No. 19-5807

In the Supreme Court of the United States

THEDRICK EDWARDS,
Petitioner,
v.
DARREL VANNOY, WARDEN,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF OREGON AND THE OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER

Lisa C. Hay
Federal Public Defender
Stephen R. Sady*
C. Renée Manes
Federal Public
Defender's Office
101 SW Main St.
Suite 1700
Portland, OR 97206
Phone: (503) 326-2123
lisa_hay@fd.org
*Counsel of Record

Shaun S. McCrea
Executive Director
Oregon Criminal
Defense Lawyers
Association
101 East 14th Street
Eugene, OR, 97401
Phone: (541) 686-8716
smcrea@ocdla.org

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Statement Of Interest[1]

Based on appointments pursuant to the Criminal Justice Act, the Federal Public Defender for the District of Oregon represents petitioners in actions pursuant to 28 U.S.C. § 2254 who are challenging their Oregon state court convictions as obtained in violation of their federal constitutional rights. Attorneys in this office have long identified Oregon convictions based on non-unanimous juries as a source of injustice, both as a Sixth Amendment violation and as diluting the right to proof beyond a reasonable doubt and implicating the Equal Protection Clause. This Court vindicated the Sixth Amendment right to a unanimous jury in *Ramos v. Louisiana*, 139 S. Ct. 1647 (2020). However, our clients with convictions based on non-unanimous jury polls will remain imprisoned unless *Ramos* applies retroactively. If the decision in *Ramos* applies retroactively to Mr. Edwards, the decision will also apply to the limited number of petitioners who have asserted the same claims in their § 2254 petitions in federal court.

The Oregon Criminal Defense Lawyers Association (OCDLA) is a non-profit organization based in Eugene,

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[1] Pursuant to Rule 37.3, counsel for *amici* state that counsel for both parties, Petitioner Theodrick Edwards and Respondent Warden, Darrel Vanney, have consented in writing to the filing of this brief. In addition, counsel for both parties have submitted letters of consent to the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Oregon. OCDLA's members are lawyers, investigators, and related professionals dedicated to defending individuals who are accused of crimes in Oregon. OCDLA serves the defense community by providing continuing legal education, public education, and networking. OCDLA members represent individuals asserting violations of federal constitutional rights in post-conviction actions in the Oregon state courts.

Summary Of Argument

In the *Ramos* pleadings before this Court, Louisiana and Oregon asserted that the number of persons convicted without jury unanamity would result in significant hardship to those States if relief were to be granted to the petitioner. While the briefs are not yet filed, *amici* anticipate that similar "floodgates" arguments will be made by the Respondent and counsel for the two States affected by *Ramos*.

Amici do not write to address the merits of Mr. Edwards' arguments and all the reasons that, under this Court's precedents, he is entitled to relief. Instead, *amici* write to address the possible results in Oregon if Mr. Edwards prevails in this matter. Specifically, we note that the number of persons seeking relief under *Ramos* has not been as high as anticipated and that, as has historically been the case in analogous circumstances, the criminal justice system is not so inflexible that it cannot adapt to assuring that Oregon's convictions and prison sentences comply with individuals' fundamental rights.

First, far fewer individuals than counsel for the State of Oregon previously anticipated are likely to be granted relief on direct appeal under *Ramos*, and far fewer have filed – or are likely to file – state post-conviction petitions to revisit old convictions.

Second, based on similar experiences in the federal system where retroactive application of criminal justice practices has caused tens of thousands of cases to be revisited, the federal courts have been able to smoothly implement the reforms. The stakeholders in the system – the courts, the prosecutors, and defense counsel – have all worked cooperatively to achieve agreed dispositions, with limited litigation. There is every reason to believe that the same processes will occur in Oregon if the ruling in *Ramos* is applied retroactively, so that such application will not cause an unmanageable disruption of Oregon's criminal justice system.

As this Court noted in *McGirt v. Oklahoma*, the types of concerns that Louisiana and Oregon are likely to present are easily overblown with exaggerated numbers:

> But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.

No. 18-9526, 2020 WL3848063, *19-20 (U.S., July 9, 2020). And, "[i]n any event, the magnitude of the legal wrong is no reason to perpetuate it." *Id.*

The magnitude of the legal wrong in Mr. Edwards' case, and in the case of other individuals convicted by non-unanimous jury votes, is exceptionally high given the essential truth-finding function of jury unanimity. This Court should find that its decision in *Ramos* applies retroactively.

Argument

A. As The Number Of Cases On Direct Appeal Reflects, The Number Of Cases Potentially Requiring Litigation On Collateral Review Is Relatively Low.

