No. 18-217

IN THE

Supreme Court of the United States

RANDALL MATHENA,
Petitioner,

v.

LEE BOYD MALVO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit erred in holding that the constitutional principle articulated in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016)—that sentencing a juvenile to life without parole violates the Eighth Amendment unless he or she is "'the rare juvenile offender whose crime reflects irreparable corruption,'" 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-480)—applies regardless of whether a State characterizes its sentencing scheme as "mandatory" or "discretionary."

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STATEMENT

In *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), this Court held that the Eighth Amendment prohibits life imprisonment without the possibility of parole for the great majority of juvenile offenders. Only "'the rare juvenile offender whose crime reflects irreparable corruption'" may receive that sentence. *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-480). As *Montgomery* held, that constitutional command is "substantive" under *Teague* v. *Lane*, 489 U.S. 288 (1989), and thus retroactive to cases on collateral review. *Montgomery*, 136 S. Ct. at 734.

Respondent Lee Boyd Malvo was seventeen when he committed the offenses for which he was sentenced to life without parole. Malvo's sentencing proceedings did not consider (and, since they took place in 2004, eight years before *Miller*, could not have considered) whether he was one of the rare, irreparably corrupt juvenile offenders who may constitutionally receive that sentence. The Fourth Circuit's decision below, granting Malvo new sentencing hearings, was thus a straightforward—and straightforwardly correct—application of *Miller* and *Montgomery*.

In particular, the Fourth Circuit correctly rejected the Commonwealth's argument that the rule of *Miller* applies only to "mandatory" schemes that preclude sentencers from considering age and not to "discretionary" schemes, like Virginia's, that purportedly permit them to do so. Whether *Miller* articulated only a procedural rule—requiring that sentencers have some opportunity to consider a defendant's youth—or instead a substantive rule—barring life without parole for juveniles who are not irreparably corrupt—was precisely the question presented in *Montgomery*. And *Montgomery* unambiguously resolved that question, holding that *Miller*'s rule is a substantive constitutional guarantee that applies regardless of the sentencing procedure used. *Montgomery* thus held that, under *Miller*, "*[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison*, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479 (emphasis added)). The Fourth Circuit did not err in following that holding. Nor did it violate *Teague* by applying the rule *Miller* and *Montgomery* recognized to Malvo's case.

In rejecting the Commonwealth's attempt to limit *Miller*'s rule to mandatory sentencing schemes, the Fourth Circuit joined the overwhelming majority of courts to consider the issue since *Montgomery*. The Commonwealth's petition identifies no conflict in the lower courts warranting a grant of certiorari—still less any justification for relitigating the question *Montgomery* already decided.

A. Malvo's Convictions And Sentences

In the fall of 2002, when Malvo was seventeen, he took part in a series of fatal shootings in the Washington D.C. metropolitan area—the so-called "D.C. sniper" attacks. He committed the murders along with and at the instigation of John Allen Muhammad, a man almost 25 years his senior.

The resulting criminal trials in Virginia and Maryland revealed how Malvo fell in with Muhammad. As defense witnesses explained, Malvo was physically abused and largely abandoned during his childhood in Jamaica and Antigua. *See* Pet. App. 8a. At age 15, Malvo met Muhammad in Antigua, and Muhammad became a "surrogate father" to him. *Id.* In 2001, Muhammad brought Malvo illegally into the United States. *Id.* Beginning in October 2001, Muhammad intensively trained Malvo in military tactics. *Id.* Almost a year later, the pair began the series of attacks that left twelve people dead and six others seriously wounded. *Id.* at 4a-5a. At Muhammad's trial, Malvo testified that he had falsely claimed to be the triggerman in the Virginia murders in order to save Muhammad—"being my, as I thought then, my father"—from the death penalty. *Muhammad* v. *State*, 934 A.2d 1059, 1079 (Md. Ct. Spec. App. 2007).

Malvo was prosecuted in two jurisdictions in Virginia. In his 2003 trial in Chesapeake, Virginia (for crimes that occurred in Fairfax County), the jury convicted Malvo of two counts of capital murder. Pet. App. 3a. At that time, Virginia law authorized only two punishments for capital murder: "death, … or imprisonment for life" without parole. 2003 Va. Code Ann. § 18.2-10(a). And it required a sentencing proceeding "limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment." *Id.* § 19.2-264.4(A). In Malvo's case, although the prosecutor had sought the death penalty, the jury recommended a life sentence. Pet. App. 3a. In 2004, the court sentenced Malvo to two terms of life imprisonment without the possibility of parole. *Id.* No one—not the court, the prosecutor, or Malvo's counsel—suggested that there was any possibility Malvo could be sentenced to anything less than life without parole. *Id.* at 22a. Malvo subsequently entered an *Alford* plea in proceedings in Spotsylvania County and received two additional life-without-parole sentences. *Id.* at 3a.

B. *Miller* v. *Alabama* And Its Predecessors

In the years following Malvo's convictions, this Court announced several decisions recognizing Eighth Amendment limits on punishments for juvenile offenders. It barred the death penalty for juveniles in *Roper* v. *Simmons*, 543 U.S. 551, 568-570 (2005), and barred life without parole for juveniles who commit non-homicide offenses in *Graham* v. *Florida*, 560 U.S. 48, 68 (2010). The Court explained that, relative to adults, "juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are

not as well formed." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569-570) internal quotation marks omitted)).

"*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Because of these attributes, juveniles "are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68. Similarly, "'the same characteristics that render juveniles less culpable than adults suggest … that juveniles will be less susceptible to deterrence.'" *Id.* at 72 (quoting *Roper*, 543 U.S. at 571). Moreover, "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 73.

