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 THE COMMONWEALTH OF PUERTO RICO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether this Court's decision in *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020), applies retroactively to cases on federal collateral review.

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INTEREST OF THE *AMICUS CURIAE*

The Commonwealth of Puerto Rico respectfully submits this brief as *amicus curiae* in support of respondent. Until this Court decided *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020), criminal trials in Puerto Rico had been decided by non-unanimous juries, as was the case in Oregon and Louisiana.

The Commonwealth of Puerto Rico, although it is not a State and was not mentioned in the majority opinion in *Ramos*, is equally affected by this decision and has the same interests as the states of Oregon and Louisiana in the outcome of this case. The Commonwealth understands that the holding of *Ramos* applies to criminal cases pending under direct review in Puerto Rico with similar circumstances, as has been held by the Puerto Rico Supreme Court. As a consequence, all those cases will have to be retried. Although this represents a very substantial burden to the Commonwealth's criminal justice system, it is a natural consequence of this Court's adoption of a new constitutional rule.

In the present case, however, Petitioner is requesting this Court to find that *Ramos* has retroactive effect, also applying to cases on collateral review. The Commonwealth of Puerto Rico strongly disagrees. As will be discussed in this brief, Petitioner's position is erroneous as a matter of law. Further, granting retroactive effect to the new rule announced in *Ramos* would gravely disrupt Puerto Rico's criminal justice system by reopening criminal cases that have been final and

firm for years, thereby causing grievous harm to the social and economic welfare of the three million United States citizens who reside in Puerto Rico.

SUMMARY OF THE ARGUMENT

The Commonwealth of Puerto Rico supports the position of Respondent and affirmance of the decision of the Court of Appeals for the Fifth Circuit. Puerto Rico is in the same position as Oregon and Louisiana with regard to the alleged retroactive effect of the holding of this Court in *Ramos* to criminal cases in collateral review and has the same reliance interests in the finality of nonunanimous verdicts entered in criminal cases.

Ramos expressly overruled two prior decisions of this Court which had determined that the Sixth Amendment did not require unanimity of jury verdicts in felony criminal cases before State courts. Because of this, the holding of *Ramos* constitutes a new rule of criminal procedure which is generally not retroactive to cases in collateral review.

Further, the new rule announced in *Ramos* does not comply with the requirements established by this Court for retroactivity of a new procedural rule. First, it is clear that the rule is procedural, rather than substantive in nature, because it only regulates the manner of determining the defendants' culpability. Second, it is not a "watershed" rule of procedure because convictions reached by non-unanimous juries do not

present an impermissibly large risk of inaccurate convictions.

The reliance interest of the Commonwealth of Puerto Rico in the finality of its criminal convictions is great. A decision that the rule established in *Ramos* is retroactive would severely disrupt Puerto Rico's justice system, flooding it with cases which would likely result in new trials that would be hampered by lost evidence and loss of memory by witnesses. Further, it would seriously harm the victims of the criminal acts which had led to those convictions.

ARGUMENT

I. The Commonwealth of Puerto Rico shares the same reliance interests of the states of Louisiana and Oregon in the finality of its judgments in criminal cases.

The Commonwealth of Puerto Rico was not mentioned in this Court's opinions in *Ramos*, except for one sentence in the dissenting opinion by Justice Alito. This may lead to the erroneous perception that the holding of *Ramos* does not affect criminal cases in Puerto Rico. In reality, if this Court holds that its decision in *Ramos* is retroactive to criminal cases in collateral review, Puerto Rico would also be adversely affected. Therefore, it is important to briefly establish the reality of the legal status of Puerto Rico and its treatment of nonunanimous jury verdicts.

Puerto Rico has been a territory of the United States since 1898. *Puerto Rico v. Sánchez Valle*, 579 U.S. ___, 136 S. Ct. 1863, 1868 (2016). Since then, Congress has been tasked with determining "[t]he civil rights and political status of its inhabitants". *Id.*; *quoting* Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. In 1900, Congress enacted an Organic Act (Foraker Act) in which it established a civil government for Puerto Rico which, *inter alia*, established a lower house elected by Puerto Ricans and allowed the Puerto Rico legislature to enact local laws. *Id.* In 1917, Congress enacted another Organic Act (Jones Act), in which, *inter alia*, it granted United States citizenship to inhabitants of Puerto Rico and allowed them to elect the members of the Senate. *Id*. Consequently, all persons born in Puerto Rico since 1917 are born as citizens of the United States. *Igartua de la Rosa v. United States*, 229 F.3d 80, 86 (1st Cir. 2000) (Torruella, J., concurring); see also 8 U.S.C. § 1402.

