NO. _____

IN THE
Supreme Court of the United States

_____

DAVID D. DOVE,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment incorporates the Sixth Amendment guarantee of a unanimous verdict?

2. Whether the Eighth Amendment prohibits sentencing a sixteen year old youth to life without any possibility of parole for second-degree murder?

PARTIES TO THE PROCEEDING

The petitioner is David D. Dove, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David D. Dove, respectfully petitions for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal in *State v. Dove*, No. 2015-KA-0783, 194 So.3d 92 (La. App. 4th Cir. 2016).

OPINIONS BELOW

The judgment of the Louisiana Fourth Circuit Court of Appeal (Appendix "A") is reported at *State v. Dove,* 194 So.3d 92 (La. App. 4 Cir. 2016). See Pet. App. A, 1a-22a. The Louisiana Supreme Court's order denying review of that decision is reported at *State v. Dove*, 2016-1057 (La. 06/16/17); 2017 La. LEXIS 1294, and attached as Appendix "B". See Pet. App. 23a. The Court's denial of his pro se writs in *State v. Dove*, 2016-1081 (La. 06/29/17); 2017 La. LEXIS 1401 are attached as Appendix "C". See Pet. App. 25a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal were entered on May 4, 2016. The Louisiana Supreme Court denied review of that decision in two separate writ denials on June 16, 2017 and June 29, 2017. See Appendix B and C. This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. Amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

Article 782(A) of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." La. C.Cr.P. art. 782(A).

Article 878.1 of the Louisiana Code of Criminal Procedure now provides, in pertinent part:

> Art. 878.1. Hearing to determine parole eligibility for certain juvenile offenders [Effective August 1, 2017]
>
> …
>
> B. … (2) If an offender was indicted prior to August 1, 2017, for the crime of first degree murder (R.S. 14:30) or second-degree murder (R.S. 14:30.1) where the offender was under the age of eighteen years at the time of the commission of the offense and a hearing was held pursuant to this Article prior to August 1, 2017, the following shall apply: …

> **(b) If the court determined at the hearing that was held prior to August 1, 2017, that the offender's sentence [for second-degree murder] shall be imposed without parole eligibility, the offender shall not be eligible for parole. ...**

La. C. Cr. P. Art. 878.1. The provision emphasized in bold above are the procedures being applied to Petitioner.

STATEMENT OF THE CASE

Petitioner, David Dove, was 16 years old on November 25, 2009, the date ten members of a jury found he committed the second-degree murder of Jacquian Charles and the attempted second-degree murder of Terenika Barton. Pet. App. "A", at 7a. The State's only evidence against David Dove was two eyewitnesses to the shooting.

The first witness was the surviving victim, Terenika Barton. At trial, Barton testified that David Dove shot her and Jacquian Charles. When she had initially called 911, she told the operator she was unable to identify the perpetrator. Pet. App. 9a. Prior to trial, she told the screening Assistant District Attorney that her sister had shown her a group photograph with Dove in it, and that "she was uncertain of her identification made from the police lineup because she may have had the picture her sister showed her in her mind." Pet. App. at 10a. Nevertheless "at trial, Barton testified that she was 100% certain of her identification of the defendant from the police photographic lineup that was presented to her eleven days after the shooting." Pet. App. "A" at 17a. While Barton claimed that "the shooter came out of the barbershop", Pet. App. "A" at 8a, other witnesses testified that Dove was not in the barbershop on the night of the shooting. See Pet. App. "A" at 13a.

The second purported eye-witness was a jail-house informant, Jason Daniels. Daniels was incarcerated on firearm and drug charges at the time of trial. Pet. App. "A" at 9a. Daniels claimed he was purchasing heroin near the barbershop when he saw Petitioner pull a gun and shoot Charles. *Id.* Daniels did not come forward at the

time of the shooting. When he was arrested and facing other charges, he offered to provide evidence against Dove in order to secure favorable treatment in his case. Daniels' father testified that he was with his son, out of town on November 25, 2009, and that his son could not have witnessed the shooting. Pet. App. "A." at 12a.

Dove presented a number of witnesses who testified that he was at home on the night of the shooting. *Id.* Because the shooting occurred on the night before Thanksgiving, several of these witnesses were able to recall that they had been in Dove's home that night, helping his mother prepare food for the next day's festivities. *Id*. The defense also called Jamal Jones, who was arrested with the murder weapon in January of 2010. Jones testified that he had gotten the murder weapon from Chuck, a friend of his deceased brother, and that "Dove was not present when he obtained the Glock from Chuck" and that he "did not know the defendant at that time." Pet. App. "A" at 12a. The defense also elicited evidence others might have a motive to kill Charles as he "sold drugs on a daily basis and owed people money." Pet. App. "A" at 12a.

In the face of the serious material contentions concerning whether 16-year old David Dove was responsible for the murder, only ten of the twelve jurors voted to convict David Dove as charged. Pet. App. "A", at 7. In Louisiana, the jury's non-unanimous vote was sufficient to convict Dove, and subject him to the most serious penalty available under law. Pet. App. "A", at 21.

The Louisiana Court of Appeals described the evidence presented at the sentencing hearing:

> At the sentencing hearing in this case, Dove's former football and baseball coach, Dewalle Price, testified that he had known the defendant since the defendant was five years old and coached him until he was about eleven years old. Except for a period after Hurricane Katrina, Mr. Price said he saw the defendant almost daily at the playground. Price described the defendant as having a laid back personality and being respectful. He never knew the defendant to be violent or involved in gang life or illegal activities.

Pet. App. "A" at 20a. The remaining evidence presented at the hearing was from David's mother:

> She denied that the defendant had any curfew violations and said he was a good child, who was never in any trouble. He would never fight with anyone and got "good" grades — C's and D's - in school.
>
> The defendant attended private school and resided with both of his parents. Ms. Dove said the defendant was not in a gang and was innocent of these crimes. Moreover, she accused the prosecution of convicting the defendant in spite of knowing he was innocent.

