

SUPREME COURT



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Cases decided December 24, 2020.

State of Oregon v. Isidro Flores Ramos, (CC 17CR30088) (CA A167187) (SC S067105)

On review from the Court of Appeals in an appeal from the Clackamas County Circuit Court, Douglas V. Van Dyk, Judge. 298 Or App 841, 449 P3d 572 (2019). The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Justice Christopher L. Garrett.

Today, the Oregon Supreme Court held that erroneously instructing a jury that it can return a nonunanimous verdict is not structural error that requires reversal of convictions in all cases. The Court further held that the error was harmless beyond a reasonable doubt as to counts on which the jury returned unanimous verdicts.

Isidro Flores Ramos (defendant) was tried on five charges relating to the sexual assault of a child. Over defendant's objection, the jury was instructed that it did not need to be unanimous to find him guilty. The jury found defendant guilty of all five charges, and four of its five verdicts were unanimous. Defendant appealed, arguing that the jury instruction permitting nonunanimous guilty verdicts had been erroneous. The Court of Appeals affirmed defendant's convictions. Subsequently, the United States Supreme Court held, in *Ramos v. Louisiana*, ___ US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that the Sixth Amendment to the United States Constitution requires a unanimous verdict to convict a defendant of a serious offense.

In a unanimous opinion written by Justice Christopher L. Garrett, the Oregon Supreme Court reversed the conviction that was based on a nonunanimous verdict, but affirmed the convictions based on unanimous verdicts. The Court first explained that, in light of *Ramos*, the instruction permitting the jury to return nonunanimous guilty verdicts violated the Sixth Amendment. The Court then considered whether that error required reversal of the convictions that were based on unanimous

verdicts. The Court first rejected defendant's argument that the instructional error was structural. The Court explained that instructing the jury that it could return nonunanimous guilty verdicts did not make the trial fundamentally unfair and thus did not fall within the very limited category of errors that the United States Supreme Court has identified as structural errors that require reversal of convictions in all circumstances. Next the Court held that the four unanimous verdicts rendered the instructional error harmless beyond a reasonable doubt as to those verdicts. It rejected defendant's arguments that the jury instruction may have affected the jury's deliberations and that a jury poll could not accurately reflect whether the jury was unanimous.

State of Oregon v. Charles Wesley Kincheloe, (CC 17CR48475) (CA A167760) (SC S067611)

On review from the Court of Appeals in an appeal from the Jackson County Circuit Court, Timothy Barnack, Judge. 302 Or App 654, 458 P3d 736 (2020). The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Justice Christopher L. Garrett.

Today, the Oregon Supreme Court applied its decision in *State v. Flores Ramos*, ___ Or ___, ___ P3d ___ (2020), affirming convictions based on unanimous verdicts while reversing a conviction based on a nonunanimous verdict, in a case where the jury had been instructed that it could find the defendant guilty without being unanimous.

Charles Wesley Kincheloe (defendant) was convicted of first-degree rape, first-degree sodomy, and fourth-degree assault by a jury that had been instructed that it could return nonunanimous guilty verdicts. A poll of the jury revealed that its verdicts on the sodomy and assault counts had been unanimous, and its verdict on the rape count had been nonunanimous. The Court of Appeals affirmed defendant's convictions. Subsequently, the United States Supreme Court held, in *Ramos v. Louisiana*, ___ US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that the Sixth Amendment to the United States Constitution requires a unanimous verdict to convict a defendant of a serious offense.

In a unanimous opinion written by Justice Christopher L. Garrett, the Oregon Supreme Court reversed the conviction that was based on a nonunanimous verdict, but affirmed the convictions based on unanimous verdicts. The Court explained that its decision in *State v. Flores Ramos*, ___ Or ___, ___ P3d ___ (2020), also issued today, made clear that the error in instructing the jury that it could return nonunanimous guilty verdicts was harmless beyond a reasonable doubt as to the convictions based on unanimous verdicts. The Court further explained that, under its earlier decision in *State*

v. Ulery, 366 Or 500, 464 P3d 1123 (2020), the conviction based on the nonunanimous guilty verdict must be reversed.