In *Miller* v. *Alabama*, the Court applied the same principles to life-without-parole sentences for juvenile homicide offenders, concluding that life without parole is a constitutionally disproportionate punishment for most such offenders. While "not foreclos[ing] a sentencer's ability to make [the] judgment" that a defendant is "'the rare juvenile offender whose crime reflects irreparable corruption'" and thus warrants life without parole, the Court stated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 567 U.S. at 479-480 (quoting *Roper*, 543 U.S. at 573). Accordingly, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" because, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479.

C. Malvo's Habeas Petitions And *Montgomery* v. *Louisiana*

Following *Miller*, Malvo filed two federal habeas petitions seeking to vacate his life-without-parole sentences on the ground that *Miller* rendered those sentences invalid. The district court dismissed both petitions, holding that the rule in *Miller* was not retroactive to cases on collateral review. *Malvo* v. *Mathena*, No. 13-cv-376, 2014 WL 2859153, at *4 (E.D. Va. June 23, 2014); *Malvo* v. *Mathena*, No. 13-cv-375, 2014 WL 2808805, at *13 (E.D. Va. June 20, 2014). While Malvo's appeals from those decisions were pending, the Supreme Court decided *Montgomery* v. *Louisiana*.

Montgomery concluded that the rule of *Miller* is retroactive under the *Teague* framework. 136 S. Ct. at 732-736. *Teague* held that new rules of constitutional law do not apply retroactively on collateral review, with two exceptions: first, rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; second, "watershed" rules of criminal procedure. *Teague*, 489 U.S. at 307, 311 (plurality opinion). In *Penry* v. *Lynaugh*, the Court held that *Teague*'s first exception "cover[s] not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 492 U.S. 302, 330 (1989). Subsequent decisions have characterized the set of rules encompassed by the first *Teague* exception as "substantive" rules. *See, e.g.*, *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 (2004) ("New *substantive* rules generally apply retroactively. This includes … constitutional determinations that place particular conduct or persons covered by the

statute beyond the State's power to punish[.]" (citation omitted)).

In *Montgomery*, this Court held that *Miller* "announced a substantive rule of constitutional law" because 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." 136 S. Ct. at 734 (quoting *Penry*, 492 U.S. at 330). The Court rejected the argument that *Miller* merely "require[d] a sentencer to consider a juvenile offender's youth before imposing life without parole." *Id.* "Even if a court considers a child's age before sentencing him or her to a lifetime in prison," the Court explained, "that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* (quoting *Miller*, 567 U.S. at 479). Accordingly, the Court held that under *Teague's* exception for substantive rules, *Miller* applies retroactively to cases on collateral review. *See id.*

D. Proceedings Below Following *Montgomery*

The Fourth Circuit remanded Malvo's case to the district court for reconsideration in light of *Montgomery*. On remand, the Commonwealth contended that *Miller* was not applicable because Virginia had a "discretionary" sentencing scheme. Notice at 1, *Malvo* v. *Mathena*, No. 13-cv-375 (E.D. Va. Apr. 3, 2017) (ECF No. 54). The Commonwealth cited *Jones* v. *Commonwealth*, 763 S.E.2d 823 (Va. 2014) (*Jones I*), in which the Virginia Supreme Court had held Virginia's scheme "discretion[ary]" in light of a general statutory provision stating that "[a]fter conviction … the court may suspend imposition of sentence or suspend the sentence

in whole or part." *Id.* at 824-826 n.5 (citing Va. Code Ann. § 19.2-303).[1]

For his part, Malvo argued that, for purposes of applying *Miller*, Virginia's sentencing scheme was mandatory in every relevant sense. He pointed out that the statute specific to capital murder required a sentence of death or life without parole and that no court had ever suspended a sentence of life without parole for capital murder. Pet. Br. 15, *Malvo* v. *Mathena*, No. 13-cv-375 (E.D. Va. Aug. 15, 2016) (ECF No. 41). In any event, he argued, the constitutional rule of *Miller* applies regardless of whether a sentencing scheme is "mandatory" or "discretionary." *Id.* at 4-5.

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[1] It is revealing that, after *Montgomery*, the Commonwealth initially conceded that *Miller*'s rule *did* apply to life sentences imposed under Virginia's "discretionary" scheme. *See, e.g.*, Commonwealth Br., *Jones* v. *Commonwealth* (*Jones II*), No. 13-1385 (Va. June 17, 2016), *available at* 2016 WL 9049409, at *5-6 (requesting vacatur and remand to determine "whether Jones' life sentence … complies with *Miller* as modified by *Montgomery*"); Commonwealth Br. 1, 13, *Landry* v. *Baskerville*, No. 14-6631 (4th Cir. Apr. 18, 2016) (ECF No. 26) (requesting reversal and remand for district court to determine whether life-without-parole sentence "should be upheld under the exception set forth in *Montgomery*"). The Commonwealth later reversed course, presumably in light of the Virginia Supreme Court's decision that—notwithstanding the Commonwealth's contrary admission—*Miller* was inapplicable in Virginia. *See Jones II*, 795 S.E.2d 705, 723 n.27 (Va. 2017) (noting that the Commonwealth "interprets *Montgomery* to require" a new evidentiary hearing for Jones, but rejecting that position), *cert. denied*, 138 S. Ct. 81 (2017). Indeed, in its initial brief on remand in Malvo's case, the Commonwealth failed to raise the argument that *Miller* did not apply because Virginia's scheme was "discretionary." Instead, it raised the argument for the first time in a "notice" filed nearly eight months later, after *Jones II* was decided.