Id. The Court of Appeal quoted the trial court's explanation for imposing the ultimate sentence:

> While I am typically very sympathetic to young people making mistakes given the lack of maturity, given the fact that the brain doesn't really develop fully until age twenty-five and given so many circumstances that impact our youth, especially in Orleans Parish and the State of Louisiana in terms of their lives on a daily basis. In this particular case, I do think that this case is an unusual case. While [defense counsel] is correct, that the law requires the court to consider mitigating factors, [the prosecutor] is also correct, that there are a number of factors, which point to the fact that [defendant], you have had opportunities that other youth in this city have not had by attending a private school, by having both, a mother and a father and by having the opportunities that you have had. Notwithstanding that, you made certain decisions to impact the lives of two citizens in our city, as well as their family members and friends forever and it's a very serious issue. I do not see that you have taken this matter seriously. I do not sense that you have any remorse for your actions. Based on the evidence that was presented during the

> trial, it is the court's opinion that your actions did not come from - - **your actions were intentional, your actions were quite intentiona**l, ***that your actions were direct and the decision that you made was as a result of foolishness, basically, that's going to lead you to a life of incarceration***.

Pet. App. "A" at 20a-21a (emphasis added).

On direct appeal, Mr. Dove argued, among other things, that his second-degree murder conviction and sentence by a non-unanimous jury verdict violated his Sixth and Fourteenth Amendment Rights under the United States Constitution. He argued that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) called into question the validity of *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held that non-unanimous jury verdicts do not violate the defendant's constitutional rights. Pet. App. A at 26. The Louisiana Fourth Circuit Court of Appeal rejected the argument on the basis that "a less than unanimous jury (ten of twelve jurors) is sufficient to convict a person for second-degree murder." Pet. App. "A" at 21a.

Mr. Dove also argued on direct appeal that his sentences violated the principle set forth in *Miller v. Alabama*, 567 U.S. 460 (2012). Pet. App. "A" at 20a. The Court of Appeal decided: "Considering the trial court's broad discretion, the circumstances surrounding the crime, and mitigating and aggravating evidence in the record, we find that a life sentence without parole is not grossly out of proportion to the seriousness of the crime of second-degree murder such that it shocks the sense of justice despite the fact the defendant in this case was sixteen years old at the time he committed the offense." Pet. App. "A" at 21a.

The Louisiana Supreme Court denied the application for writs filed by counsel on June 16, 2017, with Justice Crichton concurring:

> After carefully studying the application and exhibits, I would grant defendant's application, order briefing, and docket for oral argument. I would do so not because I believe the trial court may have erred in imposing a sentence of life imprisonment without parole eligibility after conducting a hearing in accordance with *Miller v. Alabama*, 567 U.S. 460 (2012), but because I believe this application affords the Court with the opportunity to proactively develop an important and rapidly changing area of Eighth Amendment jurisprudence.
>
> In the 2017 regular session, after vigorous debate in both chambers, the Louisiana Legislature passed an amended version of Senate Bill 16 in an effort to carry out the United States Supreme Court's mandates regarding juvenile sentencing in *Miller v. Alabama* and *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016). In doing so, it appears that there may be a significant number of persons incarcerated in Louisiana who fall into a possible gap in the law.
>
> Those persons, who committed first or second-degree murder as juveniles, and who are serving sentences of life imprisonment at hard labor without parole eligibility, and who have already had a *Miller* hearing and been denied parole eligibility, will likely still challenge the denial of parole eligibility and the manner in which the *Miller* hearing was conducted as failing to fully comply with the Eighth Amendment, *Miller*, and *Montgomery*. Because of the manner in which the new (and likely to be soon effective) version of La.C.Cr.P. art. 878.1 was drafted, the questions presented in that subset of cases may not be resolved by the new legislation. Instead, the onus may remain on the judicial branch to finally tackle those thorny issues and answer those difficult questions. I believe the present case affords the Court the opportunity to fill this potential gap in the law and offer the district courts badly needed guidance under the Eighth Amendment. …

Pet. App. "B", at 23a-24a. The Louisiana Supreme Court denied writs on Petitioner's pro se assignments, two weeks later. See *State v. Dove*, 2017 La. Lexis 1401 (6/29/2017), attached as Pet. App. "C" at 25a.

SUMMARY OF THE ARGUMENT

Non-unanimous juries. In recent years, this Court has issued repeated pronouncements that the Sixth Amendment requires that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbors.'" *Southern Union Co. v. United States*, 2344567 U.S. 343, 356 (2012) (quoting *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting in turn 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769))) (emphasis added); *accord Apprendi v. New Jersey*, 530 U.S. at 477. Those pronouncements have come amidst a sea-change in constitutional exegesis since the opinions of *Apodaca v. Oregon*, 406 U.S. 404 (1972), *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Walton v. Arizona*, 497 U.S. 639 (1990)—a change crystallized in this Court's recent holding that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights Protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *McDonald v. City of Chicago*, 561 U.S. 742, 765, (2010) (citing *inter alia*, *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961); *Ker v. California*, 374 U.S. 23, 33-34 (1963); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964); *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969); *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985)).

As the *McDonald* Court recognized, however, the availability of non-unanimous jury verdicts forms the "one exception to this general rule." *McDonald*,

561 U.S. at 766 n. 14 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972)). But just as the Court acknowledged the existence of this exception, so, too, did it cast doubt on its legitimacy, noting "the unusual division among the Justices" in *Apodaca*, and highlighting Justice Brennan's observation that "the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments." *McDonald*, 561 U.S. at 766 n. 14.

