

20-5848
No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

* * * * *

Rich Gustafson,
Petitioner,

v.

State of Oregon,
Respondent,

* * * * *

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

* * * * *

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTION PRESENTED

If a criminal trial in the State of Oregon did not guarantee a unanimous verdict, leading defendant to choose a bench trial, was this unconstitutional under the sixth and fourteenth amendment?

Quoting from *Ramos v. Louisiana*: “[T]he Sixth Amendment requires unanimity, and that the guarantee is fully applicable against the States under the Fourteenth Amendment.” and that “if the jury trial right requires a unanimous verdict in federal court, it requires no less in state court.”

PARTIES TO THE PROCEEDING

The petitioner is Richard B. Gustafson, the defendant and defendant-appellate in the courts below. The responded is the State of Oregon, the plaintiff and plaintiff-appellee in the courts below.

[x] All parties appear in the caption of the case on the cover page

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard B. Gustafson respectfully petitions for a *Writ of Certiorari* to the State of Oregon Appellate court in *State v. Gustafson*, 300 Or App 438; 452 P.3d 962 (Or. App. 2019).

OPINION BELOW

The opinion of the Oregon Appellate Court to review the merits appears at Appendix "A" to the petition and is reported at *State v. Gustafson*, 300 Or App 438, 452 P.3d 962 (Or. App. 2019). The Oregon State Supreme Court's order denying review of that decision is in Appendix "B".

JURISDICTION

The date on which the state appellate court decided defendants case was November 06, 2019. A timely Petition for Review to the Oregon Supreme Court was thereafter denied on May 21, 2020 and a copy of the order denying review appears at Appendix "B". The court's jurisdiction is pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment (1791): In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment (1791): Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment (1868): *Section 1*: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon: Article I, Section 16. Excessive bail and fines; cruel and unusual punishments; power of jury in criminal case. Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.—In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.

ORS 163.427(a) *Sexual abuse in the first degree (Oregon Revised Statutes (2019 Edition))*

A person commits the crime of sexual abuse in the first degree when that person subjects another person to sexual contact and they are under 14 years of age.

Sexual abuse in the third degree is a Class B Felony

ORS 163.415(a,b) *Sexual abuse in the third degree (Oregon Revised Statutes (2019 Edition))*

A person commits the crime of sexual abuse in the third degree if:

- (a) The person subjects another person to sexual contact and:
 - (A) The victim does not consent to the sexual contact; or
 - (B) The victim is incapable of consent by reason of being under 18 years of age;or
- (b) For the purpose of arousing or gratifying the sexual desire of the person or another person, the person intentionally propels any dangerous substance at a victim without the consent of the victim.

Sexual abuse in the third degree is a Class A misdemeanor.

ORS 163.305 (6) *Definitions (Oregon Revised Statutes (2019 Edition))*

As used in chapter 743, Oregon Laws 1971

Sexual Contact is defined as: "Any touching of a sexual or other intimate part of a person or causing the actor for the purpose of arousing or gratifying the sexual desire of either party."

STATEMENT OF THE CASE

The petitioner, Richard B. Gustafson, was charged with 11 counts of child sex abuse, 22 counts of encouraging child sex abuse and 1 count of possession of cocaine. Defendant pleaded "Not Guilty". On the day of the trial he was offered the option of a bench trial or a jury trial. The jury trial offered to the defendant was allowed to convict with a non-unanimous jury which has now been recognized under *Ramos v. Louisiana* to be unconstitutional.

