No. 17-6231

In the Supreme Court of the United States

DAVID D. DOVE,

Petitioner,

v.

LOUISIANA,

Respondent.

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

BRIEF IN OPPOSITION

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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.

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STATEMENT OF THE CASE

1. Petitioner David Dove was convicted of one count of second-degree murder and one count of attempted second-degree murder. Pet. App. A, 7. Both offenses occurred on the evening of November 25, 2009, outside a barbershop in New Orleans. *Id.* at 9. The surviving victim, Terenika Barton, later testified that she was conversing with Jacquian Charles when she saw a man with a gun approaching Charles from behind. *Id.* at 8-9. When she alerted Charles to the man's presence, the man began shooting Charles. *Id.* at 9. Charles and Barton fell to the ground, with Charles lying atop Barton and so shielding her as the gunman stood over them and continued to fire, although Barton begged him to stop. *Id.* By the time the shooting ceased, Barton had been shot in both legs and Charles had been shot 13 times in the back. *Id.* at 16. Charles died of his injuries. The subsequent investigation led police to Dove, who was believed to be a member of a gang called the Black Flag Mafia. *Id.* at 8.

2. Dove was indicted in April of 2010. *Id.* at 7. His trial began on June 10, 2013, and ran for five days, in the course of which over 20 witnesses were called. *Id.* at 7-14. The State's theory of the case was that Dove had killed Charles in retaliation for the murder of a fellow gang member several months earlier. In support of its case the State introduced, *inter alia*, a log of phone calls made and received by Dove on the day of the shooting as well as audio recordings of several phone calls he had placed in jail. *Id.* at 8, 10. Dove was identified in open court as the perpetrator both by Barton and by Jason Daniels, who testified that he was out

looking to buy heroin on the night of the offense when he witnessed the shooting. *Id.* at 9. While the defense attempted to impeach Barton with prior inconsistent statements, she explained these by stating that she had been afraid for her safety and that of her family.[1] *Id.* Likewise, after Daniels's father testified that Daniels had been out of town on the day of the shooting, Daniels responded that his father had done so out of concern that his testifying against Dove had placed them and their family in danger.[2] *Id.* at 14. Daniels recounted having received warnings and threats with regard to testifying, including menacing statements and behavior on the part of Dove himself. *Id.* at 14.

Dove was found guilty as charged on June 14, 2013. The trial court denied a motion for a new trial and for a post-verdict judgment of acquittal, and a sentencing hearing took place November 8, 2013.[3] *Id.* at 7. At the hearing the State summarized the facts of the shooting and referred to statements Dove had made in the jailhouse calls played at trial. Pet. App. C, 35-36. It then called one witness, Charles's mother, who testified to how the loss of her son had affected her. *Id.* at 36-38. The defense called two witnesses: Dewalle John Price, a former coach of Dove's, and Aline Dove, his mother, both of whom testified to his character. *Id.* at 39-48. A pre-sentence investigation report had also been prepared and submitted. *Id.* at 53.

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[1] One individual whom the State planned to call as a witness, Karl Brown, was in fact murdered before trial, although prosecutors were not able to prove that the murder was connected to this case. *See generally* R., Vol. 3 of 8, 712 *et seq.* (hearing transcript).

[2] Daniels also noted that his father had a problem with him "going against the Code" by cooperating with law enforcement: "Where we grew up, you don't snitch." R., Vol. 8 of 8, Tr. for 6/14/2013, 204.

[3] Prior to the sentencing hearing the state legislature passed La. Code Crim. Proc. art. 878.1, implementing *Miller v. Alabama* in Louisiana. 567 U.S. 460 (2012). This law, effective August 1, 2013, has since been revised once, effective August 1, 2017.

