SUPREME COURT OF LOUISIANA

No. 2021-KP-01893

STATE OF LOUISIANA,
Applicant

v.

REGINALD REDDICK
Respondent

On Supervisory and/or Remedial Writs
Twenty-Fifth Judicial District Court, Parish of Plaquemines,
No. 93-03922;
Court of Appeal, Fourth Circuit, No. 2021-K-0589

Louisiana's Original Brief

JEFF LANDRY
ATTORNEY GENERAL

/s/ *Shae McPhee*

ELIZABETH BAKER MURRILL (#20685)
Solicitor General
SHAE MCPHEE (#38565)
Deputy Solicitor General
Lead Counsel
J. Taylor Gray (#33562)
Assistant Attorney General
Louisiana Department of Justice
909 Poydras Street, Suite 1850
New Orleans, Louisiana 70112
Telephone: (225) 938-0779
Facsimile: (504) 556-9900
mcphees@ag.louisiana.gov

CHARLES J. BALLAY (#2719)
DISTRICT ATTORNEY

25th Judicial District
333 F. Edward Hebert Blvd., Bldg. 201
Belle Chasse, LA 70037
Telephone: (504) 934-6630
charlesballay@25thda.org

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

1. Late one summer night in 1993, Reginald Reddick shot Al Moliere in the head, killing him. Moliere's brother found him slumped over the steering wheel of his car in a parking lot early the next morning. ROA.63, 1639.

Both Moliere and Reddick had been seen drinking at "Alice's Sweet Shop" the night of the murder. *See, e.g.*, ROA.1800. According to an eyewitness, Reddick was sitting with Moliere in his car when he demanded money from Moliere. ROA.1816. After Moliere did not respond, Reddick grabbed Moliere and shot him. ROA.1817, 1819. Reddick took Moliere's money, exited the vehicle, and ran up a river levee. ROA.1822.

Authorities later recovered Moliere's papers and family photos "on the river side of the levee just opposite the house where [Reddick] resided." ROA.61, 1868. Sometime after that, a young boy found a .357 magnum pistol with Reddick's initials—"R.R."—carved into the handle. ROA.1090, 1122, 1718, 1738–39, 1767, 1871. The boy found the gun not far from the location where Moliere's papers and family photos had been found. ROA.1094, 1102, 1707, 1725, 1868. The gun contained one spent round and five live rounds of ammunition. ROA.1093, 1966.

2. A jury convicted Reddick of second-degree murder for killing Moliere.[1] ROA.35–35, 480–81. The verdict was non-unanimous (by a ten-to-two vote). ROA.35–35, 480–81. The court sentenced Reddick to life imprisonment, without the possibility of parole. ROA.36, 484. Reddick's conviction and sentence were upheld by the Fourth Circuit Court of Appeal. *See* ROA.436; *accord State v. Reddick*, 97-1155 (La. App. 4 Cir. 2/11/98), 707 So. 2d 521. Reddick's sentence and conviction became final after this Court denied his writ application on September 18, 1998. ROA.379; *accord State v. Reddick*, 98-0664 (La. 9/18/98), 724 So. 2d 755.

[1] The State initially charged Reddick with first-degree murder, and a jury unanimously found him guilty. The conviction was overturned on appeal, however. *State v. Reddick*, 94-2230 (La. App. 4 Cir. 2/29/96), 670 So. 2d 551, 553.

Years passed, and Reddick sought post-conviction relief on several occasions. *See, e.g.*, ROA.405 (application for post-conviction relief filed 2009). Each application was denied. *See, e.g.*, ROA.418.

In the spring of 2020—nearly 22 years after Reddick's conviction became final—the United States Supreme Court held in *Ramos v. Louisiana* that non-unanimous verdicts violate criminal defendants' right to a jury trial under the Sixth Amendment. 140 S. Ct. 1390 (2020). Almost immediately after issuing *Ramos*, the Supreme Court granted certiorari in *Edwards v. Vannoy* to decide whether the unanimity rule would apply retroactively to cases on federal collateral review. 140 S. Ct. 2737 (2020).

Because his conviction and sentence became final long before the Supreme Court announced its decision in *Ramos*, Reddick could not benefit directly from the new unanimity rule. La. C. Cr. P. art. 930.8(A)(2). Reddick again filed an application for post-conviction relief, requesting retroactive application of the *Ramos* rule to his conviction. ROA.435, 438. Reddick asked the district court for a stay of the proceedings until the Supreme Court issued a decision in *Edwards*. ROA.431. The district court granted the stay. *See* ROA.37.

The Supreme Court ultimately decided that the *Ramos* rule would not apply retroactively to cases on federal collateral review. According to *Edwards*, *Ramos* issued a new, procedural rule of criminal procedure. *Id.* at 1556. As such, it could not apply retroactively on federal collateral review unless it satisfied the so-called "second exception" to the retroactivity bar—as described in *Teague v. Lane*. *See id.* at 1557 (discussing *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion)). Under *Teague*'s second exception, it was theoretically possible that a new "watershed" rule of criminal procedure could apply retroactively to cases on collateral review if the rule altered "our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* (quotation marks omitted). The Court concluded

Ramos's rule did not meet that high standard. *Id.* at 1557–59.

Then the *Edwards* Court took one step further and held that *no* new rule of criminal procedure *could* ever apply retroactively on federal collateral review. That ruling rendered *Teague*'s second exception "moribund." *Id.* at 1560.

The district court lifted its stay in light of the *Edwards* decision and took up the question of whether *Ramos* would apply retroactively on state collateral view. ROA.37. After a hearing, the district court granted Reddick's request for retroactive application of the *Ramos* rule without much explanation. ROA.39.

The State filed a writ application in the Fourth Circuit, which "requested that the district court file a *per curiam*" opinion providing its reasoning. ROA.494. The district court complied and issued a decision opining that, although the Supreme Court concluded new procedural rules would never apply retroactively on federal collateral review, "*Teague* is still the standard to determining the retroactivity of a new rule of criminal procedure in Louisiana." The district court next concluded that, despite the Supreme Court's ruling to the contrary, *Teague*'s second exception to the retroactivity bar applies because *Ramos* "created a 'watershed' rule that retroactively applies to application for post-conviction relief under Louisiana law." The Fourth Circuit denied the State's writ without explanation.

The State next filed a writ application in this Court, noting that the Fourth Circuit had split with other circuit courts' decisions—which had concluded that *Ramos* does not apply retroactively on state collateral review. This Court granted the State's writ application and set the case for briefing and argument.

