

Justice and Truth Roadmap

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I. Executive Summary

On April 20, 2020, more than 1,500 Louisianans heard the U.S. Supreme Court say what they always knew to be true: their convictions were wrongful. Specifically, the Court said that convictions from a trial before a jury, without a unanimous jury verdict, violate the Sixth Amendment of the U.S. Constitution.¹ That Louisiana built its criminal system around non-unanimous jury verdicts was not an accident or efficiency method. According to the U.S. Supreme Court, non-unanimous jury verdicts—also known as Jim Crow jury verdicts—came from an intentional scheme dating back more than a century.² The practice was inseparable from the economic desire to imprison and lease Black people for labor on plantations and inseparable from the political climate that demanded stripping Black Louisianans of their citizenship rights.

Nonetheless, on the evening of April 20, 2020, the more than 1,500 people who had been wrongfully convicted went to sleep in prison unsure whether Louisiana would right this great injustice. More than a year and a half later, Louisianans continue to beg the State to rectify its wrong. The Equal Justice Taskforce is tasked with looking at how to do just that.

The Promise of Justice Initiative and Voice of the Experienced submit this Justice and Truth Roadmap (the “JTR”). The JTR is a proposal submitted for consideration to The Equal Justice Taskforce. The JTR acknowledges that Louisiana can remedy the injuries caused by the State’s practice of convicting men and women even though a jury did not unanimously find that individual guilty. The JTR is a common-sense recommendation rooted in equity and public safety. It recommends that Louisiana law codify a new trial as the remedy for the men and women with non-unanimous jury convictions who remain in prison.

¹ *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

² *Id.* at 1391.

The JTR sets a two-year window to vacate these convictions, and sets a five-year window from vacation to re-try these cases. It allows for earlier re-trial in the following circumstances: (1) if a person's conviction occurred after 2015; or (2) if a person is within five years of their earliest release date.

The JTR proposes a recommendation for legislation and for additional funding. Each day, Louisiana spends at least \$78,826 incarcerating men and women who have convictions that the U.S. Supreme Court has found to be unconstitutional.³ The State has spent more than \$48.2 million incarcerating these individuals since the U.S. Supreme Court ruled these convictions unconstitutional in 2020.⁴

Under the JTR, the State would appropriate \$4.5 million in additional funding for district attorney offices and \$4.5 million for public defenders (\$3,000 per case), to be distributed based on the cases per district. The JTR further provides for increased survivor and victim family assistance in the amount of \$500,000, and for an investment in re-entry service in an amount of \$500,000, for a total of \$10 million.

This proposal is the only way to protect the constitutional and statutory rights of people who have been convicted by this Jim Crow law, support public safety, and provide appropriate support for those who are survivors of crime or family members of victims. The courts in Louisiana are in the best position to remedy this historical injustice. Adding these cases onto dockets would increase caseloads by less than 2%, the majority of retrials after acquittals do not go to trial and are resolved in advance, and the courts have an existing procedure for handling situations such as this.

In comparison, the parole board is not set to be a finder of fact regarding underlying guilt or innocence, it has its own backlog, and it is not trained for such an inquiry as that proposed by the representative of the Louisiana District Attorneys' Association. Further, parole is not an appropriate remedy for the wrongfully convicted.

³ This calculation takes the number of people with non-unanimous juries, factors in the percentage of people with non-unanimous juries held in the parish prison system versus the state prison population, applies the per diem cost as of April 20, 2020 for locals to 8 percent, and the state facility cost per diem for 92 percent of 1,500.

⁴ This calculation takes the non-unanimous per diem above and multiplies it for the time period between April 2020 and December 23, 2021.

Additionally, the JTR recommends the Equal Justice Taskforce take a position in support of legislation to:

1. Address the collateral consequence faced by men and women who have served their sentences resulting from a non-unanimous jury verdict;
2. Set a process to expunge non-unanimous jury verdict convictions; and
3. Issue an apology to those convicted by non-unanimous jury verdicts and to the jurors who had their voices silenced.

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II. Introduction

The right to a jury trial is a fundamental aspect of the Sixth Amendment of the United States Constitution. Unfortunately, over the past one hundred and forty years, courts have denied thousands of Louisianans their right to a unanimous jury. The legacy of Louisiana's non-unanimous jury verdict law, implemented to "establish white supremacy,"⁵ has had and continues to have a lasting, devastating impact on the accused, their families, and their communities today. More than 1,500 men and women remain in prison despite their conviction having been unconstitutional and despite that conviction coming from a Jim Crow law meant to silence the voices of Black jurors and convict more Black defendants.

The Equal Justice Taskforce was created to address this continuing injury and to make recommendations and report these recommendations to the Louisiana State Legislature. It was the Louisiana State Legislature and the delegates to the 1898 Constitutional Convention that stained Louisiana's judicial system by creating a system that allowed non-unanimous jury convictions. Only the legislature, through a direction to the judiciary, can provide an adequate remedy.



⁵ OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LOUISIANA 375 (H. Hearsey ed. 1898).

III. History

Although the Thirteenth Amendment of the United States Constitution prohibited slavery and involuntary servitude, it explicitly exempted individuals convicted of a crime.⁶ In response to ratification of that amendment in 1865, Southern state legislators enacted discriminatory laws, or “Black Codes,” to essentially re-enslave Blacks and force them into hard labor.⁷ These discriminatory laws applied only to Blacks and subjected Blacks to criminal prosecution for “offenses” such as breaking curfew, loitering, and failing to carry proof of employment.⁸ Upon the enactment of these “Black Codes,” Louisiana’s prison population began to shift from majority White to majority Black.⁹ Once arrested, Louisiana loaned out these prisoners to the highest bidding business or citizen for the remainder of the year.¹⁰ Black men, women, and children who were arrested were leased to plantations, coal mines, and railroad companies.¹¹

In 1879 and again in 1880, the corporate leader of the convict leasing company went to the state legislature seeking changes to Louisiana law to make it easier to staff his convict leasing business.¹² To do so, he proposed a non-unanimous jury verdict system.¹³ In 1880, the Louisiana legislature gave him what he desired, and Louisiana passed a state statute allowing for non-unanimous jury convictions.¹⁴

Throughout the 1800s, Blacks in Louisiana faced relentless terror perpetrated by white Louisianans.¹⁵ White terrorist organizations such as Knights of the White Camelia and the White League

⁶ U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁷ Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 942 (2019).

⁸ *Convict Leasing*, Equal Justice Initiative (Nov. 1, 2013), <https://eji.org/news/history-racial-injustice-convict-leasing/>.

⁹ Goodwin, *supra* note 7, at 942.

¹⁰ *Id.* at 940 n.230 (citing JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 101–02 (1884)).

¹¹ Frederick Douglass, *Convict Lease System, 1818-1895*, Library of Congress, <https://www.loc.gov/item/mfd.01008/>.

¹² Thomas Aiello, *Jim Crow’s Last Stand*, 2d. (2019), p. 11-16.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Jamila Johnson & Talia MacMath, *State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal Teague v. Lane Test*, 111 J. CRIM. L. & CRIMINOLOGY ONLINE 44 (2021).

massacred hundreds of Blacks, often in response to calls for Black suffrage.¹⁶ To thwart these calls, state legislators gathered in Tulane Hall at the 1898 Louisiana Constitutional Convention to enshrine white supremacy into Louisiana’s legal system.¹⁷ The official journals of the proceeding of the convention stated: “Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be done legally and constitutionally.”¹⁸

Since Blacks gained various rights from the Reconstruction amendments, including the right to serve on juries through the Fourteenth Amendment, the Louisiana state constitution drafters sought ways to disenfranchise Blacks from civic participation. The all-white delegates spent half their time deciding how to most effectively marginalize Black voters and subvert their participation on juries. Ultimately, Louisiana implemented several Jim Crow measures into its constitution. These restrictive provisions included a poll tax, complex voter registrations, a literacy and property ownership test, and a grandfather clause that exempted white residents from these requirements.¹⁹

A week before Louisiana’s 1898 Constitutional Convention, the U.S. Senate called for an investigation into whether Louisiana was systemically excluding Blacks from juries.²⁰ The convention delegates knew that the U.S. Supreme Court would strike down any policy of overt discrimination in violation of the Fourteenth Amendment.²¹ And so, the delegates “sought to undermine African American participation on juries in another way.”²² The Louisiana State delegates incorporated a “facially race-neutral” rule permitting non-unanimous jury verdicts “to ensure that African-American juror service would

¹⁶ Bill Quigley, *The Continuing Significance of Race: Official Legislative Racial Discrimination in Louisiana 1861 to 1974*, 47 S.U. L. REV. 1, 13 (2019).

¹⁷ Johnson & MacMath, *supra* note 15.

¹⁸ OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LOUISIANA 375 (H. Hearsey ed. 1898).

¹⁹ Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H. Hearsey ed. 1898); Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 Harv. L. Rev. 279, 286–287 (1899); *Louisiana v. United States*, 380 U.S. 145, 151–153 (1965).

