No. 21-5327

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

REPLY BRIEF FOR PETITIONER

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This Court should grant certiorari to decide (1) whether, after a trial court substitutes a juror in the middle of deliberations, its failure to instruct the jury to begin deliberations anew violates the Sixth Amendment; and (2) whether such a violation is structural error.

A mid-deliberations substitution always threatens the Sixth Amendment right to a unanimous verdict after collective deliberations. As an outsider, the newly seated juror may well be unable to influence decisions that the original jury has already reached and to meaningfully participate in discussions on outstanding issues. That mid-deliberations substitutions often occur at moments of extreme stress enhances the likelihood that the newcomer will face coercion and intimidation. During deliberations in Gonzalez's case, the hostility in the jury room was so acute that it induced disabling panic attacks for one juror, who then had to be replaced.

It is the failure to instruct the newly constituted jury to deliberate anew, however, that vitiates the jury-trial right. The instruction empowers the newly seated juror to engage freely and fully in all deliberations, such that the verdict fairly reflects the views of every individual on the reconstituted jury. Without such an instruction, a reviewing court lacks any confidence in the fairness and reliability of the outcome of the proceeding and has no way to assess the resulting harm. To preserve the Sixth Amendment's jury-trial guarantee, such an error necessitates automatic reversal.

Respondent disputes neither that the questions presented are recurring issues of significant constitutional importance, nor that they warrant this Court's review,

especially after *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Respondent also does not dispute that lower courts need guidance, as they diverge sharply in their treatment of these questions. And, because Respondent fails to grapple with the particularly volatile and coercive dynamics inherent to a mid-deliberations substitution, Respondent does not meaningfully refute the need for a deliberate-anew instruction to safeguard the jury-trial right.

Instead, Respondent asserts that any error is not structural, relying on three circumstances that purportedly show that the absence of the instruction to deliberate anew caused no harm in this case. *See* Br. Opp'n 8–12. In so arguing, Respondent overlooks a predicate question for identifying structural error: whether any of the circumstances cited can serve as reliable measures of the harm from denying the instruction. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (deeming an error structural when its effects "are simply too hard to measure"). Respondent in effect contends that this Court need not consider whether the harm may be difficult to measure because, according to Respondent, no harm occurred here. That, however, is not the operative inquiry for characterizing error as structural. *See id*. Moreover, the factors to which Respondent points—even the "saving grace" that the alternate juror observed pre-substitution deliberations, *see* Br. Opp'n 8, 13—are not defensible measures of the harm from failing to instruct the jury to deliberate anew. In fact, they illuminate why omitting that instruction renders harmless-error analysis unworkable.

Finally, beyond its mistaken complaint that the Sixth Amendment issue was not preserved adequately at trial, Respondent does not contest that this case is a strong vehicle for this Court to review and decide the important Sixth Amendment and structural-error questions presented.

This Court should grant certiorari.

I. The Denial of the Instruction to Deliberate Anew Violates the Sixth Amendment.

The core of the jury-trial right is threatened by a mid-deliberations substitution without an instruction to deliberate anew. *See, e.g.*, *Op. of the Justs. (Alternate Jurors)*, 623 A.2d 1334, 1337 (N.H. 1993) (deeming such an instruction vital to protecting the jury-trial guarantee). Respondent posits that in Gonzalez's trial the substitute juror either agreed with the already-settled verdict on Special Issue 1 or actively deliberated on that issue. Br. Opp'n 11. In so arguing, Respondent ignores the fundamental problem: Mid-deliberations substitutions are fraught with coercive potential, and the failure to instruct the jury to deliberate anew may deprive the newly seated juror of a fair opportunity to share her views or to convince others to reconsider their entrenched opinions. *See, e.g.*, *State v. Lamar*, 327 P.3d 46, 51–52 (Wash. 2014) (holding that without an instruction to deliberate anew, "the reconstituted jury did not deliberate as constitutionally required" because "[t]he alternate had no opportunity to offer his views or try to convince his fellow jurors of a different view"); *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) ("The inherent coercive effect upon an alternate juror who joins a jury that has . . . already agreed [on a verdict] is substantial."). In a combative deliberations environment such

