
No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

**REX STEPHENSON,
PETITIONER-APPELLEE,
v.**

**BRANDON KELLY,
RESPONDENT-APPELLANT.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

**NELL BROWN
ASSISTANT FEDERAL PUBLIC DEFENDER
101 SW MAIN STREET, SUITE 1700
PORTLAND, OREGON 97204
(503) 326-2123**

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I.

Whether counsel provides ineffective assistance in violation of the Sixth Amendment to the United States Constitution when he fails to investigate and to challenge the State's evidence at trial.

II.

Whether the rule of *Ramos v. Louisiana*, holding that the Sixth and Fourteenth Amendments to the United States Constitution require juries unanimity, applies retroactively to cases on collateral review.

This question will be decided in *Edwards v. Vannoy*, No. 18-31095.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	3
A. Criminal Trial And Direct Appeal Proceedings.....	3
B. State Court Appeal and Post-Conviction Relief Proceedings.....	5
C. Federal Habeas Corpus Proceedings.....	5
REASONS FOR GRANTING THE WRIT.....	7
A. Reasonable Jurists Could Debate That Relief Is Appropriate On Petitioner's Sixth Amendment Claim.	8
B. In The Alternative, This Court Should Hold This Case In Abeyance Until It Decides <i>Edwards v. Vannoy</i>	9
1. Retroactive Application Of The Rule Of <i>Ramos</i> Is Appropriate.....	10
2. <i>Ramos</i> Reaffirmed An Old Rule.....	11
3. Alternatively, <i>Ramos</i> Is A New Watershed Rule.....	14
CONCLUSION.....	15

APPENDICES

Appendix A:	Order of the United States Court of Appeals for the Ninth Circuit (09/14/20)
Appendix B:	Order and Judgment of the United States District Court for the District of Oregon (03/09/20)

TABLE OF AUTHORITIES

	Cases	Page(s)
<i>Andres v. United States</i> , 330 U.S. 740 (1948)		11
<i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972)		10
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)		8
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)		12
<i>Bousley v. United States</i> , 523 U.S. 614 (1998)		13
<i>Chaidez v. United States</i> , 568 U.S. 342 (2013)		13
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)		11
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)		14
<i>Greene v. Fisher</i> , 565 U.S. 34 (2011)		6
<i>Johnson v. Louisiana</i> , 406 U.S. 356 (1972)		10
<i>Mackey v. United States</i> , 401 U.S. 667 (1971)		13
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)		13
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)		8

<i>Malloy v. Hogan</i> 378 U.S. 1 (1964)	11
<i>Ramos v. Louisiana</i> , 590 U.S. __, 140 S. Ct. 1390 (2020)	<i>passim</i>
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	8
<i>Strickland v. Washington</i> , 466 U.S. 668	9
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	11
<i>Thompson v. Utah</i> , 170 U.S. 343 (1898)	11

Statutes

28 U.S.C. § 2253	2, 8
------------------------	------

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

**REX STEPHENSON,
PETITIONER-APPELLEE,
v.**

**BRANDON KELLY,
RESPONDENT-APPELLANT.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The petitioner, Rex Stephenson, respectfully requests that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Ninth Circuit entered on September 14, 2020.

OPINIONS BELOW

On September 14, 2020, the United States Court of Appeals for the Ninth Circuit issued an order denying a certificate of appealability. Appendix A.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .

(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

The Sixth Amendment to the United States Constitution secures the criminally accused the rights to the effective assistance of counsel and to trial by an impartial jury.

Longstanding federal jurisprudence interpreting the Sixth and Fourteenth Amendments required jury unanimity in federal criminal trials and rejected “partial” incorporation of the Bill of Rights.

On April 20, 2020, this Court held in *Ramos v. Louisiana*, 590 U.S. __, 140 S. Ct. 1390, 2020 WL 1906545 (2020), that the Sixth Amendment, which is fully incorporated to the States by the Fourteenth Amendment, requires jury unanimity in all state criminal trials.

On May 4, 2020, this Court granted certiorari in *Edwards v. Vannoy*, No. 18-31095, to review whether *Ramos v. Louisiana* applies retroactively to cases on federal collateral review. *Edwards* is under advisement now.

