

SUPREME COURT OF LOUISIANA

DOCKET NO. 2021-KP-01893

STATE OF LOUISIANA,

Applicant

V.

REGINALD REDDICK,

Respondent

On Writ of Certiorari and/or Review From
The Court of Appeal, Fourth Circuit, No. 2021-K-0589

From the Twenty-Fifth Judicial District Court
Parish of Plaquemines, State of Louisiana
No. 93-03922

Hon. Michael D. Clement, Presiding;

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*, PELICAN INSTITUTE
FOR PUBLIC POLICY, IN SUPPORT OF RESPONDENT, REGINALD REDDICK

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**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*, PELICAN INSTITUTE FOR
PUBLIC POLICY, IN SUPPORT OF RESPONDENT, REGINALD REDDICK**

COMES NOW, Pelican Institute for Public Policy, through undersigned counsel, and respectfully requests, pursuant to Rule VII § 12 of the Rules of the Supreme Court of Louisiana, that this Court grant the Pelican Institute leave of court to file the Brief attached to this motion.

I. Statement of Interest of *Amicus Curiae*, Pelican Institute for Public Policy

The Pelican Institute for Public Policy is a non-profit and non-partisan research and educational organization and the leading voice for free markets in Louisiana. Its mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Pelican Institute is committed to preserving the individual rights of Louisianans in the face of government overreach.

II. Arguments Contributed by *Amicus Curiae*

Undersigned counsel for the Pelican Institute respectfully suggests that there are matters of law that might otherwise escape this Court's attention without briefing by *Amicus*. Counsel also submits that the information in the attached brief does not merely repeat the positions that have been or will be taken by the parties.

This brief will provide the Court with a thorough analysis of Louisiana's legal history that will assist this Court in deciding whether to adopt the United States Supreme Court's reasoning in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). Specifically, this brief will explain how the reasoning underlying *Edwards* does not comport with Louisiana law and the consequences that would result from this Court adopting that reasoning. Based on that analysis of Louisiana law, this brief will also set out key considerations for this Court to bear in mind while determining what retroactivity framework to adopt for Louisiana collateral review going forward.

Counsel for *Amicus* respectfully suggests that the Pelican Institute’s concerns for the preservation of individual rights coupled with its interest in preventing federal overreach into state law gives it a unique perspective on the legal issues in this case. That perspective considers the need for a remedy for the violations of the Sixth Amendment rights of more than 1,500 people impacted by this case, while also considering the broader consequences if this Court fully adopts *Edwards* and completely eliminates remedies for violations of new procedural rights on collateral review in Louisiana. Because that result would constrict individual liberties while relinquishing this Court’s control of state law to the U.S. Supreme Court, *Amicus* is uniquely qualified to provide a legal analysis that assists this Court in evaluating those consequences.

WHEREFORE, Pelican Institute for Public Policy, respectfully requests that this Court grant it leave to file a Brief of *Amicus Curiae* in support of Respondent Reginald Reddick.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 2nd day of May, 2022, I hereby certify that a copy of the foregoing Motion for Leave to File Brief of *Amicus Curiae*, Pelican Institute for Public Policy, in Support of Respondent, Reginald Reddick has been served by FedEx upon all of the following parties:

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Hon. Michael D. Clement, Presiding;

ORDER

Upon consideration of the foregoing *Motion for Leave to File Brief of Amicus Curiae, Pelican Institute for Public Policy, in Support of Respondent, Reginald Reddick*, the motion is granted.

DONE, this _____ day of _____, 2022.

Justice, Louisiana Supreme Court

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BRIEF OF *AMICUS CURIAE*, PELICAN INSTITUTE FOR PUBLIC POLICY, IN
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INTRODUCTION

A verdict by a non-unanimous jury is “no verdict at all,” but Louisiana continues to incarcerate more than 1,500 people based on such constitutionally void verdicts. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020). The State’s primary justification for that harsh result is that the U.S. Supreme Court—applying federal law governing federal habeas in federal court—has expressly eliminated the key exception permitting retroactivity for procedural rules under *Teague v. Lane*, 489 U.S. 288, 311 (1989) for purposes of federal collateral review. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021). But this Court’s adoption of *Teague* does not require it also adopt such a significant modification of that framework. *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296 (La. 1992). Instead, this Court should reject that modification here given its own precedent on the retroactivity of procedural rights and the critical importance of those rights, including the unanimous verdict rule, in Louisiana.

ARGUMENT

Reginald Reddick is one of more than 1,500 people incarcerated in Louisiana as a result of an unconstitutional non-unanimous jury verdict who can only seek a remedy on post-conviction review.¹ There is no dispute that the Sixth Amendment rights of these individuals have been violated. The only question is whether they should have the opportunity to remedy that violation. When the U.S. Supreme Court faced this issue in *Edwards*, it made a substantial change in federal law that—if this Court were to follow—would result in not only barring relief on *Ramos* grounds, but also barring relief for any procedural rights violations on state collateral review in the future. *Amicus*, the Pelican Institute for Public Policy, an organization committed to preserving the individual rights of Louisianans in the face of government overreach, believes that is a bridge too far.

