Ramos v. Louisiana and its implications for ITWG members

Introduction

Evangelisto Ramos was sentenced in Louisiana to life in prison for stabbing Trinece Fedison to death. He was convicted by a jury in a 10 to 2 verdict. Louisiana at that time, like Oregon, permitted non-unanimous jury verdicts. He appealed his conviction to the United States Supreme Court arguing that the Sixth Amendment's right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense.

Against this backdrop are two United States Supreme Court decisions issued in 1972: *Apodaca v. Oregon* and *Johnson v. Louisiana*. In both of those cases, a majority of the Supreme Court upheld the practice of using non-unanimous jury verdicts in serious criminal cases. The deciding factor in both cases was Justice Powell's singular opinion that while the Sixth Amendment requires a unanimous verdict in serious cases, the Sixth Amendment does not apply to states through the Fourteenth Amendment.

Ultimately, in a fractured 6 to 3 decision, the *Ramos* Supreme Court overturned *Apodaca* and *Johnson,* holding that the Fourteenth Amendment requires states to guarantee unanimous jury verdicts in serious criminal cases. This case is important not just for the immediate impact on serious criminal case convictions and trials in Oregon and Louisiana, but also because of the splintered discussion involving when longstanding precedent should be overturned. It may also have significant implications for jury trials in tribal courts involving serious crimes and leaves open the question of retro-activity and the potential impact on future federal sentencing and federal habitual offender cases.

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Case Analysis

Gorsuch's (mostly) Majority Opinion

Ramos begins by noting Louisiana's non-unanimous verdict requirement was part of a state constitutional convention that proposed to "establish the supremacy of the white race" by allowing a 10 to 2 verdict they could effectively nullify African American jurors. Similarly, the *Ramos* court notes that Oregon's 1930 non-unanimous jury law traces to the KKK and their intent to dilute the influence of racial minorities on juries.

Writing for the majority, Justice Gorsuch frames the issue primarily as to whether *Apodaca* really amounts to any precedent at all given that there is no serious question that the Sixth Amendment itself requires unanimity. He notes that in *Apodaca* four justices held the Sixth and Fourteenth Amendment require unanimity as was long held under federal analysis of the Sixth Amendment. He also notes that four justices in *Apodaca* held unanimity isn't required, not because of Sixth Amendment analysis, but because unanimity did not preserve an important function in contemporary society – *e.g.* the costs of unanimity did not outweigh the benefits of non-unanimous jury verdicts. Finally, Gorsuch notes Powell's deciding opinion, which turned on holding the Sixth Amendment did not apply in full to states via the Fourteenth Amendment even though the Sixth Amendment requires unanimity. He notes Powell's is a "dual track" view that a single right can mean different things depending on if invoked against the federal or state government, something none of the current justices agree with and was already rejected by a majority of the Supreme Court at the time *Apodaca* was decided.[1] It appears that

[1] The dual track discussion is worth reviewing with an eye toward the differences between the Indian Civil Rights Act and the United States Constitution even though the language used may be identical.

five Justices agree with this analysis of *Apodaca* as lacking any precedential value at all (Gorsuch, Ginsburg, Bryer, Sotomayor, and Kavanaugh).

Given this "*Apodaca* doesn't really have any precedential value" approach, Gorsuch concludes that the only rationale for continuing to allow non-unanimous juries is either that the Sixth Amendment allows for non-unanimity (but it does not) or the Sixth Amendment applies with less force to the states under the Fourteenth Amendment (which no one on the current Supreme Court agrees with). In the face of this dilemma, Louisiana argued that the focus should be on the fact that the Supreme Court has never ruled against non-unanimous juries under the Sixth Amendment and should hold non-unanimous juries are permissible in federal and state courts alike. (Kavanaugh did not join in this part of the opinion).

Gorsuch goes on to note that Louisiana's approach is problematic because the Supreme Court has held 13 times over the past 120 years that the Sixth Amendment requires unanimity and 5 of the Justices in *Apodaca* itself agreed with this view of the Sixth Amendment. (Kavanaugh again joins the other 4 justices in this part of the decision).[2] He then moves on to analyze the dissent's position that stare decisis requires adherence to *Apodaca*, which is really the strongest argument for upholding non-unanimous jury verdicts in state courts. (Sotomayor does not join in this part of the decision). Gorsuch again argues that *Apodaca* has no precedential value at all because the deciding opinion was based on a "dual track" analysis of the Sixth and Fourteenth

[2] Gorsuch notes that as early as 1898 the Court held defendants have a constitutional right to demand a unanimous jury verdict. *See Ramos* at 1396. He goes on to note that a few decades later the Court held the Sixth Amendment affords a defendant a jury trial right as understood and applied at common law, including that the verdict be unanimous. *Id.* It doesn't appear that any Justice disagrees that a right to a jury trial includes a right that it be a unanimous decision.