The district court agreed with Malvo. Without resolving the question whether Virginia's sentencing scheme was in fact discretionary, the court held that "*Miller* applies to all situations in which juveniles receive a life-without-parole sentence," irrespective of whether the "penalty scheme is mandatory or discretionary." *Malvo* v. *Mathena*, 254 F. Supp. 3d 820, 827 (E.D. Va. 2017).

On appeal, the Fourth Circuit likewise determined that it was irrelevant "whether any of Malvo's sentences were mandatory because *Montgomery* has now made clear that *Miller*'s rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence." Pet. App. 19a.[2] The court explained that "*Montgomery* stated clearly that, under *Miller*, the Eighth Amendment bars life-without-parole sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility." *Id.* at 20a. And "*Montgomery*'s articulation of the *Miller* rule was [not] mere dictum," but "the basis for its holding that *Miller* announced a substantive rule that applies retroactively." *Id.* Because the sentencers in Malvo's cases never considered whether to impose a sentence of less than life without parole, or made a finding that his crimes "reflected irreparable corruption or permanent incorrigi-

[2] The Fourth Circuit noted that "it is far from clear that anyone involved in Malvo's prosecutions actually understood at the time that Virginia trial courts retained their ordinary suspension authority following a conviction for capital murder." Pet. App. 19a. However, it declined to decide whether Virginia's scheme was mandatory or discretionary within the meaning of *Miller* because it found *Miller* and *Montgomery* applicable whether or not Virginia's scheme was discretionary. *Id.* at 19a-20a.

bility," the Fourth Circuit held that Malvo was entitled to be resentenced.

REASONS FOR DENYING THE PETITION

The Commonwealth argues that this Court should grant certiorari because there is a "nationwide split of authority about how to interpret *Miller* and *Montgomery*" (Pet. 9); because the Fourth Circuit's decision conflicts with the decision of the Virginia Supreme Court in *Jones* v. *Commonwealth*, 795 S.E.2d 705, 714-715 (Va. 2017) ("*Jones II*"), *cert. denied*, 138 S. Ct. 81 (2017) (Pet. 7); and because the Fourth Circuit is wrong (Pet. 11). None of the Commonwealth's arguments has merit.

In fact, *Montgomery* unambiguously compels the result the Fourth Circuit reached: The Eighth Amendment bars a life-without-parole sentence for any juvenile offender whose crime reflects transient immaturity, regardless of whether that sentence was imposed under a "mandatory" or "discretionary" scheme. As explained below (Part I.A), the Commonwealth has not identified a single case that was decided after *Montgomery* and concluded that *Miller* is limited to "mandatory" schemes, other than the Virginia Supreme Court's decision in *Jones II*. That decision, simply put, is wrong. Moreover, its precedential force is at the very least uncertain, given that the Virginia Supreme Court held that the trial court lacked jurisdiction to entertain Jones's *Miller* claim in the first place. It does not create a conflict worthy of this Court's review (Part I.B).

Ultimately, the Commonwealth's argument that the Fourth Circuit's decision is incorrect, and should be reversed, is in fact an argument that *Montgomery* is

incorrect, and should be overturned (Part II). The Commonwealth has provided no justification for overturning settled law. Instead, it has tried to disguise that doing so is its goal by framing the question presented as an issue of *Teague* doctrine. *See* Pet i. But, as explained below (Part III), that issue is not presented in this case, and its answer, in any event, does not help the Commonwealth.

I. THERE IS NO CONFLICT IN THE LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW

A. There Is Neither "Widespread Confusion" Nor An "Entrenched Circuit Split" Concerning The Proper Interpretation Of *Miller* And *Montgomery*

The Commonwealth argues that the Court should grant certiorari to resolve what it calls "widespread confusion and [an] entrenched circuit split" over whether *Miller* and *Montgomery* apply only to life sentences imposed under mandatory sentencing schemes or also to those imposed under "discretionary" schemes. Pet. 11. In fact, there is neither confusion nor any meaningful split of authority.

1. To begin with, the vast majority of the cases on which the Commonwealth relies are examples of the confusion that *used to exist*—until the Court resolved that confusion in *Montgomery*.

Specifically, the Commonwealth cites decisions of nine state courts and four circuit courts that, it says, "agree … that *Miller* does not apply to discretionary life-without-parole sentences." Pet. 10-11 nn.2, 3, 5. Of

those thirteen cases, eight predate *Montgomery*.[3] As to these cases, what the Commonwealth presents as a conflict regarding *Miller* and *Montgomery* is in fact nothing more than the conflict *Montgomery* itself resolved.[4]

The Commonwealth's error is perhaps best illustrated by its reliance on the Georgia Supreme Court's pre-*Montgomery* decision in *Foster*. There, the court rejected a juvenile offender's challenge to his sentence on the ground that *Miller* invalidated only mandatory life-without-parole sentences, whereas Georgia's scheme was discretionary. *Foster* v. *State*, 754 S.E.2d 33, 37 (Ga. 2014).

Two years later—after this Court decided *Montgomery*—the Georgia Supreme Court confronted the

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[3] *Foster* v. *State*, 754 S.E.2d 33 (Ga. 2014); *Conley* v. *State*, 972 N.E.2d 864 (Ind. 2012); *Murry* v. *Hobbs*, No. 12-880, 2013 WL 593365 (Ark. Feb. 14, 2013) (per curiam); *State* v. *Gutierrez*, No. 33,354, 2013 WL 6230078 (N.M. Dec. 2, 2013); *Turner* v. *State*, 443 S.W.3d 128 (Tex. Crim. App. 2014); *Evans-García* v. *United States*, 744 F.3d 235 (1st Cir. 2014); *United States* v. *Walton*, 537 F. App'x 430 (5th Cir. 2013) (per curiam); *Croft* v. *Williams*, 773 F.3d 170 (7th Cir. 2014). The Commonwealth notes that a different panel of the Seventh Circuit ruled that *Miller did* apply to discretionary sentencing schemes (even before *Montgomery*). *See McKinley* v. *Butler*, 809 F.3d 908 (7th Cir. 2016).