Faced with this Court's recent Sixth Amendment jurisprudence, the Louisiana Supreme Court has announced that it will refuse to align its political and judicial systems with those of the other forty-eight States:

> we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned, [and] we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments. With respect to that ruling, it should go without saying that a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts.

State v. Bertrand, 6 So. 3d 738, 753 (La. 2009).

The law is very clear: under the Sixth Amendment, a unanimous jury is required. The vast majority of the Bill of Rights have been fully incorporated and made applicable to the states through the Fourteenth Amendment. There is no justification for an exception regarding unanimity.

This case presents a clean opportunity to address the question of whether Justice Powell's view of partial incorporation remains good law, or if this Court now agrees that the whole of the Sixth Amendment is incorporated to the states.

Life Without Parole for Second-Degree Murder. In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court established a substantive rule: a life without the possibility of parole sentence was disproportionate for any juvenile whose crime does not reflect "irreparable corruption." 567 U.S. at 479-80; *Montgomery v. Louisiana*, 136 S. Ct 718, 734 (2016), quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth."); *id*. at 726 ("a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "'irreparable corruption.'").

Louisiana, and 29 other jurisdictions have now determined that life without parole for second-degree murder is excessive and unnecessary. See Section II (B) below. Another seven states have functionally determined that life without the possibility of parole for juveniles convicted of second degree murder is excessive. However, the Louisiana Legislature also inexplicably decided that for defendants sentenced to life without parole for second-degree murder prior to August 1, 2017, the sentence is acceptable. Here, with no findings of irreparable corruption – and despite findings of youth and transience – the Louisiana courts upheld a life sentence without a possibility of parole. This Court's opinions in *Miller* and *Montgomery* make clear that "'life without parole is excessive for all but the rare juvenile offender.'" The evolving standards of decency – as reflected by the actions of state legislatures, the courts, and prosecutorial and jury determinations – makes clear that a life without

parole sentence for second-degree murder is excessive, especially for juveniles who have not yet had the opportunity to fully mature and develop.

Further, in a confluence of the two issues discussed above, this case highlights the broad constitutional problem in Louisiana: juveniles being sentenced to the ultimate punishment when the jurors who have heard the evidence do not even unanimously agree about the juvenile's guilt or innocence. In *Miller*, as well as *Graham v. Florida*, 560 U.S. 48 (2010), this Court analogized sentencing a juvenile to life without parole to sentencing an adult to death. *See Miller*, 567 U.S. at 475 ("In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."); *Graham*, 560 U.S. at 69-70. In accordance with the heightened reliability that the Eighth Amendment requires when the ultimate penalty is at issue, even those states that allow non-unanimous verdicts in some cases require a unanimous verdict of guilt to allow a capital trial to proceed to a penalty phase. *See* La. C.Cr.P. art. 782(A) ("Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict."); Ore. Const. art. I, § 11 ("[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise").

Louisiana has led the country per capita in incarceration. It led the country per capita in wrongful convictions. It now leads per capita the number of children sentenced to life without parole. And then there is race – both arising out of Orleans

Parish and across the state, African-American youth represent a disproportionate percentage of those sentenced to life without the possibility of parole. This case presents a strong example of the indifference to the protections that our constitution enshrines.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Consider Whether Justice Powell's partial incorporation theory in *Apodaca v. Oregon* remains good law.

Louisiana and Oregon's non-unanimous jury provisions were upheld as constitutional in *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972). In *Johnson* and *Apodaca*, the question of whether the Constitution permits a State to convict an individual of a crime based on a nonunanimous jury verdict turned on three questions: (1) whether unanimity was required under the Sixth Amendment at the Founding; (2) whether the scope of the Sixth Amendment in contemporary society was the same as it was at the Founding; and (3) if so, whether the Fourteenth Amendment fully incorporates the Sixth Amendment jury trial guarantee. On the first question, the Court was essentially unanimous. There were five votes for proposition that the scope of the Sixth Amendment was the same today as it was at the Founding. There were eight votes agreeing that the Fourteenth Amendment fully incorporated the Sixth Amendment. But the opinion fractured on the second and third questions: four Justices endorsed interpreting the Sixth Amendment in terms of the needs of the contemporary society

(a view now discredited), and Justice Powell alone endorsed incorporating only some parts of the Sixth Amendment guarantee (a view never adopted by a majority of the Court and since discredited). The fractured Court resulted in opinions permitting non-unanimous jury verdicts to stand. *See Apodaca*; *Johnson.*

A. *Apodaca* and *Johnson* Were Fractured Opinions Without A Coherent Justification For Non-Unanimous Verdicts.

In *Johnson v. Louisiana* and *Apodaca*, all nine justices agreed that at the Founding, unanimity was required. See *Apodaca* 406 U.S. at 407-08 (White J, Burger C.J., Blackmun J., Rehnquist J.) ("Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century"); see *Johnson,* 406 U.S. at 393 (Douglas J., Brennan J., Stewart J., Marshall J., *dissenting*) ("The requirements of a unanimous jury verdict in criminal cases and proof beyond a reasonable doubt are so embedded in our constitutional law and touch so directly all the citizens and are such important barricades of liberty that if they are to be changed they should be introduced by constitutional amendment.") see *id.* at 369 (Powell, concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.").

Five justices (Justice Powell and the four dissenting justices, Justice Marshall, Justice Brennan, Justice Stewart and Justice Douglas) believed that the scope of the Sixth Amendment was the same today as it was at the Founding.

Eight justices – all but Justice Powell – believed that the Sixth Amendment was co-extensive in federal court as it was in state court.

But a four justice plurality (Justice White, Chief Justice Burger, Justice Blackmun and Justice Rehnquist) determined that, despite the original understanding of the jury trial right, "[o]ur inquiry must focus upon the function served by the jury in contemporary society." *Apodaca,* at 410. These four justices were joined by Justice Powell – who disagreed with the concept of interpreting the Sixth Amendment as a functional right dependent upon the views of contemporary society – but believed in an otherwise unendorsed theory of partial incorporation of the Sixth Amendment.