as the one here, and absent an instruction to deliberate anew, the new juror may well assent to a verdict about which she did not deliberate fully and with which she does not agree. *See, e.g.*, *State v. Corsaro*, 526 A.2d 1046, 1054–55 (N.J. 1987) (reasoning that a new juror will face significant pressure "to conform to [the original jurors'] findings and verdict"); *see also, e.g.*, 53 RR 6–7. Such a verdict does not satisfy the Sixth Amendment.

Respondent also asserts, without citing authority, that the jury-trial right is satisfied even when the original jury arrives at a verdict on Special Issue 1 and a different jury arrives at a verdict on Special Issue 2. *See* Br. Opp'n 10 (arguing that no constitutional concern arises even if the newly seated juror had "no power to change a decision already made by the other jurors"). But courts have rejected this proposition. *See, e.g.*, *Corsaro*, 526 A.2d at 1055 (holding that the jury-trial right requires "the *same* trier of the fact [to] decide *all* . . . of the issues"); *see also State v. Miley*, 603 N.E.2d 1070, 1075 (Ohio Ct. App. 1991) (deeming it unconstitutional for the original jury to decide one issue and the reconstituted jury to decide another).

II. The Instructional Error Is Structural Under *Weaver*.

The error arising from the denial of an instruction to deliberate anew is structural because (1) it leaves no jury verdict within the meaning of the Sixth Amendment; (2) the error necessarily undermines the fundamental fairness of the proceeding; and (3) the jury-trial right protects an interest beyond the right to a fair trial. *See Weaver*, 137 S. Ct. at 1908; *Sullivan v. Louisiana*, 508 U.S. 275, 278–81

(1993); Pet. 18–22. Respondent does not meaningfully address any of these concerns. *See* Br. Opp'n 7–13.

This instructional error is also structural because it is impossible to gauge how the error affected whether the jury reached a constitutionally sound verdict—that is, one that enjoys unanimous support following collective deliberations. *See Weaver*, 137 S. Ct. at 1908. The secrecy of jury deliberations is practically sacrosanct. *See Tanner v. United States*, 483 U.S. 107, 120–21 (1987). As such, after the verdict courts cannot ascertain the magnitude of harm caused by the type of error challenged here. *See, e.g.*, *United States v. Acevedo*, 141 F.3d 1421, 1426 n.9 (11th Cir. 1998). Respondent argues that the denial of the instruction is not structural error, pointing to three circumstances here that it says indicate no harm: (1) the alternate juror's presence during pre-substitution deliberations; (2) the post-verdict poll; and (3) the length of post-substitution deliberations. Br. Opp'n 8–10. However, the first of these factors is not a metric of harm at all, and the other two are poor measures of harm at best. The harm here is not susceptible to measurement, and thus the instructional error necessitates automatic reversal. *See Weaver*, 137 S. Ct. at 1908.

First, the silent presence of an alternate juror during pre-substitution deliberations does not help assess the effect of denying the deliberate-anew instruction. Even an alternate who observed prior deliberations "may have been coerced or intimidated by the other eleven jury members who likely had already formulated positions, viewpoints, or opinions." *Miley*, 603 N.E.2d at 1072, 1075; *see Lowenfield v. Phelps*, 484 U.S. 231, 249 (1988) (Marshall, J., dissenting) (noting that

pre-substitution deliberations "shape[] the jury's collective state of mind"). Accordingly, while the new juror knows what transpired pre-substitution, that does not mean the jury will reach the same verdict it would have reached had the new juror participated in deliberations from the outset. *See Miley*, 603 N.E.2d at 1072, 1075. Moreover, the fact that the alternate juror in this case witnessed the prior deliberations—including the antagonism that rendered one juror unable to continue—could have easily discouraged her from participating freely and fully once seated. Thus, an alternate juror's earlier presence may well exacerbate the harm from a substitution when the reconstituted jury is not directed to deliberate anew. *Cf. id.* at 1074–75. A reviewing court simply cannot know. For that reason, an alternate juror's presence during prior deliberations cannot be treated as an index of whether harm resulted from the absence of an instruction to begin deliberating anew.