²⁰ 31 Cong. Rec. 1019 (1898).

²¹ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

²² *Ramos*, 140 S. Ct. at 1394.

be meaningless.”²³ Additionally, this scheme—which originally allowed jurors to convict Black defendants with 25 percent of the jury dissenting—conveniently allowed the Louisiana government to perpetuate its “free labor pool” through the convict leasing system.²⁴ That convict leasing system was on its way to becoming state-controlled labor.²⁵

Split juries effectively ensured that a white majority could easily override the few Blacks who served on juries, thus weakening the influence that Blacks had in criminal proceedings. The delegates also allowed for sentence enhancements for multiple convictions, including double- or triple-time or life for multiple offenses.²⁶ Non-unanimous juries were “one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”²⁷

By the 1970s, only Louisiana and Oregon allowed non-unanimous jury verdicts. (Oregon, however, required unanimous verdicts for murder trials). While federal law mandated that federal jury trials require unanimity to convict, the U.S. Supreme Court in *Apodaca v. Oregon* ruled that states did not have to follow federal law in this respect.²⁸ It was not until 2018 that the people of Louisiana, by a 64 percent ballot measure, adopted a constitutional amendment requiring unanimous verdicts for cases involving prospectively-committed crimes.²⁹

Then, in 2020, the U.S. Supreme Court decided *Ramos v. Louisiana*, which held that non-unanimous jury verdicts are (and have always been) unconstitutional as applied to the states through the Fourteenth Amendment.³⁰ Soon after, the Court had an opportunity to apply *Ramos*’ unanimity rule retroactively in *Edwards v. Vannoy* but found that the rule “does not apply retroactively on *federal* collateral

²³ *State v. Maxie*, No. 13–CR–72522, App. 56–57 (La. 11th Jud. Dist., Oct. 11, 2018); see also Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593(2018).

²⁴ *State v. Maxie*, No. 13–CR–72522, 18–19 (La. 11th Jud. Dist., Oct. 11, 2018).

²⁵ Mark T. Carleton, *Politics and Punishment: The History of the Louisiana State Penal System*. Baton Rouge: Louisiana State University Press, 1971.

²⁶ Johnson & MacMath, *supra* note 15.

²⁷ *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part).

²⁸ 406 U.S. 404, 406 (1972).

²⁹ See [ballotpedia.org/Louisiana_Amendment_2,_Unanimous_Jury_Verdict_for_Felony_Trials_Amendment_\(2018\)](https://ballotpedia.org/Louisiana_Amendment_2,_Unanimous_Jury_Verdict_for_Felony_Trials_Amendment_(2018)).

³⁰ 140 S. Ct. at 1397.

review.”³¹ The Court explicitly left it to the State of Louisiana to remedy its harms, as a result of principles of state’s rights.

Because the U.S. Supreme Court declined to apply the *Ramos* rule retroactively, hundreds of Louisianans convicted before the *Ramos* decision still languish in prison, deprived of their constitutional right to be free from a non-unanimous jury conviction. Louisiana’s law has disenfranchised Black jurors, and non-unanimous juries have convicted Black defendants for over a century, thus accomplishing the law’s invidious, racist purpose. While the exact number is unknown, there are likely many defendants sitting in Louisiana prisons who did not commit the crime of which they sit in prison. The number of those convicted by non-unanimous juries that remain in prison exceed 1,500 people.

On November 10, 2021, the Louisiana Third Circuit Court of Appeal found that it does not have to give a remedy to the people unconstitutionally convicted based on this Jim Crow law.³² On that same day, however, the Louisiana Fourth Circuit Court of Appeal found that the people incarcerated without a constitutional conviction due to this Jim Crow practice are entitled to a new constitutional trial.³³ The Louisiana Supreme Court has not agreed to hear a case, despite the circuit split and the more than 1,000 cases waiting in the lower courts for a resolution of this split.³⁴

IV. Demographics of Non-Unanimous Jury Convictions

The non-unanimous jury verdict system has had broad effects throughout Louisiana. The Promise of Justice Initiative has done significant research and a statewide investigation into who has non-unanimous jury verdicts and remains incarcerated within the prison population.

³¹ 593 U.S. ___, 141 S. Ct. 1547, 1562 (2021) (emphasis added).

³² *State v. Nelson*, 2021-0461 (3 Cir. App. 11/10/21).

³³ *Melendez v. Vannoy*, 2021-0597 (4 Cir. App. 11/10/21).

³⁴ <https://promiseofjustice.org/news/appellate-circuit-split-on-whether-people-with-jim-crow-jury-convictions-should-get-any-remedy>.

The demographics and research into the identity of people with non-unanimous jury verdicts began in September 2019 with the data-set used in the Pulitzer Prize winning series by *The Advocate*.³⁵ The Promise of Justice Initiative checked every single case, consolidating duplicates for those convicted on more than one charge with a non-unanimous jury verdict, and removing the deceased and those released from prison prior to April 2020. The Promise of Justice Initiative continued its investigation in district courts and appellate courts throughout Louisiana, spending tens of thousands of dollars on record fees, as it reviewed and requested copies of court records in parishes across the state. It then supplemented review of records held at the Louisiana State University law library as part of the state archive.

Additionally, the non-profit conducted outreach and education potentially reaching more than 15,000 people incarcerated by the Louisiana Department of Public Safety and Corrections. The Promise of Justice Initiative engaged in direct or broadcasted communication with more than 6,610 people in Louisiana prisons. It was included in partner organization surveys and newsletters, such as Voice of the Experienced's mailing list, reaching more than 1,000 incarcerated people and more than 10,000 of their families and loved ones. The Promise of Justice Initiative did outreach to hundreds of defense attorneys across the state and hosted multiple community forums with family members of people with non-unanimous jury verdicts.

The Promise of Justice Initiative also did outreach to the criminal defense bar to educate lawyers about the issue and, in turn, learned of these lawyers' cases involving non-unanimous verdicts. Working with volunteers from in-house legal departments like the legal department at Shell U.S., The Promise of Justice Initiative and its volunteers contacted lawyers throughout the state seeking affidavits regarding their non-unanimous jury verdict cases. Working with volunteers in-house at JP Morgan Chase and other

³⁵ See Advocate Staff Report, *Tilting the scales*, *The Advocate* (Apr. 1, 2018), https://www.nola.com/article_25663280-c298-53ef-8182-9a8de046619c.html; see also Jeff Adelson, *Download data used in The Advocate's exhaustive research in 'Tilting the scales' series*, *The Advocate* (Apr. 1, 2008), https://www.nola.com/article_25663280-c298-53ef-8182-9a8de046619c.html.

financial institutions and volunteers employed at the U.S. Department of Labor, The Promise of Justice Initiative collected race data, and triaged these cases.³⁶

A. There are more than 1,500 people with non-unanimous jury convictions in Louisiana prisons.

More than 1,500 people have non-unanimous jury convictions.³⁷ As of July 2020, 1,601 people with final convictions were incarcerated in Louisiana’s prisons as a result of non-unanimous jury verdicts.³⁸ Since that date, the number has decreased. One parish, Orleans, has taken steps to vacate some of these convictions, or enter into post-conviction plea agreements.³⁹ Another jurisdiction, Caddo, has entered into post-conviction plea agreements in five of its more than 100 cases.⁴⁰ It is estimated that less than 50 people have obtained relief from their non-unanimous jury convictions as of November 30, 2021.⁴¹

A significant number of people with non-unanimous jury verdicts have died in prisons since July 2020. Some, such as Barry Baker, died from COVID-19. Others, like Lee Pipkins, died of a heart attack. Some have come home through parole, such as Keith Amedee—Mr. Amedee’s incarcerated labor was spent as the personal tailor to two governors.⁴² Each person who successfully had their final conviction vacated without district attorney agreement remain in prison awaiting judicial appellate challenges, caused by the circuit split. In other words the writs taken by the district attorney have prevented people from moving to the pre-trial stage, moving to the parish jails, and getting indigent counsel..

³⁶ PJI does not have information on how many people remain on parole with non-unanimous jury verdicts, and who may have a non-unanimous jury verdict but already completed a corresponding sentence associated with that conviction.

³⁷ Unhealed Wounds, The People Still Imprisoned Due to Jim Crow Jury Verdicts, <https://static1.squarespace.com/static/5fe0e9cce6e50722511b03cc/t/600208f15293074553d75c09/1610746104812/PJI-Jim-Crow-Jury-Status-Report.pdf> (October 2020).

³⁸ Brief of Amici Curiae The Promise of Justice Initiative et al, *Edwards v. Vannoy*, No. 19-5807, Appendix 1, available at https://www.supremecourt.gov/DocketPDF/19/19-5807/148311/20200721163238941_19-5807.Edwards.Vannoy.Amicus.Promise%20of%20Justice%20Initiative.pdf.

³⁹ Matt Sledge, “New Orleans DA Jason Williams granting new trials to 22 convicted by split juries,” *The Times-Picayune*, February 26, 2021.