STATEMENT OF THE CASE

A. Criminal Trial And Direct Appeal Proceedings.

Petitioner Rex Stephenson stands convicted by a non-unanimous Oregon jury of sexual offenses against his minor stepdaughter and her cousin. Mr. Stephenson’s Sixth Amendment right to the effective assistance of counsel was violated when his attorney failed to advocate his cause at trial. The trial transcript reflects an attorney who was unable to hear or communicate effectively, much less to zealously defend his client against serious charges. Prior to trial, counsel failed to conduct investigation or review important evidence, including videotaped interviews of the alleged victims’ disclosures. Counsel only did a belated, cursory review of prejudicial, arguably irrelevant photographic evidence that necessitated expert review, and failed to seek a stipulation to keep this visual evidence out of the trial. As a result of inadequate preparation and an inability to execute tasks in the courtroom—including a general malaise at trial, an inability to hear witnesses, and lack of understanding of basic rules of evidence—counsel was unable to effectively challenge the State’s case. Nor was he able to present vital, admissible evidence through the defense witnesses. When counsel struggled to admit admissible evidence, he frequently just gave up, saying “no further questions.” Most significantly, counsel failed to present available character evidence about the victim’s propensity for honesty, to impeach the alleged victim, and to object to the

prosecutor's improper and vouching statements that bolstered the victim's testimony. As a result of counsel's errors, individually and cumulatively, the evidence presented at trial was skewed in favor of the prosecution and the jury was left with no comprehensible defense theory to counter the prosecution's narrative. This Court should have no confidence in the outcome of the trial and habeas corpus should be granted to provide a new trial with effective counsel.

Moreover, Petitioner's jury could not reach a unanimous verdict on each of the counts involving his step-niece by a count of eleven to one. The jury was also not unanimous by a count of ten to two on the charge of second-degree sodomy of his stepdaughter. Nevertheless, Oregon treated these verdicts as convictions and the Oregon trial court sentenced Petitioner to various concurrent and consecutive terms totaling 300 months in prison.

Even though his attorney stood flat-footed while the court instructed the jury it did not have to reach a unanimous decision, the Sixth and Fourteenth Amendments to the United States Constitution required unanimity. In any of forty-eight other states, Petitioner could not have been convicted on these counts without the agreement of the remaining jurors.

B. State Court Appeal and Post-Conviction Relief Proceedings.

Petitioner appealed, but his court-appointed counsel filed a brief under Oregon's rule that is akin to the *Anders* procedure. Counsel's brief stated that he could not identify any arguably meritorious issues, but allowed Petitioner to brief his own claims *pro se*, which Petitioner did. The Oregon intermediate appellate court affirmed without opinion. Petitioner's appointed counsel then withdrew without filing a petition for review by Oregon's highest court, defaulting Petitioner's *pro se* claims.

Petitioner next sought state post-conviction relief, submitting evidence that counsel had failed to investigate and to use available fodder for cross-examination of the alleged victim as well as other evidence, including character evidence that could have established the alleged victim's reputation as not being truthful and called into question her credibility and the credibility of her testimony. The post-conviction trial court denied relief. Petitioner appealed, but the intermediate appellate court affirmed without opinion and Oregon's highest court denied review.

C. Federal Habeas Corpus Proceedings.

Petitioner sought a writ habeas corpus, claiming that counsel provided ineffective assistance in numerous respects and that he is actually innocent. On March 9, 2020, the District Court denied relief and denied a Certificate of Appealability (COA). Appendix B.

Petitioner thereafter filed a notice of appeal in the Ninth Circuit Court of Appeals, seeking appellate review of the denial of his Sixth Amendment claims. The following month, this Court decided *Ramos v. Louisiana*, holding that the Sixth Amendment requires unanimous jury verdicts to convict in state criminal cases, calling into question Petitioner's non-unanimous jury conviction. Shortly thereafter, this Court accepted review in *Edwards v. Vannoy*, to decide whether *Ramos* applies retroactively to federal habeas corpus cases.

After this Court decided *Ramos* and granted review in *Edwards*, Petitioner also filed a successive post-conviction petition in the Oregon state courts to exhaust the non-unanimous jury challenge in light of *Ramos* as appears to be called for by this Court's decision in *Greene v. Fisher*, 565 U.S. 34, 41 (2011). That state-court matter remains pending.

Petitioner also filed a motion requesting that the Ninth Circuit stay or remand this matter in light of *Ramos* and *Edwards*. On September 14, 2020, the Ninth Circuit refused to grant a COA and refused to grant the requested stay or remand. Appendix A.

Specifically, the Ninth Circuit stated:

The certificate of appealability . . . is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and

that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” [citations omitted]

In his request for a certificate of an appealability, appellant asserts a new claim that his conviction by a non-unanimous jury violated his constitutional rights but concedes that this claim was never raised in the district court proceedings and has not been exhausted in the state courts. To the extent appellant seeks to raise this claim in federal court, this new claim is more properly pursued in an application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court that complies with the requirements of Ninth Circuit Rule 22-3.