Second, a post-verdict jury poll does not capture the harm of denying the instruction to deliberate anew. Such a poll cannot help establish that the jurors reached a meaningfully unanimous verdict unless they feel able to voice concerns to the court. *See Duffy v. Vogel*, 905 N.E.2d 1175, 1178 (N.Y. 2009). Given the pressure a substitute juror faces to yield to the original jury's determinations, *see, e.g.*, *United States v. Cencer*, 90 F.3d 1103, 1107 (6th Cir. 1996), courts cannot assume that the juror will feel "emboldened to speak out and protest in open court," *Ragusa v. Lau*, 575 A.2d 8, 12 (N.J. 1990) (Stein, J., concurring in part and dissenting in part). Coerced jurors "are not likely moments later in the solemn and intimidating atmosphere of the courtroom attending the announcement of the verdict to feel free

to express their reservations." *Duffy*, 905 N.E.2d at 1178. Further, jurors who have been pressured to assent to a verdict have little incentive to renege in court when doing so will only force them back into the coercive environment of the jury room. Absent an instruction to begin deliberations anew, a jury poll cannot ensure that the verdict reflects constitutionally adequate unanimity. *See Lamar*, 327 P.3d at 52–53 (recognizing that "polling the jury does not establish unanimity" when a reconstituted jury has not been instructed to start anew because "none of the jurors would have had any reason to doubt the propriety of [their deliberations] process and each would naturally respond that the verdict was his or her own"); *cf. Bishop v. State*, 670 A.2d 452, 455–56 (Md. 1996) (reversing despite a unanimous poll because it was "impossible to determine whether the [hesitant juror's] 'yes' was a product of compulsion or represented the requisite unanimity").

Third, the length of post-substitution deliberations is similarly inadequate as a metric of the impact of the error here. Extended deliberations do not reliably signify that the jury engaged in free and full debate leading to meaningful unanimity, and shorter deliberations do not demonstrate the opposite. *See, e.g.*, *Smalls v. Batista*, 6 F. Supp. 2d 211, 223 (S.D.N.Y 1998), *aff'd*, 191 F.3d 272 (2d Cir. 1999) (reasoning that the several hours that elapsed despite a coercive charge "may simply demonstrate the stamina of the holdout juror"); *Darks v. Mullin*, 327 F.3d 1001, 1016 (10th Cir. 2003) (concluding that a verdict shortly after a supplemental charge did not suggest coercion but that "the jury was within twenty minutes of a verdict before" that charge); *see also Dionas v. State*, 80 A.3d 1058, 1069 (Md. 2013) (recognizing that

"one explanation for the length of deliberations . . . does not negate every other explanation"). Because courts cannot ascertain why a jury deliberated for a certain amount of time without compromising jury secrecy, the length of deliberations does not capture the harm from the instructional error here.[1]

Contrary to Respondent's argument, where a trial court has failed to ensure that a reconstituted jury will start deliberating anew, attempting to measure the harm from that error is irreducibly speculative. *Cf. United States v. Curbelo*, 343 F.3d 273, 281 (4th Cir. 2003). Given the potential for such grave insult to the jury-trial right, a vague hope that harm did not occur does not suffice. The error is consequently structural. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (deeming an error structural when a harmless-error inquiry would require pure speculation).

III. This Court Has Jurisdiction.

Although the Court of Criminal Appeals of Texas (CCA) found the Sixth Amendment claim unpreserved, that ruling does not divest this Court of jurisdiction—and Respondent nowhere contends otherwise. *See* Br. Opp'n 12–13.

