IN THE SUPREME COURT OF THE STATE OF OREGON

JACOB KEITH WATKINS, Petitioner-Appellant, v. RICHARD ACKLEY, Superintendent, Deer Ridge Correctional Institution, Defendant-Respondent.	Jefferson County Circuit Court Case No. 20CV27534 CA A176245 S068825

BRIEF ON THE MERITS OF PETITIONER-APPELLANT

On Order Accepting Certified Appeal Under ORS 19.405
Appeal from Jefferson County
Honorable Michael R. McLane, Judge

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PETITIONER'S BRIEF ON THE MERITS

INTRODUCTION

A criminal defendant's right to have a jury unanimously agree that he or she is guilty beyond a reasonable doubt has been a cornerstone of the American justice system since colonial times. For more than 80 years, Oregon stood as one of two outlier states by permitting a jury to convict a defendant of a nonunanimous guilty verdict. In *Ramos v. Louisiana*, 590 US __, 140 S Ct 1390, 206 L Ed 2d 583 (2020), the Supreme Court of the United States held that the right to a unanimous verdict applies to the states through the Fourteenth Amendment, ending Oregon's unconstitutional reliance on nonunanimous jury verdicts to obtain convictions.

Under *Ramos* and this court's case law interpreting it, every criminal conviction resting on a nonunanimous verdict violates the United States Constitution. The question here is whether Oregon law provides a remedy in post-conviction for a person convicted by a nonunanimous verdict whose conviction became final prior to the *Ramos* decision. If it does not, then most people (including many who are still in Oregon's prisons) convicted by nonunanimous verdicts will not have a remedy for their unconstitutional convictions, based entirely on the arbitrariness of the date their convictions became final. The correct rule—the rule dictated by the Post-Conviction Hearing Act (PCHA) and the

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importance of the right to a unanimous verdict—provides each person one full and fair opportunity to challenge a criminal conviction that violates the right to a unanimous jury verdict.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Did the legislature intend the PCHA to establish the framework for when a person may obtain relief based on a new case announced after a conviction has become final, after the expiration of the post-conviction statute of limitations, or when a person has previously sought post-conviction relief?

First Proposed Rule of Law

The legislature's purpose in enacting the PCHA was to ensure that each person convicted of a crime in Oregon has one full and fair opportunity to challenge constitutional infirmities that render the conviction "void." The legislature codified procedural bars, similar to the common law principle of *res judicata*, to further the interests of finality of convictions. The legislature did not intend for this court to create additional common-law procedural bars to a post-conviction court reaching the merits of a ground for relief. The PCHA thus does not permit a common-law retroactivity rule.

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Second Question Presented

The PCHA bars a ground for relief in a late or successive petition unless the petitioner could not reasonably have raised the ground in a timely or first petition. Could a person convicted by a nonunanimous verdict in Oregon have reasonably raised the ground that their conviction violated the right to a unanimous verdict prior to the decision in *Ramos*?

Second Proposed Rule of Law

A petitioner could not reasonably have raised a ground for relief based on a violation of the right to a unanimous verdict before the United States Supreme Court decided *Ramos*. A petitioner whose conviction became final prior to *Ramos* and who raises a ground for relief based on *Ramos* satisfies the escape clauses to the procedural bars in the PCHA, and a post-conviction court should reach the merits of the *Ramos* ground for relief.

Third Question Presented

Alternatively, if this court decides to adopt a common-law retroactivity doctrine, how should a court determine whether a case decided after a conviction becomes final applies in post-conviction relief?

Third Proposed Rule of Law

A case issued after a conviction became final applies in post-conviction relief when it announces a new rule that invalidates a sentence or an offense or

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invalidates an unconstitutional procedure that resulted in a conviction and raises serious questions about the accuracy of the guilty verdict. If the purpose of a new procedural rule is not to overcome an aspect of trial that substantially impairs the truth-finding function, then a court balances the importance of the new procedural rule against the state's interest in finality and the burden on the administration of justice.

Summary of Argument

The legislature intended for the PCHA to provide a unitary process to permit a petitioner to have their conviction voided if the conviction was obtained in violation of the state or federal constitutions. At the time of enactment, in 1959, the legislature understood that a case decided after a conviction became final on direct appeal would apply in post-conviction. To ensure finality of convictions, the 1959 legislature created the procedural bars contained in ORS 138.550. Those bars permit a petitioner to obtain merits review of a ground for relief based on a case decided after a conviction became final on direct appeal or after a prior post-conviction proceeding only when the legal rule announced in the case could not reasonably have been raised at trial, on direct appeal, or in the prior post-conviction proceeding. The legislature later added the statute of limitations and an identical escape clause as that enacted with the existing procedural bars. The

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legislature did not intend for this court to create additional common-law procedural obstacles to merits review of a ground for relief.

A petitioner could not reasonably have raised a post-conviction ground for relief based on a violation of the right to a unanimous guilty verdict until after the Supreme Court's decision in *Ramos*. That decision overruled *Apodaca v. Oregon*, 406 US 404, 92 S Ct 1628, 32 L Ed 2d 184 (1972), in which a divided Court had held that the federal constitutional right to a unanimous guilty verdict did not apply to the states. There was no constitutional violation to allege based on a conviction by a nonunanimous verdict in Oregon until *Ramos*. Accordingly, a post-conviction court must reach the merits of a petitioner's ground for relief based on *Ramos*.

If this court decides to adopt a common-law rule for determining when to apply a case retroactively in post-conviction, then it should balance the interests of finality against the interests of justice. This court should not simply adopt the federal test from *Teague v. Lane*, 489 US 288, 211, 109 S Ct 1060, 103 L Ed 2d 334 (1989) (plurality), because that test incorporates principles of federalism not relevant to an Oregon court's review of an Oregon conviction, and it thus engages in a strong—nearly insurmountable—presumption against the retroactivity of even the most significant "procedural" rules, like *Ramos*. Instead, a case decided after a conviction becomes final applies retroactively in post-conviction when it announces a new rule that invalidates a conviction or a sentence or when it

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establishes that a conviction was obtained through an unconstitutional procedure that raises serious questions about the accuracy of the guilty verdict. If a new procedural rule does not meet that standard, then this court should apply a multi-factor balancing test that weighs the importance of the new rule, the interests of justice, the state's interest in finality, and the burden on the administration of justice of reversing convictions.

Ramos is a new case. It overruled existing Supreme Court precedent after the direct appeal in this case was final. By overturning Oregon law that permitted nonunanimous guilty verdicts, *Ramos* announced a rule that significantly increased the fairness of the proceedings. The right to a unanimous guilty verdict is a core tenet of due process in the Constitution, akin to the state's burden to prove a person's guilt beyond a reasonable doubt. Oregon's system of nonunanimity violated due process. Oregonians created the system to marginalize the views of jurors of color and jurors from religious or ethnic backgrounds other than white Christians of European ancestry. And the system of nonunanimity successfully did so, resulting in increased conviction rates for defendants of color and furthering white supremacist policy in Oregon. Those factors outweigh the interests of finality. It is hard to imagine a case in which the interest of justice weighs more heavily in favor of applying a newly announced rule of law retroactively. *Ramos*

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applies to cases on collateral review when the petitioner's conviction became final prior to the decision in *Ramos*.