In Section 178 of the Puerto Rico Code of Criminal Procedure, effective on July 1, 1902, the Puerto Rico legislature provided a statutory right to trial by jury in felony cases, conditioned on timely request by the accused. *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 619 (1st Cir. 1956). In 1948, Puerto Rico enacted Law Number 11 of August 19, 1948, which changed the previous unanimity requirement, and provided that criminal cases were to be tried before a jury of twelve persons, requiring the concurrence of at least nine of them to reach a guilty verdict. *Pueblo v. Figueroa Rosa*, 112 D.P.R. 154, 160, 12 Offic. Trans. 186, 194 (1982).

The purpose of the adoption of this rule was "to prevent having the isolated actions of a single juror thwart the unanimity of the verdict and quash the effort and team work of the jury". *Id.*

In 1950, Congress approved Public Law 600, which authorized the people of Puerto Rico to "organize a government pursuant to a constitution of their own adoption", but reserved for itself the ultimate right of approval of this constitution. *Sánchez Valle*, 136 S. Ct. at 1868, *quoting* Act of July 3, 1950, 64 Stat. 319[1]. In accordance to the process set by Congress, Puerto Ricans first voted to accept Public Law 600, then a constitutional convention drafted a constitution, which was later approved by Puerto Rican voters. *Id*., at pp. 1868-1869. Congress then reviewed and amended certain parts of the draft constitution before approving it, and the document became final once the convention formally accepted Congress' conditions and the Puerto Rico governor issued a proclamation to that effect. *Id*., at p. 1869.

Among the provisions Congress approved when examining the draft of Puerto Rico's Constitution was nonunanimous jury verdicts in criminal cases. Article II, § 11, subsection 2 of the Puerto Rico Constitution provides as follows:

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[1] It must be emphasized that, in this process, Congress always acted in the exercise of its plenary powers over the territory of Puerto Rico, granted by the Territory Clause of the United States Constitution. *Id*., at pp. 1875-1876; U.S. Const. Art. IV, § 3, cl. 2.

> In all prosecutions for a felony the accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine.

In a series of decisions known as the *Insular Cases*, this Court had held, *inter alia*, that only fundamental rights apply to unincorporated territories on their own force, and that the right to trial by jury protected by the Sixth Amendment was not fundamental[2]. *Downes v. Bidwell*, 182 U.S. 244, 282-283 (1901); *Dorr v. United States*, 195 U.S. 138, 148-149 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 304-305 (1922). However, in *Duncan v. Louisiana*, 391 U.S. 145, 157-158 (1968), this Court held that the right to trial by jury in felony cases is a fundamental right. Therefore, the holding to the contrary in the *Insular Cases* and *Balzac* became ineffective insofar as the right to jury trial is concerned, and such right is obligatory upon all the territories of the United States.

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[2] The Commonwealth of Puerto Rico asserts that it believes that Puerto Ricans, as United States citizens, are entitled to equal treatment in all respects as the citizens of the United States who reside in the States. Therefore, the statements made in this *amicus curiae* brief regarding its status as an unincorporated territory merely have the purpose of establishing the historical and legal background relevant to this case and do not constitute an endorsement of such inferior status, the incorporation doctrine or the *Insular Cases*, all of which the Commonwealth strongly objects.

As a result of the decision in *Ramos*, which determined that the requirement of unanimous jury verdicts for convictions was a fundamental right protected by the Sixth Amendment, the Supreme Court of Puerto Rico entered an opinion in *Pueblo v. Torres-Rivera*, 204 D.P.R. __, 2020 TSPR 42 (May 8, 2020)[3]. In this decision, the Puerto Rico Supreme Court determined that this Court's decision in *Ramos* applied to Puerto Rico, thus making obligatory that guilty verdicts in felony criminal cases tried by jury be reached unanimously. Like this Court in *Ramos*, the Puerto Rico Supreme Court in *Torres-Rivera* also held that this rule is to be applied retroactively to all criminal cases pending in direct review, and left for another case the question of whether this new rule should be applied retroactively to cases which had become final.

In light of the above, it is clear that the Commonwealth of Puerto Rico is in the same situation as that of the states of Louisiana and Oregon, has the same interest in the finality of its criminal convictions and will be affected in the same manner by the decision that this Court reaches in the present case.

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[3] An official translation in the English language of this opinion is included as an Appendix to this brief.

II. The holding of this Court in *Ramos* established a new rule of criminal procedure and therefore does not have retroactive effect on criminal cases in collateral review.