⁴⁰ John Simerman, “Caddo Parish district attorney revisits some old divided jury cases, offers deals,” *The Times-Picayune*, October 4, 2021.

⁴¹ This excludes those who had their convictions vacated by *Ramos v. Louisiana* because their conviction was not final on April 20, 2020 when *Ramos* was decided.

⁴² Tom Casciato, “Convictions by non-unanimous juries were banned In 2020. What happens to those imprisoned by them?” PBS News Hour, March 28, 2021.

B. Most people in prison with non-unanimous jury verdicts are Black.

It is clear that “the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors.”⁴³ Considering the racist origins of the non-unanimous jury, it comes as no surprise that non-unanimous juries make a significant difference in practice, particularly in cases involving Black defendants, victims, or jurors.⁴⁴ Although the non-unanimous jury scheme has disadvantaged all defendants, the effects on Black defendants are especially harrowing.

Today, Black residents make up approximately 32 percent of Louisiana’s population,⁴⁵ but nearly 67 percent of people incarcerated in Louisiana’s prisons.⁴⁶ Of the more than 1,500 men and women with non-unanimous verdicts still incarcerated in Louisiana’s prisons, 80 percent are Black.⁴⁷

For example, the television show *Fault Lines*, with reporting assistance from *The Lens*, interviewed jurors about their interaction in the jury room in the case of Brandon Jackson. In Mr. Jackson’s case, both of his dissenting jurors were Black. “There were just a multitude of things that that [sic] made me believe that he was guilty of this crime,” one of the white jurors said to reporters. She explained why she did not think it was an issue of race: “I remember Brandon Jackson coming into the jury, into the courtroom, and he was very sure of himself. He seemed to have a very um... He smiled a lot. He seemed very relaxed. But I remember Brandon made a lot of eye contact with the jurors and he seemed to be pretty sure of himself. And like I said, I felt he was really overconfident... something about his demeanor that it was like he was trying to win us over to his side with his smile, his, he made a lot of eye contact, I remember.”⁴⁸

⁴³ *Ramos*, 140 S. Ct. at 1417–18 (Kavanaugh, J., concurring in part).

⁴⁴ *Id.*

⁴⁵ Census statistics available at <https://www.census.gov/quickfacts/LA>.

⁴⁶ Statistics from the Louisiana Department of Public Safety and Corrections January 2020 Briefing Book, available at <https://s32082.pcdn.co/wp-content/uploads/2020/03/0Z-Full-Jan-2020-BB-3.13.2020.pdf>.

⁴⁷ The Promise of Justice Initiative, *Unhealed Wounds: The People Still Imprisoned Due to Jim Crow Jury Verdicts* (October 2020), p. 2.

⁴⁸ *Fault Lines*, “The Jim Crow Convictions”, October 4, 2021, minute mark 13:15, available at <https://www.youtube.com/watch?v=VYJg99wHN5g>.

As District Attorney Jason William stated in an interview for that same production in response to the language of the juror, “It’s very, very telling. It really sort of speaks to the language in that 1898 constitutional convention that created this law: a black male making eye contact with a white person years ago could cause him to lose his life and in this particular situation, it caused him to lose his freedom.”⁴⁹

In practice, Black defendants were 30 percent more likely than white defendants to be convicted by non-unanimous juries.⁵⁰

C. Non-unanimous jury verdicts disproportionately silenced Black jurors.

Black jurors were disproportionately more likely to have their voices silenced in the jury deliberation process.⁵¹ As the Sabine Parish judge in *State v. Maxie* found after significant testimony from witnesses on the impact of non-unanimous juries, “[T]he comparative disparities are statistically significant and startling[;] African-American jurors are casting empty votes 64 percent above the expected outcome[.]”⁵²

For an example on how this impacted Black jurors, the experience of JonRe Taylor is instructive.⁵³ JonRe is a Black citizen of Louisiana.⁵⁴ Her father’s family has lived in Louisiana for as long as anyone can remember.⁵⁵ She graduated from Robert E. Lee High School in Baton Rouge in 2001 and received a Bachelor of Arts in Political Science and Government from Southern University and A&M College in 2007.⁵⁶ She received an M.B.A. from Colorado Technical University in 2015. Soon after her college graduation, Ms. Taylor was summoned to appear for jury duty in the Nineteenth Judicial District Court in

⁴⁹ *Id.* at 16:16.

⁵⁰ *State v. Maxie*, No. 13–CR–72522, 24 (La. 11th Jud. Dist., Oct. 11, 2018); *see generally* Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, (2018).

⁵¹ *State v. Maxie*, No. 13–CR–72522 (La. 11th Jud. Dist., October 11, 2018).

⁵² *Id.* at 24. The full transcript of *Maxie* is available at https://drive.google.com/file/d/1_Wzi6fuDopqcHwmhLINRejJ96stBLfAN/view?usp=sharing.

⁵³ This account is taken almost verbatim from the amicus brief submitted by JonRe Taylor to the U.S. Supreme Court, sharing her experience. Brief of Amici Curiae JonRe Taylor, *Edwards v. Vannoy*, No. 19-5807, available at https://www.supremecourt.gov/DocketPDF/19/19-5807/148311/20200721163238941_19-5807.Edwards.Vannoy.Amicus.Promise%20of%20Justice%20Initiative.pdf.

⁵⁴ *Id.* at 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

Baton Rouge.⁵⁷ She was selected, sworn, and served as the twelfth juror in Case No. 07-06-0032, *State of Louisiana v. Thedrick Edwards*.⁵⁸ The jury comprised 11 white jurors and Ms. Taylor.⁵⁹

Following a four-day trial, the jury unanimously voted “not guilty” on one count of attempted armed robbery, voted 10-2 to convict Edwards with respect to four counts of armed robbery, and voted 11-1 to convict him on the remaining four counts (aggravated rape, armed robbery, and two counts of aggravated kidnapping).⁶⁰ Ms. Taylor was the only juror to vote “not guilty” with respect to all nine charges.⁶¹ Ms. Taylor’s experience during deliberations as a young Black woman—during which the other jurors were free to simply ignore the views of their fellow panel member of a different race or class—left her profoundly disillusioned.⁶²

Prior to serving as a juror, Ms. Taylor considered attending law school.⁶³ The experience of casting an “empty vote” that could be, and was, nullified by the votes of ten or eleven white jurors engendered cynicism.⁶⁴ This is hardly a surprise: relegating Black jurors like Ms. Taylor to a form of second-class citizenship, to the detriment of Black defendants, “was the whole point of adopting the non-unanimous jury requirement in the first place.”⁶⁵ Over the past thirteen years, Ms. Taylor has thought frequently of the victims in this case, particularly the two college students who were sexually assaulted.⁶⁶ (Ms. Taylor disclosed during voir dire that she herself has been the victim of a forcible rape.)⁶⁷ But Ms. Taylor has also spent the past thirteen years troubled by the possibility that the wrong teenager was condemned to life imprisonment at Angola.⁶⁸ Five other teenagers initially were indicted in connection with the crime spree—

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2.

⁶³ *Id.*

⁶⁴ See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1320 (2000).

⁶⁵ *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part).

⁶⁶ Brief of Amici Curiae JonRe Taylor, *Edwards v. Vannoy*, No. 19-5807, at 2.

⁶⁷ *Id.*

⁶⁸ *Id.*

including several who, unlike Edwards, were found with guns and the proceeds of the multiple robberies.⁶⁹ In any other jurisdiction except Oregon, the extent to which Ms. Taylor’s fellow jurors judged Edwards based on his relationship with his friends, rather than based on solid proof of individualized wrongdoing, would have been further debated and scrutinized.⁷⁰ But because this trial took place in Louisiana, the other jurors—six older white men and five older white women—were free to disregard Ms. Taylor’s views and return a verdict without her.⁷¹

As early as the 1870s, commentators talked about the need to silence Black jurors on the belief that Black jurors would become the champions of a Black defendant solely because of the Defendant’s race:

He [the freed slave] does not appear to much advantage in any capacity in the courts of law As a juror, he will follow the lead of his white fellows in causes involving distinctive white interests; but if a negro be on trial for any crime, he becomes at once his earnest champion, and a hung jury is the usual result.⁷²

That there are still people in our community who are pained because of the systemic way Louisiana engrained in its judicial system this sort of thinking is troubling in its own accord.

The reporting done in a *Fault Lines* documentary further shows the detriment to the jury process inextricable from race. The following is an excerpt with a Black juror who served in *State v. Jackson*.⁷³

Juror ⁷⁴	“What I mainly remember is that when they presented the case and when we deliberated that I was not convinced that it was proven that he was guilty.”
Reporter	“And why were you having doubts about that?”
Juror	“No one said that they knew it was Brandon, they recognized him, they knew his mannerisms. No one was able to say enough to convince me that they were sure that it was him that committed the robbery.”
Reporter	“And did you express express [sic] your point of view to the jurors?”

