REVIVING *TEAGUE*'S "WATERSHED" EXCEPTION

When the Supreme Court announces a new constitutional rule, that holding applies retroactively to a criminal defendant's case if her conviction is not yet final.[1] Defendants whose cases are on collateral review, however, are not entitled to the same benefit of retroactivity. Instead, under *Teague v. Lane*,[2] a "new rule" generally does not apply retroactively on collateral review.[3] There are two exceptions to the bar on retroactivity in collateral review proceedings: first, for substantive rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe;"[4] and second, for "watershed rules of criminal procedure."[5] Although the Court has announced rules that fit within *Teague*'s substantive exception,[6] it has "never found a rule that fits [the watershed exception]."[7]

This Note focuses on the Court's evolving habeas retroactivity doctrine and, specifically, the "watershed" exception to the Court's general rule that new rules of constitutional law are not applied retroactively on collateral review. That exception was announced in *Teague*, but it has its origins in Justice Harlan's retroactivity jurisprudence of the late 1960s and early 1970s. As discussed below,

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1. Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

2. 489 U.S. 288 (1989) (plurality opinion).

3. 489 U.S. 288, 310 (1989) (plurality opinion) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

4. *Id.* at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

5. *Id.* at 311.

6. *See, e.g.*, Welch v. United States, 136 S. Ct. 1257, 1268 (2016) ("*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." (citing Johnson v. United States, 135 S. Ct. 2551 (2015))).

7. Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1337 (11th Cir. 2019).

Justice Harlan articulated two different standards for determining whether a new rule is a watershed rule: first, whether it promotes the reliability of convictions by significantly improving the pre-existing fact-finding procedures;[8] and second, whether it is "implicit in the concept of ordered liberty."[9] In Part I, I argue that this latter standard—adopted from the incorporation debates—has been discredited and is ill-suited for retroactivity purposes.

Nevertheless, the *Teague* plurality announced a rule that requires petitioners to satisfy *both* standards.[10] It also noted that only "bedrock" rules of criminal procedure will qualify.[11] In Part II, I analyze the Court's retroactivity jurisprudence since *Teague* and argue that, as a result of *Teague* and its progeny's emphasis on analogizing to "bedrock" rules like the one announced in *Gideon v. Wainwright*,[12] the watershed exception is all but a dead letter today. Moreover, the Court's justification for such a difficult standard—finality interests—is insufficient to limit retroactivity to rules as fundamental as *Gideon*'s. Indeed, one can strike a balance slightly different than the *Teague* plurality's while maintaining respect for finality interests—a balance similar to that embraced by some Founding-era jurists.

In Part III, I discuss why the Court's recent decision in *Ramos v. Louisiana*[13] invites the Court to modify the *Teague* standard. The rule announced in *Ramos*—that the Sixth Amendment's right to a jury trial requires a unanimous verdict—is fundamentally about reliability, and the finality interests at stake are lower than usual. Moreover, Justice Gorsuch's arguments in *Ramos* suggest that *Teague*

8. *See* Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (noting that "constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas").

9. *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring in the judgments in part and dissenting in part).

10. *See* 489 U.S. 288, 312 (1989) (plurality opinion) (combining *Desist*'s reliability element with *Mackey*'s standard).

11. *Id.* at 315.

12. 372 U.S. 335, 344 (1963); *see also* Saffle v. Parks, 494 U.S. 484, 495 (1990) (rejecting retroactivity of Petitioner's proposed rule in part because "it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception").

13. 140 S. Ct. 1390 (2020).

may not even be binding precedent. Accordingly, the *Ramos* decision creates a unique opportunity for the Court to minimize the impact of *Gideon* and "bedrock procedural rules" on the watershed inquiry and shift the analysis toward the reliability-enhancing nature of a rule, even if it decides that *Ramos* is not retroactive.

Indeed, not long after delivering the *Ramos* decision, the Court granted certiorari in *Edwards v. Vannoy* to resolve whether the rule announced in *Ramos* applies retroactively on collateral review. In Part IV, I discuss some of the ways in which the oral argument in *Edwards* reveals how the Justices are currently thinking about the watershed exception.

I. THE ORIGINS OF *TEAGUE*: JUSTICE HARLAN'S PUZZLING RETROACTIVITY JURISPRUDENCE

Under *Teague*, a new procedural rule is a "watershed rule" if it satisfies two requirements. First, the rule must "significantly improve the pre-existing factfinding procedures" used before and at trial.[14] The goal is reliability: the Court sought to avoid "an impermissibly large risk that the innocent will be convicted."[15] Second, the rule must be "implicit in the concept of ordered liberty."[16]

These standards were inspired by Justice Harlan's opinions in two cases. The first is his dissenting opinion in *Desist v. United States*,[17] in which Justice Harlan explained his views on retroactivity.[18] He argued first that new rules should always be applied retroactively on direct review.[19] Next, he suggested that, on collateral

14. 489 U.S. at 312 (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

15. *Id.* (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

16. *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

17. 394 U.S. 244 (1969).

18. *Id.* at 257–68 (Harlan, J., dissenting).

19. *Id.* at 258–59. At the time, new rules were not required to be applied retroactively on direct review. Instead, the Court applied a three-pronged test balancing the purpose of the new rule, the extent of reliance on the old rule by law enforcement, and "the

review, the only new rules that should be applied retroactively are those that "significantly improve the pre-existing fact-finding procedures" used before and at trial.[20] In doing so, Justice Harlan cited to Professor Paul Mishkin, a then-leading federal courts scholar.[21] Indeed, it is widely understood that Professor Mishkin's arguments strongly influenced Justice Harlan's opinions on retroactivity.[22] Accordingly, a brief discussion of Professor Mishkin's argument is warranted.

Professor Mishkin's justification for retroactively applying certain new procedural rules can be summed up in one word: reliability. In the portion of Professor Mishkin's article cited by Justice Harlan, Professor Mishkin notes that "the mere possibility, however real, that a new trial might produce a different result is not a sufficient basis for habeas corpus," and the "functions of collateral attack must thus be focused on relieving from confinements whose

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effect on the administration of justice" of applying the new rule retroactively. Stovall v. Denno, 388 U.S. 293, 297 (1967). This led to a hodge-podge of standards for retroactivity in which "certain 'new' rules are to be applied to all cases then subject to direct review, certain others are to be applied to all those cases in which trials have not yet commenced, certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred." *Desist*, 394 U.S. at 257 (Harlan, J., dissenting) (citations omitted). The Court eventually adopted Justice Harlan's position and held that, on direct review, all new rules are applied retroactively. Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

20. *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

21. *Id.* (citing Paul Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77–101 (1965)).

22. *See, e.g.*, Robert J. Jackson Jr., *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1647 (2005) ("Professor Mishkin's observations significantly influenced Justice Harlan's thinking about the problem of retroactivity."); Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After* Danforth v. Minnesota: *Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 19 (2009) (noting that Justice Harlan "relied heavily" on Professor Mishkin and "adopted nearly entirely Mishkin's analysis"); Kermit Roosevelt III, *A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CALIF. L. REV. 1677, 1685 (2007) (explaining that Justice Harlan "precisely followed" Professor Mishkin's analysis).

basis is deficient in more fundamental ways."[23] For Professor Mishkin, one of those "fundamental" deficiencies relates to the reliability of a guilty verdict. As Professor Mishkin explained, "when a constitutional guarantee is heightened or added to in a manner calculated to improve the reliability of a finding of guilt, the new interpretation essentially establishes a new required level of confidence as the condition for criminal punishment."[24] Building from this premise, Professor Mishkin argues that retroactive application of a new rule on collateral review is warranted where that rule substantially improves the *reliability* of the adjudicative process:

> [T]here is certainly substantial justification for the position that no one shall thereafter be kept in prison of whom it has not been established by processes embodying essentially that *new degree of probability that he is in fact guilty*. Valuing the liberty of the innocent as highly as we do, *earlier proceedings whose reliability* does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention. For to continue to imprison a person without having first established to the presently *required degree of confidence that he is not in fact innocent* is indeed to hold him, in the words of the habeas corpus statute, "in custody in violation of the Constitution."[25]

Justice Harlan adopted this focus on reliability. Although Justice Harlan did not quote Professor Mishkin's exact language in his *Desist* opinion, he noted that a "principal function" of habeas is to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[26] Moreover, the *Teague* plurality itself described Justice Harlan's approach in *Desist* as focusing on a similar concept, *i.e.*,

23. Paul Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 80 (1965).

24. *Id.* at 81.

25. *Id.* at 81–82 (emphases added) (quoting 28 U.S.C. § 2241(c)(3) (1965)).

26. 394 U.S. at 262 (Harlan, J., dissenting).

"accuracy."[27] Accordingly, after *Desist*, Justice Harlan's approach to retroactivity on collateral review—an approach driven primarily by Professor Mishkin's analysis—can fairly be described as focusing on reliability.

