

No. 18-9130

IN THE SUPREME COURT OF THE UNITED STATES

SHAUN ALLEN DICK,

Petitioner,

v.

STATE OF OREGON,

Respondent.

BRIEF OF RESPONDENT STATE OF OREGON

ON PETITION FOR WRIT OF CERTIORARI TO THE
OREGON COURT OF APPEALS

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Constitutional and Statutory Provisions

Or Const, Art I § 11	1, 2
US Const, Amend VI	2
US Const, Amend XIV	2

Other Authorities

Memorandum from Oregon Department of Justice, <i>available at</i> https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDoc ument/197041	2
Memorandum from Oregon District Attorneys Association, <i>available at</i> https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDoc ument/196927	2
Oregon House Joint Resolution 10	2

RESPONDENT'S BRIEF IN OPPOSITION

This case presents the same issue pending before the Court in *Ramos v. Louisiana*, No. 18-5924, *cert. granted*, 139 S. Ct. 1318 (2019). Because the proper disposition of the petition may be affected by the Court's resolution of *Ramos*, the petition should be held pending the decision in that case and then disposed of as appropriate in light of that decision.

STATEMENT

Petitioner sodomized and attempted to rape a woman, and he was charged with eight felonies. Pet. App. 5a-7a. At trial, the court instructed the jury that at least 10 out of 12 jurors had to agree on the verdict. Tr. 460-61. The jury returned a verdict of guilty on all counts. Pet. App. 12a. On seven of the eight counts the vote was 11 to 1, and on the eighth count it was 10 to 2. Pet. App. 12a. The Oregon Court of Appeals summarily affirmed the convictions, and the Oregon Supreme Court denied discretionary review. Pet. App. 1a-3a.

DISCUSSION

Article I, section 11 of the Oregon Constitution provides that for felonies other than first-degree murder, "ten members of the jury may render a verdict of

guilty or not guilty.” Or. Const., Art. I, § 11.¹ In *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court upheld the constitutionality of that provision. Although no single rationale commanded a majority of the Court—a plurality concluded that the Sixth Amendment does not require unanimity, and one justice concluded that the Fourteenth Amendment does not incorporate a unanimity requirement against the States—the case yielded a rule of law allowing nonunanimous verdicts in state criminal prosecutions. 406 U.S. at 406 (plurality op.); *id.* at 369–77 (Powell, J., concurring in the judgment). For almost five decades, the Oregon courts have rejected constitutional challenges to Article I, section 11, based on *Apodaca*. See, e.g., *State v. Ibarra*, 427 P.3d 1127, 1128 (Or. App.), *rev. den.*, 432 P.3d 1096 (Or. 2018); *State v. Bowen*, 168 P.3d 1208, 1209 (Or. App. 2007), *modified*, 185 P.3d 1129 (Or. App.), *rev. den.*, 197 P.3d 1104 (Or. 2008), *cert. den.*, 558 U.S. 815 (2009); *State v. Taggart*, 512 P.2d 1359, 1366 (Or. App. 1973), *cert. den.*, 419 U.S. 877 (1974).

¹ Oregon House Joint Resolution 10, which is pending in the Oregon legislature and would need to be approved by the voters in November 2020, would amend the constitution to require unanimity. The amendment is supported by the Attorney General, the Oregon District Attorneys Association, and other stakeholders. See, e.g., Memorandum from Oregon Department of Justice, *available at*

<https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/197041>; Memorandum from Oregon District Attorneys Association, *available at*

<https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/196927>.

In *Ramos*, this Court is reviewing the constitutionality of a now-repealed Louisiana law that allowed nonunanimous verdicts. The petitioner in *Ramos* has expressly asked the Court to overrule *Apodaca*. Pet. Br., *Ramos v. Louisiana*, No. 18-5924, at 47. This case presents essentially the same question. Petitioner properly preserved his objection to the jury instruction allowing a nonunanimous verdict, and the issue was properly exhausted on appeal through the state courts. Tr. 466; Pet. App. 1a-3a. There are minor difference between the Louisiana's former law and Oregon's current law—for example, Louisiana allowed nonunanimous verdicts on charges of first-degree murder, whereas Oregon does not—but the legal question about whether the Sixth and Fourteenth Amendments allow nonunanimous verdicts in state criminal prosecutions is the same.

Accordingly, the petition in this case should be held pending the Court's decision in *Ramos* and then disposed of as appropriate in light of that decision. If this court adheres to the holding in *Apodaca*, it should deny the petition. If it overrules *Apodaca*, it should grant the petition, vacate the Oregon Court of Appeals' judgment, and remand for that court to reconsider in light of the ruling in *Ramos*.

CONCLUSION

The petition should be held pending the Court's decision in *Ramos v. Louisiana*, No. 18-5924, *cert. granted*, 139 S. Ct. 1318 (2019), and then disposed of as appropriate in light of that decision.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

A handwritten signature in black ink, appearing to read "Benjamin Gutman", is written over a horizontal line.

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PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on June 24, 2019, in compliance with Rule 29, I mailed the brief of the State of Oregon, as respondent in the above-entitled case, by depositing 10 copies thereof in the United States Postal Service mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.



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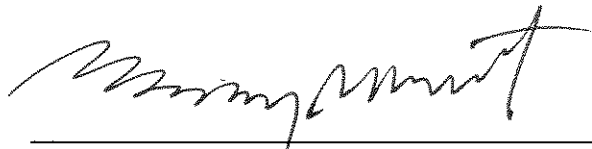
v.

STATE OF OREGON,

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PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on June 24, 2019, three copies of the brief of the State of Oregon, as respondent in the above-entitled case were served upon Ernest G. Lannet, attorney for petitioner, by mail delivery to Office of Public Defense Services, 1175 Court Street NE., Salem, OR 97301. I further certify that all parties required to be served have been served.



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