No. 18-217

IN THE

Supreme Court of the United States

RANDALL MATHENA, WARDEN,
Petitioner,

v.

LEE BOYD MALVO,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Circuit erred in holding that the constitutional rule articulated in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and made retroactive to cases on collateral review in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), applies to juveniles convicted of capital murder in Virginia and sentenced to life without parole with no consideration of whether their youth might warrant a lesser sentence.

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BRIEF FOR RESPONDENT

INTRODUCTION

Miller v. *Alabama*, 567 U.S. 460 (2012), "require[s]" sentencers to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before imposing life without parole on a juvenile. *Id.* at 480. That proposition by itself resolves this case. The Warden concedes that, under *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), *Miller*'s rule is retroactive. And he does not dispute that the judge and jury who sentenced Lee Boyd Malvo never considered whether his youth might have warranted a sentence less than life without parole. Malvo is thus entitled to resentencing under *Miller*, as the court of appeals correctly held.

The Warden's contrary arguments cannot be reconciled with *Miller*. He claims that because *Miller* invalidated "mandatory" life-without-parole sentences for juveniles, it holds only that sentencers cannot be barred from considering youth when imposing life without parole. As long as a sentencer could theoretically consider youth, he contends, it does not matter under *Miller* whether the sentencer actually does so. *Miller* itself refutes that claim, explaining that "[o]ur decision" "mandates" that sentencers "consider[] an offender's youth and attendant characteristics" before imposing life without parole. 567 U.S. at 483; *see also id.* at 480.

The Warden's contentions also disregard *Miller*'s core rationale. *Miller*'s invalidation of "mandatory" life-without-parole sentences is premised on the Court's recognition that the qualities of youth—immaturity, vulnerability, and changeability—must be taken into account when sentencing a juvenile offender because those qualities will typically make life without parole an excessive punishment for a juvenile. 567 U.S. at 477-480. "Mandatory" schemes, in which sentencers have no alternative but to sentence all juvenile offenders to life without parole, necessarily violate *Miller* because they "mak[e] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence" and thereby "pose too great a risk of disproportionate punishment." *Id.* at 479. But the same risk exists whenever a sentencer imposes life without parole on a juvenile without considering whether youth might warrant a lesser sentence. Such a life-without-parole sentence violates *Miller* whether it is "mandatory" or not.

Montgomery confirms that understanding of *Miller*. Both the majority and the dissent in *Montgomery* understood *Miller* as having "held," at a minimum, "that a juvenile … could not be sentenced to life in pris-

on without parole absent consideration of the juvenile's special circumstances" and how they counsel in favor of a lesser sentence. 136 S. Ct. at 725; *see id.* at 743 & n.1 (Scalia, J., dissenting).

The reasoning necessary to the *Montgomery* majority's retroactivity holding further confirms that understanding of *Miller*. To determine whether *Miller*'s rule was retroactive, the Court first had to decide whether *Miller* announced a "substantive" rule—that is, a rule barring imposition of a particular punishment on a particular group of defendants, regardless of the procedure used. *Montgomery*, 136 S. Ct. at 732. The Court concluded that while *Miller* had "a procedural component," in that it "requires a sentencer to consider a juvenile offender's youth," that requirement gave effect to a substantive Eighth Amendment rule: Life-without-parole sentences are disproportionate for juveniles whose crimes reflect "the transient immaturity of youth" rather than "permanent incorrigibility." *Id.* at 734-735. *Montgomery*'s articulation of *Miller*'s rule did not expand the rule—that was the dissent's position, which the Court rejected. And *Montgomery*'s holding that *Miller*'s rule is substantive, and not merely procedural, makes clear that *Miller* cannot be cabined to "mandatory" sentencing schemes.

The Warden simply ignores all of *Montgomery*'s reasoning. And his reading of *Miller* as invalidating only the use of a mandatory sentencing procedure would have required *Montgomery* to come out the other way. The Warden's insistence that he is not asking the Court to overrule any part of *Miller* or *Montgomery* thus rings hollow. Limiting *Miller* and *Montgomery* to their facts, severed from their rationales, as he urges, would have the same effect as overruling them—at least as far as the Virginia inmates now serving life

without parole for juvenile offenses are concerned. Under the Warden's view, Virginia judges will never have to consider a juvenile offender's youth before imposing life without parole, and the prisoners already serving that sentence will die in prison, with no consideration of their youth at the time of their crimes and no chance to show that they have changed.

There is no doubt that Malvo committed heinous crimes. Seventeen years later, the shootings John Muhammad directed and Malvo helped carry out continue to evoke terror and trauma in the victims and their families and in those who could have been victims—including anyone in the Washington, D.C. area during the fall of 2002. Whether life without parole is the appropriate punishment for Malvo—taking into account his youth at the time of the crimes, his vulnerability to Muhammad, whom he thought of as his father, and his capacity for change—is potentially a thorny question. But it is not the question presented here. Resolving this case requires nothing more than straightforward application of this Court's precedent establishing that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. The Court should affirm for all the reasons given in this brief—and at the very least it should affirm, as the court of appeals observed, to maintain the integrity of its precedent and thus "sustain the law." Pet. App. 28a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Relevant portions of the Virginia statutes governing sentences for capital murder at the time of Malvo's offenses are reproduced in the addendum.

STATEMENT

A. Factual Background

In September and October 2002, forty-one-year-old John Allen Muhammad and respondent Lee Boyd Malvo, who was then seventeen, committed a series of shootings—twelve of them fatal—primarily in the greater Washington, D.C. area. Pet. App. 4a. Muhammad and Malvo terrorized the area for several weeks as they shot people engaged in ordinary activities, apparently at random, while concealed in a car some distance away. *Id.* at 4a-6a. The shootings, which came to be known as the "D.C. sniper" attacks, ended when Muhammad and Malvo were apprehended on October 24, 2002. *Id.* at 6a.

Testimony at Malvo's and Muhammad's subsequent trials shed light on Muhammad's motives for the shooting spree, which was triggered at least in part by Muhammad's anger that his ex-wife had won custody of their children. *Muhammad* v. *State*, 934 A.2d 1059, 1077 (Md. Ct. Spec. App. 2007). Extensive evidence also illuminated how Muhammad developed a perverse "surrogate father" relationship with Malvo and led him to participate in the crimes. Pet. App. 8a.

Malvo was born in Jamaica to a mother who neglected and routinely beat him. His relationship with his own father effectively ended when he was five. Pet. App. 8a. After that, Malvo's mother continually moved him from place to place, largely abandoning him when he was nine to a series of relatives, acquaintances, and strangers in Jamaica and Antigua, and then leaving

him, at age fourteen, essentially on his own. *See* CAJA1243-1254.

When Malvo was fifteen, he met Muhammad—an American citizen who had absconded to Antigua with his three children after losing custody of them. Pet. App. 8a. Having never established a consistent relationship with any parental figure, Malvo eagerly seized on Muhammad as a substitute father. CAJA1259, 1494. Muhammad soon began introducing Malvo as his son and treating him as the "big brother" of Muhammad's children. Trial Tr. 64, *State* v. *Muhammad*, No. 102676 (Md. Cir. Ct. May 24, 2006) (Dkt. 575).

In 2001, Muhammad brought Malvo and his children to the United States. CAJA738. After Muhammad's children were taken from him and returned to his ex-wife, he focused his energies on "training" Malvo. CAJA1280-1281, 1628. He drastically restricted Malvo's diet. CAJA807, 899; Trial Tr. 37, *Muhammad*, No. 102676 (Md. Cir. Ct. May 23, 2006) (Dkt. 574) ("*Muhammad* May 23 Tr."). He inundated Malvo with lessons in the tenets of the Nation of Islam and his own violent worldview. CAJA1266-1270. And he trained Malvo—who had never shot a gun before—in military maneuvers and tactics, including daily shooting lessons that lasted for hours. CAJA1281-1282, 1285-1286, 1296. Malvo followed instructions, wanting to please the man he now thought of as his father. CAJA1293, 1652-1653.