In an *amicus* brief filed in *Ramos*, counsel for the State of Oregon asserted that the number of cases on direct appeal that would require reversal if relief were granted to the petitioner "easily may eclipse a thousand cases." *Brief of Amicus Curiae State of Oregon in Support of Respondent,* at 12, filed in *Ramos v. Louisiana,* Case No. 18-5924.

Since the decision in *Ramos*, counsel for Oregon has conceded that 269 cases on direct appeal need to be returned to the trial court level because the convictions were a result of non-unanimous jury verdicts. Conrad Wilson, *Oregon DOJ Concedes Hundreds Of Non-Unanimous Verdicts Should Be Tossed,* OREGON PUBLIC BROADCASTING (May 12,

2020).[2] Not over a thousand, not nearly a thousand, not even half of a thousand: the State of Oregon conceded that only 269 cases were pending in Oregon on direct appeal that raised the non-unanimity issue at the time *Ramos* was decided. Even that number may not be an accurate reflection of how many cases will present viable claims under *Ramos* in the event that decision is held to apply retroactively.

Since the decision in *Ramos*, the Criminal Justice Reform Clinic of the Lewis and Clark Law School, run by Professor Aliza Kaplan, has put together a packet of information for individuals whose convictions were possibly by non-unanimous jury verdicts, and who wish to pursue a successive state post-conviction petition to raise claims under *Ramos*. These would be the individuals whose convictions might be years, or even decades, old. There has been a concerted effort by both Professor Kaplan and attorneys with the Federal Public Defender's office to provide information regarding *Ramos* to individuals who are incarcerated in the Oregon state prisons. The Federal Public Defender's office has previously provided education and assistance to individuals incarcerated within the Oregon Department of Corrections, and attorneys with the office teach classes and seminars in those facilities. Attorneys also answer calls from state prisoners inquiring on *Ramos* issues.

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[2] Available at:

https://www.opb.org/news/article/non-unanimous-jury-oregon-toss-verdicts

Prisoners in Oregon are entitled to the appointment of counsel in state post-conviction proceedings. Accordingly, as soon as a petition is filed, it is sent to the Post-Conviction Consortium for review and assignment of counsel.[3] Consultation with the head of that Office this week established that there were 52 new successive state petitions that had been filed seeking to raise claims under *Ramos* – although four of those petitions were filed by a single individual, and two by another. Further, some petitioners appear to have actually pled guilty at the trial level, while others appear to involve defendants whose verdicts were, in fact, unanimous. So the numbers of cases that could possibly result in new trials is considerably lower.

Similarly, of the roughly 15 individuals who have directly contacted the Federal Public Defender's office for assistance on *Ramos* related issues, at least one quarter of those individuals are unlikely to be able to mount any successful challenge under *Ramos*. Sometimes this is because a review of their files reflects that the jury was unanimous. Sometimes the jury was non-unanimous on some counts but was unanimous on others, and all counts were sentenced concurrently so no meaningful relief would be available. Some of the individuals who have contacted the office did not proceed to a jury trial at all, but either had a bench trial or pled guilty. And sometimes there is no way to discern whether or not there was a non-unanimous jury poll.

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[3] Oregon Post-Conviction Consortium, site available at:

http://oregonpcr.com/oregon-post-conviction

In a significant percentage of the Oregon cases with jury trials, the defense counsel did not request a poll of the jury. Even when jury polls were conducted, sometimes the only information reflected on the record was that at least ten jurors voted to convict. A report of the Oregon Public Defense Services has confirmed that, in 37% of jury trials, there was no polling requested, or any such polling was not adequate to determine if the jury was unanimous or not, for reasons including that it was not made part of the trial record. Oregon Office of Public Defense Services Appellate Division, *On the Frequency of Non-unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission*, at 4 (May 21, 2009).[4] Years after the fact, there is little likelihood of determining if any jury was, or was not, unanimous. This is particularly true because Oregon has extremely restrictive rules precluding contact with jurors without leave of court, which is only granted on a showing of good cause. *See* Oregon Rules of Professional Conduct 3.5(c)&(e); Oregon Uniform Trial Court Rule 3.120; United States District Court for the District of Oregon, Local Rule of Civil Procedure 48-2.[5]

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[4] Available at:

https://www.oregon.gov/opds/commission/reports/PDSCReportNonUnanJuries.pdf

[5] Moreover, the Oregon Supreme Court has held that it will not consider the affidavit of a juror to impeach a verdict post-trial unless that affidavit proves the existence of a separate crime, not simply some misconduct. *Pinnell v. Palmateer*, 200 Or. App. 303, 317, 114 P.3d 515, 525 (Or. App. 2005). A juror's vote to

