No. 19-5807

IN THE

Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

v.

DARREL VANNOY, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a membership of almost 40,000. NACDL's members include private criminal defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as amicus in many of the Court's most significant criminal cases advocating for the constitutional rights of criminal defendants. Of special relevance here, the NACDL provided an amicus brief in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). In that brief, the NACDL explained (1) why non-unanimous juries are fundamentally less deliberative than unanimous juries, and (2) how non-unanimous juries skew the decision to exercise the jury trial right, as they fundamentally alter the meaning of a jury verdict for Sixth Amendment purposes.

In this case, the Court will decide whether *Ramos* applies retroactively to cases on federal collateral review. *Gideon v. Wainwright*, 372 U.S. 335 (1963), is the only case the Court so far has identified as satisfying *Teague v. Lane*'s "watershed rule"

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[1] Both parties have filed blanket consents to the filing of amicus briefs at the merits stage. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

exception to non-retroactivity. *See Whorton v. Bockting*, 549 U.S. 406, 419 (2007). *Gideon* held that the Sixth Amendment right of an indigent defendant charged with a felony to have appointed counsel applies to the states under the Due Process Clause of the Fourteenth Amendment. 372 U.S. 335.

One element of the *Teague* watershed rule exception considers whether the new rule "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418. In the context of deciding whether *Ramos* is a watershed rule, it is instructive to review the history of the *Gideon* rule, which closely parallels the history of the *Ramos* rule. NACDL has a strong interest in the history and interpretation of *Gideon* and is well situated to provide that background.

Related to the requirement that the new rule must address bedrock procedural elements essential to the fairness of the proceeding, the *Teague* watershed rule exception also requires a showing that the rule is "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Id.* (internal citation and quotation omitted). A close review of *Gideon* informs what constitutes an "impermissibly large risk" and what is meant by an "inaccurate" conviction. As an association of criminal defense lawyers, NACDL also can explain the unacceptable risk of inaccuracy associated with a non-unanimous verdict.

SUMMARY OF THE ARGUMENT

I. The Court should hold that *Ramos*, 140 S. Ct. 1390, retroactively applies to cases on federal collateral review. Since deciding *Teague v. Lane*, 489 U.S. 288 (1989), over thirty years ago, this Court has not recognized any new rules of criminal procedure

that satisfy the watershed rule exception to non-retroactivity for cases on collateral review. *Ramos*, 140 S. Ct. at 1407 ("*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."). Although the watershed rule test is demanding, it cannot be so demanding that it can never be met. *Teague* contemplated future rules that would satisfy the exception.

The Court repeatedly has singled out the right-to-counsel rule established in *Gideon*, 372 U.S. 335, a pre-*Teague* case, as illustrative of the sort of rule that would qualify as a watershed rule. *See, e.g., Whorton*, 549 U.S. at 419; *Beard v. Banks*, 542 U.S. 406, 417 (2004); *Saffle v. Parks*, 494 U.S. 484, 495 (1990). If the *Teague* exception is to have any substance, there must be room for new rules, sufficiently analogous to *Gideon*, to be characterized as a watershed rule. *Ramos* is such a rule. In fact, it is hard to imagine a more watershed rule than one defining the essential elements of a "jury verdict" for constitutional purposes.

In distinguishing post-*Teague* rules from *Gideon*, the Court has characterized *Gideon* as effecting a "sweeping" change in the law by establishing a "previously unrecognized" bedrock procedural element essential to the fairness of the proceeding. *Whorton*, 549 U.S. at 421. In fact, *Gideon*, like *Ramos*, did not recognize a previously unrecognized Sixth Amendment right, nor did it break new ground in holding that Sixth Amendment guarantees are incorporated into the Fourteenth Amendment. Like *Ramos*, *Gideon* overruled a wayward precedent to restore a previously recognized bedrock procedural element, the right to assistance of counsel.

