App. 1

IN THE SUPREME COURT OF PUERTO RICO

People of Puerto Rico Respondent v. Tomás Torres Rivera Petitioner	**No.** CC-2019-0916

Justice Rodríguez Rodríguez delivered the Opinion of the Court.

San Juan, Puerto Rico, May 8, 2020.

> The principle has been followed equally in reverse: if a state cannot do it constitutionally, neither can Puerto Rico.[1]

On this occasion, it is incumbent upon us to examine the reach of the United States Supreme Court decision in *Ramos v. Louisiana*, 590 US ___ (2020), No. 18-5924 (slip op.), in our criminal system. Specifically, we must decide whether, in view of this opinion, a defendant convicted in our jurisdiction based on a non-unanimous verdict violates the inherent procedural safeguards of the fundamental right to trial by jury protected by the Sixth Amendment of the Constitution of the United States.

---

[1] David Helfeld, *How Much of* the *United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 449, 452-75 (1985).

I.

Tomás Torres Rivera was charged with committing several criminal offenses: lewd acts with a minor, Section 133[ ] of the Puerto Rico Penal Code of 2012, 33 LPRA § 5194[(a)] (3 counts); attempted lewd acts, Sections 35, 36, and 133 of the Puerto Rico Penal Code of 2012, 33 LPRA §§ 5048, 5049, and 5149 (1 count), and child abuse, Section 58 of Law No. 246 of 2011, known as the Child Safety, Well-being, and Protection Act, as amended, 8 LPRA § 117[4] (7 counts). After the trial, a jury found him guilty on all charges. In eight of the eleven counts, the jury rendered a unanimous guilty verdict. Nevertheless, the jury rendered a guilty verdict by majority vote on the three counts of lewd acts with a minor under Section 133[ ] of the Puerto Rico Penal Code.[2]

Dissatisfied, Torres Rivera appealed the decision to the Court of Appeals and made three assignments of error. First, petitioner averred that the Court of First Instance erred in denying his petition to instruct the jury on the requirement that their verdict should be unanimous. He contended that, in accordance with the Sixth Amendment of the United States Constitution, the Territory Clause contained in the federal constitution, and the decision reached by the United States Supreme Court in *Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863 (2016), unanimity was

---

[2] For two of those counts, a guilty verdict was rendered with a vote of 9-3, while a vote of 11-1 was reached for the remaining count. Thus, found guilty on all charges, petitioner was sentenced to a total of twenty-two years and six months in prison.

an indispensable requirement for a conviction. As to the second assignment of error, Torres Rivera posited that the first instance court had erred in its construction of sections of the Penal Code related to aggravating factors and the concurrence of crimes. Lastly, Torres Rivera pointed out that the prosecution did not prove beyond a reasonable doubt that he committed the offenses charged and, thus, the conviction should be vacated.[3]

On October 7, 2019, the Court of Appeals issued a judgment affirming the judgment entered at the trial court which found petitioner guilty on all counts. Regarding error assigned pertaining to the application of aggravating factors, the intermediate appellate court remanded the case to the Court of First Instance to reexamine the penalties imposed. The Court of Appeals supported its decision to affirm the guilty verdicts rendered by a jury's majority vote by citing our ruling in *Pueblo v. Casellas Toro*, 197 DPR 1003 [97 PR Offic. Trans. 52] (2017) to the effect that the juror unanimity requirement was not a fundamental constitutional right applicable to Puerto Rico. *See*, Judgment of the Court of Appeals of October 7, 2019, at 37, 51.

---

[3] While the case was pending at the appellate level, Torres Rivera filed a petition for a bond on appeal with the Court of First Instance. After the hearing, the trial court denied the petition. Dissatisfied, petitioner filed a petition for appeal with the Court of Appeals, which was issued as a writ of certiorari and consolidated with the petition for appeal to vacate the conviction. The petition for writ of certiorari was subsequently denied.

Thus, on October 22, 2019, Torres Rivera moved the Court of Appeals to reconsider its judgment and stay the proceedings until the United States Supreme Court issued its opinion in *Ramos v. Louisiana*. Petitioner maintained that should the United States Supreme Court rule that the juror unanimity requirement is applicable to the states, he would prevail in his first assignment of error. Though a resolution notified on November 12, 2019, the intermediate appellate court denied his petition to reconsider and stay the proceedings.