After this Court granted the writ of certiorari in *Ramos*, there was a significant effort to have trial counsel throughout the state raise and preserve claims regarding convictions by a non-unanimous jury. Moreover, it also appears that more cases went to trial during that time than anticipated. And while *Ramos* was pending, state appellate counsel made efforts to stay cases that presented the issue while awaiting the ruling of this Court. Even with these efforts, between March 18, 2019 (the grant of certiorari in *Ramos*), and April 20, 2020 (the decision), there were still only a total of 269 cases in Oregon pending on direct appeal that presented the issue in a manner requiring an immediate grant of relief – not the thousand or more cases anticipated by the State of Oregon. Given the concerted effort to raise and preserve the issue, this number is likely to be higher than the typical year.

In addition, many individuals may not seek to challenge their old convictions at all in spite of the lack of unanimity. After the decision in *Ramos*, the Federal Public Defender undertook outreach efforts to past clients of the office, dating back to 2005, where the federal petitions had raised claims regarding non-unanimous jury verdicts. The majority of those clients had already served all of their sentence, including their time on post-prison supervision. Fewer than a quarter of those individuals responded to the inquiries and were considering filing a successor petition in state court under *Ramos*. Many individuals who are

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acquit or convict does not constitute misconduct, much less a separate crime.

long past their sentence end date would have little reason to revisit their cases from so long ago.

In sum, there were not huge numbers of cases pending on direct appeal that needed to be remanded for a retrial after *Ramos*, and to date just over fifty successive state post-conviction petitions have been filed seeking to challenge old convictions based on that ruling. For that small percentage of individuals who may decide to seek relief if *Ramos* is deemed to be retroactive, who can prove that their jury was non-unanimous and that they are entitled to some form of relief, there still would not necessarily be a retrial in every such case. Many of those cases are likely to be subject to renegotiation and resolution, rather than a retrial.

B. In Other Criminal Justice Contexts, Retroactive Changes Have Resulted In The Efficient Review And Resolution Of Thousands Of Prior Convictions And Sentences, With Relatively Few Cases Requiring Litigation.

Over the last decade there have been significant systemic changes in the federal criminal justice system, either from amendments adopted by the U.S. Sentencing Commission, legislative enactments by Congress, or substantive criminal law decisions by this Court. Those changes have often been applied retroactively, dramatically affecting the sentences, and at times the convictions, of tens of thousands of individuals who had previously been deemed guilty of federal criminal offenses. These changes include:

- The Sentencing Commission's decision in 2007 to decrease the Drug Quantity Table of the Sentencing Guidelines for crack cocaine offenses by two levels, and to make that change retroactive, commonly referenced as the "Crack-Minus-Two" amendment.

- Congress's decision in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, to reduce the crack-powder cocaine sentencing disparity and to eliminate certain mandatory minimum sentences, which Congress made retroactively applicable by the First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194 (2018).

- The Sentencing Commission's decision in 2010 to further decrease the Drug Quantity Table for crack cocaine offenses, consistently with the Fair Sentencing Act, and to make that change retroactive.

- The Sentencing Commission's decision in 2014 to downwardly adjust the entire Drug Quantity Table of the Sentencing Guidelines by two levels – commonly referenced as "Drugs-Minus-Two" – and to make that change retroactive with a built-in one-year delay.

- This Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), void for vagueness, and which was deemed retroactively applicable in *United States v. Welch*, 136 S. Ct. 1257 (2016).

In each of these instances, it was anticipated that the federal courts would need to revisit a substantial number of cases, many of which were years, if not decades, old.

When the Sentencing Commission adopted the Crack-Minus-Two amendment, the Report of the Office and Research and Data for the Commission anticipated that:

> 19,500 offenders who would appear to be eligible to seek a reduced sentence under this amendment includes: (A) 17,127 offenders sentenced between fiscal years 1992 and 2006 who have been verified by the Federal Bureau of Prisons (BOP) as still incarcerated (as explained in further detail below); and (B) 2,373 offenders sentenced during the first three quarters of fiscal year 2007 (as explained in further detail below). Of the 19,500 offenders, more than one-third (n=7,187) were sentenced after the decision in *Booker*. [6] [footnote omitted]

Glen Schmitt, Lou Reedt & Kenneth Cohen, *Analysis of the Impact Of the Crack Cocaine Amendment if Made Retroactive*, Letter to the Chair and Commissioners of the U.S. Sentencing Commission, at 5 (October 3, 2007).[7] The fact that *Booker* was impli

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[6] *United States v. Booker*, 543 U.S. 220 (2005).

