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ABSTRACT

Until the Supreme Court's 2020 decision in Ramos v. Louisiana, non-unanimous jury verdicts were constitutional and utilized in two states: Louisiana and Oregon. The Ramos decision not only declared the practice of non-unanimous jury verdicts unconstitutional, but it also emphasized the essential nature of jury verdict unanimity in criminal trials throughout American history and legal jurisprudence. A year later, in Edwards v. Vannoy, the Court considered retroactive application of Ramos. Utilizing the test created in Teague v. Lane that assessed the retroactivity of new rules of criminal procedure, the Court announced that, despite the essential nature of the unanimous jury verdict requirement, it was not a "bedrock element of criminal procedure." Therefore, like every other new rule of criminal procedure to date, this rule did not apply retroactively. After acknowledging that the Teague test had never found a new rule of criminal procedure to meet its demanding standard, Edwards then took the drastic step of eliminating the bedrock exception to Teague altogether. This Note argues that the Edwards Court was wrong in its analysis and conclusion to deny hundreds of prisoners relief based on non-unanimous jury verdicts that were obtained prior to Ramos. Though the Supreme Court has denied relief to those prisoners, this Note explains that state courts still have the ability to retroactively apply Ramos and that justice requires state courts to adjudicate non-unanimous jury verdict claims accordingly.

Keywords: jury verdict, constitutional law, criminal trials, criminal procedure, retroactivity, Teague, prisoners relief

INTRODUCTION

David Sims was convicted of a felony in 2015 despite two members of the jury finding him not guilty.[1] Based on this unjust verdict, the court sentenced Sims to life in prison without the possibility of parole.[2] Sims appealed his conviction to the Louisiana

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[1] State v. Sims, No. 26735-13, 2016 La. App. LEXIS 353, at *12 (La. App. 3d Cir. Sept. 28, 2016).
[2] *Id.* at *2.

Supreme Court, but the court rejected his claims.[3] As a result, Sims exhausted his right to appeal, which ended the direct review of his conviction. Similarly, Nathaniel Lambert was convicted by a non-unanimous jury verdict in 1997.[4] Even though one juror believed that Lambert was not guilty, the trial court also sentenced him to life in prison without the possibility of parole.[5] However, the court of appeals ultimately reversed Lambert's sentence for reasons unrelated to his non-unanimous jury verdict.[6] Presently, more than twenty years after this reversal, Lambert is still litigating the resentencing that stemmed from his 1997 conviction on direct review.[7]

In 2020, the Supreme Court ruled in *Ramos v. Louisiana* that non-unanimous jury verdicts such as those imposed on Sims and Lambert are unconstitutional.[8] However, the Court's ruling in *Ramos* only applies to cases that are adjudicated after *Ramos* was decided or that are currently on direct appeal. As such, while both Sims and Lambert were convicted by non-unanimous jury verdicts, the current procedural posture of their cases is entirely different from one another. Sims's 2015 conviction became final in 2017, meaning that *Ramos* did not apply to his case. However, because Lambert's 1997 convictions and sentences never became final, he remains on direct appeal and is therefore entitled to a new trial under *Ramos*.[9] Though Sims was convicted eighteen years after Lambert, he was not able to benefit from *Ramos*, and he will remain in prison for the rest of his life based on a law that the Supreme Court deemed unconstitutional.

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"Beyond a reasonable doubt" is the highest burden of proof in the American legal system.[10] The intention behind this high burden is to ensure that criminal defendants are, in fact, guilty with a high degree of certainty before the State deprives them of their liberty.[11] In 1898 and 1934, Louisiana and Oregon, respectively, adopted non-unanimous jury verdict laws to circumvent this demanding standard.[12] As explained by the Supreme Court, racism and white supremacy motivated these states to enact non-unanimous jury laws in order to silence minority jurors' voices.[13] By permitting only ten members of the jury to find a defendant guilty, while two (likely) minority jurors find the defendant not guilty, these laws allowed a criminal defendant to be convicted despite the existence of

[3] State v. Sims, 224 So. 3d 984 (La. 2017).
[4] State v. Lambert, 267 So. 3d 648 (La. App. 4th Cir. 2019); Supplemental Brief for Petitioner at 1, Lambert v. Louisiana, 267 So. 3d 648 (La. App. 4th Cir. 2019) (No. 19-8149).
[5] *Id.*
[6] *Id.*
[7] As of October 5, 2020, Lambert's case is pending in the Court of Appeals of Louisiana, Fourth Circuit, under case No. 19-8149.
[8] 140 S. Ct. 1390 (2020).
[9] Lambert v. Louisiana, 141 S. Ct. 225 (2020).
[10] *See* In re Winship, 397 U.S. 358, 363–64 (1970).
[11] *Id.*
[12] *Ramos*, 140 S. Ct. at 1394; *id.* at 1417 n.86. These laws did not apply to capital cases and did not apply to first-degree murder charges in Oregon. *See* LA. CONST. of 1898, art. 116 ("cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict"); OR. CONST. art. I, § 11 ("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").
[13] *Id.*

reasonable doubt by at least one member of the jury.[14] Not only were these laws based in discrimination, but they also defied historical understandings of the Sixth Amendment's guarantee of a trial by an impartial jury. Though the Sixth Amendment does not explicitly contain this right, if its mandate "carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity."[15] Supreme Court Justices, legal treatises, and ample Supreme Court opinions throughout history have repeatedly endorsed this view.[16] Despite this historical and legal understanding of the unanimous jury verdict, the Supreme Court initially upheld non-unanimous jury verdict laws in 1972, stating that such laws did not violate either the Sixth or Fourteenth Amendments.[17] The Court did not strike down these laws as unconstitutional until 2020 in *Ramos v. Louisiana*.[18]

Even though *Ramos* now requires unanimous jury verdicts to convict defendants, hundreds of individuals are already serving prison sentences based on non-unanimous jury verdicts.[19] *Ramos* did not affect any prisoner whose convictions became final prior to the day the Supreme Court rendered its decision because new rules of criminal procedure are typically only applied prospectively.[20] If prisoners with finalized convictions choose to litigate their unconstitutional non-unanimous jury verdicts, they will have to do so on collateral review. Collateral review, unlike direct review, means that a conviction has already been finalized, which makes reversal of the conviction more difficult to achieve.[21] Until recently, new rules of criminal procedure, such as *Ramos*'s rule requiring unanimous jury verdicts, could only apply retroactively to cases on collateral review if they met a demanding standard that the Supreme Court established in *Teague v. Lane*.[22] According to *Teague*, only "watershed" rules of criminal procedure satisfied the Court's standard for retroactive application.[23] As the *Teague* Court explained, "watershed rules" are those which are "absolutely prerequisite to fundamental fairness implicit in the concept of ordered liberty."[24] Notably, *Teague*'s understanding of "watershed rule" only applied to new rules of criminal procedure, not old ones. Old rules, according to *Teague*, automatically apply retroactively.[25]

In December 2020, the Court heard oral arguments in *Edwards v. Vannoy* to assess whether *Ramos* should apply retroactively.[26] In May 2021, the Court not only ruled in

[14] *Id.*
[15] *Id.* at 1396.
[16] *See id.* at 1396–97 ("Justice Story explained in his Commentaries on the Constitution that 'in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable.' Similar statements can be found in American legal treatises throughout the 19th century . . . In all, this Court has commented on the Sixth Amendment's unanimity requirement no fewer than thirteen times over more than 120 years.").
[17] *See* Johnson v. Louisiana, 406 U.S. 356, 367 (1972); *see also* Apodaca v. Oregon, 406 U.S. 404 (1972).
[18] *Ramos*, 140 S. Ct. at 1390.
[19] Brief for The Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defender as Amici Curiae Supporting Respondents at 11, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).
[20] *See* 140 S. Ct. at 1419.
[21] Wall v. Kholi, 562 U.S. 545, 551 (2011).
[22] 489 U.S. 288 (1989).
[23] *Id.*
[24] *Id.*
[25] *See Ramos*, 140 S. Ct. at 1437 ("Under *Teague*, 'an old rule applies both on direct and collateral review'") (citing Whorton v. Bockting, 549 U.S. 406, 416 (2007)).
[26] Transcript of Oral Argument, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

Edwards that *Ramos* will not apply retroactively, but it also completely eliminated the "watershed" exception from the *Teague* test.[27] Though the Court had never held that a new rule of criminal procedure was retroactive under the *Teague* test,[28] *Edwards*'s ruling completely eliminated that possibility by creating a blanket rule that new rules of criminal procedure will not apply retroactively.[29]

This Note posits that the *Edwards* Court incorrectly denied *Ramos* retroactive application and patently violated individuals' constitutional rights by eliminating the "watershed" exception to the *Teague* test. By looking to the original understanding of the Sixth Amendment's requirement of unanimity, as well as to the constitutionally required burden of proof to establish guilt, this Note demonstrates that the unanimous jury verdict requirement is a "watershed" rule of criminal procedure, and, as such, the *Edwards* Court should have applied it retroactively.

Alternatively, this Note argues that the Court should not have applied *Teague* to *Ramo*s in the first place, as the unanimous jury verdict's historical nature refutes the novelty of *Ramos*'s ruling, negating the Court's need to rely on *Teague*. Instead, the *Edwards* Court should have found that *Ramos* did not create a new rule, but rather applied settled rules concerning the Sixth and Fourteenth Amendments. If *Ramos* was an old rule, the *Teague* standard would be irrelevant, and the Court would have had to retroactively apply *Ramos*.

Fortunately, regardless of the *Edwards* decision, states can still retroactively apply ostensibly novel rules of criminal procedure in their own post-conviction proceedings because the Supreme Court only sets the floor for when new rules apply retroactively.[30] By maintaining autonomy to decide retroactive application of their own state law, both Louisiana and Oregon can still apply *Ramos* retroactively and grant new trials to all criminal defendants that were convicted by non-unanimous jury verdicts prior to the *Ramos* decision.

This Note explores the various avenues that the legal system can and should take to apply *Ramos* retroactively on collateral review to prisoners with convictions based on non-unanimous jury verdicts. Even though *Edwards* denied *Ramos*'s retroactive application, various arguments in favor of retroactivity remain relevant because state courts can still grant retroactivity to state prisoners. This Note therefore serves several purposes. First, it delineates several arguments supporting retroactivity to shed light on the numerous theoretical frameworks that state court judges can use to arrive at the same ultimate conclusion. Simultaneously, this Note assesses the Court's egregious errors in *Edwards* to inform subsequent state litigation. Though *Edwards* is now precedent and impacts both non-unanimous jury doctrine and retroactivity doctrine, critically analyzing the decision can decrease its significance, particularly to state post-conviction petitioners. The paths to achieving retroactivity through *Ramos*, while limited, do exist in underappreciated and underutilized ways. Accordingly, legal practitioners must consider all possibilities when advocating for retroactivity. This Note seeks to persuade practitioners that retroactively applying *Ramos* is necessary to secure justice for all incarcerated individuals who remain

[27] Edwards v. Vannoy, 141 S. Ct. 1547 (2021).
[28] *Ramos*, 140 S. Ct. at 1407.
[29] *Id.*
[30] *See* Danforth v. Minnesota, 552 U.S. 264 (2008).

victims of non-unanimous jury verdicts and advances options to achieve retroactivity on a state level.

Part I examines the Supreme Court's retroactivity jurisprudence and highlights the considerations that culminated in the Court's current test for retroactivity. Part II reviews non-unanimous jury verdict jurisprudence to contextualize the issue before the Court in *Edwards*. Part III critiques the *Edwards* decision and supplies an alternative analysis that argues for retroactively applying *Ramos* based on the theory that *Ramos* created a new rule of criminal procedure. Part IV supplies another alternative analysis that the Court could have conducted to retroactively apply *Ramos* based on a theory that *Ramos* did not declare a new law. Finally, Part V considers what states can do to facilitate *Ramos*'s retroactive application now that the Supreme Court has denied retroactivity of *Ramos* on collateral review.