Still aggrieved, on December 11, 2019, Torres Rivera filed a petition for a writ of certiorari with this Court and a Motion to Stay Proceedings. In the petition for certiorari, he contended – among other matters[4] –

---

[4] In his petition for certiorari, Torres Rivera made three additional assignments of error related to the standard of proof and the appropriateness of the mitigating factors in his specific case. Specifically, the errors assigned were the following:

"FIRST ERROR: The Court of Appeals, Carolina-Guayama Judicial Region, Special Division, erred in denying the Motion to Stay Proceedings until the Supreme Court of the United States renders its opinion in the case of *Ramos v. Louisiana*, as regards to whether the Fourteenth Amendment of the Constitution of the United States incorporates to the States the jury unanimity requirement for convictions, since this is the same question raised as an error on appeal in this case and, should the federal Supreme Court find in favor of the defendant, Torres Rivera would prevail regarding the argument that a nonunanimous guilty verdict is unconstitutional.

"SECOND ERROR: The Court of Appeals, Carolina-Guayama Judicial Region, Special Division, erred in affirming the decision of the Court of First Instance to not consider the mitigating factors when imposing the penalty.

that the Court of Appeals had erred in not staying the proceedings and affirming the conviction based on a nonunanimous guilty verdict rendered by a jury. In so doing, Torres Rivera restated the arguments posited with the Court of Appeals and maintained that it would be proper to stay the proceedings in his case until the United States Supreme Court ruled over the constitutionality of nonunanimous guilty verdicts rendered by juries in criminal cases. On January 24, 2020, this Court issued a resolution denying the issuance of the writ for certiorari and the motion to stay proceedings, notice of which was served on January 29. Torres Rivera timely filed a motion for reconsideration which was also denied through resolution and notified on March 3, 2020.

While pending a second motion for reconsideration filed on March 6, 2020, Torres Rivera filed on April 21, 2020 a paper captioned Urgent Motion to Take Judicial Notice of *Ramos v. Louisiana* and to Issue a Remedy in Accordance Therewith. In this motion, Rivera Torres stated that the decision of the United States Supreme Court on April 20, 2020 in the case *Ramos v. Louisiana*,

---

"THIRD ERROR: The Court of Appeals, Carolina-Guayama Judicial Region, Special Division, erred in affirming the judgment entered by the Court of First Instance without weighing the impact of the prosecution's slim and bare evidence and stereotyped testimony on the constitutional standard requiring the State to prove beyond a reasonable doubt all the elements of the offense.

"FOURTH ERROR: The Court of Appeals erred in ruling that the prosecution submitted evidence to prove that lewd acts tend to awake, excite or satisfy the sexual passion or desire of the accused." Petition for certiorari, at 4.

590 US ___ (2020), No. 18-5924 (slip. op.), disposed of his case and, pursuant thereto, it lied to vacate the judgment entered against him. Having received this Urgent Motion as a motion for order in aid of jurisdiction, on April 22, 2020 we ordered the Solicitor General to appear before us and show cause why, in light of the decision in *Ramos v. Louisiana*, we should not vacate the judgment entered by the trial court in this case.

Observing our order, the Solicitor General filed on May 1, 2020 a Motion in Compliance with Order indicating, at the outset, that "the Office of the Solicitor General, on behalf of the People of Puerto Rico, in accordance with the applicable caselaw . . . acknowledges that the decision in *Ramos v. Louisiana* generally applies to Puerto Rico." In addition, the Solicitor General recognizes to begin with that he "agrees that in this case a decision may be rendered only to the effect of ordering a new trial exclusively for the 3 counts for which the jury rendered a nonunanimous verdict, in accordance with the new legal framework." *See*, Motion in Compliance with Order, at 2. The Solicitor General, however, clarifies that this concession "is utterly bound by the procedural events of this case, which is pending direct review before this Court, with 3 nonunanimous guilty verdicts rendered by the jury, and a defendant who preserved the issue." *Id.*

With the benefit of the parties' briefs and considering the procedural stage of the controversy at bar, this Court grants the Second Motion for Reconsideration filed by the petitioner and issues the writ of certiorari only in regard to the first assignment of error, so

as to pass on the effects of the United States Supreme Court decision in *Ramos v. Louisiana* in our legal system.[5]

II.

The Sixth Amendment of the Constitution of the United States defines the rights recognized to the accused in federal criminal proceedings by establishing that

> 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.

[US Const. amend. VI, LPRA vol. 1.]

In time, the different rights listed in this amendment have been recognized as fundamental rights for an impartial criminal trial and have been expressly incorporated to the States through the Fourteenth

---

[5] On May 4, 2020, the United States Supreme Court issued a writ of certiorari in the case of *Edwards v. Vannoy*, No. 19-5807 (5th Cir.), to resolve the issue regarding the retroactive effect of *Ramos v. Louisiana*, 590 US ___ (2020).

Amendment.[6] Consequently, the fundamental rights of the accused have been recognized at the state level, namely: the right to a speedy trial,[7] the right to a public trial,[8] the right to present witnesses in defendant's favor,[9] the right to confront witnesses testifying against the defendant,[10] the right to counsel,[11] and,

---

[6] See, *Duncan v. Louisiana*, 391 US 145, 148-49 (1968) ("The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' whether it is 'a basic in our system of jurisprudence,' and whether it is a 'fundamental right, essential to a fair trial.'") [Citations omitted.] See also, *Gosjean v. American Press, Co.*, 297 US 233, 243-244 (1936).

