

**IN A GENERAL COURT MARTIAL
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY**

UNITED STATES OF AMERICA

v.

**Dial, Andrew J.
LTC, U.S. ARMY
Alpha Company,
Allied Forces North Battalion,
United States Army North Atlantic
Treaty
Organization Brigade, APO AE 09752**

**DEFENSE BRIEF OF SPECIFIED
ISSUES RE: MOTION FOR
APPROPRIATE RELIEF: UNANIMOUS
VERDICT**

31 December 2021

Pursuant to this Court's Order to Brief Specified Issues RE: Defense Motion for Appropriate Relief (Unanimous Verdict), dated 17 December 2021, the Defense in the above case respectfully submits this brief for those seven specified issues. The law and argument for each of those issues will be addressed in the order specified by this Court.

1. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), effectively overruled the decision in *Johnson v. Louisiana*, 406 U.S. 356 (1972), with respect to the Equal Protection challenge; and, whether or not it overruled the decision with respect to the Due Process challenge, the holding on the Due Process challenge was merely that the reasonable-doubt standard does not, in and of itself, require unanimity.

In *Ramos*, the Supreme Court disapprovingly referred to the badly fractured set of opinions in both of the 1972 companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson*, which allowed Oregon and Louisiana's schemes for non-unanimous verdicts for serious offenses to continue. See *Ramos*, 140 S. Ct. at 1397.

However, the Supreme Court’s opinion in *Ramos* relied on the constitutional protections in the Sixth Amendment, which were at issue in *Apodaca*, and not the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, which were at issue in *Johnson*. Therefore, while directly overruling the decision in *Apodaca*, the impact of *Ramos* on *Johnson* is less clear.

Concerning the Due Process challenge, the Court in *Johnson* concluded that a conviction based on nine of 12 jurors satisfied the State’s burden of proving guilt beyond a reasonable doubt and that the disagreement of the three jurors did not alone establish reasonable doubt. *Johnson*, 406 U.S. at 362. The Defense acknowledges there is an argument that the Court’s decision in *Ramos* does not overrule that part of the decision in *Johnson*. See *State v. Ramos*, 367 Ore. 292, 309, 478 P.3d 515, 527 (2020) (finding that “[t]he *Johnson* reasonable-doubt holding remains good law after *Ramos*”).

However, the court in *Johnson* did not consider whether the relationship between unanimity and impartiality, as described in *Ramos* (See *Ramos*, 140 S. Ct. at 1396), requires a different result. Regardless of whether the part of the *Johnson* decision regarding the reasonable-doubt standard is still good law, it would only stand for the principle that a non-unanimous verdict does not per se violate that standard. Although the Defense’s motion quoted opinions from the D.C. Circuit and Sixth Circuit and acknowledged the interplay between unanimity and the burden of proof beyond a reasonable doubt, the Defense’s Due Process argument is broader than and unresolved by the decision in *Johnson*.

The majority of the Defense’s motion is devoted to the primary argument that unanimity is a core aspect of the impartiality guaranteed in the Sixth Amendment. That

impartiality is distinct from the rights concerning the composition of the jury, and that impartiality applies with equal meaning to court-martial panels. As mentioned in the motion, an accused at a court-martial enjoys most of the rights under the Sixth Amendment. In addition, a right under the Sixth Amendment may apply to a court-martial through the Due Process Clause of the Fifth Amendment. See e.g., *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court's decision in *Batson v. Kentucky* applies to courts-martial by virtue of due process). This concept, which was the primary Due Process argument in the Defense's motion, was not at issue in *Johnson*.

Concerning the Equal Protection challenge in *Johnson*, the decision that Louisiana's scheme did not constitute a denial of equal protection under the law does not survive *Ramos*. The Court analyzed the issue, and found a rational basis for Louisiana denying the requirement for unanimity for conviction of serious offenses in certain types of cases. After *Ramos*, a rational basis is not sufficient for a state to deny a certain classification of defendants the fundamental right of requiring unanimity to convict of a serious offense. The government interest provided in *Johnson* would clearly not satisfy a strict-scrutiny analysis. In addition, even if *Ramos* did not overrule that part of the *Johnson* decision, the Equal Protection challenge in *Johnson* was an attack on Louisiana's statutory scheme that required unanimity for capital and five-person jury cases, but requiring the concurrence of at least nine of 12 for other cases. See *Johnson*, 406 U.S. at 263. Those classifications were categories based on the seriousness of the crime and severity of the punishment that may be imposed, which bears no similarity to the classification at issue before this Court.