After hearing argument the court delivered its ruling. The judge began by explaining that she was "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 . . . ." *Id.* However, she found Dove's case to be unusual. He had been given "opportunities that other youth in this city have not had," having attended a private school and having had parents who both supported him. *Id.* at 54. Despite this, he had knowingly and deliberately committed a brutal crime, a crime for which he had shown no remorse. Believing Dove to be incorrigible, the court sentenced him to life imprisonment without benefit of parole, probation, or suspension of sentence. *Id.*

3. Dove sought review in the Louisiana Fourth Circuit Court of Appeal, which affirmed his convictions and sentences on May 4, 2016. Pet. App. A, 1. With respect to a *pro se* claim that non-unanimous verdicts are unconstitutional, the appellate court cited state and federal jurisprudence rejecting this argument, including *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *State v. Bertrand*, 6 So.3d 738 (La. 2009). *Id.* at 21. Dove also challenged his life-without-parole sentence, invoking *Miller v. Alabama*, 567 U.S. 460 (2012), and this claim failed as well. The court of appeals found that the trial court had applied *Miller* properly, and that the sentence was "not grossly out of proportion to the seriousness of the crime . . . despite the fact the defendant in this case was only sixteen years old at the time he committed the offense." *Id.* at 21. Dove then submitted a counseled application for discretionary review in the Louisiana Supreme Court, which was summarily denied June 16,

2017. Pet. App. B, 23. Justice Scott Crichton stated in a separate opinion that he would grant review, "not because I believe the trial court may have erred in imposing a sentence of life imprisonment without parole eligibility . . . 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." *Id.* The state high court denied another application June 29, 2017. *Id.* at 25. Dove applied to this Court for a writ of certiorari September 26, 2017.

REASONS FOR DENYING THE PETITION

Because Dove fails to show that the verdicts against him were, in fact, non-unanimous, he lacks standing to challenge the constitutionality of such verdicts. Even if his arguments on this point were relevant to his case, certiorari would still be unwarranted because Dove fails to adduce any new or compelling justification for departing from the doctrine of *stare decisis*. He neither shows nor alleges that Louisiana's current provisions for less-than-unanimous jury verdicts were impermissibly motivated by race, and there have been no recent developments in this Court's Sixth Amendment jurisprudence that would justify upsetting longstanding precedent in the manner he proposes.

Dove's argument in favor of extending *Miller* should not be considered because he failed to raise it below. Moreover, the argument is neither supported by nor consistent with *Miller*'s logic, and Dove is unable to show that *Miller* itself has been overtaken by evolving standards of decency. As for claims that *Miller*'s

strictures have gone unheeded in this case or in Louisiana as a whole, they are simply not borne out by the facts. Further review is unwarranted.

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION PRESENTED.

A. Dove's argument against non-unanimous verdicts is irrelevant to his case.

The question whether the Sixth Amendment, as incorporated through the Fourteenth Amendment, requires unanimous verdicts in state felony cases is not properly presented for a simple reason: there is no evidence Dove was convicted by a non-unanimous jury. Therefore, the factual bedrock of his claim is entirely lacking, and he lacks standing to challenge the constitutionality of non-unanimous verdicts.

Dove writes that "only ten of the twelve jurors voted to convict [him] as charged," Pet. 5, and in support of this contention he cites page 7 of his Appendix A. But this, the first page of the Louisiana Fourth Circuit's decision on appeal, merely states the following with respect to the verdicts: "A 10-14 June 2013 jury trial found Dove guilty as charged on both counts." Likewise, on page 21 of Appendix A the appellate court notes only that Dove asserted *pro se* that the jury was "less than unanimous[.]" The undersigned has been unable to find any support for this assertion. There are no polling slips in the record that would establish how jurors voted. Neither the trial transcript nor the pertinent minute entry indicates the jurors were polled at all.[4]

[4] R., Vol. 8 of 8, Tr. for 6/14/2013, 214; R., Vol. 1 of 8, 87 (Minute Entry for 6/14/2013). The minute entry does reflect that the jury required only three hours and four minutes of deliberation before returning its verdicts.

Furthermore, none of Dove's previous counsel claimed the verdicts against him were non-unanimous. Dove's trial counsel did file a motion challenging the constitutionality of non-unanimous verdicts, but he did so before trial.[5] Counsel did not raise this argument again in the wake of Dove's conviction, either at sentencing or in post-verdict motions.[6] Dove's appellate counsel also made no representations as to how the jury had voted (other than that it returned verdicts of guilty).[7] Finally, when Dove's counsel in the Louisiana Supreme Court challenged the constitutionality of non-unanimous verdicts, they conspicuously declined to allege that the verdicts in this case were indeed non-unanimous.[8]

Absent a showing that the verdicts against Dove were less than unanimous, he lacks standing to challenge such verdicts.