As *Gideon* demonstrates, a watershed rule need not be one that breaks new ground and effects a revolutionary change in the law. Otherwise, *Gideon* would not be the paradigmatic watershed rule. Rather, the essential element of a watershed rule is that it compelled the States to provide a bedrock procedural element essential to a fair trial—either for the first time or, as in *Gideon* and *Ramos*, by correcting course when an unsound decision has broken with past, better reasoned precedent. The novelty of the rule needs to be sufficient for the rule to constitute a "new rule" for purposes of the *Teague* analysis, but it need not be a bolt out of the blue. The substance and reach of the rule are what matters.

Ramos is a watershed rule because it confirms what has long been true but was briefly forgotten: a true jury verdict—includes the Sixth Amendment right to a unanimous jury—and the States are compelled to provide that right through incorporation in the Fourteenth Amendment. It is also no less sweeping than *Gideon* because it applies to every single felony jury trial in all fifty states and ensures that no state will be able to opt for non-unanimous juries.

II. Under *Teague*, a watershed rule is one "without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 313. An accurate conviction is one that was rendered with all the bedrock procedural elements necessary to a fair trial. *Gideon*, the paradigm watershed rule, substantially increases the accuracy of convictions, because defense counsel helps to ensure that the defendant receives the procedural protections to which he or she is entitled. The test is not whether the new rule

increases the likelihood that actual guilt will be determined, or *Gideon* would not be a watershed rule.

Ramos, like *Gideon*, substantially increases the accuracy of convictions because only a unanimous verdict guarantees that a defendant's guilt was established beyond a reasonable doubt. Indeed, it is possible for a fair trial to happen without counsel, as defendants also have a constitutional right to represent themselves at trial. But it is not possible for a fair trial to happen without a unanimous jury verdict. Moreover, a unanimous jury makes it substantially more likely that the verdict reflects the decision of an accurate cross-section of the community. And, by requiring unanimous juries, the *Ramos* rule also significantly increases the likelihood that the verdict will be based on a careful review of the evidence rather than the biases of individual jurors, thereby increasing the accuracy of the verdict.

ARGUMENT

I. *Gideon* Was No More Groundbreaking Than *Ramos*

A. Gideon Was a New Rule Only Because It Overruled Betts, Which Had "Made an Abrupt Break" with the Court's Previous "Well-Considered Precedents"

The decision in *Gideon* to recognize the Fourteenth Amendment due process right to assistance of counsel was not a radical break from past precedent. Instead, as with *Ramos*, *Gideon* overruled a deeply flawed precedent that had carved out the heart of a fundamental component of the Sixth Amendment.

In *Powell v. Alabama*, 287 U.S. 45, 68 (1932), three decades before *Gideon*, the Court held (with a 7-2 majority) that the right to counsel in a capital case is guaranteed by the Due Process Clause of the Fourteenth Amendment. In reaching its holding, the Court considered the state of the law when the Constitution was adopted.

In England, until 1836, parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel but, except as to those charged with treason, persons accused of serious crimes had no right to counsel. *Id.* at 60. This English rule was widely criticized and rejected by the colonies. As *Powell* explained: "An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers." *Id.* At least twelve of the thirteen colonies "definitely rejected" the English common law rule and recognized the right to counsel in all criminal prosecutions, "save that in one or two instances the right was limited to capital offenses or to the more serious crimes." *Id.* at 64–65; *see also Holden v. Hardy*, 169 U.S. 366, 386 (1898) ("But, to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."). When the Bill of Rights was adopted, the Founders enshrined in the Sixth Amendment the right of an accused "to have the Assistance of Counsel for his defence" in all criminal prosecutions.

