

## THE AM LAW LITIGATION DAILY

### Litigator of the Week: After SCOTUS Reverses Non-Unanimous Murder Conviction, O'Melveny Wins Acquittal on Retrial

By Ross Todd

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**N**early three years ago, appellate lawyers at **O'Melveny & Myers** convinced the U.S. Supreme Court to reverse the second degree murder conviction facing pro bono client Evangelisto Ramos. A divided New Orleans jury had voted 10-to-2 to convict Ramos in 2016. But the high court held the Sixth Amendment right to a jury trial requires a unanimous verdict to convict defendants of a serious offense, even in state court.

With Ramos facing a retrial, O'Melveny partner **Rebecca Mermelstein**, who joined the firm last year from the U.S. Attorney's Office for the Southern District of New York, teamed with local co-counsel **Sarah Chervinsky**. This past week, after three days of testimony and less than four hours of deliberations, a 12-person jury in New Orleans found Ramos not guilty—unanimously.

**Lit Daily: Tell me about Evangelisto Ramos and what was at stake for him.**

Rebecca Mermelstein: Let me start with the second question, because it was literally his life at stake. In Louisiana, the penalty for second degree murder is life without the possibility of parole. If he had been convicted it was a certainty he would die in prison. In fact, at Angola, the infamous prison where he was incarcerated, inmates are required to save towards paying for their own coffin. So the stakes could not have been higher. Amazingly, despite what he has been through, Evangelisto is an optimistic, open-hearted person. He has a smile that lights up his whole face. And he's worked hard his whole life to try to help support his immediate and extended family. Even while in prison he worked at an in-house inmate-run "restaurant."

**How did this matter come to O'Melveny initially?**

The case was referred to us by **The Promise of Justice Initiative**. At the time, Louisiana and Oregon were the last two states to permit "Jim Crow" non-unanimous jury verdicts in criminal cases. Non-unanimous

juries have long been a way to sideline and silence minority voices in jury deliberations and to ease the way towards more easily convicting minority defendants. So the issue was important not just to our client, but to the tens of thousands of defendants who had been convicted by non-unanimous juries. The opportunity to help address the systemic racism in our justice system made it easy to get O'Melveny's amazing appellate team onboard.

**Why was it important for the firm to handle this case back at the trial court? And for you yourself to handle as your first trial at the firm?**

O'Melveny special counsel **Jeff Fisher** and former partner **Yaira Dubin**, the appellate lawyers who originally worked on this case, didn't just write the briefs and argue the case in the Supreme Court. They also visited Evangelisto at Angola and got to know him. As Evangelisto told me during trial, "O'Melveny is my family." We agreed. Having succeeded in overturning his conviction, we wanted to make sure that he had the representation he deserved at trial. As a former (and very recent!) federal prosecutor, I have a lot of faith in institutions. But when I read the trial transcript from Evangelisto's first trial, it was clear that even beyond the non-unanimous jury verdict, there were serious problems with the way the first case was tried. As a prosecutor, I always believed that zealous defense lawyers are a service not just to their own clients but to the system at large. They play an essential role in holding prosecutors' feet to the fire. So it was an absolute privilege so soon after leaving the U.S. Attorney's Office to serve in that defense role myself.



Rebecca Mermelstein of O'Melveny & Myers.

**Who was on your team and how did you divide the work?**

As a result of the appellate process and then COVID delays, this case took years to come back for trial. In that time an incredible number of O'Melveny attorneys contributed to both the legal and personal aspects of the case. For example, O'Melveny had a Zoom meeting with Evangelisto every week—whether or not there were legal matters to discuss. The trial team included counsel and associates **Allessandra Johnson, David Cohen, Caitlyn Holuta** and **Makenzie Russo**. Amazingly, a former counsel at the firm, **Patrick McKegney**, was so devoted to the matter that he joined us as well, despite no longer working at O'Melveny. We obviously aren't frequent practitioners in Louisiana, so we also needed local counsel for the case. We brought on Sarah Chervinsky, who was such a skilled trial lawyer that she and I ended up trying the case together. Given the size of the case, we didn't think more than two lawyers should sit at counsel table. But the rest of the team did phenomenal work writing briefs, developing trial strategy, drafting cross-examination outlines, sizing up jurors, becoming experts on DNA, pathology and drug use, and shepherding Evangelisto's family through the trial process. And through it all, partner **Mark Racanelli**—who graciously gave up his speaking role so that I could try the case—was an invaluable senior advisor, cheerleader and team captain.

**As a former prosecutor, what stuck out to you about the previous trial and the case the prosecution was attempting to make again here against Mr. Ramos?**

What stuck out the most was really how poorly the case had been investigated. The police had not tracked the victim's location through any of the many means available to them: GPS, cell site, social media, ATM withdrawals. They didn't interview witnesses who lived in the immediate vicinity of the crime scene. They didn't follow up on anonymous tips to a tipline that identified the perpetrators as living in a particular building. They didn't even do DNA testing on all of the evidence seized.

**What were your key defense themes and how did you attempt to drive them home with the jury?**

We had a few key themes. A big one, as I mentioned above, was the incompetency of the police investigation. Another was that the forensic evidence was not consistent with guilt. For example, the prosecution argued that the victim was stabbed in our client's apartment, but a thorough search of the apartment found zero evidence of blood. We also developed an argument—not used in the first trial—that, based on pathology, the victim's time of death was about 12 hours after she had been with our client, a delay that was wholly inconsistent with him

having killed her. Lastly, we also argued that our client's conduct, making the initial contact with the police and offering up his DNA, was the conduct of an innocent person. And while not a trial theme, we were very careful throughout to be respectful to the victim and her family. In fact, an element of the closing argument was that two families had been irreparably damaged by this crime: the victim's family, who lost her forever, and our client, who was wrongfully imprisoned.

**Mr. Ramos' DNA was present on the trashcan where the victim's body was found. How did you deal with that evidence at trial?**

We handled it in two ways. First, we had other explanations for how his DNA could have been present. He told the police he had used that neighborhood trash can, so it's possible his DNA had gotten there when he touched it on a separate occasion. There is also a scientific concept of "secondary transfer." That just means that, for instance, if I touch a pen, give it to you, and then you touch a water bottle, my DNA could be on the water bottle—which I never touched—because it passed from me to the pen, from the pen to you, and from you to the water bottle. Our client was in close contact with the victim the day before she died. And her DNA was on the trash can, too. So it was also possible that his DNA was transferred from the victim to the trash can. Second, we also tried to minimize the significance of the DNA and to focus the jury on all the other ways they could determine he was innocent. For example, if the victim's time of death was inconsistent with our client's guilt, then the jury could vote "not guilty" without having to decide how his DNA got there.

**What was Mr. Ramos' reaction to the verdict? And what are his plans for the future?**

Evangelisto had complete confidence in the outcome of the case. As he told us a few weeks before trial, "I have Jesus and I have O'Melveny." It was a humbling vote of confidence—and also nerve-racking given the uncertainty of the outcome in any trial. That faith definitely guided him through trial. And yet despite that, when the foreperson actually said "not guilty," he had to ask me to confirm the verdict. He was so overwhelmed it was hard to process. Evangelisto is working hard to get his life back together. After eight years in prison, he had no ID, no possessions, and no home. Both our O'Melveny team and his family are working to help and support him through it, and he is living with family while he looks for work.

**What will you remember most about this matter?**

I will always remember the feeling of standing next to someone who was sentenced to die in prison and has been freed from those shackles. The hug Evangelisto gave me after the verdict was the best feeling in the world.