

No. 18-9693

IN THE
Supreme Court of the United States

KEVIN SHEPPARD

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

REPLY TO THE STATE'S BRIEF IN OPPOSITION

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REPLY BRIEF

Pursuant to Rule 15.6, Petitioner Kevin Sheppard files this *Reply Brief* to the *State's Brief in Opposition* (BIO).

The central argument in the BIO is a procedural one: whether the unanimity claim was properly preserved below. While ordinarily, this would be an issue to be resolved in the first instance in the court's below, in this case the dispute is entirely foreclosed by the lower court's ruling. Despite the significant time the BIO spends arguing that the constitutional issue was not "pressed" in the state courts, the Louisiana First Circuit Court of Appeal *explicitly* ruled that the issue was properly preserved for review:

Contrary to the State's assertion, it appears that the defendant properly preserved this issue for appellate review. Defense counsel noted that it was raising "the normal 10 to 2 verdict objection" and then clarified, "we would object to the non –unanimous verdict structure that's in Louisiana law...It violates [the defendant' s] constitutional rights, Your Honor." In arguing his motion for post –verdict judgment of acquittal, defense counsel again raised the non -unanimous jury verdict issue...

State v. Kevin Sheppard, 2018 WL 4520247 at 2-3 (La. App. 1 Cir. 9/21/18) (Unpublished). Thus, not only was the issue raised and preserved, it was, as the appellate court found, argued multiple times. The BIO's insistence that Petitioner did not argue the issue as vigorously as the State would like is not supported by the trial or appellate record. Nor is the BIO's hyper-technical conceit regarding procedural

bars accurate as a matter of state law: Louisiana does not require an exhaustive level of intricacy in preserving an issue.¹

Even in the unusual circumstance where the ruling of the Louisiana Court of Appeal would be considered insufficient to ensure the issue is preserved, the Louisiana Supreme Court has determined, and this Court did not contest, that a non-unanimous jury issue is a “constitutional error patent on the face of the proceedings,” and the merits may be considered on appeal regardless of the competence of the trial objection. *See State v. Wrestle, Inc.*, 360 So. 2d 831, 837 (La. 1978), *aff'd in part, rev'd in part sub nom. Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979). Accordingly, through any procedural lens, the issue of unanimity is properly preserved for this Court’s review.

The State agrees that if this Court finds Petitioner properly raised the claim below, the petition should be held for *Ramos v. Louisiana*. As the issue of unanimity was adequately preserved in multiple instances in the state courts, this matter should be held.

¹ An objecting party must only “make[] known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.” La.C.Cr.P. art. 841 (*see, e.g., State v. Boutte*, 384 So.2d 773 (La.1980); *State v. Vanderpool*, 493 So. 2d 574, 575 (La. 1986)).

CONCLUSION

The petition for writ of certiorari should be held pending this Court's decision in *Ramos v. Louisiana*, 139 S. Ct. 1318 (2019), and then be disposed of as appropriate in light of that decision.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "G. Ben Cohen", with a long horizontal flourish extending to the right.

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