I. HISTORY OF RETROACTIVELY APPLYING NEWLY RECOGNIZED RULES OF CRIMINAL PROCEDURE

Until *Edwards*, the Supreme Court's decision in *Teague v. Lane* governed the law on retroactively applying newly recognized rules of criminal procedure.[31] The *Teague* test weighed heavily against retroactive application of cases on collateral review for a variety of reasons. Primarily, the Court found a strong interest in the finality of convictions. According to Justice Harlan, "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[32] Retroactive application disrupts the finality of convictions and therefore deprives criminal law of "much of its deterrent effect."[33] Retroactive application also creates issues involving reliance interests. Applying new law to old cases can involve retrials, plea bargaining, and other administrative changes, all of which come with a cost.

Though courts have only applied *Teague*'s test for the past thirty years, the debate on retroactively applying newly decided law has a much longer history and continues today. Prior to *Teague*, the Court was continuously divided on retroactivity issues, and its rulings on retroactive application lacked a clear framework, often producing inconsistent results. Though *Teague* standardized these results by creating a framework that applied consistently to cases with the same procedural posture, it also developed a test that no case has passed. In recognition of this "false promise" the Supreme Court dramatically altered the *Teague* test in *Edwards v. Vannoy*.[34]

A. The Retroactivity Regime Before Teague v. Lane

For most of its history, the Supreme Court had not addressed retroactivity issues because the Court rarely created new constitutional protections for criminal defendants. It was not until 1956 that any Supreme Court Justice discussed the implications of creating

[31] Teague v. Lane, 489 U.S. 288, 300–01 (1989).
[32] Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).
[33] *Teague*, 489 U.S. at 288, 309 (1989).
[34] Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021).

new constitutional rights or concerned themselves with whether prior defendants could benefit from their creation.[35] In *Griffin v. Illinois*, the Court held that an Illinois law requiring all criminal defendants to pay for a transcript of their trial proceedings unconstitutionally deprived destitute offenders of access to appellate review.[36] In a concurring opinion, Justice Frankfurter warned that:

> [W]e should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.[37]

Justice Frankfurter was clearly aware of the complications that newly recognized rules created for those whose cases were decided under the old rule, foreshadowing the long debate that would ensue over the next several decades.

Two years after *Griffin*, in *Eskridge v. Washington State Board of Prison Terms and Paroles*, the Court held that *Griffin* was controlling and mandated retroactive application of its ruling.[38] The Court reasoned that "[w]e do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that destitute defendants must be afforded as adequate appellate review as defendants who have enough money to buy transcripts."[39] Though the Court did not explicitly acknowledge it, this was the first time it applied a new rule of criminal procedure retroactively. Despite the Court's implicit recognition that the issue of retroactivity may lend itself to constitutional questions and procedural issues, the Court continued to rule on similar claims on a case-by-case basis for the next seven years without creating a consistent framework for retroactivity.[40] Meanwhile, Justice Harlan consistently urged the Court to adopt a real framework for retroactivity in a series of cases from 1961 to 1964.[41]

Finally, in *Linkletter v. Walker* the Supreme Court heeded Justice Harlan's plea and laid out a test for retroactivity.[42] In *Linkletter*, the Supreme Court addressed the question of whether *Mapp v. Ohio*,[43] which made the exclusionary rule (a rule that requires exclusion of illegally obtained evidence) applicable to the states, should apply retroactively.[44] After years of inconsistent retroactive application of new laws, the Court

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[35] Peter Bozzo, *What We Talk About When We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 28 (2019).
[36] 351 U.S. 12 (1956).
[37] *Id.* at 26.
[38] 357 U.S. 214, 216 (1958).
[39] *Id.*
[40] *See* Jackson v. Denno, 378 U.S. 368 (1964); Smith v. Crouse, 378 U.S. 584 (1964) (per curiam); Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (per curiam); Gideon v. Wainwright, 372 U.S. 335 (1963).
[41] *See* Ruark v. Colorado, 378 U.S. 585, 585 (1964) (Harlan, J., dissenting); Jackson, 378 U.S. at 439–40 (Harlan, J., dissenting); Smith, 378 U.S. at 584 (Harlan, J., dissenting); LaVallee v. Durocher, 377 U.S. 998, 998 (1964) (Harlan, J., dissenting from the denial of certiorari); Pickelsimer, 375 U.S. at 3–4 (Harlan, J., dissenting); Patterson v. Medberry, 368 U.S. 839, 839–40 (1961) (memorandum of Harlan, J., respecting the denial of certiorari).
[42] 381 U.S. 618 (1965).
[43] 367 U.S. 643 (1961).
[44] *Linkletter*, 318 U.S. at 618.

created a three-pronged approach where retroactivity would be determined by "weigh[ing] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[45] Using this standard, the Court held that *Mapp* would apply only prospectively because retroactively applying *Mapp* would not assist in achieving *Mapp*'s purpose of deterring lawless police action.[46]

Ultimately, *Linkletter*'s vague three-pronged test led to inconsistent results in later cases that adjudicated claims of retroactive application.[47] When applying the *Linkletter* test to *Miranda v. Arizona,* the Court employed *Miranda*'s new rule (that the Fifth Amendment requires law enforcement officers to advise persons in custody prior to questioning of their rights to silence and an attorney) to the defendants in *Miranda* and its companion cases.[48] However, when applying the *Linkletter* test to *Johnson v. New Jersey*, the Court held that the defendant could not benefit from the *Miranda* ruling because *Miranda* should only apply to trials that commenced after its decision.[49] While the defendant in *Johnson* was convicted before the *Miranda* decision, the defendants in *Johnson* and *Miranda* were both on direct review of their convictions.[50] The Court's refusal to apply *Miranda* retroactively in *Johnson* therefore resulted in unequal treatment of criminal defendants who were similarly situated.[51]

While Justice Harlan concurred with the Court's decision in *Johnson*, he was adamant that the *Linkletter* test should not apply to cases on direct review, but rather only to cases on collateral review—a distinction that the *Linkletter* test failed to address. In his dissenting opinion in *Desist v. United States*, Harlan advocated for the Court to stop applying *Linkletter* to cases on direct review because "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[52] Consequently, Harlan also attempted to explicate a reason for limiting retroactivity of petitions of habeas corpus. Expounding on the Court's long-enduring belief that habeas petitions should not be subject to retroactive application of newly established rules, Harlan explained:

> [T]he threat of [collateral review] serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the [collateral review] court need only apply the constitutional standards that prevailed at the time the original proceedings took place.[53]

According to Harlan, retroactive application of new rules on collateral review was not in accordance with a prominent purpose of collateral review: to correct errors of previous

[45] *Id.* at 629.
[46] *Id.* at 633–37.
[47] Teague v. Lane, 489 U.S. 288, 302–03 (1989).
[48] 384 U.S. 436 (1966).
[49] Johnson v. New Jersey, 384 U.S. 719, 732 (1966).
[50] *Teague*, 489 U.S. at 303.
[51] *Id.*
[52] Desist v. United States, 394 U.S. 244, 258 (1969).
[53] *Id.* at 262–63 (Harlan, J., dissenting).

proceedings according to the rules that existed when the proceeding took place. Harlan's concurring opinion in *Mackey v. United States* laid out two exceptions to this principle.[54] His first exception was for new substantive due process rules of criminal law, which he argued should be "placed on a different footing . . . because [they] represent[] the clearest instance where finality interests should yield."[55] Harlan explained that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[56] Harlan's second exception involved new procedural rules that are "implicit in the concept of ordered liberty."[57] Harlan expanded on this exception by explaining that in some situations, "it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[58] As an example, Harlan referred to the right to counsel, which had only been established in 1963 in *Gideon v. Wainwright*,[59] but which was then held as "a necessary condition precedent to any conviction for a serious crime."[60]

As justices continued to point out crucial issues regarding retroactivity, the *Linkletter* test continually proved insufficient to address them. For example, the Court encountered the issue of *Linkletter*'s application to new substantive law in *Robinson v. Neil*.[61] Holding that the doctrine of double jeopardy should be applied retroactively, the *Robinson* Court created a distinction between "procedural" rules, such as those "bearing on the use of evidence or on a particular mode of trial," and "nonprocedural guarantees," such as "[t]he prohibition against being placed in double jeopardy."[62] While *Linkletter* governed new procedural rules, *Robinson* involved new substantive rules. This critical distinction rendered *Linkletter* irrelevant to the Court's decision in *Robinson* and allowed it to apply the law of double jeopardy retroactively.[63]

Even more pressing issues surrounding the application of the *Linkletter* test arose in a litany of cases that led to disparate treatment of defendants on collateral review. In *Solem v. Stumes*, the Court used the *Linkletter* test to determine that a previous ruling in *Edwards v. Arizona*[64] did not apply retroactively to cases on collateral review.[65] However, after the *Edwards* ruling but before the *Solem* decision, several lower courts had already applied *Edwards* to cases on collateral review.[66] Thus, some defendants on collateral review prior

[54] Mackey v. United States, 401 U.S. 667, 667 (1971).
[55] *Id.* at 692–93.
[56] *Id.* at 693.
[57] *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
[58] *Id.*
[59] 372 U.S. 335 (1963).
[60] *Mackey*, 401 U.S. at 694.
[61] 409 U.S. 505 (1973).
[62] *Id.* at 507–09.
[63] According to Peter Bozzo, *Robinson* suggested that the Justices were moving away from a balancing test and toward a categorical approach. Substantive rules (such as the Double Jeopardy Clause) would apply retroactively, while procedural rules (such as the *Miranda* Warning) would not. *See* Peter Bozzo, *What We Talk About When We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 56 (2019).
[64] 451 U.S. 477 (1981).
[65] 465 U.S. 638 (1984).
[66] *See* Witt v. Wainwright, 714 F.2d 1069, 1072–74 (11th Cir. 1983); Sockwell v. Maggio, 709 F.2d 341, 343–44 (5th Cir. 1983); McCree v. Housewright, 689 F.2d 797, 800–02 (8th Cir. 1982).

to *Solem* benefitted from retroactive application of *Edwards*, while similarly situated defendants after *Solem* did not.[67] Further diminishing *Linkletter*'s effect, the Court in *Griffith v. Kentucky* rejected the *Linkletter* standard for cases pending on direct review at the time a new rule is announced.[68] Echoing the sentiment of Justice Harlan, the Court declared that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[69]

Due to subsequent rulings that significantly complicated the *Linkletter* test, in addition to the justices' consistent criticism of that test, the Court granted a writ of certiorari in *Teague v. Lane*. In *Teague*, the Court would finally create a unifying framework to clarify how questions of retroactivity should be resolved for cases on both direct and collateral review.