Yet, just two years later, Justice Harlan suddenly shifted course. In his partial dissent in *Mackey v. United States*, Justice Harlan argued that the watershed exception should be reserved for those new rules that are "implicit in the concept of ordered liberty."[28] He adopted this standard from the incorporation debates and, specifically, Justice Cardozo's opinion in *Palko v. Connecticut*.[29]

Justice Harlan gave three reasons for departing from a focus on reliability. First, he concluded that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[30] Second, he noted that new rules of criminal procedure that had been recently announced by the Court were only "marginally effective" at improving the fact-finding process and that the interest in finality outweighs the interest in applying marginal improvements retroactively.[31] Finally, Justice Harlan found it difficult to distinguish between "those new rules that are designed to improve the factfinding process and those designed principally to further other values."[32]

As noted above, the *Teague* plurality essentially combined the *Desist* and *Mackey* standards when it announced its "watershed" doctrine. In doing so, the Court suggested that the concerns Justice Harlan announced in *Mackey* could be alleviated by combining the

27. Teague v. Lane, 489 U.S. 288, 312 (1989) (plurality opinion). Although the *Desist* approach can be fairly described as one focused on "accuracy," it is more appropriate to use the term "reliability." This is because the term "reliability" is geared toward the adjudicative *process* (*i.e.*, whether the adjudicative process was reliable enough to comply with the Constitution), whereas "accuracy" improperly focuses on the adjudicative *result*—a focus that Professor Mishkin squarely and correctly rejected in his analysis.

28. 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

29. 302 U.S. 319 (1937).

30. *Mackey*, 401 U.S. at 694 (Harlan, J., concurring in the judgments in part and dissenting in part).

31. *Id.* at 694–95.

32. *Id.* at 695.

Palko standard with a focus on accuracy.[33] However, instead of attempting to reconcile the *Desist* and *Mackey* standards, the Court should have rejected Justice Harlan's *Mackey* analysis entirely. This is so for four reasons.

First, the *Palko* standard is ill-suited for retroactivity purposes. That standard was used to determine whether a particular guarantee in the Bill of Rights was incorporated by the Fourteenth Amendment and therefore applicable to the states.[34] However, as Justice Marshall explained elsewhere, *Palko* has been discredited, and a number of constitutional criminal procedure requirements were held inapplicable to the states under the *Palko* standard:

> *Palko* represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as *Betts v. Brady*, the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." It relied upon *Twining v. New Jersey*, which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. *Betts* was overruled by *Gideon v. Wainwright*; *Twining*, by *Malloy v. Hogan*. *Palko*'s roots had thus been cut away years ago.[35]

Even the *Teague* plurality recognized that *Palko*, in itself, was not the right test for retroactivity: "[w]ere we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. . . . Reviving the *Palko* test now, in this area of law, would be

33. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) ("We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial.").

34. *See Palko*, 302 U.S. at 325 (explaining that rights are valid against the states if they are "implicit in the concept of ordered liberty").

35. Benton v. Maryland, 395 U.S. 784, 794–95 (1969) (citations omitted) (quoting Betts v. Brady, 316 U.S. 455, 462 (1942)).

unnecessarily anachronistic."[36] Of course, the *Teague* plurality did not incorporate *Palko* "without more;" instead, it combined *Palko* with the "accuracy element" from Justice Harlan's *Desist* dissent.[37] Yet, that solution does not meaningfully address the Court's concerns with *Palko* because that "anachronistic" standard remains as a hurdle to retroactivity.

Later jurisprudence further illustrates the inappropriateness of the *Palko* standard for retroactivity purposes. As demonstrated below, the post-*Teague* Court routinely analogizes to *Gideon* and the right to counsel as the quintessential watershed right.[38] But that right was not recognized until the Court decided *Gideon* in 1963—over twenty-five years *after* the Court began applying the *Palko* standard.[39] Indeed, in the case that *Gideon* overruled, the Court cited the *Palko* standard in its analysis and nevertheless *rejected* the petitioner's claim that the Fourteenth Amendment incorporated a right to counsel against the states.[40] In other words, the only watershed right the Court has ever recognized may not actually satisfy the *Palko* standard that the Court embraced for its watershed inquiry.

Second, Justice Harlan's rejection of reliability as a goal of habeas was misguided. In arguing that habeas is not designed to "inquire whether a criminal convict did in fact commit the deed alleged,"[41] Justice Harlan confused constitutionally required reliability—the goal of Professor Mishkin's retroactivity analysis—with the accuracy of a conviction (*i.e.*, actual innocence).[42] Professor Mishkin's

36. *Teague*, 489 U.S. at 312 (plurality opinion).

37. *Id.*

38. *See infra* Part II.

39. *See Palko*, 302 U.S. at 325.

40. *Betts*, 316 U.S. at 462 nn.10–11, 471–72.

41. Mackey v. United States, 401 U.S. 667, 694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

42. Although reliability is one goal of the habeas procedure, the Court has never recognized a free-standing "actual innocence" claim that would allow a prisoner to be released if she can demonstrate she is actually innocent. Herrera v. Collins, 506 U.S. 390, 404–05 (1993). Instead, actual innocence is only relevant to overcoming a procedural default. A petitioner who procedurally defaulted on a constitutional claim can

emphasis on reliability was not intended to allow free-standing actual innocence claims. Indeed, he expressly and correctly rejected that notion: "[H]abeas corpus should only inquire into the reliability of the earlier process of guilt-determination, rather than seek to determine the fact of guilt itself."[43]

Instead, Professor Mishkin focused on the ways in which new rules of criminal procedure can promote accuracy in such a way that they render any prior guilty verdict *constitutionally unreliable*. Professor Mishkin noted that rules of criminal procedure collectively express "that degree of confidence that a man has committed a crime which the *Constitution requires* as a condition of the state's depriving him of liberty or life."[44] Noting that reliability must be measured by "current constitutional standards," he explained why a focus on reliability implicates the Constitution in the habeas context: "[T]o continue to imprison a person without having first established to the presently required degree of confidence that he is not in fact innocent is indeed to hold him, in the words of the habeas corpus statute, 'in custody in violation of the Constitution.'"[45] In other words, Professor Mishkin was not arguing that certain rules should be applied retroactively in order to determine whether a petitioner was actually innocent—*i.e.*, to determine whether the *result* at trial was correct. Rather, he was arguing that certain rules should be applied retroactively because, absent the rule, the *process* resulting in the petitioner's guilty verdict cannot be considered reliable enough to comply with the Constitution.

Justice Harlan should have recognized this distinction. Indeed, he began his retroactivity analysis in *Mackey* by focusing on defective trials, not results: "I start with the proposition that habeas lies to inquire into *every constitutional defect in any criminal trial*, where the petitioner remains 'in custody' because of the judgment in that

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overcome that default if she demonstrates actual innocence, but she will still have to prevail on her constitutional claim to overturn her conviction. *See* House v. Bell, 547 U.S. 518, 555 (2006).

43. Mishkin, *supra* note 23, at 86.

44. *Id.* at 81 (emphasis added).

45. *Id.* at 82 (quoting 28 U.S.C. § 2241(c)(3) (1965)).

trial."[46] Even Justice Harlan's *Desist* opinion reflected this distinction between process and result: he argued that rules should be held retroactive if they "significantly improve the pre-existing fact-finding *procedures*" or, put another way, "substantially affect the fact-finding *apparatus* of the original trial."[47]

Third, Justice Harlan's concern that some new rules of criminal procedure only marginally improve reliability does not justify outright rejecting reliability as a standard for retroactivity. To be fair, his concern is not without merit: in some sense, every rule of criminal procedure promotes reliability.[48] Accordingly, if *any* improvement in reliability is the standard by which a new procedural rule is deemed retroactive on collateral review, then every new rule should be held retroactive. This would improperly contravene any interest the states have in the finality of convictions.[49]

However, as discussed below,[50] finality concerns do not warrant a complete rejection of reliability as a standard for retroactivity. Instead, they simply suggest limiting retroactivity to the very rules that Justice Harlan focused on in *Desist*: those without which there is an "impermissibly large risk" that a guilty verdict is unreliable.[51] Indeed, that is precisely how the *Teague* plurality addressed Justice Harlan's concern: by "limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished."[52]

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46. 401 U.S. at 685 (Harlan, J., concurring in the judgments in part and dissenting in part) (emphasis added).

47. 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (emphases added).

48. *See* Mishkin, *supra* note 23, at 80 ("Most constitutional requirements defining due criminal process have as their prime if not sole objective [the] goal of insuring the reliability of the guilt-determining process." (quoting Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957))).

49. *See* Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) (noting that retroactivity exceptions must recognize that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system").

50. *See infra* text accompanying notes 89–109.

51. 394 U.S. at 262 (Harlan, J., dissenting).

52. 489 U.S. at 313 (plurality opinion).