In the plurality opinion of this Court in *Teague v. Lane*, 489 U.S. 288 (1989), this Court adopted a rule for determining whether a newly-recognized rule of criminal procedure is retroactive to cases in collateral review. This rule has been used ever since. Under *Teague*, the first question to be resolved is whether the rule announced by the Court is new, since an old rule applies both on direct and collateral review. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). A new rule is defined as "a rule that . . . was not *dictated* by precedent existing at the time the defendant's conviction became final". *Id*., quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

In this case, it is clear that the holding of this Court in *Ramos* established a new rule. To establish that the Sixth Amendment requires that jury verdicts in criminal cases be unanimous, this Court had to overrule the cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). This Court has stated clearly that "[t]he explicit overruling of an earlier holding no doubt creates a new rule". *Whorton*, 549 U.S. at 416, quoting *Saffle*, 494 U.S. at 488.

Further, even if there could be any doubt that the overruling of *Apodaca* and *Johnson* by itself establishes that *Ramos* created a new rule, the fact is that,

before *Ramos*, no holding of this Court *dictated* that jury verdicts in State criminal cases had to be unanimous. Indeed, it was not until *Duncan* was decided in 1968 that a trial by jury in felony cases is a fundamental Sixth Amendment right obligatory upon the States. Although *Apodaca* and *Johnson* were severely criticized, and eventually overruled in *Ramos*, this Court did not decide conclusively that these cases did not constitute precedent upon which the States, and territories, could rely upon to establish rules of criminal procedure providing for nonunanimous verdicts.

In the particular case of Puerto Rico, it is clear that the rule established in *Ramos* is new. As the Commonwealth has shown previously, the draft prepared by its constitutional convention and submitted to Congress in 1952 contained the nonunanimous jury verdict provision for criminal cases. Pursuant to Public Law 600, the President had to review this draft and determine that it conforms with the Constitution of the United States before submitting it to Congress. 48 U.S.C. § 731d. Congress further examined this draft and made various corrections, which did not alter the provision for nonunanimous jury verdicts. *Sanchez-Valle*, 136 S. Ct. at 1869. The approval of Puerto Rico's Constitution by the Federal Government clearly indicates that, by 1952, the political branches of government did not understand that the right to a unanimous jury verdict in criminal cases was binding on Puerto Rico.

Furthermore, between *Duncan*, which in 1968 held that the Sixth Amendment right to a jury trial in criminal cases was fundamental, and thus obligatory

upon the States and Puerto Rico, and *Ramos*, there is not a single precedent dictating that unanimous jury verdicts were a fundamental right applicable to Puerto Rico. The only precedents of this Court on that question were *Apodaca* and *Johnson*, decided in 1972. Moreover, the United States Court of Appeals for the First Circuit, after 1952, decided consistently that the nonunanimous jury verdict provision in the Puerto Rico Constitution did not violate the Sixth Amendment. *Torres v. Delgado*, 510 F.2d 1182, 1183 (1st Cir. 1975); *Fournier v. González*, 269 F.2d 26, 28-29 (1st Cir. 1959).

Finally, the "new rule" principle serves to "validat[e] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions". *Whorton*, 549 U.S. at 417, quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372-373 (1993). There is no question that the Commonwealth of Puerto Rico's assumption of the correctness of the holding of *Apodaca* and *Johnson* was reasonable, given the historic events described in this brief.

Since the question in this case involves criminal cases on collateral review, and the rule announced by this Court in *Ramos* is clearly a new rule, it applies to all criminal cases still pending on direct review, in which the defendant is similarly situated as in *Ramos*. *Whorton*, 549 U.S. at 416. However, a new rule is retroactive to collateral review cases only if (1) the rule is substantive; or (2) the rule is a "watershed" rule of criminal procedure implicating the fundamental

fairness and accuracy of the criminal proceeding. *Id*. For the reasons set forth below, the Commonwealth asserts that the rule established in *Ramos* does not comply with either requirement.

III. The rule established in *Ramos* is neither a substantive rule nor a "watershed" procedural rule, and is therefore not retroactive to criminal cases on collateral review.

In *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004), this Court explained the analysis to be applied to new rules established in criminal cases, as follows:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987). As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, see *Bousley v. United States*, 523 U.S. 614, 620-621, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, see *Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S. Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Such rules apply retroactively because they

"necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley, supra*, at 620, 118 S. Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S. Ct. 2298, 41 L.Ed.2d 109 (1974)).