B. There is no compelling reason to revisit *Apodaca v. Oregon*.

Even if Dove's argument against non-unanimous verdicts were relevant, certiorari would still be unwarranted.

1. The doctrine of stare decisis counsels against granting certiorari.

The Court has repeatedly declined to grant certiorari to review this issue. *See, e.g., Barbour v. Louisiana*, 562 U.S. 1217 (2011); *Louisiana v. Miller*, 568 U.S. 1157 (2013); *McElveen v. Louisiana*, 568 U.S. 1163 (2013); *Louisiana v. Hankton*, 135 S.Ct. 195 (2014); *Louisiana v. Webb*, 135 S.Ct. 1719 (2015); *Baumberger v.*

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[5] R., Vol. 3 of 8, 646 (motion filed 5/14/2013).

[6] Pet. App. C (hearing on post-verdict motions and sentencing); R., Vol. 1 of 8, 111 (motions for new trial and for judgment of acquittal).

[7] R., Vol. 8 of 8, Original Appellant Brief.

[8] R., Vol. 8 of 8, Original Writ Application.

Louisiana, 17-5755 (2017); *Mincey v. Vannoy*, 17-5792 (2017); *Bowen v. Oregon*, 558 U.S. 815 (2009); *Herrera v. Oregon*, 562 U.S. 1135 (2011). Dove offers it no new or compelling reason to proceed differently here.

The doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Welch v. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). Any departure therefrom accordingly demands "'special justification.'" *Id.* at 495 (citation omitted). This is true even in constitutional cases. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). "Adherence to precedent promotes stability, predictability, and respect for judicial authority. For all these reasons, we will not depart from the doctrine of *stare decisis* without some compelling justification." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal citations omitted). Today's Court would undoubtedly approach a great many of its precedents differently as matters of first impression. If, as Dove suggests, that alone is enough to call those precedents into doubt, then *stare decisis* has no meaning.

Among the "factors in deciding whether to adhere to the principle of *stare decisis*" are "the antiquity of the precedent" and "the reliance interests at stake[.]" *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) (citation omitted). The precedents at issue here, *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), are forty-six years old, and Louisiana (as well as Oregon) has relied on them since 1972 to instruct jurors in felony trials that they may return non-unanimous verdicts. Overruling *Apodaca* and *Johnson* would bring great instability and unpredictability to Louisiana and Oregon. Thousands of convictions

would be upset if such a new rule were later declared retroactive; and although such a rule should not be applied retroactively during collateral review, *cf. Schriro v. Summerlin*, 542 U.S. 348, 353-358 (2004), there is no doubt that a flood of defendants would file motions claiming otherwise.

The *Apodaca* and *Johnson* decisions also provide workable rules that are easy to apply. Because these decisions do not defy consistent application, this factor also weighs against departing from precedent. *See Pearson v. Callahan*, 555 U.S. 223, 235 (2009). Furthermore, the Court has not questioned *Apodaca* and *Johnson* and has cited one or both of them without reservation. *E.g., Schad v. Arizona*, 501 U.S. 624, 634 n. 5 (1991) ("a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict"); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979) ("a jury's verdict need not be unanimous to satisfy constitutional requirements"); *Brown v. Louisiana*, 447 U.S. 323, 330-331 (1980) ("the constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict.").

2. The history of Louisiana does not counsel in favor of granting certiorari.

Dove suggests that Louisiana's non-unanimous verdict system is impermissibly motivated by race. This argument lacks merit. First, although sources show that delegates at Louisiana's 1898 Constitutional Convention were motivated to disenfranchise black voters (see, e.g., *State v. Webb*, 133 So.3d 258, 283-284 (La. Ct. App. 2014)), the convention also strove to "[s]hape a judiciary system which will relieve the parishes of the enormous burden of costs in criminal

trials, and . . . present to the people of this State a judiciary system which shall be both efficient and economical." *Id.* at 284 (quoting OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 10 (1898)). As this Court has recognized, "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit." *Apodaca*, 406 U.S. at 411 (footnote omitted). There is no definitive evidence demonstrating that the 1898 Constitution's authorization of non-unanimous jury verdicts was based on racism rather than judicial efficiency.