Finally, Justice Harlan's concern that it is often difficult to distinguish between "rules that are designed to improve the factfinding process and those designed principally to further other values"[53] is unpersuasive. Professor Robert Jackson Jr. suggested that this rationale revealed "a concern that retroactivity might hinge on the subjective value preferences of a majority of the Justices of the Court."[54] Yet, there is arguably no standard more at the whim of the Justices' subjective value preferences than "implicit in the concept of ordered liberty."[55]

One is left wondering why, despite these flaws, Justice Harlan abandoned his focus on reliability and embraced the *Palko* standard in *Mackey*. While it is impossible to determine with certainty, one potential motive is that Justice Harlan was dissatisfied with the Court's expansion of the scope of habeas in recent years, and he saw an opportunity to narrow that scope by limiting retroactivity.[56] Indeed, Justice Harlan had vigorously dissented from the Court's expansion of habeas in *Fay v. Noia*—a landmark case that greatly expanded the scope of federal habeas—and described the Court's holding there as "one of the most disquieting that the Court has rendered in a long time."[57] And in both *Mackey* and *Desist*, Justice Harlan continued to criticize the Court's expansion of habeas, noting in the latter that he "continue[d] to believe that *Noia* . . . constitutes an indefensible departure both from the historical principles which defined the scope of the 'Great Writ' and from the principles of federalism which have formed the bedrock of our constitutional

53. Mackey v. United States, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

54. Jackson, *supra* note 22, at 1649.

55. *See, e.g.*, Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 858 (2013).

56. Lasch, *supra* note 22, at 20–21 (arguing that Justice Harlan was "frustrated" with the Court's expansion of habeas and "sought to achieve a restriction of the writ via the retroactivity problem").

57. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

development."[58]

Regardless of why Justice Harlan suddenly shifted course from the *Desist* standard to the *Mackey* standard, the *Teague* plurality embraced both.[59] It also included language suggesting that a watershed rule is one that "alter[s] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[60]

Professor Jackson suggests that the *Teague* plurality intended for the *Desist* standard to be the primary focus in the watershed inquiry. Specifically, he argues that the Court "resisted a return to an indeterminate jurisprudence of unknown jurists' substantive values" and made accuracy, instead of the *Mackey* standard, the "touchstone" of the watershed inquiry.[61]

However admirable Professor Jackson's attempt to read *Mackey* out of *Teague* may be, it is not supported by the Court's opinion. Nowhere in the opinion does the Court suggest that *Desist*'s reliability element deserves primacy in the watershed analysis. In fact, in applying its new standards to the *Teague* petitioner's proposed rule, the Court's conclusion suggests that the touchstone is, in fact, the *Mackey* standard: "An examination of our decision in *Taylor* applying the fair cross section requirement to the jury venire leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'"[62]

But one need not look solely at the *Teague* opinion to refute Professor Jackson's claim. The three decades since *Teague* demonstrate

58. Desist v, U.S., 394 U.S. 244, 262 (1969) (Harlan, J., dissenting); *see also Mackey*, 401 U.S. at 685 (Harlan, J., concurring in the judgments in part and dissenting in part) (noting that he "consistently protested a long course of habeas decisions in this Court which, I still believe, constitute an unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system").

59. *See* 489 U.S. 288, 312 (1989) (plurality opinion) (combining *Desist*'s reliability element with *Mackey*'s standard).

60. *Id.* at 311.

61. Jackson, *supra* note 22, at 1651–52.

62. *Teague*, 489 U.S. at 315 (plurality opinion).

that the *Mackey* standard and the Court's emphasis on "bedrock procedural elements" are front and center in the watershed inquiry.

II. A DEAD LETTER: EXPLAINING THE COURT'S "WATERSHED" JURISPRUDENCE SINCE *TEAGUE*.

Today, the watershed exception to *Teague* is all but a dead letter. Since *Teague* was decided, the Court has addressed whether a particular new rule is a watershed procedural rule in thirteen different cases; in each case, "watershed" status was rejected.[63] In analyzing these cases, Professor Jackson suggests that the Court's post-*Teague* jurisprudence emphasizes accuracy rather than the *Palko* standard.[64] He goes so far as to suggest that "the few doctrinal hurdles to discarding *Mackey*'s unhelpful reference to the incorporation debate might easily be overcome."[65] To the contrary, however, *Teague*'s progeny routinely apply the *Palko* standard, cite "bedrock procedural elements," and reference *Gideon*. As a result, the Court sets the bar for retroactivity so high that no procedural rule can satisfy it—no matter how much the rule improves the reliability of the

63. *See, e.g.*, Butler v. McKellar, 494 U.S. 407, 416 (1990) (rejecting retroactive application of Arizona v. Roberson, 486 U.S. 675 (1988)); *Saffle* v. Parks, 494 U.S. 484, 495 (1990) (rejecting retroactive application of Petitioner's proposed new rule); Sawyer v. Smith, 497 U.S. 227, 245 (1990) (rejecting retroactive application of Caldwell v. Mississippi, 472 U.S. 320 (1985)); Graham v. Collins, 506 U.S. 461, 477–78 (1993) (rejecting retroactive application of Petitioner's proposed new rule); Gilmore v. Taylor, 508 U.S. 333, 345–46 (1993) (rejecting retroactive application of Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990)); Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (rejecting retroactive application of Petitioner's proposed rule); Goeke v. Branch, 514 U.S. 115, 120 (1995) (rejecting retroactive application of Petitioner's proposed rule); Gray v. Netherland, 518 U.S. 152, 170 (1996) (rejecting retroactive application of Petitioner's proposed rule); Lambrix v. Singletary, 520 U.S. 518, 539 (1997) (rejecting retroactive application of Espinosa v. Florida, 505 U.S. 1079 (1992)); O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (rejecting retroactive application of Simmons v. South Carolina, 512 U.S. 154 (1994)); Schriro v. Summerlin, 542 U.S. 348, 355–58 (2004) (rejecting retroactive application of Ring v. Arizona, 536 U.S. 584 (2002)); Beard v. Banks, 542 U.S. 406, 420 (2004) (rejecting retroactive application of Mills v. Maryland, 486 U.S. 367 (1988)); Whorton v. Bockting, 549 U.S. 406, 421 (2007) (rejecting retroactive application of Crawford v. Washington, 541 U.S. 36 (2004)).

64. Jackson, *supra* note 22, at 1663 (suggesting that the Court's post-*Teague* jurisprudence is consistent with an approach emphasizing the reliability of the proceedings).

65. *Id.* at 1656.

adjudicative process.

This trend in the Court's post-*Teague* jurisprudence was not inevitable. The year after *Teague* was decided, the Court rejected three claims that a newly announced procedural rule deserved watershed status. However, in doing so, the Court focused on whether the rule promoted reliability. For example, in *Butler v. McKellar*,[66] the Court held that a rule barring police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation did not satisfy *Teague*'s watershed exception because a violation of that rule "would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood."[67] In *Saffle v. Parks*,[68] decided the same day as *Butler*, the Court held that the defendant's proposed rule—that the jury be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence—could not be applied retroactively because "fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn . . . on whether the defendant can strike an emotional chord in a juror."[69] The *Saffle* Court mentioned *Gideon* only briefly, noting that "[w]hatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception."[70] Thus, the impact of the *Palko* standard and the *Gideon* analogy on these cases was, at most, minor.

Just a few months later, that began to change. In *Sawyer v. Smith*, the Court declined to apply retroactively the rule that a sentencer may not be led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.[71] In doing so, the Court explained that "[a] rule that qualifies under this exception must not only improve accuracy, but also 'alter our

66. 494 U.S. 407 (1990).
67. *Id.* at 416.
68. 494 U.S. 484 (1990).
69. *Id.* at 495.
70. *Id.*
71. Sawyer v. Smith, 497 U.S. 227, 245 (1990).

understanding of the bedrock procedural elements' essential to the fairness of a proceeding."[72] The Court noted that it is "unlikely that many such components of basic due process have yet to emerge."[73] This stringent two-pronged standard was necessary, the Court explained, because the *Teague* exceptions must be consistent with principles of finality.[74] The *Sawyer* Court also noted that focusing solely on reliability poses a difficult line-drawing exercise because much of the Court's capital sentencing jurisprudence "is directed toward the enhancement of reliability and accuracy in some sense."[75] Professor Jackson suggests that *Sawyer* could be read narrowly such that the *Palko* standard and "bedrock" requirement only deny retroactivity on their own force when "the petitioner, by the very nature of his constitutional claim, must *concede* that the new rule is not essential to the fairness of the proceeding."[76] He points to language in the Court's opinion noting that the petitioner conceded that the constitutional error was harmless.[77]

However, later cases undermine that reading of *Sawyer*. Indeed, *Sawyer* marked the beginning of a string of cases in the Court's watershed jurisprudence—none of which involved a petitioner's concession of harmless error—in which *Desist*'s reliability element was virtually ignored. In *Gilmore v. Taylor*,[78] the Court declined to apply retroactively a rule that required jury instructions to include clear instructions about an affirmative defense because the rule did not

72. *Id.* at 242 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion)).

73. *Id.* (quoting *Teague*, 489 U.S. at 313 (plurality opinion)).