With the assistance of a court appointed lawyer, Mr. Gustafson appealed his case to the Oregon Appellate Court. His appellate counsel argued four assignments of error, arguing defendant's Fourth Amendment rights were violated, that he should be acquitted on all counts of encouraging child sex abuse in the first-degree and that many specific counts should be merged. In addition, defendant provided a pro se supplemental appeal brief. Mr. Gustafson argued that the charges of child sex abuse in the first degree did not meet the criteria listed under ORS 163.427(a) and ORS 163.305 (6) and that the sentence was cruel and unusual under the Eight Amendment and under Oregon's Article I, section 16. He raised the argument again in his pro se Petition for Review. (see appendix D,E)

Though defendant did not challenge the issue of the constitutionality of a non-unanimous jury at the time of trial or on appeal, in *State v. Williams* 366 Or 495 the

_____ Oregon Supreme Court exercised their discretion "to review defendant's Sixth

Amendment challenge, even though defendant failed to raise that argument in the trial court and in his opening brief in the Court of Appeals.”

On November 6, 2019, the Court of Appeals denied all of the defendants arguments that were raised. A Petition for Review to the Supreme Court of Oregon was filed by defendant's attorney on January 21, 2020. The Petition for review was denied on May 21, 2020.

Though defendants petition for review was denied, *State v. Williams* was accepted due to the recent change in law with the decision of *Ramos v. Louisiana*. “The petition for review is allowed, limited to the issue of the appropriate disposition of this case in light of *Ramos v. Louisiana*. The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.” *State v. Williams* 366 Or 495

REASONS FOR GRANTING PRO SE WRIT OF CERTIORARI

Defendant believes that his case has merit under new Federal law brought forth by *Ramos v. Louisiana* No. 18-5924. Defendants attorney understood that a 10-2 or 11-1 verdict would constitute a guilty verdict under Oregon's non-unanimous jury conviction law and persuaded defendant to proceed in a bench trial rather than a jury trial. Reluctantly, but in trusting his attorney, defendant took this advice.

The court has made plain error in not having as one of its options for defendant a trial by unanimous jury as required by the Sixth Amendment. "[T]he question of whether a defendant is entitled to reversal even where the challenge to a non-unanimous verdict was not preserved in the trial court and was raised for the first time on appeal—that is, whether such a challenge may be raised as 'plain error' that an appellate court should exercise its discretion to correct. We concluded that the answer is yes." *State v. Ulery*, 366 Or 500. In *State v. Worley*, 304 Or App 860 "The Oregon Supreme Court concluded that a trial court's acceptance of a non-unanimous verdict constituted plain error and exercised discretion to correct that error in light of the gravity of the error and because failure to raise the issue in the trial court did not weigh heavily against correction as the trial court would not have been able to correct the error under 'controlling law.'"

The acknowledgment above of the trial court not being “able to correct the error under controlling law” is admission to the how the court was conducting their trials. The defendant in the given circumstance of the “controlling law” did not have an option of a unanimous jury under such law and though choosing a bench trial, under Federal Law, he should have been entitled to the option of a trial by unanimous jury. He was not afforded such a trial.

Defendant realizes that he did not choose a non-unanimous jury trial, which was offered to him by the State of Oregon in his 2014 trial. But a unanimous jury trial was not, by undermining law, a choice. Even if defendant would have raised the legal issue of not being offered a unanimous jury trial prior to the *Ramos v. Louisiana* decision, he would have been denied such a request as is shown by the Appellate Courts decision in *State v. Dick*.

“At trial, defendant requested the court to instruct the jury that it needed to reach unanimous verdicts, which the court declined to do. The jury returned non-unanimous verdicts on all counts. On appeal, defendant assigned error to the court's acceptance of non-unanimous verdicts, and we summarily affirmed based on then-existing precedent. After we issued the appellate judgment and the Oregon Supreme Court denied review, defendant petitioned for *certiorari* in the United States Supreme Court. The Court allowed *certiorari*, vacated this court's judgment, and remanded the case for further consideration in light of *Ramos v. Louisiana*.” *State v. Dick*, 305 Or App 248 (July 2020).