⁶⁹ *Id.* at 2-3.

⁷⁰ *Id.* at 3.

⁷¹ *Id.*

⁷² “Future of the Freedman,” *Daily Picayune*, August 31, 1873, at 5, quoted in R. Smith & B. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 *LA. L. REV.* 361, 376 (2012).

⁷³ *State v. Jackson*, 82,978 (26th JDC, Bossier).

⁷⁴ *Fault Lines*, “The Jim Crow Convictions,” October 4, 2021, minute mark 12:13, available at <https://www.youtube.com/watch?v=VYJg99wHN5g>.”

Juror “I’m sure I at least made one statement and that was blown down, I mean, they dismissed it.”

Reporter “And when they dismissed your concerns, how did that make you feel?”

Juror “I felt like OK I voiced my opinion and I was hoping that maybe what I said had sank in on someone and made them think about it and to change their mind even if they didn’t want to speak out in front of the group, but from the verdict that did not happen.”

...

Reporter “And you were a little bit nervous about talking to us on camera. Why was that?”

Juror “I just wouldn’t want this to get back to my bosses because it could have a negative effect on me.”

Reporter “Why is that?”

Juror “Because they think a lot like the people on the jury did.”

Reporter Which is how?

Juror “He’s a criminal, let’s get him off the street. Let’s lock him up. He’s a criminal, let’s lock him up. Or maybe even he’s a Black man, let’s lock him up.”

The impact of Black jurors throughout Louisiana is profound and shapes how these individuals interact with the systems of justice. It impacts how they communicate about justice in Louisiana and has undoubtedly shaped how they communicate about these systems with their children and their friends. These individuals’ voices have yet to be recognized.

D. The majority of people with non-unanimous jury convictions are serving sentences of life without the possibility of parole.

Louisiana has the highest incarceration rate in the country.⁷⁵ It leads the nation in life sentences without the possibility of parole,⁷⁶ with more incarcerated people serving these sentences than Texas, Arkansas, Mississippi, Alabama, and Tennessee combined.⁷⁷ Almost one in five people serving life sentences without the possibility of parole in Louisiana receive this sentence as a result of a non-unanimous jury verdict.⁷⁸

The impact on Louisiana's population serving life without the possibility of parole is significant. While only 16.3 percent of Louisiana's overall adult correctional population is serving life without the possibility of parole sentences, as of October 2020, 62 percent of the men and women with non-unanimous jury verdicts were serving life without the possibility of parole.⁷⁹ The Promise of Justice, alone, represents 559 people with life without the possibility of parole sentences with non-unanimous jury verdicts, and an additional 96 serving life without the possibility of parole, who assert they have a non-unanimous jury verdict but have not been able to access their jury polling from the Clerk of Criminal Court in Orleans Parish. Notably 63 of these individuals received parole eligibility after 15 years under last year's Act 122 reforms. In the complete non-unanimous jury population, The Promise of Justice Initiative has identified 94 cases where the person was under the age of 18 when the crime was alleged to have occurred. Other community organizations and representatives already represented the majority of those convicted as children. Of these 95, The Promise of Justice Initiative represents 25, and 18 of those are serving life sentences. The vast majority of The Promise of Justice Initiative's clients who were children when arrested

⁷⁵ Lea Skene, *Louisiana's Life Without Parole sentencing the Nation's Highest—and Some Say That Should Change*, ADVOCATE (Dec. 7, 2019, 4:59 PM), available at https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html [<https://perma.cc/HYR8-PHNR>].

⁷⁶ *Id.*

⁷⁷ John Bel Edwards & James M. Le Blanc, *Louisiana Corrections: Briefing Book 28* (July 2020), available at <https://s32082.pcdn.co/wp-content/uploads/2020/08/Full-BB-Jul-20.pdf> [<https://perma.cc/QTR2-TRUB>]; TCR Staff, *Louisiana Leads Nation in Life Without Parole Terms*, CRIME REPORT (Dec. 12, 2019), available at <https://thecrimereport.org/2019/12/12/louisiana-leads-nation-in-life-without-parole-terms> [<https://perma.cc/G3PL-8SDK>].

⁷⁸ Brief of Amici Curiae the Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders at 26, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No.19-5807), 2020 WL 4450431.

⁷⁹ Unhealed Wounds, *The People Still Imprisoned Due to Jim Crow Jury Verdicts*, <https://static1.squarespace.com/static/5fe0e9cce6e50722511b03cc/t/600208f15293074553d75c09/1610746104812/PJI-Jim-Crow-Jury-Status-Report.pdf> (October 2020).

were resentenced without the possibility of parole. The majority of people with non-unanimous jury verdicts have not had parole options in the past, but also have cases involving crimes that the parole board has demonstratively less experience with. The crimes associated with these cases are also the types of crimes that communities most demand accurate convictions. Given the serious nature of these cases, if the convictions are not accurate, no one is seeking the actual perpetrator of the crime.

E. Location of Non-Unanimous Jury Verdicts

As discussed above, it is unlikely that there are many more than 1,500 non-unanimous jury convictions in Louisiana. Below is a chart of the information The Promise of Justice Initiative had gathered regarding the location of 1,448 of the non-unanimous jury verdicts as of July 2020. The chart also shows the location of the 1,049 cases The Promise of Justice Initiative filed between April 2020 and April 2021 regarding the non-unanimous jury issue and the additional three cases that have been accepted by the non-profit since April 2021.

Within The Promise of Justice Initiative cases were a subset of cases where a person said they had a non-unanimous jury verdict, but the courts had sealed the record or had not responded to requests to produce the record of the polling of the jury. Of that total number, nearly 200 were sealed or the subject of a public record request for which The Promise of Justice Initiative has not yet received a response. Through those representations, The Promise of Justice Initiative later obtained documentation showing that 15 people had unanimous verdicts, and it no longer represents these clients. Today, 141 people are still in a posture of trying to access their case files from the courts—approximately 126 of these cases are stayed awaiting litigation with the Clerk of Court in Orleans Parish.

Spread of Non-Unanimous Jury Verdicts

Jurisdiction	Number of Assistant District Attorneys ⁸⁰	Number of Non-Unanimous Jury Verdict Cases ⁸¹	Number of People For Whom The Promise of Justice Initiative Filed A Claim in District Court
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⁸⁰ Brief of Amici Curiae The Promise of Justice Initiative et al., *Edwards v. Vannoy*, No. 19-5807, Appendix 1, available at https://www.supremecourt.gov/DocketPDF/19/19-5807/148311/20200721163238941_19-5807.Edwards.Vannoy.Amicus.Promise%20of%20Justice%20Initiative.pdf.

⁸¹ *Id.*

1 st JDC	27	166	103
2 nd JDC	10	8	8
3 rd JDC	9	13	7
4 th JDC	26	59	37
5 th JDC	6	7	3
6 th JDC	7	7	6
7 th JDC	5	3	0
8 th JDC	4	0	0
9 th JDC	15	21	10
10 th JDC	5	8	4
11 th JDC	4	2	3
12 th JDC	7	8	6
13 th JDC	5	6	3
14 th JDC	23	55	34
15 th JDC	19	40	34
16 th JDC	21	24	16
17 th JDC	13	12	8
18 th JDC	10	13	10
19 th JDC	48	134	105
20 th JDC	5	11	20
21 st JDC	18	26	21
22 nd JDC	30	120	22
23 rd JDC	19	28	23
24 th JDC	52	219	171
25 th JDC	5	3	2

26 th JDC	12	30	20
27 th JDC	11	10	10
28 th JDC	3	0	0
29 th JDC	9	10	6
30 th JDC	6	5	6
31 st JDC	4	0	1
32 nd JDC	19	36	27
33 rd JDC	4	4	8
34 th JDC	8	6	3
35 th JDC	4	2	1
36 th JDC	4	4	4
37 th JDC	2	4	3
38 th JDC	2	1	1
39 th JDC	2	2	2
40 th JDC	9	13	8
Orleans	82	324	266 ⁸²
42 nd JDC	4	4	4

The Louisiana Code of Criminal Procedure provides a statutory minimum of assistant district attorneys per district.⁸³ There are 574 statutorily authorized assistant district attorneys in Louisiana. This does not include forty-two elected District Attorneys and the same number of First Assistants who are not typically tasked with trying cases. Nor does it include other assistant district attorneys paid for by the

⁸² 126 of these cases are still not verified due to barriers with the clerk of court.