State of Oregon v. Michael James Dilallo, (CC 17CR81038) (CA A168222) (SC S067493)

On review from the Court of Appeals, in an appeal from the Lane County Circuit Court, Mustafa T. Kasubhai, Judge. 302 Or App 187, 456 P3d 702 (2020). The decision of the Court of Appeals and the judgment of the circuit court are affirmed. Opinion of the Court by Justice Adrienne C. Nelson.

Today, the Oregon Supreme Court declined to exercise its discretion to conduct plain error review of a challenge to a jury instruction permitting nonunanimous guilty verdicts, in a case in which the defendant had not objected to the instruction and the jury had not been polled.

Michael James Dilallo (defendant) was found guilty of delivery of methamphetamine and conspiracy to commit delivery of methamphetamine by a jury that had been instructed that it could return nonunanimous guilty verdicts. Defendant did not object to that instruction. The jury was not polled, and the record contained no indication of whether the jury's verdicts were unanimous. The verdicts merged into a single conviction. Defendant appealed, assigning error to the jury instruction and seeking plain error review. The Court of Appeals affirmed. Subsequently, the United States Supreme Court held, in *Ramos v. Louisiana*, ___ US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that the Sixth Amendment to the United States Constitution required a unanimous verdict to convict a defendant of a serious offense.

In a unanimous opinion written by Justice Adrienne C. Nelson, the Oregon Supreme Court affirmed defendant's conviction, determining that it would not be appropriate to conduct plain error review. The Court explained that, when deciding whether to exercise its discretion to review an unpreserved assignment of error, an appellate court must consider several factors, including the gravity of the error and whether the purposes of preservation were served. The Court held that, in this case, an important purpose of the preservation requirement had not been served, because the jury had not been polled, and it could have been polled if defendant had objected to the jury instruction in the trial court. The Court reasoned that, in light of *State v. Flores Ramos*, ___ Or ___, ___ P3d ___ (2020), also issued today, whether the error in instructing the jury that it could return nonunanimous guilty verdicts was harmless would come down to whether the jury's verdicts were unanimous, which made the absence of a poll significant. The Court further explained that reversing defendant's conviction would lead to an anomaly because the absence of information in the record about whether the jury had been unanimous would require reversal, leaving defendant better off than defendants who had objected to the jury instruction in the trial court.

State of Oregon v. Peter Anthony Ciraulo, (CC 17CR72865; 18CR39718) (CA A168211; A168227) (SC S067569)

On review from the Court of Appeals, in an appeal from the Douglas County Circuit Court, Kathleen E. Johnson, Judge. 341 Or App 849, 459 P3d 960 (2020). The decision of the Court of Appeals and the judgment of the circuit court are affirmed. Opinion of the Court by Justice Rebecca A. Duncan.

Today, the Oregon Supreme Court applied its decision in *State v. Flores Ramos*, ___ Or ___, ___ P3d ___ (2020), affirming convictions based on unanimous verdicts, in a case where the jury had been instructed that it could find the defendant guilty without being unanimous.

Peter Anthony Ciraulo (defendant) was found guilty of first-degree forgery, possession of a forged instrument, and third-degree theft by a jury that had been instructed that it could return nonunanimous guilty verdicts. The verdict form indicated that all three verdicts had been unanimous, which the presiding juror confirmed. The Court of Appeals affirmed defendant's convictions. Subsequently, the United States Supreme Court held, in *Ramos v. Louisiana*, ___ US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that the Sixth Amendment to the United States Constitution required a unanimous verdict to convict a defendant of a serious offense.

In a unanimous opinion written by Justice Rebecca A. Duncan, the Oregon Supreme Court affirmed defendant's convictions, holding that, although the jury had been misinstructed about the need for unanimity, the error had been harmless beyond a reasonable doubt as to all of defendant's convictions. Relying on *State v. Flores Ramos*, ___ Or ___, ___ P3d ___ (2020), also issued today, the Court explained that the record sufficiently established that all of the jury's verdicts were unanimous which, in turn, demonstrated that the instructional error was harmless.

