IN THE SUPREME COURT
STATE OF LOUISIANA[1]

ORIGINAL APPLICATION FOR WRIT OF REVIEW

AMICI CURIAE BRIEF OF THE LAW FIRM ANTIRACISM ALLIANCE AND THOMAS AIELLO, PHD IN SUPPORT OF APPLICATION FOR WRIT OF _CERTIORARI_ OR REVIEW ON BEHALF OF STATE OF LOUISIANA, _EX REL_ EYBA BROWN

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[1] This brief should be considered in all the cases identified on Exhibit A to this brief. So as not to overburden the Clerk's office, it is only being filed once.

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A. Louisiana's non-unanimous jury verdict law stems from racist origins.

The right to a jury trial is a fundamental aspect of the Sixth Amendment of the United States Constitution. Unfortunately, over the past two hundred years, courts have denied hundreds of Louisianians their right to a unanimous jury. The legacy of Louisiana's non-unanimous jury verdict law, implemented to "establish white supremacy,"[2] has had and continues to have a lasting, devastating impact on the accused, their families, and their communities today.

Although the Thirteenth Amendment of the United States Constitution prohibited slavery and involuntary servitude, it explicitly exempted individuals convicted of a crime.[3] In response to ratification of that amendment in 1865, Southern state legislators enacted discriminatory laws, or "Black Codes," to essentially re-enslave Blacks and force them into hard labor.[4] These discriminatory laws applied only to African Americans and subjected Blacks to criminal prosecution for "offenses" such as breaking curfew, loitering, and failing to carry proof of employment.[5] Upon the enactment of these "Black Codes," Louisiana's prison population began to shift from majority white to majority Black.[6] Once arrested, Louisiana loaned out these prisoners to the highest bidding business or citizen for the remainder of the year.[7] Black men, women, and children who were arrested were leased to plantations, coal mines, and railroad companies.[8]

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[2] OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LOUISIANA 375 (H. Hearsey ed. 1898).
[3] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").
[4] Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 942 (2019).
[5] *Convict Leasing*, Equal Justice Initiative (Nov. 1, 2013), https://eji.org/news/history-racial-injustice-convict-leasing/.
[6] Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 942 (2019).
[7] Goodwin, *supra* note 3, at 940 n.230 (citing JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 101–02 (1884)).
[8] Frederick Douglass, Convict Lease System, 1818-1895, Library of Congress, https://www.loc.gov/item/mfd.01008/.

Throughout the 1800s, Blacks in Louisiana faced relentless terror perpetrated by white Louisianians.[9] White terrorist organizations such as Knights of the White Camelia and the White League massacred hundreds of Blacks, often in response to calls for Black suffrage.[10] To thwart these calls, state legislators gathered in Tulane Hall at the 1898 Louisiana Constitutional Convention to enshrine white supremacy into Louisiana's legal system.[11] The official journals of the proceeding of the convention stated: "Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be done legally and constitutionally."[12]

Since Blacks gained various rights as a result of the Reconstruction amendments, including the right to serve on juries through the Fourteenth Amendment, the Louisiana state constitution drafters sought ways to disenfranchise Blacks from civic participation. The all-white delegates spent half their time deciding how to most effectively marginalize Black voters and subvert their participation on juries. Ultimately, Louisiana implemented several Jim Crow measures into its constitution. These restrictive provisions included a poll tax, complex voter registrations, a literacy and property ownership test, and a grandfather clause that exempted white residents from these requirements.[13]

A week before Louisiana's 1898 Constitutional Convention, the U.S. Senate called for an investigation into whether Louisiana was systemically excluding Blacks from juries.[14] The convention

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[9] Jamila Johnson & Talia MacMath, *State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal* Teague v. Lane Test, 111 J. Crim. L. & Criminology Online 44 (2021).
[10] Bill Quigley, *The Continuing Significance of Race: Official Legislative Racial Discrimination in Louisiana 1861 to 1974,* 47 S.U. L. REV. 1, 13 (2019).
[11] Jamila Johnson & Talia MacMath, *State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal* Teague v. Lane Test, 111 J. Crim. L. & Criminology Online 44 (2021).
[12] OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LOUISIANA 375 (H. Hearsey ed. 1898).
[13] Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H. Hearsey ed. 1898); Eaton, The Suffrage Clause in the New Constitution of Louisiana, 13 Harv. L. Rev. 279, 286–287 (1899); *Louisiana v. United States,* 380 U.S. 145, 151–153 (1965).
[14] 31 Cong. Rec. 1019 (1898).