Amendment, which was rejected by a majority of the Supreme Court before *Apodaca* was decided. Finally, Gorsuch notes that even if *Apodaca* amounts to a precedent, everyone agrees it is wrongly decided and stare decisis does not require "ignoring what everyone knows to be true."

Gorsuch concludes his analysis by noting that overruling *Apodaca* would not have a major impact as issues involving prior convictions based on non-unanimous juries would only arise in two states. (Sotomayor rejoins this part of the decision). Furthermore, he notes, in regard to concerns about challenges to prior convictions, new rules of criminal procedure do not usually apply on collateral review. (Kavanaugh does not join this part of the decision).

Sotomayor Concurrence

Justice Sotomayor wrote a concurring opinion noting that overruling *Apodaca* is particularly compelled in this case and that the racist origins of the non-unanimity rules in Louisiana and Oregon uniquely matter in the analysis.

Kavanaugh Concurrence

Justice Kavanaugh's concurrence focuses on application of stare decisis. He notes that courts usually leave overruling precedent to the legislative process. However, this approach is not as rigid in the *Ramos* context as such a fix could only occur by constitutional amendment. Consequently, deciding correctly in the constitutional context

is particularly important but that “strong grounds” are required. He goes on to lay out three broad factors in determining “strong grounds”: 1. the prior decision is “grievously wrong”; 2. significant real-world impacts need to be considered; and 3. it shouldn’t “unduly upset” reliance interests. Kavanaugh finds the prior decision to be clearly wrong, that there are real world negative impacts from it - highlighted by the racist origins, and he doesn’t think reliance interests would be unduly upset as it would only apply to Louisiana and Oregon.

Thomas’ Concurrence

Thomas, as is his penchant, wrote separately to note his grounds for when stare decisis does and does not apply (“the Court’s typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law”). He points out why stare decisis shouldn’t apply here *(Apodaca* is wrong)*,* and that he would hold that the unanimity jury requirement of the Sixth Amendment applies to states through the Fourteenth Amendment’s “privileges or immunities” clause rather than the “due process” clause.

Alito’s Dissent

Alito writes for the dissent and is joined by Roberts and Kagan. The focus of the dissent is classic stare decisis analysis and a focus on their belief that there is enormous detrimental reliance by the states of Louisiana and Oregon on *Apodoca.* He notes the

potential “crushing burden” on those state’s courts and criminal justice system. As for the racist underpinnings of the origin of non-unanimous juries, he points out that both states had subsequent conventions in which the rule was adopted for legitimate reasons (such as obviating the need for retrial when there is a closely hung jury).

Of particular note for the ITWG is the dissent’s discussion of potential future impacts. Alito notes that the *Ramos* decision calls into question the *Williams v. Florida*, 399 U.S. 78 (1970), decision. That case did not constitutionalize the common law’s clear twelve-person jury requirement. He notes that there are five states that do not require twelve-person juries in criminal cases: Arizona, Connecticut, Florida, Indiana, and Utah. In Arizona an eight-person jury is required to convict for many felonies. In Connecticut six person juries are permitted in all but death penalty cases. Florida is the same. Indiana allows six person juries in felonies below level five (6mo to 2.5 years). Utah has eight person juries in non-capital cases.

Implications for ITWG Tribes

Unanimous Juries

The most immediate and concerning potential impact from the *Ramos* decision is that tribes probably cannot allow for non-unanimous jury decisions in serious criminal cases. “Serious” criminal cases likely include any felony case. Thomas opted to use the term 'felony' instead of 'serious offense'. But that begs the question as to what is a “felony”. Tribes are limited to a maximum sentence of three years in jail per offense, unlike states and unlike the common law. States vary in how they define misdemeanor and

felony cases. Some misdemeanors go beyond a year, but not likely up to three. And most states' lowest level felonies have a maximum sentence of 5 years instead of three. Perhaps it can be argued that the Tribal Law and Order Act of 2010's expansion of sentencing authority to a maximum of three years operates more like a "super misdemeanor" than a low-level felony, although this may be difficult to argue in light of the legislative history around TLOA ,which specifically referenced the need for tribal courts to address "violent offenses" including homicide and rape.