74. *See id.* ("The scope of the Teague exceptions must be consistent with the recognition that '[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.' The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.'" (alterations in original) (citations omitted) (quoting *Teague*, 498 U.S. at 309 (plurality opinion); Solem v. Stumes, 465 U.S. 638, 654 (1984) (opinion of Powell, J.))).

75. *Id.* at 243.

76. Jackson, *supra* note 22, at 1655.

77. *Id.* (citing *Sawyer* v. Smith, 497 U.S. 227, 243–44 (1990)).

78. 508 U.S. 333 (1993).

satisfy the *Palko* standard.[79] The Court did not even mention the reliability component of the watershed inquiry. Similarly, in *Gray v. Netherland*,[80] the Court rejected the argument that the petitioner's proposed rule—that defendants be given more than one day's notice of the state's evidence—was a watershed rule, and it did so based solely on an analogy to *Gideon*: "Whatever one may think of the importance of [Petitioner's] proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception."[81] The Court applied the same reasoning yet again in *O'Dell v. Netherland*, rejecting retroactive application of a rule because it was not on par with *Gideon*.[82] Finally, in *Lambrix v. Singletary*,[83] the Court noted simply that the reasoning in *Sawyer* foreclosed the possibility that the procedural rule at issue was a watershed.[84] Although the Court mentioned the reliability element of the watershed inquiry in a handful

79. *Id.* at 345 ("Although the *Falconer* court expressed concern that the jury might have been confused by the instructions in question, we cannot say that its holding falls into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." (alteration in original) (quoting Graham v. Collins, 506 U.S. 461, 478 (1993))).

80. 518 U.S. 152 (1996).

81. *Id.* at 170 (second alteration in original) (quoting *Saffle* v. Parks, 494 U.S. 484, 495 (1990)).

82. 521 U.S. 151, 167 (1997) ("Unlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly 'alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." (alteration in original) (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990))). Professor Jackson suggests that the *O'Dell* Court "indicat[ed] that the rule's ambiguous effect on accuracy provided an alternative basis for the Court's holding." Jackson, *supra* note 22, at 1654. Specifically, he points to a footnote in the Court's retroactivity analysis in which the Court states, "[i]t is by no means inevitable that, absent application of the rule of *Simmons*, 'miscarriages of justice' will occur." *Id.* (quoting *O'Dell*, 521 U.S. at 167 n.4). However, that language was a rejection of Petitioner's suggestion that the *Simmons* rule operates to prevent miscarriages of justices in the same way the *Gideon* rule did. *See id.* In other words, that language simply reflects the Court's finding that that *Simmons* rule is unlike *Gideon*—once again demonstrating the substantial weight that the *Gideon* analogy carries in the watershed inquiry.

83. 520 U.S. 518 (1997).

84. *Id.* at 540 ("Lambrix does not contend that [the watershed] exception applies to *Espinosa* errors, and our opinion in [*Sawyer*] makes it quite clear that that is so.").

of cases in the years immediately following *Sawyer*,[85] it did so in a conclusory manner and only alongside the *Palko* standard or "bedrock"-type language.[86]

The Court's continued reliance on "bedrock" language and the *Gideon* analogy is problematic because limiting the watershed exception to rules as sweeping as *Gideon*'s right to counsel creates an impossible hurdle—it swallows the watershed exception. Chief Justice Warren described *Gideon* as "the most important criminal procedure case his Court had decided and the third most important case of his tenure overall."[87] Legal scholars describe the *Gideon* rule as one of the most important—if not *the* most important—constitutional protections for criminal defendants.[88] It is no wonder, then, that no other rule has ever achieved watershed status: it is difficult to identify any potential rule that would alter our understanding of procedural fairness the way *Gideon* did.

Yet, that does not mean that *no* new procedural rule should ever be applied retroactively, particularly where the only interest

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85. *See, e.g.*, *Graham*, 506 U.S. at 478 (noting that denying Petitioner's proposed rule would not seriously diminish the likelihood of accurate sentencing); Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (noting that denying Petitioner's proposed rule would actually enhance reliability of proceeding); Goeke v. Branch, 514 U.S. 115, 120 (1995) (explaining that Petitioner's proposed rule "cannot be said to 'be so central to an accurate determination of innocence or guilt'" such that it qualifies for watershed status (citations omitted) (quoting *Graham*, 506 U.S. at 478)).

86. *See, e.g.*, *Graham*, 506 U.S. at 478 (noting that watershed status only applies to rules "implicit in the concept of ordered liberty" and that "it [is] unlikely that many such components of basic due process have yet to emerge"); *Caspari*, 510 U.S. at 396 (finding Petitioner's proposed rule is not a "groundbreaking occurrence"); *Goeke*, 514 U.S. at 120 (finding that Petitioner's proposed rule failed to satisfy the *Palko* standard).

87. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1390 (2004) (quoting Leonard W. Levy, INTRODUCTION TO THE SUPREME COURT UNDER EARL WARREN 3, 20 (1972)).

88. *See, e.g.*, Justin Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2487 (2013) ("*Gideon* stands as the most important constitutional protection for criminal defendants. *Gideon* is uniquely capable of protecting the innocent and promoting accuracy of result."); William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1264 (2011) (noting that *Gideon* "has become the central decision in our conception of American justice").

weighing against retroactivity is finality.[89] Indeed, even Justice Harlan's *Mackey* opinion acknowledged that other rules besides *Gideon* might warrant retroactivity: "Other possible exceptions to the finality rule I would leave to be worked out in the context of actual cases brought before us that raise the issue."[90] Although he did not identify any candidates, he never went so far as to claim—as the *Teague* plurality did—that it is "unlikely that many such components of basic due process have yet to emerge."[91] That restrictive language from *Teague* is seemingly driven by the plurality's fidelity to finality interests.[92]

"[The] Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under [28 U.S.C.] § 2254," the federal statue authorizing federal collateral review of state criminal convictions.[93] Indeed, Founding-era and other early jurists routinely noted that interests of finality and comity for state courts should not always outweigh the fundamental importance of ensuring that criminal defendants are not wrongfully deprived of liberty or life. Former Eighth Circuit Chief Judge Donald P. Lay persuasively explained those jurists' views:

> Arguments of state court finality and comity lose sight of the historical concerns of our constitutional fathers. In 1821, Chief Justice Marshall observed the Constitution did not provide the states with preeminent authority for enforcing the Constitution. He wrote: "There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the

89. *See* Sawyer v. Smith, 497 U.S. 227, 259 (1990) (Marshall, J., dissenting) ("This raw preference for finality is unjustified.").

90. 401 U.S. 667, 694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

91. Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion).

92. *See id.* at 309–10 (discussing finality interests and finding finality-based criticisms of retroactivity "persuasive"); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1041 (1993) ("The interest of state finality again spurred the change in habeas procedures [announced in *Teague*].").

93. Reed v. Ross, 468 U.S. 1, 15 (1984).

> times, which would justify the opinion that the confidence reposed in the States was so implicit, as to leave in them and their tribunals the power of resisting or undefeating [sic],[94] in the form of law, the legitimate measures of the Union." . . . Justice Rutledge [later] stated: "The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, *considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant*."[95]

Chief Judge Lay further noted that Congress authorized a federal habeas remedy despite concerns for finality. He explained that federal habeas, "by its very nature, challenges the finality of unconstitutional state court convictions. It inevitably provides 'duplication of judicial effort,' 'delay in setting the criminal proceeding at rest,' 'inconvenience' and 'postponed litigation of fact.' Notwithstanding these obvious concerns, Congress nevertheless created the remedy."[96]

Similarly, Professor Douglas Berman notes that the Constitution itself includes provisions that seemingly undermine the idea that the Framers were primarily concerned about finality. These provisions include the Suspension Clause, the Executive's pardon power, and the Court's appellate jurisdiction.[97] These elements of

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94. The correct word here should be "defeating." *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 388 (1821) ("There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.").

95. Lay, *supra* note 92, at 1025 (footnote omitted) (quoting *Cohens*, 19 U.S. (6 Wheat.) at 388; Sunal v. Large, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting)).

96. Lay, *supra* note 92, at 1045 (footnote omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Powell, J., concurring)).

97. Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 155 (2014).

the Constitution suggest the Framers sought to ensure that "criminal defendants in a new America would have various means to seek review and reconsideration of the application of governmental power even after an initial criminal conviction and sentencing."[98] Indeed, Berman argues that, "given the checks and balances built into our constitutional structure and the significant individual rights and criminal procedure protections enshrined in the Bill of Rights, one might readily conclude that the Framers were likely far more concerned with the fitness and fairness of criminal justice outcomes than with their finality."[99]

Justice Harlan also believed that finality cannot always outweigh the interest in ensuring that defendants are not wrongfully deprived of liberty or life. As noted above, he did not believe—as the *Teague* plurality did—that it is "unlikely that [any watershed rules] have yet to emerge."[100] Rather, he acknowledged that "other possible exceptions to the finality rule" may exist.[101] The phrasing there is revealing: by characterizing rules that qualify for retroactive application as "exceptions to the *finality* rule," Justice Harlan implicitly acknowledged that finality should not always outweigh the interest in ensuring a conviction is constitutionally sound. This is consistent with his statements in other cases. In *Sanders v. United States*,[102] for example, he noted that res judicata should not be strictly applied in criminal law: "The consequences of injustice—loss of liberty and sometimes loss of life—are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation."[103] And in *Mackey*, while discussing the retroactivity exception for substantive rules of criminal law, he noted that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought

98. *Id.*

99. *Id.*

100. Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion).