SUMMARY OF HISTORICAL AND PROCEDURAL FACTS

This case is on review from an order granting the state's motion for summary judgment, thus this court "must view the pleadings, as well as any 'depositions, affidavits, declarations and admissions' that the parties have submitted in support of or in opposition to the summary judgment motion, in the light most favorable to the non-moving party." *Eklof v. Steward*, 360 Or 717, 729, 385 P3d 1074 (2016) (quoting ORCP 47).

I. Summary of facts from criminal trial and direct appellate review

On August 18, 2010, petitioner was charged by information with two counts of first-degree rape, one count of first-degree sodomy, and one count of first-degree sexual abuse. ER-2 (Amended Petition); Ex 4 (information of felony). All four crimes were alleged to have been committed on June 19, 2010, and all counts named the same alleged victim (complainant hereafter). *Id.* Petitioner pleaded not guilty to all charges and proceeded to a jury trial. ER-2.

Because no third party witnessed any of the alleged crimes, the trial boiled down to a credibility contest between petitioner and the complainant. Ex 14 (Appellant's Opening Brief in first post-conviction appeal), available in the Trial

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Court File (TCF) at 99-152.[1] The complainant testified that she and petitioner were "friend[s] with benefits" and that, on the night in question, they went to a party together. TCF at 106. At the party, she and petitioner went to use a bathroom and started "kissing." Complainant testified that she and petitioner were both "drunk." *Id.* Complainant testified that, in the bathroom, petitioner raped her and then forced her to perform oral sex. TCF at 107. Complainant testified that she and petitioner returned to the party and she did not report the rape or sodomy to anyone. *Id.* About 20 minutes later, petitioner raped her again in the back of a pickup truck. *Id.* at 108. Complainant testified that she called her ex-boyfriend to report the rape because she "knew he would come and get me." *Id.* Instead, he called complainant's mother, who picked her up and took her to the hospital. *Id.*

Although there were many people at the party, no one witnessed the alleged crimes. Ex 14. Several party-goers testified that petitioner and complainant acted like "a couple" throughout the night. TCF at 110. Party-goers testified that petitioner and complainant were "hanging over each other, kissing on each other," and had their "arms wrapped around each other, smiles on the face, kisses." *Id.*

[1] Neither party submitted a complete transcript of the underlying criminal trial, thus petitioner has gleaned the facts from the only available source in this record, Ex 14, which cites to the criminal trial transcript.

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Petitioner admitted to all of the sexual acts but testified that all acts were consensual. *Id.* at 110-13. He testified that complainant was acting happy and normal until people started to approach them while they were having sex in the back of the pickup truck; that is when she got "pissed" and "upset." *Id.* at 112.

On January 5, 2011, the jury returned a 10-2 verdict of guilty on all four counts. ER-16 (Verdict). The court sentenced petitioner to 150 months in prison. Ex 8 (criminal judgment of conviction and sentence). Petitioner filed a direct appeal and his court-appointed appellate attorney filed a brief pursuant to ORAP 5.90.[2] ER-3; Ex 9 (Appellant's Opening Brief). The Court of Appeals affirmed the convictions without issuing a written opinion, no petition for review was filed, and on November 7, 2012, the direct Appellate Judgment entered. ER-3; Ex 10 (direct Appellate Judgment).

II. Summary of facts from first post-conviction proceeding

Petitioner filed a timely petition for post-conviction relief alleging that his convictions were obtained in violation of his right to the adequate and effective assistance of trial counsel under Article I, section 11, of the Oregon Constitution and the Sixth Amendment of the United States Constitution. Ex 12 (Amended

[2] ORAP 5.90 provides the procedure for filing a brief where "counsel appointed by the court to represent an indigent defendant in a criminal case on direct appeal" has "determined that the case does not raise any arguably meritorious issues."

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Petition). Petitioner alleged that his attorney failed to conduct an adequate investigation, including failing to contact complainant's ex-boyfriend. TCF 128. The ex-boyfriend would have testified at trial that complainant had a history of alcohol abuse, manipulation, and lying and that, in his opinion, she is not a truthful person. TCF at 128. The ex-boyfriend also would have testified that when the complainant called him on the night in question and accused petitioner of sexually assaulting her, he did not believe the complainant because he thought she was trying to "manipulate" him by making false allegations. *Id.*

In addition, petitioner submitted evidence from complainant's best friend at the time of the trial. TCF at 107. If she had been asked, the friend would have testified that complainant "didn't sound distressed or anything" immediately after she was allegedly raped by petitioner. TCF at 131. She also declared that "[complainant] had a long history of lying, and I didn't want to be friends any more with someone who was dishonest and manipulative." *Id.* at 132. She would have testified that "I started believing that [complainant] was not an honest person before we ever went to that party in 2010 with [petitioner.]" *Id.* "If anyone had asked me that at [petitioner's] trial I would have said that I don't think she is a truthful person." *Id.*

Petitioner also submitted a declaration from complainant's brother. TCF at 133. He testified that "If I had been called to testify, I would have told the truth.

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The truth is my sister is a liar whose word cannot be trusted. I wouldn't trust anything that [she] has to say about her personal life." TCF at 133.

The post-conviction trial court denied relief on all claims. ER-3. Petitioner appealed and the Court of Appeals affirmed without issuing a written opinion. *Watkins v. Taylor*, 278 Or App 823, 380 P3d 1211 (2016); ER-3. This court denied the petition for review. *Watkins v. Taylor*, 360 Or 423, 383 P 3d 866 (2016); ER-3.

III. Summary of procedural facts in this post-conviction case

On August 10, 2020, petitioner initiated the instant post-conviction proceeding. ER-18 (OECI case register). As relevant here,[3] petitioner's first ground for relief alleged that his convictions were obtained in violation of the Sixth and Fourteenth Amendments to the United States Constitution because they were based on nonunanimous 10-2 jury verdicts. ER-5. Petitioner alleged that he could not reasonably have raised this ground for relief until April 20, 2020, when the United States Supreme Court issued its decision in *Ramos v. Louisiana*. ER-5.

The state filed a motion for summary judgment. TCF at 164. The state argued that petitioner was not entitled to relief because "*Ramos* does not apply retroactively as matter of law, defendant is entitled to summary judgment." TCF at

[3] Petitioner does not challenge the grant of summary judgment on grounds 2-5.

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169. In support of that argument, the state cited to *Teague* and *Chavez v. State of Oregon*, 364 Or 654, 438 P3d 381 (2019), among other cases. TCF at 169-70.

Petitioner filed a response, arguing that the decision in *Ramos* met the escape clauses contained in ORS 138.510 and ORS 138.550 and, thus, the state was not entitled to judgment as a matter of law. TCF at 213-15. Petitioner also made clear that he "does not agree that *Teague* controls retroactivity analysis in this case which is appropriately resolved by application of the Post-conviction Hearings Act (PCHA), or alternatively under a broader and less stringent retroactivity analysis as permitted by *Danforth v. Minnesota*, 552 US 264[, 128 S Ct 1029, 169 L Ed 2d 859] (2008)." TCF at 215. Alternatively, petitioner also argued that even under *Teague*, *Ramos* was a "watershed" decision. TCF at 216.