B. 1989: Teague v. Lane

Stemming from a 1977 incident, Frank Teague was convicted of attempted murder, armed robbery, and aggravated battery in 1979.[70] During jury selection, the prosecutor used all ten peremptory challenges to exclude black jurors.[71] A few years later, in 1986, the Court ruled in *Batson v. Kentucky* that the Equal Protection Clause of the Fourteenth Amendment prohibited prosecutors from using peremptory challenges to strike jurors based on their race.[72] In light of the *Batson* ruling, Teague attempted to have his conviction overturned on collateral review by arguing that the prosecutor in his case violated the Constitution by using race-based peremptory challenges.[73] Given the Court's continual frustration with *Linkletter*, the Court used *Teague* as an opportunity to reshape retroactivity jurisprudence. Due to the complications and inequities of prior legal frameworks regarding retroactivity, the *Teague* Court concluded that new rules should always apply retroactively to cases on direct review but not necessarily to those on collateral review.[74] The Court found that a case announces a new rule when "it breaks new ground or imposes a new obligation on the States or the Federal Government."[75] In other words, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[76]

Adopting Justice Harlan's view of retroactivity for cases on collateral review, the *Teague* Court declared that a new constitutional rule of criminal procedure would only apply retroactively to cases on collateral review if it meets one of two conditions: (1) the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) the rule pertains to "procedures that . . . are 'implicit in the concept of ordered liberty.'"[77] The Court further narrowed the scope of this second exception to "watershed rules of criminal procedure . . . without which the

[67] Teague v. Lane, 489 U.S. 288 at 305 (1989).
[68] 479 U.S. 314 (1987).
[69] *Id.* at 322.
[70] *Teague*, 489 U.S. at 292–93.
[71] *Id.* at 293.
[72] 476 U.S. 79 (1986).
[73] *Teague*, 489 U.S. at 293.
[74] *Teague*, 489 U.S. at 300.
[75] *Id.* at 301.
[76] *Id.*
[77] *Id.* at 311 (citing Mackey v. United States, 401 U.S. 667, 692–93 (1971)).

likelihood of an accurate conviction is seriously diminished."[78] The Court feared that if it permitted the "[a]pplication of constitutional rules not in existence at the time a conviction became final," the Court would "seriously undermine[] the principle of finality which is essential to the operation of our criminal justice system."[79] Finding that *Batson* was a new rule that was neither substantive nor "watershed," the Court refused to apply it retroactively to Teague's case.[80]

C. 2021: Edwards v. Vannoy

This Note is primarily interested in *Edwards v. Vannoy* for its contribution to non-unanimous jury verdict jurisprudence, which will be analyzed in depth in the next section. However, the *Edwards* Court also altered the *Teague* test in a significant way, and its impact on retroactivity jurisprudence requires attention. After thirty-two years of declining to define any new rule of criminal procedure as "watershed" and consequently refusing to retroactively apply any new rule of criminal procedure under *Teague*, the Court concluded in *Edwards* that "the watershed exception is moribund."[81] According to the Court, this theoretical exception "offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."[82] Accordingly, the *Edwards* Court eliminated the watershed exception to *Teague* and bluntly declared that going forward, "[n]ew procedural rules do not apply retroactively on federal collateral review."[83]

II. NON-UNANIMOUS JURY VERDICT JURISPRUDENCE

While *Edwards* had a critical impact on retroactivity doctrine, its central question involved the recently declared unconstitutional non-unanimous jury verdict practice. Long before *Edwards* was decided, non-unanimous jury verdicts were not only utilized but were also explicitly constitutional.

A. 1972: Johnson v. Louisiana *and* Apodaca v. Oregon

Johnson v. Louisiana[84] and *Apodaca v. Oregon*[85] were 1972 companion cases challenging laws in Louisiana and Oregon that permitted non-unanimous jury verdicts. Though the two cases relied on different constitutional provisions, the Supreme Court upheld the constitutionality of non-unanimous jury verdicts in both cases.[86]

The defendant's initial criminal trial in *Johnson* occurred prior to the Supreme Court's decision in *Duncan v. Louisiana*, which held that the Sixth Amendment's

[78] *Id.* at 311–13.
[79] *Id.* at 309.
[80] *Id.* at 316.
[81] Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021).
[82] *Id.*
[83] *Id.*
[84] 406 U.S. 356 (1972).
[85] 406 U.S. 404 (1972).
[86] *See id.*; *see also Johnson*, 406 U.S. at 356.

guarantee to the right to a jury trial applied to the states.[87] The Court had already held that *Duncan* did not apply retroactively,[88] limiting the constitutional issue in *Johnson* to whether Louisiana's non-unanimous jury verdict law violated due process and equal protection under the Fourteenth Amendment.[89] In *Johnson*, the petitioner argued that non-unanimous jury verdicts violate due process because they inherently imply reasonable doubt when at least one juror votes not guilty (indicating that the juror had reasonable doubt about the defendant's guilt).[90] However, the Court held that Louisiana's non-unanimous provisions did not violate due process in part because "want of jury unanimity is not to be equated with the existence of a reasonable doubt."[91] The Court also held that Louisiana's non-unanimous scheme did not violate the Equal Protection Clause for two reasons. First, it served a rational purpose because it reduced expense in the administration of justice. Second, it was not invidiously discriminatory because it did not vary the difficulty of proving guilt with the gravity of the offense.[92]

In dissent, Justice Douglas emphasized the necessity of unanimous verdicts "if the great barricade known as proof beyond a reasonable doubt is to be maintained."[93] Non-unanimous juries, in Douglas's opinion, were a "watered down" standard of civil rights which had a disparate impact on "the lower castes in our society."[94] Foreshadowing later debates surrounding the reliability of non-unanimous jury verdicts, the dissent warned that *Johnson* would lead to less thorough jury deliberation because, as soon as juries attained their requisite majority, further consideration would not be required, and those in the minority would lose the opportunity to persuade their fellow jurors of the alternative outcome.[95]

Apodaca differed from *Johnson* in that the defendant's initial trial occurred after the Supreme Court's ruling in *Duncan v. Louisiana*. Responding to the defendant's Sixth Amendment claims, a plurality of the Supreme Court determined that the Sixth Amendment did not require convictions by unanimous jury verdicts.[96] The plurality posited that juries still represented a cross section of the community despite the absence of a unanimity requirement and reasoned that the Fourteenth Amendment's bar against systematic exclusion of racial minorities from the jury selection process did not mandate jury unanimity.[97] Even under a non-unanimous rule, the plurality found that racial minority

[87] 391 U.S. 145 (1968).
[88] DeStefano v. Woods, 392 U.S. 631 (1968).
[89] The Court's retroactivity analysis in 1968 differs from the Court's modern-day retroactivity analysis. *See* Teague v. Lane, 489 U.S. 288 (1989). *DeStefano* held that *Duncan* only applied prospectively, beginning the day *Duncan* was decided (May 20, 1968). *See DeStefano*, 392 U.S. at 635. Therefore, even though the Sixth Amendment was incorporated against the states through the Fourteenth Amendment by 1972, this analysis was not applicable in *Johnson* because petitioner's initial trial took place in February 1968. *See* State v. Johnson, 230 So. 2d 825, 829 (La. 1970).
[90] Johnson v. Louisiana, 406 U.S. 356, 359 (1972).
[91] *Id.* at 363.
[92] *Id.* at 364.
[93] *Id.* at 391–92 (Douglas, J., dissenting).
[94] *Id.* at 386–87 (Douglas, J., dissenting).
[95] *Id.* at 388–89 (Douglas, J., dissenting).
[96] *Apodaca*, 406 U.S. at 413–14.
[97] *Id.*

members' views would be considered just as rationally by other jury members as they would be under a unanimity rule.[98]

In a concurring opinion, Justice Powell provided *Apodaca*'s necessary fifth vote. Though Powell conceded that the Sixth Amendment required unanimous jury verdicts in federal cases, he argued for a "dual-track" rule of incorporation, whereby the Fourteenth Amendment's Due Process Clause would not incorporate all of the elements of a federal jury trial within the meaning of the Sixth Amendment and therefore did not require jury unanimity in state trials.[99] Powell's "dual-track" approach has since been undermined by numerous Supreme Court decisions.[100] The Court therefore has removed the lynchpin that provided the fifth vote in *Apodaca*, rendering the plurality's decision toothless. This line of logic became important in *Ramos* when the Supreme Court considered the prominent role of *stare decisis* in non-unanimous jury verdict jurisprudence.

B. 2018 - Louisiana's Non-Unanimous Jury Campaign

Throughout U.S. history, Louisiana and Oregon have been the only states to adopt the non-unanimous jury verdict.[101] However, on November 6, 2018, Louisiana passed Constitution Amendment 2, requiring jury unanimity in criminal trials for crimes committed on or after January 1, 2019.[102] Soon after Louisiana's success, Oregon engaged in similar efforts to end its non-unanimous jury law via state referendum, but the joint resolution proposing the referendum failed in the Oregon Senate during the final days of the 2019 legislative session.[103] At that point, Oregon became the only state to continue the practice of allowing non-unanimous jury verdicts.

C. 2020 - Ramos v. Louisiana

Evangelisto Ramos, a criminal defendant on direct review, was convicted by a non-unanimous jury for a crime that occurred in 2014. Consequently, Ramos—like all other defendants charged with crimes that occurred prior to January 1, 2019—still faced the consequences of a non-unanimous jury verdict. Ramos eventually appealed that verdict to the Supreme Court, where the Court struck down *Apodaca* and concluded that the Sixth Amendment's right to a jury trial—incorporated against the states through the Fourteenth

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[98] *Id.*
[99] *Id.* at 369–77.
[100] *See* McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) ("The Court abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'"); *see also* Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) ("The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a "'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"). This rejection of Powell's "dual-track" approach to incorporation necessarily indicates that the Court has rejected the logic Powell relied upon to join *Apodaca*'s majority.
[101] Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020). The U.S. territory of Puerto Rico also adopted the non-unanimous jury verdict. P.R. CONST. art. II, § 11(2).
[102] LA. CONST. art. I § 17(A); LA. DEP'T OF STATE, OFFICIAL ELECTION RESULTS (2018), https://voterportal.sos.la.gov/static/2018-11-06/resultsRace/Statewide.
[103] Conrad Wilson, *Bill To Put Non-Unanimous Juries Before Voters Fails To Make It Out Of Oregon Legislature*, OREGON PUBLIC BROADCAST (July 1, 2019, 1:45 p.m.), https://www.opb.org/news/article/non-unanimous-juries-oregon-bill-legislature-2019.

Amendment—required a unanimous verdict to convict.[104] Citing historical texts, previous Supreme Court opinions, and writings from the Founders, the *Ramos* Court made clear that the Constitution has *always* intended for the Sixth Amendment to require jury unanimity.[105]

Though *Johnson* and *Apodaca* failed to mention the sordid history that motivated both Louisiana and Oregon's non-unanimous jury verdict laws, Justice Gorsuch, writing for the *Ramos* plurality, stressed this shameful past. Noting that Louisiana's non-unanimous jury verdict stemmed from Louisiana's 1898 constitutional convention, Gorsuch recited the convention's avowed purpose "to establish the supremacy of the white race."[106] Gorsuch continued to emphasize this history, noting that, "with 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.'"[107] Similarly, Gorsuch noted that Oregon's non-unanimous jury verdict laws can be traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries."[108]

Justice Kavanaugh's concurring opinion also drew on the racist history of the non-unanimous jury laws to support the argument that *Apodaca* must be overturned.[109] Kavanaugh's opinion recounted the non-unanimous jury rule's origins and effects, specifically Louisiana's desire to "diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875."[110] He characterized the approval of such a law "as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African Americans."[111] To Kavanaugh, the law's racist origin strongly supported overturning *Apodaca.*

Because *Apodaca* was based on improper legal reasoning at best, Justice Sotomayor disputed its precedential potency. In a separate concurrence, Sotomayor argued that *Apodaca* should be overturned because it was a "universe of one."[112] Referring to Powell's

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[104] *Ramos* focused on overturning *Apodaca* instead of *Johnson* because the Court ruled that non-unanimous jury verdicts violate the Sixth Amendment. *Apodaca* upheld non-unanimous jury verdicts based on the Sixth Amendment, whereas *Johnson* upheld non-unanimous jury verdicts based on the Fourteenth Amendment. Because the Fourteenth Amendment fully incorporates the Sixth Amendment against the States, overturning *Apodaca* effectively overturns *Johnson*. *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[105] *See Ramos*, 140 S. Ct. at 1395 ("As Blackstone explained, no person could be found guilty of a serious crime unless 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.'"); *see also id.* at 1396 ("[I]n 1824, Nathan Dane reported as fact that the U. S. Constitution required unanimity in criminal jury trials for serious offenses."); *see also id.* ("Justice Story explained in his Commentaries on the Constitution that 'in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable.'"); *see also id.* at 1396–97 ("As early as 1898, the Court said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'").