ERRORS

1. The lower court erred by concluding that a new procedural rule could retroactively benefit a petitioner on post-conviction review under state law.

2. The lower court erred by concluding that the United States Supreme Court's decision in *Ramos v. Louisiana* announced a new watershed rule of criminal procedure that requires retroactive application on post-conviction review under state law.

SUMMARY OF THE ARGUMENT

1. In *Edwards*, the United States Supreme Court concluded that *Ramos*' unanimity rule should not apply retroactively because it is not a watershed rule of criminal procedure. But the Court did not end its analysis there. The Court observed that, since adopting the *Teague* retroactivity framework, it had *never* identified any watershed rule. Consequently, no new procedural rule had applied retroactively. Rather than continuing the search for a watershed rule—which had proved as elusive as a "Tasmanian Tiger"[2]—the Court acknowledged that no new procedural rule would ever apply retroactively on federal collateral review.

Since adopting the *Teague* framework nearly thirty years ago, this Court has never identified any watershed rule of criminal procedure. And so, this Court has not applied any new rule of criminal procedure retroactively on state collateral review. The State respectfully urges the Court to follow the United States Supreme Court's example in *Edwards* and acknowledge that no new rule of criminal procedure will ever apply retroactively on state collateral review. The Court can and should reverse the lower court on these grounds alone.

2. Alternatively, the State asks the Court to conclude that *Ramos* did not announce a watershed rule of criminal procedure capable of satisfying *Teague*'s second exception. *Edwards* got it right. Although *Ramos* was a very important

[2] Justice Alito described the watershed rule as a "Tasmanian Tiger" during oral argument in *Edwards*. *See* Oyez, *Edwards v. Vannoy*, https://www.oyez.org/cases/2020/19-5807.

decision, especially for Louisiana, it was not as important as *Duncan v. Louisiana*, which held that States must provide jury trials. *See generally Duncan v. Louisiana*, 391 U.S. 145 (1968). *Duncan* was not applied retroactively. Nor was *Ramos* as important as *Batson v. Kentucky*, which remedied intentional discrimination in the jury selection process. *See generally Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* was not applied retroactively either. If *Duncan* and *Batson* were not watershed rules, *Ramos* certainly was not.

3. The State's interest in the finality of its non-unanimous verdicts is overwhelming and untainted by racial discrimination, as Reddick contends. If this Court decides *Ramos* should apply retroactively, it will flood the criminal justice system with hundreds of old cases. Evidence deteriorates, memories fade, and witnesses become unavailable over time. It will be difficult—if not impossible—for the State to retry these cases. Even if the State could retry some defendants, doing so would subject the victims of their crimes to fresh pain and difficulty.

After the United States Supreme Court upheld the constitutionality of non-unanimous verdicts in *Apodaca v. Oregon*, 406 U.S. 404 (1972), Louisiana held a constitutional convention in 1973 and re-adopted a narrower version of its non-unanimity rule. Nobody contends the Legislature acted with discriminatory intent during the 1973 convention—where it passed sweeping guarantees of racial equality. The Legislature relied in good faith on *Apodaca* and sought only to enhance judicial efficiency with its revamped non-unanimity rule. Thus, Reddick's conviction—which became final in 1998—is untainted by any racial discrimination.

* * *

The State respectfully asks the Court to reverse the lower court's decision and hold that new procedural rules never apply retroactively on state post-conviction review. Alternatively, the State asks the Court to hold that *Ramos* did not announce a new "watershed" rule of criminal procedure.

ARGUMENT

I. NEW PROCEDURAL RULES NEVER APPLY RETROACTIVELY

In *Edwards*, the Supreme Court observed "[i]t is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review." 141 S. Ct. at 1560. In the decades since adopting the retroactivity framework of *Teague*, the Court *never* identified a new watershed rule of criminal procedure warranting retroactive application. After considering the issue again and again in case after case without ever identifying even one "watershed" rule, the Court eventually concluded in *Edwards* that "[t]he watershed exception is moribund." *Id.*

This Court has also adopted the *Teague* retroactivity framework. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992). And, like its federal counterpart, this Court has never identified a new rule of criminal procedure that warrants retroactive application. The time has come for this Court to make explicit what has become increasingly apparent: New procedural rules do not apply retroactively on state post-conviction review. The lower court erred by concluding otherwise.

A. In Federal Habeas Cases, the Watershed Exception Is "Moribund"

If this Court or the United States Supreme Court announces a new constitutional rule, the rule applies automatically to all criminal cases pending on *direct* review—state or federal. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."); *State v. Ruiz*, 2006-1755 (La. 4/11/07), 955 So. 2d 81, 85 ("This Court has followed *Griffith v. Kentucky* for some time and has applied new rules to cases pending on direct review or not yet final."). Even a criminal defendant who lost at trial can benefit from a new constitutional rule if his case remains pending on appeal when the new rule is announced. *See State v. Sparks*, 1988-0017 (La. 5/11/11), 68 So. 3d 435, 469 (applying

new rules on appeal despite 24-year gap between sentencing and appeal).

Things change substantially, however, after direct review ends and a criminal defendant's case becomes final. For federal habeas cases, the Supreme Court explained in *Teague* that new constitutional rules generally should not apply retroactively to cases that are final. *See Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016), *as revised* (Jan. 27, 2016) ("Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced."); *accord Danforth v. Minnesota*, 552 U.S. 264, 300 (2008) (Roberts, C.J., dissenting) ("[O]ur decision in *Griffith* made finality the touchstone for retroactivity of new federal rules."). This is known as "*Teague*'s retroactivity bar." *Montgomery*, 577 U.S. at 199.

In *Teague*, the Court envisioned two possible exceptions to the retroactivity bar. The first exception is for new *substantive* rules of constitutional law. 489 U.S. at 307. These are "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198. Substantive rules also include "decisions that narrow the scope of a criminal statute by interpreting its terms . . . [and] constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) (citing *Saffle v. Parks*, 494 U.S. 484, 494–95 (1990); *Bousley v. United States*, 523 U.S. 614, 620–21 (1998)). State and federal courts "must give retroactive effect to new substantive rules of constitutional law." *Montgomery*, 577 U.S. at 198.