Addressing whether the Sixth Amendment right to counsel applied to the states through the

Fourteenth Amendment, *Powell* cited earlier cases in which the Court treated assistance of counsel as a component of due process. 287 U.S. at 69–70 (citing *Cooke v. United States*, 267 U.S. 517, 537 (1925); *Felts v. Murphy*, 201 U.S. 123, 129 (1906); *Frank v. Mangum*, 237 U.S. 309, 344 (1915); *Kelley v. Oregon*, 273 U.S. 589, 591 (1927)). In addition, as *Powell* observed, "[t]he state decisions which refer to the matter, invariably recognize the right to the aid of counsel as fundamental in character." *Id.* at 70–71 (citing cases). And, constitutional scholars treated the right to assistance of counsel as necessarily included in the right to due process. *Id.* at 70 (citing J. Cooley, 2 Story on the Constitution, 4th ed., § 1949, p. 668).

Following *Powell*, the Court confirmed the right to appointed counsel in federal felony cases, including non-capital felony cases. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Gideon's extension of *Powell* and *Johnson* to non-capital cases in state courts was a new rule for purposes of *Teague* only because it overruled *Betts v. Brady*, 316 U.S. 455 (1942). In *Betts*, based on a flawed review of "historical data," a divided Court decided that "'appointment of counsel is not a fundamental right, essential to a fair trial.'" *See Gideon*, 372 U.S. at 340 (quoting *Betts*, 316 U.S. at 471). In overruling *Betts*, *Gideon* concluded that the Court in *Betts* had "ample precedent" for treating the rights protected by the Bill of Rights as "equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." *Id.* at 341.

Gideon emphasized the Court's pre-*Betts* decision in *Powell*. After "full consideration of all the historical data examined in *Betts*," *Powell* had "unequivocally

declared" that the right to assistance of counsel is a fundamental right made obligatory upon the States. *Id.* at 342–43 (citing *Powell*, 287 U.S. at 68). *Gideon* rejected the notion that the rationale underlying *Powell* was limited to capital cases: "While the Court . . . did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case*, its conclusions about the fundamental nature of the right to counsel are unmistakable*." *Id.* at 343 (emphasis added). The Court therefore concluded that *Betts* "departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested." *Id.* at 345.

Gideon concluded that *Betts* also could not be reconciled with *Johnson*, where the Court characterized the right to assistance of counsel as "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Id.* at 343 (quoting *Johnson*, 304 U.S. at 462). Other, pre-*Betts* decisions of the Court had also emphasized that the right to assistance of counsel was a fundamental right. *Id.* (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–244 (1936); *Avery v. Alabama*, 308 U.S. 444 (1940), and *Smith v. O'Grady*, 312 U.S. 329 (1941)).

Moreover, in another *Gideon* parallel to *Ramos*, only two states had asked that *Betts* be left intact. *Id.* at 345. "Twenty-two States, as friends of the Court, argue[d] that *Betts* was 'an anachronism when handed down' and that it should now be overruled." *Id.*

In *Whorton*, the Court interpreted *Teague*'s watershed rule exception to non-retroactivity to require that the "new rule must itself constitute a *previously unrecognized* bedrock procedural element

that is essential to the fairness of a proceeding." 549 U.S. at 421 (emphasis added). And, "[i]n applying this requirement," the Court has "looked to the example of *Gideon*," and has held that "less sweeping and fundamental rules" than *Gideon* do not qualify as "watershed rules." *Id.* But, in fact, *Gideon* did not create a "previously unrecognized" bedrock procedural element. Though a "new rule" because it overturned *Betts*, *Gideon* was firmly grounded in the Court's prior precedent (*Powell* and *Johnson*). The very rationale of *Gideon* for overruling *Betts* was that "the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents," and that, *"[i]n returning to these old precedents*, sounder we believe than the new, *we but restore* constitutional principles established to achieve a fair system of justice." *Gideon*, 372 U.S. at 343–44 (emphasis added).

B. Ramos Constitutes a Watershed Rule Because, Like Gideon, It Rejected a Prior Errant Decision to Restore a Bedrock Procedural Element Necessary to a Fair Trial

Like *Gideon*, *Ramos* overruled a deeply flawed decision (*Apodaca v. Oregon*, 406 U.S. 404 (1972)) that was inconsistent with earlier precedent on a bedrock procedural element of a fair trial. 140 S. Ct. 1390 (2020).