¹ See Brief of *Amici Curiae* The Promise of Justice Initiative et al. (“PJI *Edwards* Br.”) at 11, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021).

I. *Edwards* Does Not Provide Sufficiently Compelling Reasons for this Court to Bar Relief for Procedural Constitutional Violations on State Collateral Review.

The U.S. Supreme Court’s decision to end retroactivity for procedural rules in *Edwards* is a substantial departure from *Teague* that this Court need not, and should not, follow. The State “urges the Court to follow the United States Supreme Court’s example in *Edwards*” and bar retroactive relief for procedural constitutional violations on state collateral review. State’s Orig. Br. at 12. That view would depart from this Court’s holding in *Taylor*, which allows for procedural relief via the *Teague* retroactivity framework. But the reasoning from *Edwards* alone, in light of this Court’s treatment of retroactivity, does not provide a sufficient basis for this Court to depart from *Taylor*. This is particularly true because the consequences of doing so are severe, barring any possible post-conviction relief in light of new procedural constitutional rules for individuals in Louisiana.

A. Following *Edwards* Would Result in a Substantial Departure from this Court’s Precedent, Dramatically Reducing This Court’s Control of State Collateral Review.

A holding that no procedural rule could ever apply retroactively on state collateral review would largely subjugate this Court’s authority over state retroactivity law to the U.S. Supreme Court and deny retroactive remedies for Louisianans whose constitutional procedural rights were violated.

1. This Court’s Precedent and Scope of Authority

Taylor is the controlling precedent on retroactivity in Louisiana. Under *Taylor*, Louisiana courts apply new constitutional rules retroactively if they are substantive or if they are “watershed” procedural rules. *Id.* at 1296–97. This Court adopted the framework announced in *Taylor* because it was persuaded by Justice Harlan’s opinions in *Desist v. United States*, 394 U.S. 244 (1968) and *Mackey v. United States*, 401 U.S. 667 (1970), as interpreted by the U.S. Supreme Court in *Teague. Taylor*, 606 So.2d at

1297 (“[W]e now adopt Justice Harlan’s views on retroactivity, as modified by *Teague* and subsequent decisions, for all cases on collateral review in our state courts.”). As one of the *Ramos* retroactivity opinions below explained, this Court did not “adopt[] *Teague* and all of its future progeny,” just “the *Teague* standard as it stood at the time of the *Taylor* opinion” in 1992. *State v. Nelson*, 21-461 (La. App. 3 Cir. 11/10/21) 330 So.3d 336, 342.

This Court is not required to follow the U.S. Supreme Court’s framework for federal retroactivity. This Court recognized as much in *Taylor*, acknowledging that it was “not bound to adopt the *Teague* standards.” *Id.* at 1296. The U.S. Supreme Court later confirmed that conclusion in *Danforth v. Minnesota*, 552 U.S. 264 (2008), permitting states to give broader remedies on state collateral review than the U.S. Supreme Court allowed on federal collateral review because *Teague* does not “constrain[] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion.” *Danforth*, 552 U.S. at 266. The U.S. Supreme Court again recognized this Court’s authority to apply broader relief on state collateral review than federal law requires in *Edwards*, when it held that “States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings.” *Edwards*, 141 S. Ct. at 1559 n.6 (citing *Danforth*, 552 U.S. at 282).

The U.S. Supreme Court does exert control over this Court on *Teague*’s substantive prong because, in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the U.S. Supreme Court determined substantive rules “rest[] upon constitutional premises” and therefore provide a constitutional floor this Court must meet for state collateral review. *Id.* at 200. In *Montgomery*, the Court declined to opine on whether rules it determined were watershed procedural rules would also control. *Id.* That issue is now irrelevant because in *Edwards* the U.S. Supreme Court announced it would not find any procedural rules

to be watershed for federal habeas. *Edwards*, 141 S. Ct. at 1560. But, again, that Court expressly acknowledged that this Court may continue to apply procedural rules, including the *Ramos* unanimity rule specifically, retroactively on state collateral review. *Id.* at 1559 n.6.

In short, Louisiana courts apply new constitutional rules retroactively when they are substantive or when they are watershed procedural rules. *Taylor*, 606 So.2d at 1296–97. And this Court is free to retroactively apply any constitutional rules, substantive or procedural, on state collateral review without concern of federal interference. *Danforth*, 552 U.S. at 282.

2. Adopting *Edwards* Would Result in the U.S. Supreme Court Exerting Near-Complete Control Over Louisiana State Law on Retroactivity.

