

SUPREME COURT

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Cases decided December 30, 2022.

Jacob Keith Watkins v. Richard Ackley, (CC 20CV27534) (CA A176245) (SC S068825)

On certification from the Court of Appeals under ORS 19.405 in an appeal from Jefferson County Circuit Court, Michael R. McLane, Judge. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Justice Thomas A. Balmer. Senior Judge and Justice pro tempore Richard C. Baldwin filed a concurring opinion. Justice Roger J. DeHoog did not participate in the consideration or decision of this case.

Today, the Oregon Supreme Court held that a petitioner was entitled to relief in state post-conviction proceedings from convictions that had been entered on nonunanimous guilty verdicts and that had become final before the United States Supreme Court announced, in *Ramos v. Louisiana*, __ US __, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that such nonunanimous verdicts violate the Sixth Amendment to the United States Constitution. The Oregon Supreme Court concluded that, although the "retroactive" post-conviction relief that petitioner sought was not necessarily available for every constitutional violation, the violation of the Sixth Amendment jury unanimity requirement -- as set out in *Ramos* -- was of such a magnitude that it constituted a "substantial denial" of a constitutional right that "rendered the conviction[s] void," for which relief was required under the Oregon Post-Conviction Hearings Act (PCHA) (assuming that none of the procedural bars to relief in the Act apply). The Court's decision follows and to an extent responds to a recent decision by the United States Supreme Court holding that the *Ramos* jury unanimity rule is not retroactively applicable in federal habeas corpus proceedings, but that states remain free, as a matter of state law, to apply the rule retroactively in their state post-conviction proceedings. *Edwards v. Vannoy*, __ US __, 141 S Ct 1547, 209 L Ed 2d 651 (2021).

In the underlying criminal prosecution, petitioner had been convicted of four felonies, all based on verdicts that had not been unanimous. Relying on the understanding of the Sixth Amendment that prevailed at the time, petitioner did not

object to the nonunanimous verdicts during his trial, his unsuccessful direct appeal, or the trial or appeal of his first unsuccessful post-conviction petition. After the United States Supreme Court issued its decision in *Ramos*, petitioner filed a second post-conviction petition, raising, among other things, a claim that his convictions based on nonunanimous verdicts had violated the Sixth Amendment right to a jury trial. The post-conviction court rejected that claim on the ground that the new constitutional rule announced in *Ramos* did not apply retroactively in state post-conviction proceedings. (The state, notably, had not asserted any of the res judicata defenses or the statute of limitations set out in the PCHA).

Petitioner appealed, arguing that the post-conviction court had erred for two reasons. First, petitioner argued that a provision of the PCHA, ORS 138.550 -- which states that "the effect of prior judicial proceedings concerning the conviction of petitioner * * * shall be as specified in this section and not otherwise" and then sets out various res judicata defenses -- shows that, when it enacted the PCHA, the Oregon legislature had intended that any and all new federal constitutional rules apply retroactively in post-conviction proceedings. Second and, alternatively, petitioner urged adoption of a retroactivity rule that would make retroactive relief available in post-conviction for a past violation of the jury unanimity rule announced in *Ramos*. On the parties' joint motion, the Court of Appeals certified the appeal to the Supreme Court.

In a unanimous opinion authored by Justice Thomas A. Balmer, the Oregon Supreme Court held that the post-conviction court had erred in denying relief on petitioner's claim based on a direct application of the *Ramos* jury unanimity rule.

The Court first considered, and rejected, petitioner's construction of ORS 138.550 as establishing a legislative intent that any violation of a newly announced constitutional rule of criminal procedure must be remedied in post-conviction as long as the issue could not reasonably have been raised at an earlier time or in an earlier proceeding. The Court explained that, even if it were to accept petitioner's view that ORS 138.550 precluded application of any procedural bar to post-conviction review not expressly mentioned in that statute, petitioner's broader argument -- that a post-conviction court must always grant relief for a newly announced rule -- ultimately relied on an interpretation of a different statutory provision, ORS 138.530(1)(a), that the Court already had rejected in an earlier decision. The Court also rejected an argument by the state that ORS 138.530(1)(a) established a legislative intent to preclude retroactive post-conviction relief based on a newly recognized constitutional rule when the federal constitution would not require such retroactive relief.