[4] When the Commonwealth opposed certiorari in *Jones* v. *Virginia*, No. 16-1337, it was quick to point out that federal appellate decisions on which it now relies for a split were decided before *Montgomery*, and that "[t]hose courts should be permitted to revisit the issue in light of the intervening decision." No. 16-1337 Br. in Opp. 32 & n.129 (U.S. Aug. 10, 2017). Indeed, it included in that list *United States* v. *Jefferson*, 816 F.3d 1016 (8th Cir. 2016) (discussed below at pp. 15-16), even though it was decided after *Montgomery*, because the opinion was issued "without discussion of this issue." No. 16-1337 Br. in Opp. 32 n.129.

issue again. *See Veal* v. *State*, 784 S.E.2d 403 (Ga. 2016). This time, it held that a juvenile sentenced to life without parole in Georgia *could* challenge his sentence under *Miller*. It explained that "*Montgomery* demonstrates that our previous understanding of *Miller* … was wrong …. [D]etermining whether a juvenile falls into that exclusive realm [of those for whom life without parole is a constitutional punishment] turns … on a specific determination that he is *irreparably corrupt*." *Id.* at 410-411; *see also id.* at 410 ("[We] might … [have rejected] the merits of Appellant's *Miller* claim … because [Georgia's sentencing scheme] does not … *mandate* life without parole [citing *Foster*] …. *But then came Montgomery*." (second emphasis added, internal quotation marks omitted)).

2. Of the remaining five decisions that the Commonwealth claims are on its side of an "entrenched" split, four did not actually involve the issue presented here—*i.e.*, whether *Miller* and *Montgomery* apply to juveniles who received life without parole sentences under discretionary sentencing schemes. Indeed, none of those decisions involved challenges to life-without-parole sentences at all. Any stray observations the courts made about how *Miller* might apply to sentences not before them were dicta and cannot create a split.

In *Lucero* v. *People*, 394 P.3d 1128 (Colo. 2017), *cert. denied*, 138 S. Ct. 641 (2018), the trial court sentenced the defendant to consecutive terms of years for multiple offenses, resulting in an aggregate sentence of eighty-four years. *Id.* at 1129. The court decided that neither *Graham* nor *Miller* applies to such a term-of-years sentence. *Id.* at 1131-1132. Although the court remarked that "*Miller* is limited to … mandatory life without parole, and does not extend to lengthy aggregate sentences or life sentences with the possibility of

parole," *id.* at 1133, its reference to "mandatory" life without parole is dictum. The *Lucero* court was not confronted with, and had no reason to consider, the question whether *Miller* applies to a discretionary life-without-parole sentence.

In *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017), the defendant originally received a sentence of life without parole, which he successfully challenged under *Miller*. *Id.* at 883. On resentencing, he received concurrent life sentences (with the possibility of parole) for some offenses and consecutive term-of-years sentences for other offenses. *Id.* at 884. He argued that "the combined effect of his consecutive sentences … amount[ed] to the functional equivalent of life in prison without the possibility of parole and thereby violate[d] the constitutional prohibition against cruel and unusual punishment." *Id.* at 882. In rejecting that argument, the court stated in passing that "*Miller* only applies to cases in which a sentencing scheme 'mandates life in prison without possibility of parole for juvenile offenders.'" *Id.* at 891. But this aside was not a *holding* that *Miller* does not apply to life-without-parole sentences imposed under a discretionary sentencing scheme. That issue was not presented in *Nathan*.

State v. *Charles*, 892 N.W.2d 915 (S.D. 2017), *cert. denied*, 138 S. Ct. 407 (2017), likewise did not involve a challenge to a discretionary life-without-parole sentence. The defendant initially received a mandatory life-without-parole sentence. He successfully challenged that sentence under *Miller* and, after "[a] two-day resentencing hearing focused largely on the applicability of the *Miller* factors in [his] case," was resentenced to 92 years with the possibility of parole at age 60. *Id.* at 922. The court rejected the argument that his new sentence was unconstitutional, holding

that a lengthy term of years with the possibility of parole is not categorically unconstitutional. *Id.* at 920, 923. The court's statement that *Miller* "bars *mandatory* life sentences without parole against juvenile homicide offenders, not *discretionary* sentences of life without parole," *id.* at 920, is, once again, dictum. The challenge the court was considering was to a term-of-years sentence, not a discretionary life-without-parole sentence.

Like *Nathan* and *Charles*, *United States* v. *Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016), involved a defendant who had successfully challenged his life-without-parole sentence under *Miller*. The district court conducted a resentencing hearing and issued an opinion in which it detailed *Miller*'s foundational principles and then analyzed the "*Miller* Factors" as applied to the defendant's case. *See United States* v. *Jefferson*, No. 97-276, 2015 WL 501968, at *3-8 (D. Minn. Feb. 5, 2015). After concluding that three of those factors weighed in favor of a sentence less than life in prison, *id.* at *7-8, the district court determined that, "[a]lthough the applicable guideline range calls for a sentence of life in prison, … a downward variance to a sentence of fifty years" was appropriate. *Id.* at *8.