In *Ramos*, there was no doubt that the Sixth Amendment guaranteed the right at issue—the right to a unanimous verdict—just as there was no doubt in *Gideon* that the Sixth Amendment guaranteed the right to assistance of counsel. A review of common law at the time of the Sixth Amendment's adoption, "state practices in the founding era," and "opinions and treatises written soon afterward" led to the

"unmistakable" conclusion that a "jury must reach a unanimous verdict in order to convict." *Id.* at 1395. Moreover, the Court "ha[d], repeatedly and over many years, recognized that the Sixth Amendment requires unanimity." *Id.* at 1396; *see also id.* at 1399 ("this Court has said 13 times over 120 years that the Sixth Amendment does require unanimity").

Nor was there any question that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. *Id.* at 1397. "This Court has long explained that the Sixth Amendment right to a jury trial is fundamental to the American scheme of justice and incorporated against the States under the Fourteenth Amendment." *Id.* (internal quotation omitted). "So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." *Id.*

By allowing non-unanimous verdicts in felony cases, Louisiana and Oregon had long been outliers. They remained so, until *Ramos*, because of *Apodaca*, 406 U.S. 404, and a companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972). As the Court explained in *Ramos*, *Apodaca* and *Johnson* resulted in a "badly fractured set of opinions," with Justice Powell providing the decisive fifth vote for the States "based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent." *Ramos*, 140 S. Ct. at 1397–98. Justice Powell acknowledged that the Sixth Amendment guaranteed a right to a unanimous jury but was unwilling to follow the Court's precedents that the rights guaranteed by the Sixth Amendment applied to the States by incorporation in the Fourteenth Amendment. *See id.* at 1398.

Thus, to the extent *Ramos* established a new rule of criminal procedure for *Teague* purposes, it did so by overruling a deeply flawed, outlier precedent that could not be squared with the Court's other Sixth and Fourteenth Amendment jurisprudence. Just as *Gideon* overruled *Betts* because it had, without sound reason, broken with past precedent, so *Ramos* overruled the "gravely mistaken" *Apodaca*, which "sits uneasily with 120 years of preceding case law." *Id.* at 1405.

Ramos constitutes a watershed rule for the same reason *Gideon* does. It reaffirms a core Sixth Amendment right essential to a fair trial. As the Court explained in *Ramos*, when interpreting the Sixth Amendment right to an impartial jury trial, it is "unmistakable" that a "jury must reach a unanimous verdict in order to convict." *Id.* at 1395. The right to a unanimous verdict, which traces back to Fourteenth Century England, rests on the conviction that "a verdict, taken from eleven, was no verdict at all." *Id.* (internal citation and quotation omitted). By the time the Sixth Amendment was ratified, unanimous verdicts had been required for almost 400 years. *Id.* at 1396. The right to a unanimous verdict has for centuries been deemed essential to a fair trial, and this bedrock principle is enshrined in the Sixth Amendment, no less than the right to assistance of counsel at issue in *Gideon*.

The Court previously has rejected efforts to analogize new rules of criminal procedure to *Gideon*. Those cases have involved new rules markedly less sweeping and fundamental than *Ramos*. Almost all have involved discrete rules for the post-conviction sentencing process. In *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997), for example, the new rule established

the defendant's right to argue in capital sentencing his ineligibility for parole in the face of prosecution claims of continued dangerousness. The Court distinguished the "narrow right of rebuttal" afforded by the new rule to "defendants in a limited class of capital cases" from the "sweeping rule of *Gideon*." *Id.* at 167. Similarly, *Saffle v. Parks*, 494 U.S. 484 (1990), involved whether a jury could be instructed at the penalty phase of a trial to avoid any influence of sympathy. In rejecting the comparison to the *Gideon* rule, the Court concluded that the "proposed rule" has "none of the primacy and centrality of the rule adopted in *Gideon*." *Id.* at 495. Moreover, the "objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Id.*; *see also Beard*, 542 U.S. at 418–19 (new rule invalidating capital sentencing schemes that required juries to disregard non-unanimous mitigating factors); *Gray v. Netherland*, 518 U.S. 152, 170 (1996) (new rule addressed adequacy of notice of evidence to be provided at sentencing phase).