The Court then went on to consider whether state law required that some new constitutional rules of criminal procedure be retroactively applicable in state post-conviction proceedings. Although both petitioner and the state had suggested that the Court could adopt a common-law standard for when retroactive relief would be required,

the Court concluded that such a standard already resided in the general directive, set out in ORS 138.530(1)(a), that post-conviction relief must be granted when a petitioner establishes a "substantial denial" of the petitioner's constitutional rights "which denial rendered the conviction void."

After considering the text of ORS 138.530(1)(a), the cases that had interpreted it, and scholarly commentary published shortly after its enactment, the Court concluded that it demonstrated a legislative intent that post-conviction relief be limited to constitutional violations that were (1) consequential in the criminal justice proceeding; and (2) offensive to the Court's judicial sense of fairness. The Court further concluded that the standard that it drew from that construction was the basic instrument for determining a petitioner's right to relief for any post-conviction claim of constitutional error, including a claim that relies on a constitutional rule announced after the convictions being challenged became final:

"[W]hether we are considering a more commonly alleged constitutional violation, such as inadequate assistance of counsel, or, as here, a procedure that was not recognized as a constitutional violation until after the conviction being challenged became final, the test for when post-conviction relief is required for a constitutional defect is the same: Where the state has not asserted and proved any of the procedural defenses set out in the PCHA, a court must grant post-conviction relief for any denial of a constitutional right that is both consequential and offensive to our 'judicial sense' of what is fundamentally fair in the context of criminal prosecutions, based on the traditions that have determined what we recognize as a defendant's procedural rights."

Applying that standard to the issue before it, the Court considered the longstanding understanding in American law that jury unanimity is essential to a fair trial; the logical importance of jury unanimity for obtaining a fair and accurate verdict; and the fact that the state constitutional provision that permitted conviction of any crime (except first-degree murder) by a nonunanimous verdict had been adopted for a reason that was offensive to the court's sense of what was fundamentally fair -- that is, to allow racial, religious and other majorities to override the views of minorities in determining guilt or innocence. The Court ultimately concluded that, although petitioner's convictions on nonunanimous verdicts already had been final when the jury unanimity rule was announced in *Ramos*, the violation of that rule had been so consequential and so fundamentally unfair that it "rendered * * * the conviction[s] void" within the meaning of ORS 138.530(1)(a). Accordingly, the Court concluded that petitioner was entitled to post-conviction relief.

In reaching that conclusion, the Court recognized that its decision would likely lead to the reexamination of many judgments, in other cases, that had become final years or decades prior. But, it emphasized, its analysis of ORS 138.530(1)(a), its grounding in the extraordinary remedy of habeas corpus, and the denial of the

constitutional right at stake that had resulted in a criminal trial that lacked the fairness that the court expects in the administration of justice, compelled its decision. In these circumstances, the Court explained, the important value of finality in the criminal justice system must give way to the constitutional right to a unanimous jury verdict.

The Court accordingly reversed the post-conviction court's judgment and remanded the case to that court for further proceedings.

Senior Judge Richard C. Baldwin filed a concurring opinion. The concurrence detailed the "sordid history" of Louisiana's and Oregon's nonunanimous verdict laws, including Louisiana's intent to "establish the supremacy of the white race" and Oregon's motivation to "dampen the influence of racial, ethnic, and religious minorities on Oregon juries" through each state's use of the nonunanimous verdict. The concurrence noted that neither state had fully grappled with their ignoble histories until 2020, when the United States Supreme Court determined in *Ramos* that nonunanimous verdict laws violated the Sixth Amendment. The concurrence concluded with both a reminder that Oregon's unchecked bigotry in the adoption of the nonunanimous verdict law undermined the fundamental Sixth Amendment rights of all Oregonians for several decades and a call to learn from that history to avoid such grievous injury in the future.