[7] *Klopfer v. North Carolina*, 386 US 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment").

[8] *In re Oliver*, 333 US 257, 278 (1948) ("It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal.").

[9] *Washington v. Texas*, 388 US 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

[10] *Pointer v. Texas*, 380 US 400, 403-04 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

[11] *Gideon v. Wainwright*, 372 US 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

particularly relevant to the question at hand, the right to a trial by jury.[12]

In *Duncan v. Louisiana*, 391 US 145 (1968), the United States Supreme Court ruled that the right to a trial by jury in criminal proceedings is inherent to the due process of law pervading throughout the American constitutional scheme. See, *Duncan*, 391 US ___, at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which-were they be tried in a federal court – would come within the Sixth Amendment's guarantee.").

Subsequent decisions defining the outlines of this fundamental right to a jury trial rejected to impose on the states, through the Fourteenth Amendment, the requirement for unanimous verdicts in order to convict. See, *Apodaca v. Oregon*, 406 US 404 (1972); *Johnson v. Louisiana*, 406 US 356, 360 (1972); *Williams v. Florida*, 399 US 78 (1970). In this way, it is clear that the United States Supreme Court opted not to require the uniform incorporation against the states of the fundamental right to a trial by jury as enshrined in the Sixth Amendment.[13]

---

[12] *Duncan*, 391 US, at 157-58 ("Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.").

[13] However, in *Malloy v. Hogan*, 378 US 1, 10-11 (1964), the United States Supreme Court, in an opinion delivered by Justice

Until very recently, thus, United States Supreme Court caselaw upheld the validity of state convictions by nonunanimous jury verdicts.[14] In accordance with this pattern, in *Pueblo v. Casellas Toro*, 197 DPR 1003, 1005 [97 PR Offic. Trans. 52, ___] (2017), this Court held that the unanimity requirement for guilty verdicts was not a fundamental right recognized by the United States Supreme Court and, therefore, was not applicable to Puerto Rico. In this sense, this Court noted that the incorporation of the right to a trial by jury to the states by virtue of *Duncan* did not entail "extensive changes in a state's criminal procedure as to juries of less than twelve jurors and the unanimity requirement for a conviction." *Id.* at 1014 [97 PR Offic. Trans. 52, at ___].

Brennan, suggested the importance of the uniform interpretation of the substantive content of the rights protected by the Bills of Rights, as these rights have been incorporated to the states through the Fourteenth Amendment. ("The Court thus has rejected 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.' ").

[14] After the decision in *Apodaca* and until recently, the United States Supreme Court repeatedly denied granting petitions for writ of certiorari seeking to review nonunanimous verdicts at the state level and demanding the recognition of the unanimity requirement as an essential element of the right to a trial by jury. See: *Bowen v. Oregon*, O.T. 2009, No. 08-1117, *cert. denied*, 558 US 815, S.Ct. 52, 175 L.Ed. 2d 21 (2009); *Lee v. Louisiana*, O.T. 2008, No. 07-1523, *cert. denied*, 555 US 823, 129 S.Ct. 143, 172 L.Ed.2d 39 (2008); *Logan v. Florida*, O.T. 2007, No. 07-7264, *cert. denied*, 552 US 1189, 128 S.Ct. 1222, 170 L.Ed.2d 76 (2008).

Hence, in *Pueblo v. Casellas Toro* this Court concluded that a guilty verdict reached by the consensus of, at least, nine out of twelve jurors was valid and satisfied the requirements of the Sixth Amendment right to a trial by jury. *Casellas Toro*, 197 DPR, at 1019 [97 PR Offic. Trans. 52, at ___]. Our decision was made pursuant to the rule of law in force at that moment, Thus, we upheld the text of Section 11, Clause 2, of our Bills of Rights, which allows guilty verdicts by a majority vote. ("In all prosecutions for a felony[,] the accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine"). PR Const. art. II, § 11, LPRA vol. 1.

Lastly, as grounds for our decision, this Court stressed that "in Puerto Rico only the fundamental rights of the United States Constitution recognized by its Supreme Court apply." *Casellas Toro*, 197 DPR, at 1019 [97 PR Offic. Trans. 52, at ___]. Given that the size of a jury or the unanimity requirement were not explicitly recognized by the federal Supreme Court as essential elements of the fundamental right to a trial by jury, we held then that the unanimity requirement provided in the Sixth Amendment of the United States Constitution did not apply to Puerto Rico.

III.