In early 2002, Muhammad and Malvo set out across the country on a "mission" to get Muhammad's children back from his ex-wife, who had moved to the Washington, D.C. suburbs. *Muhammad* May 23 Tr. 45-46. During their travels, Muhammad revealed to Malvo that the mission included a plan to commit random shootings in the D.C. area until the government gave them $10

million, which would be used to create a utopian society for black children. *Id.* at 50-54; CAJA1707. Distressed, Malvo attempted suicide. *Muhammad* May 23 Tr. 54-55. Ultimately, however, he acquiesced in Muhammad's plan. *Id.* at 55.

After Muhammad and Malvo were apprehended, Malvo sought to protect his "father" by telling law enforcement that he, Malvo, had pulled the trigger in all the D.C.-area shootings. *Muhammad* May 23 Tr. 204-205. He refused to answer to "Lee Boyd Malvo," insisting he be called "John Lee Muhammad." CAJA1189. Initially, he would not cooperate with his attorneys in preparing a defense, refusing to say anything disloyal to Muhammad. *Muhammad* May 23 Tr. 205-206. He relinquished the fantasy of Muhammad as a loving father only gradually, over many months. *Id.* at 206-207.

Malvo later explained that at first, he was numb to the horror of his crimes, and that it was not until much later that he was able to feel true remorse. *Muhammad* May 23 Tr. 206-207. When his numbness wore off, Malvo felt overwhelming guilt and shame; he was haunted by his victims. *See* White, *A Killer, Coming of Age*, Wash. Post, Sept. 30, 2012, at A1. In 2006, Malvo wrote to the district attorney in Maryland and volunteered to testify against Muhammad, although he received no reduction in his own sentences for doing so. *Muhammad* May 23 Tr. 207-213. He testified for two days, laying out his and Muhammad's crimes in detail. *Muhammad*, 934 A.2d at 1136. Since then, Malvo has repeatedly expressed remorse for his crimes. *E.g.*, White, *supra*; *Muhammad* May 23 Tr. 212-213.

Malvo is now thirty-four. He is serving his sentences at Red Onion State Prison, Virginia's super-

maximum security facility, where he has spent years in solitary confinement.

B. Malvo's Convictions And Sentences

Malvo and Muhammad were tried separately for shootings in Virginia and Maryland. Muhammad was convicted of capital murder in Virginia and sentenced to death. *Muhammad* v. *Commonwealth*, 619 S.E.2d 16, 30 (Va. 2005). He was executed in 2009.[2]

In 2003, Malvo was charged in Fairfax County, Virginia, with capital murder in the commission of an act of terrorism, *see* Va. Code Ann. §18.2-31(13),[3] and capital murder of more than one person within a three-year period, *see id.* §18.2-31(8). Pet. App. 7a. The prosecutor sought the death penalty. *Id.* Malvo pleaded not guilty, and the case was transferred to the Circuit Court for the City of Chesapeake. *Id.*

At his trial, Malvo acknowledged his participation in the shootings, but raised an insanity defense, contending that at the time of the crimes he was in a dissociative state resulting from Muhammad's indoctrination and control. Pet. App. 7a-8a. The jury rejected the insanity defense and convicted him of the charges. *Id.* at 8a.

At the time of Malvo's crimes, Virginia law "authorized" two punishments for defendants age sixteen and over convicted of capital murder: "death … or imprisonment for life." Va. Code Ann. §18.2-10(a) (punishments for Class 1 felonies); *see id.* §18.2-31 (classify-

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[2] Muhammad was also convicted in Maryland of six counts of first-degree murder. *Muhammad* v. *State*, 934 A.2d 1059, 1065 (Md. Ct. Spec. App. 2007).

[3] All citations to the Virginia Code are to the 2002 edition unless otherwise noted.

ing capital murder as Class 1 felony).[4] A defendant convicted of capital murder was entitled to a sentencing hearing before a jury, "which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment." *Id.* §19.2-264.4(A). If the jury did not recommend death, "the defendant shall be sentenced to imprisonment for life." *Id.*; *see also id.* §19.2-264.4(E) (if jury cannot agree on penalty, "the court shall … impose a sentence of imprisonment for life"). Because Virginia had previously abolished parole for felony offenses, *see id.* §53.1-165.1, "life imprisonment" meant life without parole, and the defendant was entitled to a jury instruction to that effect, *see id.* §19.2-264.4(A).

At Malvo's sentencing hearing, the jury was instructed that the death penalty could be imposed only if it found one of two statutory aggravating circumstances—future dangerousness and vileness, *id.* §19.2-264.2—and recommended death. JA65-66, 67. The jury was also instructed that if it concluded the death penalty was not justified, it must "fix the punishment of the defendant at … imprisonment for life," and that "'imprisonment for life' means imprisonment without possibility of parole." JA66, 68. The jury found both aggravating factors, but did not recommend a death sentence, instead "fix[ing] [Malvo's] punishment at imprisonment for life" for each capital count. JA71.

On March 10, 2004, the court held a very brief hearing to impose sentence. JA74-82. No one suggested at any point that Malvo could receive a sentence less than life without parole. *See id.* Malvo's counsel asked only

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[4] Section 18.2-10(a) was later amended to permit death only for those eighteen or older and not intellectually disabled. *See* Va. Code Ann. §18.2-10(a) (2019).

that Malvo be placed in a facility where he could receive mental-health treatment. JA78-80. The prosecutor reiterated the jury's verdict and asked the court "to impose the sentence," which the court did, sentencing Malvo to two terms of life imprisonment. JA80-81.

Malvo subsequently entered an *Alford* plea, *see North Carolina* v. *Alford*, 400 U.S. 25 (1970), in separate proceedings in Spotsylvania County, Virginia, pleading guilty to one count of capital murder and one count of attempted capital murder. Pet. App. 9a-10a. He was sentenced to two additional terms of life without parole on those counts. *Id.*[5]

C. This Court's Juvenile Sentencing Decisions

In the years after Malvo's sentencing, this Court issued a series of decisions holding that the Eighth Amendment restricts States' ability to impose the most severe sentences on juvenile offenders.

In 2005, in *Roper* v. *Simmons*, 543 U.S. 551, the Court held that juveniles cannot constitutionally be sentenced to death. The Court noted "[t]hree general differences between juveniles … and adults": first, a "'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults'"; second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures"; and, third, "the character of a juvenile is not as well

[5] Malvo also pleaded guilty to six counts of first-degree murder in Maryland and received six life-without-parole sentences. *Muhammad*, 934 A.2d at 1076. He raised a *Miller* challenge to those sentences in state post-conviction proceedings in the Maryland trial court, which denied relief. *State* v. *Malvo*, No. 102675C, 2017 WL 3579711, at *13 (Md. Cir. Ct. June 15, 2017). Malvo's appeal of that judgment is pending.

formed as that of an adult." *Id.* at 569-570. While the Court recognized that juveniles can commit heinous crimes, "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570.

In 2010, in *Graham* v. *Florida*, 560 U.S. 48, the Court held that juveniles cannot constitutionally be sentenced to life without parole for non-homicide offenses. The Court reiterated that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* at 68; *see also id.* at 91-92 (Roberts, C.J., concurring in the judgment) (noting "the general presumption of diminished culpability" for "juvenile offenders").

In 2012, *Miller* v. *Alabama*, 567 U.S. 460, held that the Eighth Amendment also restricts States' ability to impose life without parole on juvenile homicide offenders. The Court drew on "two strands of precedent." *Id.* at 470. First, it relied on cases like *Roper* and *Graham* establishing that "children are constitutionally different from adults for purposes of sentencing" and that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 471-472. Second, it relied on cases requiring that sentencers consider mitigating factors—including youth—before imposing the death penalty. *Id.* at 475-476. Together, those decisions led the Court to conclude that sentencers must "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it" before imposing life without parole on juveniles. *Id.* at 476.

The Court therefore held that "the Eighth Amendment forbids a sentencing scheme," like the ones before it, "that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. "By 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.* The Court stated that although it was not banning life-without-parole sentences for juveniles outright, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* Accordingly, "we require [sentencers] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

In 2016, in *Montgomery* v. *Louisiana*, 136 S. Ct. 718, the Court held that *Miller*'s rule applies retroactively to cases on collateral review. Under this Court's retroactivity precedent, a new rule is retroactive if, as relevant here, it is a "substantive" constitutional rule that "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'" *Id.* at 729. While procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability,'" substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Id.* at 729-730 (emphasis omitted).