The post-conviction trial court granted the state's motion for summary judgment and denied relief in a general judgment. ER-17. Petitioner appealed and this court accepted the Court of Appeals' certification of this appeal pursuant to ORS 19.405.

ARGUMENT

Beginning in the 14th century, English law required a unanimous jury verdict to convict a person of a serious crime. *Ramos*, 140 S Ct at 1395. Jury unanimity was also required when the Framers drafted the Constitution. Accordingly, the requirement of jury unanimity is implicit in the Sixth Amendment

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right to a jury trial and it has been consistently and expressly recognized by the Supreme Court since at least 1898. *Id*.

Despite the well-established nature of the right and its importance to ensuring the fairness of guilty verdicts, in 1934 Oregon voters amended Article I, section 11, of the Oregon Constitution to permit a jury to find a defendant guilty of a crime (other than first-degree murder) by a verdict of 10-2 or 11-1 or 12-0. *State v. Ulery*, 366 Or 500, 501, 464 P3d 1123 (2020). Racism and white supremacy motivated the voters. "Oregon's rule permitting nonunanimous verdicts can be similarly [to Louisiana's rule] traced to the rise of the Klu Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'" *Ramos*, 140 S Ct 1391 (quoting *State v. Williams*, No. 15-CR-58698 (Mult Co Cir Ct, Dec 15, 2016)). The voters succeeded in perpetuating white supremacy through the nonunanimous verdict rule. *See Ramos*, 140 S Ct at 1393-95 (acknowledging continued racially discriminatory effects of the nonunanimous jury rule); *id*. at 1410 (Sotomayor, J., concurring in part) (same); *id*. at 1417-19 (Kavanaugh, J., concurring in part) (same).

In *Apodaca* in 1972, a plurality of the United States Supreme Court held that the Sixth Amendment's unanimity requirement did not apply to the states, allowing Oregon's outlier practice to continue. The Supreme Court ended that practice in 2020 when it overruled *Apodaca* and held that the Sixth Amendment requirement

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of jury unanimity for a guilty verdict for a serious offense applies to the states through the Due Process Clause of the Fourteenth Amendment. *Ramos,* 140 S Ct at 1397. "*Ramos* makes clear that all convictions for serious offenses that were based on nonunanimous verdicts" violated "the defendant's Sixth Amendment right to jury unanimity." *State v. Ramos*, 367 Or 292, 295, 478 P3d 515 (2020). "A verdict, taken from eleven, [i]s no verdict at all[.]" *Ramos*, 140 S Ct at 1395.

This court has given effect to *Ramo*s by applying it to cases on direct appeal when the trial occurred prior to *Ramos*. An appellate court should exercise its discretion to correct the error even if it is unpreserved. *Ulery,* 366 Or at 504. The constitutional error is so grave that it warrants reversal despite the state's interest "in avoiding the expense and difficulty associated with a retrial." *Id*. at 504. The gravity of the constitutional violation also compelled this court to waive the rules of appellate procedure and reverse convictions based on nonunanimous verdicts even when the issue had not been properly presented on direct appeal. *State v. Williams,* 366 Or 495, 466 P3d 55 (2020). A trial court's instruction to the jury that it could return a nonunanimous verdict was harmless error where the verdict was unanimous. *Ramos,* 367 Or at 331.

The issue in this case remains unresolved. When a conviction is based on a nonunanimous (10-2 or 11-1) guilty verdict and the person's conviction became final prior to the *Ramos* decision, does the gravity of the constitutional violation

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require a post-conviction court to reverse the conviction? That presents purely a question of state law. *Chavez*, 364 Or at 668. The Supreme Court's retroactivity decisions apply only to cases on federal collateral review in federal habeas corpus; they do not bind state courts, except that a state must give retroactive effect to new substantive rules that prohibit a punishment or an offense. *See Chavez*, 364 Or at 668 (so stating after reviewing United States Supreme Court case law); *see also State v. Fair*, 263 Or 383, 387-88, 502 P2d 1150 (1972) (same).

The Supreme Court's federal retroactivity rule derives from the Court's interpretation of the federal habeas corpus statutes. Congress intended to grant federal courts broad authority to decide when to grant a petitioner relief, which includes the authority to decide when to provide a remedy for a federal constitutional violation based on a case announced after a conviction became final. *Danforth*, 552 US at 278. ("*Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute."). The Supreme Court's decisions on retroactivity thus reflect a federal court's limited authority to review state-court convictions and federalism concerns about disturbing the finality of state-court judgments. *Id.* at 279-80.

In that limited context, the Supreme Court held "the *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review." *Edwards v. Vannoy*, 590 US __, 141 S Ct 1547, 1559, 209 L Ed 2d 651 (2021). The Court then went

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one step farther and declared that *no new procedural rule* would ever apply retroactively in federal habeas corpus. *Id*. The Court noted, however, 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." *Id*. at n 6 (citing *Danforth*, 553 US at 282).

In the sections that follow, petitioner explains that Oregon law requires courts to apply the *Ramos* jury-unanimity rule to cases in post-conviction proceedings when the record establishes that a conviction is based on a nonunanimous guilty verdict and when the conviction became final prior to the *Ramos* decision.

In section I, petitioner explains that the legislature in the PCHA intended to require a court to grant a petitioner relief when the petitioner establishes a ground for relief and the ground is not barred by the statutory procedural bars in the PCHA. Those bars balance the interests of finality of judgments against interests of fundamental fairness. The legislature did not intend for this court to create an additional common-law barrier to relief in the form of a retroactivity rule. Here, petitioner's conviction based on a nonunanimous verdict plainly violated the Sixth Amendment. The petition is successive and filed after the statute of limitations, but the *Ramos* jury-unanimity rule meets the escape clauses to those procedural bars

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because petitioner could not reasonably have raised the ground for relief prior to *Ramos*.

In section II, petitioner argues in the alternative that if this court were to adopt a common-law retroactivity test, then this court should adopt the test that it previously suggested in *Fair*, 263 Or at 388-39. That test asks whether the new rule substantially enhances the reliability of the determination of guilt and undermines confidence in the accuracy of guilty verdicts of past trials. If the answer is yes, then the new rule applies retroactively. If the answer is no, then a court weighs multiple factors, including the purpose of the new rule, the state's reliance interests on the old rule, and the impact on the administration of justice. The *Ramos* jury-unanimity rule substantially enhances the reliability of a jury's guilty verdict. A nonunanimous guilty verdict is "no verdict at all"; it does not result in a conviction under the Sixth Amendment. Accordingly, *Ramos* applies to cases on post-conviction that became final prior to the decision.

Finally, in section III, petitioner argues further in the alternative that even if this court were to adopt the federal retroactivity test under Oregon law, the *Ramos* jury-unanimity rule should apply retroactively as a new watershed rule of criminal procedure. This court should adopt as the rule for Oregon post-conviction proceedings the reasoning of the three dissenting judges in *Edwards* who would have applied *Ramos* retroactively on federal collateral review.