⁸³ LA. R.S. § 16:51.

parish.⁸⁴ However, given the funding of additional prosecutors supported with federal funds and from fines and fees, the actual number of assistant district attorneys is closer to 700.⁸⁵

In 18 of the judicial districts, or 42% of judicial districts, there are equal or more statutorily authorized assistant district attorneys than cases. In 14 judicial districts, there are less than five non-unanimous jury cases that The Promise of Justice Initiative believes involve have any person still in prison, and in 16 judicial districts, The Promise of Justice Initiative filed fewer than five post-conviction relief applications. In the jurisdictions with the most non-unanimous jury verdicts and the third-most, the offices are already in the process of reviewing convictions with non-unanimous jury verdicts.⁸⁶

F. Length of Deliberation

While it is a common talking point that jury instructions may have caused some jurors not to state their view because it was unnecessary to reach a guilty verdict, the empirical data suggests otherwise. In 84 percent of cases, jurors spent more than an hour debating before they reached either a 10-2 or 11-1 verdict.⁸⁷ While there may always be exceptions, crafting a remedy to this problem cannot be driven by actions on the margin.

V. Non-Unanimous Jury Verdicts Are Not Only Wrongful, But Lead To Inaccurate Convictions

It is beyond dispute that every non-unanimous jury verdict was an unconstitutional conviction, and therefore a wrongful conviction. On April 20, 2020, the U.S. Supreme Court not only made clear that the practice violated the Sixth Amendment, but that it *always* violated the Sixth Amendment.⁸⁸ It was

⁸⁴ See LA. R.S. § 16:53 (“In addition to the number of assistant district attorneys provided for each judicial district and for the parish of Orleans in R.S. 16:51 the district attorney of each judicial district and of the parish of Orleans may appoint additional assistant district attorneys. The salary of such additional assistant district attorneys, with the approval of the governing authorities affected, shall be paid by the parish or parishes composing the judicial district or by the parish of Orleans.”).

⁸⁵ See *Travers Mackel*, Little to no state funding for 700 assistant district attorneys across Louisiana, WDSU6 (Jan. 31, 2018), available at <https://www.wdsu.com/article/little-ono-state-funding-for-700-assistant-district-attorneysacross-louisiana/15931071>. Although cuts were proposed, full funding was ultimately restored.

⁸⁶ Simerman, *supra* note 40; Sledge, *supra* note 39.

⁸⁷ Unhealed Wounds, The People Still Imprisoned Due to Jim Crow Jury Verdicts, <https://static1.squarespace.com/static/5fe0e9cce6e50722511b03cc/t/600208f15293074553d75c09/1610746104812/PJI-Jim-Crow-Jury-Status-Report.pdf> (October 2020).

⁸⁸ *Ramos*, 140 S.Ct. at 1397.

unconstitutional in 1898, and was unconstitutional on each trial date for the roughly 1,500 Louisianans still in prison. If it was unconstitutional, why have the courts not proceeded with new trials? Just because someone's trial and conviction was unconstitutional, does not mean the courts always provide a remedy. That does not in any way change the fact that roughly 1,500 people have been wrongfully convicted, but that they have been wrongfully convicted and left without a remedy.

It is also clear that non-unanimous juries have also led to *inaccurate* convictions. The National Registry of Exonerations (hereinafter NRE) is the most rigorous database of exonerations in the country. It has tracked exonerations that have occurred since 1989.⁸⁹ The NRE defines an exoneration as:

A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.⁹⁰

The NRE does not track the cases of innocent people who enter guilty or no contest pleas to resolve their cases and are immediately released from prison. In Louisiana, the leading organization advocating for innocence is Innocence Project New Orleans (hereinafter IPNO). IPNO, for instance, has represented seven innocent people who have been “freed” but not technically exonerated.⁹¹ Freed or exonerated people are only a subset of the innocent people who are convicted.⁹²

⁸⁹ <https://www.law.umich.edu/special/exoneration/Pages/about.aspx#>.

⁹⁰ Brief of Amici Curiae Innocence Project New Orleans, *Edwards v. Vannoy*, No. 19-5807, (hereinafter IPNO Amicus) pp.5-6, available at https://www.supremecourt.gov/DocketPDF/19/19-5807/148364/20200722123734456_Edwards%20v%20Vannoy%20No%20195807%20IPNO%20Amicus%20FINAL.pdf (citing Glossary, National Registry of Exonerations, available at <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited July 16, 2020)).

⁹¹ *Id.* at fn. 4.

⁹² *Id.*

According to the cases listed on the NRE, of the 62 known cases where a wrongly convicted innocent person was later exonerated in the State of Louisiana, 40 were tried in a way that permitted the defendant to be convicted by a non-unanimous jury. In other words, these were not capital cases—which prohibited non-unanimous verdicts—or were not convicted without a 12-person jury.

Of these 40 cases, at least 20 resulted in non-unanimous jury convictions. It is notable that according to the NRE, Louisiana is second only to Illinois in its per capita rate of exonerations.⁹³ The following are the 20 exonerations following non-unanimous jury convictions.

- 1) *State v. Reginald Adams*, Orleans Parish Case No. 278-951
- 2) *State v. Gene Bibbins*, East Baton Rouge Parish Case No. 2-87-979
- 3) *State v. David Bueso*, East Baton Rouge Parish Case No. 12-17-0089
- 4) *State v. Gerald Burge*, St. Tammany Parish Case No. 147-175
- 5) *State v. Darvin Castro Santos*, St. Bernard Parish Case No. 346-637
- 6) *State v. Royal Clark*, Jefferson Parish Case No. 02-0895
- 7) *State v. Catina Curley*, Orleans Parish Case No. 461-907
- 8) *State v. Glenn Davis*, Jefferson Parish Case No. 92-4541
- 9) *State v. Larry Delmore*, Jefferson Parish Case No. 92-4541
- 10) *State v. Douglas Dilosa*, Jefferson Parish Case No. 87-105
- 11) *State v. Robert Hammons*, St. Tammany Parish Case No. 136-658
- 12) *State v. Travis Hayes*, Jefferson Parish Case No. 97-3780
- 13) *State v. Jermaine Hudson*, Orleans Parish Case No. 407-888
- 14) *State v. Willie Jackson*, Jefferson Parish Case No. 87-205
- 15) *State v. Terrence Meyers*, Jefferson Parish Case No. 92-4541
- 16) *State v. Troy Rhodes*, Orleans Parish Case No. 432-709

⁹³ See The First 1600 Exonerations, National Registry of Exonerations, 14 (2015), available at http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf

17) *State v. Michael Shannon*, Orleans Parish Case No. 478-693

18) *State v. Kaliagh Smith*, Orleans Parish Case No. 475-055

19) *State v. Kia Stewart*, Orleans Parish Case No. 464-435

20) *State v. Archie Williams*, East Baton Rouge Case No. 01-83-0234

Statistically, 40 percent of trials result in non-unanimous jury verdicts.⁹⁴ Because 50 percent of the exoneration cases have included non-unanimous jury verdicts, non-unanimous verdicts are 25 percent more common in cases in which an innocent person is convicted than in all cases as a whole.

In briefing to the U.S. Supreme Court submitted by the Innocence Project New Orleans, the non-profit represented that it has approximately 100 clients who are still incarcerated “despite strong evidence of innocence,” “potential innocence cases that it is investigating,” or “cases [that] would be investigated if resources were available.”⁹⁵

As IPNO explained to the U.S. Supreme Court:

By cross-referencing its case/applicant database, which contains over 5,000 applicants, with data on cases in which there is evidence of a nonunanimous verdict, IPNO has identified one hundred individuals that are currently incarcerated based on non-unanimous verdict in cases in which there are indicia of innocence. These one hundred individuals are current IPNO clients or people that have had their cases selected for current or future investigation by IPNO because of case facts that match indicators of actual innocence. Ninety-one of these one hundred individuals are Black, suggesting that 91% of innocent people that are currently in prison because of verdicts made possible by a white supremacist law are Black. This estimate is likely to be under-inclusive. Some innocent individuals in Louisiana who were convicted by non-unanimous verdicts will not have completed the IPNO application process or will not fall within its mandate. Nevertheless, the estimate is a useful guide to the scale of the problem.⁹⁶

A. Cases where no crime occurred

Among the people who were convicted by a non-unanimous jury and who have been exonerated is Jermaine Hudson. In March of 1999, Mr. Hudson’s white 18-year-old accuser told his father he had been

⁹⁴ Dan Swenson, “Understanding Louisiana’s nonunanimous jury law findings: interactive, animated slide show,” *The Advocate*, April 1, 2018.

⁹⁵ IPNO Amicus, p. 14.

⁹⁶ *Id.* at p. 15.

robbed at gunpoint of cash and his St. Christopher medal. His father called the police and officers came with a photographic lineup a month later. His accuser did not want to tell his father he had spent his paycheck on drugs and had never been robbed, so he randomly chose a man out of the lineup. Mr. Hudson was pulled over in a traffic stop and then arrested for the crime. He spent 22 years in prison. His accuser came forward to the Orleans Parish District Attorney's office in March 2021. "For the last 20 years since this happened, I have been tortured by the lie I told," he said in an affidavit sworn to Assistant District Attorney Cormac Boyle.

When addressing the legislature in support of HB 346—a bill from the 2021 legislative session that sought to provide a remedy for non-unanimous jury convictions—Mr. Hudson shared his harrowing story: "Trying to fight an armed robbery charge conviction with a 10-2 verdict was a really hard battle. I didn't really have anywhere to turn to and no one to really look to. No one believed me always crying about my innocence."