Montgomery concluded that *Miller* announced a substantive, and not merely a procedural, rule: *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S. Ct. at 734. *Mil-*

ler did have "a procedural component," which "require[s] a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* But that procedure "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 735.

D. Malvo's Federal Habeas Proceedings

In 2013, Malvo filed two federal habeas petitions challenging his Chesapeake and Spotsylvania life-without-parole sentences and seeking resentencing under *Miller*. The district court dismissed both petitions on the ground that *Miller* was not retroactive. CA-JA126-129. While Malvo's appeal was pending, this Court decided *Montgomery*, and the court of appeals remanded the case to the district court. Pet. App. 11a.

In the immediate wake of *Montgomery*, Virginia repeatedly conceded in federal habeas proceedings brought by Virginia prisoners that *Miller* did apply to its capital-murder sentencing scheme. It also conceded that, under *Miller* and *Montgomery*, a sentencing court must determine whether a juvenile defendant "falls into the protected class of youthful offenders 'whose crimes reflect the transient immaturity of youth,' or 'those rare children whose crimes reflect irreparable corruption.'"[6]

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[6] Appellee Br. 15-16, *Landry* v. *Baskerville*, No. 14-6631 (4th Cir. Apr. 18, 2016) (Dkt. 26); *see also, e.g.*, Appellee Br. 3, *Crawford* v. *Pearson*, No. 15-6498 (4th Cir. Mar. 14, 2016) (Dkt. 19) (arguing for remand so district court could determine "whether the Virginia trial court complied with *Miller* and found that Crawford was 'incorrigible'"); Warden Reply to Order 4-5, *Ross* v. *Fleming*,

In a case before the Virginia Supreme Court, Virginia likewise agreed that the defendant was entitled to resentencing to ensure that his juvenile life-without-parole sentence "complies with *Miller*." Commonwealth Br. 5, *Jones* v. *Commonwealth*, No. 131385 (Va. June 16, 2016). The Virginia Supreme Court, however, rejected that concession and held that *Miller* did not apply in Virginia because Virginia's capital-murder sentencing scheme was not "mandatory." *Jones* v. *Commonwealth*, 795 S.E.2d 705, 713 (Va. 2017) ("*Jones II*"); *see id.* at 723 n.27 (acknowledging Virginia's concession).[7]

Jones II read *Miller* to hold only that a sentencer "'must have the *opportunity* to consider mitigating circumstances'" before sentencing a juvenile to life without parole. 795 S.E.2d at 708 (emphasis in *Jones II*). Accordingly, it viewed *Miller* as applicable only to "mandatory" sentencing schemes that "'*preclude*' a sentencer from taking account of an offender's age." *Id.* (emphasis in *Jones II*). Although Virginia law provided that in capital-murder cases where the jury does not recommend death, "the defendant shall be sentenced to imprisonment for life," Va. Code Ann. §19.2-264.4(A), the Virginia Supreme Court reasoned that the trial court had the authority to "suspend" such a life sen-

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No. 6:13-cv-34 (W.D. Va. Apr. 26, 2016) (Dkt. 30) (noting that record did not "establish that the trial court considered the required 'distinctive attributes of youth'" or made a "finding of 'irretrievable depravity'").

[7] The Virginia Supreme Court had previously so held in *Jones* v. *Commonwealth*, 763 S.E.2d 823, 826 (Va. 2014) ("*Jones I*"). This Court granted certiorari in that case, vacated, and remanded for further consideration in light of *Montgomery*. 136 S. Ct. 1358 (2016). In *Jones II*, the Virginia Supreme Court concluded that *Montgomery* did not affect its earlier holding. 795 S.E.2d at 707.

tence under a general statute providing that "'[a]fter conviction, … the court may suspend imposition of sentence or suspend the sentence in whole or part.'" *Jones I*, 763 S.E.2d at 824-825 (quoting Va. Code Ann. §19.2-303). Because the trial court was not "precluded" from considering youth in resolving a request for suspension, in the Virginia Supreme Court's view, life without parole was not the "mandatory" sentence for capital murder, and *Miller* did not apply. *Jones II*, 795 S.E.2d at 711-713.

On remand to the district court in this case, the Warden initially did not raise that argument, instead contending that Malvo's sentencing hearing satisfied *Miller*. Br. 4-9, *Malvo* v. *Mathena*, No. 2:13-cv-375 (E.D. Va. Aug. 15, 2016) (Dkt. 44). After *Jones II*, however, the Warden filed a "notice" contending that *Miller* was inapplicable because Virginia's sentencing scheme was not "mandatory." Warden's Notice 1, *id.* (E.D. Va. Apr. 3, 2017) (Dkt. 54).

The district court rejected that analysis of *Miller*.[8] The court found it unnecessary to address whether Virginia's scheme was best labeled "mandatory" or "discretionary." Pet. App. 42a. Rather, it held that *Miller* identified an Eighth Amendment right that is

[8] As a threshold matter, the Warden conceded, and the district court held, that Malvo was not required to exhaust state remedies. Pet. App. 40a. *Jones II* had held that a prisoner could not pursue a *Miller* claim through a motion to vacate his sentence in state court, 795 S.E.2d at 719-721, and the time for filing a state habeas petition expired long before *Miller*, Pet. App. 40a (citing Va. Code Ann. §8.01-654(A)(2)). As a result, there was "no state corrective process available" to Malvo. *Id.*; *see* 28 U.S.C. §2254(b)(1)(B). In this Court, the Warden again expressly concedes that point, and concedes that as a result, the federal courts properly reviewed Malvo's *Miller* claim *de novo*. Pet. Br. 13 n.2.

"not possessed solely" by juveniles sentenced under "mandatory" schemes. *Id.* *Miller* "recognized that juveniles are constitutionally different from adults and that they are, therefore, entitled to certain considerations"—specifically, a hearing where their youth is considered to determine whether life without parole is a proportionate sentence—in "all situations" before "being sentenced to die in prison." *Id.* And *Montgomery* confirmed that holding: It made clear that *Miller* articulated a substantive rule under which life without parole is a disproportionate sentence for juvenile offenders whose crimes reflect "transient immaturity" rather than "irreparable corruption," and that the hearing *Miller* requires is designed to implement that rule. *Id.* at 42a-43a. Because Malvo never received such a hearing in connection with any of his life-without-parole sentences, the district court held that Malvo was entitled to be resentenced and granted relief. *Id.* at 47a-51a, 62a.[9]

On appeal, the Warden renewed his argument that Virginia's capital-murder sentencing scheme was not "mandatory" and that *Miller* was thus inapplicable in Virginia. He also contended that the district court had violated the retroactivity principles set out in *Teague* v. *Lane*, 489 U.S. 288 (1989), by relying on *Montgomery*'s articulation of *Miller*'s holding. In an opinion by Judge Niemeyer, a unanimous Fourth Circuit panel rejected those arguments.

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[9] The district court also rejected the Warden's arguments that Malvo's sentencing hearing, given the nature of his crimes, satisfied *Miller*, Pet. App. 47a-51a, and that Malvo's plea agreement waived his right to challenge his Spotsylvania sentences, *id.* at 58a, 61a.

The court of appeals acknowledged but did not resolve Malvo's contention that his sentences were "mandatory" even as the Warden used the term. Malvo argued that when he was sentenced, Virginia law mandated death or life without parole for capital murder, and trial courts did not believe they could suspend such a sentence. Pet. App. 18a-19a. While finding it "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," the court declined to decide that question. *Id.* at 19a.

Instead, the court of appeals held that the mere existence of such suspension authority did not make *Miller* inapplicable. As the court explained, *Miller* held "not only [that] 'a judge or jury [must] have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,'" but also that "the sentencer must actually 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" Pet. App. 14a (quoting *Miller*, 567 U.S. at 480, 489). While *Miller* "reserv[ed] the possibility that such a severe sentence could be appropriately imposed on 'the rare juvenile offender whose crime reflects irreparable corruption,'" it required sentencers to consider youth before making that judgment. *Id.* at 14a-15a (quoting *Miller*, 567 U.S. at 479-480).