In *Teague*, the Court also contemplated an exception to the retroactivity bar for an "extremely narrow" class of "watershed" *procedural* rules. *Id.* at 352; *Teague*, 489 U.S. at 311 ("[T]he second exception [is meant] to be reserved for watershed rules of criminal procedure."). Rules are procedural when they "regulate only the manner

of determining the defendant's culpability." *Id.* at 353.

Because new procedural rules have a "more speculative connection to innocence" than substantive rules, the Supreme Court sharply curtailed *Teague*'s second exception. *Summerlin*, 542 U.S. at 352. The Court "repeatedly emphasized the limited scope of the second *Teague* exception, explaining that it is clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Beard v. Banks*, 542 U.S. 406, 417 (2004) (cleaned up).

Over the years, the Supreme Court announced many new procedural rules. Over and over again, it considered whether the new procedural rules should apply retroactively on federal collateral review. The Court declined every invitation to declare a new procedural rule "watershed"—prioritizing States' tremendous interests in the finality of their convictions over prisoners' interests in retroactive application of a new procedural rule that has only a speculative connection with innocence. *Summerlin*, 542 U.S. at 352.

For example, the Supreme Court concluded that none of the following new procedural rules warranted retroactive application:

- *Chaidez v. United States*, 568 U.S. 342 (2013) (rejecting retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that defense counsel is ineffective for not advising defendant about risk of deportation arising from guilty plea);
- *Whorton v. Bockting*, 549 U.S. 406 (2007) (rejecting retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004), which held that admission of certain hearsay evidence violated the Confrontation Clause);
- *Summerlin*, 542 U.S. at 348 (rejecting retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury must determine presence or absence of aggravating factors to impose death penalty);

- *Beard*, 542 U.S. at 406 (rejecting retroactivity of *Mills v. Maryland*, 486 U.S. 367 (1988), which invalidated capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously);
- *Tyler v. Cain*, 533 U.S. 656 (2001) (rejecting retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990), which held that jury instruction is unconstitutional if there is a reasonable likelihood the jury understood it to allow conviction without proof beyond reasonable doubt);
- *O'Dell v. Netherland*, 521 U.S. 151 (1997) (rejecting retroactivity of *Simmons v. South Carolina*, 512 U.S. 154 (1994), which held that capital defendant must be allowed to inform sentencer that he would be ineligible for parole if prosecution argues future dangerousness);
- *Gilmore v. Taylor*, 508 U.S. 333 (1993) (rejecting retroactivity of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), in which the Seventh Circuit held that a jury instruction—which left jurors with a false impression that they could convict even if defendant possessed one of the mitigating states of mind—violated due process);
- *Sawyer v. Smith*, 497 U.S. 227 (1990) (rejecting retroactivity of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which held that Eighth Amendment barred imposition of death penalty by jury that had been led to believe responsibility for the ultimate decision rested elsewhere).

Finally, in *Edwards*, the Supreme Court granted certiorari to consider the retroactivity of *Ramos*—which concluded that the Sixth Amendment prohibited States from accepting non-unanimous jury verdicts. The rule announced in *Ramos* was undisputedly procedural. And so, the question for the Court in *Edwards* was whether *Ramos* announced a "watershed" rule that warranted retroactive application. Like every other new procedural rule it had considered, the Court concluded the *Ramos* rule should not apply retroactively.

The *Edwards* Court then observed that, "for decades, the Court has rejected watershed status for new procedural rule after new procedural rule." 141 S. Ct. at 1560. The Court *sua sponte* raised the question of whether *any* new procedural rule could ever satisfy the watershed exception. The answer was no: "At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception." *Id.* at 1559.

In light of its observation that new procedural rules never apply retroactively, the Court concluded that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." *Id.* at 1560. To avoid these negative consequences, the Court decided that "[t]he watershed exception is moribund. It must be regarded as retaining no vitality." *Id.* (internal quotation marks omitted).

The rule of *Edwards* is clear: New procedural rules will never apply retroactively on federal collateral review. *Teague*'s "purported exception" for watershed procedural rules was no exception at all. *Id.* It was never anything more than an "empty promise." *Id.* New procedural rules have never applied retroactively on federal collateral review under the *Teague* framework. And, in light of *Edwards*, they never will.

B. Since Adopting *Teague*, This Court Has Never Applied a New Procedural Rule Retroactively

Nearly 30 years ago, this Court adopted *Teague*'s retroactivity framework for criminal defendants seeking post-conviction relief in state court. *Whitley*, 606 So. 2d at 1296. The Louisiana Constitution "does not prohibit nor require courts to give retroactive application to criminal law decisions." *Id.* And the Court "was not bound to adopt" the *Teague* retroactivity bar. *Id.* But the Court concluded it was necessary "[g]iven our overcrowded state judicial system." *Id.* at 1297. Moreover, the Court agreed with Justice Harlan's words "on the need for finality." *Id.* (quoting *Mackey v.*

United States, 401 U.S. 667, 691 (Harlan, J., concurring)). According to Justice Harlan, relitigating "facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed . . . may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Id.*

This Court wields broad power to fashion remedies for petitioners on state post-conviction review. Indeed, the Court is free to apply a new rule retroactively on state post-conviction review even when the United States Supreme Court has *expressly declined* to make the rule retroactive on federal collateral review. *Danforth*, 552 U.S. at 266 (holding *Teague* does not constrain "the authority of state courts to give broader effect to new rules of criminal procedure" than the Supreme Court's holdings); *accord Montgomery*, 577 U.S. at 199 ("Since *Teague*'s retroactivity bar limits only the scope of federal habeas relief," . . . States are free to make new procedural rules retroactive on state collateral review." (cleaned up)); *Edwards*, 141 S. Ct. at 1559 n.6. ("States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings.").

Despite wielding unfettered authority to fashion remedies on post-collateral review, since adopting the *Teague* retroactivity framework, this Court has *never* applied any procedural rule retroactively. Like the United States Supreme Court, this Court has turned down every opportunity to declare a new procedural rule retroactive:

- *Whitley*, 606 So. 2d at 1296 (rejecting retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990), which held that jury instruction is unconstitutional if there is a reasonable likelihood the jury understood it to allow conviction without proof beyond reasonable doubt);
- *State v. Tate*, 2012-2763 (La. 11/5/13), 130 So. 3d 829, 841 (concluding that the Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460

(2012), was procedural and not retroactive);[3]

- *Stewart v. State*, 95-2385 (La. 7/2/96), 676 So. 2d 87, 87 (rejecting retroactivity of *State v. Hattaway*, 621 So. 2d 796 (La. 1993), in which this Court determined that the right to counsel guaranteed by Louisiana Constitution Article I, § 13 attaches no later than the first court appearance or judicial hearing, rather than at the time of indictment as previously understood);
- *State v. Ferreira*, 2019-01929 (La. 10/14/20), 302 So. 3d 1096, 1097, (rejecting retroactivity of *Lee v. United States*, 137 S. Ct. 1958 (2017), which held that it is ineffective assistance of counsel to fail to inform a defendant of the immigration consequences of pleading guilty).