Like Mr. Hudson, a number of men and women in prison are in situations where they maintain that there simply was no crime. For instance, Jeremiah Johnson remains incarcerated for a conviction originating out of Jefferson Parish. He was convicted of armed robbery over what he maintains was a dispute about his change from his purchase of chips. When the clerk finally gave the proper change, she then flagged down an officer and said she saw a gun on him and he forced her to give more change than she should have given. He was almost immediately apprehended, with the proper change on his person and no gun. He remains in prison on a 49.5-year sentence.

B. Cases of self-defense

Included within the exonerated is Catina Curley. She spent nearly 11 years in prison, despite a non-unanimous verdict, for shooting her abusive husband after an argument during which he pushed her against a wall, choked her, and threw a can of soda at her. *State v. Curley*, 250 So. 3d 236, 238 (La. 2018). After the Louisiana Supreme Court reversed her conviction for an evidentiary issue she went to trial again, and the trial ended in an acquittal.

The accounts of people in prison with self-defense facts, similar to those of Ms. Curley, are troubling. These cases include Rhonda Jordan, who was convicted with an unconstitutional non-unanimous jury. At trial, she presented substantial evidence that her family was under attack in their home and she did what she had to do to keep them safe. While two jurors found her self-defense arguments credible, Louisiana still convicted her and sentenced her to 20 years at hard labor.

These cases also include Ricky Davis, who was sentenced to life without parole for trying to protect a sexual assault victim. When Mr. Davis ran to a parking lot to get the license plate of the assailant, the driver attempted to run him and another bystander over with his truck. Ricky fired his weapon in an attempt to stop the driver. Mr. Davis received a life sentence for trying to do the right thing. “Ricky was a family friend who introduced me to his son. Now, his son and I have been married going on 12 years,” his daughter-in-law, Jeanique Angelain, said. “I was in the courtroom when the verdict came out. The two people who voted not guilty, their voices didn’t matter. So my children suffer because those jurors didn’t have a voice. My children have never seen him outside of prison. My daughter is about to be 10 and the last day of his trial is the day I found out I was having a little girl. Ricky has never had the opportunity to push my children on a swing or fly a kite with them. He loves going fishing and he’s never gotten to take his grandchildren fishing. They ask, ‘When does Paw-Paw get to come home?’ I don’t want to lie to them, it is heartbreaking. We have hope now, he might be able to come home to us.”

C. Cases of conflicting evidence, alibis, and single eye witnesses

Also among the people exonerated with a non-unanimous jury verdict is Kia Stewart. Mr. Stewart’s conviction was based on the testimony of a single eyewitness. Mr. Stewart was mistakenly identified as the man who shot Bryant Craig on a public street in broad daylight on the morning of July 31, 2005, just a month before Hurricane Katrina would devastate New Orleans. Police developed Mr. Stewart as a suspect based on an inaccurate anonymous tip and, having done no further investigation, included Mr. Stewart’s photograph in an array for the witness to identify, which he did.

When 17-year-old Kia Stewart heard there was a warrant for his arrest, he turned himself in to the police so he could clear his name. Because Hurricane Katrina hit three weeks later, he waited four years in

jail for a trial. His defense counsel were two law students. The State presented the one eyewitness. The defense presented no witnesses. The jury deliberated for one hour and thirteen minutes before finding him guilty. The vote was 10-2. Kia Stewart was sentenced to spend the rest of his life in prison.⁹⁷ IPNO later discovered at least 18 witnesses who either saw the crime and knew that Mr. Stewart was not the shooter, heard the true perpetrator confess to the crime, were with the perpetrator in the immediate aftermath of the crime, or proved Mr. Stewart's alibi. *Stewart v. Cain*, Orleans Parish Case No. 464-435 at 2 (April 13, 2015).

Mr. Stewart is one of the lucky few to have benefited from the lawyers at IPNO. Because people seeking post-conviction relief are often without legal counsel, situations like Mr. Stewart's can take decades to identify, if ever. Mr. Stewart spent nearly 10 years in prison for a crime he did not commit.

There are other examples of people who were convicted by non-unanimous juries despite overwhelming evidence that should have resulted in acquittal. For example, the evidence presented during Eyba Brown's trial confirmed that he was not in the city of Houma, where the robbery occurred, at the time of the crime. Rather, multiple witnesses testified that they were with Mr. Brown was in Lafayette at the time in question. Further, Mr. Brown was arrested for a traffic violation near the time of the crime and was bonded out of jail. Taken together, it seems extremely difficult to imagine that Mr. Brown could have been in Houma at the time of the crime. Even assuming he could, the victims did not agree that Mr. Brown was the perpetrator. While one victim chose Mr. Brown in a photo lineup, the other victim chose another person in the lineup. Finally, the victims' car was stolen in the robbery and found in New Orleans two weeks later with three black males in the car. There were seven latent fingerprints in the car, and none of them matched Mr. Brown's fingerprints. For any number of reasons, the two dissenting jurors harbored reasonable doubts about his guilt, but Mr. Brown remains in prison to this date.

D. Some Convictions No Longer Hold the Same Public Policy Support

⁹⁷ Joint Stipulations at 1, *Stewart v. Cain*, Orleans Parish Case No. 464-435 (April 9, 2015).

Non-unanimous jury verdicts also lead us to grapple with some historic sentencing practices. For example, Eric McClain was convicted by a non-unanimous jury after police searched his mother's home pursuant to a search warrant and found cocaine.

Mr. McClain, who is Black, was convicted by a 10-2 jury on December 9, 2010. The jury came back with questions on five separate occasions and deliberated for nearly half as long as the trial itself before they reached the 10-2 split. Mr. McClain was sentenced as a habitual offender to life without the possibility of parole. His prior felony convictions were for non-violent drug crimes, for which he received relatively minor sentences. On his first conviction he served two years, and on his second, he served 18 months.

If Mr. McClain were sentenced today, the current drug statute would only subject him to a sentence of 1-20 years. The habitual offender statute is used much more sparingly. Even if it were to be used, the habitual offender statute was also revised for individuals like Mr. McClain with convictions for non-violent crimes, such that he would not be subject to a sentence of more than twice the longest possible sentence of the underlying offense, meaning he could be subject to no more than a 40-year sentence.

Similarly, among the individuals with non-unanimous jury convictions is Mr. David Banks—a 53-year-old man who was sentenced to life imprisonment for cocaine possession under Louisiana's extreme habitual offender statute. Originally sentenced to twenty years, Mr. Banks was charged as a habitual offender, and resentenced to life without parole. Mr. Banks' non-unanimous conviction rested entirely on the testimony of the two arresting officers, who did not find any cocaine on Mr. Banks and instead claimed he threw it out while running from the officers.

The Benefits of Retrying These Cases Outweigh the Costs

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

residents per capita.⁹⁸ Although allowing new trials to all defendants convicted by non-unanimous juries would come at an administrative cost, it is likely less burdensome than the alternative of ensuring individuals convicted on non-unanimous verdicts remain incarcerated for life.

Each day Louisiana spends at least \$78,826 incarcerating men and women who have convictions that the U.S. Supreme Court has found to be unconstitutional.⁹⁹ The State of Louisiana has spent more than \$48.2 million incarcerating these individuals since the U.S. Supreme Court ruled these convictions unconstitutional in 2020.¹⁰⁰ There are already more than 1,000 cases in the courts, where documentation of the non-unanimous jury verdicts has been filed .

VI. The Courts Are Best Suited to Provide a Remedy

There were 143,401 criminal cases filed in the district courts in Louisiana in 2019.¹⁰¹ This does not include another 85,000 criminal filings in city and parish courts which would not be eligible for a jury trial. As such, the number of final non-unanimous jury-cases represents just over one percent of the cases that the Louisiana courts handle every year. And for various reasons, a substantial portion of this one percent would not actually result in new trial.

A. The vast majority of cases that are reversed will likely enter plea agreements

Less than one percent of cases proceed to trial in Louisiana. The vast majority enter into plea agreements. With the 143,401 cases initiated, there were only 445 criminal jury trials in Louisiana in 2019. Given the high plea rate, it is expected that a significant majority of the *Ramos*-reversals will not lead to a retrial. Even assuming a retrial rate of 10 times the ordinary trial rate in Louisiana, the impact on the system will not be overwhelming. Research also confirms that only about a third of cases that produce hung juries

⁹⁸ Louisiana Department of Public Safety and Corrections – Corrections Services, Proposed Budget Supporting Document [FY 2019-2020], 2, *available at* https://www.doa.la.gov/opb/pub/FY20/SupportingDocument/08A_Corrections_Services.pdf [<https://perma.cc/Q94Q-L2AW>]

⁹⁹ *See supra* note 3.

¹⁰⁰ *See supra* note 4.