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I. This court has not yet fully interpreted the Post-Conviction Hearing Act to answer whether the legislature intended for this court to create a common-law retroactivity rule

This court has come full circle on its own authority to decide whether to grant relief to a post-conviction petitioner based on a newly decided federal procedural rule. In 1972 in *Fair*, this court correctly recognized that it had the authority to give broader effect to federal constitutional rights than that given by the Supreme Court. 263 Or at 388. Then, in 2004, this court reversed course and held that it was obligated to follow the Supreme Court's retroactivity rulings. *Page v. Palmateer*, 336 Or 379, 84 P3d 133 (2004). But the United States Supreme Court overruled *Page* in *Danforth*, making clear that a state court, this court, decides when new federal rules apply in state post-conviction proceedings, so long as the state court gives at least as broad effect as the Supreme Court requires. Since *Danforth*, this court has considered but not resolved how an Oregon court should determine when to grant a remedy to a post-conviction petitioner based on a new rule of federal constitutional law. The court most recently addressed the issue in detail in *Chavez*. Accordingly, petitioner summarizes *Chavez* in some detail.

The petitioner in *Chavez* "alleged that his trial attorney failed to advise him about the immigration consequences of his guilty plea in violation of the Sixth Amendment." 364 Or at 656. The case that announced the Sixth Amendment violation, *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284

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(2010), was decided more than 10 years after the petitioner pleaded guilty. *Chavez*, 364 Or at 656. The petitioner initiated his post-conviction case in 2011, after the expiration of the two-year statute of limitations in ORS 138.510(3). To obtain a remedy for the Sixth Amendment ineffective-assistance-of-counsel violation, the petitioner thus had to establish that the *Padilla* ground for relief met the escape clause to the limitations period and, depending on this court's view of whether Oregon had an additional retroactivity test, that *Padilla* applied to cases in post-conviction. *Id*. at 657.

This court applied the test from *Verduzco v. State*, 357 Or 553, 355 P3d 902 (2015), to analyze whether the ground for relief could reasonably have been raised prior to the decision in *Padilla*:

> "The touchstone is not whether a particular question is settled, but whether it reasonably is to be anticipated so that it can be raised and settled accordingly. The more settled and familiar a constitutional or other principle on which a claim is based, the more likely the claim reasonably should have been anticipated and raised. Conversely, if the constitutional principle is a new one, or if its extension to a particular statute, circumstance, or setting is novel, unprecedented, or surprising, then the more likely the conclusion that the claim reasonably could not have been raised."

Verduzco, 357 Or at 571 (internal quotation marks omitted). *Padilla* announced a new rule that diverged from the "almost unanimous" Sixth Amendment rule before *Padilla*: "that a Sixth Amendment inadequate assistance claim based on the failure to advise a defendant of the immigration consequences of a guilty plea was simply

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not cognizable." *Chavez*, 364 Or at 663. *Padilla* was thus "novel, unprecedented, and surprising," even though some litigants were unsuccessfully raising similar claims before *Padilla*. *Id.* This court accordingly held that the petitioner satisfied the escape clause in ORS 138.510(3). *Id*.

This court next addressed the petitioner's retroactivity argument. The Supreme Court had previously held that *Padilla* announced a new federal constitutional rule that does not apply retroactively in federal court. *Chaidez v. United States*, 568 US 342, 350, 133 S Ct 1103, 185 L Ed 2d 149 (2013). The petitioner argued that two provisions of the PCHA, ORS 138.530(1)(a) and (2), expressed the legislature's intent that all new state and federal constitutional rules apply retroactively in state post-conviction proceedings. This court interpreted ORS 138.530(2) and concluded that it "does not reflect a legislative choice to require that all new constitutional rules be applied retroactively[.]" *Chavez*, 364 Or at 393. It reached the same conclusion after interpreting ORS 138.530(1)(a). *Id*. at 394. The court noted that in *Fair* it had held it "may but need not apply some new constitutional rules retroactively," although it made that statement in *Fair* without "analyzing the text and context of the [PCHA]." *Chavez*, 364 Or at 678. That statement, this court noted, implied that the PCHA did not require all new constitutional rules to apply in post-conviction. *Id.*

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This court narrowly cabined its holding that *Padilla* did not apply retroactively because of the limited arguments presented to it:

> "Considering the text and context of Oregon's post-conviction statute, *we hold that ORS 138.530 does not require that all new constitutional rules be applied retroactively*. That holding is sufficient to answer the sole retroactivity argument that petitioner has made in his briefs to this court. It follows that we need not decide in this case whether we should clarify or further refine the factors that this court considered in *Fair* in deciding whether a new constitutional rule will apply retroactively."

Chavez, 364 Or at 679 (emphasis added). Accordingly, open questions remain about whether some other provision of the PCHA requires the application of a new constitutional rule and, if not, what common-law rule this court should adopt to determine retroactivity.

II. The legislature intended a court to review the merits of a ground for relief based on a case decided after a conviction became final when the case announces a legal rule that the petitioner could not have reasonably raised sooner.

This court interprets a statute to discern the intent of the legislature that enacted the provision at issue. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009); *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995). This court examines the statutory text in context and gives the legislative history the weight that it deems appropriate. *Id.* at 171-72. "As a part of context, this court considers, among other things, other provisions of the same statute, other related statutes, prior versions of the statute, and this court's decisions interpreting the statute."

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Jones v. General Motors Corp., 325 Or 404, 411, 939 P2d 608 (1997). Context also includes case law existing at the time the legislature enacted the operative text. *Lindell v. Kalugin*, 353 Or 338, 349, 297 P3d 1266 (2013). This court presumes that the legislature enacts statutes with an understanding of the existing law. *Weber and Weber*, 337 Or 55, 67, 91 P3d 706 (2004).

The legislature enacted the PCHA because "[t]he Constitution of the United States requires the states to provide persons convicted of crimes 'some clearly defined method by which they may raise claims of denial of federal rights.'" *Bartz v. State*, 314 Or 353, 361, 839 P2d 217 (1992) (quoting *Young v. Ragen*, 337 US 235, 239, 69 S Ct 1073, 93 L Ed 1333 (1949)). The "PCHA was adopted in 1959 to provide a detailed, unitary procedure to persons seeking post-conviction relief." *Id.* at 362. It "both created a right to post-conviction relief and established a comprehensive set of procedures for resolving post-conviction claims." *Ware v. Hall*, 342 Or 444, 449, 154 P3d 118 (2007).

As petitioner explains below, the legislature did not create those comprehensive procedures with the intent of leaving the scope of available rights and remedies to the common law. *Cf. Stevens v. Bisphem*, 316 Or 211, 230, 851 P2d 556 (1993) ("The legislature has seen fit to control very fully the criminal justice process from pre-trial proceedings through post-conviction relief proceedings, and to provide for nearly all conceivable contingencies that might

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arise as a case makes its way through that system."). The comprehensiveness of that landscape "demonstrates the legislature's intention that only those persons deserving of a conviction will be, or will remain, convicted." *Id.*; *see also State v. Cloran*, 233 Or 400, 412, 377 P2d 911 (1963) (explaining that the PCHA "was designed * * * to provide a remedy for any denial of constitutional rights or to correct an excessive sentence").

