No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FIVEA SHARIPOFF,

PETITIONER-APPELLEE,
v.

ROB PERSSON,

RESPONDENT-APPELLANT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether, in a case where the jury question was whether Petitioner acted with extreme indifference to the value of human life when she made a driving error, the trial court violated Petitioner's right to a meaningful opportunity to present a complete defense by excluding evidence that others also made the same driving error.

II.

Whether the rule of *Ramos v. Louisiana*, holding that a non-unanimous jury requirement violates the Sixth and Fourteenth Amendments to the United States Constitution, applies retroactively to cases on collateral review.

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

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The petitioner, Fivea Sharipoff, 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 February 10, 2021.

OPINIONS BELOW

On February 10, 2021, 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.

STATEMENT OF THE CASE

A. Criminal Trial And Direct Appeal Proceedings

At Petitioner's trial for manslaughter based on a vehicular crash that occurred after Petitioner drove down a highway off-ramp and entered the freeway going the wrong direction, the State asked the jury to consider evidence that Petitioner mistakenly turned left from the intersection into the freeway off-ramp (short of the intended on-ramp) as evidence of the degree of her impairment. Thus, in turn, the State asked the jury to find that this was evidence of her extreme indifference to the value of human life, which was the key disputed issue at trial. To rebut the inference that Petitioner made the wrong turn because of her alcohol impairment, the defense sought to introduce evidence that the intersection was confusing and poorly signed, which increased the likelihood of wrong turns, as well as evidence that others had made the same driving error as Petitioner. The trial court allowed introduction of the former, but not the latter. Petitioner was convicted of driving under the influence of intoxicants, manslaughter and assault by an Oregon jury that was instructed that it did not have to reach a unanimous verdict.

B. State Court Appeal and Post-Conviction Relief Proceedings

Petitioner appealed her conviction, alleging that the trial court erred in excluding evidence that two police officers and four civilians had driven the wrong way down the same ramp she incorrectly navigated despite that the evidence was

relevant to whether she had acted "recklessly under the circumstances manifesting extreme indifference to the value of human life." The Oregon Court of Appeals affirmed without opinion and Oregon's highest court denied review. Petitioner next sought post-conviction relief, raising claims of ineffective assistance of counsel not at issue here. The post-conviction court denied relief, the Court of Appeals affirmed without opinion, and the Supreme Court denied review.

C. Current Federal Habeas Proceedings

Petitioner timely filed a *pro se* petition for writ of habeas corpus in federal court. The briefing focused on the exhausted claim that the trial court violated Petitioner's constitutional rights when it excluded important testimony that others had gone down the same off-ramp the wrong way. *Id.* On April 27, 2020, the Magistrate Judge issued a Findings and Recommendation, recommending the denial of relief and of a Certificate of Appealability (COA). Appendix C. On June 1, 2020, the District Court denied relief, also refusing to grant a COA. Appendix B.

Thereafter, 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. Subsequent to this Court's decision in *Ramos*, Petitioner filed a successive post-conviction petition in

the Oregon state courts to exhaust her *Ramos* claim. That state-court petition remains pending.

Petitioner also filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit to request a COA. On February 10, 2021, the Ninth Circuit denied Petitioner's request for a COA. Appendix A.

REASONS FOR GRANTING THE WRIT

Petitioner's conviction is the product of constitutional error. 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. 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, applies retroactively to federal habeas corpus cases such as this one.

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.

At trial, the State asked the jury to consider evidence that Petitioner mistakenly turned left from the intersection into the freeway off-ramp (short of the intended on-ramp) as evidence of the degree of her impairment, which, in turn, the State asked the jury to find was evidence of her extreme recklessness (extreme indifference to the value of human life), which was the key disputed issue at trial.

To rebut the inference that Petitioner made the wrong turn because of her alcohol impairment, the defense sought to introduce evidence that the intersection was confusing and poorly signed, which increased the likelihood of wrong turns, as well as evidence that, in fact, others had made the same driving error as had Petitioner. The trial court allowed introduction of the former, but not the latter. Both were critical to the defense's ability to present a complete defense, and, specifically, to rebut the State's case for the heightened standard of recklessness. The practical evidence regarding the experience of other drivers would have bolstered the expert testimony that the intersection was theoretically problematic. The fact that other drivers had had difficulty navigating the intersection made it more likely that the intersection was actually problematic, and that these problems—and not her impairment or her reckless indifference—contributed to or caused the driving error. This evidence, therefore, bore on a fact of consequence, and, as such, was relevant and admissible. Petitioner's claim satisfies the standard for issuance of a COA and it deserves encouragement to proceed further.

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

Petitioner's Oregon conviction by a jury that was instructed it did not have to unanimously agree was a violation of her rights to due process, to an unbiased jury, and to have the State prove the charges beyond a reasonable 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. *E.g.*, *State v. Ibarra*, 293 Or. App. 268, 427 P.3d. 1127 (Or. Ap. 2018) (challenge to Oregon's use of non-unanimous juries and reliance on *Apodaca/Johnson* summarily denied as not presenting a substantial question of law).

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

[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).

provisions apply identically against the States and the federal government.[3] The 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.

Significantly, 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

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[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.'").

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 balked at the prospect of arguing that *Apodaca* supplied a binding precedent in litigating the *Ramos* case.

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. 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."); *Bousl*ey *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 will present a *Ramos* problem. As a practical matter, an even smaller fraction will be retried. 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 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 *Edwards*.

DATED this 3rd day of March, 2021.

s/ Nell Brown
Nell Brown
Attorney for Petitioner