New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle, supra*, at 495, 110 S. Ct. 1257 (quoting *Teague*, 489 U.S., at 311, 109 S. Ct. 1060 (plurality opinion)). That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." *Id.*, at 313, 109 S. Ct. 1060 (emphasis added). This class of rules is extremely narrow, and "it is unlikely that any . . . 'ha[s] yet to emerge.'" *Tyler v. Cain*, 533 U.S. 656, 667, n. 7, 121 S. Ct. 2478, 150 L.Ed.2d 632 (2001) (quoting *Sawyer v. Smith*, 497 U.S. 227, 243, 110 S. Ct. 2822, 111 L.Ed.2d 193 (1990)).

Under these definitions, the new rule announced in *Ramos* is not substantive. A substantive rule "set[s] forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose". *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016). In *Montgomery*, for example, this Court held that its decision in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), that mandatory life sentence without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments, constituted a substantive rule of constitutional law. *Montgomery*, 136 S. Ct. at 736.

The rule established in *Ramos*, however, does not make any behavior not punishable by criminal law or eliminate an unconstitutional punishment. Rather, it is a rule "that regulate(s) only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353. As such, the rule established in *Ramos* is procedural, not substantive.

As a procedural rule, *Ramos* may only have retroactive effect upon cases on collateral review if it constitutes a "watershed rule". To qualify as watershed, a new rule must meet two requirements. First, it must be necessary to prevent an "impermissibly large risk" of an inaccurate conviction. Second, it must alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Whorton*, 549 U.S. at 418, quoting *Schriro*, 542 U.S. at 356.

The "watershed rule" exception is, however, "very narrow". *Whorton*, 549 U.S. at 417, quoting *Schriro*, 542 U.S. at 352. In no case after *Teague* has a new rule been determined to be watershed. The only case which has been identified as qualifying under this exception is *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which this Court held that counsel must be appointed for any indigent defendant charged with a felony. *Whorton*, 549 U.S. at 419.

In *Gideon*, the defendant, who was convicted of a felony, was an indigent person who requested the appointment of counsel, but the trying court denied his request because, at that time, Florida law only provided for assignment of counsel in capital cases. *Gideon*, 372 U.S. at 336-337. In *Betts v. Brady*, 316 U.S. 455 (1942), the Court had decided that a state's refusal to assign counsel for indigent defendants charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment. However, in *Gideon*, this Court overruled *Betts*. *Id.* at 339. It stated that a defendant's need for a lawyer permeates the entire criminal procedure, in the following words:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the

> moving words of Mr. Justice Sutherland in *Powell v. Alabama*:
>
> '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 have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' *Gideon*, 372 U.S. at 344-345, quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

The language quoted above explains the difference between a "watershed" rule and one that is not. The right of indigent persons to counsel affects the entire procedure in criminal cases. Lack of counsel deprives the ordinary defendant of his ability to defend himself and properly exercise his right to be heard. The risk of an inaccurate verdict in such a case is "intolerably high". *Whorton*, 549 U.S. at 419.

The watershed rule established in *Gideon* is a far cry from the one established in *Ramos*. In essence, the *Ramos* rule establishing that unanimous jury verdicts are a fundamental right under the Sixth Amendment is directed to regulating the manner of determining the defendant's culpability. The reach of this rule is nowhere near that of the rule announced in *Gideon*, which affects practically the entire criminal process, not just the verdict. In its opinion in *Schriro*, this Court determined that trials in which a judge determined culpability do not present an "impermissibly large risk" of an inaccurate conviction. *Schriro*, 542 U.S. at 355-356.

Further, in *Schriro*, 542 U.S. at 353-354, this Court held that the decision of *Ring v. Arizona*, 536 U.S. 584 (2002) was not retroactive to cases on collateral review. In *Ring*, this Court decided that, because Arizona law made certain findings of fact essential to apply the death penalty, those facts must be found by a jury. In determining that the rule of *Ring* was not a "watershed rule", in *Schriro*, 542 U.S. at 356-357, this Court stated the following:

> Our decision in *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), is on point. There we refused to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States. While *DeStefano* was decided under our pre-*Teague* retroactivity framework, its reasoning is germane. We noted that, although "the right to jury trial generally tends to prevent arbitrariness and

> repression[,] . . . '[w]e would not assert . . . that every criminal trial-or any particular trial-held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" 392 U.S., at 633-634 (quoting *Duncan, supra*, at 158). We concluded that "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S., at 634. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.

The same reasoning applies in this case. A conviction decided by nine out of twelve jurors may not present a higher risk of inaccuracy than a conviction decided by one judge. If the right to trial by jury does not constitute a "watershed rule", certainly the right to a unanimous verdict by a jury, which is more limited than the right to trial by jury, may not be "watershed".