In summary, *Ramos* effectively overruled *Johnson*, with the only possible exception being the part of the decision concerning the holding that a non-unanimous verdict does not per se violate the reasonable-doubt standard under the Due Process Clause. Such a holding would not address the Defense’s argument that unanimity is a required aspect of impartiality under either the Sixth Amendment or the Due Process Clause of the Fifth Amendment. The part of the decision in *Johnson* on the Equal Protection challenge does not survive *Ramos*; and, even if it did, it would not apply to the vastly different classification in this case. Either way *Johnson* is not binding law on the Equal Protection issue raised before this Court.

2. Servicemembers and civilians are “in all relevant aspects alike” for the purpose of unanimity of verdicts.

The Court of Appeals for the Armed Forces (CAAF) recently applied the analysis for the due process right to equal protection of the laws. In *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), CAAF held that subjecting members of the Fleet Reserve and not retired reservists to UCMJ jurisdiction did not violate Equal Protection. *Id.* at 281. The first step of the analysis is “whether the groups are similarly situated, that is, are they ‘in all relevant respects alike.’” *Id.* at 280 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

This Court has posed the question of whether service members and civilians are in all relevant aspects alike for the purpose of unanimity of verdicts. The Defense acknowledges the obvious fact that there are substantial differences between military society and civilian society, but the key phrase is “relevant aspects.” When the different

treatment involves whether the verdict of guilt for a serious offense requires unanimity, the relevant aspects involve how the different individuals are situated in regard to the determination of the verdict.

A civilian, or even a servicemember, being prosecuted by the United States in a Federal district court for a non-capital serious offense is innocent until proven guilty beyond a reasonable doubt, as determined by the 12-member impartial jury of her or his peers. After the individual exercised the constitutional right to confront witnesses and present a defense, with the assistance of counsel, the decision of whether or not the individual is guilty is in the hands of the jury. If convicted, the civilian is subject to substantial deprivation of liberty and property, along with a host of possible collateral consequences, such as the loss of the rights to vote and possess firearms and registration as a sex offender, if applicable.

A servicemember being prosecuted by the United States in a general court-martial for a non-capital serious offense is innocent until proven guilty beyond a reasonable doubt, as determined by the eight-member impartial panel selected by the convening authority. After the individual exercised the constitutional right to confront witnesses and present a defense, with the assistance of counsel, the decision of whether or not the individual is guilty is in the hands of the panel. If convicted, the servicemember is subject to substantial deprivation of liberty and property, along with a host of possible collateral consequences, such as the loss of the rights to vote and to possess firearms and registration as a sex offender, if applicable.

Although there are good reasons for why certain procedural rules, including the composition of the tribunal, differ depending on the forum, the same is not true for a

different required concurrence by the tribunal before the individual is convicted of a serious offense. The Defense acknowledges there are some differences in the goals of the military justice system as a whole, but those differences are not at play in the determination of the verdict. At that relevant time, the singular purpose is justice; maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not a consideration. As mentioned in the Defense’s discussion of *Ortiz v. United States* in its motion, the Supreme Court found that the military justice system’s essential character is “judicial.” 138 S. Ct. 2165, 2174 (2018). “The procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding, whether state or federal.” *Id.* The American scheme of justice does not tolerate making it easier to convict a Soldier at a court-martial for the purposes of efficiency in the military establishment.

3. An accused has a statutory right to a court-martial panel; and, once Congress granted that statutory right to a court-martial panel, it must be implemented in a manner that complies with the Due Process Clause of the Fifth Amendment.

An accused has a statutory right to a court-martial panel, under Article 16 of the Uniform Code of Military Justice (UCMJ). However, once Congress grants a statutory right related to the procedures by which courts-martial are conducted, that right must be implemented in a manner consistent with fundamental notions of procedural fairness. By analogy, the Court of Military Appeals (CMA) recognized that the right to appeal certain courts-martial is a statutory right; but, once it is granted, it is protected by the

safeguards of constitutional due process. *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) (“[A] military criminal appeal is a creature ... solely of statutory origin, conferred neither by the Constitution nor the common law. However, once granted, the right of appeal must be attended with safeguards of constitutional due process[.]”)

(internal citations and quotations omitted). The Supreme Court has also provided Due Process protection to statutory appellate rights that states granted in their discretion.

“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). In other words, Congress could not create a court-martial panel system in which the panel decides guilt or innocence on the flip of a coin. Although that is an extreme example, it highlights the significance of the determination of guilt or innocence.

4. Court-martial panels and juries serve the same function, and unanimity of verdicts is a critical aspect of that function.

The purpose of military justice differs in important respects from civilian criminal justice. “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” MANUAL FOR COURTS-MARTIAL, pt. I, para. 3. However, the aims of the military justice system and the criminal justice system are separate and distinct from the roles and responsibilities of court-martial members and jurors.