Because of Justice Powell's peculiar and atypical view of *partial* incorporation, the Court ruled by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty." As Justices Douglas, Brennan, Marshall and Stewart observed, dissenting in *Johnson*, "[t]he result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?" 406 U.S. at 383.

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [Apodaca], when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my

> Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson, 406 U.S. at 395 (Brennan, J. *dissenting*). As this Court observed in *McDonald*, the odd accounting of votes undermines the coherence of the *Apodaca* and *Johnson* opinions:

> In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. …
>
> Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, … and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, …
>
> Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. Apodaca, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

McDonald v. City of Chicago, 561 U.S. 742, 766 (2010). It is significant to note that the four plurality justices who held that the Sixth Amendment did not require unanimity did not do so because of a different view of the original history (compare for instance Justice Stevens' historical understanding of the Second Amendment in Heller with Justice Scalia's historical understanding of the Second Amendment) but rather observed "Our inquiry must focus upon the function served by the jury in contemporary society." *Apodaca*, at 410 (plurality of White, J. Blackmun, J., Rehnquist, J., and Burger, CJ).

B. This Court's Recent Jurisprudence Has Severely Undercut the Rationale of Apodaca and Johnson

Although Louisiana courts continue to use this Court's decision in *Apodaca* to justify non-unanimous jury verdicts, this Court's recent Sixth Amendment jurisprudence renders *Apodaca* – both Justice Powell's partial incorporation theory, and the plurality's focus on the function of the jury in contemporary society -- impossible to defend. In fact, this Court's recent Sixth Amendment decisions have rejected both theoretical predicates on which the *Apodaca* plurality opinion is based.

1. This Court No Longer Measures the Value of a Constitutional Right by the Function that It Serves

While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes but rather from the original understanding of the guarantees contained therein. In a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely*, 542 U.S. at 313. Rather, the controlling value is "the Framers' paradigm for criminal justice." *Id.*

Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause

conceived in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California*, 554 U.S. 353 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 375. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted). This pronounced shift in constitutional exegesis—the return to historical analysis—calls *Apodaca* into serious question.

2. The Court's Recent Jurisprudence Has Reaffirmed that the Sixth Amendment Requires a Unanimous Verdict

In the *Apprendi* line of cases, this Court has repeatedly and explicitly reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies require that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Southern Union*, 567 U.S. at 356 (quoting *Blakely*, 542 U.S. at 301 (quoting in turn Blackstone, *Commentaries on the Laws of England* 343)). This Court further explained in *Booker v. United States*:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:

> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours . . . .'"

543 U.S. at 238-39 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

Even more recently, this Court flatly stated in *McDonald* that the only reason that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict" in federal trials, but not state criminal trials, was this "unusual division among the Justices" in *Apodaca*. 561 U.S. at 766 n. 14. This Court has also since stated in a double jeopardy case arising from a state prosecution that "[t]he very object of the jury system is to *secure unanimity* by a comparison of views, and by arguments among jurors themselves." *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012) (emphasis added) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)).

The *Apodaca* plurality's view of the Sixth Amendment cannot be squared with these repeated pronouncements.

3. The Racial Origins of the Non-Unanimous Jury Provide Strong Justification for Ensuring that the Fourteenth Amendment Fully Incorporates the Sixth Amendment

Whatever the views on partial incorporation of the Fourteenth Amendment in other contexts, the Sixth Amendment's guarantee of a unanimous jury verdict is not the location to provide a watered down version of the Bill of Rights because Louisiana's nonunanimity rule uniquely strikes at the heart of equality and citizenship. The State adopted its nonunaminity rule in its 1898 constitutional convention, whose "mission" was "to establish the supremacy of the white race in this state." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana*: Held In New Orleans, Tuesday, February 8, 1898, at 374 (1898) (statement of Hon. Thomas J. Semmes) (hereinafter "Official Journal"). Like Alabama's Constitutional Convention of 1901, the Louisiana constitutional convention of 1898 "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." See *Hunter v. Underwood,* 471 U.S. 222, 229 (1985) citing S. Hackney, Populism to Progressivism in Alabama 147 (1969); C. Vann Woodward, Origins of the New South, 1877-1913, pp. 321-322 (1971). In Alabama, like Louisiana:

> [t]he delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940).

Hunter v. Underwood, 471 U.S. at 229. These conventions understood that denial of suffrage, both from the jury box and the voting poll, through misdemeanor disenfranchisement, dilution, and other apparatus in a manner that would ensure

the "supremacy" of the Anglo-Saxon race that would avoid the scrutiny of "Massachusetts" judges." *See Official Journal* At 381; *see also* Robert J. Smith, Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice*, Vol. 72 No. 2 LA. LAW REV. 361, 375 (2012) ("The Delegates achieved these anti-participation goals not only by restricting access to the ballot box but also by diluting the voice of members of racial minority groups by allowing non-unanimous jury verdicts in criminal cases"); *id* at 376 (noting commentators at the time of Constitutional Convention's concern that African-American presence on juries would prevent convictions, and result in hijacking sentencing outcomes); Thomas Aiello, *Jim Crow's Last Stand: Non-Unanimous Criminal Jury Verdicts in Louisiana*, Louisiana State University Press, Baton Rouge, Louisiana, 2015; Aliza Kaplan, Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: NonUnanimous Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, Vol. 95 OREGON LAW REVIEW No. 1, 3 (February 2017); .Angela A. Allen-Bell. *These Jury Systems are Vestiges of White Supremacy*, Washington Post, Sept. 22, 2017.

II. IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A SIXTEEN YEAR OLD CONVICTED OF SECOND-DEGREE MURDER VIOLATES THE EVOLVING STANDARDS OF DECENCY.