delegates knew that the U.S. Supreme Court would strike down any policy of overt discrimination in violation of the Fourteenth Amendment.[15] And so, the delegates "sought to undermine African American participation on juries in another way." *Ramos v. Louisiana*, 590 U.S. ___ , 140 S. Ct. 1390, 1394 (2020). The Louisiana State delegates crafted a "facially race-neutral" rule permitting non-unanimous jury verdicts "to ensure that African-American juror service would be meaningless."[16] Additionally, this scheme—which allowed jurors to convict Black defendants with 25 percent of the jury dissenting—conveniently allowed the Louisiana government to perpetuate its "free labor pool" through the convict leasing system.[17]

Split juries effectively ensured that a white majority could easily override the few Blacks who served on juries, thus weakening the influence that Blacks had in criminal proceedings. The delegates also allowed for sentence enhancements for multiple convictions, including double or triple time or life for multiple offenses.[18] Non-unanimous juries were "one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service." *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part).

By the 1970s, only Louisiana and Oregon still allowed non-unanimous jury verdicts. (Oregon, however, required unanimous verdicts for murder trials). While federal law mandated that federal jury trials require unanimity to convict, the United States Supreme Court in *Apodaca v. Oregon* ruled that states did not have to follow federal law in this respect. 406 U.S. 404, 406 (1972). It was not until 2019 that the people of Louisiana, by a 64 percent ballot measure, adopted a constitutional amendment

[15] *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).
[16] *State* v. *Maxie*, No. 13–CR–72522, App. 56–57 (La. 11th Jud. Dist., Oct. 11, 2018); see also Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593 (2018).
[17] *State* v. *Maxie*, No. 13–CR–72522, 18–19 (La. 11th Jud. Dist., Oct. 11, 2018).
[18] Jamila Johnson & Talia MacMath, *State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal* Teague v. Lane Test, 111 J. Crim. L. & Criminology Online 46 (2021).

requiring unanimous verdicts for cases involving prospectively committed crimes. Then, in 2020, the United States Supreme Court issued *Ramos v. Louisiana*, which held that non-unanimous jury verdicts are unconstitutional as applied to the states through the Fourteenth Amendment. 140 S. Ct. at 1397. Soon after, the Court had an opportunity to apply *Ramos*' unanimity rule retroactively in *Edwards v. Vannoy* but found that the rule "does not apply retroactively on federal collateral review."[19]

Because the U.S. Supreme Court declined to apply the rule retroactively, hundreds of Louisiana defendants convicted before the *Ramos* decision still languish in prison, deprived of their constitutional right. Louisiana's law has disenfranchised Black jurors, and non-unanimous juries have convicted Black defendants for over a century, thus accomplishing the law's invidious, racist purpose. While the exact number is unknown, there are likely many defendants sitting in Louisiana prisons as a result of questionable or even false convictions. And the numbers of those convicted by non-unanimous juries exceeds 1,500 and more than 120 of those are now before the Court for relief, with at least an additional 880 in lower courts.

B. Louisiana's discriminatory non-unanimous jury verdict law has led to the unjust incarceration of hundreds of Louisianians today.

The detrimental effects of Louisiana's non-unanimous verdict law are profound. For the last 120 years, the law has marginalized and convicted Blacks in unjust criminal proceedings throughout Louisiana. "[T]he math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors." *Ramos*, 140 S. Ct. at 1417–18 (Kavanaugh, J., concurring in part). Considering the racist origins of the non-unanimous jury, it comes as no surprise that non-unanimous juries make a significant difference in practice, particularly in cases involving Black defendants, victims,

[19] 593 U.S. ___ , 141 S. Ct. 1547, 1562 (2021).

or jurors. *Id*. Although the non-unanimous jury scheme has disadvantaged all defendants, the effects on Black defendants are especially harrowing.