The function of the court-martial panel during deliberations differs depending on

whether it is for findings or the sentence. While deliberating on findings, the court members' sole purpose is justice, and maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not considerations. The sole purpose at that time is to adjudicate the merits in the interest of justice. The military judge instructs the court members as follows: "As court members, it is your duty to hear the evidence and to determine whether the accused is guilty or not guilty and, if required, to adjudge an appropriate sentence." Dep't of Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2, § V, para. 2-5 (2020). The military judge also instructs the members on the presumption of innocence and the burden of proof, in accordance with Article 51(c) of the UCMJ.

The Defense acknowledges that, during deliberations on the sentence, there is an additional purpose of promoting good order and discipline in the armed forces. Article 56(c)(1). Deliberations on sentence are not at issue in this motion. Focusing on the relevant moment of determining guilt or innocence demonstrates that the function served by court-martial panel members and jurors is identical – presuming innocence and determining whether the prosecution proved each element beyond a reasonable doubt.

The unanimity of the verdict is a critical aspect of the determination of guilt or innocence, affecting the accuracy and reliability of verdicts. In *Ramos*, Justice Gorsuch quoted Justice Story's explanation of unanimity of verdict as "indispensable." *Ramos*, 140 S. Ct. at 1396 ("Justice Story explained in his Commentaries on the Constitution that 'in common cases, the law not only presumes every man innocent, until he is proved guilty, but unanimity in the verdict of the jury is indispensable.'"). With the

fallibility of human beings, it is beyond cavil that unanimity decreases the dangers of wrongful convictions. Each member’s perception of the evidence and personal experiences add to the collective wisdom of the court-martial panel, but that benefit is fully realized only with unanimity of the verdict. In her dissenting opinion in a case about the retroactivity of the new unanimity rule from *Ramos*, Justice Kagan explained how the unanimity rule “is central to the Nation’s idea of a fair and reliable guilty verdict” and “only then is the jury’s finding of guilt certain enough – secure enough, mistake-proof enough – to take away the person’s freedom.” *Edwards v. Vannoy*, 141 S. Ct. 1547, 1576 (2021) (holding that the *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review) (Kagan, J., dissenting). Such concerns about the fairness and reliability of a non-unanimous verdict are even greater with a court-martial panel. With the convening authority selecting the best qualified court members by reason of age, education, training, experience, length of service, and judicial temperament, in accordance with Article 25, a reasonable doubt in the mind of a member of such a blue-ribbon panel casts uncertainty on the accuracy and reliability of a verdict of guilty. The American scheme of justice cannot tolerate such uncertainty with a conviction for a serious offense at a court-martial.

5. In *Ramos v. Louisiana*, the Supreme Court found that unanimity is a critical aspect of “impartiality,” and such a meaning would be the same in the context of court-martial panel impartiality.

In *Ramos*, the Supreme Court was emphatic in its novel recognition that a unanimous guilty verdict is an indispensable feature of an impartial jury. “If the term ‘trial

by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Ramos*, 140 S. Ct. at 1396. The Supreme Court has recently had the opportunity to discuss its holding in *Ramos*, when it addressed the retroactivity of the new rule requiring unanimity for conviction of serious offenses. In the majority opinion for *Edwards v. Vannoy*, Justice Kavanaugh acknowledged that the *Ramos* holding that "a state jury must be unanimous to convict a defendant of a serious offense" was a new rule. 141 S. Ct. at 1555. Dissenting from the majority's conclusion that it did not meet the legal standard for the narrow exception for a new procedural rule to be retroactive, Justice Kagan summarized how the Court described the unanimity rule in *Ramos*. "Citing centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital', 'essential,' 'indispensable,' and 'fundamental' to the American legal system." *Id.* at 1573 (Kagan, J., dissenting).

The critical aspect of impartiality involving unanimity has the same meaning in the context of court-martial panels. A long line of CAAF decisions recognizes constitutional rights to an impartial and fair decision. "Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the fact." *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *see also United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). That right to an impartial court-martial panel has more recently been found not only in the Due Process Clause of the Fifth Amendment but also in the Sixth Amendment itself. *See, e.g., United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection

of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations.”). As demonstrated by the cases cited on pages 8 through 9 of the Defense’s Motion for Appropriate Relief: Unanimous Verdict, this is not the only Sixth Amendment protection that applies to an accused at a court-martial. Also, in *United States v. Castellano*, 72 M.J. 217 (C.A.A.F. 2013), CAAF held that the military judge violated “Appellant’s due process rights under the Fifth and Sixth Amendments” by finding a *Marcum* factor himself rather than presenting it to the court members. *Id.* at 219.