If this Court follows *Edwards*, that decision would result in the U.S. Supreme Court almost entirely binding this Court on retroactivity going forward. Should this Court maintain that only “watershed” procedural rules can apply retroactively, but conclude under *Edwards* that no such rules will ever be found, then it will create an outright bar to retroactive relief for violations of new procedural constitutional rules in Louisiana. While this Court could still play a role in determining whether a rule is procedural or substantive, under *Montgomery*, that determination would rarely control state law because the U.S. Supreme Court can overrule this Court if it fails to retroactively apply a new rule that the U.S. Supreme Court determines is substantive. *Montgomery*, 577 U.S. at 200. This Court would only maintain a sliver of control in the rare instance where the U.S. Supreme Court holds a rule is procedural but this Court holds the same rule is substantive, thereby granting broader relief than required by the U.S. Supreme Court. *Danforth*, 552 U.S. at 282. But that instance has never occurred. Therefore, if this Court adopts *Edwards*, it would abrogate remedies for violations of new procedural constitutional rights for people incarcerated in Louisiana prisons while transforming this Court into little more than a second intermediate appellate court for determining Louisiana retroactivity law.

B. *Edwards*' Reasoning Does Not Apply to this Court's Precedents on the Retroactivity of Procedural Rules.

Edwards held that no new procedural rules would apply on federal habeas in the future based on the U.S. Supreme Court's prior decisions universally declining to apply those rules retroactively, but this Court's prior decisions on procedural rules do not lead to the same conclusion. And the Court should not be persuaded by the State's encouragement to, first, entirely reject new procedural rules on collateral review, and then hold *Ramos* is not retroactive solely because it is procedural. That approach ignores the context of *Ramos* and the reasoning undergirding decades of Louisiana precedent allowing for retroactive application of procedural rules.

1. This Court's Post-*Teague* View on the Retroactivity of Procedural Rules Differs from that of the U.S. Supreme Court.

In *Edwards*, the U.S. Supreme Court refused to apply procedural rules on federal habeas because it had rejected "watershed" status for procedural rules on every occasion it applied the standard (more than a dozen times since *Teague*).² *Edwards*, 141 S. Ct. at 1557. This Court, on the other hand, has arguably issued just one, and at most three, decisions declining to apply "watershed" status to procedural rules since adopting *Teague*, and none justifies a blanket ban on future procedural retroactivity. If anything, *Ramos* satisfies the factors this Court has considered when evaluating procedural retroactivity. This Court's precedent does not justify a complete bar to procedural retroactivity.

² *Edwards*, 141 S. Ct. at 1557 (rejecting watershed status for *Ramos* before determining whether to end the watershed exception on federal habeas); *Chaidez v. United States*, 568 U.S. 342, 347, n.3 (2013); *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Beard v. Banks*, 542 U.S. 406, 416–17 (2004); *Tyler v. Cain*, 533 U.S. 656, 665 (2001); *O'Dell v. Netherland*, 521 U.S. 151, 156–57 (1997); *Lambrix v. Singletary*, 520 U.S. 518 (1997); *Gray v. Netherland*, 518 U.S. 152, 170 (1996); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994); *Graham v. Collins*, 506 U.S. 461, (1993); *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993); *Saffle v. Parks*, 494 U.S. 484, 494–95 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990).

The single decision where this Court evaluated “watershed” status and prevented a procedural rule from being applied retroactively was *Stewart v. State*, 676 So.2d 87 (La. 1996), when this Court declined to define the right to counsel during a pre-identification lineup as a “bedrock component of the fair adjudication of a criminal case.” *Id.* at 89. The Court reasoned that a procedural rule should apply retroactively when “time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.” *Id.* at 88–89 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring)). This Court also noted that “[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a ‘question of probabilities’” and “the probability of injustice resulting from the lack of counsel at lineup” was not sufficient to warrant retroactivity. *Stewart*, 676 So.2d at 87 (La. 1996) (quoting *Stovall v. Denno*, 388 U.S. 293, 298 (1967)). The State notes that this Court also concluded the procedural right to counsel was not retroactive in *State v. Ferreira*, 302 So.3d 1096 (La. 2020), but that case offers little guidance here as this Court did *not* conduct any retroactivity analysis in that opinion. *Id.* at 1097 (denying retroactivity for the same reasons as the U.S. Supreme Court announced in *Chaidez*); *see also Chaidez*, 568 U.S. at 347 n.3 (basing its holding on whether or not the rule at issue was “new” since *Chaidez* did not argue either the substantive or procedural exceptions in *Teague* applied).

Neither *Stewart* nor *Ferreira* justifies abandoning procedural retroactivity altogether in Louisiana when *Ramos* meets the very standards set out by this Court in *Stewart*. First, as explained in detail in § II.C *infra*, “time and growth” in the past decade have altered perceptions in Louisiana of whether jury unanimity constitutes a procedural element of a trial that vitiates fairness. This is evidenced by the supermajority of Louisiana voters that chose to amend the Constitution to require jury unanimity in 2018. *See Louisiana Secretary of State, Official Election Results for Election Date: 11/6/2018,*

<https://voterportal.sos.la.gov/static/2018-11-06/resultsRace/Statewide> (last accessed Apr. 28, 2022).