Specifically, the CCA's ruling is inadequate to preclude federal review. This Court has not hesitated to deem state-law procedural bars inadequate when enforcing them advances no legitimate state interest. For example, in *Osborne v. Ohio*, this Court held inadequate the state court's finding of waiver when counsel pressed an

[1] Respondent suggests that a juror affidavit submitted in a separate proceeding demonstrates an absence of harm in this case. *See* Br. Opp'n 9. Setting aside the impropriety of relying on matters outside the appellate record, juror affidavits cannot serve as measures of harm; an affidavit discussing coercion (or its absence) during deliberations is inadmissible. *See United States v. Straach*, 987 F.2d 232, 241–42 (5th Cir. 1993) (deeming precisely such an affidavit inadmissible). Here, the record reflects that deliberations were highly contentious, with "everybody screaming at each other." *See* 53 RR 6–7.

objection and the "judge, in no uncertain terms, rejected counsel's argument." 495 U.S. 103, 124 (1990); *see also, e.g.*, *Henry v. Mississippi*, 379 U.S. 443, 448–49 (1965) (holding that when an objection sufficed to give the court a chance to cure the error, acquiescing to the state-court finding of waiver serves no end other than "giving effect to . . . an arid ritual of meaningless form" (internal quotation marks omitted)).

The CCA noted that a "litigant must 'let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him.'" Pet. App. 11a (quoting *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016)). The purpose of the rule is to ensure that opposing counsel and the court are aware of the substance of the objection, so that the former can respond and the latter can rule. *See Thomas v. State*, 723 S.W.2d 696, 700–01 (Tex. Crim. App. 1986). Here, defense counsel's objection satisfied that purpose. Counsel repeatedly articulated the basis of the objection—that the new juror could alter the outcome with respect to the already-decided first Special Issue—and asked the court to start penalty-phase deliberations anew. 53 RR 21–26; *see James v. Kentucky*, 466 U.S. 341, 348–49 (1984) (deeming a state-court ruling that hinged on a "required magic word" inadequate to foreclose federal review). The State understood the objection and even explained it to the court. 53 RR 24–25. The court, too, fully grasped the objection; indeed, it rejected

the defense's position on the merits, ruling that "[w]hat has been decided"—that is, the verdict on the first Special Issue[2]—"should remain, period."[3] 53 RR 25.

Defense counsel thus satisfied the preservation requirement, and nothing would be gained from demanding more of counsel in these circumstances. *See, e.g.*, *Osborne*, 495 U.S. at 124; *Lee*, 534 U.S. at 376 (rejecting an "exorbitant application of a generally sound rule"). The CCA's ruling is therefore inadequate to defeat this Court's jurisdiction, *see Osborne*, 495 U.S. at 124, and the Court may review Gonzalez's Sixth Amendment claim.

CONCLUSION

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

Respectfully submitted,

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[2] Contrary to Respondent's claim, s*ee* Br. Opp'n 10–11, the charge makes clear that the jury had to decide Special Issue 1 before deliberating on Special Issue 2. The charge instructed the jury that if it "return[ed] a verdict of yes to Issue Number 1, only then [could the jury] *answer* Issue Number 2," 52 RR 42 (emphasis added), not that if the jury returned a verdict of yes to Issue Number 1, only then could it *return a verdict* on Issue Number 2. Texas law positions Special Issue 1 as a screening mechanism, and the instruction thus did not permit the jury to deliberate on Special Issue 2 when it might never be tasked with deciding that issue. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(1) (directing that "if the jury returns an affirmative finding [on Special Issue 1], the jury shall answer the [second] issue"). The charge and jury questions in the record therefore establish that the original jury had decided the first Special Issue before the substitution. *See* 52 RR 42; 5 CR 2023–24.

[3] Respondent cites the "scrum of voices speaking on various topics" in arguing that the defense failed to preserve the objection. Br. Opp'n 12. This Court, however, has recognized that "the realities of trial" warrant abjuring rigid formalism in favor of substantial compliance with procedural requirements. *Lee v. Kemna*, 534 U.S. 362, 382, 385 (2002).