The defendant appealed, challenging his new sentence under *Miller*. The Eighth Circuit held that *Miller* did not bar the fifty-year sentence. *Jefferson*, 816 F.3d at 1019. Although the court referred with apparent approval to pre-*Montgomery* decisions of other federal circuits that "declined to apply *Miller*'s categorical ban to discretionary life sentences," *id.*, the court was considering a term-of-years sentence imposed after a *Miller* hearing, not a discretionary sentence of life without parole imposed without a *Miller* hearing. Any suggestion that *Miller* should not apply to juveniles

who received life sentences pursuant to discretionary schemes was—once again—clearly dictum.

3. That leaves just one decision on the Commonwealth's side of its putative split: the Virginia Supreme Court's decision in *Jones II*. As discussed below (at pp. 17-18), *Jones II*'s discussion of the issue is of questionable precedential value. But even assuming it created a true conflict with the Fourth Circuit's decision, the "split" would be exceptionally lopsided.

The courts of at least eleven states have concluded that *Miller* and *Montgomery* apply to juveniles sentenced to life without parole generally, making no distinction between "mandatory" and "discretionary" sentencing schemes. The Commonwealth acknowledges seven of those decisions, *see* Pet. 10-11 n.4 (citing cases from Montana, Oklahoma, Connecticut, Utah, Ohio, Wyoming, and North Carolina), but it omits decisions from Illinois, Idaho, Georgia, and Florida. *See People* v. *Holman*, 91 N.E.3d 849, 861 (Ill. 2017) ("None of what the [*Miller*] Court said is specific to only mandatory life sentences. *Montgomery* made that clear."), *cert. denied*, 138 S. Ct. 937 (2018); *Windom* v. *State*, 398 P.3d 150, 155 (Idaho 2017) ("The *Montgomery* Court held that *Miller* announced a new substantive rule of constitutional law. In addressing that issue, the Court did not limit the new rule to a prohibition on mandatory fixed-life sentences for juveniles."), *cert. denied*, 138 S. Ct. 977 (2018); *Veal*, 784 S.E.2d at 410-412 (discussed above at pp. 12-13; holding that, after *Montgomery*, it is clear *Miller* applies whether or not a sentencing scheme is mandatory); *Landrum* v. *State*, 192 So. 3d 459, 466 (Fla.

2016) (rejecting state's argument that *Miller* did not apply to a discretionary sentencing scheme).[5]

Given that the overwhelming majority of courts to have considered whether *Miller* applies to discretionary life-without-parole sentences have concluded that it does, there is no "entrenched" split warranting certiorari.

B. The Virginia Supreme Court's Decision In *Jones II* Does Not Justify Certiorari

The one post-*Montgomery* case cited in the petition that actually addressed a "discretionary" life-without-parole sentence is the Virginia Supreme Court's decision in *Jones* v. *Commonwealth* ("*Jones II*").[6] *Jones II* stated that the rule of *Miller* and *Montgomery* applies only to "mandatory" sentencing schemes, not "discretionary" sentencing schemes like Virginia's. However,

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[5] *See also State* v. *Seats*, 865 N.W.2d 545, 555-556, 558 (Iowa 2015) (life without parole sentence may be imposed only if the sentencing court finds that "the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society"); *Commonwealth* v. *Batts*, 163 A.3d 410, 435 (Pa. 2017) ("Under *Miller* and *Montgomery*, a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it finds that the defendant is one of the 'rare' and 'uncommon' children [who are permanently incorrigible] …, permitting its imposition.").

[6] In *Jones I*, the Virginia Supreme Court had rejected Jones's *Miller* challenge, holding that the trial court "lacked jurisdiction" over Jones's motion to vacate his sentence and observing that Virginia's sentencing scheme was not "mandatory," and so "*Miller* is not applicable even if it is to be applied retroactively." *Jones* v. *Commonwealth*, 763 S.E.2d 823, 823, 826 (Va. 2014). This Court granted certiorari, vacated, and remanded for reconsideration in light of *Montgomery*. 136 S. Ct. 1358 (2016). In *Jones II*, the Virginia Supreme Court reaffirmed and amplified its decision in *Jones I*.

because *Jones II* concluded that the trial court whose decision it was reviewing had no jurisdiction to consider Jones's *Miller* claim, the precedential value of its discussion of the issue is questionable.

Jones II held that the trial court had no power to entertain Jones's *Miller* claim because he had made it in a "motion to vacate" his sentence, a procedure used under state law to set aside sentences that are outside the range prescribed by statute or otherwise "void ab initio." 795 S.E.2d at 717, 719.[7] Reasoning that a *Miller* violation would have rendered Jones's sentence merely "voidable," not "void ab initio," the court held that a motion to vacate was an improper vehicle for raising the issue. *Id.* at 717. The court explained that "Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case" to be used as a means to collaterally attack a conviction or sentence on federal constitutional grounds. *Id.* at 719. In light of the court's conclusion that the trial court lacked jurisdiction to adjudicate the *Miller* claim, its discussion of the merits of that claim was not necessary to its disposition of the case.

Indeed, in opposing Jones's second petition for certiorari, the Commonwealth itself argued that the Virginia Supreme Court had "conclude[d] that Jones' federal constitutional claim must be presented in a habeas petition as opposed to a motion to vacate," and that the Virginia Supreme Court "alone is entitled to decide the jurisdiction of Virginia courts." Br. in Opp. 14-15,

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[7] Jones filed a motion to vacate because the time to file a state habeas petition challenging his sentence had expired before *Miller* was decided. *Malvo* v. *Mathena*, 254 F. Supp. 3d 820, 826 (E.D. Va. 2017).