¹⁰¹ Supreme Court of Louisiana, 2019 Annual Report of the Judicial Council of the Supreme Court, Statistical Data at 25 (2019), *available at* https://www.lasc.org/press_room/annual_reports/reports/2019_AR.pdf.

are ever retried. Over half are disposed of by plea agreements, dismissals, or other dispositions.¹⁰² Retrial “provides an opportunity for the prosecution and defendant to reassess the strength of their respective cases and, in many cases, agree on an alternative to retrial (dismissal or plea agreement).”¹⁰³

B. Survivors have an interest in a constitutional conviction

Survivors have an interest in the court system revisiting these cases, rather than the parole board or a panel recommendation system. Melanie, a survivor of more than 50 incidents of sexual abuse, testified in support of this option at the Louisiana State Legislature.¹⁰⁴ She explained why a constitutional conviction in her perpetrator’s case is important to her and why she supports new trials:

I am the survivor of rape when I was a child. . . . While I know without a shred of a doubt that his verdict and sentencing was just, the concept that we can send someone to prison for life imprisonment without a unanimous jury verdict is deplorable and it is steeped in Jim Crow racism and that is just not acceptable to me as a victim. The possibility of him getting out of prison absolutely paralyzes me, and would be trading his life sentence for mine. Regardless of that, I can’t in good conscience teach my sons that we support the rule of law only when it does not potentially hurt us. In this case it is wrong and I implore you to change it.¹⁰⁵

While the voices of survivors are certainly not a monolith, there are common-sense reasons for a remedy that utilizes the court system. Louisiana’s Constitution includes a declaration of rights primarily geared to court proceedings:

Article I, § 25 – Declaration of Rights

Any person who is a victim of crime shall be treated with fairness, dignity, and respect, and shall be informed of the rights accorded under this Section. As defined by law, a victim of crime shall have the right to reasonable notice and to be present and heard during all critical stages of preconviction and postconviction proceedings; the right to be informed upon the release from custody or the escape of the accused or the offender; the right to confer with the prosecution prior to final disposition of the case; the right to refuse to be interviewed by the accused or a representative of the accused; the right to review and comment upon the presentence report prior to imposition of sentence; the right to seek

¹⁰² See Paula L. Hannaford-Agor, J.D., Valerie P. Hans, Ph.D., Nicole L. Mott, Ph.D., G. Thomas Munsterman, M.S.E., National Institute of Justice, *Are Hung Juries a Problem?*, National Center for State Courts (2002) (citing Planning & Management Consulting Corporation, *Empirical Study Of Frequency Of Occurrence Cases Effects And Amount Of Time Consumed By Hung Juries*, 4-30 to 4-37 (1975)).

¹⁰³ *Id.*

¹⁰⁴ Testimony available at https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2021/may/0513_21_JU starting at 1:06:25.

¹⁰⁵ *Id.*

restitution; and the right to a reasonably prompt conclusion of the case. The legislature shall enact laws to implement this Section. The evidentiary and procedural laws of this state shall be interpreted in a manner consistent with this Section.

Louisiana's Crime Victim Bill of Rights also provides numerous protections for survivors in court proceedings that are stronger than in other scenarios.¹⁰⁶ These include, but are not limited to:

- The right to be interviewed in a private setting and to a secure area during criminal proceedings;
- The right to request assistance by judicial and law enforcement agencies in informing employers that the need for cooperation in the prosecution of the case may necessitate absence from work;
- The right to reasonable notice and to be present and heard during all critical stages of pre-conviction and post-conviction proceedings, and the right to be notified of scheduling changes of criminal justice proceedings;
- The right to consult with the prosecution prior to the trial and final disposition of the case;
- The right to refuse to be interviewed by the accused or a representative of the accused;
- The right to review and comment upon the pre-sentence report prior to imposition of sentencing and the right to be notified of the minimum and maximum sentence allowed by law;
- The right to be present at all phases of the court proceedings, including the sentencing hearing;
- The right to make a written or oral impact statement; and
- The right to seek restitution.¹⁰⁷

Moreover, it is not unprecedented for changes in law or policy to have survivors and victims' families re-engage with a conviction long-final:

¹⁰⁶ See Louisiana Revised Statutes, Title 46, Chapter 21-B – Rights of Crime Victims and Witnesses § 1841 et seq.

¹⁰⁷ *Id.*

- Survivors and victims' loved ones are faced with the painful experience of re-entering the traumatic criminal legal process when a person convicted is being exonerated of the crime, they receive a commutation from the Governor, or their sentence is being reduced by the State, often because the sentence was considered to be excessive or harsh. This re-entering of the process that they were wrongfully told would be final is not the fault of the survivor. Louisiana has had 63 exonerations since 1989, the vast majority (49) for murder and sexual abuse cases.¹⁰⁸ In fact, New Orleans, the parish where the most unconstitutional Jim Crow jury verdicts were handed down, is also considered to be the exoneration capitol of the United States.
- The decision by the Louisiana Supreme Court in the case of Derek Harris, an army veteran who was sentenced to life without parole for selling \$30 worth of marijuana, is providing a mechanism for excessive sentences to be addressed post conviction.¹⁰⁹ In many cases this will mean survivors or victims' families will receive notification that a sentence they were told was final will now be given a second look. Programs like Louisiana Victim Outreach and Pardon and Parole regularly provide logistical, emotional, and therapeutic support for survivors who are notified of an upcoming parole or clemency hearing, as well as these changes in post-conviction proceedings where someone who was previously ineligible for release is now eligible for parole.
- Commutations of life sentence are first handed down by the parole board in Louisiana, then await signature by the Governor. The board has recommended clemency for 214 people serving life sentences in Louisiana since 2016.¹¹⁰ Survivors are notified of these hearings and in each of these 214 cases where clemency was recommended, the sentences were thought to be final and never eligible for a second look.

¹⁰⁸ See <https://www.nealdavislaw.com/criminal-defense-guides/exonerations-by-state-2019.html>.

¹⁰⁹ See https://www.washingtonpost.com/national/thousands-are-serving-life-sentences-in-louisiana-a-new-case-could-give-them-the-chance-to-appeal/2020/06/17/facd58f2-aff-11ea-8758-bfd1d045525a_story.html.

¹¹⁰ https://www.nola.com/news/courts/article_a1895208-5d16-11ec-a569-1f234e8e0b1e.html.

Hundreds of Louisianans were until recently serving life without parole sentences for distributing heroin or manufacturing cocaine. Criminal justice reform legislation in 2009 sponsored by members of the Black Caucus and widely supported by Republicans and Democrats reduced these sentences that were handed down to defendants and victims as final.¹¹¹

There are thus several ways that the State exhibits the ability to right the wrongs of the past or make changes to a sentence previously deemed final. Taking this brave step shows a commitment to justice and moral necessity for the person incarcerated unjustly, as well as having systems in place to notify and support victims through a process that they were not told they would ever need to take part in.

C. The state has an interest in a credible court system

There are two critical ingredients to the functioning of the republic: public trust and confidence in government institutions. More than 1,500 men and women are in prison for a practice that betrayed the public's trust and makes the confidence in those convictions almost non-existent. When the public has neither trust nor confidence in the justice system, our whole system of government is undermined.

Non-unanimous jury verdicts are unconstitutional and undermine the legitimacy of the criminal justice system. Thus, such verdicts have long been prohibited in criminal procedure practices throughout the country. Only Louisiana and Oregon have allowed convictions by juries with one or two dissenting jurors. In Louisiana, Jim Crow law has permitted people to be sent to prison for the rest of their lives by non-unanimous juries. Non-unanimous jury verdicts were explicitly designed to disenfranchise the voices of Black jurors and convict more Black defendants, and this design has deprived criminal defendants of their Sixth Amendment rights for decades.

Several judges have spoken on the reasons why a remedy of new trials is fundamental to the court system. For instance, Chief Justice Bernette Joshua Johnson, in *State v. Gipson*, explained:

The recent campaign to end the use of the law is already part of the history of this state's long and ongoing struggle for racial justice and equal rights for all Louisianans. That

¹¹¹ See <https://drugpolicy.org/news/2001/06/louisiana-passes-sweeping-drug-law-reform>.

campaign meant many more citizens now understand the law's origins, purpose, and discriminatory impact. And that understanding contributes to a cynicism and fatal mistrust of Louisiana's criminal justice system by many citizens who see the lack of fundamental fairness and equal protection afforded to all. It is time that our state courts—not the United States Supreme Court—decided whether we should address the damage done by our longtime use of an invidious law.

A panel of the Louisiana Fourth Circuit Court of Appeal, when vacating Julio Melendez's conviction, articulated why anything short of new trials will feed that cynicism and fatal mistrust: "Considering the historically racist motivations behind the adoption of the non-unanimous jury verdict practice, this Court finds the practice, from its inception, was not steeped in fairness. Therefore, in the interest of justice and fundamental fairness, we hereby grant the writ and reverse the judgment of the district court."¹¹²

D. Any remedy outside of the judicial system will be an insufficient remedy

Task members have proposed a remedy where "mini-trials" are conducted by the Parole and Pardon Board to determine if an injustice occurred, and then afford parole. Other suggestions have included pardons or an independent risk review panel. Both the methods and the form of relief are insufficient to remedy the harms done to those with non-unanimous jury verdicts.