101. Mackey v. United States, 401 U.S. 667, 694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

102. 373 U.S. 1 (1963).

103. *Id.* at 24 (Harlan, J., dissenting).

properly never to repose."[104]

This is not to say that finality is irrelevant. Indeed, Justice Harlan also noted in *Sanders* that his views on the proper point of repose "[are] not to suggest[] that finality, as distinguished from the particular rules of res judicata, is without significance in the criminal law."[105] And as the Court explained in *Teague*:

> Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have *as much* place in criminal as in civil litigation, not that they should have *none*.[106]

Yet, finality also need not be dispositive in every case that proposes retroactive application of a procedural rule. This is particularly true in cases where the constitutional right at issue substantially improves the reliability of the adjudicative process. Indeed, the Court has expressly acknowledged that finality concerns carry less weight when a constitutional right plays a fundamental role in ensuring reliability. For example, the Court has explained that "finality concerns are somewhat weaker" in cases involving ineffective assistance of counsel claims because that claim "asserts one of the crucial assurances that the result of the proceeding is reliable."[107]

Accordingly, one can respect finality interests and nevertheless acknowledge—as Justice Harlan did—that other possible exceptions to the finality rule besides *Gideon* may in fact exist. Doing so simply requires striking a slightly different balance than that of the *Teague* plurality—one that is more consistent with the balance

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104. 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part).

105. 373 U.S. at 24 (Harlan, J., dissenting).

106. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

107. Strickland v. Washington, 466 U.S. 668, 694 (1984).

struck by Founding-era jurists.[108] And one can strike that balance by limiting retroactivity to the types of rules that Justice Harlan focused on in *Desist*: those without which there is an "impermissibly large risk" that a guilty verdict is unreliable.[109]

Unfortunately, *Teague*'s fidelity to finality and its progeny's emphasis on the *Gideon* analogy and "bedrock" language has made it impossible for the Court to strike that balance today. Indeed, it is fair to say that the Court places so much weight on the non-reliability elements of *Teague*'s watershed test that it ignores reliability outright, even where compelling arguments demonstrate that a particular rule substantially promotes the reliability of a verdict.

On this point, *Gilmore* is illustrative. The new rule in that case came from *Falconer*, in which the Seventh Circuit held that the Illinois model jury instructions were unconstitutional because they allowed a jury to return a murder verdict without considering whether the defendant's mental state would support a voluntary manslaughter verdict instead.[110] The defendant in *Gilmore* took the stand at his Illinois trial and admitted killing the victim, but claimed he was acting under a sudden and intense passion and was therefore only guilty of the lesser included offense of voluntary manslaughter.[111] In other words, he *admitted* to the murder elements in order to present an affirmative defense. Justice Blackmun compellingly argued that the jury instructions in the defendant's case—which were nearly the same as those struck down in *Falconer*—"severely diminished the likelihood of an accurate conviction" because they "prevented the jury from even *considering* the voluntary manslaughter option."[112]

However, Justice Blackmun was in dissent, and the majority did not even engage with his reliability-based arguments. Instead, in

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108. *See supra* text accompanying notes 94–99.

109. 394 U.S. 244, 262 (1969) (Harlan, J., dissenting).

110. Gilmore v. Taylor, 508 U.S. 333, 345–46 (1993) (citing Falconer v. Lane, 905 F.2d 1129, 1136 (7th Cir. 1990)).

111. *Id.* at 336.

112. *Id.* at 360 (Blackmun, J., dissenting); *see also id.* at 363 ("When the judge instructed the jurors, he effectively told them to disregard Taylor's provocation testimony.").

one sentence, the Court rejected the watershed claim because the *Falconer* rule did not satisfy the *Palko* standard.[113] Thus, the Court seemingly did not care that the *Falconer* rule substantially promoted reliability—perhaps enough to be applied retroactively.[114]

There is one case in the post-*Teague* era that exemplifies a more appropriate retroactivity analysis. In *Schriro v. Summerlin*,[115] the Court addressed whether the rule announced in *Ring v. Arizona*[116]—*i.e.*, where the law authorizes the death penalty only if an aggravating factor is present, that factor must be proved to a jury rather than to a judge[117]—applied retroactively on collateral review.[118] Writing for the Court, Justice Scalia explained that "the question is whether judicial factfinding so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[119] The Court concluded that it did not, explaining that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[120] Justice Scalia did not cite to the *Palko* standard or the language in *Teague* about "bedrock procedural elements."[121]

In dissent, Justice Breyer reached the opposite conclusion

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113. *See id.* at 345 (majority opinion) ("Although the *Falconer* court expressed concern that the jury might have been confused by the instructions in question, we cannot say that its holding falls into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." (citations omitted)).

114. Indeed, Justice Blackmun believed the rule was as important to reliability as *Gideon*: "The right to an affirmative-defense instruction that jurors can understand when there is evidence to support an affirmative defense is as significant to the fairness and accuracy of a criminal proceeding as is the right to counsel." *Id.* at 364 (Blackmun, J., dissenting).

115. 542 U.S. 348 (2004).

116. 536 U.S. 584. (2002).

117. *Id.* at 589.

118. *Schriro*, 542 U.S. at 349. *Ring* was an extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

119. *Schriro*, 542 U.S. at 355–56 (quoting Teague v. Lane, 489 U.S. 288, 312–13 (1989) (plurality opinion)).

120. *Id.* at 356.

121. *See id.*

regarding the *Ring* rule's reliability-enhancing role in capital sentencing.[122] He argued that the applicability of aggravating factors in a death case is ultimately a value judgment turning on "community-based standards"—a value judgment for which a jury is better equipped than a judge.[123] He also argued that, in capital sentencing proceedings, finality interests are "unusually weak" and the countervailing interests in "protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures" are "unusually strong."[124]

Whether one agrees with Justice Scalia or Justice Breyer, their robust debate illustrates the proper inquiry regarding retroactivity: a focus on whether a rule substantially promotes the *reliability* of a verdict or sentence. The *Schriro* approach pays respect to finality interests, limiting retroactivity only to those rules that create an "impermissibly large risk" of an unreliable verdict or sentence, as opposed to rules that increase reliability in any way, however small. In that manner, the *Schriro* approach also addresses *Sawyer*'s concern that all of the Court's capital sentencing jurisprudence "is directed toward the enhancement of reliability and accuracy in some sense."[125]

However, a reliability-based approach also rightly eliminates the *Palko* standard that, as argued above, is ill-suited for retroactivity.[126] And it allows petitioners to claim retroactivity without having to make an impossible argument: that the new rule is as "bedrock" as *Gideon*. Indeed, the *Schriro* Court did not tie itself to *Palko* or proclaim that *Ring* is not bedrock—the easy way out. Instead, the

122. Justice Breyer suggested that the majority "does not deny that *Ring*" satisfies the *Palko* standard. *See id.* at 359 (Breyer, J., dissenting). In doing so, he does not cite to the majority opinion but, rather, to opinions in other cases—including Justice Scalia's concurring opinions—suggesting that the *Ring* rule is fundamental. *See id.* He cites to those opinions, rather than the *Schriro* opinion, because the *Schriro* Court never opined on that issue one way or another. It is difficult to know whether the majority accepted Justice Breyer's characterization or if it simply considered the *Palko* standard less relevant to its inquiry.

123. *See id.* at 361–62.

124. *See id.* at 362–64.

125. Sawyer v. Smith, 497 U.S. 227, 243 (1990).

126. *See supra* text accompanying notes 34–40.

vigorous debate between Justice Scalia and Justice Breyer exemplifies the *Desist* approach. *Schriro* provided hope for a revived watershed inquiry; indeed, Professor Jackson suggested that *Schriro* might be "indicative of an emerging consensus at the Court to take seriously *Teague*'s admonition that it 'would be unnecessarily anachronistic' to import *Palko*'s analysis into retroactivity doctrine."[127]

Unfortunately, two other cases demonstrate that *Schriro* was just a brief aberration from the Court's usual post-*Teague* emphasis on analogizing to "bedrock" rules. In *Beard v. Banks*,[128] decided the same day as *Schriro*, the Court rejected retroactive application of the rule announced in *Mills v. Maryland*,[129] which prohibited capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously.[130] The Court only briefly discussed the rule's impact on reliability[131] and analogized the rule away from *Gideon* and the "bedrock" standard.[132] Later, in *Whorton v. Bockting*,[133] the Court held that its landmark decision in *Crawford v. Washington*[134] did not satisfy *Teague*'s watershed exception.[135] The Court addressed both elements of the test— the reliability element and the "bedrock" element.[136] But even when it addressed the *Crawford* rule's impact on the reliability of the factfinding process, a substantial portion of the analysis addressed why that impact "is in no

127. Jackson, *supra* note 22, at 1662 (quoting Teague v. Lane, 489 U.S. 288, 312 (1989) (plurality opinion)).

128. 542 U.S. 406 (2004).