The court of appeals observed that *Montgomery* "confirmed" that reading of *Miller*: "[I]mposing a life-without-parole sentence on a juvenile homicide offender pursuant to a mandatory scheme *necessarily* violates the Eighth Amendment as construed in *Miller*," because the sentencer necessarily takes no account of the defendant's youth. Pet. App. 20a. But "a [sentencer]

also violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility.'" *Id.* (quoting *Montgomery*, 136 S. Ct. at 734). The court of appeals rejected the Warden's argument "that *Montgomery*'s articulation of the *Miller* rule was mere dictum," since that articulation "was the basis for [*Montgomery*'s] holding that *Miller* announced a substantive rule that applies retroactively." *Id.* And it held that "because *Montgomery* explicitly articulated the rule in *Miller* that it was retroactively applying, the district court could not have violated *Teague* in applying that rule." *Id.*[10] Accordingly, the court of appeals affirmed the district court.

SUMMARY OF ARGUMENT

Miller v. *Alabama* "require[s] [sentencers] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before imposing life without parole on a juvenile. 567 U.S. 460, 480 (2012). The Warden concedes that *Miller*'s requirements apply retroactively. And it is undisputed that at Malvo's sen-

[10] The court of appeals likewise rejected the Warden's argument that Malvo's Chesapeake sentencing satisfied *Miller*, explaining that "the jury was not allowed to give a sentence less than life without parole" and that, in fact, the jury "considered Malvo's mitigation evidence and found that he deserved the lighter of the two sentences that it *could* give." Pet. App. 22a. In addition, the court rejected the argument that, by pleading guilty in Spotsylvania County, Malvo had "implicitly waived his right to argue, based on intervening Supreme Court holdings, that his sentences were ones that the State could not constitutionally impose on him." *Id.* at 27a. The Warden has not challenged either of these holdings in this Court.

tencing over eight years earlier, the jury could not, and the judge did not, consider whether Malvo's youth might warrant a sentence less than life without parole. Malvo is accordingly entitled to resentencing.

The Warden contends that *Miller* applies only to "mandatory" schemes that bar the sentencer from imposing any sentence less than life without parole, and is inapplicable to any other type of sentencing scheme. That is wrong. *Miller* requires not only that sentencers be permitted to consider youth, but also that they actually do so, to determine whether life without parole is a proportionate sentence. Indeed, *Miller* says exactly that: "Our decision" "mandates … that a sentencer … consider[] a defendant's youth and attendant characteristics" before imposing life without parole. 567 U.S. at 483; *see also Montgomery* v. *Louisiana*, 136 S. Ct. 718, 725 (2016) ("*Miller* … held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances."); *id.* at 743 & n.1 (Scalia, J., dissenting) (agreeing that *Miller* requires consideration of youth).

The Warden's narrow reading of *Miller* is also refuted by the reasoning necessary to *Miller*'s conclusion that "mandatory" schemes are unconstitutional. That conclusion rested principally on the Court's recognition that juveniles' lesser culpability and greater capacity for change will typically make life without parole an excessive punishment for them, even for heinous crimes. *Miller* requires sentencers to take the qualities of youth into account because failing to do so "poses too great a risk of disproportionate punishment." 567 U.S. at 479. "Mandatory" schemes violate the Eighth Amendment because they guarantee that youth will not be taken into account and thus necessarily create the

"risk of disproportionate punishment" with which *Miller* is concerned. But *any* sentencing proceeding in which youth is not taken into account—"mandatory" or not—poses precisely the same risk.

Montgomery v. *Louisiana*, 136 S. Ct. 718 (2016), which held that *Miller*'s rule is retroactive, confirms that reading of *Miller*. *Miller*'s requirement that sentencers consider youth, *Montgomery* explained, arises from and gives effect to an underlying Eighth Amendment rule: Life without parole is an excessive sentence for the majority of juveniles whose crimes stem from "transient immaturity." *Id.* at 734. *Miller* accordingly articulated a "substantive" rule applicable to cases on collateral review under this Court's retroactivity precedent. *Id.* That conclusion, too, reaffirms that *Miller*'s rule does not turn on whether a sentencing scheme is "mandatory" or "discretionary." Such substantive limits on States' authority to impose a particular punishment on a particular class of defendants, by definition, apply regardless of the procedure the State uses to impose the punishment. *Montgomery*, 136 S. Ct. at 730.

Put differently, if *Miller* had done nothing more than invalidate "mandatory" sentencing schemes, without tying that result to a constitutional restriction on States' ability to sentence juveniles to life without parole, it would not have articulated a "substantive" rule for retroactivity purposes, and *Montgomery* would have come out the other way. While the Warden disputes this point, he never acknowledges *Montgomery*'s reasoning or explains how, on his view, *Miller*'s rule is "substantive" as this Court's retroactivity jurisprudence uses the term. He is simply attempting to substitute new, illogical reasoning for *Montgomery*'s actual *ratio decidendi*. But *stare decisis* bars wholesale evisceration of the reasoning of this Court's precedent just

as it bars outright overruling of that precedent, absent special circumstances that the Warden has made no effort to show exist here.

For its part, the United States admits that *Miller* requires consideration of youth and that *Montgomery* made clear *Miller* extends beyond "mandatory" sentencing schemes. Indeed, after *Montgomery* the United States advocated precisely the conclusion the court of appeals reached here. It successfully argued that a juvenile offender serving life without parole must be resentenced—whether the sentence was "mandatory" or "discretionary"—if the sentencer did not determine that his crimes arose from irreparable corruption, rather than transient immaturity. *See Mejia-Velez* v. *United States*, 320 F. Supp. 3d 496, 505 (E.D.N.Y. 2018). Having changed its mind, the United States now invites this Court to "clarify" that it did not mean what it said in *Miller* and *Montgomery*, but intended to employ an altogether different rationale. What the United States seeks is not a clarification, but an overruling, and like the Warden, it offers no explanation as to why the Court should ignore *stare decisis* principles here.

In any event, the United States' proposed new rationale makes little sense. The United States argues that "discretionary" sentencing schemes do not give rise to the risk of disproportionate sentences *Miller* addressed. But a "discretionary" sentence like that here, where youth was not considered at all, indisputably does give rise to that risk. The United States also contends—reprising an argument this Court already declined to adopt in *Montgomery*—that *Miller*'s invalidation of "mandatory" sentencing schemes was a "substantive" rule because it expanded the range of sentencing outcomes. But the United States never explains why such a rule is "substantive" under this

Court's retroactivity decisions, and in fact its position cannot be squared with those decisions. This Court should reject the United States' attempt to rewrite established retroactivity doctrine.

If one abides by this Court's precedent, as the court of appeals did, this case is straightforward. *Miller* requires sentencers, before imposing life without parole on a juvenile, to consider whether the lesser culpability and greater changeability associated with youth warrant a lesser sentence. Because Malvo's sentencers did not undertake that required consideration of his youth, he is entitled to resentencing.

ARGUMENT

I. *MILLER* REQUIRES ACTUAL CONSIDERATION OF YOUTH WHENEVER A JUVENILE IS SENTENCED TO LIFE WITHOUT PAROLE

Malvo's sentences violate *Miller* for a simple reason: *Miller* requires consideration of youth before a juvenile may be sentenced to life without parole, and that did not happen in Malvo's case. As *Miller* explained: "[W]e require [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. That requirement flowed directly from the two key strands of precedent that informed the Court's decision in *Miller*, and it is restated in express terms in *Montgomery*. Moreover, as *Miller* and *Montgomery* make clear, it is a requirement that must be satisfied whenever a juvenile faces life without parole, whether the sentencing scheme is "mandatory" or "discretionary."

A. Each Of *Miller*'s Two Strands Of Precedent Supported Its Holding That Youth Must Be Considered

Miller "implicate[d] two strands of precedent." 567 U.S. at 470. The first strand "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders"—such as juveniles—"and the severity of a penalty." *Id.* The second strand "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* Each strand supported *Miller*'s holding that sentencers must consider a juvenile defendant's youth and its attendant characteristics to determine whether life without parole is a constitutionally disproportionate sentence.