Jones v. *Virginia*, No. 16-1337 (U.S. Aug. 10, 2017), *available at* 2017 WL 3485648. The Commonwealth thus acknowledged that the Virginia Supreme Court rested its decision on a state jurisdictional ground (which, it argued, constituted an adequate and independent state ground precluding certiorari). *See id.* at 14 & n.68.

Because the Virginia Supreme Court's discussion of *Miller* and *Montgomery* in *Jones II* was not necessary to its disposition of the case, *Jones II* alone cannot create a conflict justifying certiorari. *See, e.g.*, *Bunting* v. *Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from the denial of certiorari) ("We sit … not to correct errors in dicta …."); *cf. California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'").

Finally, even if there were a conflict between *Jones II* and the Fourth Circuit's decision below, it would be entirely different from the dispute between the Virginia Supreme Court and the Fourth Circuit that warranted certiorari in *Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam). *LeBlanc* centered on the degree of deference that federal courts must give to a state court's application of clearly established Supreme Court precedent under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Here, however, the AEDPA standard is not in play. The Fourth Circuit did not vacate Malvo's sentence because it concluded that the Virginia Supreme Court had unreasonably applied clearly established Supreme Court precedent. Malvo's *Miller* claim was never considered in state court (because, as *Jones II* confirmed, he had no vehicle through which to raise it in state court), and so the Fourth Circuit properly ad-

dressed the constitutional issue *de novo*. Thus, unlike in *LeBlanc*, the "federalism interest implicated in AEDPA cases" has no relevance here. 137 S. Ct. at 1729.

Moreover, in *LeBlanc*, this Court noted that there were "reasonable arguments on both sides" of the federal constitutional issue. 137 S. Ct. at 1729. Here, by contrast, it is simply not the case that there are "reasonable arguments on both sides." *Montgomery* has already made clear that *Miller* applies to "discretionary" sentencing schemes just as it does to "mandatory" sentencing schemes—as every other court to consider the question has recognized. To the extent that Virginia courts erroneously apply the Virginia Supreme Court's analysis rather than the Fourth Circuit's, this Court can address that problem by granting certiorari in a case on direct appeal.

II. THE DECISION BELOW IS CORRECT

A. *Miller* v. *Alabama* And *Montgomery* v. *Louisiana* Squarely Control This Case

In holding that *Miller*'s rule applies to "discretionary" sentencing schemes, the Fourth Circuit simply applied the settled law articulated in *Miller* and *Montgomery*, which make crystal clear that the vast majority of juveniles cannot constitutionally be sentenced to life without parole, regardless of the procedures followed. In sentencing Malvo, the Virginia trial courts never made the determination *Miller* requires—that Malvo was "one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his 'crimes reflect permanent incorrigibility.'" Pet. App. 4a (quoting *Montgomery*, 136 S. Ct. at 734). Accordingly,

the Fourth Circuit ordered resentencing so that the Virginia courts could consider that question. That decision was plainly correct.

This Court's precedents now firmly establish that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. Because juveniles lack maturity, are more vulnerable to negative influences, and have characters that are less well formed, they "are less deserving of the most severe punishments" than adults. *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569). And, for the same reasons, the "penological justifications" for a life-without-parole sentence are dramatically weakened for juveniles. *Miller*, 567 U.S. at 472-474.

When it applied these principles to sentencing schemes that mandate life without parole in *Miller*, this Court concluded that such schemes "pose[] *too great a risk of disproportionate punishment*" to survive constitutional scrutiny. 567 U.S. at 479 (emphasis added). The Court continued:

> [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. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and *the rare juvenile offender whose crime reflects irreparable corruption*.

Id. at 479-480 (emphasis added) (internal quotation marks and citation omitted).

As the Fourth Circuit recognized, the Eighth Amendment concerns underlying that ruling apply regardless of whether the juvenile in question was sentenced pursuant to a "mandatory" or "discretionary" sentencing scheme. To be sure, *Miller* involved two juveniles sentenced to life without parole under mandatory sentencing schemes. The reason that the Court invalidated sentences imposed under those schemes, however, was not their mandatory nature alone, but their failure to distinguish juveniles whose crimes reflect the transient immaturity of youth from those whose crimes reflect irreparable corruption. Mandatory sentencing schemes *necessarily* fail to take account of the special characteristics of juveniles in the way *Miller* held the Constitution requires, but "discretionary" schemes may also fail to do so. *See Miller*, 567 U.S. at 479-480; *see also Montgomery*, 136 S. Ct. at 734-735; Pet. App. 20a.

Miller's reasoning thus made clear that the mere existence of discretion, unguided by the factors relevant to the proportionality of sentences for young offenders, could not save a juvenile life-without-parole sentence. Only by specifically considering a juvenile defendant's "diminished culpability and heightened capacity for change," *Miller*, 567 U.S. at 479, to determine whether the defendant is one of "the rare juvenile offender[s] whose crime reflects irreparable corruption," *id.* at 479-480, can a court determine whether the Eighth Amendment permits sentencing that defendant to life without parole.

Montgomery did not expand or modify the rule of *Miller*. It set out the rule using the same terms: "*Miller* determined that sentencing a child to life without parole is excessive for all but '"the rare juvenile offender whose crime reflects irreparable corruption."'"

Montgomery, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-480). That rule, the Court reasoned, "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.* (citations omitted). Accordingly, the Court held, *Miller*'s rule is "substantive" under *Teague*'s first exception and retroactive to cases on collateral review. *See id.*

As *Montgomery* confirmed, that rule cannot be limited to "mandatory" sentences. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Montgomery*, 136 S. Ct. at 732-733. However a state characterizes its sentencing scheme, and whatever procedures it provides, to be constitutional that scheme must "give[] effect to *Miller's* substantive holding." *Id.* at 735. Accordingly, "*[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison*, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 734 (quoting *Miller*, 567 U.S. at 479 (emphasis added)). This Court could hardly have been clearer. And the Fourth Circuit did not err in concluding that it was bound to follow this Court's precedent.