Further, there is no doubt as to the “probability of injustice” from any case that qualifies for relief under *Ramos*. If the defendant’s Sixth Amendment rights had not been violated, *they would not have been convicted at all*. So injustice is guaranteed in every one of these cases unless those convicted by non-unanimous juries can vindicate their constitutional rights.

That leaves *State v. Tate*, 130 So.3d 829 (La. 2013), as the only other post-*Taylor* decision where this Court evaluated procedural retroactivity. *Tate* is a somewhat odd case, as this Court held the right from *Miller v. Alabama*, 567 U.S. 460 (2012), requiring a hearing before imposing a life without parole sentence on children, was procedural and not watershed only to be overruled by the Supreme Court years later and compelled to implement the rule retroactively as a substantive rule in *Montgomery*. Nevertheless, even though the *Miller* right was not ultimately procedural, this Court’s discussion in *Tate* of what constitutes a procedural rule remains useful. Notably, this Court relied heavily on language from *Whorton v. Bockting*, 549 U.S. 406 (2007), to conclude that a procedural rule is retroactive and “in the same category with *Gideon*” when it “effect[s] a profound and ‘sweeping’ change.” *Id.* at 841. Further, this Court explained that procedural rules that “appl[ie]d fairly narrowly” to a “small subset of defendants” should not apply retroactively. *Tate*, 130 So.3d at 841. *Ramos* meets those requirements, as it reversed 120 years of this state’s law and applies to hundreds of cases on post-conviction review, demonstrating why new procedural rights should not be cast aside. PJI *Edwards* Br. at 11, 33.

In *Tate*, this Court also acknowledged that it had granted relief on state collateral review under a new constitutional rule that it determined in *Tate* was procedural, a step the U.S. Supreme Court had never taken between *Teague* and *Edwards*. Specifically, this Court “twice granted applications on collateral review to remand for reconsideration of sentence after conducting a new sentencing hearing in accordance with the principles enumerated in *Miller*” prior to announcing its decision on *Miller*’s

retroactivity. *Tate*, 130 So.3d at 833 n.1 (citing *State v. Simmons*, 99 So.3d 28 (La. 2012) and *State ex rel. Landry v. State*, 106 So.3d 106 (La. 2013)). Those two cases underscore that this Court’s decisions under Louisiana law about new procedural rules on state collateral review differ from the U.S. Supreme Court’s decisions about new procedural rules on federal collateral review. Where the U.S. Supreme Court never allowed a new constitutional rule that it held to be procedural to apply on federal collateral review between *Teague* and *Edwards*, this Court *has* allowed new constitutional rules that it held were procedural to apply on state collateral review since adopting *Teague*.

The *Edwards* decision rested on an unbroken line of more than a dozen cases since adopting *Teague* where that Court declined to apply a new procedural constitutional rule on federal collateral review, but this Court has no such precedent. Instead, this Court has attempted, with mixed success, to deny retroactivity on procedural grounds in just three cases. But according to the standards this Court set out in those opinions, particularly *Stewart* and *Tate*, *Ramos* should apply retroactively. Moreover, this Court has applied a new constitutional rule that it held was procedural on state collateral review since adopting *Teague*. Therefore, *Edwards*’ reasoning, applied to this Court’s precedent, cannot justify abandoning procedural retroactivity altogether.

2. The Procedural Rules the *Edwards* Court Relied on to Reject *Ramos* Have Been Applied Differently in Louisiana.

In declining to make *Ramos* retroactive on federal habeas, the *Edwards* Court relied on its precedent to deny three arguments in favor of applying *Ramos* retroactively. But that Court’s precedent does not justify the same result under *Louisiana* precedent.

First, *Edwards* considered the “significance of the jury-unanimity right,” concluding that because it had not held that the jury-trial right, applied to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), was retroactive in *DeStefano v. Woods*, 392 U.S. 631 (1968), it would make little sense to hold

unanimity retroactive. *Edwards*, 141 S. Ct. at 1558. But that analysis is out-of-step with Louisiana’s treatment of *Duncan*’s retroactivity in *State v. Beer*, 214 So.2d 133 (La. 1968). This Court characterized the *Duncan* decision as a choice between requiring a trial by jury or a trial by judge. *Beer*, 214 So.2d at 137–38. And the Court did not see any compelling reason why a jury would be a more reliable fact-finder than a judge. *Id.* (citing *Duncan*, 391 U.S. at 192–93 (Harlan, J., dissenting)). But the issue here is whether a unanimous jury is a more reliable fact-finder than a non-unanimous jury, and on that point, the evidence introduced by Reddick and other amici, including that more than 100 people incarcerated on non-unanimous convictions are credibly innocent, overwhelmingly demonstrates that a unanimous jury *is more reliable*. See Brief of *Amicus Curiae* Innocence Project New Orleans at 8–10.