Imposition of a life without parole sentence on a sixteen year old convicted of second-degree murder violates the evolving standards of decency. There is an emerging national consensus, reflected in legislative enactments and sentencing practices nationwide, that makes clear that it no longer comports with our standards of decency to sentence a child to life without the possibility of parole for second degree murder. The sentence in this case is cruel and unusual.

In *Miller v. Alabama*, the Court declined to "foreclose a sentencer's ability" to make the judgment that a "juvenile offender whose crime reflects irreparable corruption,," could conceivably receive a life sentence without parole. See *Miller v. Alabama*, 567 U.S. 460, 479 (2012). The Court noted, however, that a life without parole sentence "reflects an 'irrevocable judgment about an offender's value and place in society' at odds with a child's capacity for change." *Id* at 473.

In *Montgomery v. Louisiana*, this Court made clear that a lifetime in prison is "disproportionate sentence for all but the rarest of children, those whose crimes reflect "'irreparable corruption.'" 136 S. Ct. 718, 726 (2016). And yet, in this instance, Petitioner was sentenced to life imprisonment for second-degree murder, see La. R.S. 14:30.1, which is not even the most aggravated form of murder under Louisiana law. Cf. La. R.,S. 14:30 (outlining the elements of first degree murder). Indeed, despite this Court's recognition that the severity of a life without parole sentence for a juvenile is akin to a death sentence for an adult, *Miller*, 567 U.S. at 475, an adult is statutorily precluded from receiving a capital sentence for second-degree murder in

Louisiana. *Cf.* La. R.S. 14:30(C)(1) (providing for a sentence of death or life without parole for an adult convicted of first-degree murder) *with* La. R.S. 14:30.1(B) (providing only a sentence of life without parole for an adult convicted of second-degree murder).

A. To the Extent Life Without Parole for Juveniles Is Permissible At All, It Should Be Limited to the Most Aggravated Murders

When a state classifies offenses -- identifying the most aggravated murders – life without any possibility of parole for juveniles should be restricted to the most culpable offenses.

There is an emerging understanding that life without parole for juveniles is itself an excessive and unnecessary punishment. *Cf Johnson v. Idaho* (17-236) *Petition for Certiorari,* pending; see also *id*., *Brief for Amicus Curiae, Fair Punishment Project in Support of Petitioner,* filed 9/11/2017. But to the extent that the Court finds that there are some rare, narrow class of adolescent offenders for whom a life without parole sentence is not excessive, it must be limited to the most aggravated offenses. In *Graham v. Florida*, this Court recognized that in addition to considering the fundamental differences between juveniles and adult minds, it was important to "consider next the nature of the offenses to which this harsh penalty might apply." 560 U.S. 48, 68-69 (2010). The Court observed that imposition of life without parole for a juvenile was akin to imposing the death penalty. But in Louisiana (for defendants sentenced to life without parole prior to August 1, 2017, like David Dove) and a handful of other states, the death in prison punishment for children is imposed without the narrowing that would be required for capital offenses.

Concurring in *Miller v. Alabama*, 567 U.S. 460 (2012), Justice Breyer noted that life without parole should be limited to the most aggravated offenses – otherwise the most severe sentence available is imposed on adolescents who have "twice diminished moral culpability." *Id.* at 490. While recognizing that the "question of intent" and the classifications of homicides are "complicated", when a State has a classification which makes clear that an offense is ***not*** the most culpable murder, imposition of a life without parole on the adolescent defendant is excessive.

In the majority of states and instances (outside of Louisiana), life without parole for juveniles is limited to those ***both*** guilty of the most culpable offenses (because it is only "those crimes [that] reflect the 'irreparable corruption') and who demonstrate a proven inability to mature-- Indeed, as the Court explained in *Montgomery*, a life sentence without the possibility of parole is excessive for all juvenile offenders except for "the rare juvenile whose crime reflects irreparable corruption":

> Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" … it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016). Even in Louisiana, prospectively, life without parole is not available for second degree murder

B. There Is A National Consensus That Life Without Parole For A Sixteen Year Is Excessive, Particularly When Imposed for A Lesser Degree of Homicide.

Prior to this Court's opinion in *Miller*, twenty-seven jurisdictions made life without parole the mandatory punishment for 14-year old children, convicted of

aggravated murder, with two other states rendering it available for 15-year old children. See *Miller v. Alabama,* 567 U.S. at 482 n 9 (2012). At the time, 5 jurisdictions prohibited life without parole altogether or specifically for juveniles.

1. Alaska[1]
2. Colorado[2]
3. Kansas[3]
4. Kentucky[4]
5. Oregon[5]

Following *Miller*, seventeen (17) jurisdictions prohibited the imposition of juvenile life without parole ("JLWOP") by statute or court ruling.

6. Arkansas[6]
7. California[7]
8. Connecticut[8]
9. Delaware[9]

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[1] See National Conference of State Legislatures, Juvenile Life Without Parole, February 2010, available at http://www.ncsl.org/documents/cj/jlwopchart.pdf; *see also* Alaska Stat. § 12.55.125.

[2] National Center for Juvenile Justice, *State Juvenile Justice Profiles*, available online at: http://www.ncjj.org/stateprofiles; see also The Sentencing Project: *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole,* June 2014, available at http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf; *see also* Colo. Rev. Stat. § 18-1.3-401(4)(b).

[3] *See* Kan. Stat. § 21-6618.

[4] *See* Ky. Rev. Stat. Ann. § 640.040 (3).

[5] *See* Or. Rev. Stat. Ann. §§ 161.620(1) & 163.105(1)(c).

[6] *See* S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections).