B. The Commonwealth Seeks To Relitigate *Montgomery*

The Commonwealth seeks reversal of a decision that *Montgomery* compelled. It thus cannot prevail unless this Court overturns *Montgomery*. The Commonwealth refuses to admit that it is asking the Court to do so, but its denial is feeble. Indeed, the Commonwealth

implicitly acknowledges that for it to prevail, the Court must ignore part of *Montgomery's* analysis. *See* Pet. 11 ("We are not asking the Court to overrule *Montgomery* or turn a blind eye to *large portions* of the decision." (emphasis added)).

The "portions" of *Montgomery* that the Commonwealth would have this Court "turn a blind eye to" are not small, and they are not dicta; they are necessary to the Court's decision that *Miller*'s rule is substantive, and thus should apply retroactively.[8] As discussed above, *Montgomery* rejected the argument that *Miller* merely required States to provide juveniles with certain procedural protections before sentencing them to life without parole. Instead, it concluded that *Miller*'s rule is retroactive because that rule held a particular punishment ("life without parole") unconstitutional for a particular "class of defendants" ("juvenile offenders whose crimes reflect the transient immaturity of youth"). *Montgomery*, 136 S. Ct. at 734.

Notwithstanding *Montgomery*'s clear holding, the Commonwealth urges the Court to conclude that *Miller* exempted a different class of individuals (all juveniles) from a different punishment ("mandatory life without parole"). Thus, according to the Commonwealth, when *Montgomery* ruled that *Miller* applied retroactively, it benefited only juveniles who received "mandatory life without parole" as a punishment—not those who received "discretionary life without parole." *See* Pet. 12, 16.

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[8] Even the Commonwealth appears to recognize this. *See* Pet. 15-16 (referring to the "lengthy analysis of the bases, premises, and justifications for the *Miller* rule" in *Montgomery*, the role of which was "to explain *why* the new rule adopted in *Miller* '… announce[d] a new substantive rule that, under the Constitution, must be retroactive'" (quoting *Montgomery*, 136 S. Ct. at 732)).

But "mandatory life without parole" is not a punishment. It is a punishment (life without parole) imposed through a particular procedure (mandatory sentencing). If "mandatory life without parole" for juveniles were what *Miller* had forbidden, *Montgomery* would have come out the other way. That would have been a *procedural* ruling—forbidding only a particular procedure for imposing life without parole on juveniles (mandatory application, without any case-specific or discretionary consideration)—and so it would not have fallen within the first *Teague* exception.

The Commonwealth's argument merely reprises the dissent in *Montgomery*, which argued that *Miller* prescribed only a "new, youth-protective *procedure*." 136 S. Ct. at 743 (Scalia, J., dissenting). According to the dissent, "[*Miller*] mandates only that a sentencer *follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* In holding that *Miller* outlawed the imposition of a punishment on a class of individuals, the dissent opined, "the majority is not applying *Miller*, but rewriting it." *Id.* That is precisely the Commonwealth's contention here. But given that this argument did not carry the day when the Court was deciding *Montgomery*, it cannot possibly prevail now that *Montgomery* is settled law.

If *Miller* and *Montgomery* themselves were not enough, this Court has more recently reaffirmed, albeit implicitly, that *Miller* is not limited to "mandatory" life-without-parole sentences. Nine months after deciding *Montgomery*, the Court granted review of five Arizona state court decisions, vacated those decisions, and remanded them for reconsideration in light of *Montgomery*. *See Tatum* v. *Arizona* (No. 15-8850); *Purcell* v. *Arizona* (No. 15-8842); *Najar* v. *Arizona* (No. 15-

8878); *Arias* v. *Arizona* (No. 15-9044); *DeShaw* v. *Arizona* (No. 15-9057). The Arizona decisions had rejected *Miller* claims on the ground that Arizona's sentencing scheme is "discretionary." *See, e.g.*, *State* v. *Tatum*, No. 2 CA-CR 2014-0460-PR, 2015 WL 728080, at *2 (Ariz. Ct. App. Feb. 18, 2015) ("[T]he *Miller* Court held only that a *mandatory* life sentence violated the Eighth Amendment …. [A] natural life sentence with no opportunity for release is permitted if a sentencing court, after considering sentencing factors, could have imposed a lesser sentence."). In these five cases, the Court had the benefit of petition-stage briefing that discussed the applicability of *Montgomery* and *Miller* to a discretionary sentencing scheme. *See, e.g.*, Pet. 1, *Tatum* v. *Arizona*, No. 15-8850 (U.S. Apr. 4, 2016) ("In *Montgomery* v. *Louisiana*, this Court clarified that, where a life-without-parole sentence is not mandatory for a juvenile homicide offender under state law, the Eighth Amendment forbids a judge from imposing that sentence without finding that the crime reflects 'permanent incorrigibility' or 'irreparable corruption.'" (citation omitted)); Br. in Opp. 6, *Tatum* v. *Arizona*, No. 15-8850 (U.S. May 27, 2016) ("Petitioner's argument rests on the fatally flawed premise that *Miller* and *Montgomery* apply to discretionary sentencing schemes, such as Arizona's.").