Second, the *Edwards* Court refused to give any weight to arguments that *Ramos* relied on the original meaning of the Sixth Amendment because it determined that other cases relying on that meaning, specifically *Crawford v. Washington*, were not retroactive under *Whorton v. Bockting*. *Edwards*, 141 S. Ct. at 1559. But this Court has never made such a ruling on *Crawford*. In fact, *Crawford*’s retroactivity was never actually determined in Louisiana at all. This Court has only cited *Whorton* to explain when a procedural rule should apply retroactively, and *Ramos* meets that standard. See *supra* § I(B)(1). Perhaps more importantly, this Court recently espoused the importance of a remedy for a Sixth Amendment violation in *State v. Harris*, __ So.3d __, 2020 WL 3867207 (La. 2020), granting relief because “otherwise, [Harris] would be left without a viable remedy for a possible constitutional violation” 2020 WL 3867207, at *10; see also *id.* at *13 (Crichton, J., concurring) (rejecting the State’s argument about “the administrative burden” from granting relief because that “burden is far outweighed by the need to preserve the Sixth Amendment right to effective representation and guarantee that the violation of that right will have a remedy under the law.”).

Third, the *Edwards* Court discounted arguments as to *Ramos*'s effect in preventing racial discrimination because it had rejected the retroactivity of *Batson* in a pre-*Teague* opinion. *Edwards*, 141 S. Ct. at 1559 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Allen v. Hardy*, 478 U.S. 255 (1986)). Because *Batson* was a procedural rule addressing racial discrimination, the Supreme Court determined that any argument regarding *Ramos*'s impact on racial discrimination was irrelevant. The State contends that this Court has also declined to apply *Batson* retroactively. That, however, is wrong. This Court did apply *Batson* retroactively on collateral review in *State ex rel. Prejean v. Smith*.³ In that case, Prejean's conviction became final in 1980 after the U.S. Supreme Court denied his petition for certiorari. *State ex rel. Prejean v. Smith*, 89-KP-2441 (La. 10/19/1989) 549 So.2d 1237. But this Court granted relief in 1989 on a state habeas petition and ordered a *Batson* hearing. *State ex rel. Prejean v. Smith*, 89-KP-2399 (La. 10/16/1989) 549 So.2d 1237. The Court applied *Batson* retroactively, even though Prejean's conviction was final in 1980 and *Batson* was not announced until 1986. That decision further demonstrates the inapplicability of *Edwards*' reasoning in Louisiana.

None of the precedent relied on by *Edwards* to reject both *Ramos* and procedural retroactivity altogether justifies those same conclusions by this Court.

C. Multiple States Have Applied Procedural Rules Retroactively Post-*Teague*.

Another reason *Edwards* fails to apply here is that state courts have retroactively applied rules that the U.S. Supreme Court declined to apply retroactively on federal habeas. The Missouri Supreme Court, in *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), held that the procedural rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), requiring a jury determination regarding the presence of aggravating factors to impose the death penalty, would apply on state collateral review. *Whitfield*, 107 S.W.3d at 256

³ This Court made two decisions in this case three days apart, both of which are cited here.

(abrogated on other grounds by *State v. Wood*, 580 S.W.3d 566 (Mo. 2019)). Delaware also applied a procedural rule retroactively on state collateral review post-*Teague*. Indeed, the Delaware Supreme Court held that its prior holding in *Rauf v. State*, 145 A.3d 430 (Del. 2016), requiring jury unanimity to impose a death sentence “announced a new watershed procedural rule” that “contributed to the reliability of the fact-finding process,” “without which the likelihood of an accurate [sentence] is seriously diminished.” *Powell v. State*, 153 A.3d 69, 74 (Del. 2016) (quoting *Teague*, 489 U.S. at 313). Those results run counter to the State’s argument that it is “apparent” that “[n]ew procedural rules do not apply retroactively on state post-conviction review.” State’s Orig. Br. at 6. *Whitfield* and *Powell* indicate that post-*Teague*, and in *Powell*’s case applying the *Teague* framework, some rules of criminal procedure *do* in fact apply on state collateral review.

The State asks this Court to follow *Edwards* because “*Teague*’s ‘purported exception’ for watershed procedural rules was no exception at all. It was never anything more than an ‘empty promise.’” State’s Orig. Br. at 10. That may be true on federal collateral review, but it is decisively not on *state* collateral review, both in Louisiana and elsewhere. Procedural rules, at least those as important in Louisiana as *Ramos*, are not an “empty promise,” and they should apply retroactively on state collateral review.