As shown above, the Accused has a right to a unanimous guilty verdict as part of his right to an impartial panel under the Sixth Amendment. He also has a right to a unanimous guilty verdict as part of this right to due process under the Fifth Amendment. “Impartial court-members are a *sine qua non* for a fair court-martial.” *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995). In addition, CMA stated that, when a right applies by virtue of due process, “it applies to courts-martial, just as it does to civilian juries.” *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court’s decision in *Batson v. Kentucky* applies to courts-martial).

6. Congress does not have any plausible reason for allowing a conviction on a non-unanimous verdict, other than the impermissible reason of making a conviction and deprivation of liberty and property easier at a court-martial.

The Government’s response states that the unanimity right from *Ramos* is not so extraordinarily weighty as to overcome the balance struck by Congress. However, there was no discussion of the interests on either side of the scales during the balancing. If

there was a valid reason for denying servicemembers this fundamental right concerning the determination of guilt, it is curious that it was not included in the Government's response. Instead the Government relied on citing to cases that predated the Supreme Court's new rule that, under the Fourteenth Amendment, states must require unanimity before conviction of a serious offense. The Government's response fails to appreciate the newly elevated status of this fundamental right.

In addition, the military justice system has evolved from the Founding-era in both scope and due process. Courts-martial can now convict individuals for offenses with no service connection. *Solorio v. United States*, 483 U.S. 435 (1987). Also, courts-martial can convict individuals who are not servicemembers on active duty. *See, e.g., United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021) (holding that a retired servicemember in the Navy's Fleet Reserve was subject to court-martial jurisdiction); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012) (holding that Article 2(a)(10)'s extension of jurisdiction to persons serving with or accompanying an armed force in the field in time of a contingency operation did not violate the Constitution). With this expansion of the scope of court-martial jurisdiction, far more due process has been required over time. The Government's best reason for preserving non-unanimity is the historical practice, but that is inconsistent with all of the ways in which courts-martial have evolved from the rough form of justice criticized by the Supreme Court in *Toth v. Quarles*, 350 M.J. 11 (1955) to the judicial system the Supreme Court approved of in *Ortiz*.

The Government may argue that military necessity requires making it easier to convict at courts-martial and having guilty verdicts with less certainty and reliability, regardless of the concerns expressed by Justice Kagan. However, the Government has

other reasonable courses of action for any rare cases in which conducting another trial would have a significant impact on the military mission. After *Ramos*, adhering to the status quo of non-unanimous guilty verdicts at courts-martial cannot be tolerated in the American scheme of justice.

7. Although a unanimous verdict of guilty is required for courts-martial, a unanimous verdict of acquittal is not required.

The Defense is not arguing that all verdicts in a court-martial must be unanimous but only that convictions require unanimity. The right to a unanimous verdict is an individual right held by an accused, so it is not required that acquittals be unanimous. The Oregon Supreme Court came to this same logical conclusion after *Ramos*. “*Ramos* does not imply that the Sixth Amendment prohibits acquittals based on non-unanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals.” *State v Ross*, 367 Ore. 560, 573, 481 P.3d 1286, 1293 (2021). Even if Article 52(a)(3) of the UCMJ is unconstitutional to the extent it authorizes less than unanimous guilty verdicts, it is constitutional to the extent that failing to obtain the concurrence of at least three-fourths of the members present results in a finding of not guilty.

This interpretation alleviates any concerns about unlawful command influence. An acquittal could be the result of anywhere from zero to five out of eight votes of guilty. Although a conviction would effectively reveal the vote of every member, just like it does in capital cases, there can be no serious argument that court members would be apprehensive of displeasing the convening authority by voting to convict of a charge or

specification the convening authority referred for trial by court-martial.

CONCLUSION

As the Supreme Court recognized in *Ortiz*, courts-martial have transformed into courts that are judicial in character rather than disciplinary tools of the commander. As such, they must adhere to the American scheme of justice. The Supreme Court's recent holding in *Ramos* that the unanimity requirement applies to the states because it is fundamental to the American scheme of justice, requires this Court to conduct a fresh analysis and come to the conclusion that the United States Constitution requires a unanimous verdict for the conviction of a serious offense at a court-martial. This conclusion is unmistakable, whether the right exists by virtue of the Sixth Amendment, Due Process under the Fifth Amendment, or Equal Protection under the Fifth Amendment.

Robert Mihail
ROBERT MIHAIL
CPT, JA
Trial Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have served an electronic copy of the above on the court and trial counsel on 31 December 2021.

Robert Mihail
ROBERT MIHAIL
CPT, JA
Trial Defense Counsel