In sum, for 30 years, despite considering the issue on several occasions, this Court has never once identified any new procedural rule capable of satisfying *Teague*'s watershed exception.

C. This Court Should Hold the Watershed Exception Is "Moribund" for State Collateral Review

The State respectfully urges the Court to follow the United States Supreme Court's example in *Edwards* and—for the purposes of state collateral review—declare the watershed exception moribund. All of the negative consequences of maintaining the exception identified by *Edwards* also apply here. Retaining the watershed exception for the purposes of state collateral review "offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." 141 S. Ct. at 1560.

The practical effect of adopting *Edwards*' view of *Teague* would be to draw a bright line between substantive and procedural rules on state collateral review. New substantive rules would always apply retroactively; new procedural rules would

[3] *Tate* was abrogated by *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which concluded *Miller* announced a substantive rule of criminal procedure.

never apply retroactively. The profound difference between substantive and procedural rules militates in favor of drawing this sharp distinction. The reason substantive rules are always retroactive is "they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 351–52. By contrast, procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the *possibility* that someone convicted with use of the invalidated procedure *might* have been acquitted otherwise." *Id.* at 352 (emphasis added). "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 136 S. Ct. at 730.

In any event, declaring *Teague*'s second exception moribund would simply acknowledge what has been "increasingly apparent to bench and bar." *Edwards*, 141 S. Ct. at 1560. The Supreme Court has identified only one procedural rule that "might fall within this exception"—the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Beard*, 542 U.S. at 417. That "sweeping rule . . . established an affirmative right to counsel in all felony cases." *O'Dell*, 521 U.S. at 167. The Supreme Court "has flatly stated that it is unlikely that [any rules like *Gideon*] have yet to emerge." *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) (internal quotations omitted). Thus, concluding the watershed exception retains "no vitality" is unlikely to negatively impact state prisoners because no watershed rules are likely to emerge. *Edwards*, 141 S. Ct. at 1560.

The *Ramos* plurality opinion explained that "*Teague* frees [the Court] to say what [it] know[s] to be true about the rights of the accused under our Constitution today, while leaving questions about the reliance interest States possess in their final judgments for later proceedings crafted to account for them." *Ramos*, 140 S. Ct. at

1407 (plurality op.). Doing away with *Teague*'s second exception will make it even easier for the Court to say what it knows to be true about the rights of the accused under our Constitution today: The Court will be assured that any new procedural rules it identifies will not have devastating impacts on the State's judicial system.

At bottom, in Louisiana, the watershed exception has amounted to an "empty promise." *Edwards*, 141 S. Ct. at 1560. Declaring it moribund will provide the State, this Court, and even defendants with the benefits of finality—as explained by Justice Harlan in *Mackey* and the Supreme Court in *Edwards*. *See Whitley*, 606 So. 2d at 1297; *Edwards*, 141 S. Ct. at 1560. If new procedural rules do not apply retroactively on state collateral review, then there will be no need to decide whether *Ramos* announced a watershed rule of criminal procedure. The Court can—and should—reverse the lower court on this ground alone.

II. *RAMOS* DID NOT ANNOUNCE A WATERSHED PROCEDURAL RULE

Even if *Teague*'s second exception survives for the purposes of state collateral review, *Ramos* did not announce a watershed rule of criminal procedure. *Edwards* considered this issue directly and properly concluded *Ramos* could not satisfy *Teague*'s second exception in light of the Court's precedent rejecting the retroactivity of other significant procedural rules. 141 S. Ct. at 1556–59.

In any event, under the traditional *Teague* analysis, *Ramos* is not watershed. Unanimity is not necessary to prevent an "impermissibly large risk of an inaccurate conviction." *Whorton*, 549 U.S. at 418. Nor did *Ramos* alter our understanding of the "bedrock procedural elements essential to the fairness of a proceeding." *Id.* The lower court erred by concluding *Ramos* was a watershed rule.

A. *Edwards* Correctly Concluded *Ramos* Is Not a Watershed Rule

Despite its observation that *Ramos* was a "momentous and consequential" decision, the *Edwards* Court concluded *Ramos* did not announce a watershed rule. *Edwards*, 141 S. Ct. at 1559. The Court reasoned that it had identified *exceptionally* consequential procedural rules in other cases, touching upon issues of jury-trial rights

and racial discrimination in the jury selection process. These "decisions fundamentally reshaped criminal procedure throughout the United States and significantly expanded the constitutional rights of criminal defendants." *Id.* But none of those new rules applied retroactively.

For example, in *Batson v. Kentucky*, "the Court overruled precedent and revolutionized day-to-day jury selection by holding that state prosecutors may not discriminate on the basis of race when exercising individual peremptory challenges." *Id.* (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986)). And yet, despite the importance of *Batson*—and its profound impact on the justice system by remedying race-based inequities connected with the jury-trial right—the Court declined to make *Batson* retroactive in *Allen v. Hardy*, 478 U.S. 255 (1986) (*per curiam*).

In *Duncan v. Louisiana*, the Court "repudiated several precedents and ruled that a defendant *has a constitutional right to a jury trial* in a state criminal case." *Id.* at 1558 (emphasis added) (discussing *Duncan v. Louisiana*, 391 U.S. 145 (1968)). Despite the fact that *Duncan* guaranteed the right to a jury trial, "the Court in *DeStefano* declined to retroactively apply the jury right." *Id.* (citing *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*)).

And, finally, in *Crawford v. Washington*, the Court "relied on the original meaning of the Sixth Amendment's Confrontation Clause to overrule precedent and restrict the use of hearsay evidence against criminal defendants." *Id.* (discussing *Crawford v. Washington*, 541 U.S. 36 (2004)). *Ramos* also "relied on the original meaning of the Sixth Amendment" when overturning *Apodaca v. Oregon*, 406 U.S. 404 (1972). But, in *Whorton*, the Court declined to retroactively apply *Crawford*. 549 U.S. at 421.