129. 486 U.S. 367 (1988)

130. *Beard*, 542 U.S. at 408.

131. *See id.* at 419–20 (explaining that "the fact that a new rule removes some remote possibility of arbitrary infliction of the death sentence does not suffice to bring it within *Teague*'s second exception.").

132. *See id.* at 420 ("However laudable the *Mills* rule might be, 'it has none of the primacy and centrality of the rule adopted in *Gideon*.' The *Mills* rule applies fairly narrowly and works no fundamental shift in 'our understanding of the bedrock procedural elements' essential to fundamental fairness." (citations omitted)).

133. 549 U.S. 406 (2007).

134. 541 U.S. 36 (2004).

135. *Whorton*, 549 U.S. at 421.

136. *See id.* at 418–21.

way comparable to the *Gideon* rule."[137] Thus, the Court continues to frame its inquiry around *Gideon*—an impossible standard.[138]

III. *RAMOS V. LOUISIANA* AND *EDWARDS V. VANNOY*: REVIVING THE "WATERSHED" EXCEPTION

On April 20, 2020, the Court held in *Ramos v. Louisiana*[139] that the Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense.[140] Almost immediately, commentators began questioning whether the rule would apply retroactively,[141] and just two weeks later, in *Edwards v. Vannoy*,[142] the Court granted certiorari on that very question.[143]

This is not particularly surprising. Discussion about the potential retroactivity of the *Ramos* rule appeared in nearly all of the opinions

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137. *Id.* at 419.

138. A collateral consequence of the difficulty in satisfying the watershed standard is that, in order to apply procedural rules retroactively, the Court is forced to rewrite history and recharacterize those rules as "substantive." *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is illustrative. There, the Court held that the holding in *Miller v. Alabama*, 567 U.S. 460, 483 (2012)—that a sentencer must consider a juvenile defendant's youth and attendant characteristics before imposing a sentence of life without parole—was a "substantive" rule that must be applied retroactively. *Montgomery*, 136 S. Ct. at 732. However, the *Miller* Court expressly noted that its decision "does not categorically bar a penalty for a class of offenders or type of crime. . . . Instead, it mandates only that a sentencer follow a certain *process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, 567 U.S. at 483 (emphasis added). Indeed, as Justice Scalia persuasively explained in dissent, "[i]t is plain as day that the majority is not applying *Miller*, but rewriting it." *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting).

139. 140 S. Ct. 1390 (2020).

140. *Id.* at 1397.

141. *See, e.g.*, Leah Litman, *Ten Thoughts on* Ramos v. LA, TAKE CARE BLOG (Ap. 20, 2020), https://takecareblog.com/blog/ten-thoughts-on-ramos-v-la [https://perma.cc/3ZSB-8N5B] ("One big issue after Ramos will be what happens to all of the Louisiana and Oregon convictions that were obtained by non-unanimous juries?"); Josh Blackman, *5 Unanswered Questions from Ramos v. Louisiana*, VOLOKH CONSPIRACY (Apr. 21, 2020, 8:00 AM), https://reason.com/2020/04/21/5-unanswered-questions-from-ramos-v-louisiana/ [https://perma.cc/3W2Q-DX6Z] (identifying whether *Ramos* can be applied retroactively as one of *Ramos*'s unanswered questions).

142. 140 S. Ct. 2737 (2020).

143. *Id.* at 2738.

issued in the case. Justice Alito expressed concern in his dissent that "[p]risoners whose direct appeals have ended will argue that today's decision allows them to challenge their convictions on collateral review, and if those claims succeed, the courts of Louisiana and Oregon are almost sure to be overwhelmed."[144] He noted the potential issues with retrying cases, including the unavailability of key witnesses for older cases.[145]

Writing for the Court, Justice Gorsuch responded to these concerns by noting that "*Teague*'s test is a demanding one," and that any future inquiry "will rightly take into account the States' interest in the finality of their criminal convictions."[146] Justice Kavanaugh went even further in his concurring opinion and expressly rejected the notion that *Ramos* should be applied retroactively: "[A]ssuming that the Court faithfully applies *Teague*, today's decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final."[147]

As Justice Gorsuch noted, litigation about the retroactivity of *Ramos* "is sure to come."[148] When that litigation arrives at the Court, the Justices will have a unique opportunity to minimize the impact of *Gideon* and "bedrock procedural rules" on the watershed inquiry and shift the analysis toward the reliability-enhancing nature of a rule. This is so for three reasons.

First, the unanimity requirement is fundamentally about reliability. The petitioners' brief in *Ramos* illustrates this point. The petitioners identified several purposes of the unanimity requirement, including promoting public confidence in the criminal justice system, checking overzealous prosecutors, and promoting group deliberation.[149] Each of these goals ultimately *promotes* reliability or is accomplished only *by* reliability. For example, group deliberation allows jurors to "evaluate the strength of the evidence, test

144. *Ramos*, 140 S. Ct. at 1438 (Alito, J., dissenting).
145. *Id.*
146. *Id.* at 1407 (majority opinion).
147. *Id.* at 1420 (Kavanaugh, J., concurring in part).
148. *Id.* at 1407 (majority opinion).
149. Brief for Petitioner at 27–28, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

hypotheses, and challenge latent assumptions—*all in service of the search for the truth*."[150] Public confidence in the criminal justice system is promoted by unanimity because "the public considers unanimous juries *more accurate* and fair than the nonunanimous alternative."[151] And when unanimity checks overzealous prosecutors, it makes it harder to achieve a guilty verdict in questionable cases: "If a verdict could be nonunanimous, a 'zealous prosecutor would carry a *far lighter burden of persuasion*'" in contestable cases.[152] Indeed, the petitioner in *Edwards* made similar arguments to the Court in his briefing.[153]

Whether the absence of unanimity poses an "impermissibly large risk" that the innocent will be convicted is, of course, a separate question. One could argue, quite plausibly, that reliability is not substantially enhanced where the alternative to unanimity in Louisiana and Oregon was not a majority vote (say, 7-5) but a requirement of 10-2 or 11-1. In other words, one might argue that a difference of one or two jurors does not improve reliability enough to qualify for watershed status.[154]

Regardless of where one lands in that debate, however, reliability is front and center when it comes to the unanimity requirement, and that allows the Court to engage in a *Schriro*-like debate. That debate, in turn, presents the opportunity to revise the watershed framework and disavow the Court's emphasis on *Gideon* and "bedrock procedural elements."[155] The Court could still include some

150. *Id.* at 29 (emphasis added).

151. *Id.* at 33.

152. *Id.* at 28 (emphasis added) (quoting Hibdon v. United States, 204 F.2d 834, 839 (6th Cir. 1953)).

153. *See* Brief for Petitioner at 27–29, Edwards v. Vannoy, 140 S. Ct. 2737 (2020) (No. 19-5807).

154. Indeed, the respondent in *Edwards* made this argument in his brief. *See* Brief for Respondent at 30–38, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

155. Unfortunately, the petitioner in *Edwards* promotes the reliance on *Gideon* and "bedrock" procedural rules rather than critiquing it. Specifically, he argues that *Ramos* is "uniquely deserving of watershed status" because it is distinct from those rules that the Court found incomparable to *Gideon*. *See* Brief for Petitioner at 30–32, *Edwards*, 140 S. Ct. 2737 (No. 19-5807) (noting that "a *Gideon*-like rule would qualify for watershed

sort of requirement that a rule be "fundamental" or "essential." Indeed, the Court in *Ramos* described the unanimity rule in those terms throughout its opinion,[156] and Justice Harlan, too, thought that the unanimity requirement was an "essential feature" of the right to a jury trial.[157] However, any reference to such language should also emphasize that reliability is the touchstone of the inquiry.

Second, the finality interests at stake in retroactively applying *Ramos* are minimal. Although the number of individuals currently incarcerated with final convictions in Louisiana and Oregon is unclear, the fact remains that only two states have allowed non-unanimous jury verdicts since the Court upheld Oregon's system in 1972.[158] In those states, less than three percent of criminal cases ended in a jury trial, and some of those trials ended in acquittals or mistrials.[159] Thus, the potential for a deluge of reopened cases falling on state courts nationwide is less than usual.[160]

Finally—and perhaps most controversially—Justice Gorsuch's opinion in *Ramos* opened the door to treating *Teague*'s retroactivity analysis as non-binding. Specifically, Justice Gorsuch argued that the case *Ramos* overruled, *Apodaca v. Oregon*,[161] is not binding

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status" and arguing that *Ramos* "stands apart" from the rule in *Crawford* because it is more comparable to *Gideon* than *Crawford*). At no point does he suggest that the Court alter its framework or dispose of the emphasis on *Gideon* altogether.