[7] *See* S.B. 394, Reg. Sess. (Cal. 2017) passed both the California House and Senate providing any person who under the age of 18 at the time of an offense, sentenced to life without the possibility of parole, shall be eligible for release on parole after serving 25 years, unless entitled to earlier parole consideration. The law is pending the Governor's signature.

[8] *See* S.B. 796, Jan. Sess. (Conn. 2015) (amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a and enacting new sections).

[9] *See* S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending Del. Code Ann. tit. 11, §§ 636(b), 4209, 4209A, 4204A).

10. **District of Columbia**[10]
11. Hawaii[11]
12. Iowa[12]
13. Massachusetts[13]
14. Nevada[14]
15. New Jersey[15]
16. North Dakota[16]
17. South Dakota[17]
18. Texas[18]
19. Utah[19]
20. Vermont[20]
21. West Virginia [21]
22. Wyoming[22]

In addition to these twenty-two (22) states that categorically prohibit life without parole for juveniles, sixteen (16) more states have limited life without parole to capital murder first degree murder, or terrorism offenses:

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[10] In April 2017, the District of Columbia eliminated life without parole for juveniles. *See* D.C. Act A21-0568, 63 D.C. Reg. 15312.

[11] See H.B. 2116, 27th Leg. Sess. (Haw. 2014) (amending Haw. Rev. Stat. §§ 706-656(1), -657).

[12] *State v. Sweet*, 879 N.W. 2d 811 (Iowa 2016).

[13] *See Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013); *Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013).

[14] *See* A.B. 267, 78th Reg. Sess. (Nev. 2015) (amending Nev. Rev. Stat. §§ 176.025, 213.107 and enacting new sections in chs. 213 & 176).

[15] *See* A. 373, 217th Leg. Assemb. (N.J. 2017) (amending N.J.S. 2C:11-3).

[16] *See* N.D. H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting a new section in ch. 12.1-32).

[17] *See* South Dakata, S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016) (amending S.D. Codified Laws § 22-6-1 and enacting a new section).

[18] *See* Texas, S.B. 2, 83rd Leg. Special Sess. (Texas 2013) (enacting Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071).

[19] *See* Utah, H.B. 405 (Utah 2016) (amending Laws of Utah §§ 76-3-203.6, -206, -207, -207.5, -207-.7 and enacting § 76-3-209).

[20] *See* Vermont, H. 62, 73rd Sess. (2015) (enacting Vt. Stat. Ann. tit. 13, § 7045).

[21] *See* W. Va. Code §§ 61-11-23, 62-12-13b).

[22] *See* H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013) (amending Wyo. Stat. Ann. §§ 6-2-101(b), 6-2-306(d), (e), 6-10-201(b)(ii), 6-10-301(c), 7-13-402(a)).

23. Arizona[23]
24. Florida[24]
25. Georgia[25]
26. Illinois[26]
27. Maryland[27]
28. Minnesota[28]
29. Missouri[29]

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[23] *Compare* Ariz. Rev. Stat. § 13-751 (imposing sentence of life or natural life for defendants convicted of first degree murder) with Ariz. Rev. Stat. § 13-710 and Ariz. Rev. Stat. § 13-716 providing for parole eligibility for second degree murder).

[24] In 2014, Florida passed statutes that provide the vast majority of juveniles serving life without parole the opportunity for a second-look hearing before a judge after serving 15, 20 or 25 years. *See* Fla. Stat. §§ 775.082, 316.3026, 373.430, 403.161, 648.571, 921.1401, 921.1402. In Florida, the only defendants who can now receive a life without parole sentence are those convicted of first-degree murder who have previously been convicted of a violent felony.

[25] *See* Ga. Code Ann. § 16-5-1 (e) (2) ("(2) A person convicted of the offense of murder in the second degree shall be punished by imprisonment for not less than ten nor more than 30 years.").

[26] *See* 730 Ill. Comp. Stat. 5/5-4.5-30(a)(" The sentence of imprisonment for second degree murder shall be a determinate sentence of not less than 4 years and not more than 20 years.").

[27] *See* Md. Code Ann., Crim. Law § 2-204(b) ("A person who commits a murder in the second degree is guilty of a felony and on conviction is subject to imprisonment not exceeding 30 years.").

[28] Minnesota provides for life without parole for first-degree murder. *See* Minn. Stat. § 609.185. *But see Jackson v. State*, 883 N.W.2d 272 (Minn. 2016) (providing any juvenile sentenced to life without parole prior to Miller would receive a sentence of life with the possibility of parole). Second degree murder is subject to a maximum forty year sentence. See Minn. Stat. § 609.19.

[29] In 2016, Missouri passed a statute that permits juveniles sentenced to LWOP before August 28, 2016 to submit a petition to the parole board for sentence review after serving 25 years, effectively abolishing JLWOP in all old cases. Mo. Rev. Stat. § 558.047(1). Regardless, second-degree murder is a Class A Felony for which a defendant is subject to a minimum of 10 years and a maximum of 30 years or life with parole. Mo. Rev. Stat. § 565.021; Mo. Rev. Stat. § 558.011.1(1). *Cf State v. Nathan*, 522 S.W. 3d 881, 2017 Mo. LEXIS 338 at 21 (Mo. 2017) ("[A}fter the jury could not unanimously agree to impose life in prison without the possibility of parole solely for the first-degree murder conviction, the circuit court set aside Nathan's first-degree murder conviction and instead found he was guilty of second-degree murder….Nathan was to be sentenced for second-degree murder within the statutorily authorized range of punishments (10 to 30 years or life for second-degree murder)."); *id,* at 37-38(Stith, J. dissenting) ("In the order issued upon resentencing after remand by this Court pursuant to *Miller*, the judge was forced to sentence Nathan to second-degree murder and life with parole because the jury had failed to find Nathan was irreparably corrupt.