The question asked in *Ramos v. Louisiana No. 18-5924* is “[h]ow does the state [of Oregon] deal with the fact [the Supreme] Court has said 13 times over 120 years that the sixth Amendment does require unanimity?” New cases have inundated the Oregon Courts since the Supreme Court decision in April of 2020 where they “took this case to

decide whether the Sixth Amendment right to a jury trial-as incorporated against the States by way of the Fourteenth Amendment-requires a unanimous verdict to convict a defendant of a serious offense.” *Ramos v. Louisiana* No. 185924. The US Supreme Court recently decided an important question of federal law in the *Ramos v. Louisiana* case that has not been, but should be looked upon in defendants case due to the fact that at the time of trial, Oregon law conflicted with the relevant decisions of this court. This *Ramos* decision upheld in April of 2020 has shed light on the the state of Oregon in their refusal to acknowledge that their continued practice of non-unanimous jury trial was unconstitutional.

If defendant had been offered by rule of law a proper jury trial, his attorney as well as defendant would have opted for such a trial. Regardless of defendant choosing a bench trial, based on the circumstances, the State of Oregon should be mandated by the law set forth in the United States Constitution to require the application of the *Ramos v. Louisiana* decision in the same retroactive manor as other cases that it has been applied within the appeal process. As explained in *Griffith v. Kentucky*, 479 U.S. 314 107 s.Ct. 708 “[a] new rule for the conduct of criminal prosecutions, such as the ruling in *Batson*, applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.”. In addition *Griffith v. Kentucky* explains that the “[f]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review

violates basic norms of constitutional adjudication.” By requiring the *Ramos v. Louisiana* case to be applied to defendant's case, true due process under the United States Constitution will fairly be served.

Objectivity in a legal setting means fairness and impartiality. The person who fails to act objectively has allowed self-interest or prejudice to cloud their judgment. By attempting to turn legal reason into a system that would interpret rules to serve the courts benefit does not invoke justice. In the upcoming years there will be a large financial burden placed on the Oregon courts. However, if the Oregon Courts would have upheld the law of the US constitution by applying the Sixth & Fourteenth Amendments, there would be no such issue. Defendant would have had a constitutional trial and would have chosen a jury trial and would have been tried legally.

Just because Oregon has retained Apodaca for over 70 years doesn't mean it did so unconstitutionally. “Oregon may need to retry defendants convicted of felonies by non-unanimous verdicts whose cases are still pending on direct appeal.” *Ramos v. Louisiana No. 185924*. Defendant who was subjected to a bench trial, whether persuaded by attorney or decided upon himself after weighing the risk of a non-unanimous guilty verdict, never had the option of a unanimous jury trial as is required by the Sixth Amendment. “And, as we've seen at the time of the Amendment's adoption, the right to a jury trial meant a trial in which the jury renders a unanimous verdict.” *Ramos v. Louisiana No. 185924*. Defendant was not provided this constitutional right

and if a federal law applies to one individual regardless of the time and place it should apply to all.

The Supreme Court realized that the error of not following the constitutional requirement of the Sixth Amendment was not harmless and that there are many other like cases. Currently there are hundreds of cases being addressed. In *Ramos v. Louisiana* No. 185924 the US Supreme Court realized that "In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that?"

It is imperative that all of us whether a judge, a teacher, a laborer, or a mother or a father or any walk of life regardless of ethnicity or color, that we all help to uphold our constitutional rights as they were meant to be upheld. We cannot allow ourselves to be swayed toward a decision that is politically beneficial nor be complacent with a lack of action. We must dare to admit that there has been injustice for too long and that there needs to be a sincere correction that addresses all that have been affected.

The Oregon judicial system has made a critical and strident error in their misconduct of court procedures by not following federal law. Unless defendant had been found guilty in a jury trial by a 12-0 unanimous verdict, the trial, by not being conducted by the rule of federal law should be nullified and defendants convictions should be reversed and remanded.

CONCLUSION.

For the foregoing reasons, the petition for *Writ of Certiorari* should be granted.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Gustafson', with a stylized flourish at the end.

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