Today, Blacks make up approximately 32 percent of Louisiana's population,[20] but nearly 70 percent of Louisiana's incarcerated felons.[21] Louisiana has the highest incarceration rate in the country.[22] It leads the nation in life sentences without the possibility of parole,[23] with more inmates serving these sentences than Texas, Arkansas, Mississippi, Alabama, and Tennessee combined.[24] In Louisiana, almost one in five of the people serving life sentences without the possibility of parole receive this sentence as a result of a non-unanimous jury verdict.[25] Black defendants are 30 percent more likely than white defendants to be convicted by non-unanimous juries.[26] Before *Ramos*, 1,600 people in Louisiana were found guilty by non-unanimous juries.[27] Without this Court's adoption of a new retroactivity standard, none of these individuals can be permitted to challenge their convictions.

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[20] Census statistics available at https://www.census.gov/quickfacts/LA.
[21] Statistics from the Louisiana Department of Public Safety and Corrections January 2020 Briefing Book available at https://s32082.pcdn.co/wp-content/uploads/2020/03/0Z-Full-Jan-2020-BB-3.13.2020.pdf.
[22] Lea Skene, *Louisiana's Life Without Parole sentencing the Nation's Highest—and Some Say That Should Change,* ADVOCATE (Dec. 7, 2019, 4:59 PM), https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html [https://perma.cc/HYR8-PHNR].
[23] Lea Skene, *Louisiana's Life Without Parole sentencing the Nation's Highest—and Some Say That Should Change,* ADVOCATE (Dec. 7, 2019, 4:59 PM), https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html [https://perma.cc/HYR8-PHNR].
[24] John Bel Edwards & James M. Le Blanc, *Louisiana Corrections: Briefing Book* 28 (July 2020), https://s32082.pcdn.co/wp-content/uploads/2020/08/Full-BB-Jul-20.pdf [https://perma.cc/QTR2-TRUB]; TCR Staff, *Louisiana Leads Nation in Life Without Parole Terms,* CRIME REPORT (Dec. 12, 2019), https://thecrimereport.org/2019/12/12/louisiana-leads-nation-in-life-without-parole-terms [https://perma.cc/G3PL-8SDK].
[25] Brief of Amici Curiae the Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders at 26, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No.19-5807), 2020 WL 4450431.
[26] *State* v. *Maxie*, No. 13–CR–72522, 24 (La. 11th Jud. Dist., Oct. 11, 2018); see also Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593 (2018).
[27] Brief of Amici Curiae the Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders at 26, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No.19-5807), 2020 WL 4450431.

This Court should hear the issue on whether the *Ramos* rule should be applied retroactively because it presents an opportunity to affirm that Louisiana guarantees equal justice for all. In addition, the racist history and lasting, pernicious effects of Louisiana's non-unanimous verdict law should compel this Court to adopt a new retroactivity standard.

C. <u>This Court should adopt a new test for retroactivity, taking into account the racist origins of Louisiana's non-unanimous jury verdict law</u>.

Since the enactment of Louisiana's non-unanimous jury rule in 1898, hundreds of defendants have remained behind bars, potentially on the basis of questionable or wrongful convictions as a result of these split juries. These individuals remain in prison today, with no opportunity for relief. The invidious, discriminatory history of Louisiana's non-unanimous jury law should compel this Court to remedy this miscarriage of justice. This Court should recognize the jury unanimity rule in *Ramos* as a fundamental rule of criminal procedure entitled to retroactive application.

The U.S. Supreme Court has "reserved retroactive application of rules of criminal procedure for the most exceptional of cases." *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court established its governing federal retroactivity standard in *Teague v. Lane*. 489 U.S. 288 (1989). Under the demanding *Teague* standard, courts cannot retroactively apply new constitutional rules of criminal procedure to cases on federal habeas review unless one of two exceptions apply. The pertinent exception here requires that new rules be applied retroactively if they are "watershed" rules of criminal procedure which "alter our understanding of the bedrock procedural elements that must be found to vitiate fairness of a particular conviction." *Id.* at 311. The rationale for the *Teague* test is that it respects the finality of state convictions and therefore promotes federal-state comity.

In *State ex rel. Taylor v. Whitley,* this Court adopted the *Teague* test when it assessed the retroactivity of state post-conviction claims on collateral review. 606 So. 2d 1292, 1296 (La. 1992). But this Court is not bound by this test.