More significantly, the 1898 Louisiana Constitution is long defunct, having been superseded by several more recent state constitutions. *Cf. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (observing that if a law is struck down "because of the bad motives of its supporters . . . it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."). The most recent state constitution was adopted in 1974 and includes a provision allowing ten-out-of-twelve verdicts. LA. CONST. art. I, § 17(A). Records from the constitutional convention show this was a considered choice. "The revision of a less-than-unanimous jury requirement in the 1974 Constitution was not by routine incorporation of the previous Constitution's provisions; the new article was the subject of a fair amount of debate." *State v. Hankton*, 122 So.3d 1028, 1038 (La. Ct. App. 2013). The "1973 Constitutional Convention debated the issue of less-than-unanimous jury verdicts when it changed the required number of jurors concurring from nine out of twelve to ten out of twelve." *Id.* Race was not mentioned. Rather,

the stated purpose (again) was judicial efficiency. Moreover, the 1974 Louisiana Constitution "was adopted by a vote of the people." *Id.* There is no suggestion or contemporary evidence of popular appeals to race as a reason for the passage of the non-unanimous-verdict provision of the 1974 Constitution. It is this provision, not Article 116 of the 1898 Louisiana Constitution, that applied to these proceedings.

3. This Court's recent Sixth Amendment cases do not cast doubt upon Johnson *and* Apodaca.

Dove posits a recent "sea-change in constitutional exegesis" that "crystallized" in *McDonald v. Chicago*, 561 U.S. 742 (2010). Pet. 10. There, this Court observed that incorporated Bill of Rights protections apply identically to the States and the Federal Government. *Id.* at 765. That rule was well established in 1972, when *Apodaca* and *Johnson* were decided. *Cf. Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (quoted in *McDonald*, 561 U.S. at 765). *McDonald* did not alter the incorporation test and does not provide a compelling basis to reconsider those precedents.

The other cases cited by the Petitioner, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Southern Union Co. v. United States*, 567 U.S. 343 (2012), refer to William Blackstone's prescription 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," *Apprendi*, 530 U.S. at 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)). History has not changed since *Apodaca* was decided. The

plurality in that case observed that "the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." 406 U.S. at 407-08 (footnotes omitted). Yet the text of the Sixth Amendment does not reference a unanimity requirement, and "'the relevant constitutional history casts considerable doubt on the easy assumption that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution.'" *Id.* at 408-409 (citation and ellipses omitted). But the "most salient fact" that shows the Sixth Amendment does not include a unanimity requirement is that, as originally proposed by James Madison, the Amendment did require a trial by jury "with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites." *Id.* at 409 (citing 1 ANNALS OF CONG. 435 (1789)). Although other inferences can be drawn from the refusal to adopt this language, a plurality of this Court found the "more plausible" inference to be that "the deletion was intended to have some substantive effect." *Id.* at 410 (citation omitted). No new developments or reexamination of Founding-era history supports overruling a decision upon which Louisiana has relied for almost fifty years.

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION PRESENTED.

A. Dove did not fairly present this question to the Louisiana courts.

The categorical rule proposed by Dove's second Question Presented would prohibit a state from imposing life without parole in any case where the offender was sixteen at the time of the crime and is convicted of second degree murder. The

Court should not consider this issue because it was not pressed or passed upon below. *Cf. Illinois v. Gates*, 462 U.S. 213, 217-223 (1983). Dove's argument to the Louisiana courts was that *Miller* had been incorrectly applied—not that *Miller* ought to be extended. His counseled assignment of error presented to the Louisiana Supreme Court was as follows: "The appellate court erred in applying *Miller* to the case, concluding David Dove's sentence without the possibility of parole for a crime committed when he was sixteen years old was not unconstitutionally excessive, where there was an insufficient showing he was 'irreparably corrupt.'"[9]

Here, Dove is not asking the Court to apply *Miller*, but to change it in light of allegedly evolving standards of decency. If the Court grants certiorari on this question, that would make it the court of first instance on the subject. This strongly suggests that certiorari should be denied. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Yee v. Escondido*, 503 U.S. 519, 533 (1992) ("In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below.").