In light of the above, the Commonwealth asserts that the procedural rule announced in *Ramos* does not comply with any of the requirements established in *Teague* to have retroactive effect on cases in collateral review.

IV. The reliance interests of the Commonwealth of Puerto Rico favor a decision that the rule established in *Ramos* is not retroactive to cases on collateral review.

In *Lockhart v. Fretwell*, 506 U.S. 364, 372-373 (1993), this Court stated that *Teague*'s retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions and the recognition that they should not be penalized for relying on the constitutional standards prevailing at the time the original proceedings took place, and validates reasonable interpretations of those precedents even if they are shown to be contrary to later decisions. Therefore, the reliance interests of the States in the finality of their criminal convictions is possibly accounted for in the *Teague* test, which, as shown before, mandates the nonretroactivity of this Court's holding in *Ramos*[4]. Nevertheless, it is important to point out the adverse effects that retroactivity would have on the integrity of the criminal process in Puerto Rico.

First, the effect of retroactivity on the States' and Puerto Rico's procedure in criminal cases cannot be simply dispatched by making reference to the limiting provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), see 28 U.S.C. §§ 2244, 2254. This may affect the number of habeas petitions that reach the federal courts, but AEDPA requires exhaustion of State court remedies before a federal court

[4] In *Ramos*, a plurality stated that in this case, the reliance interests of States in the finality of their criminal convictions will be rightly taken into account. *Id*., 140 S. Ct. at 1407 (Gorsuch, J.).

may assert its jurisdiction of a habeas petition. 28 U.S.C. § 2254(b). In *Montgomery v. Louisiana*, 136 S. Ct. at 729, this Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." Further, although the Court in *Montgomery* did not resolve whether a "watershed" rule would have the same effect on State collateral review proceedings, the possibility is still open.

Therefore, if this Court decides that the rule established in *Ramos* is substantive, the Puerto Rico courts would likely have to apply *Ramos* retroactively in collateral review, and would probably have to reopen all criminal cases in which the defendant was found guilty by a nonunanimous jury. It is impossible to determine how many cases may fall under this category, but, given that in Puerto Rico there are around 9,000 inmates in prison, the cases affected may reasonably be in the hundreds, after discounting those inmates who reached a plea bargain or chose to be tried by a judge[5].

Because the *Ramos* rule concerns the unanimity of the verdict, retroactivity of that decision would

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[5] The Commonwealth notes that even these persons have already begun filing cases before Puerto Rico courts asking that their convictions be reversed in light of *Ramos*. Therefore, a finding that *Ramos* is retroactive would cause an avalanche of such cases which, even if lacking merit, would have to be litigated, placing even more stress on an already compromised justice system.

probably force retrial of hundreds of cases in which the convictions may be years, or even decades, old. All these cases would be hampered by problems of lost evidence, faulty memory of witnesses and missing witnesses[6]. In a substantial number of cases, new expert reports may have to be secured. Further, the sheer amount of cases could overwhelm the Puerto Rico criminal justice system, which is already stretched thin by pending criminal cases.

Finally, in all these cases, the Department of Justice, in addition to its normal prosecuting duties, complies with its statutory duties pursuant to the Puerto Rico Crime Victims' Rights Act, Laws of P.R. Ann., tit. 25, § 973a. These duties include the protection of victims and witnesses against possible harm that may be caused by the accused and other related persons, and maintain communication with them during all the criminal proceedings. The performance of these important duties towards the victims of crime in Puerto Rico could be severely limited by the sheer volume of reopened cases.

Moreover, those persons who are victims of the criminal acts committed by the defendants, many of whom are witnesses, would have to revive their experience during the commission of those acts, suffering new harm. These victims would also have to suffer

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[6] See *Allen v. Hardy*, 478 U.S. 255, 260-261 (1986) (*per curiam*), in which this Court discussed the reliance interests of States and the possible effects of retroactive application of new criminal rules of procedure in the context of the three-factor analysis used before *Teague*.

harm from the uncertainty that a new trial would cause and the possibility that, this time, the evidence could not be sufficient to process a case that had been final for years. Further, some victims may even have to relocate for fear of reprisal from the defendant. It is perhaps the victims who would suffer the greatest harm from a finding of retroactivity in this case.

Therefore, the reliance interest of the Commonwealth of Puerto Rico in the finality of its criminal convictions is yet another contributing factor favoring a determination that this court's decision in *Ramos*, that a unanimous jury verdict is a fundamental right protected by the Sixth Amendment and binding upon the States, and also upon Puerto Rico, is not retroactive to criminal cases on collateral review.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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