[106] *Id.* at 1394.

[107] *Id.*

[108] *Id.* (quoting State v. Williams, No. 15CR58698, 2016 WL 11695154, at *10 (Or. Cir. Dec. 15, 2016)).

[109] *Id.* at 1410 (Kavanaugh, J., concurring).

[110] *Id.* at 1417 (Kavanaugh, J., concurring).

[111] *Id.*

[112] *Id.* at 1409 (Sotomayor, J., concurring).

"dual-track" approach to incorporation, both Sotomayor and Kavanaugh recognized that Powell's flawed application of Fourteenth Amendment incorporation was the only reason *Apodaca* upheld the constitutionality of the non-unanimous jury verdict.[113] Powell had acknowledged that the Sixth Amendment required unanimity, but had also imposed his now-rejected dual-track incorporation theory to uphold the constitutionality of state non-unanimous jury verdict laws.[114] Sotomayor recognized that the *Apodaca* decision, therefore, was never legitimate precedent at inception, and so the Court could not uphold it in *Ramos*.[115]

Focusing on the practical implications of overturning precedent, Justice Alito, writing in dissent, argued that the reliance interests involved in overturning *Apodaca* (retrying criminal defendants convicted of felonies by non-unanimous verdicts whose cases are still pending on direct appeal) would provoke a "'crushing' 'tsunami' of follow-on litigation."[116] The plurality conceded that "new rules of criminal procedure usually do [impose a cost], often affecting significant numbers of pending cases across the whole country."[117] However, Justice Gorsuch maintained that the potential for significant subsequent follow-up litigation has not impacted the Court's decision to apply new rules retroactively in prior instances.[118] As evidence, Justice Gorsuch cited examples of other cases where the Court created new rules of criminal procedure, which subsequently forced the Court to vacate and remand hundreds of decisions on direct appeal.[119]

Justice Alito further argued that a ruling in favor of Ramos would prompt defendants whose appeals were already exhausted to challenge their non-unanimous convictions through collateral review.[120] Gorsuch responded by minimizing the likelihood that *Teague* would allow for this result because "*Teague*'s test is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it."[121] Ultimately, the plurality set aside this issue "for a future case where the parties [would] have a chance to brief the issue and [the Court would] benefit from their adversarial presentation."[122]

While the plurality (Justices Gorsuch, Ginsburg, and Breyer) dismissed the discussion of retroactive application as a matter not currently before the Court, Kavanaugh

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[113] *Id.*
[114] Johnson v. Louisiana, 406 U.S. 366, 371 (1972).
[115] *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).
[116] *Id.* at 1406 (quoting Alito, J., dissenting at 1425, 1436).
[117] *Id.* at 1406.
[118] *Id.*
[119] *See* United States v. Booker, 543 U.S. 220 (2004) (holding that the Federal Sentencing Guidelines must be advisory rather than mandatory). This holding "forc[ed] the Court to vacate and remand nearly 800 decisions to the courts of appeals." *Ramos*, 140 S. Ct. at 1406.
[120] *Ramos*, 140 S. Ct. at 1437.
[121] *Id.* at 1407.
[122] *Id.*; Ultimately, the majority in *Edwards* contradicts the plurality in *Ramos* and uses this brief retroactivity discussion in *Ramos* to bolster its claims that *Edwards* should not apply *Ramo*s retroactively. *See* Edwards v. Vannoy, 141 S. Ct. 1547 at 1560–61 (2021) ("*Ramos* discussed retroactivity and plainly foreshadowed today's decision. The lead opinion in *Ramos* . . . explained that overruling or repudiating *Apodaca* was not likely to significantly affect Louisiana's and Oregon's reliance interests in preserving final convictions because *Ramos* was not likely to apply retroactively on federal collateral review . . . In light of that explicit language in *Ramos*, the Court's decision today can hardly come as a surprise.").

predicted that the *Ramos* decision would fail the *Teague* test, meaning that the Court would not retroactively apply *Ramos* to cases on collateral review.[123]

D. 2021 - Edwards v. Vannoy

Less than a month after *Ramos* was decided, the Supreme Court granted certiorari in *Edwards v. Vannoy* to decide whether *Ramos* should apply retroactively to cases on collateral review.[124] The *Edwards* Court determined that *Ramos* declared a new rule of criminal procedure, but its mandate for unanimous jury verdicts was not a watershed one.[125] Though the Court admitted that *Ramos* was "momentous and consequential," it could not be labeled "watershed" because similar momentous and consequential cases that "fundamentally reshaped criminal procedure throughout the United States and significantly expanded the constitutional rights of criminal defendants" also did not apply retroactively on federal collateral review.[126] Specifically, the majority cited three types of cases that relate to the *Ramos* ruling, none of which applied retroactively: cases involving a jury right,[127] cases that restored the original meaning of the Sixth Amendment,[128] and cases that prevented racial discrimination.[129] According to the Court, these three types of cases dictated that *Ramos* similarly could not be applied retroactively.[130]

In dissent, Justice Kagan noted that none of these decisions corresponded to *Ramos*.[131] Justice Kagan observed that, if a rule implicated only one of these three aspects of the criminal process, then it may not achieve watershed status.[132] For example, *Crawford* restored the original meaning of the Sixth Amendment but did not also prevent racial discrimination *and* implicate the jury right. However, a rule such as the unanimous jury verdict that simultaneously implicated a jury right, restored the Sixth Amendment's original meaning, and prevented racial discrimination should achieve watershed status.[133]

To further emphasize *Ramos*'s essential nature to the criminal process, the dissent cited previous cases involving the reasonable doubt standard and unanimous jury verdicts, both of which applied retroactively.[134] In *In re Winship*, the Court established that a jury must find guilt "beyond a reasonable doubt."[135] Two years later, the Court applied this rule retroactively in *Ivan V. v. City of New York*[136] because the rule established in *Winship* was

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[123] *Ramos*, 140 S. Ct. at 1419.
[124] Edwards v. Vannoy, 141 S. Ct. 1547 (2021).
[125] *Id.* at 1562.
[126] *Id.* at 1559.
[127] Though *Ramos* involves the right to a jury, the Court cited to *Duncan v. Louisiana* and *DeStefano v. Woods* to assert that new rules involving the jury right have not historically applied retroactively.
[128] Though *Ramos* restores the original meaning of the Sixth Amendment, the Court cited *Crawford v. Washington* and *Whorton v. Bockting* to assert that rules that restore the original meaning of the Sixth Amendment are not considered watershed.
[129] Though the ruling in *Ramos* prevents racial discrimination, the Court cited *Batson v. Kentucky* and *Allen v. Hardy* to assert that new rules that prevent racial discrimination similarly have not applied retroactively.
[130] *Edwards*, 141 S. Ct. at 1559.
[131] *Id.* at 1579 (Kagan, J., dissenting).
[132] *Id.*
[133] *Id.*
[134] *Id.* at 1576–77.
[135] 397 U.S. 358, 361 (1970).
[136] 407 U.S. 203 (1972).

"among the essentials of due process and fair treatment."[137] The *Edwards* dissent compared *Winship* to *Ramos*, analogizing the safeguards that both rules provided to protect innocent individuals from wrongful convictions.[138] According to Justice Kagan, both cases played a vital role in "the American scheme of criminal procedure[,]" and, thus, *Ramos* should have been applied retroactively in *Edwards*, just as *Winship* had been applied retroactively in *Ivan V.*[139]

The *Edwards* dissent also pointed to *Burch v. Louisiana*,[140] which mandated unanimous jury verdicts for six-person juries, and *Brown v. Louisiana*,[141] which applied *Burch* retroactively.[142] The dissent emphasized the inherent contradiction that *Edwards* created given that the *Brown* Court had "held retroactive a unanimity requirement, no different from the one here save that it applied to a smaller jury."[143] The dissent specified the reasons the *Brown* Court used to grant retroactivity, namely that six-person non-unanimous jury verdicts "impair the 'purpose and functioning of the jury,'. . . raise[] serious doubts about the fairness of [a] trial . . . and fail[] to assure the reliability of [a guilty] verdict."[144] If the six-person unanimous jury verdict requirement applied retroactively for these reasons, the dissent argued that precedent dictated that a twelve-person unanimous jury verdict must also apply retroactively.

It is important to note that both *Ivan V.* and *Brown* were decided under a retroactivity regime that existed prior to *Teague*. The majority in *Edwards* leaned on this fact to downplay the significance of these cases and steadfastly held that no new rules of criminal procedure were ever applied retroactively under *Teague*.[145] While this is technically true, these pre-*Teague* cases utilized the same logic and similar standards that *Teague* considered when determining retroactivity.[146] Given this powerful precedent, the requirements for retroactive application under *Teague*, and the inadequate case law on which the majority relied, the Court was wrong to deny *Ramos*'s retroactive application on federal collateral review.

III. WHY THE *EDWARDS* COURT WAS WRONG: *RAMOS* PASSES THE *TEAGUE* TEST

While deliberating on their decision in *Edwards*, the justices purportedly analyzed *Ramos* under *Teague* to ascertain whether *Ramos* was a watershed rule.[147] In reality, the

[137] *Id*. at 203.
[138] *Edwards*, 141 S. Ct. at 1576–77 (Kagan, J., dissenting).
[139] *Id.*
[140] 441 U.S. 130 (1979).
[141] 447 U.S. 323 (1980).
[142] *Edwards*, 141 S. Ct. at 1577 (Kagan, J., dissenting).
[143] *Id.*
[144] *Id.* (citing *Brown*, 447 U.S. at 331, 335 n.13, and 334).
[145] *Id.* at 1558 n.5.
[146] While the majority dismissed this precedent, citing its pre-*Teague* posture, they simultaneously point to *Gideon* as the only case that could have satisfied *Teague* despite its analogous pre-*Teague* posture. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see Edwards*, 141 S. Ct. at 1558 n.5 ("In any event, *Brown* and *Ivan V.* were pre-*Teague* decisions . . . [P]re-*Teague* decisions holding that a rule *is* retroactive are not as relevant as pre-*Teague* decisions holding that a rule *is not* retroactive . . ."); *but see also Edwards*, 141 S. Ct. at 1557 ("The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court's landmark decision in *Gideon v. Wainwright*.").
[147] *Edwards*, 141 S. Ct. at 1555.