Troy Kevin Huggett v. Brandon Kelly, (CC 18CV50891) (CA A174444) (SC S068823)

On certification from the Court of Appeals under ORS 19.405 in an appeal from Marion County Circuit Court, J. Burdett Pratt, Senior Judge. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Justice Thomas A. Balmer. Justice Roger J. DeHoog did not participate in the consideration or decision of this case.

Today, based on its analysis in a decision that also issued today, *Watkins v. Ackley*, __ Or __ (December 30, 2022), the Oregon Supreme Court held that a petitioner was entitled to relief in state post-conviction proceedings from two convictions that had been entered on nonunanimous guilty verdicts and that had become final before the United States Supreme Court announced, in *Ramos v. Louisiana*, __ US __, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that such nonunanimous verdicts violate the Sixth Amendment to the United States Constitution. The Oregon Supreme Court reversed the post-conviction court's decision denying relief and remanded to that court for further proceedings.

In the underlying criminal prosecution, petitioner had been convicted of two felonies, both based on nonunanimous guilty verdicts. Relying on the understanding of the Sixth Amendment that prevailed at the time, petitioner did not object to the nonunanimous verdicts during his trial, but he did argue in his unsuccessful direct appeal

that his convictions on nonunanimous verdicts violated his rights under the Sixth Amendment. After the United States Supreme Court issued its decision in *Ramos*, petitioner filed a second post-conviction petition, raising various claims of inadequate assistance of counsel and a claim that his convictions based on nonunanimous verdicts had violated the Sixth Amendment right to a jury trial. The post-conviction court rejected all of petitioner's claims, explaining its rejection of his "standalone" *Ramos* claim on the ground that the new constitutional rule announced in *Ramos* did not apply retroactively in state post-conviction proceedings. (The state, notably, had not asserted any of the defenses set out in the PCHA).

Petitioner appealed, and the Court of Appeals certified the appeal to the Supreme Court, along with two cases that raised similar issues, *Watkins v. Ackley*, (A176245) (S068825), and *Jones v. Brown*, (A175780) (S068824).

In a unanimous opinion authored by Justice Thomas A. Balmer, the Oregon Supreme Court held that the post-conviction court had erred in denying relief on petitioner's claim based on a direct application of the *Ramos* jury unanimity rule. The Court explained its decision by pointing to its opinion in *Watkins*, ___ Or ___, and noting that petitioner's "standalone" *Ramos* claim was identical to the petitioner's claim in *Watkins* and that, in opposing that claim, the state had relied on the same arguments that it had relied on in *Watkins* and had not attempted to defend the post-conviction court's denial of the claim on any other ground. As to petitioner's claims that trial counsel had been constitutionally inadequate in various respects, the Court explained that the relief that must be granted on remand on petitioner's standalone *Ramos* claim rendered those other claims moot.

Bethanie J. Jones v. Nichole Brown, (20CV02495) (CA A175780) (SC S068824)

On certification from the Court of Appeals under ORS 19.405 in an appeal from Washington County Circuit Court, Patricia A. Sullivan, Judge. 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 Thomas A. Balmer. Justice Roger J. DeHoog did not participate in the consideration or decision of this case.

Today, based on its analysis in a decision that also issued today, *Watkins v. Ackley*, ___ Or ___, (December 30, 2022), the Oregon Supreme Court held that a petitioner was entitled to post-conviction relief on three earlier convictions, which had been entered on nonunanimous guilty verdicts and had become final before the United States Supreme Court announced, in *Ramos v. Louisiana*, ___ US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), that such nonunanimous verdicts violate the Sixth Amendment to the United States Constitution. While the Oregon Supreme Court reversed the post-conviction court's decision denying relief on those three convictions, it affirmed the post-conviction

court's decision with respect to four other convictions, which had been entered on unanimous verdicts. The Court remanded the case to the post-conviction court for further proceedings.

