NO. 17-6231

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

REPLY TO THE STATE OF LOUISIANA'S BRIEF IN OPPOSITION

G. Ben Cohen*
Shanita Farris
Erica Navalance
The Promise of Justice Initiative
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
bcohen@thejusticecenter.org

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

Pursuant to Rule 15.6, Petitioner David D. Dove files this Reply Brief to the State's Brief in Opposition (hereinafter BIO). As discussed more fully below, the BIO argues that questions presented are not properly before this Court, despite the plain adjudication of the merits of the issues below: the Court of Appeal for the Fourth Circuit firmly held that the non-unanimous conviction did not violate the Sixth and Fourteenth Amendment (pet. App. A at 21a), and that the life sentence without the possibility of parole imposed upon a sixteen-year-old offender convicted of second-degree murder did not violate the Eighth and Fourteenth Amendments (pet. App. A at 21a). When the BIO turns to the substantive questions, Louisiana offers some merits justifications for non-unanimous jury verdicts and the sentencing scheme that resulted in Petitioner's life without parole sentence. The BIO does not however, argue that these are insubstantial issues unworthy of this Court's Rule 10 review.

I. This Court Should Grant Certiorari to Address the Constitutionality of Non-Unanimous Jury Verdicts.

1. The constitutionality of non-unanimous jury verdicts is properly before the Court. As the BIO concedes, petitioner raised the issue prior to trial. BIO at 6. Petitioner raised the issue on appeal. The fact that Petitioner had to raise the issue *pro se* rather than in counseled pleadings to the Court of Appeal and Louisiana Supreme Court may speak to the quality of his counsel, but not whether the issue was raised. Had the State disagreed with Petitioner's *pro se* Assignment of Error, it would have filed a response to Petitioner's Brief in the Court

of Appeal and the Court of Appeal would not have reached the issue. To the contrary, the Court of Appeal squarely reached the merit of the question holding:

> In Dove's final assignment of error, he complains that he was convicted of second degree murder by a less than unanimous jury, which, he asserts, is unconstitutional and a denial of his right to equal protection under the United States Constitution and the Sixth, Eight, and Fourteenth Amendment thereto, and La. Const. Art. I, §§ 13, 15, 16, and 20. Our state constitution (Art. I, § 17), statutory law (La. C.Cr.P. art. 782 A), and both federal and state jurisprudence … have upheld this procedural device that a less than unanimous jury (ten of twelve jurors) is sufficient to convict a person for second degree murder. This assignment of error is without merit

Pet. App. at 21a. As in *Burch v. Louisiana*, 441 U.S. 130 (1979), the Louisiana courts considered and "disposed of that claim" and as such the "federal question therefore is properly raised in this court." *Id.* at n. 4. To the extent the minutes or record fail to establish a unanimous verdict, that deficiency must be borne by respondent. [1]

2. The BIO's citation to a number of this Court's denials of certiorari is not dispositive, and this Court's Opinion in *Apodaca* is no longer supportable. "As we have often stated, the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) *citing United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.). "The "variety of considerations [that] underlie denials of the writ," *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.), counsels against according denials of certiorari any precedential value." *Teague* at 296.

[1] This Court also has before pending *Sims v. Louisiana*, 17-7002, which presents the same question without any of the concerns that the State has here about standing. In that case, the State has waived its right of response, and the case has been distributed for the February 16, 2018 conference.

Nor is *stare decisis* dispositive. S*tare decisis* is at its nadir "in cases . . . involving procedural and evidentiary rules" because such rules do not produce "reliance" like substantive rules do. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (citation omitted). This is more so when, as here, the procedural holding is dependent upon plurality opinions predicated upon two distinct legal positions – both of which have been rejected. First, no subsequent Court has adopted Justice Powell's conclusion that although "the Sixth Amendment requires a unanimous jury verdict," the Fourteenth Amendment does not incorporate that aspect of the Sixth Amendment against the states. Second, recent case-law has rejected the plurality's conclusion that the breadth of the Sixth Amendment requires consideration of the role it performs "in contemporary society." *Apodoca,* 406 U.S. at 406.

Whether there are legitimate *stare decisis* concerns may be relevant to the debate at the merits stage but does not dispel the need to grant certiorari. Given how this Court's jurisprudence has severely undercut *Apodaca*'s logic in recent years, granting certiorari will enhance confidence in the administration of justice. To the extent the State of Louisiana asserts that issues of finality and certainty inform this Court's decision – those concerns ameliorate towards granting the petition rather than delaying further.