The key decisions in the first strand of precedent were *Roper* v. *Simmons*, 543 U.S. 551 (2005), which held that juveniles cannot constitutionally be sentenced to death, and *Graham* v. *Florida*, 560 U.S. 48 (2010), which held that juveniles cannot constitutionally be sentenced to life without parole for non-homicide crimes. *Miller*, 567 U.S. at 470-475. As *Miller* explained, *Roper* and *Graham* "establish[ed] that children are constitutionally different from adults for purposes of sentencing": Their "diminished culpability and greater prospects for reform" make them "'less deserving of the most severe punishments.'" *Id.* at 471.

In particular, *Roper* relied on "[t]hree general differences between juveniles … and adults" that "render suspect any conclusion that a juvenile falls among the worst offenders" for whom the death penalty is proportionate. 543 U.S. at 570; *see supra* pp.10-11. Juveniles' immaturity "means 'their irresponsible conduct is not

as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570. Their vulnerability and lesser control over their environment "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences." *Id.* And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* In short, while juveniles can commit "brutal crimes," those crimes are likely to reflect "unfortunate yet transient immaturity," rather than "irreparable corruption." *Id.* at 572-579.

Graham relied on those same differences between juveniles and adults to hold that juveniles cannot be sentenced to life without parole for non-homicide offenses. 560 U.S. at 68-69; *see also id.* at 91-92 (Roberts, C.J., concurring in the judgment) (noting "the general presumption of diminished culpability" for "juvenile offenders"); *supra* p.11. The Court observed that, like the death penalty, a life-without-parole sentence "forswears altogether the rehabilitative ideal," making "an irrevocable judgment about [the defendant's] value and place in society"—a "judgment [that] is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Graham*, 560 U.S. at 74. Accordingly, although States were "not required to guarantee eventual freedom" to juvenile nonhomicide offenders—some of whom may "turn out to be irredeemable"—the Court concluded that the Eighth Amendment "prohibit[s] States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.* at 75; *see also id.* (juvenile nonhomicide offenders must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

From this strand of precedent, *Miller* drew the conclusion that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." 567 U.S. at 473. While "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes," "none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* "*Graham*'s reasoning," rather, "implicates any life-without-parole sentence imposed on a juvenile." *Id.* Even when a juvenile has committed murder, "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." *Id.* Accordingly, *Miller* concluded that, under *Graham* and *Roper*, the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474. Rather, sentencers must take account of the characteristics of youth to "assess[] whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.*

Miller's second strand of precedent required "individualized sentencing" in the death-penalty context—meaning that before imposing the death penalty, a sentencer must consider all mitigating factors advanced by the defendant, including the "'mitigating qualities of youth.'" 567 U.S. at 475-476. *Miller* found *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), "especially on point." 567 U.S. at 476. In *Eddings*, the court that had sentenced the sixteen-year-old defendant to death had considered his age as a mitigating factor, but refused to consider "evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance." 455 U.S. at 115. That evidence, *Eddings* explained, was "particularly relevant" because of his

youth—"a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* Because courts "must consider all relevant mitigating evidence," the Court in *Eddings* vacated the death sentence. *Id.* at 117.

Miller also relied on decisions invalidating "mandatory" schemes making death the only available punishment for a particular crime—precisely because such schemes prevent the individualized consideration of mitigating factors that the Eighth Amendment requires. *Miller*, 567 U.S. at 475; *see, e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) ("[C]onsideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death.").

The individualized-sentencing decisions, *Miller* observed, "requir[e]" sentencers to "consider the characteristics of a defendant and the details of his offense"—including youth and its accompanying vulnerabilities—before sentencing him to death, the harshest possible sentence. 567 U.S. at 470; *see id.* at 475-476. By analogy, the Court concluded, sentencers must consider youth and its attendant characteristics before sentencing a juvenile to life without parole, the harshest possible sentence for juveniles. *Id.* at 476-478.

Together, the two lines of precedent considered in *Miller* led the Court to hold that sentencers must take account of juveniles' "diminished culpability and heightened capacity for change" to ensure that juvenile offenders do not suffer a disproportionate punishment. 567 U.S. at 479. As the court of appeals observed, it follows that a "mandatory" life-without-parole sentence imposed on a juvenile necessarily violates *Miller*, be-

cause a sentencer who has no choice but to impose life without parole cannot consider whether the characteristics of youth make that sentence disproportionate. But any life-without-parole sentence imposed on a juvenile—whether "mandatory" or "discretionary"—likewise violates *Miller* and creates an intolerable risk of disproportionate punishment if the sentencer fails to "take into account how children are different, and how those differences counsel against … a lifetime in prison." 567 U.S. at 480; *see* Pet. App. 14a, 19a-21a.

B. *Montgomery* Confirms That *Miller* Requires Actual Consideration Of Youth, Not Merely "Discretion" To Consider It

Miller is clear that a juvenile may not be sentenced to life without parole absent actual consideration of youth and that unexercised "discretion" to consider youth is insufficient. But *Montgomery* puts the point beyond debate.

Both the majority and the dissent in *Montgomery* agreed that, at the very least, *Miller* requires sentencers to consider youth before imposing life without parole on a juvenile. The opinion for the Court began by recognizing that *Miller* "held" that a juvenile "could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances." *Montgomery*, 136 S. Ct. at 725; *see also id.* at 726 ("*Miller* required that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison.").

Likewise, the principal dissent viewed *Miller* as "'mandat[ing] that a sentencer … consider[] a defendant's youth and attendant characteristics'" before im-

posing life without parole. *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting); *see id.* at 743 n.1 (observing that "the majority's initial description of *Miller* is the same as our own"). Neither the majority nor the dissent ever suggested what the Warden now argues—that *Miller* requires only that a sentencer have discretion to consider youth and that it does not matter whether the sentencer actually does so. The *Montgomery* Court's unanimity on that point forecloses the Warden's argument.

The reasoning necessary to *Montgomery*'s holding that *Miller* is retroactive makes it even plainer that *Miller* cannot be satisfied by mere "discretion" to consider youth. The question in *Montgomery* was whether *Miller* announced a "substantive" rule of constitutional law retroactive to cases on collateral review under *Teague* v. *Lane*, 489 U.S. 288 (1989), and its progeny. In light of the interest in finality of criminal convictions, new constitutional rules generally do not apply retroactively. *Id.* at 310 (plurality opinion). However, *Teague* identified two "exceptions": rules that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" and "watershed rules of criminal procedure." *Id.* at 311.

As the Court later explained, the first *Teague* "exception" protects "substantive categorical guarantees accorded by the Constitution," such as the Eighth Amendment's guarantee against cruel and unusual punishment, which applies "regardless of the procedures followed" to impose that punishment. *Penry* v. *Lynaugh*, 492 U.S. 302, 329 (1989). It thus encompasses any rule that, "as a substantive matter," "prohibit[s] a certain category of punishment for a class of defendants

because of their status or offense." *Id.* at 329-330; *see also Montgomery*, 136 S. Ct. at 729-730.

Such substantive rules apply retroactively because failure to do so necessarily creates "'a significant risk'" that the defendant "faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004); *accord Montgomery*, 136 S. Ct. at 729-730. By contrast, "[n]ew rules of procedure"—which "regulate only the *manner of determining* the defendant's culpability"—almost never apply retroactively. *Schriro*, 542 U.S. at 352-353. Such procedural rules "merely raise the possibility" that a defendant sentenced through "the invalidated procedure" might have otherwise received a different sentence, as opposed to the risk that a defendant is serving a sentence the State cannot constitutionally impose on him at all, regardless of the procedure used. *Id.*; *see Montgomery*, 136 S. Ct. at 729-730.

The question in *Montgomery*, therefore, was whether *Miller* articulated a substantive rule. The Court held that it did. "The 'foundation stone' for *Miller*'s analysis," *Montgomery* observed, "was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." 136 S. Ct. at 732 (quoting *Miller*, 567 U.S. at 471 n.4). "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." *Id.* at 732-733.