State of Oregon v. Zackery Joshua Chorney-Phillips, (CC 17CR81310) (CA A167674) (SC S067557)

On review from the Court of Appeals in an appeal from the Polk County Circuit Court, Norman R. Hill, Judge. 301 Or App 853, 455 P3d 1049 (2020). The decision of the Court of Appeals and the judgment of the circuit court are affirmed. Opinion of the Court by Justice Meagan A. Flynn.

Today, the Oregon Supreme Court declined to exercise its discretion to conduct plain error review of an unpreserved challenge to a jury instruction permitting

nonunanimous guilty verdicts, in a case in which the challenge involved an argument that the jury poll had been insufficient to show that the jury's verdicts had been unanimous.

Zackery Joshua Chorney-Phillips (defendant) was found guilty of first- and second-degree custodial interference by a jury that had been instructed that it could return nonunanimous guilty verdicts. Defendant did not object to that instruction. The jury was polled, and each juror answered "yes" to the trial court's question, "let me know if this was your verdict." Defense counsel told the court that he was satisfied with the poll. The two guilty verdicts merged into a single conviction for first-degree custodial interference. Defendant appealed, assigning error to the jury instruction permitting nonunanimous guilty verdicts and seeking plain error review. The Court of Appeals affirmed. Subsequently, the United States Supreme Court held, in *Ramos v. Louisiana*, ___ US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that the Sixth Amendment to the United States Constitution required a unanimous verdict to convict a defendant of a serious offense.

In a unanimous opinion written by Justice Meagan A. Flynn, the Oregon Supreme Court affirmed defendant's conviction, determining that it would not be appropriate to conduct plain error review. The Court explained that, in light of *State v. Flores Ramos*, ___ Or ___, ___ P3d ___ (2020), also issued today, defendant's argument that his conviction should be reversed came down to a challenge to the sufficiency of the jury poll. Relying on *State v. Dilallo*, ___ Or ___, ___ P3d ___ (2020), also issued today, the Court held that it would not be appropriate to conduct plain error review of defendant's unpreserved assignment of error because defendant had told the trial court that he was satisfied with the jury poll and did not alert the state or the trial court of a need to develop the record further.

In re Application for Admission of Neil Patrick Halttunen, (BBX A172051) (SC S067161)

On review of the recommendation of the Board of Bar Examiners. Applicant is conditionally admitted to the practice of law. Opinion of the Court Per Curiam.

Today, the Oregon Supreme Court concluded that applicant Neil Patrick Halttunen (applicant) has proved by clear and convincing evidence that he possesses the good moral character necessary for admission to the Oregon State Bar.

There was no dispute that, from 2009 to 2012, while working as a police officer, applicant had engaged in inappropriate, unethical, and dishonest conduct that raised significant questions about his moral character. Applicant admitted that he inappropriately had used the position of trust and authority that he possessed as a police

officer to pursue romantic and sexual relationships with vulnerable women whom he encountered while performing his official duties. He also admitted that he had been dishonest with his employer about that conduct during an internal investigation. Applicant, however, argued that he had demonstrated sufficient reformation since leaving the police department to establish his current fitness to practice law. A majority of the Board of Bar Examiners issued an opinion recommending that the court deny applicant admission, while a minority opinion recommended conditional admission.

In a unanimous per curiam opinion, on *de novo* review, the Court concluded that applicant had demonstrated genuine self-improvement and rehabilitation since his misconduct to justify conditional admission to the Bar. After his departure from the police department, applicant underwent therapy, through which he gained insight into his past behaviors and their impact on others, and developed the tools and support network to maintain a successful reformation. All the psychological experts who treated or evaluated applicant supported his admission, and none believed that he suffers from the kind of fundamental and pervasive personality challenge that might prevent a successful rehabilitation of his behavior and character. Applicant also presented numerous character references, many of whom are members of the Bar. Those who knew applicant since before his misconduct described the positive changes that they have seen in him since he left law enforcement. Those who met applicant after his misconduct insisted that applicant's past bears no resemblance to the person that they know today.

Based on that record, the Court concluded that applicant had accomplished the kind of genuine transformation of attitudes, mental health, and behavior that make him an applicant who presently possesses the good moral character and fitness to become a member of the Oregon State Bar. Nevertheless, based on the extent and nature of applicant's past conduct, the Court imposed a term of conditional admission to run for 48 months.