In the underlying criminal prosecution, petitioner had been convicted of three felonies based on nonunanimous guilty verdicts and four other crimes based on unanimous guilty verdicts. Relying on the understanding of the Sixth Amendment that prevailed at the time, petitioner did not object to the nonunanimous verdicts during her trial or raise the issue in her appeal. After the United States Supreme Court issued its decision in *Ramos*, petitioner filed a post-conviction petition, raising various claims of inadequate assistance of counsel and a claim that her convictions based on nonunanimous verdicts had violated the Sixth Amendment right to a jury trial. The post-conviction court rejected all of petitioner's claims, explaining its rejection of her "standalone" *Ramos* claim on the ground that the new constitutional rule announced in *Ramos* did not apply retroactively in state post-conviction proceedings. (The state, notably, had not asserted any of the defenses set out in the PCHA).

Petitioner appealed, and the Court of Appeals certified the appeal to the Supreme Court, along with two cases that raised similar issues, *Watkins v. Ackley*, (A176245) (S068825), and *Huggett v. Kelly*, (A174444) (S068823).

In a unanimous opinion authored by Justice Thomas A. Balmer, the Oregon Supreme Court held that the post-conviction court had erred in denying relief on petitioner's claim that three of her convictions violated the jury unanimity rule announced in *Ramos*. The Court explained its decision by pointing to its opinion in *Watkins* and noting that petitioner's "standalone" *Ramos* claim was identical to the petitioner's claim in *Watkins* and that, in opposing that claim, the state had relied on the same arguments that it had relied on in *Watkins* and had not attempted to defend the post-conviction court's denial of the claim on any other ground. As to petitioner's claims that trial counsel had been constitutionally inadequate in various respects, some of which implicated petitioner's four convictions that had been based on unanimous jury verdicts, the Court explained that the claims either were not well taken or were rendered moot by the relief that must be granted on remand on petitioner's standalone *Ramos* claim.

State of Oregon v. Deangelo Franklin Martin, (CC 18CR25299, 18CR31500) (CA A169801 (control), A169803) (SC S068859)

On review from the Court of Appeals in an appeal from the Multnomah County Circuit Court, Shelley D. Russell, Judge. 313 Or App 578, 496 P3d 1077 (2021). The decision of the Court of Appeals and the judgment of the circuit court are affirmed. Opinion of the Court by Justice Christopher L. Garrett.

Today, the Oregon Supreme Court held that a defendant's right to confront adverse witnesses in a probation revocation hearing was not violated by the trial court's ruling that a recording of a victim's call to 9-1-1 could be admitted to show that defendant contacted the victim.

Defendant was serving a sentence of supervised probation, one condition of which was that he could not contact the victim. The state initiated revocation proceedings after receiving a report that defendant violated that condition. At the revocation hearing, the state sought to admit a recording of the victim's call to 9-1-1 describing the contact, informing the trial court that it had made unsuccessful efforts to locate the victim. Defendant objected, arguing that he had a right to cross-examine the victim under the Due Process Clause of the Fourteenth Amendment, and that the state had not demonstrated good cause to overcome that right. Weighing the factors that both defendant and the state agreed were relevant, the trial court determined that the state had established good cause for not allowing confrontation and ruled that the 9-1-1 recording could be admitted. The Court of Appeals affirmed, concluding that balancing was unnecessary because the 9-1-1 recording qualified as an "excited utterance" for purposes of that exception to the rule prohibiting hearsay, and evidence falling within such a hearsay exception can always be admitted in the probation revocation context without violating Fourteenth Amendment Due Process.