B. Dove's sentence is consistent with *Miller v. Alabama*.

Dove's sentence is not contrary to the Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). In *Miller*, this Court held that a mandatory sentencing scheme imposing life without parole on juveniles who commit murder violates the Eighth Amendment. 567 U.S. at 489. The

[9] R., Vol. 8 of 8, Original Writ Application, 5.

Court also directed sentencers weighing life without parole for juvenile homicide offenders to take into consideration "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480 (footnote omitted). In so holding, the Court observed that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 483. Rather than mandate a factual finding by the sentencer or create a presumption, this Court made a predictive judgment that life without parole would be disproportionate under the Eighth Amendment in all but the rarest of cases. *See Montgomery*, 136 S.Ct. at 735.

The courts below followed the rule set out in *Miller* by considering all of Dove's circumstances. There is little in this case that brings to mind the attributes of youth: far from acting impetuously, Dove appears to have been carrying out a premeditated plan. And he did so with exceptional ruthlessness, shooting Charles again and again at close range. He nearly killed a second person, Terenika Barton, for no other reason than that she happened to be present, and acted with extreme indifference to the safety of anyone else who might have been in the vicinity.[10] Dove has also not shown the slightest indication of any subsequent regret or change of heart. He was arrested on a separate charge of second-degree battery while

[10] Police found one bullet that had passed through the windshield of a vehicle and lay on a baby seat in the rear. Pet. App. A, 8.

awaiting trial[11] and was heard in jail calls vowing to "fuck over" various individuals upon his release.[12] In the Pre-Sentence Investigation Report compiled almost four years after the shooting, the investigator wrote that Dove "was and still is an active member" of the Black Flag Mafia gang.[13] She also reported that he had "blatantly lied" when asked about the circumstances leading to his arrest and showed no remorse for his actions.[14] One might suspect such callousness resulted from a "brutal or dysfunctional" home environment. 567 U.S. at 477. Yet Dove told the investigator that his parents had been married at the time of his birth and remained so until he was 13, that he had a good relationship with his family, and that he had not suffered any physical, emotional, or mental abuse.[15]

C. Dove's arguments for extending *Miller* are without merit.

Dove also argues that in states (like Louisiana) which recognize different degrees of murder, life without parole should be considered excessive for any juvenile defendant convicted of less than the most aggravated degree of murder. Not only is this argument forfeited, see § II(A), *supra*, it is neither supported by nor consistent with *Miller*'s logic.

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[11] R., Vol. 1 of 8, 124 (Pre-Sentence Investigation Report). The report also identified an arrest for simple battery in 2008. *Id.*

[12] *See, e.g.*, R., Vol. 8 of 8, Tr. for 6/14/2013, 150 ("And then it says – David says, 'I'm a fuck over both of them.'") (quoting defense counsel); R, Vol. 8 of 8, Tr. for 6/13/2013, 276 ("Can you explain why the defendant is on the jail tapes talking about how he wants to fuck over all of Jacques' friends [*sic*]?") (quoting the prosecutor).

[13] R., Vol. 1 of 8, 124.

[14] *Id.* at 127.

[15] *Id.* at 125.

1. *Miller* could have crafted a bright-line rule that all offenders who are sixteen and who are not convicted of the jurisdiction's most aggravated form of murder cannot receive life without parole. But it did not. Nor did the Court in *Miller* adopt capital jurisprudence wholesale in crafting its holding. Instead, *Miller* relied upon two "strands" of precedent, one barring certain sentencing practices categorically, the other prohibiting the mandatory imposition of capital punishment. 567 U.S. at 470. The strand of this Court's jurisprudence requiring the use of statutory aggravating circumstances in capital cases, so as to "genuinely narrow the class of persons eligible for the death penalty . . . compared to others found guilty of murder," has not been tied into *Miller* jurisprudence. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983) and *Gregg v. Georgia*, 428 U.S. 153 (1976)).

Further, whereas *Miller* provides a uniform standard, one based upon the characteristics of youth everywhere, definitions of "capital" or "first-degree" murder can vary considerably between states. For instance, while Louisiana classifies the intentional killing of another (without more) as second-degree murder, the same crime constitutes first-degree murder in Pennsylvania.[16] If *Miller* were extended in the manner Dove suggests, then the same punishment, as applied to the same crime, could be perfectly acceptable in one state yet cruel and unusual in another—an absurd result.