According to *Edwards*, because *Batson*, *Duncan*, and *Crawford* were not watershed rules, *Ramos* necessarily fell short. This is plainly correct. Each of these decisions is more impactful and fundamental than *Ramos*. If *Duncan*'s right to a *jury*

trial itself was not watershed, how could *Ramos*' subsidiary right to a unanimous jury verdict be watershed? *Batson* remedied *intentional* racial discrimination in the jury selection process. By contrast, *Ramos*' unanimity rule remedied (at most) *disparate* impacts on racial minorities.

For the purposes of state collateral review, this Court never made *Batson*, *Duncan*, or *Crawford* retroactive.[4] *See, e.g.*, *State v. George*, 255 La. 104, 107, 229 So. 2d 715, 716 (1969) (declining to apply *Duncan* retroactively); *State v. Rockeymore*, 253 La. 101, 102, 216 So. 2d 828, 829 n.2 (1968) (same). Because those cases were not retroactive on state collateral review—under the reasoning of *Edwards*—*Ramos* should not apply retroactively either.

B. Non-unanimity Does Not "Seriously Diminish" Accuracy

To qualify as "watershed," a new rule must be "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Whorton*, 549 U.S. at 418 (cleaned up). It is not enough to say that the rule is "aimed at improving the accuracy of trial" or that the rule "is directed toward the enhancement of reliability and accuracy in some sense." *Sawyer*, 497 U.S. at 242–43. Rather, "the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Summerlin*, 542 U.S. at 352 (emphasis added). Thus, the relevant question is not whether *Ramos* "resulted in some net improvement in the accuracy of factfinding in criminal cases," but instead whether the absence of the unanimity rule "seriously" diminishes the likelihood of an accurate conviction. *Whorton*, 549 U.S. at 420.

There is no reason to believe that non-unanimous verdicts lead to an "impermissibly large risk of an inaccurate conviction." *Id.* at 418. Even leaving *Edwards* aside, the United States Supreme Court's precedent confirms that accuracy is not seriously diminished without *Ramos*' unanimity rule. And, as a factual matter,

[4] It does not appear that this Court even considered whether *Batson* or *Crawford* should apply retroactively.

non-unanimous verdicts are not a significant causal factor of wrongful convictions. Finally, there is nothing fundamentally inaccurate about non-unanimous convictions—which have been championed by leading scholars and are currently accepted by this Country's closest allies.

1. The United States Supreme Court has handed down decisions rejecting the retroactivity of new rules protecting fundamental jury trial rights. These decisions show why accuracy is not seriously diminished absent *Ramos*' unanimity rule.

For example, in *Schriro v. Summerlin*, the Court was asked to decide whether the new rule it announced in *Ring v. Arizona* was a watershed rule of criminal procedure. In *Ring*, the Court "held that a sentencing judge, sitting without a jury, may not find an aggravating circumstance necessary for imposition of the death penalty." *Summerlin*, 542 U.S. at 353 (cleaned up). When considering whether judicial factfinding seriously diminished the accuracy of the proceeding in *Summerlin*, the Court looked to its decision in *DeStefano*, 392 U.S. at 631, where the Court "refused to give retroactive effect to *Duncan*." *Id.* at 356. As discussed above, "*Duncan* applied the Sixth Amendment's jury-trial guarantee to the States." *Id.* Although the Court decided *DeStefano* under the pre-*Teague* retroactivity framework, *Summerlin* emphasized that *DeStefano*'s "reasoning is germane" to the question of *Ring*'s retroactivity. *Id. Summerlin* observed that if "a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Id.* at 356–57. That reasoning applies *a fortiori* here. If a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial where at least 10 of 12 jurors must agree to convict a defendant could be.

Similarly, in *Allen*, 478 U.S. at 255, the Supreme Court held in a *per curiam* decision that its landmark decision in *Batson* would not apply retroactively. *Allen*'s reasoning—though it predates *Teague*—is also "germane" to the present case because

it directly addressed whether the *Batson* rule sufficiently enhanced the accuracy of criminal trials. *Summerlin*, 542 U.S. at 357. In *Allen*, the Court observed that a new rule is more likely to deserve retroactive application when it "goes to the heart of the truthfinding function." 478 U.S. at 259. The *Batson* rule may have had "some bearing on the truthfinding function of a criminal trial." *Id.* But that rule also "serves other values as well," such as preventing discrimination against jurors and strengthening "public confidence" in the justice system. *Id.* Moreover, the Court noted that retroactive application of *Batson* to cases pending on collateral review would "seriously disrupt the administration of justice" because "prosecutors, trial judges, and appellate courts" had relied on the cases that *Batson* overruled, and retroactive application would result in countless vacated convictions and retrials. *Id.* at 260.

If *Batson* and *Ring* did not sufficiently improve accuracy to warrant watershed status, *Ramos* also falls short. A non-unanimous verdict does not seriously impair accuracy if *no jury at all* does not seriously impair accuracy. *See Summerlin*, 542 U.S. at 353 (discussing *Stefano*, 392 U.S. at 631). Notably, the Supreme Court has repeatedly declined to make important procedural rules retroactive even in capital cases, where the consequences of an inaccurate verdict or sentence are particularly acute.

2. In any event, non-unanimity did not seriously diminish the accuracy or reliability of jury verdicts. An "inaccurate" conviction means the conviction of someone who is factually innocent. *See Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Teague*, 489 U.S. at 312). But non-unanimous juries do not appear to be a significant causal factor of wrongful convictions. This can be seen by comparing the number of wrongful convictions in Oregon and Louisiana to those States that have always required unanimity.

Oregon has had 23 exonerations (approximately 0.5 per 100,000 residents) and Louisiana has had 75 exonerations (1.6 per 100,000). Louisiana's rate of exonerations

per capita is comparable to that of New York (331 exonerations; 1.6 per 100,000) and Texas (400 exonerations; 1.3 per 100,000), and considerably lower than that of Illinois (425 exonerations; 3.3 per 100,000 residents), even though the latter three States have mandated unanimity all along.[5] And, if anything, these figures overstate the impact of non-unanimous verdicts in Louisiana and Oregon, since not all exonerations in those States involved non-unanimous convictions. Before the Supreme Court, Thedrick Edwards' *amici* conceded that only around 25% of the exonerations in Louisiana involved non-unanimous verdicts. *See* Innocence Project Br. 6–7.[6]

3. Reddick is wrong to suggest that non-unanimous convictions are necessarily inaccurate or unfair. ROA.522. Although there may be some instances in which unanimity helps promote accuracy through better deliberations, that will surely not always be the case. In other circumstances, unanimity will diminish the accuracy of a verdict and merely promote delay, frustration, and gridlock. *See Whorton*, 549 U.S. at 419–20 (similarly noting that the *Crawford* rule could increase or decrease the accuracy of trial proceedings depending on the circumstances).