An analysis of what constitutes a "serious offense" at common law under the Sixth Amendment should probably also involve an analysis of the "petty offense" doctrine. That doctrine looks at when an offense mandates a jury trial versus a bench trial under the federal constitution. And that analysis involves an analysis of what was considered a "petty offense" at common law. *See Creatures of the Common Law: The Petty Offense Doctrines and 18 U.S.C. 19*, 59 Mont. L. Rev. 343 (1998). Essentially, under that doctrine a defendant is not entitled to a jury trial under Article 3 of the United States Constitution or the Sixth Amendment if they are charged with a petty offense (as opposed to a "serious" offense which mandates a jury trial). Federal statute defines a petty offense as a Class B or Class C misdemeanor, for which the maximum penalty is sixth months. 18 U.S.C. 19. But that doesn't necessarily mean anything over six months is a "serious" offense at common law. However, in *Duncan v. Louisiana*, 391 U.S. 145 (1968) the US Supreme Court wrote, "It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense." *Id.* at 162. The court went on to hold that the defendant in that case was entitled to a jury trial.

Consequently, tribes may want to take a closer look at their jury verdict requirements, particularly if they have been modeled after states like Oregon or Louisiana, and consider changing the requirement to unanimity in cases involving more than six months in jail if it isn't already required.

Less Than Twelve Person Juries

The other issue of significant concern is the dissent's implication that the *Ramos* majority opinion undermines the practice of using less than 12 persons on juries in serious criminal cases and invites future challenges to the *Williams* decision. The driving force behind *Ramos* was the fact that everyone basically agreed that the Sixth Amendment right to a jury trial carried with it the common law requirement that a verdict be unanimous. Similarly, it appears that at common law the right to a jury trial also carried with it the right to a twelve-person jury in serious cases. Perhaps the number of persons on a jury is not quite as clearly required as the unanimity of the jurors under the common law right to a jury trial. And also, unlike states, tribes are subject to the Indian Civil Rights Act, which by its terms only guarantees a right "to a trial by jury of not less than six persons". 25 U.S.C. 1302(a)(10). A tribe that guarantees at least six person juries is in compliance with the Indian Civil Rights Act, and Congress did not alter the six-person jury requirement when expanding sentencing authority in the Tribal Law and Order Act of 2010.

Collateral Implications

This case also has potential impacts for tribes in the collateral context. Will a prior conviction for, say, felony domestic violence in Oregon or Louisiana where a unanimous jury verdict was not required be permitted as a prior conviction for purposes of the federal habitual offender statute? Will it count only if the prosecution proves the conviction was obtained by a unanimous verdict even though unanimity was not required for conviction? Will a prior tribal court conviction for domestic violence that did not require a unanimous jury verdict be considered a prior conviction for purposes of the habitual offender statute? Will prior convictions in violation of the unanimity requirement be counted when calculating a defendant's sentencing score under the federal sentencing guidelines? Gorsuch's dicta suggest he would not extend the ruling to collateral consequences and attacks, but Kavanaugh did not join that part of the decision. Will tribal court judges count felony convictions in Oregon or Louisiana in violation of *Ramos* on tribal cases, either for calculating mandatory minimum sentences or as a factor to consider when rendering a sentence in non-mandatory sentencing situations? These are all things to keep in mind and consider.

Jurisprudence of Stare Decisis

Finally, the case presents an interesting insight into the current Supreme Court's stare decisis jurisprudence, which is of importance to everyone who handles Indian law cases. In the Indian law context, the Supreme Court already seems to often make things up as they go, but it is also a context in which prior decisions are often simply wrong (at

least to many of those who regularly practice Indian law) and racist. Gorsuch seems to invite a new jurisprudence that would allow for analyzing if a prior decision has any precedential value to begin with – in the context of cases where everyone agrees it is wrong and the prior deciding opinion is one that is not only viewed as clearly wrong now but also was not supported by prior caselaw at the time the case was originally decided. (*Kagama*? *Rogers*? etc.) The racist underpinning of prior wrongly decided cases also seemed to be a significant factor weighing in favor of overturning prior precedent in Gorsuch's, Sotomayor's, and Kavanaugh's analysis. Perhaps tribes can use this to their advantage in future cases attempting to overrule prior Indian law cases.