Appendix A, at 1-2.

REASONS FOR GRANTING THE WRIT

Petitioner’s conviction is the product of ineffective assistance of trial counsel in violation of his Sixth Amendment rights. This Court should order summary reversal because the Ninth Circuit was clearly wrong in finding that Petitioner did not meet the standard for a COA.

Moreover, the non-unanimous 10-2 and 11-1 jury verdicts in this case violate the Sixth Amendment’s guarantee of an impartial jury. Thus, in the alternative, this Court should hold this case in abeyance until it decides *Edwards v. Vannoy*, No. 18-31095, which will determine whether the rule of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), holding unconstitutional non-unanimous jury verdicts like Petitioner’s, applies retroactively to federal habeas corpus cases.

A. Reasonable Jurists Could Debate That Relief Is Appropriate On Petitioner’s Sixth Amendment Claim.

To obtain a certificate of appealability, a habeas petitioner must make a “substantial showing of the denial of constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. “[A] COA does not require a showing that the appeal will succeed.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Rather, he “must ‘[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.’” *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

As this Court has explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue (and an appeal of the district court’s order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Petitioner's Sixth Amendment claim meets this standard for issuance of a COA. Petitioner's counsel's failures to investigate, prepare for trial, and confront the State's case in any meaningful way despite available fodder for cross-examination, together with his dismal performance at trial, merits appellate review. *Strickland v. Washington*, 466 U.S. 668, 688-90 (1984), stated that a court judging an IAC claim judges the reasonableness of counsel's conduct:

on the facts of the particular case, viewed as of the time of counsel's conduct. . . . In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

In light of the circumstances of this case, it was unreasonable for counsel not to investigate and to use all available evidence to challenge the State's witnesses. Counsel's omission and shortcomings caused the adversarial process to utterly fail in this particular case. Petitioner's Sixth Amendment claim deserves encouragement to proceed further, satisfying the COA standard.

B. In The Alternative, This Court Should Hold This Case In Abeyance Until It Decides *Edwards v. Vannoy*.

Petitioner's Oregon conviction was by a non-unanimous jury in violation of his rights to due process, to an unbiased jury, and to have the State prove the charges beyond a reasonable doubt. The verdict and, as a result, Petitioner's convictions

reflect lingering doubt. In April 2020, *Ramos* revisited this Court’s fractured decisions in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), and held that the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict to convict. 140 S. Ct. at 1397. Raising this issue in Oregon was futile under existing precedent at the time of Petitioner’s trial. The Oregon courts have summarily rejected non-unanimous-jury challenges for years. However, this Court has now held in *Ramos* that convictions like Petitioner’s are unconstitutional. This Court subsequently granted review in *Edwards v. Vannoy*, to address whether the rule of *Ramos*—that jury unanimity is required in state cases as in federal cases—should be applied retroactively to federal habeas corpus cases. Therefore, in the alternative, Petitioner requests that this Court hold his case in abeyance until this important issue has been decided. *See Hall v. Myrick*, No. 17-35709.

1. Retroactive Application Of The Rule Of *Ramos* Is Appropriate.

Ramos should be applied retroactively to Petitioner’s case because, despite the jurisprudential aberration that *Apodaca* represented, the jury unanimity requirement has always been fundamental to our system of criminal justice. As such, *Ramos* either reaffirmed a longstanding “old rule” that was undisturbed by the historical accident of *Apodaca*, or it announced a watershed “new rule” that restored

a bedrock principle of constitutional law in Louisiana and Oregon and seriously improved the fairness and accuracy of criminal trials. Either way, *Ramos* applies retroactively on collateral review.

2. *Ramos* Reaffirmed An Old Rule.

Ramos should apply retroactively on collateral review because, under *Teague v. Lane*, 489 U.S. 288, 311 (1989), it reaffirmed an “old rule” that was logically dictated by an extensive line of precedent—settled decades before Petitioner’s conviction became final and undisturbed by the historical accident of *Apodaca*. Specifically, this Court has long recognized: (i) the Sixth Amendment guarantees the right to a unanimous verdict;¹ (ii) the Jury Trial Clause is a fundamental right and is incorporated against the States;² and (iii) all incorporated Bill of Rights provisions apply identically against the States and the federal government.³ The

¹ E.g., *Andres v. United States*, 330 U.S. 740, 748 (1948) (the Sixth Amendment requires “[u]nanimity in jury verdicts”); *Thompson v. Utah*, 170 U.S. 343, 353 (1898) (“[L]ife and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.”).