The comprehensive procedures detail what a petitioner must do to establish a ground for relief, including a ground based on a new rule of law; when a post-conviction court must grant relief; and the range of remedies available to a court. When a petitioner establishes "a substantial denial in the proceedings resulting in petitioner's conviction * * * of petitioner's rights under the Constitution of the United States * * * and which denial rendered the conviction void[,] the legislature provided that "[p]ost-conviction relief shall be granted by the court[.]" ORS 138.530(1)(a). When a court grants relief, the legislature provided that the remedy "shall include release, new trial, modification of sentence, and such other relief as may be proper and just." ORS 138.520. Notably, the court did not authorize a court to refuse to remedy a constitutional violation. The question becomes, then, *when* the legislature intended to provide a ground for relief based a new procedural rule announced after a petitioner's conviction became final.

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A. The text of the PCHA balances finality against fundamental fairness through the *res judicata* provisions of ORS 138.550, the statute of limitations in ORS 138.510, and the escape clauses to those provisions.

The legislature intended a court to reach the merits of a ground for relief based on a new constitutional rule when that rule gives rise to a ground for relief that could not reasonably have been raised earlier. It expressed that intent by balancing finality against the interests of justice in the *res judicata* provisions in ORS 138.550:

> "The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in the petition *shall be as specified in this section and not otherwise*:
>
> "(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.
>
> "(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

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> "(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.
>
> "(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground could reasonably have been asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in the conviction and sentence of the petitioner."

(Emphasis added).

As the first sentence of ORS 138.550 expresses, the legislature intended that statute to address comprehensively *when* a petitioner could obtain review on the merits of a ground for relief after prior judicial proceedings had concluded. The statute codifies common law *res judicata* principles. Jack G. Collins and Carl R.

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Neil, *The Oregon Postconviction–Hearing Act*, 39 Or L Rev 337, 356 (1960) (hereinafter "Collins and Neil"). When a petitioner whose conviction has become final on direct appeal or who has previously challenged their conviction in post-conviction alleges a ground for relief that is based on a *newly* announced rule, ORS 138.550 bars the ground unless the petitioner establishes that the ground could not reasonably have been raised in the prior proceeding. *Verduzco*, 357 Or at 565.

Whether a ground could reasonably have been raised "depends on where the legal rule that forms the basis for a claim lies in a continuum: '[W]hen the underlying principle is novel, unprecedented, or surprising, and not merely an extension of settled or familiar rules, the more likely it becomes that the ground for relief could not reasonably have been asserted.'" *White v. Premo*, 365 Or 1, 7, 443 P3d 597 (2019) (quoting *Chavez*, 364 Or at 663; internal quotation marks in *Chavez* omitted) (interpreting ORS 138.550(3)). This court has interpreted the identically worded escape clause to the statute of limitations in ORS 138.510(3) in the same way. *Verduzco*, 357 Or at 564-71.

Nothing in the text of the PCHA suggests that the legislature intended a court to create additional, common-law procedural obstacles to a court's review on the merits of a ground for relief. *See Gaines*, 346 Or at 171 ("[T]here is no more persuasive evidence of the intent of the legislature than 'the words by which the legislature undertook to give expression to its wishes.'"). Rather, the legislature

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intended for the text of the act, specifically ORS 138.510(3) and ORS 138.550, to address when a petitioner may assert a ground for relief based on a case decided after a conviction became final or after the conclusion of a first post-conviction proceeding.

B. Context shows that the 1959 legislature understood that new procedural rules would apply in post-conviction unless a statutory provision of the PCHA barred their application.

In 1959, when the legislature enacted the PCHA, newly announced rules of criminal procedure applied retroactively in state collateral review of criminal convictions and in federal habeas corpus. *Danforth*, 552 US at 272. In 1958, the Court had retroactively applied the holding in *Griffin v. Illinois*, 351 US 12, 18-20, 76 S Ct 585, 100 L Ed 891 (1956), that the Fourteenth Amendment requires states to provide "as adequate appellate review" for an indigent defendant as those with means. *Chavez*, 364 Or at 677 (internal citation omitted). As the Court explained in *Danforth*, "until 1965 the Court continued to construe every constitutional error, including newly announced ones, as entitling state prisoners to relief on federal habeas. 'New' constitutional rules of criminal procedure were, without discussion or analysis, routinely applied to cases on habeas review." *Id.* at 272. In Oregon, this court had not been presented with an argument about retroactivity prior to 1959. *Chavez*, 364 Or at 671 ("Oregon courts had not applied new constitutional rules retroactively" but "the issue had not arisen in state habeas.").

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Of course, the application of a new constitutional rule results in the reversal of a conviction only if the petitioner establishes that the legal error prejudiced him or, in the wording of the PCHA, "rendered the conviction void." ORS 138.530(1). Thus, the context of the PCHA includes that the 1959 Oregon legislature understood that the United States Supreme Court applied its decisions in federal habeas corpus retroactively and that those decisions were binding on state courts regardless of whether the case was on direct appeal or collateral review. *Danforth*, 552 US at 272.

Petitioner's understanding of the state of Supreme Court case law in 1959 is consistent with *Chavez*, although petitioner and this court in *Chavez* focus on different aspects of the cases. In *Chavez*, this court recognized that the Court in *Danforth* explained that "every constitutional error, including newly announced ones," entitled state prisoners to federal habeas corpus relief until the Court decided *Linkletter v. Walker*, 381 US 618, 85 S Ct 1731, 14 L Ed 601 (1965). *Chavez*, 364 Or at 665. This court in *Chavez* focused on the rarity of Supreme Court cases applying a new constitutional rule to grant relief as evidence that the legislature did not have retroactivity in mind when it enacted ORS 138.530(2). *Chavez*, 364 Or at 665-66. Respectfully, whether the application of the rule was rare or frequent misses the point. Under this court's well-established statutory interpretation methodology, the context of the PCHA includes that the 1959

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legislature would have understood that a petitioner would be entitled to relief on collateral review based on any federal constitutional violation, including new procedural rules.

Additional context from contemporary scholars on whom this court has frequently relied to understand the 1959 legislature's intent in enacting the PCHA confirms that understanding. Collins and Neil, 39 Or L Rev at 338-39 (describing the origins of the PCHA); *Verduzco*, 357 Or at 570 (noting that this court has "repeatedly" "looked to [the Collins and Neil] article in seeking to understand the 1959 post-conviction act.").

Collins and Neil confirm that the legislature intended the *res judicata* rules in ORS 138.550 to balance finality against fundamental fairness. They explained that ORS 138.550 "attempts to provide a clear and workable basis for reducing the tide of postconviction litigation to manageable proportions, while maintaining standards of fairness." Collins and Neil, 39 Or L Rev at 356. In clarifying the application of those provisions, Collins and Neil posed a hypothetical that involved a retroactivity question.