The prevailing standard in our legal framework and in the United States regarding the substance of

the right to a trial by jury changed significantly with the United States Supreme Court decision in *Ramos v. Louisiana*, 590 US ___ (2020) No. 18-5924 (slip op.) issued on April 20, 2020. In that case, the federal Supreme Court concluded that the fundamental right to a trial by jury under the Sixth Amendment, as incorporated throughout the states by way of the Fourteenth Amendment, does not admit nonunanimous verdicts in criminal cases tried in state courts. See, *Ramos v. Louisiana*, at 7. ("[I]f Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.")

To summarize, in *Ramos v. Louisiana*, a defendant questioned a judgment issued in the state of Louisiana through which he was found guilty of committing a felony by way of a guilty verdict of a majority of 10 out of 12 jurors. As a result of this verdict, he was sentenced to life in prison without the possibility of parole. The argument posed before the United States Supreme Court was that unanimity was an essential requirement of the right to a trial by jury in criminal matters, and that any provision of state law allowing nonunanimous verdicts for felony convictions was unconstitutional.

The United States Supreme Court agreed with the defendant and vacated the judgment against him. In so doing, it concluded that the right to a trial by jury enshrined in the Sixth Amendment requires a unanimous verdict in criminal proceedings where the defendant is accused of a felony. The Court's reasoning in

Ramos v. Louisiana dispels all doubt with respect to how the requirement of a unanimous verdict constitutes a fundamental procedural protection for all those accused of a felony. As a result, a unanimous jury represents an immanent quality of the fundamental right to a trial by jury under the Sixth Amendment.

In short, the analysis of the highest court in the United States scrutinized the phrase "impartial jury" included in the Sixth Amendment to construe the substantive content and procedural requirements of a criminal jury trial. After examining the history of this concept and its inclusion in the Constitution, the Court concluded that an impartial trial inexorably requires a unanimous verdict of the jury. See, *Ramos*, at 4. ("The text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it some meaning about the content and requirements of a jury trial. One of these requirements was unanimity. Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.")

IV.

Insofar as the right to a trial by jury in a felony criminal proceeding constitutes a fundamental right,[15]

[15] See, *Duncan;* Section II of this Opinion.

the United States Supreme Court decision in *Ramos v. Louisiana* serves to delimit the content and the scope of this right. In that sense, this federal ruling institutes the unanimity of the jury as a substantive requisite for obtaining a criminal conviction. Thus, unanimity is recognized as a natural corollary to the impartiality demanded by the Sixth Amendment.

Prior to this decision, the precise contours of the right to a trial by jury had not been specifically defined. Moreover, an analysis of the caselaw concerning the procedural guarantees contained in the Sixth Amendment reveals that it was not incorporated until the 1960s, when the Warren Court sought to extend to state courts the same protections that apply in federal court.[16] It was not until 1968 in *Duncan* that the United States Supreme Court recognized the right to a trial by jury in felony cases as a fundamental right applicable to the states by virtue of the Fourteenth Amendment.

In the case of Puerto Rico, the judicial benchmark for the right to a trial by jury under the Sixth Amendment had been decided prior to its recognition as a fundamental right in *Duncan*. In *Balzac v. Porto Rico*, 258 US 298 (1922), the United States Supreme Court concluded that some provisions of the United States Constitution did not apply to Puerto Rico as an unincorporated territory. *Id.* at 304-306. According to the

[16] For a compendium of the development of the Sixth Amendment, its complexities, and the incorporation of its procedural guarantees to the states, *see*, Sanjay Chhablani, *Disentangling* the *Sixth Amendment*, 11 U. Pa. J. Coast. L. 487 (2009).

Court's reasoning, the right to a trial by jury was not fundamental in nature and thus did not extend to all the territories under the jurisdiction of the United States. *Id.* at 309. Specifically, the federal court resorted to an earlier decision to conclude the following:

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established.

Id. (citing *Dorr v. United States*, 195 US 138, 148 (1904)).

These statements, however, served to reaffirm the controversial theory of territorial incorporation initially articulated by Justice White in his Concurring Opinion in *Downes v. Bidwell*, 182 US 244 (1901). According to this theory, only the rights recognized as fundamental would extend to unincorporated territories of the United States. *See*, [David] Helfeld, [*How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 449], 458][(1985)].

Almost a century after the ruling of the United States Supreme Court in *Balzac*, it is evident that the passage of time has modified the law of the land, to the point where what was decided therein with respect to

the right to a trial by jury has become dead letter. By expressly recognizing in *Duncan* that right as fundamental, it was automatically made extensive to Puerto Rico. This occurred at the margins of the inextricable historical interweaving of the theory of territorial incorporation outlined in *Balzac.* After all, regardless of the legal doctrine cited, the protections and guarantees that emanate from the rights designated as fundamental by the United States Supreme Court extend to Puerto Rico. See, *Casellas Toro*, 197 DPR, at 1019 [97 PR Offic. Trans. 52, at ___].