156. *Ramos*, 140 S. Ct. at 1395–96 (noting that the unanimity requirement is a "vital right" and an "essential feature of the jury trial").

157. Baldwin v. New York, 399 U.S. 117, 127 (1970) (Harlan, J., dissenting in part and concurring in part) (explaining that one of "three essential features" of a Sixth Amendment jury is that "the verdict should be unanimous").

158. *Ramos*, 140 S. Ct. at 1398 (majority opinion).

159. *See* Brief for Petitioner at 36, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

160. *See* Litman, *supra* note 141 ("[T]he fallout from holding [*Ramos*] retroactive would be less than in many other cases, given that only Louisiana and Oregon had such a rule."). Of course, finality interests may be more paramount in future cases where a new rule would apply retroactively to fifty states rather than two. However, *Edwards* nevertheless presents an opportunity for the Court to take a first step—and perhaps not the last—toward striking a new balance in the watershed inquiry.

161. 406 U.S. 404 (1972).

precedent.[162] He explained that only four Justices in *Apodaca* found that the Sixth Amendment did not require unanimity, and the holding in the case relied on the solo opinion of Justice Powell, who believed the Sixth Amendment required unanimity but nevertheless joined the Court's judgment based on a dual-track theory of incorporation that the Court had already rejected.[163] "[T]o accept [Justice Powell's] reasoning as precedential," explained Justice Gorsuch, "would [require the Court] to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected."[164] And because a single Justice's opinion is not precedent, the case in its entirety does not supply a "governing precedent."[165]

For present purposes, this argument is relevant because the watershed inquiry announced in *Teague* only garnered four votes. Indeed, at least one circuit has noted that, under normal principles of determining what constitutes precedent,[166] the *Teague* plurality opinion is non-binding.[167] Although the Court has repeatedly applied *Teague*'s watershed inquiry as governing law, that practice would not be dispositive for Justice Gorsuch, who was seemingly unpersuaded by Justice Alito's argument in dissent that the Court

162. *Ramos*, 140 S. Ct. at 1402 (Gorsuch, J., majority opinion) ("[N]ot even Louisiana tries to suggest that *Apodaca* supplies a governing precedent.").

163. *See id.* ("Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected . . . .").

164. *Id.*

165. *Id.*

166. Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976))).

167. *See* Elortegui v. United States, 743 F. Supp. 828, 830 n.5 (S.D. Fla. 1990) ("The Eleventh Circuit has twice noted that the plurality opinion by Justice O'Connor in *Teague* is not binding precedent. Indeed, under [*Marks*], the concurrence by Justice Stevens and Justice Blackmun, stating a somewhat different test than the one formulated by the plurality, should be binding precedent." (citing Hall v. Kelso, 892 F.2d 1541, 1543 n. 1 (11th Cir. 1990); Collins v. Zant, 892 F.2d 1502, 1511 n. 10 (11th Cir. 1990))).

had "reiterated time and again what *Apodaca* had established."[168] Accordingly, if Justice Gorsuch's argument were to gain traction,[169] it would provide a third reason for the Court to modify the *Teague* framework in the manner described above.

IV. ORAL ARGUMENT IN *EDWARDS V. VANNOY*: DECIPHERING THE JUSTICES' CURRENT THOUGHTS ON THE WATERSHED EXCEPTION

On November 30, 2020, the Court heard oral argument in *Edwards*. The parties' arguments and the Justices' questions touched on a number of intriguing issues related to the *Teague* analysis, including but not limited to whether *Ramos* announced a new rule,[170] the source of the Court's authority to impose the *Teague* exceptions on states,[171] and whether to consider the racist origins of non-

168. *Ramos*, 140 S. Ct. at 1428 (Alito, J., dissenting) (collecting cases noting that "holding" of *Apodaca* was that the Sixth Amendment does not require unanimity in state court).

169. To be clear, this is a *big* "if." Only Justice Breyer and Justice Ginsburg joined this portion of Justice Gorsuch's opinion, and Justice Kavanaugh felt compelled to note in his concurrence that "six Justices treat the result in *Apodaca* as a precedent." *Ramos*, 140 S. Ct. at 1416 n.86 (Kavanaugh, J., concurring in part).

170. Petitioner's counsel offered a path to retroactivity for the Justices who were sympathetic to Justice Gorsuch's argument in *Ramos* that *Apodaca* never held precedential value. *See* Transcript of Oral Argument at 4, Edwards v. Vannoy, 140 S. Ct. 2737 (2020) (No. 19-5807) (Petitioner's counsel arguing that "[f]or some justices, *Apodaca* was dead on arrival since its deciding votes rationale was foreclosed by precedent. For these justices, *Apodaca* provided no precedential value and *Ramos* is an old rule dictated by precedent."). Most of the Justices, however, rejected this position at oral argument. *See, e.g.*, *id.* at 10 (Justice Thomas noting that "[w]e've had *Apodaca* on the book for—books for quite some time. I think the cases we have actually, if not endorsed it, certainly saw it sitting comfortably if not awkwardly with our case law"); *id.* at 18 (Justice Kagan stating "I thought that *Apodaca* was a precedent, so you would have a very steep climb to get me to think that *Ramos* was anything other than a new rule.").

171. Justice Thomas and Justice Alito both asked questions regarding the Court's authority to retroactively impose rules on the states. *See id.* at 64–65 (Justice Thomas asking the federal government "where do you think this—the authority of this Court to apply rules retroactively comes from?"); *see also id.* at 66–67 (Justice Alito asking the federal government "[w]here does the authority to impose the *Teague* rule on the states come from? If it's an interpretation of the—of the habeas statute, then don't we have to

unanimous juries when determining retroactivity.[172] Although a thorough analysis of the issues raised at oral argument is beyond the scope of this Note, two aspects of the argument are worth

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deal with 2254(d)? If it's not an interpretation of the statute, it would have to come from a provision of the Constitution, such as the Suspension Clause. Is that where you think it comes from?"). At least one commentator suggested that these comments reflect a belief that the Court lacks the authority to apply *any* rules retroactively. *See* Amy Howe, *Argument analysis: Complex retroactivity issues divide justices in jury-unanimity case*, SCOTUSBLOG (Dec. 2, 2020, 5:50 PM), https://www.scotusblog.com/2020/12/argument-analysis-complex-retroactivity-issues-divide-justices-in-jury-unanimity-case/ [https://perma.cc/GF4C-DHAQ] ("Both [Justice] Alito and Justice Clarence Thomas seemed doubtful that the court even had the authority to apply rules retroactively.").

172. Much of this questioning related to the issue of how the Court could find *Ramos* retroactive on the basis of its race-discriminatory origins when the Court declined to apply retroactively the rule announced in *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), that peremptory challenges based solely on race are unconstitutional. *See Allen v. Hardy*, 478 U.S. 255, 261 (1986) (holding *Batson* does not apply retroactively on collateral review). Justice Kavanaugh's question to Respondent's counsel noted the relationship between the rules announced in *Batson* and *Ramos*:

> In *Ramos*, Justice Gorsuch's opinion and mine as well talked about the history of nonunanimous juries, the linkage to racist origins. . . . I also looked at the—how it was linked to the history of race-based peremptory strikes in Batson and how those two things had come from a—from a similar place, a similar unfortunate place in our history, in the Court—in the country's history. And in this case, you know, there's a black defendant. The state uses its peremptory strikes to strike all but one black juror—this is four of its six peremptories against black venire persons—strikes five blacks for cause because several of them—in part, for several of them—had a family history of incarceration. And you're left with one black juror with a black defendant. Then you get a [sic] 11-to-1 verdict on the armed robbery count, the two kidnapping counts—one of the armed robbery counts, two kidnapping counts, and the rape count. And the one juror is the black—black woman, the black juror. This case seems like a classic example of what we were concerned about with the combination of peremptory challenges being used on the basis of race, maybe not to strike every juror but to strike all but one, and then the nonunanimous jury system complementing the—the peremptory challenges.

Transcript of Oral Argument at 54–55, Edwards v. Vannoy, 140 S. Ct. 2737 (2020) (No. 19-5807). Other Justices asked how, if at all, the race-discriminatory history of the non-unanimous jury practice should factor into the watershed inquiry. *See, e.g.*, *id.* at 64 (Justice Thomas asking, "what role do you think that the sordid roots of the nonunanimous jury rule in Louisiana should play in our analysis?"); *id.* at 21 (Justice Kagan asking, "[h]ow does [the race-discriminatory origin of non-unanimous juries] play into the *Teague* analysis and how can it play given that we've held *Batson* non—nonretroactive?").

noting because they shed light on the ways that some Justices may be reconsidering the contours of the *Teague* inquiry.