Fortunately, *Teague* did not set forth a ceiling, but rather a floor. *See State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. 2006). As long as the new retroactivity standards that states adopt "rise above the federal constitutional floor,"[28] states have the power to adopt new remedial laws of their choosing. The U.S. Supreme Court in *Danforth v. Minnesota* held that states can adopt their own retroactivity standards in applying new rules of criminal procedure. 552 U.S. 264, 282 (2008). Further, in *Edwards*, the U.S. Supreme Court explicitly indicated that states remain free to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings. *Edwards v. Vannoy*, 593 U.S. ___ , 141 S. Ct. 1547, 1559 (2021) (citing *Danforth*, 552 U.S. at 282). "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth*, 552 U.S. at 280.

This case presents this court with a new "watershed" rule of criminal procedure that "our understanding of the bedrock procedural elements that must be found to vitiate fairness of a particular conviction" as *Teague* requires to retroactively apply criminal procedural rules. By retroactively applying *Ramos*, this Court can correct over a century of racism in Louisiana's criminal jury system.

The *Teague* Court's justifications for eschewing retroactivity—comity and the respect for the finality of state convictions—are not sufficiently persuasive for adhering to the *Teague* rule, particularly in the context of something as fundamental as the right to a unanimous jury. These principles do not apply to states reviewing their own state convictions, and therefore are not compelling reasons for states to continue to apply the test. *Id.* at 279 ("Federalism and comity considerations are unique to *federal* habeas review of state convictions" [emphasis added]).

Several states have treated *Teague* as a starting point and chosen to apply their own retroactivity standards. For example, in *Casiano v. Commissioner of Correction*, the Connecticut

[28] Jamila Johnson & Talia MacMath, *State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal* Teague v. Lane Test, 111 J. Crim. L. & Criminology Online 37 (2021).

Supreme Court held that the rule in *Miller v. Alabama,* 567 U.S. 460 (2012)—that mandatory life sentences are unconstitutional for juvenile offenders—was a watershed rule of criminal procedure. 317 Conn. 52, 69, 115 A.3d 1031, 1041 (2015).

The U.S. Supreme Court later applied the *Miller* rule retroactively in *Montgomery v. Louisiana*, but based its reasoning off an alternative rationale—that *Miller* had created a new substantive rule. 577 U.S. 190, 212 (2016). Missouri also used its own retroactive standard to rule the Court's decision in *Ring v. Arizona* applied retroactively, even before *Danforth* had been issued. *See State v. Whitfield, 107 S.W.3d 253, 269 (Mo. 2003) (en banc).*

This Court should adopt its own retroactivity test that takes into consideration the state's particular history of racial animus that prompted certain laws' enactment as a means to promote racism. Specifically, this Court should apply *Ramos* retroactively because of the non-unanimous verdict law's well-documented racist origins and lasting impact on Louisiana's criminal justice system. In *Ramos*, a majority of the justices considered the racist origins of Louisiana's non-unanimous verdict law as a reason for abandoning *stare decisis* and overturning the "gravely mistaken" and "egregiously wrong" precedent in *Apodaca*. 140 S. Ct. at 1405, 1414 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). Former Louisiana Chief Justice Johnson has advocated for this Court to abandon its use of the *Teague* test in favor of a new retroactivity rule that "takes into account the harm done by the past use of non-unanimous jury verdicts in Louisiana courts." *State v. Gipson*, 296 So. 3d 1051, 1056 (La. 2020) (Johnson, C.J. dissenting). Because individual states best understand their history and the transgressions they have committed against their citizens, they are also uniquely suited to remedy these wrongs.

Additionally, the benefits of applying *Ramos* retroactively would likely outweigh the costs. Louisiana spends nearly $600 million each year on its prison system, making it the global leader in

incarcerating the most residents per capita.[29] Although allowing new trials to all defendants convicted by non-unanimous juries would come at a significant administrative cost, it is likely less burdensome than the alternative of ensuring individuals convicted on less than unanimous verdicts remain locked up for life.

Although the dissent in *Ramos* expressed concern that applying its decision retroactively would prompt a "'crushing' 'tsunami' of follow-on litigation," the majority opinion surmised that retroactivity would likely cause less disruption than would applying other new rules of criminal procedure. *Ramos*, 140 S. Ct. at 1406. "Similar consequences likely followed when *Crawford v. Washington* overturned prior interpretations of the Confrontation Clause or *Arizona v. Gant* changed the law for searches incident to arrests. Our decision here promises to cause less[] . . . disruption than these other decisions." *Id.* at 1406–07.