Regarding the application of fundamental rights to Puerto Rico, the United States Supreme Court has accepted that "[i]t is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico." *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 US 572, 600 (1976). See also, *Torres v. Com. of Puerto Rico*, 442 US 465, 471 (1979). ("As in *Examining Board v. Flores de Otero* . . . we have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment.")

The extension to Puerto Rico of the right to trial by jury as a fundamental right was tacitly recognized by this Court in *Pueblo v. Laureano*, 115 DPR 447 [15 PR Offic. Trans. 589](1984), when it held that the governing standard when determining whether a person had a right to a trial by jury in Puerto Rico must be the

severity of the maximum sentence that could be imposed for the offense of which the individual stood accused. In so doing, the Court applied the ruling of the United States Supreme Court in *Baldwin v. New York*, 399 US 66 (1970), to the effect that a jury trial would extend to crimes punishable [by imprisonment] for a term greater than six months, regardless of the classification or seriousness of the offense.

Subsequently, in *Pueblo v. Santana Velez*, 177 DPR 61 [77 PR Offic. Trans. 5] (2009), this Court, without ambages, effectuated the theory that "[t]he right to a trial by jury under the Sixth Amendment is a fundamental right that applies to the states through the due process clause of the Fourteenth Amendment and, therefore, to Puerto Rico." *Id.* at 65 [77 PR Offic. Trans. 5, at ___]. That conclusion was the basis for the analysis outlined in *Casellas Toro*, which underscored that "through the process of selective incorporation, the right to a trial by jury in criminal cases was acknowledged as fundamental" and that "in Puerto Rico, only those fundamental rights of the United States Constitution recognized by the United States Supreme Court are applicable." *Casellas Toro*, 197 DPR, at 1014, 1019. [97 PR Offic. Trans. 52, at ___]. Thus, it cannot be denied that the right to a trial by jury applies fully to Puerto Rico.

V.

In the case at hand, Torres Rivera requested that we vacate the judgments entered against him for three

counts of lewd acts on grounds that the decision of the United States Supreme Court applies to Puerto Rico and, consequently, requires the unanimity of verdicts returned in our jurisdiction. As we have indicated, the Solicitor General did not oppose this contention and acknowledged that, in Torres Rivera's specific case, it is proper for the Court to vacate the judgments issued for three of the eleven offenses of which he was convicted by way of nonunanimous verdicts, and order a new trial.[17] *See*, Motion in Compliance with Order, at

---

[17] The members of the Constituent Assembly discussed the very situation considered herein. The text of Section 11 admits unanimous verdicts, although it grants the legislature flexibility to establish the number of votes necessary to obtain a conviction that would satisfy the demands of Section 11. It is thus recorded in the Journal of the Constitutional Assembly when acknowledging the possibility that using the phrase "no less than nine" would allow for different variations through legislation. See, *Diario de Sesiones de la Canvancion Constituyente de Puerto Rico* [Journal of the Constitutional Assembly of Puerto Rico], at 1939-1941 (digital version). Similarly, the Report of the Commission for the Bill of Rights explains that "the formula proposed would allow the [Legislative] Assembly to increase the margin of the majority up to unanimity, if it were to deem it convenient in the future." *Informe de la Comision de la Carta de Derechos* [Report of the Commission for the Bill of Rights], at 3184 (digital version). *See also*, 3 Jose Trias Monge, *Historia Constitucional de Puerto Rico*, Rio Piedras, Ed. UPR, 1982, at 194-195.

The legislative authority to require that every conviction be decided by all twelve jurors has always been included in the constitutional constraint of "no less than nine." Although the Legislative Assembly has never increased the number of votes required to obtain a conviction, as the Constitutional Assembly foresaw, the decision in *Ramos v. Louisiana* and our reading of Section 11 as ordered by *Ramos* would require the legislature to amend the Rules of Criminal Procedure to clearly and unambiguously order the unanimity requirement in guilty verdicts in accordance with

24-25 ("the annulment of the verdicts in cases GIS2015G0002, GIS2015G003 y GIS2014G0011 **and a new trial to that effect** are in order".) (Emphasis added.)

Nevertheless, the Solicitor General advises that his position is in response to the fact that this case "is pending direct review before this Court." Motion in Compliance with Order, at 2.[18] At the same time, he

---

this legal precedent. Hence, the practical effect of the ruling in *Ramos v. Louisiana is* to suppress the flexibility that the text of the Constitution afforded the legislature to increase the minimum of nine by way of statute.