Court swiftly denied *Ramos*'s retroactive application by analogizing to similar precedents instead of "faithfully appl[ying] [*Teague*] to [*Ramos*]."[148] Had the Court genuinely applied *Teague* to *Ramos*, it would have reached the opposite conclusion.[149]

Under the *Teague* test, newly recognized rules of criminal procedure did not apply to cases on collateral review unless they were substantive rules or "those procedures that . . . are 'implicit in the concept of ordered liberty.'"[150] The *Teague* Court explained that this second exception applied only to new "watershed rules of criminal procedure."[151] Such watershed rules (1) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" and (2) "prevent an 'impermissibly large risk' of an inaccurate conviction."[152]

The Supreme Court has repeatedly held that *Gideon v. Wainwright*[153] was "the only case that this court identified as qualifying under [the watershed] exception."[154] In *Gideon*, the Court held that counsel must be appointed for any indigent defendant charged with a felony because "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[155] As the Court explained,

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[156]

Therefore, denial of representation, the Court went on to reason, created an intolerably high risk of an unreliable verdict.[157] Accordingly, a new procedural rule would not apply retroactively unless its "primacy and centrality" to fairness and accuracy was akin to the right to representation.[158] Not only do unanimous jury verdicts arguably meet all of the

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[148] *Id.* at 1581 (Kagan, J., dissenting).
[149] *Id.*
[150] Teague v. Lane, 489 U.S. 288, 311 (1989).
[151] *Id.*
[152] Whorton v. Bockting, 549 U.S. 406, 418 (2007).
[153] 372 U.S. 335 (1963). Notably, *Gideon* was decided prior to the adoption of the *Teague* test. Therefore, when determining its retroactive application, it was not subjected to *Teague*'s analysis of "watershed" status.
[154] *Whorton*, 549 U.S. at 419. Notably, *Gideon* was decided prior to the adoption of the *Teague* test. Therefore, when determining its retroactive application, it was not subjected to *Teague*'s analysis of "watershed" status.
[155] *Gideon*, 372 U.S. at 344.
[156] *Id.* at 344–45.
[157] *Whorton*, 549 U.S. at 419.
[158] *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990) ("Although the precise contours of [the watershed exception] may be difficult to discern, we have usually cited *Gideon v. Wainwright*, holding that a

requirements to pass the *Teague* test, but they also share similar essential features with the rights at issue in *Gideon*. Unanimous jury verdicts are the only type of verdict capable of indicating guilt beyond a reasonable doubt (a widely applied standard that itself ensures a fair and accurate trial process) because any dissenting juror indicates the presence of a reasonable doubt. Therefore, *Ramos* should have applied retroactively because, as with *Gideon*, it satisfied all components of the *Teague* test.

A. Ramos v. Louisiana *Established a New Rule of Criminal Procedure*

For the *Teague* test to apply to a retroactivity analysis, the rule in question must be considered "new."[159] As stated in *Saffle v. Parks*, "the explicit overruling of an earlier holding no doubt creates a new rule."[160] It is undisputed that *Apodaca* and *Johnson* dictated subsequent litigation over jury unanimity by deeming non-unanimous jury verdicts constitutional. *Ramos* overruled this precedent.[161] Indeed, *Edwards* declared the unanimous jury requirement new because *Ramos* "was not dictated by precedent or apparent to all reasonable jurists when Edwards's conviction became final in 2011."[162] Once a rule of criminal procedure is declared "new," the Court can then analyze it under the *Teague* test to determine if it is a "watershed" rule that mandates retroactive application.

B. Unanimous Jury Verdicts Alter the Legal System's Understanding of the Bedrock Procedural Elements Essential to a Proceeding's Fairness

Teague required that a new rule constitute a "bedrock procedural element" of criminal adjudication in order for it to apply retroactively.[163] Relying on *Gideon v. Wainwright* as the model example of a rule that implicates such bedrock elements, the Court in *Wharton v. Bockting* explained that *Gideon* created a "profound and sweeping change" essential to the fairness of a proceeding.[164] Any new rule of criminal procedure must be held in the same regard as *Gideon* in order to qualify as altering our understanding of bedrock procedural elements. [165] *Ramos* satisfied this standard.

i. Constitutionally Requiring Unanimous Jury Verdicts Created a Sweeping Change

The concept of "sweeping change" is not just a numbers game. *Gideon* declared that the right to counsel was a "sweeping change" essential to the fundamental fairness of trials because "lawyers in criminal court are necessities."[166] This ruling created a widespread

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defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception"); *Whorton*, 549 U.S. at 419 ("Guidance in answering this question [if the new rule remedied 'an impermissibly large risk' of an inaccurate conviction] is provided by *Gideon v. Wainwright*.").

[159] *Saffle*, 494 U.S. at 487.

[160] *Id.* at 488.

[161] Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020).

[162] Edwards v. Vannoy, 141 S. Ct. 1547, 1555–56 (2021).

[163] *Whorton*, 549 U.S. at 421.

[164] *Id.*

[165] *Id.*

[166] Beard v. Banks, 542 U.S. 406, 418 (2004) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

impact on indigent criminal defendants across the country.[167] When assessing whether new rules of criminal procedure met *Teague*'s high demands, the Court repeatedly ruled that laws affecting a narrow class of cases did not meet this "sweeping" standard.[168] It may be difficult to imagine that *Ramos*'s ruling requiring unanimous jury verdicts could be considered "sweeping" because forty-nine states already required unanimous jury verdicts when *Ramos* was decided.[169] However, when *Gideon* was decided, twenty-two states submitted amicus curie briefs to the Court to support their already-implemented practice of providing attorneys to all indigent defendants.[170] Regardless, *Ramos*'s ruling had a sweeping impact. The dissent in *Ramos* correctly emphasized that the majority's ruling is not limited to Louisiana or Oregon because every other state previously had the ability to implement a non-unanimous jury verdict practice.[171] The mandate of unanimous jury verdicts is therefore sweeping because every criminal jury trial requires a jury verdict, and *Ramos* altered that requirement by announcing a constitutional mandate for jury unanimity in every criminal trial in every state.

ii. Unanimous Juries are Essential to the Fundamental Fairness of Trials

When assessing whether new laws are "essential to the fairness of a proceeding," the Court has held that new laws must do more than affect an incremental change.[172] The Court's holding in *Ramos* that unanimous jury verdicts are constitutionally required remedied the practice of non-unanimous jury verdicts, which had betrayed the "guilt beyond a reasonable doubt" standard.[173] This standard was, and remains, one of the foundations of the American legal system,[174] and restoring it to its full potency by requiring unanimous jury verdicts created more than an incremental change in the bedrock procedural elements essential to fundamental fairness.

The justices' debate over the "guilt beyond a reasonable doubt" standard, especially in *Johnson*, illustrates this standard's importance in the American legal system. As far back as 1895, the Court in *Davis v. United States* stated that the "beyond a reasonable doubt standard" is implicit in "constitutions . . . [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty."[175] The Court reaffirmed this

[167] *Beard*, 542 U.S. at 418.
[168] *See* O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (holding that the narrow right to rebuttal that *Simmons* affords to defendants in a limited class of capital cases is not sweeping).
[169] Though *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) states that "in 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But not Louisiana" the Court mischaracterized Louisiana's law. In 2018, Louisiana amended its constitution to require unanimous jury verdicts, making it the 49th state to adopt this practice. *See supra* note 102.
[170] *Gideon*, 372 U.S. at 345.
[171] *Ramos*, 140 S. Ct. at 1427.
[172] *See* Sawyer v. Smith, 497 U.S. 227 (1990) (denying retroactive application of a law that enhances the accuracy of capital sentencing because a rule that produces incremental change is not a prerequisite to fundamental fairness); *see also Beard*, 542 U.S. at 419–20 (denying retroactive application of a law that removes some remote possibility of arbitrary infliction of the death sentence because it does not fundamentally shift our understanding of procedural elements essential to fundamental fairness).
[173] *See* In re Winship, 397 U.S. 358, 362 (1970) (citing numerous examples of opinions of the Court, which indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required).
[174] *See* In re Winship, 397 U.S. 358 (1970).
[175] 160 U.S. 469, 488 (1895).

position in 1970, finding that the "beyond a reasonable doubt" standard is "basic in our law and rightly one of the boasts of a free society[]" and, as such, "is a requirement and a safeguard of due process law in the historic, procedural content of due process."[176] As Justice Marshall explained a couple of years later in his *Johnson* dissent, it does "violence to language and logic to say that the government has proved the defendant's guilt beyond a reasonable doubt" when a verdict includes one or two dissenting jurors.[177] In *Johnson*'s majority opinion, Justice White argued that non-unanimous jury verdicts do not violate the "beyond a reasonable doubt standard . . . [because] [t]hat rational men disagree is not itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard."[178] However, by admitting that those dissenters are indeed "rational men," it follows that their doubt is also reasonable. Unanimous jury verdicts, therefore, eliminate reasonable doubt from the jury deliberation process and restore the constitutionally mandated burden of proof for criminal conviction to "beyond a reasonable doubt."

During oral arguments in *Edwards,* Justice Kagan insinuated that non-unanimous jury verdicts betrayed the reasonable doubt standard: "[w]e cannot imagine [the reasonable doubt standard] being viewed as anything less than fundamental to our entire system."[179] Kagan's dissent in *Edwards* elaborated further, pointing out that the Court gave "complete retroactive effect" to the rule that a jury must find guilt "beyond a reasonable doubt" in *In re Winship*.[180] The dissent went on to analogize *In re Winship* to *Ramos,* declaring that the rules from both cases safeguard individuals from unjust convictions and that they "play[] a 'vital' part in 'the American scheme of criminal procedure.'"[181] In sum, because unanimous jury verdicts restored the "guilt beyond a reasonable doubt standard" to criminal proceedings, their requirement in all jury trials undoubtedly altered the bedrock procedural elements essential to the fairness of a proceeding.

C. Unanimous Jury Verdicts are Necessary to Prevent an Impermissibly Large Risk of an Inaccurate Conviction

For a new rule to meet the *Teague* test's accuracy requirement, "it is not enough to say that the rule is aimed at improving the accuracy of trial . . . or that the rule is directed toward the enhancement of reliability and accuracy in some sense."[182] The Court demands a higher standard: that the new rule remedy an "impermissibly large risk of inaccurate conviction."[183]

Years of social science research prove that unanimous jury verdicts are critical to ensuring the accuracy and reliability of convictions.[184] Such studies confirm that unanimous jury verdicts strengthen the deliberation process and reduce the likelihood of wrongful convictions through longer and more thorough debate that requires the

[176] *In re Winship*, 397 U.S. at 362 (citing Leland v. Oregon, 343 U.S. 790, 802–03 (1952)).
[177] Johnson v. Louisiana, 406 U.S. 356, 401 (1972) (Marshall, J., dissenting).
[178] *Id*. at 362.
[179] Transcript of Oral Argument at 50, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).
[180] Edwards v. Vannoy, 141 S. Ct. 1547, 1576 (2021).
[181] *Id.* at 1577.
[182] Whorton v. Bockington, 549 U.S. 406, 418 (2007).
[183] *Id.*
[184] Brief of Amici Curiae Law Professors and Social Scientists, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

consideration of the viewpoints of women and minorities.[185] For example, a 2018 study of 199 serious felony guilty verdicts by non-unanimous juries in Louisiana confirmed that Louisiana's non-unanimity rule effectively suppressed the views of racial minorities.[186] Requiring unanimity, on the other hand, ensures that jurors who share a majority viewpoint must still consider and respond to the views of jurors in the minority, thereby increasing the accuracy of verdicts.[187] Together, these studies provide convincing evidence that unanimous jury verdicts are necessary to promote accurate convictions.

Statistics on wrongful convictions by non-unanimous juries also indicate the need for unanimity. Of the sixty-two defendants who were wrongly convicted and later exonerated in Louisiana, thirty-three were tried in a manner that permitted a defendant to be convicted by a non-unanimous verdict.[188] Of these thirty-three defendants, at least fifteen were convicted by a non-unanimous jury verdict.[189] These fifteen innocent individuals spent a combined 237 years and 9 months in prison.[190] Furthermore, nine of those fifteen wrongfully convicted in Louisiana were tried in proceedings that lasted less than a day.[191] Because social science has identified the correlation between the thoroughness of deliberation and the accuracy of the subsequent verdict, it seems likely that non-unanimous jury verdicts played a critical role in wrongfully convicting these defendants.[192]

Innocence Project New Orleans (IPNO), a nonprofit organization that seeks to exonerate innocent prisoners in Louisiana, has built upon previous research of wrongful convictions, specifically those that were based on non-unanimous jury verdicts. By extensively researching and investigating current cases of wrongful convictions based on non-unanimous jury verdicts that have yet to be resolved, IPNO estimates that at least 100

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[185] *Id.* at 5, 9.