[7] Available at: [continued]

cated in 7,187 cases meant that the Commission anticipated that these resentencings would require consideration of far more information to arrive at a "reasonable" sentence rather than strict application of a Guidelines analysis.

This estimate was largely borne out by the statistics subsequently gathered by the Commission. According to the Sentencing Commission's *Preliminary Crack Cocaine Retroactivity Data Report*, published in June 2011,[8] district courts entertained a total of 25,143 petitions for relief under the Crack-Minus-Two amendment, of which 62%, or 16,148, were granted. *Id.* at 4, Table 1.

The Fair Sentencing Act of 2010 did not involve such significant filings, but the Commission has reported that approximately 6,800 individuals filed motions to receive, and received, reduced sentences as of December 2014. U.S. Sentencing Commission, *Report to Congress: Impact of the Fair Sentencing Act of 2010*, at 26 (August 2015).[9] When the First Step Act

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https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/impact-analysis-crack-amendment/20071003_Impact_Analysis.pdf

[8] Available at:

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf

[9] Available at: [continued]

was adopted in 2018 allowing for retroactive application of the Fair Sentencing Act, an additional 2,387 individuals sought and obtained resentencing proceedings and a grant of relief. U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, at 4, Table 1 (January 2020).[10]

Significantly greater numbers of cases arose as a result of the Drugs-Minus-Two amendment. The Commission adopted retroactive application of the Amendment estimating that:

> [A]pproximately 46,000 offenders could potentially benefit from retroactive application of the Drugs Minus Two Amendment[.]

U.S. Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, at 4 (July 2020).[11] For that reason, the Commission delayed

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https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf

[10] Available at:

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20200203-First-Step-Act-Retro.pdf

[11] Available at:

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf

implementation of the retroactive application of the amendment by one year. *Id.* at 4-5.

Again, the Commission's estimate was very nearly accurate. Approximately 50,676 motions for retroactive application of the Drugs-Minus-Two amendment had been filed as of the date of the Commission's July 2020 report, of which slightly less than two-thirds, or 30,852 motions, have been granted. *Id.* at 5. The Report also reflects that these motions involved detailed analyses of issues such as post-offense rehabilitation and public safety factors. *Id.* at 1, 5.

No readily available data confirms the number of cases that have been revisited based on the decision in *Johnson*. A quick Westlaw search documents 2,822 district court cases reference *Johnson* and the term "relief." The Federal Public Defender for the District of Oregon has kept its own statistics on *Johnson* cases, which reflect that a total of 108 petitions pursuant to 28 U.S.C. § 2255 were filed in our district by individuals raising claims under *Johnson*. Five of those cases were voluntarily dismissed after review and consultation with counsel in the office. The government rarely contested that *Johnson* provided an appropriate basis to review prior convictions and sentencings, and in the vast majority of cases, the government agreed to a resentencing proceeding, leaving only 10% of cases that required contested litigation on the issues.

In sum, according to statistics obtained and confirmed by the Sentencing Commission, in the last twelve years the United States District Courts have

entertained just over 85,000 filings seeking to review the proceedings in criminal cases that were already final – some of which had been finalized for decades – based on changes in the federal Sentencing Guidelines and under this Court's decisions in *Johnson* and *Welch*. Throughout that time, the district courts have continued to function and to address all matters pending before them without undue hardship. Instead, and as discussed next, the judges of the United States District Courts and the parties' counsel who appear before them – both for the defense and the government – have worked cooperatively to process and resolve these matters.

C. The Likely Result Of A Grant Of Relief To Mr. Edwards Will Be That The Majority Of Affected Cases Will Be Resolved Through Negotiation.

It is not unusual for prosecutors to voice concerns that any change in the criminal justice system with a retroactive application will have grave consequences for the administration of justice.