30. Nebraska[30]
31. New Mexico[31]
32. New York[32]
33. North Carolina[33]
34. Pennsylvania[34]
35. Tennessee[35]
36. Virginia[36]
37. Washington[37]
38. Wisconsin[38]

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[30] Second-degree murder in Nebraska is a Class IB felony punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment with parole eligibility afeter 20 years. See Neb. Rev. Stat § 28-304(2) and Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002); *State v. Moore*, 743 N.W. 2d 375 (Neb. 2008) ("We note that Moore was shown a degree of leniency by the State when it entered into a plea agreement under which the homicide charges were reduced from first to second degree murder and that Moore was thereby spared the possibility of sentences of either life without parole or death."). *See also* Neb.R.R.S. § 83-1,110.04 ("(1) Any offender who was under the age of eighteen years when he or she committed the offense for which he or she was convicted and incarcerated shall, if the offender is denied parole, be considered for release on parole by the Board of Parole every year after the denial.")

[31] N.M. Stat. Ann. § 30-2-1 (West); N.M. Stat. Ann. § 31-18-15 (West) (sentence for second degree murder is fifteen years, subject to alteration).

[32] New York limits life without parole for juveniles to a narrow band of cases involving terrorism. *See* N.Y. Penal Law § 490.25.

[33] North Carolina exempts juveniles conflicted of felony murder from LWOP, and limits imposition of LWOP for juveniles to a narrow category of first degree murder cases. See N.C. Gen. Stat. §§ 15A-1340.19A, -1340.19B.

[34] In 2012, Pennsylvania enacted legislation that abolishes JLWOP for second-degree murder and gives courts discretion to sentence juveniles to either LWOP or a parole-eligible sentence for first-degree murder. 18 Pa. Cons. Stat. § 1102.1.

[35] See Tenn. Code § 39-13-210; Tenn. Code § 40-35-111 (punishment for second degree murder is not less than 15 and not more than 60 years).

[36] Va. Code § 18.2-32 ("All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five nor more than forty years.").

[37] In 2014, the legislature retroactively eliminated LWOP for crimes committed by juveniles aged 15 and younger. The legislation provided that juveniles aged 16 and 17 who are convicted of aggravated first-degree murder may be sentenced either to LWOP or a parole-eligible sentence. Wash. Rev. Code § 10.95.030.

[38] Wis. Stat. § 940.02(1); Wis. Stat. § 939.50(3)(b) (providing maximum sentence of 60 years).

In addition to the thirty-eight (38) jurisdictions that have formally abandoned JLWOP for second-degree murder, two states have zero individuals serving a JLWOP sentence: Maine and Rhode Island.[39] Five more states have five or fewer individuals serving JLWOP sentences: Indiana, Idaho Montana, New Hampshire, and Ohio.[40] But even in these states, the significant majority of these cases of juveniles serving life without parole, the cases are limited to those convicted of first degree murder.[41] In total, forty-five (45) jurisdictions are either abolitionist, or functionally so.[42]

Even more particularly, Louisiana has adopted a statute that henceforth prohibits imposition of a life without parole sentence for juveniles convicted of second-degree murder prospectively.

This consensus is stronger than the consensus in *Atkins* and *Roper*.

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[39] The Juvenile Sentencing Project, Juvenile Life Without Parole Sentences in the United States, *June 2017, Snapshot,* A Project of Quinnipiac University School of Law, available at https://www.juvenilelwop.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences_01.pdf last visited 9/23/2017.

[40] *Id*.

[41] All five of the juveniles serving life without parole from New Hampshire were convicted of first-degree murder. *Petition of State,* 103 A.3d 227, 229 (N.H. 2014). The only Montana case involving a juvenile serving life without parole involves a charge of the most severe version of homicide available. *See State v. Keefe*, 759 P.2d 128, 129 (Mont. 1988). In Idaho, three of the four juveniles serving life without parole, were convicted of first degree murder. See *State v. Draper*, 261 P.3d 853, 857 (Idaho, 2011) (first-degree murder); *State v. Adamcik*, 272 P.3d 417, 425-426 (Idaho, 2012) (same); *Johnson v. State*, 319 P.3d 491, 494 (Idaho 2014) (same); *State v. Windom*, 253 P.3d 310, 311 (Idaho 2011) (second-degree murder) vacated *Windom v. State*, 398 P. 3d 150 (Idaho, 2017) (vacating sentence and remanding under *Montgomery*).

[42] *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (including jurisdictions where the laws "continue to authorize executions, but none have been carried out in decades" in consensus rejecting the execution of the intellectually disabled); *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (Oregon is on the abolitionist side of the ledger because it has "suspended the death penalty and executed only two individuals in the past 40 years.").

C. The Direction of Change Establishes A Consensus That Life Without Parole for Second-degree Murder is Excessive

In 2012, when this Court decided *Miller*, it declined to address the question of whether a life sentence without the possibility of parole for a defendant under the age of 18 violates the Eighth Amendment, noting: "We do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . ." *Id.* at 2469. The Court observed: "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty ***will be uncommon***." *Id.* (emphasis added).

Since this Court's opinion in *Miller*, a majority of states have amended their laws to ensure that juvenile offenders have an opportunity for release. Other states have recognized the ineffable inquiry in assessing whether a youth is "irretrievably corrupt." See *State v. Sweet*, 879 N.W.2d 811, 836-837 (Iowa 2016); *Diatchenko v. DA*, 1 N.E.3d 270, 275-76 (Mass. 2013).