Administrative and economic costs aside, the ethical burden of depriving hundreds of Louisianians of equal justice is too substantial to bear. "[I]t is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.* at 1408.

This Court now has an opportunity to remedy the effects of discrimination so deeply imbedded into Louisiana's criminal justice system. This Court can provide hundreds of people deprived of their constitutional right a chance to seek judicial relief. As a result of the racist origins and devastating impact of Louisiana's non-unanimity verdict law on Louisiana's citizens and their communities, this Court should apply *Ramos* retroactively.

[29] Louisiana Department of Public Safety and Corrections – Corrections Services, Proposed Budget Supporting Document [FY 2019-2020], 2 https://www.doa.la.gov/opb/pub/FY20/SupportingDocument/08A_Corrections_Services.pdf [https://perma.cc/Q94Q-L2AW]

D. <u>The statistics of jury decisions—not considered or addressed in *Edwards*—demonstrate that unanimous juries are "watershed" rules under *Teague* and should be applied retroactively in Louisiana</u>.

In *Edwards*, the Court considered whether the unanimous jury was a "watershed" rule of criminal procedure that applied retroactively under *Teague v. Lane*. 141 S. Ct. at 1557. To be watershed, a rule must be (a) a new rule of criminal procedure that (b) is fundamental to the fairness of a proceeding and (c) "seriously diminishes the likelihood of obtaining an accurate conviction." *See Teague*, 489 U.S. at 311–315; *see also Whorton v. Bockting,* 549 U.S. 406, 414 (2007) (observing that "a watershed rule [] implicate[s] "the fundamental fairness and accuracy of the criminal proceeding").The U.S. Supreme Court was clear that *Ramos*—which held that a jury must be unanimous to convict for a serious criminal offense—was a new rule. *See Ramos*, 140 S. Ct. at 1397; *Edwards*, 141 S. Ct. at 1555–56 (observing that the *Ramos* rule of unanimity was not readily apparent to all reasonable jurists and that the requirement overruled the earlier *Apodaca* precedent).

The *Edwards* Court, however, rejected all three arguments for applying *Ramos* retroactively to applicable Louisiana defendants. The Court recognized the benefit of unanimity to defendants but held that this right could not be squared with the Court's prior holdings. *Edwards*, 141 S. Ct. at 1558 (comparing *Ramos* with the fact that the general right to a jury trial was not applied retroactively). The Court also rejected retroactivity on Sixth Amendment grounds and by analogizing *Edwards* with previous departures from racist criminal procedure that nonetheless were non-retroactive. *Id*. at 1558–59 (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986) to observe "the Court overruled precedent . . . by holding that state prosecutors may not discriminate on the basis of race" but nevertheless did not apply the rule retroactively). Both of these latter rejected arguments only dealt with *Teague's* "fundamental fairness" prong for watershed rules.

The *Edwards* Court's primary conclusion—that retroactive application would be inconsistent with precedent not applying the general right to jury retroactively—is ripe for repair by this Court. *Id.* at 1558

("Notwithstanding the extraordinary significance of . . . guaranteeing a jury trial . . . the Court in *DeStefano* declined to retroactively apply the jury right." *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*)). The *Edwards* holding is erroneous. First, statistical analysis clearly demonstrates that before *Ramos,* non-unanimous juries unfairly resulted in a significantly higher risk of inaccurate conviction. *See Teague*, 489 U.S. at 311–315. Second, even though *Edwards* held otherwise, unanimity is a fundamental procedural right and this Court has the independent freedom to apply the right retroactively. *Id.*

That unanimity constitutes an issue of fundamental fairness is supported by the following facts: 1) unanimous juries are *drastically* more accurate than convicting with a judge versus a unanimous jury; 2) the unanimity right has more in common with the watershed *Gideon* right to counsel than other procedural rights not applied retroactively; and, 3) the rationale for denying retroactivity in *DeStefano*—which the *Edwards* Court seemingly failed to adequately address—has long expired. For these reasons, this Court should recognize unanimity as a watershed rule of criminal procedure and apply *Edwards* retroactively.

i. ***Statistical analysis of Louisiana conviction data demonstrates that unanimous juries unfairly increase the likelihood of inaccurate conviction.***

Many academics and practitioners have tried their hand at modeling jury dynamics for criminal cases. These models all make various assumptions and draw a wide variety of conclusions about jury dynamics and optimal jury design. The primary concern of watershed rules for *Teague*, however, is not whether a non-unanimous jury increases one's odds of being found guilty—which legitimate statisticians and scholars disagree on[30]—but whether non-unanimous juries unfairly increase the likelihood of inaccurate convictions. *See Teague*, 489 U.S. at 315.