[18] Regarding this, we highlight that the ruling in *Ramos v. Louisiana* specifically refers to the applicability of the standard established to cases that are pending review and are therefore not final and unappealable. Thus, in addressing the concerns of the dissenting judges as to the effects of the decision, the United States Supreme Court explains that "[t]he first concerns the fact Louisiana and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal." *Ramos v. Louisiana*, at 22. These statements are in line with previous rulings of this Court concerning the retroactive application of caselaw standards to cases pending before our courts. Specifically, in *Pueblo v. Torres Irizarry*, 199 DPR 11 [99 PR Offic. Trans. 3] (2017), we affirmed our decision in *Pueblo v. Gonzalez Cardona*, 153 DPR 765 [53 PR Offic. Trans. 51] (2001), regarding how a standard adopted through caselaw providing a constitutional defense to a defendant would apply retroactively "so long as at the time this standard is adopted the judgment from which relief is sought is not final and unappealable." *Torres Irizarry*, 199 DPR, at 27 [99 PR Offic. Trans. 3, at ___]. See also, *Pueblo v. Thompson Faberlle*, 180 DPR 497 [80 PR Offic. Trans. 22] (2010) (citing *Gonzalez Cardona*, 153 DPR, at 770-771 [53 PR Offic. Trans. 51, at ___] (2001)). We reiterate, however, that the issue of retroactivity is not under the consideration of this Court and, as we have indicated, the retroactive application of the unanimity requirement is currently before the United States

requests that the validity of the unanimous verdicts returned for the remaining eight offenses and for which the defendant was convicted be affirmed. Regarding the validity of these convictions, the Solicitor General emphasizes that Torres Rivera must not be released from custody and must continue to serve the sentence imposed for those eight offenses. Note, however, that the relief sought by Torres Rivera's legal representation through Urgent Motion is circumscribed precisely to "vacating the conviction as it pertains to Torres Rivera's guilt for the three infractions of Section 133[] of the Penal Code, since the verdict was not unanimous." Urgent Motion, at 6.[19] Regarding the remaining errors assigned in the petition for certiorari,

---

Supreme Court in the case of *Edwards v. Vannoy*, No. 19-5807 (5th Cir.), issued May 4, 2020. Regarding this, in the Opinion of the Court as delivered by Justice Gorsuch, the Court acknowledged that the ruling and the analysis on which its decision is based does not include cases where a final and unappealable judgment has been rendered since the retroactive application of the standard was not before the Court in this case. *Id.* at 24. (Gorsuch, J.) ("Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation. That litigation is sure to come, and will rightly take into account the States' interest in the finality of their criminal convictions.")

[19] Regarding the remaining errors assigned in the petition for certiorari, we decline to exercise our jurisdiction to review them, as we believe that the Court of Appeals did not err in affirming the judgments entered by the Court of First Instance for the eight offenses for which the jury returned a unanimous verdict.

we decline to exercise our jurisdiction to review the decision rendered by the Court of Appeals.

A reading of the Opinion of the United States Supreme Court in *Ramos v. Louisiana* shows that unanimity constitutes an additional essential procedural protection that is derived from and is of the same substance as the fundamental right to a jury trial enshrined in the Sixth Amendment to the United States Constitution. The recognition of unanimity as an inherent characteristic of the fundamental right to a trial by an impartial jury is binding in our jurisdiction and obligates our courts to require unanimous verdicts in all felony criminal proceedings tried in their courtrooms.[20]

By virtue of the change in the law as regards to recognition of the unanimity requirement as an essential component of the right to a trial by jury, it is proper for us to vacate the judgments entered against Torres Rivera for the three counts of lewd acts under Section 133[ ] of the Penal Code for which a unanimous verdict was not returned. Pursuant to the petition for relief contained in Solicitor General's Motion in Compliance with Order, we order a new trial be held for these three counts. We advise that, pursuant to the standard

---

[20] It can be no other way. To not apply the *Ramos v. Louisiana* ruling in our jurisdiction would result in the absurdity of allowing Puerto Rico to deny its citizens the full exercise of a fundamental right that all states are bound to recognize. In the words of Professor Helfeld, "[n]ot to do so would require a justification, explaining why Puerto Rico could deny a fundamental right which no state can deny." Helfeld, *supra*, at 458.

established in *Ramos v. Louisiana*, in order to obtain a conviction, the jury must return a unanimous verdict.

VI.

For the foregoing reasons, we vacate the judgments entered by the Court of First Instance against Torres Rivera for the three counts of lewd acts as typified in Section 133[ ] of the Puerto Rico Penal Code, and we order a new trial be held in accordance with our ruling hereunder. The convictions for the surviving charges shall remain unaltered.