[186] Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1599 (2018).

[187] *See* Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI.-KENT L. REV. 579, 587 (2007) ("In juries required to reach unanimity, jurors understandably pay more attention to those who hold minority views; furthermore, those attempting to argue a minority position participate more in the discussion and have more influence.").

[188] Brief of Amicus Curiae Innocence Project New Orleans at 3, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807). Of note, Louisiana's non-unanimous verdict rule did not apply to first degree murder charges.

[189] *Id.*; The number is "at least fifteen" because not every jury trial is polled. Thus, it is possible that some individuals were wrongfully convicted based on a non-unanimous jury verdict, but there is no evidence to prove it.

[190] The 15 known non-unanimous cases are: (1) State v. Reginald Adams, Orleans Parish Case No. 278-951; (2) State v. Gene Bibbins, East Baton Rouge Parish Case No. 2-87-979; (3) State v. Gerald Burge, St. Tammany Parish Case No. 147,175; (4) State v. Royal Clark, Jefferson Parish Case No. 02-0895; (5) State v. Catina Curley, Orleans Parish Case No. 461-907; (6) State v. Glenn Davis, Jefferson Parish Case No. 92-4541; (7) State v. Larry Delmore, Jefferson Parish Case No. 92-4541; (8) State v. Douglas Dilosa, Jefferson Parish Case No. 87-105; (9) State v. Robert Hammons, St. Tammany Parish Case No. 136- 658; (10) State v. Travis Hayes, Jefferson Parish Case No. 97-3780; (11) State v. Willie Jackson, Jefferson Parish Case No. 87-205; (12) State v. Terrence Meyers, Jefferson Parish Case No. 92- 4541; (13) State v. Michael Shannon, Orleans Parish Case No. 478-693; (14) State v. Kia Stewart, Orleans Parish Case No. 464-435; (15) State v. Archie Williams, East Baton Rouge Case No. 01-83-0234.

[191] Brief of Amicus Curiae Innocence Project New Orleans at 11, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

[192] *See* Brief of Amici Curiae Law Professors and Social Scientists at 8, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924).

current innocent prisoners in Louisiana were convicted by non-unanimous jury verdicts.[193] Another nonprofit organization, The Promise of Justice Initiative (PJI), has also engaged in extensive research to identify all current Louisiana prisoners who were convicted by non-unanimous jury verdicts regardless of claims of innocence. Through datasets provided by published studies, research of court records, and outreach to inmates and families, PJI has identified 1,677 individuals that are currently incarcerated based on non-unanimous jury verdict convictions.[194]

[193] These 100 individuals are current IPNO clients or people that have had their cases selected for current or future investigation by IPNO because facts in their cases match indicators of actual innocence. While IPNO has received thousands of applications from people claiming to be innocent, it does not have the resources to investigate every case. Therefore, IPNO prioritizes cases through a grading system, setting for investigation those cases which receive one of its top two grades. These grades mean that, based on information provided by the applicant and the existing court record, "[n]ew evidence appears to give strong indication of innocence" or the "[o]riginal conviction [is] based on [a] weak case or new evidence appears to partially undermine the state's case." Brief of Amicus Curiae Innocence Project New Orleans at 15 n.14.

[194] Brief of Amici Curiae The Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defender at 5–7, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807). Amici describes their methodology for identifying non-unanimous cases in great detail:

> We began with the data-set used in the Pulitzer Prize winning series by *The Advocate*. *See* Advocate Staff Report, *Tilting the scales*, *The Advocate* (Apr. 1, 2018), https://www.nola.com/article_25663280- c298-53ef-8182-9a8de046619c.html; *see also* Jeff Adelson, *Download data used in The Advocate's exhaustive research in 'Tilting the scales' series*, *The Advocate* (Apr. 1, 2008), https://www.nola.com/article_25663280-c298-53ef-8182-9a8de046619c.html. We checked every single case, removing duplicates, the deceased and those released from prison. We continued our investigation in district courts and appellate courts throughout Louisiana, seeking non-unanimous jury verdicts outside the time range analyzed by *The Advocate*.
>
> We searched through online court records, court of appeals records, records held at the Louisiana State University law library, and reviewed and requested copies of court records in parishes across the state. Additionally, we conducted outreach and education potentially reaching more than 15,000 people incarcerated in Louisiana Department of Public Safety and Corrections. We engaged in direct or broadcasted communication with more than 6610 people in Louisiana prisons. We were included in partner organization surveys and newsletters reaching more than 1000 incarcerated people and more than 10,000 of their families and loved ones. We did outreach to hundreds of defense attorneys across the state, and hosted multiple community forums with family members of people with non-unanimous jury verdicts.
>
> After the *Ramos* opinion issued, amici LACDL engaged with the criminal defense bar to educate lawyers on the need to timely file pursuant to La. C. Cr. P. Art. 930.8, and offered continuing legal education with PJI to lawyers engaged in the practice. Simultaneously, amici distributed questionnaires and information to community organizations, family members of people incarcerated, inmate counsel and individuals in prison. Amici held meetings in prisons across Louisiana, engaging with inmate counsel and entire groups of incarcerated people. Combining our own research from publicly available sources with outreach we received from people in prison, we have identified 1677 individuals with non-unanimous convictions: that includes all of the people represented by the private bar, everyone currently on direct appeal and every individual in any of the prisons requesting representation.

Extrapolating from IPNO and PJI's statistics, an estimated 6% of non-unanimous jury verdicts have resulted in wrongful convictions.[195] Though a wrongful conviction rate of 6% may not seem like "an impermissibly large risk of inaccurate conviction," this rate means that slightly more than one in twenty defendants convicted by a non-unanimous jury verdict in Louisiana are possibly innocent. While the Court has never defined "impermissibly large risk," the language from which the Court derives this standard originates in Paul Mishkin's *The Supreme Court, 1964 Term*.[196] There, Mishkin analyzed the writ of habeas corpus's purpose, asserting that its function is to provide "a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[197] Given the recent mass movements for criminal justice reform and widely publicized attention paid to people who have spent decades in prison for crimes they did not commit,[198] a 6% wrongful conviction rate due to a law that was designed to achieve these results may very well be viewed as "an impermissibly large risk of inaccurate conviction" by societal standards.

By design, the *Teague* test was almost impossible to meet. It is, therefore, no surprise that the Court never found a new rule of criminal procedure that met it.[199] The majority in *Edwards* grappled with this reality, describing *Teague* as an "empty promise" because it failed to establish the remedy it was designed to achieve.[200] When measured against *Teague*'s nearly impossibly high standards and the "gold standard" established in *Gideon*, new rules of criminal procedure will almost always fail to remedy an impermissibly high risk of inaccurate conviction or match the Court's view of the absolute need for counsel. However, even criminal representation cannot safeguard against the loss of the beyond-a-reasonable-doubt protection inherent in non-unanimous jury verdicts. As such, in order for the legal system to achieve "ordered liberty," a criminal defendant should have the right to a unanimous jury verdict, and this right should be applied retroactively.

Ultimately, the *Edwards* Court determined that if a rule as "fundamental," "essential," "vital," and "indispensable" as one that mandated unanimous jury verdicts in state trials was not watershed, then nothing can or ever will be.[201] The Court, of its own

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> While there may be a handful of additional individuals not yet identified, we believe we have successfully identified every individual who wants to litigate the constitutionality of their non-unanimous conviction.

[195] One hundred current prisoners convicted by a non-unanimous jury verdict in Louisiana that IPNO estimates are innocent divided by the 1,677 individuals currently incarcerated based on non-unanimous jury verdict convictions equals a rate of 6% non-unanimous jury verdict conviction resulting in a wrongful conviction. Brief of Amicus Curiae Innocence Project New Orleans, *supra* note 188, at 14–17.

[196] *See* Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions . . . First, it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted") (citing Paul J. Mishkin, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 78 (1965)).

[197] Mishkin, *supra* note 196, at 78.

[198] *See* THE INNOCENCE PROJECT, https://www.innocenceproject.org/about/ (last visited Dec. 8, 2020); *see also* THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited July 7, 2021) (2,832 exonerations since 1989 and more than 25,265 years lost collectively in prison due to wrongful convictions).

[199] Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

[200] Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021).

[201] *Id.* at 1559.

volition, then took the drastic step of eliminating the watershed exception to *Teague*.[202] Had *Edwards* properly analyzed *Ramos* under the *Teague* test, it would have understood the watershed rule that *Ramos* had created and left *Teague* intact.

IV. WHY THE *EDWARDS* COURT WAS WRONG: *RAMOS* DID NOT DECLARE A NEW RULE

Prior to *Edwards*, once the Court established that a rule of criminal procedure was new, it used *Teague* to determine whether the rule applied retroactively. However, when determining whether an *old* rule of criminal procedure applied retroactively, the Court did not, and still does not, apply *Teague*.[203] *Edwards* explicitly focused on new rules of criminal procedure, so its holding does not change how the Court analyzes old rules.[204]

Since *Ramos* overturned precedent and created a new rule under *Edwards*, it necessarily repudiated that very precedent.[205] Justice Kavanaugh emphatically characterized *Apodaca* as "egregiously wrong," not just in the present day, but when it was initially decided.[206] Additionally, the emphasis *Ramos* placed on the historic constitutionality of unanimous jury verdicts undermined the very idea that *Apodaca* could ever qualify as precedent. Accordingly, if *Apodaca* was never valid precedent and the historical understanding of the Sixth Amendment always required unanimous jury verdicts, then *Edwards* should not have applied *Teague* because *Ramos* did not establish a new rule but only affirmed an old one.

Ramos repeatedly emphasized the historical origins of unanimous jury verdicts and reaffirmed their constitutional guarantee by way of the Sixth and Fourteenth Amendments. When explaining the unanimous jury verdict's deep roots, Justice Gorsuch noted that, although this concept stemmed from fourteenth-century England, the understanding that the jury trial right entailed a guarantee of unanimity traveled over to "the young American States," which "appeared to regard unanimity as an essential feature of the jury trial."[207] While multiple states explicitly required unanimity in their state constitutions, other states "preserved the right to a jury trial in more general terms."[208] It is therefore likely that when the Constitution was ratified,"[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."[209] Influential treatises, including Nathan Dane's 1824 *Digest of American Law* and Justice Story's 1833 *Commentaries on the Constitution of the United States*, reflected this understanding, demonstrating that this founding viewpoint continued to dominate legal thought well after the Founding generation's heyday.[210]

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[202] *Id.* at 1560.
[203] Chaidez v. United States, 568 U.S. 342, 347 (2013) ("Only when we apply a settled rule may a person avail herself of the decision on collateral review.").
[204] *See Edwards*, 141 S. Ct. at 1556 ("Having determined that Ramos announced a new rule requiring jury unanimity, we must consider whether that new rule falls within an exception for watershed rules of criminal procedure that apply retroactively on federal collateral review.").
[205] *Id.*
[206] *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring).
[207] *Id.* at 1396 (majority opinion).
[208] *Id.*
[209] *Id.*
[210] Brief of Amici Curiae Former Judges, Prosecutors, and Public Officials at 5, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

As Justice Gorsuch observed in *Ramos*, the Court has "commented on the Sixth Amendment's unanimity requirement no fewer than thirteen times over 120 years"[211] in cases as old as *Thompson v. Utah*[212] and as new as *United States v. Haymond*.[213] In fact, a multitude of cases spanning centuries of Supreme Court jurisprudence affirm that unanimous jury verdicts are a mandatory aspect of federal criminal trials based on the history of the Constitution.[214] As the Court in *Johnson* elaborated,

> [I]n amending the Constitution to guarantee a right to a jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law. At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law.[215]

If the Sixth Amendment always required unanimous jury verdicts in federal criminal trials, then the appropriate interpretation of the Fourteenth Amendment as established in *Duncan v. Louisiana* requires that jury unanimity applies to the states as well.[216] Because the Sixth Amendment's right to a unanimous jury verdict is fully incorporated against the states through the Fourteenth Amendment, *Ramos* did not create a new rule; rather, it simply applied settled interpretations of the Sixth and Fourteenth Amendments to affirm an old one.[217] From this perspective, *Apodaca* was egregiously wrong due to its fundamental misunderstanding of incorporation and inaccurate interpretation of the Sixth Amendment; consequently, *Apodaca* loses its power and legitimacy as precedent.