[30] *Compare* Timothy Feddersen and Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts under Strategic Voting*, The American Political Science Review, vol. (1998) https://doi.org/10.2307/2585926 *and* Peter Coughland, *In Defense of Unanimous Jury Verdicts: Mistrials,*

To satisfy *Teague*, the data must demonstrate that allowing conviction by non-unanimous juries creates an impermissibly large risk of inaccurate conviction. *Id.* at 311, 315. To test this, we compare whether wrongful convictions occur at a significantly higher rate when given by a non-unanimous jury versus a unanimous one. This type of endeavor relies on Bayes' theorem—a mathematically proven and widely used formula. In medicine, Bayes' theorem is routinely used to determine the frequency of "false positives" conditioned on a positive test—the medical equivalent of a "false conviction" here.

Louisiana does not track or provide official data on the number of prisoners convicted from non-unanimous versus unanimous juries. The only publicly available datasets of jury conviction results in Louisiana were recently compiled by the Advocate newspaper. Applying Bayes theorem to this data, we can compute the probability of a wrongful conviction contingent on either a non-unanimous or unanimous jury.

Comparing these two probabilities based on the largest dataset available, a non-unanimous jury presents approximately a 25 percent higher chance of being wrongfully convicted versus a unanimous jury.[31] A smaller but more precise dataset of jury verdicts—which the Advocate obtained consulting the

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Communication, and Strategic Voting, American Political Science Review (2000) https://www.jstor.org/stable/2586018.

[31] Bayes Theorem is P(A|B) = (P(A)*P(B|A))/P(B). This reads, "the probability of A given B is equal to the probability of A, times the probability of B given A, divided by the probability of B.
Here, we are interested in the probability of being wrongfully convicted given one is convicted by a non-unanimous jury and comparing it with the probability of being wrongfully convicted given one is convicted by a unanimous jury. These are our two "P(A|B)s."

The Advocate—which did a deep dive into publicly available jury data—estimates 40% of jury convictions are non-unanimous. Thus, P(B) = .4 for nonunanimous and P(B)=.6 for unanimous.

The Innocence Project New Orleans research demonstrates that from the 33 exonerations since non-unanimous juries existed, 15 of these were convicted by non-unanimous juries and 18 were convicted by unanimous ones. Thus P(B|A), or the probability of being convicted by a non-/unanimous jury given you were innocent, is at least 15/33 for nonunanimous juries and 18/33 for unanimous juries.

The overall wrongful conviction rate is estimated at 5%, although—because we are comparing the odds of wrongful conviction by unanimous versus non-unanimous juries—this number is irrelevant. Both non-unanimous and unanimous conditional probabilities are functions of the overall wrongful conviction rate, so it will cancel out when comparing the two. Thus P(A), or the probability of wrongful conviction = .05.

East Baton Rouge Courts directly—suggests that the risk of being wrongfully convicted doubles (that is, 100 percent higher) when a defendant is tried before a non-unanimous jury versus a unanimous one.[32] The true increase in conviction risk from a non-unanimous jury probably lies somewhere in the middle, but the data are clear: Non-unanimous juries substantially increase the risk of wrongful conviction in Louisiana.

Critically, analyzing wrongful convictions using these data ignores guilty prisoners convicted of more serious charges by non-unanimous juries than they would have been by unanimous juries. For example, non-unanimous juries might inaccurately find a defendant guilty of murder when all twelve jurors would have correctly agreed on manslaughter. *Teague* is unclear as to whether the "accuracy of convictions" prong for watershed rules considers "over-convictions" such as these or solely wrongful convictions of the innocent. *Compare Teague*, 489 U.S. at 312 (favorably discussing Justice Harlan's point that the primary function of habeas is to ensure there is not "an impermissibly large risk *that the*

Plugging in these numbers, P(wrongful conviction | non-unanimous jury) = P (wrongful conviction) * P (non-unanimous jury | wrongful conviction) / P(non-unanimous jury) = .05 * 15/33 / .4 = .056

P(wrongful conviction | unanimous jury) = P(wrongful conviction) * P(unanimous jury | wrongful conviction) / P(unanimous jury) = 05*18/33 /.6 = .045

Comparing the two results, .056/.045 results in approximately a **25% higher** chance at wrongful conviction under a non-unanimous jury.