For example, under a unanimity rule, a holdout juror might "continue[] to insist upon acquittal without having persuasive reasons in support of [his] position." *Johnson v. Louisiana*, 406 U.S. 356, 361 (1972). As Professor Akhil Amar explained, an "eccentric holdout" juror might "refuse[] to listen to, or even try to persuade, others." Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1191 (1995). It hardly advances the accuracy of the jury's deliberations if a holdout juror, empowered by a unanimity rule, can block a verdict based on an irrational interpretation of the evidence, an improper bias in favor of the defendant,

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[5] The per capita figures cited here are derived by dividing the state-level statistics in the National Registry of Exonerations, *see* https://bit.ly/3091xdd (last visited 4/4/2022), by each State's estimated population as of July 1, 2021, *see* U.S. Census Bureau, State Population Totals, https://bit.ly/363ZLxN.

[6] The brief is available on the United States Supreme Court's website at https://bit.ly/3u69vmo.

or a desire to nullify the charges notwithstanding compelling evidence of guilt. *Cf. Saffle*, 494 U.S. at 495 ("The objectives of fairness and accuracy are more likely to be threatened rather than promoted by a rule allowing the sentence to turn on whether the defendant . . . can strike an emotional chord in a juror.").

Because unanimity may or may not improve the accuracy of convictions, *Ramos* is more analogous to *Crawford* than *Gideon*. As discussed above, in *Crawford*, the Court overturned *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of a new interpretation of the Confrontation Clause. In *Whorton*, the Court unanimously declined to retroactively apply *Crawford*'s new rule. The Court reasoned that "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials." *Whorton*, 549 U.S. at 419. Similarly, in *Ramos* the Court explained that "a jurisdiction adopting a non-unanimous jury rule even for benign reasons would still violate the Sixth Amendment." 140 S. Ct. at 1401 n.44 (emphasis added). Unanimity may be an "ancient guarantee," *id.* at 1390, but it is by no means the only way for a jury to fairly and accurately determine the guilt or innocence of the defendant.

Numerous other countries that employ a jury system allow juries to return non-unanimous verdicts. In fact, "among the class of countries that embraces the jury, the unanimous decision rule for guilt and acquittal generally enforced by the American system is very much an anomaly." Ethan J. Lieb, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 642 (2008). "Although Canada and some jurisdictions in Australia maintain unanimity as a requirement (for conviction and acquittal)," this is far from the majority rule; instead, "more relaxed majoritarian and supermajoritarian rules clearly dominate the global jury system landscape." *Id.* at 642.

Notably, England no longer requires juries to render verdicts unanimously. "In England . . . the requirement of a unanimous verdict was dropped in 1967 by the Criminal Justice Act, which permitted verdicts of ten to two." Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62-SPG Law & Contemp. Probs. 7, 36 (1999). The Supreme Court of Ireland has similarly explained that a "requirement of unanimity" is not needed to ensure that jurors can "bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused." *O'Callaghan v. Attorney General*, [1993] 2 I.R. 17, 26. It would be odd for this Court to hold that the same rule used by several countries is so fundamentally unfair that it significantly diminishes the likelihood of an accurate verdict.

C. Unanimity Is Not a Previously Unrecognized Bedrock Rule

A new rule also may not be deemed watershed unless it "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418. This second requirement "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right." *Id.* at 420–21. Rather, the new rule "must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421 (citations omitted). Reddick cannot make that showing here.

The Supreme Court laid the groundwork for *Ramos* by recognizing other bedrock rights in previous cases—such as the right to a jury trial in *Duncan*. *See Edwards,* 141 S. Ct. at 1558 (discussing *Duncan*, 391 U.S. at 145). Given that non-unanimity had never "become part of our national culture," *Ramos*, 140 S. Ct. at 1406, it is highly implausible that *Ramos* involved a "previously unrecognized" "bedrock" right.

III. THE STATE'S FINALITY INTERESTS ARE OVERWHELMING

Teague's demanding test is "expressly calibrated" to account for the State's legitimate reliance interests in the finality of its convictions. *Ramos*, 140 S. Ct. at

1407 (plurality op.) (citing *Stringer v. Black*, 503 U.S. 222, 228 (1992); *see also Montgomery*, 136 S. Ct. at 735 (noting importance of "avoid[ing] intruding more than necessary upon the States' sovereign administration of their criminal justice systems")). It is difficult to overstate the State's interest in the finality of its non-unanimous jury verdicts. The State has been accepting such jury verdicts for decades. Redoing those trials decades later would be impractical—if not impossible—and could overwhelm the criminal justice system.

And, contrary to Reddick's assertions, the State's finality interests are untainted by racial discrimination.

A. Applying *Ramos* Retroactively Could Overwhelm the Justice System

If the Court grants relief to Reddick, the State could potentially be forced to retry hundreds of defendants—many of whom were convicted years or decades ago. *See Allen*, 478 U.S. at 260 (discussing same concerns in rejecting retroactivity of *Batson* rule). In the Supreme Court, one of Thedrick Edwards' *amici* estimated that more than 1,600 cases in Louisiana alone could be affected in some way by a holding that *Ramos* applies retroactively (with 1,300 of those defendants requiring "new proceedings"). *See* Promise of Justice Institute Br. 9–20.[7] This Court has already denied writ applications in dozens of cases with *Ramos* retroactivity claims.[8]

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[7] The brief is available on the United States Supreme Court's website at https://bit.ly/35DYIGW.

