror on the jury after they had already begun to deliberate was harmless error. The court reasoned the fact the jury deliberated for three more hours after that substitution shows the alternate participated in deliberations and did not simply bow to the will of the majority. In this case the jury deliberated for a full day after the substitution, so the same is true here: the alternate juror fully participated in the punishment deliberations and decisions.

And what if the former alternate juror did have no power to change a decision already made by the other jurors as to the first question? There is no evidence the jury had already reached an answer to the first question when the juror substitution was made, but let's suppose they had. Then the decision how to answer that first question was made by a unanimous jury of twelve people. So Petitioner still had the unanimous jury to which he's constitutionally entitled.

The petition at page 5 says jurors must have already reached an answer to special issue question number 1 because they sent out notes asking to clarify the second question, and adds their instructions said "only if jurors returned a 'yes' verdict on Special Issue 1 could they proceed to Special Issue 2." But that's not quite what the jury instructions said. They said, "You are further instructed that if you return a verdict of yes to Issue Number 1, only then are you to *answer* Issue Number 2." 52 RR 42(emphasis added). This instruction left the jurors free to

discuss the issues in any order they wanted. They just weren't to answer Special Issue Number 2 unless they answered 'yes' to Special Issue Number 1.

There are only two possibilities of how the jury answered the first special issue. The first is that the original jury had reached an answer and the alternate juror once she was placed on the jury agreed with that answer (based on her polling respoonse). The second possibility is the jurors had not reached agreement on how to answer the first special issue question when S.F. was placed on the jury, so she deliberated and voted on each issue. In either scenario Petitioner received a unanimous jury verdict as to each question. In fact, in the first scenario he received a unanimous verdict of thirteen jurors rather than the usual twelve. But his verdict was unanimous and his Sixth Amendment rights were upheld.

II. There is no Structural Error

Petitioner argues the claimed error in not instructing the re-constituted jury to begin deliberating anew was structural error, not requiring objection to preserve. Petitioner argues that "Trial errors are discrete, isolated events whose effects can be ascertained…" Petition at 16. "The structural-error doctrine, by contrast, focuses not on measurable effect on the verdict but on ensuring that 'certain basic, constitutional guarantees… define the framework of any criminal trial." Petition at 16-17, citing *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017) (a case about the right to a public trial even during jury selection.)

But Mr. Gonzalez received those "basic, constitutional guarantees": a fair trial and unanimous verdicts to every issue in that trial.

III. Issue Not Preserved

Petitioner has to make this structural error argument because the Court of Criminal Appeals properly held this error, if any, was not preserved for appellate review. *Gonzalez*, 616 S.W.3d at 591-92. Petitioner says "the trial court understood and rejected defense counsel request for an instruction to deliberate anew." Petition at 23. But that is just not true.

The Court of Criminal Appeals went into the facts surrounding this issue at great length. The context was that at the same time the alternate juror was placed on the jury, the court was also trying to answer a jury note asking that several terms in the second special issue be clarified. The court conferred with lawyers for both sides plus the court's staff attorney. So there was a scrum of voices speaking on various topics, sometimes at once. *See, e.g.,* 53 RR 23-25.

As for the issue of instructing the jury to deliberate anew, the Court of Criminal Appeals said,

> The closest [defense counsel] came was when he said, '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 prosecution, court staff attorney, and the trial court assumed the jury would 'address all the issues among themselves,' leading the trial court to ask, '[W]hat are we supposed to do, go back and re-litigate the first phase of the trial?' This question showed that

> the trial court did not understand that appellant wanted an instruction to begin punishment deliberations anew. The defense attorney's answer did not clarify the matter… [T]he basis for his request was not obvious; he never mentioned the Sixth Amendment or any other authority to support his position.

Gonzalez , 616 S.W.3d at 591-92.

The defense in the trial court never articulated a reason for its request, authority to support its position, and never obtained a ruling. All of these are required to preserve error under Texas procedural law. TEX. R. APP. P. 33.1(a)(1) and (2).

IV. Conclusion

The rather unusual procedure of having alternate jurors in the jury room during deliberations (to which no one objected) turned out to be the saving grace of this case. The alternates were instructed not to participate in deliberations, but to listen closely. So when one of those alternates was placed on the jury, she had heard all deliberations and was ready to join in. The fact that the jury deliberated for hours more after that shows the formerly alternate juror was a full participant in the punishment decision. Petitioner received unanimous jury verdicts at every stage of his trial.

PRAYER

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

Respectfully submitted,

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Certificate of Service

I, Jay Robert Brandon, a member of the Bar of this Court, certify pursuant to Supreme Court Rule 29.5 that on this date the accompanying Response to Petition for a Writ of Certiorari was sent via first-class mail, postage prepaid, to the United States Supreme Court and were filed with the Court's electronic filing system. I further certify that on this date the State's Brief in Opposition to the Petition for a Writ of Certiorari and supporting documents were sent via first-class mail, postage prepaid, and electronically to counsel for Petitioner:

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Respectfully submitted this 22nd day of September, 2021.

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