In contrast to new rules addressing discrete issues that may come up in the post-conviction process, *Ramos*, like *Gideon*, applies to all trials for serious crimes and goes to the very heart of the fairness of the procedure in which guilt or innocence is determined. Because a non-unanimous verdict is "no verdict at all," the *Ramos* rule imposing a requirement of unanimity on the States has all the primacy and centrality of *Gideon*.

II. As *Gideon* Demonstrates, an "Accurate" Conviction Is One That Reflects a Fair Process, and a Unanimous Jury Is Essential to a Fair Process

A. The Gideon Rule Increases the Likelihood the Defendant Will Be Protected by the Bedrock Procedural Elements Essential to a Fair Trial, Not the Likelihood That Actual Guilt or Innocence Will Be Accurately Determined

Under *Teague*, a watershed rule is one "without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 313; *accord Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); *see also Whorton*, 549 U.S. at 418 (a watershed rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction") (internal citation and quotation omitted). *Whorton* tells us that *Gideon* qualified as a watershed rule because "the risk of an unreliable verdict is intolerably high" when a defendant is denied assistance of counsel. 549 U.S. at 419. According to *Whorton*, the *Gideon* rule had a "direct and profound" relationship to the "accuracy of the factfinding process." *Id.*

In evaluating which new rules of criminal procedure constitute watershed rules, it is important to put the notion of an "accurate conviction" in context. The assistance of counsel guaranteed by *Gideon* significantly increases the likelihood that the accused receives every available procedural protection, including safeguards enshrined in the Constitution: (1) the right to a speedy trial; (2) the right against self-incrimination; (3) the right to cross-exam witnesses; (4) the right to have guilt or

innocence determined based only on admissible evidence; (5) the presumption of innocence; and (6) the right to be found innocent if guilt is not established beyond a reasonable doubt. These rights reflect a central tenet of Anglo-American jurisprudence that "it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); 4 William Blackstone, Commentaries on the Laws of England *352 (1769) ("all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer"). Nowhere is this clearer than in the "beyond a reasonable doubt" standard for conviction, which protects those who committed the crime as well as those who are innocent.

Thus, contrary to *Whorton*'s suggestion, 549 U.S. at 419, the *Gideon* rule does not necessarily increase the "accuracy of the factfinding process," because accurate factfinding is not the overarching goal of the bedrock procedural elements of a fair trial. Assistance of counsel ensures that every defendant will receive all the protections intended to reduce the risk that an innocent person will be convicted, even if that means in a given case that a guilty person may go free. *See, e.g., Gideon*, 372 U.S. at 345 ("Left without the aid of counsel [a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.") (quoting *Powell*, 287 U.S. at 68–69).

Counsel may advise the defendant not to testify, exclude inculpating evidence, create doubt through zealous cross-examination, and emphasize to the jury

the demanding burden of proof borne by the prosecution. This advocacy may or may not increase the accuracy of the factfinding process. Counsel's role is not to root out actual guilt or innocence for the jury, but to protect the rights of the accused.

There are two types of guilt: actual and legal. A person may be actually guilty and yet not legally guilty because guilt was not established beyond a reasonable doubt at a trial that provided the accused all of the procedural protections to which he or she was entitled. For purposes of determining whether a new rule is a watershed rule, a rule increases the accuracy of convictions if it increases the likelihood that the conviction was rendered with all the bedrock procedural protections essential to a fair trial, not because it increases the likelihood that actual guilt will be determined. If the latter were true, *Gideon* would not be the paradigm watershed rule.