Quoting directly from *Miller*'s explication of its own holding, *Montgomery* explained that "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences coun-

sel against irrevocably sentencing them to a lifetime in prison.'" 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 480). That procedural component of *Miller*'s holding in turn implements a "substantive holding" that life without parole "violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity,'" as opposed to "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 734 (quoting *Miller*, 567 U.S. at 479-480). *Miller* requires sentencers to consider youth, *Montgomery* explained, precisely to determine whether a particular juvenile defendant falls into the group of juveniles for whom life without parole would be disproportionate punishment. *Id.* at 735. Failing to apply *Miller*'s rule retroactively would thus create "'a significant risk that' … the vast majority of juvenile offenders[] 'face[] a punishment that the law cannot impose upon [them].'" *Id.* at 734.

Accordingly, as the court of appeals recognized, mere "discretion" to consider how a defendant's youth might warrant a lesser sentence cannot satisfy either the procedural or the substantive component of *Miller*. *Miller* mandates actual consideration of juveniles' lesser culpability and greater capacity for change to effectuate the Eighth Amendment's prohibition on sentencing to life without parole a juvenile whose crime reflects transient immaturity. Unexercised "discretion" to consider youth contravenes *Miller*'s express requirement that youth be considered. And it does nothing to protect juveniles against receiving a punishment that is disproportionate for the vast majority of them.

II. THE WARDEN'S READING OF *MILLER* IS WRONG

A. The Warden's Reading Of *Miller* Is Irreconcilable With *Miller*'s Language And Reasoning

The Warden reads *Miller* differently. He notes that *Miller* considered sentencing schemes that allowed no sentence less than life without parole and held that "*mandatory life-without-parole* sentences for juveniles violate the Eighth Amendment." Pet. Br. 20 (quoting *Miller*, 567 U.S. at 470 (Warden's emphasis)). From that, he concludes that *Miller* is satisfied if the sentencer could have considered the defendant's youth as a basis for a lesser sentence, whether or not the sentencer actually did so. That cramped interpretation of *Miller*—which relies primarily on counting the number of times the word "mandatory" appears in the decision, Pet. Br. 19-21—ignores this Court's own repeated statements as to what its holding requires. And it ignores the *ratio decidendi* of the Court's decision, which necessarily defines the scope of the holding. Both aspects of *Miller* refute the Warden's reading.

As an initial matter, the Warden never defines "mandatory" or "discretionary" sentencing schemes—even though he claims that *Miller* turns entirely on the dichotomy between them. He thereby obscures the very aspects of sentencing that matter for *Miller*'s purposes. A "mandatory" scheme—by which the Warden appears to mean a scheme where the sentencer has no authority to set a sentence less than life without parole under any circumstances—can readily be identified as unlawful under *Miller*. On the other hand, the "discretionary" category—which apparently includes everything not "mandatory"—encompasses any number of sentencing schemes. Under a "discretionary" scheme that permits sentences less than life without parole,

sentencers might be required to consider youth, permitted to consider youth, or even prohibited from considering youth. And when imposing a "discretionary" life-without-parole sentence, the sentencing court might or might not take the defendant's youth into account. The Warden's distinction between "mandatory" and "discretionary" sentences thus bears little or no connection to *Miller*'s central concern—the risk that juveniles will receive excessive life-without-parole sentences. That risk can be ameliorated only by actual consideration of youth and its characteristics.

The Warden contends (at 20-21) that "[b]y its own terms, *Miller*'s holding is limited to mandatory life-without-parole sentences," and that "every sentence that is even arguably a holding (or a summary of the Court's holding) specifically references the mandatory nature of the challenged life-without-parole sentences." That is incorrect. As noted, *Miller* states several times that its holding requires sentencers to consider the characteristics of youth before imposing life without parole on a juvenile. The concluding sentence of the paragraph summarizing *Miller*'s "hold[ing]" says: "*[W]e require* [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 479-480 (emphasis added).[11] In the

[11] The Warden addresses this sentence only in a footnote (at 21 n.6), where he quotes it selectively. He ignores the clear import of the words "we require"—which signal that what follows is a holding, not mere dicta. And he wrongly claims that "the Court acknowledged *Miller* presented no occasion" to resolve the issue. In fact, the Court said the opposite. The question *Miller* did not reach was whether to recognize a categorical bar on life without parole for juveniles. The question it did reach and resolve was whether sentencers must consider youth. As the Court explained: "[W]e do not consider … [whether] the Eighth Amendment re-

footnote to that sentence, the Court repeats that "*[o]ur holding requires* factfinders to attend to [the] circumstances" specific to each juvenile defendant and the extent to which youth might mitigate the crime. *Id.* at 480 n.8 (emphasis added). In rebutting the States' arguments, the Court explains: "*Our decision … mandates*" that a sentencer "consider[] an offender's youth and attendant characteristics [] before imposing" life without parole. *Id.* at 483 (emphasis added). And when discussing the constitutional flaw in the specific sentences before it, the Court notes that "a sentencer *needed to* examine all [the] circumstances" relevant to youth "before concluding that life without any possibility of parole was the appropriate penalty." *Id.* at 479 (emphasis added). The Warden simply ignores all of these statements expressly addressing the scope of *Miller*'s holding—and contradicting his view of *Miller*'s scope.

The Warden likewise ignores virtually all of *Miller*'s reasoning. He apparently takes the view that the only parts of this Court's decisions with precedential effect are sentences that contain the word "holding" (or, in this case, "mandatory"), and that the remaining sentences can be ignored. Leaving aside that *Miller* expressly stated that its "hold[ing]" requires actual consideration of youth, 567 U.S. at 479-480, that is not how this Court's (or any court's) decisions should be read. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996).

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quires a categorical bar on life without parole for juveniles," and "we do not foreclose" the imposition of that sentence, but "we require [sentencers] to take into account how children are different." *Miller*, 567 U.S. at 479-480.

Nor is the force of this Court's holdings confined to the precise facts of the case that gave rise to them. "The holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome." *Tate* v. *Showboat Marina Casino P'ship*, 431 F.3d 580, 582 (7th Cir. 2005).

As discussed above, *see supra* Part I.A, *Miller* identified the two strands of precedent that were necessary to its decision: precedent establishing that the Eighth Amendment bars imposition of certain sentences on juveniles because of their lesser culpability, and precedent requiring individualized sentencing in the death-penalty context. The Warden all but ignores the first strand, and discusses only the second. Pet Br. 25-27.

But, even taken in isolation from the first strand, *Miller*'s second strand of precedent does not support the Warden's position. While it includes decisions striking down "mandatory" capital punishment, the principle it stands for is broader—namely, that defendants must be able to advance, and sentencers must take into account, all mitigating circumstances. "Mandatory" imposition of the death penalty is unconstitutional because it precludes sentencers from taking those circumstances into account. But, as *Eddings*—the decision *Miller* relied on most heavily—makes clear, mitigating circumstances, including youth, "'must … be duly considered'" even where, as in *Eddings*, the sentencing scheme does not make death a "mandatory" punishment. 455 U.S. at 116. "The Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (plurality opinion) (citation omit-

ted). As *Miller* held, it likewise requires consideration of youth as a constitutionally indispensable part of the process of imposing life without parole. 567 U.S. at 480.

In any event, as its reliance on *Graham* and *Roper* suggests, *Miller* did not merely extend the individualized-sentencing requirement to life without parole for juveniles. The Court's concern was not only that juvenile defendants should receive individualized consideration that takes mitigating factors into account, so that punishment can be tailored to the offender and the offense. Its concern was much more specific: "Because juveniles have diminished culpability and greater prospects for reform, … 'they are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471. Indeed, those "characteristics of youth" can make life without parole an unconstitutionally "disproportionate" punishment that the State has no power to impose. *Id.* at 473. *Miller* requires sentencers "to take into account how children are different" so that they will not impose life without parole on a "'juvenile offender whose crime reflects unfortunate yet transient immaturity'"—an offender for whom that punishment would violate the Eighth Amendment. *Id.* at 479. That fundamental Eighth Amendment restriction, and the required consideration of youth that implements it, are applicable whenever a juvenile faces a life-without-parole sentence.

B. If The Warden's Reading Of *Miller* Were Correct, *Montgomery* Could Not Have Held *Miller* Retroactive

The Warden's reading of *Miller* is also irreconcilable with *Montgomery*. Indeed, if the Warden were correct, *Montgomery* could not have reached the result it did.