II. This Court Should Apply a Louisiana-centered Framework that Preserves Remedies for At Least Those Procedural Rules as Important as Unanimity on Collateral Review.

If this Court chooses to depart from the *Taylor/Teague* framework, Louisiana history and precedent suggest it should adopt a retroactivity framework that does not follow *Edwards* and instead preserves post-conviction remedies for violations of procedural constitutional rights. The U.S. Supreme Court’s retroactivity framework is grounded in concerns of comity and federalism that do not apply to state courts. And the finality interests highlighted by the State, while important, are not so substantial

that they require a complete bar to retroactive relief for procedural constitutional rights. Additionally, the nature of the jury unanimity rule in *Ramos* requires an analysis considering its impact in Louisiana. Therefore, if this Court chooses to depart from the *Taylor/Teague* framework, it should apply a new framework that better considers the needs of Louisianans without needlessly subjecting this Court to inconsistent federal review.

A. Several Other States Have Abandoned or Modified the *Teague* Framework in Favor of Frameworks that Better Serves Their Citizens.

In evaluating whether and how to follow *Teague*, several state supreme court decisions have made clear that U.S. Supreme Court’s interpretation of *Teague* has often centered interests of comity and federalism above individual rights. The federalism concerns underlying U.S. Supreme Court precedent are not relevant to this Court’s decisions about Louisiana law. If anything, those concerns underscore that if this Court departs from the *Taylor/Teague* framework, it should not merely adopt the U.S. Supreme Court’s *Edwards* framework.

In *Whitfield*, the Missouri Supreme Court declined to adopt *Teague* because it preferred greater flexibility, explaining that “[w]hile Missouri shares many of the policy concerns *Teague* discusses concerning the finality of convictions, these concerns are well protected” by the test “traditionally applied by this Court.” *Whitfield*, 107 S.W.3d at 267. The Court decided an alternative test was preferable because it “permits [Missouri Courts] to consider the particular facts and legal issues relevant to the specific issue before the Court”—for example, “to consider that the right asserted is the fundamental right to trial by jury and that the stake is of the highest magnitude—the defendant’s life.” *Id.* The court also suggested that “[t]he *Teague* test essentially prevents state courts from achieving their goal [of correcting injustice], for through its focus on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare

case.” *Id.* at 268 n.15 (quoting Mary C. Hutton, *Retroactivity In The States: The Impact of Teague v. Lane On State Postconviction Remedies*, 44 *Ala. L. Rev.* 421, 450 (1993)).

Similarly, Nevada and Idaho have both acknowledged the need to depart from *Teague* as it was applied by the Supreme Court. The Nevada Supreme Court explained “[t]hough we consider the approach to retroactivity set forth in *Teague* to be sound in principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review.” *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002). The *Colwell* court went on to explain that *Teague*’s strictures were grounded in “circumscribing federal habeas review of state court decisions, but as a state court we choose not to bind quite so severely our own discretion in deciding retroactivity.” *Id.* The court adopted *Teague*’s overall framework but reserved its “prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity (as long as we give new federal constitutional rules at least as much retroactive effect as *Teague* does).” *Id.* Idaho took a similar approach, adopting the *Teague* standard based on its simplicity and the appeal of finality, but charting its own path with respect to how *Teague* should be applied in Idaho courts: “when deciding whether to give retroactive effect to a decision of the U.S. Supreme Court, this Court is not required to blindly follow that court’s view of what constitutes a new rule or whether a new rule is a watershed rule.” *Rhoades v. State*, 233 P.3d 61, 70 (Idaho 2010).

In addition, California courts have also recognized the shortcomings of adopting *Teague*, explaining that “[a] close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion.” *In re Thomas*, 30 Cal. App. 5th 744, 760 (2018) (quoting *Danforth*, 552 U.S. at 277). The court explained that, as *Danforth* recognized, “*Teague*’s general rule against retroactivity in federal habeas proceedings

bottoms out on comity,” so that “[i]f anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individual than is required by *Teague*.” *Id.* (quoting *Danforth*, 552 U.S. at 279–80). Finally, it noted that the “finality of state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.” *Id.* (quoting *Danforth*, 552 U.S. at 279–80).

What these opinions demonstrate is that, regardless of whether it rejects *Teague* outright, modifies *Teague* to fit its own purposes, or simply declines to follow *Edwards*’ interpretation of *Teague* for federal habeas, this Court can better-serve Louisiana by preserving some avenue for procedural retroactivity on state collateral review. This is particularly true given that the U.S. Supreme Court’s analysis of federal retroactivity is grounded in interests of comity and federalism that do not apply here. Instead, when evaluating a new procedural rule, this Court should place Louisiana precedent and history at the center of its analysis.

B. Legitimate Finality Concerns Do Not Justify Any Framework That Completely Abrogates Remedies for Procedural Constitutional Rights.