"John Doe is convicted in Oregon of a crime by virtue of the admission at his trial of evidence seized in violation of the Federal Constitution." *Id.* at 358. At the time of trial, that does not violate the Fourteenth Amendment (at the time their article was published, in 1960, the exclusionary rule did not apply to the states, as

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Collins and Neill noted by citing to *Wolf v. Colorado*, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1949), *overruled by Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961)). *Id*. Collins and Neil then proposed, apparently anticipating *Mapp*, that two years after Doe's conviction, the Court reversed *Wolf* and held that "a conviction based upon such evidence violates rights guaranteed by the fourteenth amendment." 39 Or L Rev at 359. They explained that under the PCHA, "Doe could obtain relief by bringing a postconviction proceeding" based on the newly announced federal procedural rule so long as the *res judicata* provisions of ORS 138.550 did not bar the ground for relief. *Id*.

Collins and Neil explained that the legislature intended a post-conviction court to apply retroactively new federal procedural rules when the petitioner had not raised a ground for relief previously and could not have reasonably raised the ground for relief previously. They summarized the sometimes "anomalous" operation of ORS 138.550:

> "Thus, the prisoner who took no appeal and brought no postconviction proceeding would obtain relief after the change of constitutional interpretation by the United States Supreme Court, whereas the man who raised the issue but was denied relief erroneously, as it later appears, would presumably be without remedy, at least in the state courts."

Collins and Neil, 39 Or L Rev at 359.

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In summary, the text of the PCHA establishes that the legislature intended the PCHA to provide a single, unitary process for a person convicted of a crime to obtain review on the merits of a federal constitutional violation that the petitioner had not previously raised and could not have reasonably raised previously. Context establishes that the 1959 legislature intended the *res judicata* rules in ORS 138.550 and the escape clauses to those provisions to serve the purposes of a common-law retroactivity rule by balancing the need for finality and the fair administration of justice against the fairness of granting a person a remedy for a constitutional violation that rendered their conviction void. Accordingly, if a petitioner's ground for relief based on *Ramos* was not raised at trial or on direct appeal and if it satisfies the test announced in *Verduzco* for when a new case satisfied the escape clauses, then a post-conviction court must reach the merits of the *Ramos* ground.

C. This court should overrule its cases that applied a common-law retroactivity test without properly interpreting the PCHA.

Petitioner views this court's recent case law as recognizing that the questions present in this case are open questions, as summarized above. Petitioner acknowledges, however, that this court has applied a common-law retroactivity test in cases including *Haynes*, *Fair*, *Page*, and *Chavez*, which implies that the PCHA does not provide the sole answer to when a newly decided rule applies in post-conviction. If this court views those cases as conflicting with petitioner's

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arguments, then those cases should be reconsidered and overruled for the reasons explained previously in this section. This court's prior cases did not fully examine the text, context, and legislative history of the PCHA and they did not address the arguments presented here. *See Severy/Wilson v. Board of Parole and Post-Prison Supervision*, 349 Or 461, 474, 245 P3d 119 (2010) (explaining circumstances when this court will reconsider and overrule precedent, including when a prior decision did not properly interpret a statute). Accordingly, this court should overrule its prior decisions that imply—without expressly concluding—that the legislature intended for this court to employ a common-law retroactivity rule in addition to the procedural bars in the PCHA.

D. Petitioner could not reasonably have raised a ground for relief based on *Ramos* earlier and the post-conviction court erred in refusing to reach the merits of the *Ramos* jury-unanimity ground.

Here, petitioner raised the *Ramos* ground in a petition filed after the two-year statute of limitations and after litigating a prior post-conviction case. A ground for relief based on *Ramos* satisfies the escape clauses to the relevant procedural bars, ORS 138.510(3) and ORS 138.550(3). The *Ramos* jury-unanimity rule is "new[,] * * * novel, unprecedented, [and] surprising." *Verduzco*, 357 Or at 571 (internal quotation marks omitted).

The Court's decision in *Ramos* overruled existing Supreme Court precedent and was "not merely an extension of settled or familiar rules." *White*, 365 Or at 7.

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It also invalidated the part of Article I, section 11, of the Oregon Constitution that permitted 10-2 or 11-1 guilty verdicts. The moment the Court issued *Ramos*, it transformed a losing legal argument controlled by Article I, section 11, and *Apodaca* into a winning argument. *Williams*, 366 Or at 499. Accordingly, petitioner's ground for relief based on *Ramos* could not reasonably have been raised within two years of his conviction or during his prior post-conviction proceeding.

Because petitioner's ground for relief is not procedurally barred by any provision of the PCHA, the post-conviction court must reach the merits of the ground and "shall" grant relief if petitioner establishes a federal constitutional violation that rendered his conviction void. ORS 138.530(1)(a). Petitioner met his burden by establishing that his convictions resulted from nonunanimous guilty verdicts in violation of the Sixth and Fourteenth Amendments. The post-conviction court thus must reverse the convictions and grant a new trial—the proper remedy under ORS 138.520.

III. Alternatively, if this court decides to apply a common-law retroactivity test, then new rules that invalidate an offense or punishment and new rules that raise serious questions about the accuracy of guilty verdicts apply retroactively; other new rules are subject to a balancing test to determine whether they apply retroactively.

This case does not concern a new rule that invalidates an offense or a punishment. Those rules—"substantive rules" in the wording of the *Teague* test—

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apply retroactively under any version of a retroactivity test of which petitioner is aware, and petitioner does not understand the retroactive application of such rules to be in doubt under whatever test this court might chose to adopt.[4] The *Ramos* jury-unanimity rule is a new "procedural" rule. Accordingly, petitioner focuses on the rule that this court should use to determine whether a procedural rule applies retroactively.

A. *State v. Fair*

In *Fair*, this court was charged with deciding whether to apply retroactively its interpretation of the double jeopardy provision in Article I, section 12. 263 Or at 387-88. This court held, "we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires." *Id.* at 387. However, this court also noted that "for the most part," it had chosen to follow "the lead of the [United States] Supreme Court's decisions on retroactivity." *Id.* at 386; *see Chavez*, 364 Or at 678 ("To be sure, the court in *Fair* did not state its retroactivity rule after

[4] Recent examples of "substantive" rules include the prohibition of the death penalty for the intellectually disabled in *Atkins v. Virginia*, 536 US 304, 317, 122 S Ct 2242, 153 L Ed 2d 335 (2002), and the prohibition of mandatory life without parole for a juvenile in *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). *Montgomery v. Louisiana*, 577 US 190, 208-10, 136 S Ct 718, 193 L Ed 2d 599 (2016).

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analyzing the text and context of the 1959 statute."). Significantly, this court noted an exception to that general rule. In *Haynes v. Cupp*, 253 Or 566, 456 P2d 490 (1969), *overruled in part by State v. Evans*, 258 Or 436, 442, 483 P2d 1300 (1971),[5] and *North v. Cupp.* 254 Or 451, 461 P2d 271 (1969) this court had continued to apply its own rule about the retroactive application of a federal constitutional rule even after the Supreme Court had reached a different conclusion about the retroactivity of the new rule in federal court. *Fair*, 263 Or at 387 & n 7.