In a unanimous opinion written by Justice Christopher L. Garrett, the Court explained that, under *Morrissey v. Brewer*, 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484 (1972), a defendant in a probation revocation hearing has a due process right to confront adverse witnesses unless the state establishes good cause for not allowing confrontation. The Court rejected the state's argument that good cause is always established if the evidence at issue falls within a "firmly rooted" exception to the rule prohibiting hearsay. The Court reasoned that, in light of the discretionary nature of the ultimate decision to revoke probation, and because the United States Supreme Court has held that the hallmarks of procedural due process are flexibility and fundamental fairness, it is appropriate to balance a defendant's interest in revocation against the factors bearing on the state's showing of good cause, regardless of the reliability of the evidence. Applying those factors here, including the presumptive veracity of the evidence and the difficulty in producing the witness, the Court held that the trial court had correctly ruled that the state established good cause for overcoming defendant's interest in confrontation.

Grant E. Picker et al. v. Department of Revenue, (TC 5428) (SC S069235)

On appeal from the Oregon Tax Court, Robert T. Manicke, Judge. The judgment of the Tax Court is affirmed. Opinion of the Court by Justice Thomas A. Balmer. Chief Justice Martha L. Walters did not participate in the consideration or decision of this case.

Today, the Oregon Supreme Court held that "undue hardship," as used in ORS 305.419(3) to describe when a taxpayer may be excused from paying an assessed income tax as a precondition to appeal to the Oregon Tax Court, refers only to financial hardship.

Under ORS 305.419, a taxpayer seeking to appeal a determination of income tax deficiency to the Regular Division of the Tax Court must, on or before filing a complaint seeking a refund, pay the amount assessed by the Department of Revenue (department), plus interest and penalties. The prepayment requirement does not apply, however, if the taxpayer shows that paying the tax would constitute an "undue hardship."

The department had assessed taxpayers \$5,595 for deficient taxes, plus additional penalties and interest, for tax year 2013. When taxpayers appealed to the Tax Court, they sought a stay of the requirement to prepay taxes under ORS 305.419, alleging an undue hardship. The Tax Court concluded that it needed additional evidence to decide whether payment would be an undue hardship, and it listed various documents that taxpayers should provide. Taxpayers later failed to either produce the documents or to pay the tax, and the Tax Court dismissed the action. Taxpayers appealed to the Supreme Court.

In a unanimous opinion authored by Justice Thomas A. Balmer, the Supreme Court affirmed. The Court explained that the Tax Court had found that taxpayers had failed to establish an undue hardship, and so dismissal was justified. The Court also rejected taxpayers' contention that "undue hardship" was not limited to financial hardship: the statutory context shows that the term referred only to financial hardship that would be caused by payment of the assessed tax.

Reed Scott-Schwalbach v. Ellen Rosenblum, (SC S069830)

On petition to review ballot title. The ballot title is referred to the Attorney General for modification. Opinion of the Court by Justice Christopher L. Garrett.

Today, the Oregon Supreme Court referred to the Attorney General for modification the certified ballot title for Initiative Petition 5 (2024) (IP 5). If approved, IP 5 would create a constitutional right for parents to select any kindergarten-through-twelfth-grade Oregon public school statewide, including any public charter school, for their children to attend throughout each school year. It also would require the chosen school district to (1) admit the child for enrollment, with prioritization for admission based on residency only or, if more applicants than remaining spaces, based on an "Equitable Lottery" process; and (2) provide the child with "free and appropriate public education." The Attorney General prepared a certified ballot title for IP 5, and petitioner

challenged various aspects that title.

In a unanimous opinion by Justice Christopher L. Garrett, the Supreme Court agreed with petitioner that the caption, the "yes" result statement, and the summary of the certified ballot title for IP 5 did not substantially comply with statutory requirements. The Court concluded that both the caption and the "yes" result statement must describe a major effect of IP 5 (if approved) -- that discretion currently granted to school districts to admit nonresident students would be eliminated. The Court further concluded that the summary must be modified to inform voters that, upon the exercise of the new constitutional right, home districts would experience a nonspeculative fiscal impact. The Court therefore referred the ballot title to the Attorney General for modification of the caption, the "yes" result statement, and the summary.