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[16] *Compare* LA. REV. STAT. § 14:30.1(A)(1) ("Second degree murder is the killing of a human being . . . When the offender has a specific intent to kill or to inflict great bodily harm") *with* 18 PA. CONS. STAT. § 2502(a) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.").

The idiosyncrasies of statutory classifications should also be borne in bind in assessing Dove's claims of a national consensus. Consider first his tally of 16 states that limit juvenile life-without-parole to the most aggravated class of homicide offenses. Eleven of these states (Arizona, Georgia, Illinois, Maryland, Minnesota, Missouri, Nebraska, New Mexico, Tennessee, Virginia, and Wisconsin) do not authorize life without parole at all in cases of second-degree murder—a policy choice that does not reflect a judgment regarding any particular subset of offenders, such as juveniles. In three states (Illinois, Pennsylvania, and Wisconsin) intentional killing constitutes the highest degree of homicide that exists, and Dove's crime would thus have exposed him to life without parole in those states just as it did in Louisiana.[17] Furthermore, if Dove's actions were premeditated (as the evidence strongly suggests they were, but prosecutors had no need to prove), this would support conviction for capital or first-degree murder—punishable by life without parole—in Arizona, Georgia, Maryland, Minnesota, Missouri, New Mexico, North Carolina, Tennessee, Virginia, and Washington.[18] In only three of the 16 states

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[17] 720 ILL. COMP. STAT. ANN. § 5/9-1(a)(1) (defining first-degree murder in part as a killing in which the perpetrator "intends to kill or do great bodily harm"); 18 PA. CONS. STAT. § 2502(a) (quoted *supra* at 15, n. 16); WIS. STAT. § 940.01(1)(a) (defining first-degree intentional homicide as "caus[ing] the death of another human being with intent to kill that person or another").

[18] ARIZ. REV. STAT. § 13-1105(A)(1) (defining first-degree murder in part as knowingly or intentionally causing the death of another "with premeditation"); GA. CODE ANN. § 16-5-1(a) (killing "unlawfully and with malice aforethought"); MD. CODE ANN. § 2-201(a)(1) ("a deliberate, premeditated, and willful killing"); MINN. STAT. § 609.185(a)(1) ("with premeditation and with intent"); MO. REV. STAT. § 565-020(1) ("knowingly caus[ing] the death of another person after deliberation upon the matter"); NEB. REV. STAT. § 28-303 (killing "purposely and with deliberate and premeditated malice"); N.M. STAT. § 30-2-1(A)(1) ("any kind of willful, deliberate, and premeditated killing"); N.C. GEN. STAT. § 14-17(a) (". . . or any other kind of willful, deliberate, and premeditated killing"); TENN. CODE § 39-13-202(a)(1) ("A premeditated and intentional killing of another"); VA. CODE § 18.2-32 ("any willful, deliberate, and premeditated killing"); WASH. REV. CODE § 9A.32.030(1)(a) ("With a premeditated intent").

listed (*viz.*, Florida, Nebraska, and New York) can it be said that Dove would not have faced any possibility of a life-without-parole sentence.

Dove also identifies 21 states that now prohibit the imposition of life without parole upon juveniles. But here too there are caveats. First, it appears that one state (Delaware) does not belong on this list.[19] Second, in two other states it was not the legislature but the state supreme court that imposed the prohibition, and this constitutes weaker evidence of consensus than do the actions of elected representatives.[20] *See Roper v. Simmons*, 543 U.S. 551, 589 (2005) ("Laws enacted by the Nation's legislatures provide 'the clearest and most reliable objective evidence of contemporary values.'") (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Finally, it is not the case that juvenile life-without-parole has been eliminated entirely in these states. While some barred the sentence both prospectively and retroactively, others did not.[21] It also appears that "*de facto* life sentences" remain permissible in at least two of these states, Colorado and Texas.[22]

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[19] *See* DEL. CODE § 11:4209(A) (providing that a juvenile offender convicted of first-degree murder "shall be sentenced to a term of incarceration not less than 25 years at Level V up to a term of imprisonment for the remainder of the person's natural life to be served without benefit of probation or parole or any other reduction.").