It is not only the numbers, but the direction of the change, and the speed of that change that is so significant. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."). Here, the number of states that have abolished juvenile life without parole sentences is more than twice the number that shifted from executing juveniles during the time from *Stanford* to *Roper v. Simmons* – and the shift

happened in one quarter the amount of time.[43] A larger number of states currently prohibit life without parole for adolescents convicted of second degree murder than prohibited the execution of juveniles at the time of *Roper*, or that prohibited the execution of intellectually disabled at the time of *Atkins*.[44]

Where adolescents were once seen as "super-predators" incapable of emotion or redemption, both brain-science and experience has taught us that youth are uniquely capable of growth, transformation and maturation – and unduly harsh punishments ignore the capacity of adolescents for rehabilitation. Unfortunately, when left to make judicial determinations regarding the appropriateness of a life sentence for a child-offender, judges in Louisiana err on the side of punishment. As such, life without the possibility of parole is not -- in Louisiana -- reserved for the most culpable offenders convicted of the worst offenses – but rather is the ordinary instance of injustice.[45]

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[43] When this Court considered *Stanford* in 1989, twenty-two of the thirty-seven states with the death penalty allowed the execution of 16-year-old offenders and twenty-five of the thirty-seven death penalty states allowed the execution of 17-year-old offenders. *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989). Sixteen years later, when this Court considered *Roper* in 2005, twenty states still permitted the execution of juveniles, but the practice itself was infrequent. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

[44] When this Court considered *Atkins* in 2002, eighteen states had statutory provisions prohibiting the execution of an intellectually disabled individual. *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002).

[45] A review of the second-degree juvenile convictions in Louisiana from 2013 through 2016 indicates that nearly four out of every five juveniles receive a sentence of life without the possibility of parole that is affirmed on appeal. *See State v. Jones,* 15-157 (La. App. 5 Cir 09/23/15), 176 So. 3d 713 (sentenced to life without the possibility of parole); *State v. Graham*, 2014-1769 (La. App. 1 Cir 04/24/15), 171 So. 3d 272 (sentenced to life without the possibility of parole); *State v. Williams*, 2015-0866 (La. App. 4 Cir 01/20/16), 186 So. 3d 242 (sentenced to life without the possibility of parole); *State v. Hudson*, 2015-0158 (La. App. 1 Cir 09/18/15); *State v. Davis*, 15-118 (La. App. 5 Cir 06/30/15), 171 So. 3d 1223 (sentenced to life without the possibility of parole); *State v. Wilson*, 2014-1267 (La. App. 4 Cir 04/29/15), 165 So. 3d 1150

III. THE PETITIONER'S SENTENCE OF LIFE WITHOUT PAROLE VIOLATES THE STANDARDS ANNOUNCED IN *MILLER V. ALABAMA* AND *MONTGOMERY V. LOUISIANA*

Even if this Court declines to consider the Eighth Amendment issue raised above, or concludes that a sentence of life without parole, imposed upon a juvenile for a reduced degree of homicide, does not always violate the constitution, Mr. Dove's life-without-parole sentence, imposed because his crime evidenced immaturity and foolishness, violates the substantive guarantee of *Miller v. Alabama*, 567 U.S. 460 (2012).

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court established a substantive rule: a life without parole sentence was disproportionate for any juvenile whose crime does not reflect "irreparable corruption." 567 U.S. at 479-80; *Montgomery v. Louisiana*, 136 S.Ct 718, 734 (2016), quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.").

(sentenced to life without the possibility of parole); *State v. Ross*, 14-84 (La. App. 5 Cir 10/15/14), 182 So. 3d 983 (sentenced to life without the possibility of parole); *State v. Fletcher*, 49303 (La. App. 2 Cir 10/01/14), 149 So. 3d 934 (sentenced to life without the possibility of parole); *State v. Brooks*, 49033 (La. App. 2 Cir 05/07/14), 139 So. 3d 571 (sentenced to life without the possibility of parole); *State v. Smoot*, 13-453 (La. App. 5 Cir 01/15/14), 134 So. 3d 1 (sentenced to life without the possibility of parole); *State v. Smith*, 47983 (La. App. 2 Cir 05/15/13), 116 So. 3d 884; (sentenced to life without the possibility of parole); *State v. Williams*, 50060 (La. App. 2 Cir 09/30/15), 178 So. 3d 1069 (sentenced to life with the possibility of parole); *State v. Baker*, 154 So. 3d 561 (La. Ct. App. 2014) (sentenced to life with the possibility of parole after 35 years); *State v. Jones*, 49830 (La. App. 2 Cir 05/20/15), 166 So. 3d 406 (sentenced to sixty years with the possibility of parole).

The record in this case fails to establish that Mr. Dove is among the worst-of-the-worst juvenile offenders, "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S.Ct. at 733. The entirety of the state's evidence in support of a life without parole sentence consisted of less than three pages – and was focused solely on the impact of the offense on the victim. See Appendix D, at 36a-38a. In fact, the evidence introduced demonstrated that Dove was not the most incorrigible defendant. See Appendix D, at 39a-56a. Dove was only sixteen years old and did not have any substantial criminal record. The trial court imposed a life without parole sentence because, in the court's view, Dove's crime was intentionally committed and not sufficiently mitigated, not because Dove was incapable of rehabilitation. *Id.* In fact, the court specifically noted that the offense was the result of "foolishness" when imposing this extreme punishment. *Id.* at 54a.

Because the trial court's findings reveal that Dove is one of the vast number of "juvenile offenders whose crimes reflect the transient immaturity of youth, *Montgomery*, 136 S.Ct. at 734, the Court should summarily reverse the Louisiana Fourth Circuit Court of Appeal and remand for consideration of this case in light of *Miller* and *Montgomery*. This Court has not hesitated to do so to ensure the proper enforcement of the Eighth Amendment's protections in juvenile life without parole cases. *See, e.g.*, *Arizona v. Tatum*, 137 S. Ct. 11, 11 (2016); *Adams v. Alabama*, 136 S. Ct. 1796 (2016). In light of the Louisiana courts' complete misunderstanding of this Court's precedent, summary reversal is also appropriate here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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Dated: September 27, 2017

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 27th day of September, 2017, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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