(*illegible signature*)
Anabelle Rodriguez Rodriguez
Associate Justice

IN THE SUPREME COURT OF PUERTO RICO

People of Puerto Rico Respondent v. Tomás Torres Rivera Petitioner	**No.** CC-2019-0916

JUDGMENT

San Juan, Puerto Rico, May 8, 2020

For the arguments itemized in the previous Opinion, we vacate the judgments entered by the Court of First Instance against Torres Rivera for the three counts of lewd acts typified in Section 133[] of the Penal Code of Puerto Rico, and we order a new trial be held in accordance with this decision. The convictions for the surviving charges remain unaltered.

It was so agreed by the Court and certified by the Clerk of the Supreme Court. Justice Estrella Martinez agrees with the Opinion issued by this Court, except for the content of note 18, with which he concurs, and made the following pronouncement:

> Today come upon a new rule of law, laid down by the Supreme Court of the United States in matters of the administration of the jury as an institution. Specifically, the verdict unanimity requirement, as an individual guarantee required to be found guilty. In said decision, the highest-ranking federal court

clarified its application to the states of the Union. Now, just like many other legal controversies that the courts have examined historically, today we must determine the effects of this decision in Puerto RICO.

Today we analyze a constitutional standard that applies to Puerto Rico, as it has been recognized as a fundamental right, even though the United States Supreme Court has not expressly identified the concrete basis for such application. It often does not suffice to know that a certain claim is tenable, but it must come with a solid reason supporting it, given the legal consequences derived from the absence or presence of this ground. Some sectors aim to minimize that reality, but I believe that the lack of coherence, clarity, and obliteration of discriminatory visions in judicial decisions is a significant part of the seed that maintains Puerto Rico in a legal limbo in multiple controversies that are constitutional in nature and of compelling public interest. Therefore, along with the conclusion that *Ramos v. Louisiana*, 590 US ___ (2020) applies to our jurisdiction, I must draw attention to that reality which, ultimately, frames the context in which we must resolve controversies related to the relations between Puerto Rico and the United States. With this in mind, I shall exposit two motivating factors behind this pronouncement.

First and foremost, Puerto Rico deserves a more coherent, democratic, and unambiguous treatment regarding constitutional questions

brought before the United States Supreme Court. In not every constitutional question is the treatment afforded to Puerto Rico clear and fair. As I have mentioned before, "a colonial relationship creates inequalities and controversies in many ambits of society. In all those dimensions, there is space for legal contentions, grounds, arguments, and solutions. By reason thereof, the members of the federal and local Judiciary are not exempt, as jurists, from addressing civil and criminal controversies or other matters where inequalities, social tensions and, even more importantly, who has the power to do a certain thing, are challenged." Luis. F. Estrella Martinez, *Puerto Rico:* 1a *revolucion* de un *apartheid territorial*, 52 Rev. Jur. UIPR 425, 425 (2017). Today, we cannot even concretely affirm the guarantee recognized here stems from, as a result of the precedents that currently continue to haunt us and which Judge Torruella of the First Circuit of Appeals denominates as "the doctrine of separate and unequal [people]." *See*, Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*, Rio Piedras, Ed. UPR (1985). This unleashes what has been coined as a juridical apartheid in the Caribbean. It is high time that the legal treatment afforded the citizens of Puerto Rico be grounded on ideas that dispense with caselaw born from discriminatory and unequal principles. "[T]he humiliating constitutional reaction chain brought on by the Insular Cases continues today to enforce a separate and unequal treatment for the U.S.

citizens [who live in Puerto Rico]." Gustavo A. Gelpi, *Los Casos Insulares: Un Estudio Histórico Comparativo de Puerto Rico, Hawaii y las Islas Filipinas*, 45 Rev. Jur. UIPR 215, 218 (2011).

In such a scenario, the law of the land provides that not all the guarantees and rights recognized in the Federal Constitution necessarily apply to the citizens of Puerto Rico, due to a territorial apartheid. The result is a half-baked democracy that tarnishes the United States' standing to preach human rights elsewhere.

Today, despite the complexities of this legal limbo, I state once again that we are examining a constitutional rule that applies to Puerto Rico because it has been recognized as a fundamental right, even though the United States Supreme Court has not expressly identified the concrete grounds for such application. In this context, the second motivating factor for these pronouncements lies in fully discussing the rules of retroactivity that might apply. On many occasions, footnotes have equal or greater relevance in the development of the law. In fact, there are important decisions that are known more for a simple footnote, such as *United States v. Carolene Prods. Co.*, 304 US 144, 152 n.4 (1938). Incidentally, in that footnote elements germane to these expressions are discussed, as Judge Stone conveyed that prejudice against certain discreet and insular minorities may be a

special condition and which may call for require greater judicial inquiry.