[20] *See State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013).

[21] *Compare* 2017 Ark. Acts 539, 7 ("Subsection (a)(2)(A) of this section applies retroactively to a minor whose offense was committed before he or she was eighteen (18) years of age . . . regardless of when the original sentence was imposed.") *with* 2013 Tex. Gen. Laws 5020, 5021 ("The change in law made by this Act . . . does not affect a final conviction that exists on the effective date of this Act.").

[22] *See State v. Arredondo*, 406 S.W.3d 300, 306 (Tex. App. 2013) ("Therefore, even assuming . . . two consecutive life sentences amount to a sentence of 'life without parole,' we conclude that nothing prevents such a discretionary sentence . . . ."); *Carmon v. State*, 456 S.W.3d 594 (Tex. App. 2014) (following *Arredondo*); *Lucero v. People*, 394 P.3d 1128, 1132 (Colo. 2017) ("*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense."). *Cf. State v. Charles*, 892 N.W.2d 915 (S.D. 2017) (finding defendant's 92-year sentence did not offend *Miller* because he would become eligible for parole at age 60).

Dove urges changes to the law in a situation where none are called for, and makes claims of a national consensus where none exists. He fails to show that certiorari is warranted.

2. Dove's *amici* make a different argument in support of the proposed categorical rule, insisting that Louisiana as a whole "has resisted this Court's mandates in *Miller v. Alabama* and *Montgomery v. Louisiana*[.]" *Amici*, 2. This claim is not borne out by the facts.

The Louisiana Legislature has now twice enacted legislation for the purpose of implementing *Miller*.[23] On the second occasion, it not only addressed the class of retroactive claims discussed in *Montgomery*, it went beyond *Miller* by eliminating life without parole as a possible sentence for juvenile offenders indicted for second-degree murder on or after August 1, 2017. LA. CODE CRIM. PROC. art. 878.1(A). Meanwhile, after legislative efforts to address *Montgomery* in 2016 were derailed by a last-minute filibuster,[24] the Louisiana Supreme Court stepped in to provide guidance to state trial courts on the re-sentencing of retroactive *Miller* claimants. *State v. Montgomery*, 194 So.3d 606 (La. 2016). The Louisiana Supreme Court also indicated that following re-sentencing the trial court should "issue reasons indicating the factors it considered to aid in appellate review of the sentence imposed[.]" *Id.* at 609.

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[23] 2013 La. Acts 239; 2017 La. Acts 277.

[24] *See* Bryn Stole, *Cases Expected to Clog Louisiana Courts, and Cost Millions, After State Fails to Address Unconstitutional Life Sentences*, NEW ORLEANS ADVOCATE (June 10, 2016), *available at* http://www.theadvocate.com/baton_rouge/news/crime_police/article_2c1e6197-5dbf-5f8a-8303-343320d59191.html.

Amici contend that one of *Miller*'s dictates has gone unheeded: that life-without-parole sentences be reserved for "the rare juvenile offender whose crime reflects irreparable corruption." 567 U.S. at 479-80 (quoting *Roper*). In doing so they devote particular attention to post-*Miller* cases in which juvenile offenders convicted of second-degree murder (rather than first-degree murder) were sentenced to life without parole.[25] But focusing on this distinction overlooks the realities on the ground. From the date *Roper* was decided until August 1, 2017, there was no practical reason for a prosecutor in Louisiana to seek a first-degree murder conviction rather than a second-degree murder conviction of a juvenile offender, as during this time-span (in which Dove's case fits) the sentence for both crimes was identical. Another notable oversight is *amici*'s failure identify which of the cases they list are still open, as this wholly discounts the possibility of defendants obtaining relief through direct review.[26] In particular, it ignores the fact that if state trial courts are applying *Miller* improperly, it is the responsibility of state courts of review to correct them. *Amici* do not show or allege that Louisiana's courts of review are failing in that task.

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[25] *Amici* also claim that racial disparities are apparent in these cases, but the data are far too limited to support this claim. For instance, while only two cases involved white offenders, both were sentenced to life without parole. To argue that this demonstrates a tendency to punish white juveniles with undue severity would plainly be unreasonable. But *amici*'s own arguments do not rest on much firmer ground than this.