B. Like Gideon's Assistance of Counsel Rule, the Ramos Unanimous Jury Rule Substantially Increases the Accuracy of Convictions

Like the *Gideon* rule, the *Ramos* rule substantially increases the likelihood that a defendant will receive the bedrock procedural protections essential to a fair trial. First and foremost, a unanimous jury is essential to ensuring that a defendant is not convicted unless guilt is established beyond a reasonable doubt. The dissenters in, *Johnson v. Louisiana*, whose views were vindicated in *Ramos*, concluded that "a unanimous jury is necessary if the great barricade known as proof beyond a reasonable doubt is to be maintained." 406 U.S. at 391–92 (Douglas, J., dissenting). As Justice Douglas explained:

> Suppose a jury begins with a substantial minority but then in the process of deliberation a sufficient number changes to reach the required 9:3 or 10:2 for a verdict. Is not there still a lingering doubt about that verdict? Is it not clear that the safeguard of unanimity operates in this context to make it far more likely that guilt is established beyond a reasonable doubt?

Id. at 392; *see also id.* at 403 (Marshall, J., dissenting) ("The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.").

By requiring unanimous juries, *Ramos* also greatly increases the likelihood that any conviction will satisfy the constitutional requirement that all juries be drawn from an accurate cross section of the community. "When verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace." *Id.* at 396 (Brennan, J., dissenting). By requiring unanimity, *Ramos* ensures that jurors who may have a more accurate assessment of the role explicit or implicit bias played in the arrest and prosecution of the defendant and of the reliability of eyewitness testimony will not be silenced.

A rule requiring unanimity also preserves confidence in the criminal justice system, especially important here, where the non-unanimous jury rule in Oregon and Louisiana was the product of efforts to silence black jurors and increase conviction rates for black defendants. *See Ramos*, 140 S. Ct. at 1405 (describing the "racist origins of Louisiana's and

Oregon's laws"). If a defendant "conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines," community confidence in the administration of criminal justice will be eroded. *Johnson*, 406 U.S. at 398 (Stewart, J., dissenting). "The requirements of unanimity and impartial selection . . . complement each other in ensuring the fair performance of the vital functions of a criminal court jury." *Id.*

A rule requiring unanimous juries also significantly increases the likelihood that the verdict will be based on a careful review of the evidence rather than the biases of individual jurors, thereby increasing the accuracy of the verdict. Studies and the experience of defense lawyers show that unanimous juries take more time discussing the evidence and considering it than non-unanimous juries. Non-unanimous juries are less thorough and tend to cease deliberations when the required quorum is reached. *See* Reid Hastie, Steve D. Penrod & Nancy Pennington, *Inside the Jury* 85 (Harvard Univ. Press 1983) (finding that the farther the jury gets from the unanimity rule, the fewer key categories of evidence are discussed); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001). *See also Johnson*, 406 U.S. at 388 (Douglas, J., dissenting) ("The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries.").

Moreover, hold-out jurors on a unanimous jury incentivize the jury to request additional instructions from the judge and clarifications on the beyond a reasonable doubt standard of proof. *See* Kim Taylor-

Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1273 (2000) ("Twenty-seven percent of the requests for additional instructions from the judge, twenty-five percent of the oral corrections of errors made during discussion, and thirty-four percent of the discussions of the standard of proof beyond a reasonable doubt occurred in efforts to reach unanimity after a majority view had surfaced.").

A jury's role in the criminal justice system is no less important than that of defense counsel. A procedural rule related to the structure and function of the arbiters of guilt or innocence (*Ramos*) is as bedrock and watershed as the *Gideon* rule. Like assistance of counsel, a unanimous jury greatly increases the likelihood that the criminal justice system functions fairly and provides the defendant the rights guaranteed under the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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