The *Ramos* plurality acknowledged that "*Apodaca* yielded no controlling opinion at all."[218] To add insult to injury, previous Supreme Court jurisprudence explicitly rejected *Apodaca* as nothing more than an anomaly and the "result of an unusual division among the justices."[219] Though *Teague* defined new laws as those that overturn precedent, the very institution that established *Apodaca* as precedent repeatedly denounced its improper ruling and repudiated its flawed logic. Poignantly, no Supreme Court case ever relied on *Apodaca* in reaching a decision, let alone endorsed its reasoning.[220] The Court's repeated acts to

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[211] *Ramos*, 140 S. Ct. at 1397.
[212] *See* 170 U.S. 343, 351 (1898) ("When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.").
[213] *See* 139 S. Ct. 2369, 2382 (2019) ("Where parole and probation violations generally exposed a defendant only to the remaining prison term authorized for his crime of conviction, as found by a unanimous jury under the reasonable doubt standard . . . .").
[214] *See* Andres v. United States, 333 U.S. 740, 748–49 (1948); Patton v. United States, 281 U.S. 276, 288–90 (1930); Hawaii v. Mankichi, 190 U.S. 197, 211–12 (1903); Maxwell v. Dow, 176 U.S. 581, 586 (1900); Thompson v. Utah, 170 U.S. 343, 355 (1898).
[215] Johnson v. Louisiana, 406 U.S. 366, 370 (1972) (Powell, J., concurring).
[216] Duncan v. Louisiana, 391 U.S. 145, 154 (1968) (holding that the Sixth Amendment guarantee to a right to a jury trial applies to states).
[217] Brief of Amici Curiae Former Judges, Prosecutors, and Public Officials at 3, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).
[218] Ramos v. Louisiana, 140 S. Ct. 1390, 1403 (2020).
[219] McDonald v. City of Chicago, 561 U.S. 742, 766 n.14 (2010).
[220] Brief of Amici Curiae Former Judges, Prosecutors, and Judges at 8, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

undermine *Apodaca*'s precedential power hinder the argument that *Ramos* declared new law because *Ramos* overturned a law that was never constitutionally sound.

Unlike cases in which the Court declared a new rule by overturning existing precedent but refused to retroactively apply that new rule, *Ramos* more closely resembles *Gideon v. Wainwright.*[221] Though *Gideon* was decided prior to *Teague*, the Court stated that it is the only case that would justify retroactive application if it had undergone the *Teague* analysis.[222] *Gideon* overturned *Betts v. Brady*,[223] a decision that, like *Apodaca*, was "an anachronism when handed down" and "departed from the sound wisdom upon which [prior precedent] rested."[224] By returning to previously established and accepted law, *Gideon* explained that "we but restore constitutional principles established to achieve a fair system of justice."[225] The *Ramos* plurality similarly viewed the restoration of unanimous jury verdicts as the restoration of our constitutional promise of a "trial by impartial jury."[226] Though no specific subsequent case declared *Gideon* retroactive (because retroactive application at that point was not dictated by a consistent test), the Supreme Court consistently applied *Gideon* retroactively, typically without discussion.[227] *Gideon*, therefore, serves as a firm analog to *Ramos* in its restoration of previously accepted law and its subsequent retroactive application.

As the *Ramos* dissent stressed "[i]f *Apodaca* was never a precedent and did not disturb what had previously been established, it may be argued that [the *Ramos* decision] does not impose a new rule but instead merely recognizes what the correct rule has been for many years."[228] On this point, the dissent was entirely correct. Old rules of criminal procedure were and are not subjected to *Teague*'s "watershed status" requirement. Instead, they simply apply retroactively.[229] Fortunately, although *Edwards* declared that *Ramos* had imposed a new rule, states are under no obligation to replicate this ruling in their own courts. Rather, state courts have the freedom to declare that *Ramos* did not impose a new rule and apply it retroactively.

V. STATES CAN STILL APPLY *RAMOS* RETROACTIVELY

Danforth v. Minnesota declared that *Teague* was "intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions."[230] According to the Court, "[a] close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and

[221] *E.g.*, Whorton v. Bockting, 549 U.S. 406 (2007) (holding that the Court's opinion in Crawford v. Washington, 541 U.S. 36 (2004), was a new rule because it overturned Ohio v. Roberts, 448 U.S. 56 (1980)).
[222] *See, e.g.*, *Whorton*, 549 U.S. at 419.
[223] 316 U.S. 455 (1942).
[224] Brief of Amici Curiae Former Judges, Prosecutors, and Judges at 11, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807) (citing Gideon v. Wainwright, 372 U.S. 335, 345 (1963)).
[225] *Gideon*, 372 U.S. at 345.
[226] Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).
[227] *See* Burgett v. Texas, 389 U.S. 109 (1967); Arthur v. Colorado, 380 U.S. 250 (1965); Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright, 375 U.S. 2 (1963).
[228] *Ramos*, 140 S. Ct at 1437.
[229] *Id.* at 1438.
[230] 552 U.S. 264, 280–81 (2008).

therefore had no bearing on whether States could provide broader relief in their own post-conviction proceedings than required by that opinion."[231] As such, regardless of *Edwards*, *Danforth* grants states the authority to determine the retroactivity of federal constitutional rights and the leeway to make that decision in whatever manner they choose, so long as their state law encompasses "at least as broad a scope as the . . . Supreme Court requires."[232]

Indeed, several state courts have heeded *Danforth*'s call and diverged from the Supreme Court's retroactivity analysis. After the Supreme Court's decision in *Miller v. Alabama*,[233] which forbade mandatory life sentences for juvenile offenders, the Connecticut Supreme Court decided to apply *Miller* retroactively in *Casiano v. Commissioner of Correction*.[234] Opting to use the *Teague* analysis, the *Casiano* court decided that *Miller* had created a new watershed rule of criminal procedure.[235] Several months later, the Supreme Court similarly deemed *Miller*'s ruling retroactive in *Montgomery v. Louisiana.*[236] However, the *Montgomery* Court based its decision on a different premise: that *Miller* had created a new substantive rule, bypassing *Teague*'s "watershed status" analysis.[237] Due to *Danforth*'s support for autonomy, *Casiano*'s analysis of *Miller* as a "watershed rule" and the precedent it set for the Connecticut Supreme Court remains binding. If Louisiana and Oregon opt to use the *Teague* analysis when assessing *Ramos*'s retroactivity in a state post-conviction petition, they are similarly free to reach a different conclusion than did the Supreme Court.

In addition to co-opting *Teague*, states have bypassed issues involving the *Teague* test by choosing not to use it in the first place when assessing retroactivity. *State v. Whitfield*, a Missouri Supreme Court case decided prior to *Danforth,* similarly set forth the principle that federal constitutional law "did not set a . . . ceiling on when new procedural rules will be applied to other cases, but rather a floor."[238] In other words, the Supreme Court gave states autonomy to apply new criminal procedural rules to cases on collateral review and to decide the manner in which they would make that determination, even when the Supreme Court had denied retroactive application of the same rule. When determining whether the Supreme Court's decision in *Ring v. Arizona*,[239] which held that a jury (as opposed to a judge) must find aggravating factors in order to determine a defendant's death sentence, applied retroactively, the *Whitfield* court invoked Missouri's traditionally used *Linkletter-Stovall* test instead of the *Teague* test.[240] Based on the *Linkletter-Stovall* test, the Missouri Supreme Court decided that *Ring* applied retroactively to post-conviction cases.[241] A year later, in *Schriro v. Summerlin*, the Supreme Court held that *Ring* would not apply retroactively on collateral review.[242] However, because states do not always have to follow the Supreme Court's rulings (because states have broad authority to apply new

[231] *Id.* at 277.
[232] State v. Fair, 502 P.2d 1150, 1152 (1972).
[233] 567 U.S. 460 (2012).
[234] 115 A.3d 1031 (2015).
[235] *Id.* at 1037.
[236] 577 U.S. 190 (2016).
[237] *Id*. at 205.
[238] 107 S.W.3d 253, 266 (Mo. 2003) (en banc), *abrogated by* State v. Wood, 580 S.W.3d 366 (Mo. 2019).
[239] 536 U.S. 584 (2002).
[240] *Whitfield*, 107 S.W.3d at 266.
[241] *Id.* at 272.
[242] 542 U.S. 348 (2004).

rules retroactively), *Schriro* had no effect on the *Whitfield* decision or its precedential effect on subsequent Missouri state cases. Similarly, Louisiana and Oregon are under no obligation to use the *Teague* analysis in order to decide whether the requirement of unanimity should be retroactive in those states. Rather, they have extremely broad authority to decide if *Ramos* will apply retroactively in their courts based on whatever determinative factors they see fit.

No matter how liberating *Danforth* and the principle it espouses may seem, very few states have taken the initiative to conduct their own retroactivity analyses. Most states have adopted the *Teague* test and continue to use this standard when determining retroactive application.[243] In fact, Louisiana adopted the *Teague* test when assessing its state post-conviction claims in 1992.[244] However, in a swath of recent concurring and dissenting opinions, the former Chief Justice of the Louisiana Supreme Court, Bernette Johnson, has repeatedly called on the court to abandon *Teague.*[245] In an opinion opposing the denial of a writ of certiorari, for example, Johnson argued that the court needs to adopt a new rule for retroactivity that "takes into account the harm done by the past use of non-unanimous jury verdicts in Louisiana courts."[246] Johnson explained that the court is not bound by *Teague* and that:

> [I]f concerns of comity and federalism ultimately mean that the federal courts do not force us to remedy those convictions which are already final through a writ of habeas corpus, the moral and ethical obligation upon courts of this state to address the racial stain of our own history is even more compelling . . . .[247]

Accordingly, the Chief Justice argued that *Teague* should be replaced with a test that "includes a consideration of whether a stricken law had a racist origin, has had a disproportionate impact on cognizable groups or has otherwise contributed to our state's history of systemic discrimination against African Americans."[248] According to the Chief Justice, *Ramos* would apply retroactively under this test.[249]

In 1972, the Oregon Supreme Court understood retroactivity as operating just as *Danforth* commanded: "[W]e are free to choose the degree of retroactivity or prospectivity