[26] In at least one case, that of Jeremy Burse (which is highlighted on page 7 of *amici*'s brief), this has already occurred: issues arose there on appeal that ultimately led prosecutors to agree to a plea deal carrying a sentence of 25 years' imprisonment. *See* Matt Sledge, *Man Convicted of Killing Friend at 15 Gets Shorter Term in Controversial Case*, THE NEW ORLEANS ADVOCATE (Dec. 1, 2017), *available at* http://www.theadvocate.com/new_orleans/news/courts/article_8d8b43b8-d6f3-11e7-87ff-834a2332896b.html.

Amici also have little to say of the *Miller* legislation enacted last year, other than to dismiss it as "superficial at best." *Amici*, 11. Yet given that the new legislation eliminates life without parole for juveniles convicted of second-degree murder in cases indicted on or after August 1, 2017, it accomplishes prospectively precisely what Dove is asking this Court to hold generally.

The new legislation has also extended parole eligibility automatically to retroactive *Miller* claimants in cases where prosecutors did not file a notice of intent to seek life without parole within 90 days of August 1, 2017.[27] *Amici* point to the number of notices filed as evidence that "Louisiana has ignored the instructions and intent of this Court's jurisprudence to impose this sentence only on the 'rare' and 'uncommon' juvenile offender." *Amici*, 2. But sentences are imposed by courts, not prosecutors. And of 94 inmates identified as having been re-sentenced, only *three* were re-sentenced to life without parole. In some of these cases, moreover, parole eligibility was granted notwithstanding opposition from the State.[28] In Orleans Parish, there have to date been four *Miller/Montgomery* cases in which the defendant was re-sentenced after the State argued in favor of life without parole. The defendant still received parole eligibility in all of these cases.[29]

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[27] LA. CODE CRIM. PROC. art. 878.1(B)(1). Based on an examination of the data provided for one jurisdiction, Orleans Parish, it appears that *amici*'s Appendices do not account for this provision's effect. In addition, two Orleans Parish defendants (Glenn Payne and Darryl Crockett) identified as awaiting new sentences were actually re-sentenced earlier in 2017 (both to life with parole), while one defendant (Cory Gipson) whose parish of conviction is identified as Orleans Parish was instead convicted in Caddo Parish, in north Louisiana. *State v. Gipson*, 677 So.2d 544 (La. Ct. App. 1996).

[28] *Amici* acknowledge they were unable to determine how often prosecutors opposed parole eligibility for claimants re-sentenced before the new legislation took effect. *Amici*, 9 n. 7.

[29] The defendants in question are Charles Unger, Clarence Johnson, Louis Gibson, and Glenn Payne.

Such outcomes are hardly surprising. Trial judges are presumed to know the law and to apply it in making their decisions, and both state law and the precedents of this Court make clear that life without parole is not an acceptable sentence for most juvenile homicide offenders.[30] Furthermore, the State's ability to demonstrate grounds for life without parole is severely handicapped in cases where years and even decades have passed since the defendant's trial and conviction. Conversely, it is the rare inmate who is incapable of adducing at least some signs of rehabilitation after years of incarceration. *Cf. Montgomery*, 136 S.Ct. at 736 (noting petitioner's account of his "evolution from a troubled, misguided youth to a model member of the prison community.").

Amici overlook important facts while relying upon hasty assumptions and unwarranted claims. Above all, their arguments in no way offset the failure of Dove himself to show that this case warrants review.

CONCLUSION

The State of Louisiana respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[30] *See* LA. CODE CRIM. PROC. art. 878.1(D) (instructing that "Sentences without parole eligibility . . . should normally be reserved for the worst offenders and the worst cases.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Supreme Court Rule 29.3, a copy of the foregoing memorandum has been served upon the following counsel for petitioner and *amici curiae* by placing same in the United States mail, properly addressed and with first-class postage prepaid, this 5th day of February, 2018:

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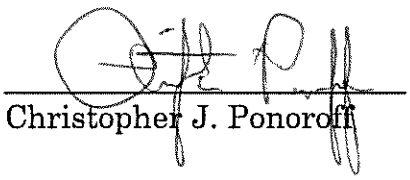

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