² E.g., *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). (Sixth Amendment right to a jury trial applied to state court criminal proceedings through the Fourteenth Amendment).

³ E.g., *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (rejecting “the notion that the Fourteenth Amendment applies to the States only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’”).

holding in *Ramos* necessarily follows under *Teague*'s objective approach: unanimity is required in both federal and state court.

The State of Oregon should not now be rewarded and the unconstitutional convictions of Oregonians left in place just because Oregon claims it relied on *Apodaca*. Oregon chose to maintain this practice despite knowing the practice arose out of racial animus and a goal of disenfranchising the votes of racial and religious minorities and despite that it permits criminal convictions based on less than the “beyond a reasonable doubt” standard. The fact is that Oregon chose to maintain its non-unanimous jury practice for decades despite prior constitutional precedent indicating that the practice is unconstitutional. A review of the badly fractured decision in *Apodaca* does not change that calculus. Neither the plurality opinion nor Justice Powell’s separate concurrence in that case can be objectively read to erase this Court’s pre-existing Sixth and Fourteenth Amendment precedent. Moreover, the clear holdings of this Court’s decisions subsequent to *Apodaca* made it clear that Oregon’s reliance on the plurality outcome of *Apodaca* was not reasonable. *E.g.*, *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (“[L]ongstanding tenets of common-law criminal jurisprudence: that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours’”) (citing 4 W. Blackstone, *Commentaries on the Laws of*

England 343 (1769)); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (reaffirming rejection of a watered down version of incorporation). In fact, a majority of this Court has never endorsed the unusual decision in *Apodaca*. To the contrary, in numerous decisions after *Apodaca*, the pre-existing precedent was repeatedly reaffirmed and *Apodaca* was characterized as an outlier and aberration. Even the State of Louisiana, in *Ramos*, balked at the prospect of arguing that *Apodaca* supplied a binding precedent.

Oregon’s ostrich-like behavior should not now be rewarded under the guise of “reasonable” reliance. Oregon’s reliance on *Apodaca*, despite that the writing was on the wall, was simply not reasonable. The State’s interests in comity and finality are not impaired by retroactively applying well-established constitutional principles like jury unanimity, in part because reasonable jurists should have anticipated them. *See Mackey v. United States*, 401 U.S. 667, 695 (1971) (opinion of Harlan, J.); *see also Chaidez v. United States*, 568 U.S. 342, 347 (2013) (“[A] person [may] avail herself of [a] decision on collateral review” when this Court merely “appl[ies] a settled rule.”); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (explaining that there is “nothing new” about a claim based upon principles “enumerated . . . long ago”).

3. Alternatively, *Ramos* Is A New Watershed Rule.

If *Ramos* is instead viewed as a “new rule” of criminal procedure, it nevertheless applies retroactively because its profound contribution to fairness and accuracy in criminal proceedings in Louisiana and Oregon makes it uniquely suited to being recognized as a “watershed rule.” For decades, criminal defendants in Oregon have been convicted pursuant to unconstitutional and discriminatory jury regimes. By dismantling non-unanimous jury practices, this Court restored a bedrock procedural element essential to fairness in criminal trials. Centuries of history and precedent teach that unanimity is at the core of the jury trial right: after all, “[a] verdict, taken from eleven, [i]s no verdict at all.” *Ramos*, 140 S. Ct. at 1395 (internal quotation marks omitted). Moreover, as a legal and practical matter, jury unanimity is necessary to prevent an impermissibly large risk of inaccurate convictions. *Ramos* is thus uniquely akin to *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has consistently identified as a watershed rule. Both decisions restored bedrock principles of criminal procedure that significantly improve the fairness and accuracy of criminal trials.

Ramos affects “prior convictions in only two States.” 140 S. Ct. at 1406. Only a fraction of criminal cases in those States have involved non-unanimous jury verdicts. As a practical matter, an even smaller fraction will be retried. And because

Teague is an inherently equitable doctrine, the racist origins of the non-unanimous jury statutes diminish the States' interest in finality and repose.

Given this backdrop, Petitioner's conviction by a jury that was instructed that it did not have to reach a unanimous result warrants further review. Accordingly, Petitioner asks that the Court hold his case in abeyance until these important issues relating to non-unanimous jury verdicts and retroactivity will be definitely decided in *Edwards*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted. At a minimum, the case should be held in abeyance pending this Court's decision in *Edwards*.

DATED this 11th day of December, 2020.

s/ Nell Brown
Nell Brown
Attorney for Petitioner