The framework proposed by the State, which would align this Court with *Edwards*, would deny remedies for procedural constitutional violations on collateral review based on an incomplete analysis of the finality interests at issue and an alarming disregard for the consequences of permanently denying new procedural rights.

1. Denying Procedural Rights is Unjustifiable and Unsupported by Precedent.

The State’s justification for adopting the *Edwards* framework, that “[e]ven 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,” should not persuade this Court to adopt a

framework that completely bars relief for procedural rights. State’s Orig. Br. at 13 (emphasis added). In this case, that framework would deny a remedy to the more than 1,500 people incarcerated on unconstitutional, non-unanimous verdicts. PJI *Edwards* Br. at 11. This denial extends directly to the 1 in 5 people incarcerated for life without the possibility of parole following a non-unanimous verdict. *Id.* at 26. This Court should not countenance the continued incarceration of so many people, many with severe sentences, on such a low threshold. The State’s admission that these convictions only *may* have been accurate, and that the continued confinement of so many people *may* still be lawful, counsels in favor of *granting* a remedy to determine if those convictions and sentences are lawful beyond a reasonable doubt—not categorically preventing *any* remedies for violations of new procedural constitutional rights on state collateral review.

Further, there is no precedent in any American jurisdiction that supports completely abrogating a person’s ability to obtain collateral relief under both federal *and* state law for violations of their procedural constitutional rights. *Amicus* is unaware of any court that has adopted such an extreme framework, including the U.S. Supreme Court in *Edwards*, which issued its opinion knowing full well that procedural rules could still be vindicated on state habeas.⁴ Barring procedural claims entirely on Louisiana state habeas would make this Court the first to ensure that nobody incarcerated in state prison

⁴ *Edwards* eliminated the possibility of procedural retroactivity on federal habeas, but *Amicus* has not found any jurisdiction that has completely eliminated procedural retroactivity on state habeas as well. Only two state supreme courts have issued opinions discussing procedural retroactivity post-*Edwards*, but both courts avoided deciding the issue. *Cardenas v. Baker*, 498 P.3d 774 (Table), 2021 WL 5276383 at *1 (Nev. 2021) (finding no constitutional violation and determining “we need not resolve Cardenas’ argument that [the procedural rule at issue] applies retroactively”); *Aili v. State*, 963 N.W.2d 442, 448 n.4 (Minn. 2021) (noting the *Edwards* decision but concluding the watershed procedural rule exception was “not at issue in this case” and deciding to “express no opinion on whether the watershed rule of criminal procedure exception applies when determining whether a new rules applies retroactively to Minnesota state court convictions and sentences”) (citing *Danforth*, 552 U.S. at 279–81).

on a final conviction could *ever* obtain a remedy for procedural rights violations under a new constitutional rule. This Court must therefore address the consequences of completely preventing post-conviction remedies for procedural rights.

2. Finality Concerns, While Valid, Do Not Dictate a Permanent Abandonment of Procedural Rights.

Finality concerns have long been an important factor in this Court’s retroactivity analysis, but they have never been sufficient to completely abrogate remedies for constitutional violations without first weighing the actual interests at issue. Barring procedural rules goes too far because it presumes that finality interests will *always* outweigh other interests, including the vindication of individual rights. The State argues taking this step ensures “that *any new procedural rules [the Supreme Court] identifies will not have devastating impacts* on the State’s judicial system.” State’s Orig. Br. at 14 (emphasis added). But it is extremely unlikely that all future procedural rules will have a “devastating impact” on Louisiana’s judicial system.

In *Whitfield*, the Missouri Supreme Court considered the impact on its judicial system of applying *Ring* retroactively and concluded that it would only apply five cases. *Whitfield*, 107 S.W.3d at 269. Further, because of the process by which those death sentences had been handed down, Missouri law required that their sentences immediately revert to life without the possibility of parole, with no allowance for another hearing where the prosecution could seek the death sentence. *Id.* Thus, applying the procedural rule from *Ring* retroactively did not have a “devastating impact” on Missouri’s judicial system—it had hardly any discernible impact on the judicial system at all. *Whitfield* demonstrates how a framework permanently denying procedural rights goes too far.

Finality also cuts against substantive rules just as much as it cuts against procedural rules, but this Court, relying on Justice Harlan’s reasoning, determined that substantive and procedural

retroactivity should still exist in the face of finality concerns. *Taylor*, 606 So.2d at 1297 (citing *Mackey*, 401 U.S. at 691 (Harlan, J., concurring)). *Taylor* permitted procedural rules to apply retroactively.

Finality interests also do not apply to convictions of innocent people. When an innocent person is convicted, it is not just the innocent that is harmed, but also the victim because the actual perpetrator remains free. This Court should not ignore the reality that there are innocent people incarcerated in Louisiana as a result of non-unanimous verdicts. As the Innocence Project of New Orleans explains in its amicus brief, it is likely that more than 100 innocent people are currently in jail in Louisiana based on a non-unanimous verdict. Brief of *Amicus Curiae*, Innocence Project New Orleans at 8.