Montgomery held that *Miller* "announced a substantive rule of constitutional law": "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. By definition, a "substantive" rule is one that invalidates a particular punishment for a particular defendant "regardless of the procedures followed." *Penry*, 492 U.S. at 329; *see Montgomery*, 136 S. Ct. at 730 (even "flawless sentencing procedures" cannot "legitimate a punishment" from which "the Constitution immunizes the defendant").

Miller's substantive rule thus cannot turn on the procedural distinction between "mandatory" and "discretionary" sentencing schemes. Life without parole imposed pursuant to a "mandatory" sentencing scheme is the same punishment as life without parole imposed pursuant to a "discretionary" sentencing scheme. In either case, the defendant is imprisoned until death with no hope of release. And in either case, the sentence is subject to the same substantive constitutional limitation: It cannot be imposed on juveniles whose crimes reflect transient immaturity. *Montgomery*, 136 S. Ct. at 734.

Put differently, if *Miller* had done nothing more than invalidate "mandatory" sentencing schemes, *Montgomery* would have come out the other way. A mere requirement that sentencers have the "discretion" to impose a lesser sentence—untethered to any constitutional restriction on life without parole for juveniles—would implicate only "*the manner of determining* the defendant's culpability," *Schriro*, 542 U.S. at 353, and would thus be a procedural, not a substan-

tive, rule.[12] But that is not what *Miller* or *Montgomery* held. Rather, as the court of appeals explained, "*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." Pet. App. 20a. This view of *Miller*'s scope "was the basis for [*Montgomery*'s] holding that *Miller* announced a substantive rule that applies retroactively." *Id.* And to give effect to that rule, the sentencer must consider a defendant's youth in all cases, whether the sentencing scheme is "mandatory" or not. Pet. App. 20a-21a; *Montgomery*, 136 S. Ct. at 735.

The Warden contends that "*Miller* was about rights," while "*Montgomery* was about retroactivity," and that *Montgomery* thus has nothing to say about the scope of *Miller*'s holding. Pet. Br. 18; *see id.* at 12-23. As demonstrated above, even the most cursory reading of *Montgomery* refutes that argument. *Supra* pp.27-28. But the Warden's contention also reflects a profound misunderstanding of this Court's retroactivity doctrine. As this Court has repeatedly explained, it is not possi-

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[12] The Warden suggests (at 26-27 n.9) that a rule that did nothing more than invalidate "mandatory" sentencing schemes would still be "substantive," but cites no authority for that proposition. While he claims that *Woodson*—which was decided over a decade before *Teague*—would have been retroactive under *Teague*, he cannot point to any case so holding, nor does he attempt to fit *Woodson* within the definition of a substantive rule set out in *Teague* and its progeny. Instead, he argues that "[r]equiring a particular outcome for all cases is not a 'procedural' rule." *Id.* But that misstates the inquiry. The question is not whether the scheme being invalidated could be characterized as having "substantive" effects (in the broad sense of the word), but whether the new constitutional rule bars the State from imposing a particular punishment on a particular group of defendants.

ble to determine whether a particular constitutional rule is retroactive without first determining the nature of the right that rule vindicates. Only "substantive" and "watershed procedural" rules are retroactive. *See, e.g.*, *Montgomery*, 136 S. Ct. at 730-732; *Schriro*, 542 U.S. at 353; *Penry*, 492 U.S. at 530. The initial question the Court had to resolve in *Montgomery*, therefore, was: What was the rule of *Miller*? The answer to that question, in turn, determined whether *Miller*'s rule was substantive and thus retroactive. *See Montgomery*, 136 S. Ct. at 732 (framing question as whether *Miller*'s rule "prohibit[s] 'a certain category of punishment for a class of defendants because of their status or offense'"). There is accordingly nothing remotely improper about looking to *Montgomery* to understand what *Miller* held: That was precisely the question *Montgomery* addressed.[13]

The Warden never engages this critical point at all. Indeed, he never even acknowledges that the question in *Montgomery* was whether *Miller* articulated a "substantive" rule. Instead, he offers (at 12-18) a lengthy disquisition on the general rule of non-retroactivity, none of which is remotely relevant here. As *Montgomery* explains, the holding in *Miller* falls outside that

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[13] The Warden observes (at 16-17) that "[t]his Court typically addresses rights and retroactivity in separate cases," and that it has at times declined to address a habeas petitioner's constitutional claim on the merits if the constitutional rule sought would not be retroactive in that case. But neither point suggests that the nature of a right and its retroactivity are severable inquiries. The Court need not decide whether the Constitution actually guarantees a particular right to determine whether that right, if recognized, would apply retroactively. But it does need to determine the nature and scope of the putative constitutional right to determine whether that right would be "substantive" or "watershed" and thus retroactive. *See, e.g.*, *Penry*, 492 U.S. at 330.

general rule, because failing to apply it retroactively would create "'a significant risk' that … the vast majority of juvenile offenders" serving life without parole are serving a sentence "'that the law cannot impose upon'" them. 136 S. Ct. at 734.

The Warden attempts to bolster his position by quoting Justice Harlan: "The relevant frame of reference … is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." Pet. Br. 17 (quoting *Teague*, 489 U.S. at 306 (quoting *Mackey* v. *United States*, 401 U.S. 667, 682 (1971))). But he fails to understand the quotation. To be sure, in framing a federal rule of retroactivity, the purposes of the writ are paramount. That is why new rules are generally not retroactive to cases on collateral review. But that is also why substantive rules *are* retroactive. A core purpose of the writ of habeas corpus is to vindicate the rights of persons imprisoned pursuant to a conviction or sentence that the Constitution bars the State from imposing. *See Montgomery*, 136 S. Ct. at 730 (citing cases). As Justice Harlan himself explained: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey*, 401 U.S. at 693.

Lacking any response to *Montgomery*'s core reasoning, the Warden asks the Court simply to ignore the many "statements [in *Montgomery*] about the premises, justifications, and nature of the *Miller* rule, some of which could be read to sweep well beyond the narrow issue before the Court in *Montgomery*." Pet. Br. 32. But the "narrow issue before the Court in *Montgomery*" was whether *Miller* is retroactive. And *Montgomery*'s "statements about the premises, justifications, and nature of the *Miller* rule" were necessary to

its holding that the *Miller* rule is retroactive. Those statements thus have precedential force, and may not be disregarded. *See Seminole Tribe*, 517 U.S. at 67 ("[W]hen an opinion issues for this Court, it is not only the result but also those portions of the opinion necessary to that result by which [the Court is] bound."); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 668 (1999) (Kennedy, J., concurring and dissenting) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). Divorcing the results in *Miller* and *Montgomery* from the reasoning necessary to those results, as the Warden advocates, would eviscerate both decisions. This Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*," *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), and it should not do so here.

C. The Court Should Reject The United States' Invitation To Repudiate *Montgomery*'s Reasoning

In contrast to the Warden, the United States concedes that *Miller* "'mandates … that a sentencer'" must "'consider[] an offender's youth and attendant characteristics … before imposing" life without parole. U.S. Br. 15 (quoting *Miller*, 567 U.S. at 483); *see id.* at 17 (acknowledging *Miller*'s "'require[ment]'" that a sentencer "'take into account how children are different, and how those differences counsel against'" life without parole). And it concedes (at 19) that "*Montgomery* did not consistently tether its discussion to mandatory sentences." These (accurate) descriptions refute any ar-

gument that *Miller* is confined to "mandatory" sentencing schemes.[14]

Indeed, as the United States acknowledges, that is precisely how the government once viewed *Miller* and *Montgomery*. Observing that "[l]itigants and lower courts cannot lightly disregard any statements in an opinion of this Court," the United States admits that "in light of *Montgomery*'s language, the government and lower courts have generally … viewed *Montgomery*'s reasoning as implicating the validity of discretionary sentences as well as mandatory ones." U.S. Br. 21.