This court then summarized its understanding of Supreme Court law on retroactivity because, although the Supreme Court cases "are not binding on us, * * * we may look to those cases for guidance." 263 Or at 388. This court quoted the *Linkletter* test, as summarized in *Stovall v. Denno*, 388 US 293, 297, 87 S Ct 1976, 18 L Ed 2d 1199 (1967), explaining that a court considers each rule on its own merits and weighs the following factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the

[5] In *Evans*, this court held that the federal constitutional rule at issue in *Haynes* applied only to cases where trial began after those rules were announced. The *Evans* strict prospectivity rule no longer applies because this court now applies the law as it exists during a direct appeal, as does the Supreme Court. *Ulery,* 366 Or at 503; *Ramos*, 367 Or at 294.

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old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Fair*, 263 Or at 388.

This court quoted with approval the Supreme Court's statement that, under factor (a), new procedural rules that raise serious questions about the accuracy of guilty verdicts apply retroactively regardless of the state's interests under factors (b) and (c):

> "Where the purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances."

Fair, 263 Or at 388-89 (quoting *Williams v. United States*, 401 US 646, 653, 91 S Ct 1148, 28 L Ed 2d 388 (1971)) (internal quotation marks omitted). When the new rule does not raise serious questions about the accuracy of guilty verdicts in past trials, then this court considers all three factors. *Id*. at 389 (quoting *Williams*, 401 US at 646).

B. This court should adopt the test from *Fair*.

If this court decides to adopt a common-law test, then it should explicitly adopt the test from *Fair* for determining when a new procedural rule applies retroactively. The *Fair* test is consistent with this court's case law that has applied new constitutional rules retroactively. The *Fair* test is a flexible approach to

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retroactivity that permits a court to balance the interests of justice on a new-rule-by-new-rule basis. The alternative test,[6] the *Teague* test, is a poor fit for Oregon law because it was designed with federalism concerns in mind and has proven so unworkable in practice that only one new procedural rule has ever satisfied it, leading the court to disavow that part of *Teague* in *Edwards*.

i. The *Fair* test is consistent with this court's case law.

This court has applied newly announced rules of federal constitutional law retroactively in post-conviction at least twice before.

First, in *Guse v. Gladden*, 243 Or 406, 414 P2d 317 (1966), *overruled in part by State v. Evans*, 258 Or 437, 442, 483 P2d 1300 (1971), and *Haynes*, this court applied retroactively the Supreme Court's rule from *Escobedo v. Illinois*, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964), which concerned when police must advise suspects of the right to remain silent under the Sixth Amendment. This court had applied *Escobedo* to Oregon criminal cases in *State v. Neely*, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965).

In *Fair*, this court applied the *Linkletter* test and cited *Haynes* as an example of a case in which this court elected to give a new federal constitutional rule (*Escobedo*) broader retroactive application than the Supreme Court chose to give

[6] As petitioner explains below, other states that have adopted their own retroactivity test use a version of the *Linkletter* test or a version of the *Teague* test.

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the rule in federal court. *Fair*, 263 Or at 387 n 7; *see also Chavez*, 364 Or at 678 n 9 (recognizing that the retroactivity rule from *Fair* applies in post-conviction even though *Fair* was a direct appeal).

Second, in *White v. Premo*, this court retroactively applied the rule from *Miller* to hold that the petitioner's sentence violated the Eighth Amendment. 365 Or at 11-20. On the same day, the court reached the same conclusion in the case of the petitioner's twin brother and co-defendant. *White v. Premo*, 365 Or 21, 443 P3d 608 (2019). Although this court did not discuss retroactivity, it held that the petitioner's ground for relief based on *Miller* satisfied the escape clauses in the PCHA and it then applied *Miller* on its merits even though the petitioner's conviction became final many years prior to the decision in *Miller*. *White*, 365 Or at 11.

The test proposed by petitioner here is consistent with *Fair*, *Haynes*, and *White*. *Fair* relied on the rule in *Haynes* and *Haynes* is consistent with applying a balancing test to retroactively apply the new procedural rule from *Escobedo* in post-conviction proceedings. *Miller* announced a new rule that prohibited a sentence and thus it applied retroactively.

ii. Other states use a balancing test or the *Teague* test.

Other states that employ retroactivity tests use either a version of the *Linkletter* test or a version of the *Teague* test. *See* Appendix A (listing states that

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apply each test). A minority of the states—nine by petitioner's count—apply a balancing test like the *Linkletter* test. *Id*. A majority of the states—39 by petitioner's count—apply a version of the *Teague* test. *Id*. The number of states in the majority may reflect the same misunderstanding of Supreme Court case law that this court held prior to *Danforth*, because many of the cases that announce the respective state tests were issued prior to *Danforth*.

After *Danforth*, some states that apply the *Teague* test have modified the test or applied it more broadly because of concerns that the Court applied *Teague* too narrowly. *See Rhoades v. State*, 233 P3d 61, 66 (Idaho 2010) (so stating). After the Court's decision in *Edwards* to overrule *Teague* and declare that no new procedural rule will apply retroactively in federal habeas corpus, more states may choose not to follow the Court's retroactivity test in their own state post-conviction proceedings.

Thus, expressly adopting *Fair* as the retroactivity test for new procedural rules is also consistent with the approaches in at least nine other states and applying a retroactivity test more broadly than the Supreme Court is consistent with an even greater number of states.

iii. The *Fair* test's multi-factor approach furthers the interests of justice.

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The test from *Fair* permits a court to strike an appropriate balance between vindicating a petitioner's constitutional rights and the state's interest in finality. The test furthers the interests of justice by recognizing that new procedural rules that "overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raise[] serious questions about the accuracy of guilty verdicts in past trials" apply retroactively. Only the rare new procedural rule will satisfy that standard. When a state court conviction was obtained through an unconstitutional procedure that "raises serious questions about the accuracy" of the guilty verdict, however, basic considerations of fairness and justice require reversing the conviction to permit the petitioner a new trial under a constitutional process that safeguards against wrongful conviction.

If a new procedural rule does not overcome an aspect of trial that substantially impairs the truth-finding function, then the *Fair* test permits a court to balance the importance of the new procedural rule against the state's interest in finality and the burden on the administration of justice.

Defining the boundaries of the *Fair* test will, of course, require a case-by-case approach in the appellate courts. No court, to petitioner's knowledge, has devised a retroactivity test that ends litigation over whether new procedural rules apply retroactively. The stakes are too high: for the person whose conviction was obtained through a constitutional violation; for the state; and for the court who

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must either countenance a constitutional violation or spend resources on proceedings on remand. The only way to end litigation would be to declare that *no* new procedural rule will ever apply retroactively, as a majority of the Supreme Court did in *Edwards* for the federal habeas corpus retroactivity test. 141 S Ct at 1560 ("New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund."). This court should not follow that path.

iv. The *Teague* test is designed for federal habeas corpus and is unworkable in application, as evident from *Edwards v. Vannoy*.