3. Louisiana’s Judicial System has Proven Capable of Retroactively Applying Constitutional Rules Following *Montgomery*.

New trials that would follow *Ramos*’s retroactive application would not be the first time Louisiana has dealt with logistical challenges involved in reopening cases. Hundreds of Louisianans previously sentenced to life without parole as juvenile offenders were given an opportunity to pursue relief after the U.S. Supreme Court overruled this Court’s decision in *Tate* and required states to provide new and individualized sentencing hearings in *Montgomery*. And Louisiana’s judicial system performed admirably, efficiently resolving these cases to vindicate the constitutional rights of all impacted persons, while ensuring that those who should not be released remained incarcerated. Louisiana’s courts will not be overburdened here, just as they were not overburdened in the wake of *Montgomery*.

The State argues that retrying numerous non-unanimous jury cases would be “impractical, if not impossible,” but this is simply not true. Hundreds of juveniles were sentenced to life without parole for decades prior to *Montgomery*, yet the state was able to complete almost 90% of those resentencings in under five years. *Montgomery v. Louisiana Six Years Later: Progress and Outliers* 3 (2022). There,

Louisiana courts proved capable of resolving an influx of cases as the result of a retroactive constitutional rule.

Although some evidence in *Ramos* cases may be lost due to the time that has lapsed since the initial trials, a blanket denial of procedural rights is unjustified. Critically, plea deals will function as they always have, giving District Attorneys the flexibility to avoid trials for what is likely to be the vast majority of people entitled to new trials. *See* PJI *Edwards* Br. at 16–18. Furthermore, because of the work of the Promise of Justice Initiative, the individuals due relief under *Ramos* already have their cases in court and their respective counsel, which will allow for the efficient resolution of these cases across the state. *Id* at 19–20.

C. Jury Unanimity is a Uniquely Important Rule in Louisiana.

“Time and growth” has completely altered Louisiana’s understanding regarding the central importance of jury unanimity to a fair conviction. *Stewart*, 676 So.2d 87, 88–89 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring)). Should this Court adopt a new framework that departs from *Taylor*, that framework must permit the retroactive application of a rule as critical as jury unanimity.

The last time this Court evaluated a challenge to the non-unanimity rule on the merits was in 2009, in *State v. Bertrand*, 6 So.3d 738 (La. 2009), when it upheld non-unanimity by relying on the U.S. Supreme Court’s decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972) declining to compel unanimous verdicts in state criminal trials. *Bertrand*, 6 So.3d at 741. This Court also declined to require unanimity based on the “insidious racial component” of non-unanimous juries purely because *Apodaca* had rejected a similar argument. *Id.* at 743; *see also State v. Simmons*, 414 So.2d 705 (La. 1982) (also upholding jury non-unanimity based on *Apodaca*); *State v. Edwards*, 420 So.2d 663 (La. 1982) (same); *State v. Green*, 390 So.2d 1253 (La.1980) (same); *State v. Morgan*, 315 So.2d 632 (La. 1975) (same).

But in the years since *Bertrand*, Louisiana’s understanding of why a lack of unanimity “vitiates the basic fairness of a trial” has changed.

Other briefs provide the complete history of jury unanimity in Louisiana post-*Bertrand*. That history merits serious consideration by this Court in understanding the fundamental importance of jury unanimity, and why it is a procedural right worthy of protection. In 2015 a historian resurfaced the origins of the non-unanimous jury rule in the now-infamous 1898 Constitutional Convention, the purpose of which was to “establish the supremacy of the white race.” *Ramos*, 140 S. Ct. at 1394; *see also* 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 33, 49 (2021). *The Advocate* then ran a Pulitzer-Prize-winning series on non-unanimous juries, which included detailed analyses demonstrating that Black people were more likely to be convicted by non-unanimous juries and more likely to cast “empty votes” as dissenting jurors powerless to prevent a conviction. Johnson & MacMath at 49. As a result, in 2018 a supermajority of Louisianans voted to amend the Constitution to require jury unanimity. *Id.* Whatever framework this Court adopts, it should be one that vindicates a right that so many Louisiana voters believed important enough to enshrine in the Louisiana constitution.

CONCLUSION

While this Court need not depart from *Taylor* based on *Edwards* alone, if it does replace the *Taylor/Teague* framework, Louisiana history and precedent demonstrate that new procedural constitutional rules as foundationally important as the *Ramos* jury unanimity rule should apply retroactively on state collateral review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 2nd day of May, 2022, I hereby certify that a copy of the foregoing Brief of *Amicus Curiae*, Pelican Institute for Public Policy, in Support of Respondent, Reginald Reddick has been served by FedEx upon all of the following parties:

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