The Parole and Pardon Board already has a statutory mission and a vital role in Louisiana. Last session, the passage of Act 122, added 300 additional cases to the 2022 docket already stretching its dedicated members. The simple truth is that the Parole and Pardon Board only has seven members. It holds live hearings three weeks of the month. On the fourth week, it holds administrative hearings. To keep its accreditation, the Board can only consider 20 cases in a day. More hearings is thought to put at jeopardy the consideration of individual circumstances, and is thought to taint the result.

What is being proposed is a review more akin--although greater in depth--to pardon hearings. These reviews have significantly more documentation. For years, the Parole and Pardon Board did only 12 of those a year. Now it has increased to 18 or 19 for 2022.

¹¹² *Louisiana v. Melendez*, 2021-0597 (4th Cir. 11/10/21).

The method of a parole hearing lacks the compulsory powers to subpoena people to provide testimony. It lacks the rights of counsel appointed counsel for the benefit of those who are indigent. It lacks the evidentiary protections of the Court system. It does not have these functions because it is not a trier of fact. Instead, parole boards have historically played a limited mercy granting role focused narrowly on the issue of inmate rehabilitation.¹¹³ Moreover, parole-grant determinations are seen as comparatively informal proceedings, made behind closed doors, without court-level due process protections or often even involvement of defense counsel. Therefore, the interests, roles, and experiences of parole agency officials are far different from the legally trained judiciary who oversee court-based processes.¹¹⁴ While two of the seven board members are judges, any composition would likely silence their voices. Moreover, they have adapted to the standards drafted by the Board for the work they carry out, and would likely struggle to educate their colleagues if they were to seek to adopt court-like processes. Historically, courts have upheld the less-stringent practices of parole boards because “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”¹¹⁵ But here, the validity of the conviction is at issue and the role being proposed is one of fact-finder.

Similarly, comments about a method of pardon from the Governor cannot occur without pardon hearings--a function set up in Louisiana's constitution. As discussed above, the current number of hearings a year is less than 20 hearings. Other sorts of panels have failed to meet their stated purpose. The Covid-19 panel, for instance, was overwhelmed with criticism. The ACLU of Louisiana brought suit over the secretive nature of the panel. In a statement that accompanied the suit, for ACLU of Louisiana senior staff attorney Bruce Hamilton said: “DOC’s inexcusable failure to release vulnerable and low-risk individuals amid COVID-19 continues to put human lives and public health at risk. As we told the court today, the public deserves to know how this secretive panel deliberated – and why the panel denied, behind closed

¹¹³ Mae C. Quinn, Constitutionally Incapable: Parole Boards as Sentencing Courts, 72 SMU L. REV. 565, 568 (2019) <https://scholar.smu.edu/smulr/vol72/iss4/9>.

¹¹⁴ *Id.* at 568-569.

¹¹⁵ *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7–9 (1979).

doors, the temporary release of demonstrably low-risk, vulnerable people whose lives were at imminent risk during a pandemic.”¹¹⁶ Coverage from Prison Legal News described the panel in coverage: "The effectiveness of the panel in achieving its stated mission was negligible. It examined only 600 of the 1,100 eligible prisoners before its suspension. Of those, it recommended early release for just 100. Factors like outstanding warrants, unacceptable housing plans and refusal to accept ankle monitors with house arrest requirements further pared the number down to 63, or 5.7 percent of the original candidates — and just 0.2 percent of DOC’s total prisoner population.”¹¹⁷ Moreover, in December 2020, The Promise of Justice Initiative reported on the limited data it was able to obtain from the panel, and found that it provided preference for white applicants at the disadvantage of Black applicants. It had racial data for 319 individuals who were reviewed by the Panel. Of those, 61% were Black, and 39% were white, but only 48% of those granted furlough were Black, while 52% were white.¹¹⁸ T

VII. Recommendations

Considering the information provided above, The Promise of Justice Initiative and Voice of the Experienced recommend that Louisiana law be changed to explicitly provide a right to a new trial as the remedy for the men and women with non-unanimous jury convictions who remain in prison. Under current law, this new trial would need to occur within two years. The Promise of Justice Initiative and Voice of the Experienced recommend that an exception to this requirement be provided for this instance. Instead, the law should provide that no post-conviction relief application on this issue can sit without ruling for more than two years, and that the State retry cases within five years.

¹¹⁶ <https://www.laaclu.org/en/press-releases/doc-releases-documents-secretive-covid-19-review-panel-declines-produce-details>.

¹¹⁷ Ed Lyon, Louisiana’s COVID-19 Prisoner Furlough Panel Next to Useless, *Prison Legal News* (Jan. 1, 2021), available at <https://www.prisonlegalnews.org/news/2021/jan/1/louisianas-covid-19-prisoner-furlough-panel-next-useless/>

¹¹⁸ PJI, Locked in with COVID-19 (December 2020), p. 38, available at <https://static1.squarespace.com/static/5fe0e9cce6e50722511b03cc/t/600207fd2739d40c7ac78fe3/1610745857468/2020-PJI-COVID-Report+%281%29.pdf>

Understanding that a five-year delay hurts some people in prison more than others, the recommendation here is to require earlier retrial in the following circumstances: (1) if a person’s conviction occurred after 2015; or (2) if a person is within five years of their earliest release date.

The State of Louisiana has spent more than \$48.2 million incarcerating individuals convicted by non-unanimous juries since the U.S. Supreme Court ruled these convictions unconstitutional in 2020.¹¹⁹ Rather than throwing money away, the State of Louisiana should invest in this process. First, the State should provide \$9 million to be split between the State Public Defender and the District Attorneys. The vision would be to appropriate \$4.5 million in additional funding for district attorney offices and \$4.5 million for public defenders. This would be \$3,000 per case to both the defense and the prosecution, to be distributed based on the cases per district.

Investment should also recognize \$1,000,000 for the needs of survivor and victim family assistance (\$500,000) and re-entry (\$500,000). While across the state courts, district attorneys’ offices and re-entry housing providers have been seeking federal grants to build re-entry infrastructure, that has not occurred equally throughout the region. It is also clear that to assure the best practices for upholding survivor and victims’ rights an appropriation of \$500,000 is appropriate.

While the taskforce has focused on those carrying the greatest weight from non-unanimous jury verdicts—the men and women in prison—these are not the only individuals who need a policy change. Louisiana has more than 1,200 restrictions in its laws that befall people who have been convicted of a crime. The State should set a mechanism to review proof of non-unanimous jury verdicts, and provide a certification that these restrictions cannot generate from non-unanimous jury verdicts. This proposal should be developed with the assistance of Right on Crime, which has not been appointed to the taskforce, but which has an expertise in this area, along with Voice of the Experienced. Moreover, there should be a process to expunge non-unanimous jury verdict convictions developed with the expertise of the Justice and Accountability Center. Lastly, the taskforce should recommend legislation to issue a formal apology to

¹¹⁹ *See supra* note 4.

those convicted by non-unanimous jury verdicts and to the jurors who had their voices silenced and develop a reconciliation process with The Promise of Justice Initiative.

VIII. Conclusion

Legislation providing for new trials is the best practice for public safety. A new trial means those who are guilty get a constitutional conviction. It is the best practice for the incarcerated and their families because it assures due process and that the constitution protects them as much as anyone else. It is the best practice for survivors because it assures the protections in Louisiana law and constitution.

In comparison, the parole board is not set to be a finder of fact regarding underlying guilt or innocence, it has its own backlog, and is not trained for such an inquiry as has been proposed by the representative of the Louisiana District Attorneys' Association. While there are two judges on the board, the Board lacks the evidentiary and due process mechanisms available in the court system. Further, parole is not an appropriate remedy for the wrongfully convicted. The harm of non-unanimous juries and the necessary remedy are inseparably intertwined. An unjust remedy does not repair but rather inflicts further harm.

Ultimately, the remedy recommended by this taskforce must address the underlying injustice. More than 1,500 human beings remain behind bars, having been denied their constitutional right to be convicted only when the State proves guilt beyond a reasonable doubt. Through its Code of Criminal Procedure, the State of Louisiana directed juries to disregard the reasonable doubts of one or two of its members. The rights of these jurors were also violated. Any remedy that does not restore the jury is no remedy at all. With all due respect to the parole board, the parole board is not a jury of anyone's peers. No body of appointees can replace the role that our forefathers envisioned when the Bill of Rights was written, which was for humans to be judged by a cross-section of society, selected at random, and sworn to seek the truth. Likewise, to supplant the jury with a mini-trial is to rub salt into an old wound by continuing to suggest that we owe our fellow citizens, most of them Black, something less than their full constitutional rights. The remedy for injustice is justice, nothing more and nothing less.