For more on Bayes Theorem, *see* Stuart, *Kendall's Advanced Theory of Statistics: Volume I—Distribution Theory*, Edward Arnold, § 8.7 (1994).

For more on the Advocate's data on exonerations and jury verdicts, *see* Adelson et al, *How an abnormal Louisiana Law discriminates and drives incarceration*, The Advocate (2018) https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

[32] Using a smaller but more reliable dataset—which the Advocate obtained by directly working with the East Baton Rouge Court—we can also make the same calculations. This dataset had 45 non-unanimous jury trials out of approximately 133 with available data in the five years of trials provided. Now, P(unanimous jury) is .66 and P(non-unanimous jury) is .34.

Plugging these numbers into the same Bayes formula as the prior footnote, P(wrongful conviction | non-unanimous) increases to .08 versus .04 for P(wrongful conviction | unanimous). This is a **doubling** of the risk of wrongful conviction in non-unanimous juries versus unanimous ones.

innocent will be convicted" [emphasis added]) *with id.* at 315 ("Because the absence of a fair cross section on the jury venire does not . . . seriously diminish *the likelihood of obtaining an accurate conviction*").

Should the more defendant-friendly *Teague* standard—which includes over-convictions as inaccurate—be used, then the non-unanimous jury rule is even more damning to the accuracy of a conviction. Unfortunately, the number of over-convictions is not mathematically discernible from the data available; however, the conceptual existence of over-convictions is itself further fodder for idea that non-unanimous juries have a greater propensity to inaccurately convict. While over-convictions are a distinct and lesser injustice than wrongful convictions, they very much exhibit the spirit of *Teague* in presenting a fundamental risk to the accuracy of a conviction. *See id.* at 315.

The Louisiana exoneration and conviction data—whether considered alongside over-convictions or not—make clear that a non-unanimous jury is a jury empowered to put an innocent person behind bars. The threshold for guilt by ten in a group of twelve drastically and negatively impacts a defendant's right to an accurate and fair trial. For these reasons, the "accuracy" prong of the *Teague* test is fulfilled by the unanimity rule.

ii. ***The unanimity right is also one of fundamental fairness under Teague, and therefore unanimity is a watershed rule which warrants retroactive application.***

Clearly, non-unanimous juries drastically increase a defendant's odds of inaccurate conviction. But, is the right to unanimity nevertheless one of fundamental fairness? *Id.* at 311. The Supreme Court has only ever identified one "watershed" rule of criminal procedure, the right to counsel identified in *Gideon*. *Whorton*, 549 U.S. at 421 (observing that *Gideon* "effected a profound and sweeping change," had "primacy" and "centrality," and that it "alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding . . ." *Gideon v. Wainwright*, 372 U.S. 335 (1963));

see Teague, 489 U.S. at 311–315. Courts therefore do not have much comparative or specific precedential guidance as to when a rule is one of "fundamental fairness."

In *Teague*, the Court endorsed a structure for ascertaining how critical a new rule is to the fairness of a trial: "We are also of the view that such rules are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Id.* at 313–14 (quoting *Rose v. Lundy,* 455 U.S. 509, 544 (1982) (Breyer, J. dissenting)).

No expedition through legal text and legal history is required, however. In *Danforth v. Minnesota,* the U.S. Supreme Court identified states have the right to grant relief retroactively when federal courts would otherwise be barred. 552 U.S. 264, 266 (2008). Thus, by distinguishing the U.S. Supreme Court's decision in *Edwards* below, the unanimity right is clearly fundamental and should be applied retroactively by this Court.