First, the *Edwards* argument revealed competing definitions of "accuracy" as that term is used in the watershed inquiry. As noted above, this Note uses the term "reliability" rather than "accuracy" because "reliability" is geared toward the adjudicative *process* (*i.e.*, whether that process was reliable enough to comply with the Constitution), whereas "accuracy" suggests that the focus is on the adjudicative result—a focus that Professor Mishkin squarely and correctly rejected in his analysis.[173]

The *Edwards* oral argument included discussions about these distinct conceptions of accuracy. For example, when asked by Justice Thomas and Justice Barrett what standard of accuracy he believed was relevant, the federal government's counsel argued that it is "factual accuracy" that is important rather than the risk of wrongful convictions.[174] The government's counsel cited the *Butler* example discussed above, where the Court held that a rule barring police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation did not satisfy *Teague*'s watershed exception because a violation of that rule "would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood."[175]

Yet, a focus on "factual accuracy" is arguably too narrow. Consider the right to counsel, the quintessential watershed right. Effective counsel can obtain the exclusion of critical evidence that would otherwise yield a more accurate set of facts for the jury. In this way, the right to counsel often results in *less* factual accuracy, not more. But despite this impact on factual accuracy, the right to counsel is a watershed rule. Accordingly, "accuracy" (as the word is used in the watershed context) cannot mean merely that the rule allows more evidence to be admitted at trial.

Rather, the more appropriate standard is illustrated by an

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173. *See supra* note 27 and accompanying text.

174. *See* Transcript of Oral Argument at 63, Edwards v. Vannoy, 140 S. Ct. 2737 (2020) (No. 19-5807); *see also id.* at 78.

175. Butler v. McKellar, 494 U.S. 407, 416 (1990).

exchange between Justice Kagan and Petitioner's counsel, who argued that a system "can be inaccurate and unfair even though it may in many instances lead to conceivably the right decision."[176] Justice Kagan later asked Petitioner's counsel if he was referring to the "ordinary meaning of accuracy, which is simply a reduction in the error rate in trials," or if he was "talking about accuracy in some different sense."[177] In answering the question, Petitioner's counsel focused on the *trial*, rather than the result, noting that it is a "systemic approach to say whether or not a trial that[] deprived someone of his liberty without a unanimous verdict is fair."[178] Later, when questioning the federal government's counsel, Justice Kagan noted that, in the *Ramos* opinion, "there's an idea that in . . . founding times, [the *Ramos*] rule was thought of as inherent in what it meant to have a fair trial by jury, and a—and an accurate trial by jury, so that whatever came out of that process, if unanimity wasn't a part of it, there wasn't a true conviction."[179] This idea that the watershed inquiry is not focused on the result but rather the process—*i.e.*, whether "whatever [result] came out of that process" is illegitimate, whether it is a conviction or an acquittal, if the process itself is constitutionally deficient—is precisely the idea that Justice Harlan emphasized in his early jurisprudence influenced by Professor Mishkin.[180]

Second, the discussions related to finality during the *Edwards* argument suggest that some Justices are frustrated with the way that the Court has balanced finality interests against retroactive application of constitutional protections. To be sure, much of the discussion regarding finality reflected traditional concerns about the administrative impact on state courts if *Ramos* were held retroactive. Indeed, a majority of the Justices probed different lawyers about

176. Transcript of Oral Argument at 10, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

177. *See id.* at 18–19.

178. *Id.* at 20. Justice Kagan seemed to endorse this position later, where she noted that if "accuracy" simply meant a reduction of error rates across the board, courts would not require the reasonable doubt standard but instead would require a preponderance standard. *See id.* at 50.

179. *Id.* at 72.

180. *See supra* text accompanying notes 17–27.

the number of cases that would have to be retried if *Ramos* were held retroactive.[181]

Yet, some of the Justices expressed disappointment with the balance that the Court has struck in applying the watershed exception. For example, Justice Sotomayor noted that, "since *Teague*, we haven't found anything watershed," and asked Respondent's counsel if the Court was "claiming an exception that is—we're never going to utilize?"[182] Justice Sotomayor pressed counsel for the federal government and the respondent for examples of procedural rules, besides *Gideon*, that would satisfy the watershed exception,[183] and she also asked whether "the *Teague* exception is an—an ill fit?"[184] Although she did not expressly tie these questions to the role of finality in the watershed inquiry, Justice Sotomayor's comments reflect disagreement with the Court's persistent refusal to find a watershed rule.

Justice Gorsuch, however, did suggest that finality plays an outsized role in the watershed inquiry. When questioning Respondent's counsel about the number of cases that would have to be retried if *Ramos* were held retroactive, Justice Gorsuch raised the point that, once a rule qualifies as a watershed, there will inherently be a considerable burden on states in applying the rule retroactively:

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181. *See, e.g.*, Transcript of Oral Argument at 37, *Edwards*, 140 S. Ct. 2737 (No. 19-5807) (Chief Justice Roberts asking Respondent's counsel, "do you agree with [Petitioner's] math, I guess, that it's going to be simply two or three additional cases per prosecutor in the state [if *Ramos* is retroactive]?"); *id.* at 12–13 (Justice Breyer questioning Petitioner's counsel about the impact on Louisiana state courts of making *Ramos* retroactive); *id.* at 17–18 (Justice Sotomayor questioning Petitioner's counsel about the impact on Louisiana state courts of making *Ramos* retroactive); *id.* at 40–42 (Justice Breyer asking Respondent's counsel, "do you know any numbers about new trials required in Puerto Rico or Oregon, as well as [Louisiana]?"); *id.* at 51–52 (Justice Gorsuch questioning Respondent's counsel about the impact on Louisiana state courts of making *Ramos* retroactive); *id.* at 62 (Chief Justice Roberts asking if federal government's counsel has "any light to shed on the statistics that we've been talking about?"); *id.* at 76 (Justice Kavanaugh asking federal government's counsel, "do you think the number of cases that would be affected has any bearing on whether something is watershed?").

182. *Id.* at 46.

183. *Id.* at 46–48, 68–69.

184. *Id.* at 48.

> [W]hat relevance does [the number of potentially impacted cases] have anyway? As I understand your argument is that, okay, it's 1,600, but it's really difficult. Wouldn't we expect it to be difficult if, in fact, it were a watershed rule? If this really were a significant change and an important one, wouldn't we expect there to be some burden for the state, and—and where does Teague tell us that matters?"[185]

Justice Gorsuch later stated to Respondent's counsel that "I think you'd agree that if it is watershed, *it's retroactive regardless of the burdens on the state*."[186] Justice Gorsuch may have been telegraphing his belief that the impact of a rule on the reliability of the adjudicative process should have primacy in the watershed inquiry, and the finality interests—*i.e.*, the burdens on states of imposing the rule retroactively—should be a secondary consideration.

CONCLUSION

Respondent's counsel replied to this last comment from Justice Gorsuch by noting that the watershed exception "is calibrated to account for reliance interests."[187] This is true. Yet, as discussed above, the origins of the watershed exception lie in Justice Harlan's *Desist* opinion, which focused on the adjudicative processes' *reliability* rather than states' reliance interests. It was only after Justice Harlan's sudden shift in *Mackey* and the Court's opinion in *Teague* that the watershed exception was calibrated toward finality. Today, after years of being weighed down by the ill-suited *Palko* standard and the impossible-to-satisfy *Gideon* analogy, the watershed exception is all but a dead letter. Indeed, Justice Alito likened the exception to "the Tasmanian tiger, which was thought to have died out in a zoo in 1936, but every once in a while, deep in the forests of Tasmania, somebody sees a footprint in the mud or a howl in the night or some fleeting thing running by, and they say, a-ha, there

185. *Id.* at 52–53.
186. *Id.* at 53.
187. *Id.* at 54.

still is one that exists."[188]

The watershed exception need not be the Tasmanian tiger of the Court's habeas jurisprudence. The Court can revive the exception by shifting the inquiry more toward reliability while limiting retroactivity—in deference to finality—to those rules whose absence creates an "impermissibly large risk" of an unreliable verdict. That is the balancing act the Court engaged in when it decided *Schriro*. There is no easy answer to which rules will qualify, as demonstrated by the compelling arguments that both Justice Scalia and Justice Breyer advanced in *Schriro*.[189] But some will—perhaps *Ramos* will—and the exception will be alive and well.

The watershed exception does not deserve the early death it seems to be on track for. Concerns for finality understandably drove the inclusion of *Palko* and *Gideon* in the watershed analysis. However, finality need not be the dispositive factor in the inquiry. And, ultimately, finality interests should not always outweigh the justice that must prevail when significant constitutional errors occur. On that point, Justice Gorsuch sums it up best, ending the *Ramos* opinion as follows:

> In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.[190]

Jasjaap S. Sidhu

188. *Id.* at 14.

189. *See supra* text accompanying notes 115–27.

190. *Ramos*, 140 S. Ct. at 1408 (majority opinion).