In 2007, when the Sentencing Commission was considering the Crack-Minus-Two Guideline amendment and the retroactive application of that reform, such concerns were voiced by the Department of Justice, through the testimony of several prosecutors. *See* U.S. Sentencing Commission, *Public Hearing on Retroactivity*, Judge Ricardo H. Hinojosa,

Presiding (November 13, 2007).[12] Gretchen Shappert, then the United States Attorney for the District of North Carolina, noted that the Department of Justice had always "opposed retroactivity" for changes to the Guidelines. *Id.,* Testimony of United States Attorney Gretchen Shappart, at 133. Ms. Sheppart expressed the prosecutors' concerns about retroactive application of the amendment and the burden on the courts and prosecutors' offices:

> The prosecutors who originally handled the cases will not be available. The witnesses who were involved in the case will not be available. Cases where there was a plea agreement and no appeal, transcripts from the original proceedings will not be available. They will have to be re-transcribed. So my concern is not the integrity of the bench. My concern is the tremendous strain upon the system and the inability of prosecutors to present all of the information that needs to be presented.
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> * * *
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> We know that each of [the defendants] is probably going to want to have a sentencing hearing of some variation or another. Notwithstanding Rule 43, they're going to want to be in the district, that if possible, they're going to want an appointed counsel,

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[12] Available at:

https://www.ussc.gov/sites/default/files/Transcript111307.pdf

> and if possible, they're going to want to talk about rehabilitation in prison, any changes in their family circumstance or situation, and we will have, if *Booker* does apply, a lopsided *Booker* proceeding where we consider all of the minimizing factors but not the aggravating factors that would've been available at the original sentencing.

Id., Testimony of United States Attorney Gretchen Shappart, at 128 & 130.

In contrast, the Oregon Federal Public Defender's office explained how such retroactive application could be – and had previously been – processed through the cooperation of all the stakeholders in the criminal justice system:

> Twelve years ago the Commission promulgated a retroactive amendment on marijuana guidelines and the District of Oregon had a disproportionate number of people who were potentially affected. The court in Oregon adopted a protocol for handling very large numbers of cases [. . . which] depended on three basic areas. One was good communication; another, cooperation among the affected parties; and the third was good faith in the cooperation and trying to get to fair results in individual cases.
>
> * * *

> [W]e met with the United States Attorney's office and the United States Attorney's office, my counterpart, had been consulting with the individual prosecutors in cases and basically coming up with what they thought would be a reasonable way of implementing a retroactive guideline[.]
>
> * * *
>
> We found a remarkable number of the cases we were in agreement on. Some, we were close and send them back to the prosecutor, send them back to the defense lawyer, come back and have some more negotiation. In a remarkable number of the cases, we were able to get to an agreement of what the client, defense counsel and the prosecutor thought was a fair disposition.

Id., Testimony of Stephen Sady, Chief Deputy Public Defender, at 58-61. On the very day the marijuana amendment became effective retroactively, the parties had already agreed to the resolution of 121 cases. *Id.* at 62.

Despite the concerns of the prosecutors, the Sentencing Commission determined to give the Crack-Minus-Two amendment retroactive affect. Again, the Federal Public Defender and other counsel worked cooperatively with their counterparts in the Department of Justice to seek just resolutions on behalf of the affected individuals. Litigation was the exception and negotiated resolutions were the general rule.

There is every reason to believe that the Oregon state courts along with the defense and prosecution attorneys working in those courts will be able to do the same should *Ramos* be deemed to have retroactive application.

The Federal Public Defender's office and counsel with the Oregon Department of Justice have agreed to resolution of federal habeas matters pending under § 2254 in appropriate cases. Often that resolution leaves the conviction intact, but reduces the sentence – either to time served or a lesser sentence that is satisfactory to the client and the State. Sometimes the negotiation is able to revive a plea offer that had previously been made and rejected by individuals who were certain that the jury would find them to be innocent.

Individuals pursuing claims for relief under *Ramos* will be well aware that they have already had at least ten jurors vote to find them guilty of their crimes of conviction. The likelihood that they may be convicted again must be evaluated and compared against any favorable offer from the prosecution. There are many reasons why "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Individuals who have spent many years in custody are more likely to view a previously rejected plea offer as a more favorable outcome than risking a retrial. It is highly probable that a significant percentage of the cases that are able to present viable claims under *Ramos* will be resolved through negotiations.

Counsel in the Federal Public Defender's office representing clients in petitions filed under § 2254 and numerous other defense counsel in the State of Oregon – including the lawyers working with and through the Criminal Justice Reform Clinic of the Lewis and Clark Law School, the Oregon Post-Conviction Consortium, the Oregon State Public Defender, the public defender's offices in the various counties, and Oregon's Office of Public Defense Services – stand ready to work with prosecutors in the State of Oregon to ensure an orderly review and resolution of the affected cases.

Conclusion

For the reasons presented by the Petitioner, *amici* urge this Court to hold that its ruling in *Ramos* applies retroactively.

Respectfully submitted this 22nd day of July, 2020.

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender
Counsel of Record