The Supreme Court adopted the *Teague* test after the *Linkletter* test was criticized for yielding unpredictable, inconsistent results. *Chavez*, 364 Or at 666. The *Teague* test has not been an improvement in practice. *Edwards*, 141 S Ct at 1559-60 (criticizing and overruling watershed rule test). Indeed, even the justices in the majority in *Edwards* disagreed about whether *Ramos* did not apply retroactively under the "moribund" *Teague* test or under the text of the federal habeas statute. *Compare Edwards*, 141 S Ct at 1559-60 (*Kavanaugh*, J.) (*Ramos* not watershed rule) *with id*. at 1562 (Thomas, J., concurring and joined by Gorsuch, J.) (the federal habeas statute should control).

In state courts, parties and courts continue to grapple with how to apply *Teague*. *See* Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal*

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Procedure, 91 Wash L Rev 463 (2016) (describing problems with the watershed rule part of the *Teague* test and their impacts on state court retroactivity decisions). State courts have responded by applying the watershed rule exception to nonretroactivity much more broadly than the Court. A 2016 analysis of 228 state court cases that asked whether a new procedural rule was watershed revealed that more than one in nine of those cases held that the new rule was a watershed rule. Fox & Stein, 91 Wash L Rev at 494-95. That is a significantly greater number than the zero rules that the Court has found to be watershed since *Teague*.

Teague's watershed rule exception to nonretroactivity turned out to be an empty promise. No rule other than *Gideon v. Wainright*, 372 US 335, 344-45, 83 S Ct 792, 9 L Ed 2d 799 (1963) (which pre-dated *Teague*), has clearly been held to satisfy it, rendering the test so unworkable that a majority of the Court abolished it entirely when it held that *Ramos* did not apply retroactively.[7] *Edwards*, 141 S Ct at 1560 ("Continuing 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."). This court

[7] The majority and dissent in *Edwards* disagreed about how many new procedural rules the Court had applied retroactively. The majority viewed only *Gideon* as applying retroactively. The dissent viewed its cases as applying three new rules retroactively: *Gideon*, the rule that a jury must find guilt beyond a reasonable doubt, and the rule that a six-person guilty verdict must be unanimous. *Edwards*, 141 S Ct at 1576-77 (Kagan, J., dissenting).

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should not adopt a meaningless test as Oregon's test for the retroactivity of new procedural rules. Whatever flaws a balancing test like the *Linkletter*/*Fair* test may have, it at least provides a test that some new procedural rules may meet.

Finally, the *Teague* test derives from the federal habeas statute, as discussed above, making it a poor fit for a state-law retroactivity rule. The Court crafted it narrowly in the interest of finality and comity. It selected a test that it admitted would likely never be satisfied in order to advance those values. Comity—respect for state-court judgments—is not relevant here. Finality is an important value. Yet this court can respect the finality of a criminal judgment without adhering to *Teague*. The *Linkletter*/*Fair* test expressly includes finality and the burden on the administration of justice as factors to weigh when a case does not call into question the accuracy of a guilty verdict.

C. *Ramos* applies retroactively to cases in post-conviction that became final prior to the decision in *Ramos*.

The *Ramos* jury-unanimity rule applies retroactively to cases in post-conviction that became final prior to the court's decision in *Ramos*. It is a new procedural rule that "overcome[s] an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Fair*, 263 Or at 388–89.

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Ramos is a new rule, as the Supreme Court unanimously agreed. *Edwards*, 141 S Ct at 1556; *id*. at 1574-74 (Kagan, J., dissenting). It overruled *Apodaca* and for the first time applied the jury-unanimity rule against the states. In so doing, *Ramos* struck down the part of Article I, section 11, that permitted 10-2 or 11-1 guilty verdicts. *Ulery*, 366 Or at 501. *Ramos*, thus, fundamentally altered Oregon criminal trials by overruling Supreme Court precedent and invalidating an Oregon constitutional provision.

The nonunanimous jury rule invalidated in *Ramos* severely undermined confidence in the accuracy of guilty verdicts. It is hard to imagine a rule that would have done so more severely. The jury-unanimity rule is an essential component of the Sixth Amendment, like the requirement that a jury find a defendant guilty beyond a reasonable doubt. *Ramos*, 140 S Ct at 1396 ("The constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment.").

A person, like petitioner, whose guilty verdict was nonunanimous was, in fact, not found guilty under the Sixth Amendment. *Id.* Each person convicted by a nonunanimous jury was wrongfully and unconstitutionally convicted by a system designed to discriminate based on race, ethnicity, and religion:

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> "To state the point in simple terms: Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law, that allows convictions of some who would not be convicted under the proper constitutional rule, and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?"

Id. at 1419 (Kavanaugh, J., concurring in part) (explaining why *stare decisis* did not justify adhering to *Apodaca*). Correcting that injustice is essential to maintain a fair and just criminal justice system. *Edwards*, 141 S Ct at 1582 (Kagan, J., dissenting) (explaining that *Ramos* should apply retroactively because it is "fundamental" and a nonunanimous verdict is "no verdict at all"). Accordingly, *Ramos* applies retroactively without regard to the countervailing concerns about finality and the administration of justice. *Fair*, 263 Or at 388–89.

Ramos applies retroactively even if this court applies the watershed rule test from *Teague* or another version of a retroactivity test. Under a state-law version of the *Teague* watershed rule, this court should adopt the reasoning of the three dissenting justices in *Edwards*. A rule is watershed if it is "implicit in the concept of ordered liberty[,]" *Teague*, 489 US at 311, it addresses "one of the bedrock procedural elements of the criminal process, *id*., or if it is "essential to [a trial's] fairness[,]" *Whorton v. Bockting*, 549 US 406, 418, 127 S Ct 1173, 167 L Ed 2d 1 (2007). The *Ramos* jury-unanimity rule is a new watershed rule of criminal procedure. The Court in *Ramos* described *Ramos* in the precise words of the

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watershed test: "Jury unanimity, the Court pronounced, is an 'essential element[]' of the jury trial right, and thus is 'fundamental to the American scheme of justice.'" *Edwards*, 141 S Ct at 1576 (quoting *Ramos*, 140 S Ct at 1396-97). Under state law, this court should follow the plain consequence of the decision in *Ramos* and hold that *Ramos* applies retroactively to cases in post-conviction.

CONCLUSION

Petitioner respectfully asks this court to conclude that his ground for post-conviction relief based on *Ramos* meets the escape clauses in ORS 138.510(3) and ORS 138.550, to hold that *Ramos* applies to cases like his that became final prior to the decision in *Ramos*, to reverse the judgment of the circuit court, and to remand to the circuit court for further proceedings.

DATED November 29, 2021.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Petition Length

I certify that (1) this petition complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this petition (as described in ORAP 5.05(2)(a)) is 11,190 words.

Type Size

I certify that the size of the type in this petition is not smaller than 14-point font for both the text of the petition and footnotes as required by ORAP 5.05(4)(f).

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will served by U.S. mail delivery on Rebecca Auten, #083710, attorney for Defendant-Respondent.

DATED November 29, 2021

Respectfully Submitted,

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