3. Indifference to the history of racism in the Constitutional Convention of 1898 is not dispositive. Whether the 1974 Constitutional Convention "cleansed" the racial origins of the 1898 Constitutional Convention would be dispositive if the sole question was whether Petitioner established by a

preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of the statute. See *Hunter v. Underwood*, 471 U.S. 222 (1985). But here, petitioner has not raised the issue as a separate equal protection violation; rather, petitioner relies upon that history to demonstrate that Justice Powell's concept of partial incorporation is the *least* supportable with regard to provisions of the Bill of Rights that were essential to protect the freedoms for which the Reconstruction Amendments were adopted, and part of the privileges and immunities conferred upon citizens.

II. This Court Should Grant Certiorari to Address the Constitutionality of Life Without Parole for A Sixteen Year Old Convicted of Second-Degree Murder.

1. The BIO erroneously claims that this question was not fairly presented to the Louisiana courts. In fact, the Court of Appeals begins its penultimate section:

> In ***his final assignment, Dove contends his life sentence at hard labor without the benefits of parole, probation, or suspension of sentence is unconstitutionally excessive*** considering that he was only sixteen years old at the time of the shooting.

Pet. App. at 18a. The state intermediary court proceeded to reject the claim.

To the extent that the State is confused[2] because the lines of argument and emphasis at this Court are different than the lines of argument presented to the state court, this reflects a lack of recognition of the difference in the role of the intermediary

[2] As the Court of Appeal opinion indicated "Further, Dove asserts *pro se* that the manner in which the *Miller v. Alabama* hearing was conducted violated his rights under due process of law." Pet. App. at 18a. This is a separate and distinct argument.

Louisiana appellate court and this Court. See e.g. *Sanders v. United States*, 373 U.S. 1, 16 (1963) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."). Indeed, whether it be in *Montgomery v. Louisiana*, 577 U.S. __ (2016) *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2010) in each instance the issue presented in the lower courts involved – as it did here -- the constitutionality of the sentence imposed, leaving to this Court the broader analysis of the evolving standards of decency.

2. Whether there is a consensus that a life sentence without the possibility of parole for a sixteen year old convicted of second-degree murder is excessive is a merits question worthy of this Court's review. The petition presented strong evidence that there is a national consensus that a life sentence imposed upon a sixteen year old for second degree murder is excessive. The BIO erroneously challenges this evidence[3] and the method of counting: "Eleven of these states … 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

[3] The BIO, for instance, claims that Delaware has life without parole for second degree murder. See BIO at 17 and n. 19 citing DEL. CODE § 11:4209(A). But that provision must be read in conjunction with other codal provisions which provide: "Notwithstanding any provision of this title to the contrary, any offender sentenced to a term of incarceration for murder first degree when said offense was committed prior to the offender's eighteenth birthday shall be eligible to petition the Superior Court for sentence modification after the offender has served 30 years of the originally imposed Level V sentence." DEL. CODE § 11:4204A (d) (2).

subset of offenders such as juveniles." BIO at 16. This is a merits argument concerning how the Court measures consensus that has been made and rejected.[4]

Nor is the evidence of consensus undermined by the number of times the Louisiana legislature attempted to rewrite the statute,[5] or by the fact that prospectively no child convicted of second-degree murder in Louisiana is eligible for life without parole. The BIO asserts "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." See BIO at 20, and generally BIO at 18-20, citing 2017 La. Acts 277, La. Code Crim. Proc. Art. 878.1. But this is the point. As Justice Stevens observed, concurring in *Graham v. Florida,*

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time…

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[4] See *Roper v. Simmons*, 543 U.S. 551, 564 (2005) ("[I]n this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."). The BIO also discounts states where the state supreme courts 'imposed the prohibition.' BIO at 17. Of course, in measuring consensus in *Roper v. Simmons,* this Court counted states that had repealed the death penalty (for juveniles or altogether) whether for constitutional or statutory reasons, along with states that had legislatively repealed the punishment.

[5] Identifying the fulcrum of cruelty and arbitrariness, the BIO notes that the legislative efforts to address *Montgomery* in 2016 – that would have resulted in a life *with* parole sentence for Petitioner – were derailed by a last-minute filibuster essentially unrelated to the issue. See Lauren Krisai, *Louisiana Inmates Serving Unconstitutional Sentences Will have to Keep Waiting for Relief*, Reason.Com June 8, 2016, , at http://reason.com/blog/2016/06/08/a-long-life-without-parole, last visited 2/8/2018 (observing that "according to Julia O'Donoghue of the Times-Picayune, Peterson actively blocked the juvenile-parole bill as retribution for House members failing to vote on a construction budget bill that was backed by the Senate.").

Graham v. Florida, 560 U.S. 48, 85 (2010) (Stevens J., concurring).

The question presented here exactly involves whether the Eighth Amendment tolerates imposition of a sentence so severe that it has otherwise been abandoned. This Court should consider the issue.