This is precisely that sort of Opinion, where a footnote is particularly relevant for the future of the administration of the criminal justice system and constitutional law. Since footnotes also lay down precedent and are part of the decision, I am forced to concur in this regard. I specifically refer to footnote 18. I am certainly in favor of recognizing the **general rule** that a decision that sets a new criminal constitutional standard applies retroactively to cases pending in courts, that is, cases that are not yet final and unappealable. *Pueblo v. Thompson*, 180 DPR 497, 508 [80 PR Offic. Trans. ___, ___] (2010) ("Thus, we restate the rule we set forth in *Pueblo v. Gonzalez Cardona*, [153 DPR 765 (2001)], where we adopted the federal practice of extending judicial interpretation of criminal procedural rules that implicate constitutional protections to cases that were not already final and unappealable at the time the opinion was issued.")

Now, the retroactivity doctrine includes other aspects not mentioned in said footnote. Moreover, *Ramos v. Louisiana*, as delivered by Justice Gorsuch, recognizes an exception to the general principle that the retroactivity of new constitutional criminal rules laid down by caselaw extends only to cases pending before the courts, thus recognizing the possibility that the new constitutional rule may extend to final and unappealable cases. *Id.* at 24 (Gorsuch, J.) ("Under *Teague v. Lane*, [489

US 288 (1989),] newly recognized rules of criminal procedure do not normally apply in collateral review. True, *Teague* left open the possibility of an exception for "watershed rules" "implicat[ing] the fundamental fairness [and accuracy] of the trial."). Conversely, in *Teague v. Lane*, it was resolved that if the new rule adopted is substantive, retroactivity will also apply to final and unappealable cases. *Id.* at 307 ("if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' "); *Whorton v. Bockting*, 549 US 406 (2007) ("A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a " 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."); *Schriro v. Summerlin*, 542 US 348 (2004).

Consequently, for the purposes of examining the retroactivity of a new constitutional rule, its contents must be evaluated rather than the procedural stage of the case. If the rule is substantive or watershed, it will apply to all cases, regardless of whether they became final and unappealable. Contrariwise, if this were a procedural rule, it would only apply to cases pending for review before the different courts. "The challenge for the courts, thus, lies in recognizing which type of new rule has been laid down before determining the scope of its retroactive application." Iris Y. Rosario Nieves, *Alcance de la retroactividad de las normas constitucionales enunciadas*

jurisprudencial – mente: una replica al profesor Ernesto Chiesa, In Rev (April 19, 2019). To such effects:

> [W]hen the Supreme Court of the United States effectuates a new constitutional rule, the states are forced to determine, before deciding the scope of its retroactive application, whether it is a procedural, substantive, or watershed rule. The result of said exercise may lead to the conclusion, in accordance with the *Teague* exceptions, whether the retroactive application of the rule extends to cases that are already final and unappealable. In doing so, the states are free to decide whether to broaden the scope of the retroactive application of a mere procedural rule, for instance, whether to apply it to cases that had already become final and unappealable. This decision, however, must not be confused with the fact that when dealing with a substantive rule, it must be applied retroactively, as the states have no discretion to do otherwise, even in final and unappealable cases.

Id.

As for the retroactive application of the new constitutional rule adopted in *Ramos v. Louisiana*, the United States Supreme Court limited its analysis to expressly recognize the

application of the new constitutional rule to active cases, including those pending at the appellate stage, as it was the factual situation under its consideration. However, a definitive majority standpoint as to the retroactive application of the new rule to final and unappealable cases was not disclosed, thus leaving open the possibility of a retroactive application in those scenarios. *Id.* at 24 (Gorsuch, J.) ("Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation. That litigation is sure to come, and will rightly take into account the States' interest in the finality of their criminal convictions").

In this case, there must be no doubt as to the application of the new constitutional rule discussed in the opinion, as the case is active and pending review at the appellate stage. Now, it seems misguided to reference only the retroactive application to pending cases and sidestep the range of possibilities mentioned herein. It also bears pointing out that we make an isolated mention that the United States Supreme Court will hear a case related to the retroactivity of the constitutional rule without recognizing that the states and Puerto Rico are at liberty to determine the scope of said retroactivity. This clarification, in my opinion, is important. Therefore, for the foregoing reasons, I consider that the Opinion should have included said legal rules, which are omitted in the footnote. The way the

footnote is drafted, even though it advises that the retroactivity issue is not being resolved, sends the wrong message that the only possibility of applying the new constitutional rule is to pending cases. Regardless of the course of action that we may adopt in a future controversy, I believe that we should have stated the full scope of the law that may be applicable to this issue and to other controversies on the matter of retroactivity.

(*illegible signature*)
José Ignacio Campos Pérez
Clerk of the Supreme Court

I CERTIFY that this is an Official Translation made by the Bureau of Translations of the Supreme Court of Puerto Rico.

In San Juan, Puerto Rico: MAY 20 2020

/s/ Sonnya I. Ramos Zeno, Esq.
Chief Deputy

Clerk of the Supreme Court /s/ [Illegible]