[8] *See, e.g.*, *State v. Dotson*, 2019-01828 (La. 6/3/20), 296 So.3d 1059; *Silva v. Vannoy*, 2019-01861 (La. 6/3/20), 296 So.3d 1033; *Lionel Jones v. State*, 2019-01900 (La. 6/3/20), 296 So. 3d 1060; *State v. Rochon*, 2019-01678 (La. 6/3/20), 296 So.3d 1028; *State v. Young*, 2019-01818 (La. 6/12/20), 2020 WL 3424876 (involved request for polling slips to file PCR); *State v. Brown*, 2020-00276 (La. 6/22/20), 297 So.3d 721; *State v. McKnight*, 2020-00873 (La. 7/17/20), 299 So.3d 64; *Dennis v. Vannoy*, 2019-01794 (La. 7/24/20), 299 So.3d 54; *State v. Essex*, 2020-00009 (La. 8/14/20), 300 So.3d 843; *State v. Cook*, 2020-00001 (La. 8/14/20), 300 So.3d 838; *State v. Parish*, 2020-00072 (La. 8/14/20), 300 So.3d 861; *Joseph v. State*, 2019-01989 (La. 8/14/20), 300 So.3d 824; *State v. McGuire*, 2019-01632 (8/14/20), 300 So.3d 830; *State v. Johnson*, 2019-02075 (La. 8/14/20), 300 So.3d 858; *State v. Spencer*, 2019-01318 (La. 8/14/20), 300 So.3d 855*; *Lawson v. State*, 2019-02074 (La. 8/14/20), 300 So.3d 858; *State v. Triplett*, 2019-01718 (La. 8/14/20), 300 So.3d 827; *Vincent Smith v. Louisiana*, 2019-02080 (La. 8/14/20), 300 So.3d 859; *State v. Rashan Williams*, 2020-00069 (La. 8/14/20), 300 So.3d 860; *State v. Withers*, 2020-00258 (La. 8/14/20), 300 So.3d 860; *State v. Wardlaw*, 2020-00004 (La. 8/14/20), 300 So.3d 859; *State v. Mason*, 2019-01821 (La. 8/14/20), 2020 WL 4726952; *State v. Mims*, 2019-2088 (La. 8/14/20), 300 So.3d 867; *State v. Sonnier*, 2019-02066 (La. 8/14/20), 300 So.3d 857; *State v. Pittman*, 2019-01354 (La. 8/14/20), 300 So.3d 856; *State v. Carter*, 2019-02053 (La. 8/14/20), 300 So.3d 856; *State v. Williams*, 2019-02010 (La. 8/14/20), 300 So.3d 856; *Hernandez v. Vannoy*, 2019-02034 (La. 8/14/20), 300 So.3d 857; *State v. Eaglin*, 2019-01952 (La. 8/14/20), 300 So.3d 840; *State v. Kidd*, 2020-00055 (La. 8/14/20), 300 So.3d 828; *State v. Joseph*, 2020-01989 (La. 8/14/20), 300 So.3d 824; *State v. Barrett*, 2019-01718 (La. 8/14/20), 300

It would be impossible to retry many of those defendants. Beyond the incredible financial burden that flooding the criminal system with retrials would impose, important practical problems would impede the State's efforts to obtain justice for victims. Over the decades, witnesses die or become unavailable and their memories fade. *See Edwards*, 141 S. Ct. at 1554 ("[A] State may not be able to retry some defendants at all because of "lost evidence, faulty memory, and missing witnesses." (quoting *Allen*, 478 U.S. at 260–61)). Evidence decays or is destroyed in storms like Hurricane Katrina. "Even when the evidence can be reassembled, conducting retrials years later inflicts substantial pain on crime victims who must testify again and endure new trials." *Id.* at 1554–55. "Put simply, the 'costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.'" *Id.* at 1555 (quoting *Sawyer*, 497 U.S. at 242).

Reddick murdered Moliere nearly thirty years ago. It would be difficult, if not impossible, to reassemble the witnesses and evidence to retry him all these decades later. As the Supreme Court observed in *Edwards*, "[w]hen previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims." *Id.* at 1554.

B. The State's Interests Are Untainted by Race Discrimination

Reddick's conviction and sentence became final in 1998—more than twenty years after Louisiana passed sweeping reforms in the Louisiana Constitutional Convention of 1973 guaranteeing "every person shall be free from discrimination

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So.3d 827*; *State v. Harris*, 2020-00291 (La. 9/8/20), 301 So.3d 13; *State v. Skipper*, 2020-00280 (La. 9/8/20), 301 So.3d 16; *State v. Sims,* 2020-00298 (La. 9/8/20), 301 So.3d 17; *State v. Jackson*, 2020-00037 (La. 9/8/20), 301 So.3d 33; *State v. Hawthorne*, 2020-00586 (La. 9/29/20), 2020 WL 5793105; *State v. Alcus Smith*, 2020-00621 (La. 9/29/20), 2020 WL 5793717; *State v. Johnson*, 2020-00052 (La. 9/29/20), 2020 WL 5793805; *Givens v. State Through Attorney General's Office*, 2020-00268 (La. 10/6/20), 2020 WL 5904873; *Cassard v. Vannoy*, 2020-00020 (La. 10/6/20), 2020 WL 5905099; *State v. Brooks*, 2020-00378 (La. 10/14/20), 2020 WL 6059695; *State v. Moran*, 2020-00623 (La. App. 10/14/20), 2020 WL 6059685.

based on race." La. Const. art. I, § 12; see id. § 3 ("No law shall discriminate against a person because of race . . . ."). Although Louisiana initially adopted its non-unanimous jury laws during its infamous 1898 constitutional convention, the Louisiana Legislature in 1973 "adopted a new, narrower [non-unanimity] rule, and its stated purpose [for doing so] was 'judicial efficiency.'" *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting) (quoting *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1038, *writ denied*, 2013-2109 (La. 3/14/14), 134 So. 3d 1193); *accord* 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184–89 (La. Constitutional Convention Records Comm'n 1977). Not even Reddick disagrees with this. In the court below, he acknowledged that the 1973 Constitutional Convention "justified allowing the non-unanimous jury verdict system to continue based on a perception *that it would promote judicial efficiency*." ROA.470 (emphasis added).

Moreover, when adopting the 10-2 non-unanimity rule in1973, the legislature expressly relied on the Supreme Court's decision in *Apodaca*—decided in 1972—which held that such verdicts were constitutional. *See* 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184–89 (La. Constitutional Convention Records Comm'n 1977). And "reliance upon a square, unabandoned holding of the Supreme Court is always justifiable reliance[.]" *Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring), *overruled by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). The Supreme Court in *Allen* found this to be a highly pertinent consideration in the retroactivity analysis: Because "prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of [previous precedent]," the Court found the "reliance interest of law enforcement officials" to be a "compelling" reason why the new *Batson* rule "should not be retroactive." 478 U.S. at 260.