First, the *Edwards* Court did not consider the statistical difference in conviction accuracy between non-unanimous and unanimous juries. *Teague* suggests that a rule which significantly impacts conviction accuracy—on its own—can be a watershed rule. *See Teague*, 489 U.S. at 315 ("Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction *or* seriously diminish the likelihood of obtaining an accurate conviction . . .") (emphasis added). Perhaps the Louisiana data's *quantifiable* demonstration of unfairness by non-unanimous juries is enough to make the unanimity right bedrock on its own, and further judicial speculation is not required.

Second, the *Edwards* court considered the right to a unanimous trial side-by-side with other landmark criminal procedure expansions. *Edwards*, 141 S. Ct. at 1559 ("One involved the jury-trial right, one involved the original meaning of the Sixth Amendment's Confrontation Clause, and one involved

racial discrimination in jury selection. Yet the *Edwards* court did not apply any of those decisions retroactively on federal collateral review."). Because the *Edwards* court did not retroactively apply the right to jury, Confrontation Clause rights, or racial discrimination rights, it elected to not apply the unanimous jury right retroactively either. *Id*.

Analogizing the unanimity right into these three rights, however, is a false equivalency. In Louisiana, given the non-unanimous jury's origin, unanimity impacts *both* the right to a jury *and* the right to be free from racial discrimination. In the same way that right to counsel—the only heretofore recognized watershed right—implicates multiple aspects of a fair trial, unanimity is a "prima[l]," "central," and holistic criminal right that is engrained throughout the Constitution. *See Whorton*, 549 U.S. at 421.

Third, the *Edwards* Court itself seems to acknowledge the potential of unanimity being fundamental but specifically contends it cannot square this with past precedent denying retroactive application of the general right to a jury trial. *See Edwards*, 141 S. Ct. at 1558 ("We cannot discern a principled basis for retroactively applying the subsidiary *Ramos* jury-unanimity right when the Court in *DeStefano* declined to retroactively apply the broader jury right itself."). Comparing jury and judicial convictions with non-unanimous and unanimous convictions, however, is apples and oranges.

The previous section already demonstrates the gross difference in accuracy between non-unanimous and unanimous juries. In contrast, academic scholarship demonstrates that juries—at least in federal court—are far more likely to convict both the innocent and the guilty than federal judges.[33] Thus, while the jury right discussed in *DeStefano* honored a constitutional right, it did not—unlike unanimous juries—actually improve the outlook of innocent defendants.

Further, significant differences between judges and juries exist that may make one preferable to the other. In fact, one in eight federal criminal defendants who take their case to trial elect to have a

[33] *See* Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L. Q. 151, 152 (2005) ("Between 1989 and 2002, the average conviction rate for federal criminal defendants was 84% in jury trials, but a mere 55% in bench trials.").

bench trial.[34] There are advantages to choosing to have a judge, rather than a jury, decide one's fate: Judges have a better understanding of complex legal standards and are less likely to be manipulated by emotion or distraction from the prosecution. In contrast, the Louisiana data on unanimous versus non-unanimous juries are clear: Defendants are at a significantly higher risk of being wrongly convicted or over-convicted by non-unanimous juries. Clearly, the unanimous jury right is both more critical to the innocent defendant and more fundamental to the constitutional right to a jury.

Lastly, the concern about *DeStefano*'s precedent is no longer warranted. When *DeStefano* declined to apply the jury right retroactively, it did so on the basis of expired law. The factors then considered were "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *DeStefano*, 392 U.S. at 633. The standard has since shifted drastically with *Teague*—which now considers exclusively accuracy and fairness. Legal conclusions drawn from expired standards cannot be an anvil to constitutional rights.

For these reasons, the right to a unanimous jury verdict in criminal cases is one of fundamental fairness. Because unanimity is both fundamental to the fairness of a proceeding and "seriously diminishes the likelihood of obtaining an accurate conviction," it is a watershed rule. *Teague*, 489 U.S. at 311.

This Court should not forego the opportunity to right this wrong.

[34] John Gramlinch, *Only 2% of federal criminal defendants go to trial, and most are found guilty*, Pew Research Center (2019) https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

CONCLUSION

This Court should grant the writ for consideration and issue an order staying all cases in the appellate courts and trial courts unless the parties choose to use article 930.1 of the Louisiana Code of Criminal Procedure[35] to plea the case (and remove the case or controversy).

[35] La. Code Crim. Proc. Ann. art. 930.1.