Accordingly, when this Court decided that the Arizona courts should reconsider their decisions in light of *Montgomery*, it was well aware that Arizona's sentencing scheme was discretionary. The two dissenting Justices made this express, describing themselves as "puzzled" by the Court's decision to vacate because "the Arizona decisions at issue are fully consistent with *Miller*'s central holding, namely, that mandatory life without parole for juvenile offenders is unconstitutional. A

sentence of life without parole was imposed in each of these cases, not because Arizona law dictated such a sentence, but because a court, after taking the defendant's youth into account, found that life without parole was appropriate[.]" *Tatum* v. *Arizona*, 137 S. Ct. 11, 13 (2016) (Alito, J., dissenting) (citation omitted). Conversely, Justice Sotomayor's concurring opinion explained that "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.' … It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole." *Id.* at 12-13 (Sotomayor, J., concurring). Although Justice Sotomayor wrote only for herself, the other five Justices who voted to grant, vacate, and remand would presumably have voted to deny the petitions if, like the dissenters, they believed that *Miller* and *Montgomery* apply only to mandatory sentencing schemes.

III. THE COMMONWEALTH'S PUTATIVE QUESTION PRESENTED IS NOT PRESENTED IN THIS CASE, BUT ITS ANSWER WOULD NOT HELP THE COMMONWEALTH IN ANY EVENT

To divert attention from its attempt to relitigate *Montgomery*, the Commonwealth has sought to frame the question presented as a broader issue of *Teague* doctrine. It asks whether "a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding

the very rule whose retroactivity was in question[.]" Pet. i.[9]

That question is not presented in this case. First, *Montgomery* did not "modif[y]" or "substantively expan[d]" the rule of *Miller*. It recognized that, under *Miller*, life without parole is an unconstitutional punishment for a class of defendants—juveniles whose crimes reflect transient immaturity. *See* discussion above at pp. 6-7, 22-23. That rule falls squarely within *Teague*'s first exception, and it applies equally to juveniles sentenced under mandatory sentencing schemes and those sentenced under discretionary schemes.

Second, even if *Montgomery* did modify or expand the rule of *Miller*—as the *Montgomery* dissenters charged—it announced a rule that is unmistakably clear. *See Montgomery*, 136 S. Ct. at 734 ("*Miller* … bar[red] life without parole … for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."); *id.* at 735 ("*Miller*'s substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."). Thus, the Fourth Circuit did not "interpret" *Montgomery* to expand *Miller*; it read and applied *Montgomery*'s plain terms. *See* Pet. App. 20a ("*Montgomery* stated clearly that, under *Miller*, the Eighth Amendment bars life-without-parole sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility. … The Warden may well critique the Supreme Court's ruling in *Montgomery*—as did Justice Scalia in dissent—but we are nonetheless

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[9] *See also* Pet. 11 (framing question as "whether decisions about the retroactive *application* of new rules of constitutional law can properly be read as *expanding* the very rules whose retroactivity was being considered").

bound by *Montgomery*'s statement of the *Miller* rule." (citation omitted)).

Nor is the Commonwealth able to show that the question presented has any application beyond this case. Although it claims that "[t]he question here … *could have* arisen in any number of contexts in the past," Pet. 11 (emphasis added), evidently it has located no such case. Thus, it has provided no basis for its speculation that "[t]he question … likely will continue to arise in the future absent this Court's intervention." *Id.* Its failure to identify any other context in which the question has arisen strongly suggests the contrary.

In any event, the Commonwealth is simply wrong to argue that "[a]llowing new constitutional rules to be expanded as part of the retroactivity determination" is "one of the very things *Teague* aims to prevent." Pet. 16-17 (citing *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990), for the principle that "'*Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered.'"). To be sure, *Teague* forbids the "piecemeal" creation or expansion and retroactive application of new, non-watershed *procedural* rules. But "the retroactive application of *substantive* rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences." *Montgomery*, 136 S. Ct. at 732 (emphasis added). That is because a State has no legitimate interest in ensuring the finality of "a conviction or sentence that the Constitution deprives the State of power to impose." *Id.*

Indeed, this Court has made clear that *Teague* is no bar to announcing and applying retroactively a new rule *in a single case*, provided that the new rule satis-

fies one of *Teague*'s exceptions. In *Penry*, for example, the petitioner sought a new rule that executing the "mentally retarded" was unconstitutional. 492 U.S. at 328-329. The Court held that such a rule would fall into the first *Teague* exception, and thus would apply retroactively. *Id.* at 329-330. It then considered the merits of the rule and concluded that the Eighth Amendment did not prohibit executing the intellectually disabled, because no consensus against such executions had yet emerged. *Id.* at 330-335.

But if the Court had concluded that the Eighth Amendment *did* bar such executions—as it did thirteen years later, in *Atkins* v. *Virginia*, 536 U.S. 304 (2002)—its holding on the *Teague* issue establishes that it could have created a new rule *and* made it retroactively applicable, to Penry and to all other death row prisoners, in a single case. *See Penry*, 492 U.S. at 330 ("[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.").

This Court decided *Penry* just four months after *Teague*; Justice O'Connor wrote the controlling opinion in both cases. Clearly, the *Penry* Court understood what *Teague* required—and what it forbade—when it concluded that *Teague* was no bar to recognizing a substantive or watershed new rule and applying that rule retroactively in a single case. It follows *a fortiori* that *Teague* does not bar the Court from "modifying" or "expanding" an existing rule in a case that decides retroactivity, again provided that the resulting rule is substantive or watershed. It makes no sense to maintain that the Court can recognize a completely new rule and

apply it retroactively, but cannot refine an existing rule and apply it retroactively. Thus, even if *Montgomery* did "modify" or "expand" *Miller*'s rule, and even if the Fourth Circuit below did "interpret" *Montgomery* to do so, neither decision thereby violated *Teague*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2018