The Supreme Court has reserved the question of whether a facially race-

neutral provision, through legislative amendment or reenactment, can overcome any taint of racial animus associated with its original enactment. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). But every federal circuit court to address that question has held that impermissible motives associated with the enactment of a race-neutral provision are cleansed when a legislature, acting without racial animus, reenacts or amends the law. *See, e.g., Hayden v. Paterson*, 594 F.3d 150, 166–67 (2d Cir. 2010); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005) ("Florida's 1968 re-enactment eliminated any taint from the allegedly discriminatory 1868 provision."); *Chen v. City of Hous.*, 206 F.3d 502, 521 (5th Cir. 2000); *Cotton v. Fordice*, 157 F.3d 388, 392 (5th Cir. 1998); *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) ("In light of the changes in American society since 1914, changes in no small way effected by successive Congresses—including the impact of the Voting Rights Act on the nature of Congress itself—it would be anomalous to attempt to tar the present Congress with the racist brush of a pre-World War I debate.").

The Louisiana Legislature unquestionably cleansed its non-unanimous jury law of any purported racial animus when it re-adopted a narrower form of that policy through a constitutional convention that no one suggested was tainted by racial animus. Louisiana's powerful and legitimate finality interests in Reddick's conviction are unimpaired by any racial taint.

Reddick contends that "the non-unanimous jury verdict rule functioned just as its white supremacist framers intended." ROA.525. Presumably he means the rule has a disparate impact against Black Louisianians. Louisiana denies that the record establishes any such disparate impact exists. But, in any event, is it well established that disparate impacts alone do not rise to the level of constitutional violations. *See Washington v. Davis*, 426 U.S. 229 (1976). Disparate racial impact is irrelevant to the retroactivity analysis; if it were, then surely the Supreme Court would have decided *Allen* the other way and applied *Batson* retroactively.

In any event, concerns about the racial effects of the non-unanimity policy were front and center when that issue was put before Louisiana voters in 2018. And, based in part on those concerns, the People voted to amend the Louisiana Constitution to require unanimity—but to do so only on a prospective basis, without undoing existing convictions. *See* Senate Bill No. 243 (2018) (proposing amendment that would mandate unanimity for "offenses committed on and after January 1, 2019"). In short, the citizens of Louisiana engaged in a "prompt and considered legislative response" to concerns about the non-unanimity rule. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72–73 (2009). This Court should not "short-circuit" the political process that led to a constitutional amendment abolishing non-unanimous verdicts on a prospective basis only.

It is important to emphasize that there is nothing inherently invidious or fundamentally unfair about allowing convictions based on non-unanimous verdicts. Quite the opposite. As noted, many developed countries, including some of the country's closest allies, have moved toward non-unanimous verdicts in recent years. Prominent scholars such as Akhil Amar have urged reconsideration of unanimity rules. And major professional organizations such as the American Bar Association and American Law Institute championed a movement away from unanimity in the years leading up to *Apodaca*. *See* American Bar Association, *Project on Standards for Criminal Justice*, Trial By Jury § 1.1 (1968); ALI, *Code of Criminal Procedure* §355 (1930). As Justice Kavanaugh correctly observed in his concurring opinion in *Ramos*: "[O]ne could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring); see also id. at 1427 (Alito, J., dissenting) (finding it "undeniably false" that "there were no legitimate reasons" to adopt a non-unanimity rule).

In sum, Louisiana's interests in its non-unanimous convictions are overwhelming and untainted by improper racial discrimination. The State took the

Supreme Court at its word in *Apodaca* when it upheld the constitutionality of non-unanimous verdicts in state courts. In light of that decision, the State held a constitutional convention—in which it passed sweeping reforms guaranteeing racial equality—and employed the 10-2 rule for the purposes of enhancing judicial efficiency. The people of Louisiana—especially the victims of past crimes—will suffer greatly if the State must now redo decades worth of work that it conducted in good faith.

At bottom, what matters is that Reddick received "a full trial and one round of appeals in which the State faithfully applied the Constitution as [the Court] understood it at the time." *Summerlin*, 542 U.S. at 358. He should not be able to "continue to litigate his claims indefinitely in hopes that [this Court] will one day have a change of heart." *Id.*

CONCLUSION

The State respectfully urges the Court to reverse the lower court's decision and hold that new procedural rules never apply retroactively on state post-conviction review. Alternatively, the State asks the Court to reverse the lower court and hold that *Ramos* did not announce a new "watershed" rule of criminal procedure.

Respectfully Submitted,

JEFF LANDRY
ATTORNEY GENERAL

/s/ *Shae McPhee*

ELIZABETH BAKER MURRILL (#20685)
Solicitor General
SHAE MCPHEE (#38565)
Deputy Solicitor General
Lead Counsel
J. Taylor Gray (#33562)
Assistant Attorney General
Louisiana Department of Justice
909 Poydras Street, Suite 1850
New Orleans, Louisiana 70112
Telephone: (225) 938-0779
Facsimile: (504) 556-9900
mcphees@ag.louisiana.gov

CHARLES J. BALLAY (#2719)
DISTRICT ATTORNEY
25th Judicial District
333 F. Edward Hebert Blvd., Bldg. 201
Belle Chasse, LA 70037
Telephone: (504) 934-6630
charlesballay@25thda.org

CERTIFICATE OF SERVICE

I certify that all of the information contained in Louisiana's Original Brief, by the State of Louisiana through the Attorney General, is true and correct to the best of my knowledge. I further certify that a copy of this brief has been mailed, by United States Mail or Federal Express, postage prepaid, on April 11, 2022, to all known counsel of record and the district court judge, as follows:

Hardell Ward The Promise of Justice Initiative 1024 Elysian Fields Avenue New Orleans, LA 70117 hward@defendla.org *Counsel for Reginald Reddick*	The Honorable Michael D. Clement 25th Judicial District Court, Parish of Plaquemines Division B P.O. Box 7126 Belle Chasse, Louisiana 70037 mclement@25thjdc.com
Justin I. Woods Clerk of Court Louisiana Fourth Circuit Court of Appeal 410 Royal Street New Orleans, Louisiana 70130 coc@la4th.org	

/s/ Shae McPhee

Shae McPhee
Deputy Solicitor General
Counsel for Applicant