3. The BIO supports Petitioner's argument for a bright-line rule observing: "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." BIO at 21. The handful of random life without parole sentences identified in the BIO, and the difficulty in ascertaining which amongst the Louisiana teenagers sentenced to life without parole are not susceptible to rehabilitation or redemption, are not arguments against granting certiorari in this case, but rather are strong evidence of the consensus that the sentence imposed upon David Dove is excessive.

The BIO contests the dismal reality presented by amici of Louisiana's indifference to the circumstances of youth claiming: "Another notable oversight is amici's failure to identify which of the cases they list are still open, as this wholly discounts the possibility of defendants obtaining relief through direct review." BIO at 19. The BIO cites the case of Jeremy Burse where "issues arose there on appeal that ultimately led prosecutors to agree to a plea deal carrying a sentence of 25 years' imprisonment." *Id* at n. 26. *Amici* can hardly be faulted for overlooking a case that had not happened yet when it filed its amicus. But more significantly, as Respondent

is aware, the plea agreement in *Burse* was a result of a motion to remand granted by the Court of Appeal over the State's objection based upon a *Brady* violation, and the State settled the case because of its recognition that the conviction would surely be overturned. The possibility of *Brady* violations in Orleans Parish – no matter how prevalent is not a sufficient mechanism for reviewing cases involving teenagers sentenced to life without parole.

Similarly, the BIO asserts that "the realities on the ground" explain that "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." BIO at 19. But this argument proves far too much – as except for the relatively few cases in which the state of Louisiana seeks death – the exact same reality applies to adult offenders. Prosecutors charge based upon their view of the conduct involved not out of an indifference to the legislature's statutory scheme. Presumably, prosecutors charge a defendant with second rather than first-degree murder because of the difficulty in presenting evidence of specific intent to kill and an additional aggravating factor, which the Louisiana Legislature has found enhance the moral culpability of the perpetrator.

The difficulties in assessing varying levels of moral culpability militate in favor of granting certiorari rather than against it. Indeed, as noted in Petitioner's supplement -- filed prior to the BIO but not contested by the BIO, Respondent in this case is quoted in news media observing:

> *'We're basically guessing on these cases,' Cannizzaro said in an interview Friday afternoon. 'I think this is an unfair call for the district attorney.'*

Julia O'Donoghue, *Louisiana DA's See to Block Parole for Juveniles Serving Life for Murder*, The Times Picayune, November 4, 2017. Ultimately acknowledging the difficulty, the article indicates that "Orleans Parish District Attorney Leon Cannizzarro said he would have preferred if the Legislature had not involved prosecutors in the decision about whether the juvenile lifers should have access to parole." *Id.* Similarly, the head of the District Attorneys' Association has indicated, that this Court will have to provide more clarity:

> Pete Adams, executive director of the Louisiana District Attorneys Association, doesn't dispute that Louisiana is probably headed back to court. He said the Supreme Court will have to add more clarity to the term 'worst of the worst' in regards to juvenile lifers.
>
> 'Eventually, the U.S. Supreme Court will say what's acceptable and what's not,' Adams said. 'If the U.S. Supreme Court says no one can get life without parole or who can't get it, we will abide by that.'

Id.. This Court should grant certiorari to provide that clarity.

III. The BIO does Not Assert, Let Alone Establish, that Petitioner's Case is the Worst of the Worst

The BIO does not even address Petitioner's third issue – that "In light of the Louisiana courts' complete misunderstanding of this Court's precedent, summary reversal is also appropriate here." Pet. at 33. At most, the BIO asserts – without support -- that the sentence is "consistent with *Miller v. Alabama*." See BIO at 12.

The BIO's cherry-picking of behaviors consistent with adolescence, such as arguments that Petitioner engaged in unruly behavior while held in an adult facility after being transferred out of the juvenile system, bragging, or petitioner's continued

insistence on his innocence, in no way signifies that Petitioner is the worst of the worst. The BIO suggests that this Court's opinion in *Montgomery*, the Eighth Amendment prohibited "life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" was a Nostradamus prognostication, a "predictive judgment" that "life without parole would be disproportionate under the Eighth Amendment in all but the rarest cases." BIO at 13. Essentially, the BIO excuses the life sentence imposed here by characterizing this Court's opinions in *Miller* and *Montgomery* as predictions that life without parole sentences "would be" rare, not directives that they "should be."

Even if this Court declines to consider the issue raised above, there is insufficient evidence in the BIO or the record below that justifies the life without parole sentence in this case. This Court should summarily reverse.

CONCLUSION

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

Respectfully Submitted,

G. Ben Cohen*
Shanita Farris
Erica Navalance
The Promise of Justice Initiative
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
bcohen@thejusticecenter.org

*Counsel of Record

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 9th day of February, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, the reply was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by email and 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:

Leon A. Cannizzaro, Jr., *District Attorney*
Orleans Parish District Attorney's Office
619 South White Street
New Orleans, LA 70119

Counsel for the State of Louisiana

G. Ben Cohen