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[243] Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 FLA. ST. U.L. REV. 53, 71 (2016).
[244] *See* State ex rel. Taylor v. Whitley, 606 So. 2d 1292, 1296 (La. 1992).
[245] *See* Silva v. Vannoy, 296 So. 3d 1033 (Mem.) (La. 2020) (Johnson, C.J., dissenting); State v. Sims, 301 So. 3d 17 (La. 2020) (Johnson, C.J., dissenting); State v. Johnson, 301 So. 3d 1177 (Mem.) (La. 2020) (Johnson, C.J., dissenting); State v. Jackson, 301 So. 3d 33 (La. 2020) (Johnson, C.J., dissenting); State v. Harris, 301 So. 3d 13 (La. 2020) (Johnson, C.J., dissenting); State v. Withers, 300 So. 3d 862 (La. 2020) (Johnson, C.J., dissenting); State v. Spencer, No. 2020-KH-00853, 2020 La. LEXIS 2463 (Dec. 15, 2020) (Johnson, C.J., dissenting); State v. Moran, No. 2020-KH-00623, 2020 La. LEXIS 2336 (Dec. 15, 2020) (Johnson, C.J., dissenting); State v. Brooks, No. 2020-KH-00378, 2020 La. LEXIS 2319 (Dec. 15, 2020) (Johnson, C.J., dissenting); Cassard v. Vannoy, No. 2020-KH-00020, 2020 La. LEXIS 2307 (Dec. 15, 2020) (Johnson, C.J., dissenting).
[246] State v. Gipson, 296 So. 3d 1051, 1052 (La. 2020) (Johnson, C.J., dissenting).
[247] *Id.*
[248] *Id.*
[249] *Id.*

which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."[250] However, after the Supreme Court created a federal rule for retroactivity in *Teague*, the Oregon Supreme Court assumed that *Teague* mandatorily applied to the states.[251] *Danforth* explicitly repudiated this interpretation, returning Oregon to its 1972 understanding of retroactivity.[252] To date, the Oregon Supreme Court has not explicitly adopted a standard for retroactivity in light of *Danforth*.[253]

However, now that *Edwards* has overruled *Teague* and eliminated the watershed exception, states that typically mirror federal law will likely reevaluate their retroactivity test and may be less inclined to follow the traditional *Teague* analysis. While such a trend can provide state petitioners with greater potential for relief, a state-court move toward *Edwards* would completely eliminate relief for all state petitioners seeking retroactive application of any new rule of criminal procedure. Fortunately, *Edwards* does not foreseeably affect *Danforth*. In fact, *Edwards* explicitly maintained that states still "remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings."[254] If state courts appreciate *Edwards*'s flawed nature, they likely will not adopt the new federal rule on retroactivity, nor will they apply it to state post-conviction petitioners seeking relief based on their non-unanimous jury verdicts.

Danforth claims aside, proponents of retroactively applying *Ramos* in Oregon have suggested that state petitioners on collateral review can bypass a retroactivity analysis and instead rely on Oregon's state-level post-conviction statute.[255] Though post-conviction petitioners in Oregon would typically be procedurally barred from bringing claims they did not already bring on direct appeal, § ORS 138.550 spells out a few exceptions. According to § ORS 138.550, the procedural limitations for filing for post-conviction relief can be bypassed via "escape clauses."[256] Escape clauses permit a petitioner to bring a claim that would otherwise be procedurally barred if the grounds on which a petitioner relies were not or could not have been reasonably asserted previously.[257] Further, when the grounds on which a petitioner relies are "novel, unprecedented, or surprising" and not merely an extension of settled or familiar rules, it becomes more likely that the grounds for relief

[250] State v. Fair, 502 P.2d 1150, 1152 (1972).
[251] *See* Page v. Palmateer, 84 P.3d 133, 136–37 (2004) ("Although Oregon courts are free to apply pronouncements of Oregon constitutional law that have a federal equivalent to a broader range of cases than the federal constitution requires, Oregon courts are *not* free to apply pronouncements of *federal* constitutional law to a broader range of cases than federal law requires.").
[252] *See* Danforth v. Minnesota, 552 U.S. 264, 277 n.14 (2008) ("[Oregon Supreme Court's] . . . decision [in Page v. Palmateer] was therefore misguided.").
[253] *See* Verduzco v. State, 355 P.3d 902, 908 (2015) (reserving the decision on whether state law gives prisoners a greater opportunity to invoke new precedents in state collateral proceedings for a later time because the state's statutory limits on post-conviction petitions resolves petitioner's claims); *see also* Chavez v. State, 438 P.3d 381, 395 (2019) (reserving the decision on whether to clarify or further refine the factors to consider in deciding whether a new constitutional rule will apply retroactively because case was resolved based on Oregon's post-conviction statute.).
[254] Edwards v. Vannoy, 141 S. Ct. 1547, 1559 n.6 (2021).
[255] *See* OR. REV. STAT. tit. 14, § 138.550 (2020); *see also* OR. REV. STAT. tit. 14, § 138.510 (2020).
[256] White v. Premo, 443 P.3d 597, 599 (2019).
[257] *Id.* at 599–600.

qualify under the escape clauses.[258] Because *Edwards* held that *Ramos* declared a new rule, it is likely that post-conviction petitioners in Oregon will not be procedurally barred because, prior to *Ramos*, non-unanimous jury verdicts were continually upheld as constitutional.[259] Thus, petitioners could not have reasonably asserted that their non-unanimous jury verdicts violated the Sixth Amendment before *Ramos* was decided.[260]

Proponents of retroactively applying *Ramos* in Oregon posit that once a court determines that a petitioner is not procedurally barred from their post-conviction claim (and thus, can move forward with their claim), the court should skip the subsequent retroactivity analysis and instead simply redress meritorious *Ramos* claims.[261] The Oregon State Legislature designed the Post-Conviction Hearing Act to address the same concerns that underly traditional retroactivity doctrines: "balanc[ing] the competing concerns of efficiency in the courts, finality and repose of convictions, accuracy of the original criminal proceeding, and fundamental fairness to criminal defendants."[262] As such, the procedural-bar and escape-clause analysis address the same issues that underlie retroactivity doctrines, making the retroactivity analysis redundant and unnecessary.[263]

Evidence of discriminatory convictions of minorities in Louisiana also supports retroactively applying *Ramos* to prisoners who were convicted with non-unanimous jury verdicts in state post-conviction proceedings. In Louisiana, 80% of people still imprisoned based on a non-unanimous jury verdicts are black, a disproportionately high rate since only 67.5% of Louisiana's overall prison population is black.[264] Given the law's explicitly racist history in Louisiana and its goals of silencing black jurors and incarcerating even more black people, the intended discriminatory effects of this law have clearly come to fruition.[265] Additionally, 62% of people with non-unanimous jury verdict convictions are serving life sentences without the possibility of parole, compared to just 13.6% of Louisiana's overall adult correctional population.[266] The severity of these sentences and the significant proportion of inmates with a life sentence due to this unconstitutional practice reinforce the reasons why Louisiana should heed its former Chief Justice's words to "address the racial stain of [its] own history" by granting retroactivity.[267]

Furthermore, the legal community in Louisiana has already taken steps to redress such harm by initiating legal campaigns to promote retroactive application of *Ramos*. PJI

[258] *Id.* at 601.
[259] *See* State v. Sanchez, 242 P.3d 692, 693 (2010); State v. Cobb, 198 P.3d 978, 979 (2008); State v. Bowen, 168 P.3d 1208, 1208–09 (2007); State v. Barfield, 720 P.2d 394, 395 (1986); State v. Gann, 463 P.2d 570, 571–72 (1969).
[260] *See, e.g.*, Chavez, 438 P.3d at 387 (2019) (ruling that petitioner was not procedurally barred from bringing a post-conviction claim under § ORS 138.510(3) because petitioner could not have reasonably raised a novel claim that did not exist prior to the expiration of the Post-Conviction Hearing Act statute of limitations).
[261] E-mail from Aliza Kaplan, Director of Criminal Justice Reform Clinic, Lewis & Clark Law School to Kara Kurland, Law Student, Northwestern University Pritzker School of Law (Nov. 25, 2020, 17:15 CST) (on file with author).
[262] *Id.*
[263] *Id.*
[264] The Jim Crow Juries Project, *The Promise of Justice Initiative*, UNHEALED WOUNDS 1, 2 (2020), https://static1.squarespace.com/static/5fe0e9cce6e50722511b03cc/t/600208f15293074553d75c09/1610746104812/PJI-Jim-Crow-Jury-Status-Report.pdf.
[265] Ramos v. Louisiana, 140 S. Ct. 1390, 1417–18 (Kavanaugh, J., concurring).
[266] The Jim Crow Juries Project, 264*supra* note 264, at 2.
[267] State v. Gipson, 296 So. 3d 1051 (La. 2020) (opinion opposing denial of writ).

has not only identified a significant number of prisoners currently incarcerated through non-unanimous jury verdicts in Louisiana, but they have also secured representation from over 150 lawyers willing to represent these individuals.[268] With legal representation already in place, Louisiana has a responsibility to ensure that those individuals convicted with non-unanimous jury verdicts receive all possible constitutional protections to ensure the validity of their convictions and corresponding sentences.

Like Louisiana's, Oregon's non-unanimous jury law has racist roots that have perpetuated the racial disparities that exist in Oregon's criminal justice system.[269] Racial minorities are similarly underrepresented on juries and overrepresented as criminal defendants.[270] While Oregon has not identified every person in its prisons who was convicted by a non-unanimous jury verdict, the Oregon legal community is attempting to equip prisoners and pro bono attorneys with all the legal resources they need to file post-conviction petitions challenging such verdicts.[271] With an organized system to file and support these petitions in place, the *Ramos* dissent's fear that neither Louisiana's nor Oregon's legal system would be able to handle the influx of retroactivity claims is likely overblown.[272] Oregon should similarly redress the effects of its racist law by granting retroactivity to all prisoners convicted with a non-unanimous jury verdict.

CONCLUSION

When ruling that non-unanimous jury verdicts were unconstitutional, the *Ramos* Court declared that "[a] verdict, taken from eleven, [i]s no verdict at all."[273] The Court came to this conclusion due to "the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt."[274] Though *Ramos* made crystal clear that a unanimous jury verdict is an essential element of the jury trial right, *Edwards* minimized this right's fundamental nature and cast aside its watershed status. In so doing, the Court denied relief to hundreds of prisoners who were convicted based on an unconstitutional law because "the costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application."[275] Though concurring in the judgment, Justice Gorsuch acknowledged that, while the Court may have come to such a conclusion regarding laws that do not personally affect them, "many other rules of criminal procedure this Court has found less than 'fundamental' since *Teague* seem anything but that to those whose lives they affect."[276]

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[268] Brief of Amici Curiae Promise of Justice Initiative, The Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders at 1, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).
[269] *Ramos*, 140 S. Ct. at 1394.
[270] Brief of Amici Curiae Prominent Current and Former State Executive and Judicial Officers, Law Professors, and the OCDLA at 23, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924).
[271] *See Criminal Justice Reform Clinic*, LEWIS & CLARK LAW SCHOOL (Dec. 15, 2020), https://law.lclark.edu/clinics/criminal_justice_reform/clinic-projects/.
[272] *Ramos*, 140 S. Ct. at 1437.
[273] *Ramos*, 140 S. Ct. at 1395.
[274] Edwards v. Vannoy, 141 S. Ct. 1547, 1575 (2021).
[275] *Id.* at 1555.
[276] *Id.* at 1572.

While Justice Gorsuch's above acknowledgment should persuade state courts to seriously consider granting retroactivity, his statements in *Ramos* provide even more motivation: "Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right."[277] It is likely that applying *Ramos* retroactively will pose challenges for Louisiana and Oregon as they determine how to move forward with re-trials and other subsequent hurdles that stem from granting retroactivity. However, the cost of giving new trials to all defendants convicted by non-unanimous juries "pales in comparison to the long-term societal cost of perpetuating—by our own inaction—a deeply-ingrained distrust of law enforcement, criminal justice, and . . . government institutions."[278] By rejecting the non-unanimous jury verdict and accepting that it is "no verdict at all," state courts must accept the reality that no non-unanimous jury verdict conviction should stand, no matter the difficulty this decision poses. That is the consequence of being right. That is the consequence of justice.

[277] *Ramos*, 140 S. Ct. at 1408.
[278] State v. Gipson, 296 So. 3d 1051, 1056 (La. 2020).