The United States had little choice but to make those concessions, since it has itself advocated precisely the conclusion the court of appeals reached here. In a case in which the juvenile defendant had been sentenced to life without parole under the Sentencing Guidelines, the United States took the position that the defendant was entitled to resentencing, regardless of whether his sentence was "mandatory" or "discretionary." It contended: "*Miller* and *Montgomery* stand for

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[14] The amici States likewise concede (at 14) that *Miller* requires "individualized consideration of a juvenile defendant's 'age and age-related characteristics'" to ensure "that a life-without-parole sentence is not unconstitutionally disproportionate." Their argument is that *Miller* and *Montgomery* "do not require a recitation of [the] magic words" "permanent incorrigibility." *Id.* That is true. *See Montgomery*, 136 S. Ct. at 735. But the court of appeals said nothing to the contrary; it explained, as *Montgomery* did, that sentencers must determine whether a juvenile's crimes reflect "permanent incorrigibility" or "transient immaturity," but did not prescribe any specific form of words sentencers must use. Pet. App. 20a (quoting *Montgomery*, 136 S. Ct. at 734). In any event, this case does not require the Court to address the metes and bounds of "permanent incorrigibility" or the findings required to support such a determination, since Malvo's sentencers did not consider youth at all.

the proposition that a court must affirmatively consider the sentencing factors set forth in *Miller* prior to imposing a sentence of life imprisonment as well as consider whether a juvenile's homicide crime reflects the 'transient immaturity of youth' … or 'irreparable corruption[.]'" U.S. Letter Br. 2, *Mejia-Velez* v. *United States*, No. 1:13-cv-3372 (E.D.N.Y. July 24, 2017) (Dkt. 31) ("*Mejia-Velez* Br."). The United States went on to say that "the government does not view" "the extent of the Court's discretion … to impose a sentence other than life imprisonment" "as dispositive." *Id.* Rather, "the dispositive issue is whether this Court considered [the *Miller*] factors in imposing sentence." *Id.* at 3. The district court agreed, concluding that *Miller* applied notwithstanding the court's discretion under the Sentencing Guidelines to grant a downward departure based on age. *Mejia-Velez* v. *United States*, 320 F. Supp. 3d 496, 505 (E.D.N.Y. 2018).

Having changed its mind as to what *Miller* requires, the United States asks this Court (at 22) to "clarify the limits of *Miller* and *Montgomery*." By that, the United States means that the Court should disregard *Miller*'s requirements and repudiate *Montgomery*'s actual reasoning, substituting new, narrower reasoning that the United States now prefers. Neither of the United States' arguments for taking that unprecedented step has merit.

1. The United States claims (at 23-28) that "*Montgomery*'s core rationale does not cover discretionary sentences." It notes that "*Montgomery* concluded that '*Miller* is retroactive because it *necessarily carries significant risk* that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.'" U.S. Br. 23 (quoting *Montgomery*, 136 S. Ct. at 736). But it then

argues, wrongly, that this core "reasoning is consistent only with the retroactive invalidation of a mandatory sentence, which carries such a risk, as opposed to a discretionary sentence, which does not." *Id.* That argument contradicts *Montgomery*'s clear explanation of why the failure to apply *Miller* retroactively would create a "significant risk." It also makes no sense.

Contrary to the United States' representation (at 24), *Montgomery*'s discussion of the "'significant risk that a defendant … faces a punishment the law cannot impose upon him'" was not "tied to the mandatory aspect of the sentences at issue." The United States quotes (at 24) what it incorrectly describes as "both of *Montgomery*'s references to … risk" and points out that the word "mandatory" appears in both. That ignores *Montgomery*'s central discussion of the issue, which explains that the "significant risk" arises from *Miller*'s "substantive rule" that "juvenile offenders whose crimes reflect the transient immaturity of youth" may not be sentenced to life without parole. 136 S. Ct. at 734; *see also id.* at 736. By definition, a "substantive rule" is applicable regardless of the procedure employed. *See id.* at 730.

Moreover, the risk that a juvenile sentenced before *Miller* to life without parole is serving an unconstitutional sentence does not turn on whether the sentence is "mandatory" or "discretionary." That risk exists whenever a sentencer fails to consider youth. And while some "discretionary" schemes might ensure that sentencers consider a juvenile offender's youth and attendant characteristics and how they militate against life without parole, there is no logical or empirical basis for assuming that all of them do—as Virginia's sentencing scheme vividly illustrates. *See infra* Part III. As the United States previously recognized, "the disposi-

tive issue" is not whether the sentence was "mandatory" or "discretionary," but "whether [the sentencer] considered [the *Miller*] factors in imposing sentence." *Mejia-Velez* Br. 3.

The United States does not engage this point at all. Instead, it makes the unsupported claim that "[i]f not barred by law from doing so, [a sentencer] would ordinarily take into account age-related factors in assessing the propriety" of life without parole for a juvenile. U.S. Br. 26. As is undisputed, that did not happen here. Nor is it reasonable to assume that, before *Miller*—and in many cases even before *Graham* or *Roper*—courts "ordinarily t[ook] into account" what *Miller* held years later: that juvenile homicide offenders' lesser culpability and greater ability to change "counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480.

Relatedly, the United States contends (at 27) that because a defendant sentenced under a "discretionary" scheme is less likely to have received an unconstitutional sentence than one sentenced under a "mandatory" scheme, the risk of such a sentence is insufficient to justify retroactive application of *Miller* to "discretionary" schemes.

That argument not only rests on pure speculation, but also muddles this Court's retroactivity jurisprudence by confusing substance and procedure. The United States suggests that retroactivity is determined by asking how likely it is that a formerly used procedure—here, "mandatory" or "discretionary" sentencing—produced an incorrect result. That is wrong, and adopting that method would create enormous confusion, given how difficult it can be to assess a procedure's effect on the accuracy of the convictions or sen-

tences it produces. That is the very reason this Court has held that procedural rules—unless they are "watershed" rules "implicit in the concept of ordered liberty"—are not retroactive even when they significantly increase the likelihood of a correct result. *Teague*, 489 U.S. at 311 (plurality opinion) (internal quotation marks omitted). In fact, that is the teaching of decisions such as *Beard* v. *Banks*, 542 U.S. 406 (2004), and *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), which the United States cites (at 27) in support of its argument, and which *Montgomery* expressly distinguished, 136 S. Ct. at 735-736.

This Court has already held that *Miller*'s rule is a substantive rule, which bars the State from imposing life without parole on juveniles "whose crimes reflect the transient immaturity of youth" no matter what procedure is used. *Montgomery*, 136 S. Ct. at 734. That substantive rule is effectuated by a hearing at which youth and its attendant characteristics, as set out in *Miller*, are considered in order to determine whether life without parole is a constitutional punishment in that case. *Id.* at 735. Where, as here, *Miller*'s substantive rule was not recognized and no measures were taken to effectuate it, failure to apply *Miller* retroactively necessarily creates an unacceptable risk that prisoners are serving sentences the State cannot constitutionally impose on them—whether the sentencing scheme was "mandatory" or "discretionary."

The United States' argument also violates basic principles of fairness and equity that underpin this Court's conclusion that rules should be retroactive for everyone or not at all. *See Teague*, 489 U.S. at 303-305. A juvenile offender whose crimes reflect transient immaturity, and who was sentenced to life without parole under a "discretionary" scheme, is receiving precisely

the same punishment as a juvenile offender whose crimes reflect transient immaturity, and who was sentenced to life without parole under a "mandatory" scheme. And that punishment offends the Eighth Amendment equally in both cases. Nothing in this Court's decisions supports the United States' notion that only one of the two defendants is entitled to relief from a punishment that the State had no power to impose.

2. Alternatively, the United States asks (at 28) that this Court "clarify[] that *Montgomery*'s holding rests on the narrower rationale set forth in the government's brief in *Montgomery*"—that is, that *Miller* was retroactive because it "expanded the substantive range of possible sentencing outcomes." The Court should reject that proposal—just as it did in *Montgomery*, where the United States made the same argument.

First of all, the United States is not really asking the Court to "clarify" anything. Rather, it seeks to have the Court jettison the entire *ratio decidendi* of *Montgomery* and replace it with different and incompatible reasoning. The United States cites no precedent for this Court's taking such a step, and fails even to acknowledge the serious *stare decisis* concerns it would raise. *Cf. supra* p.40.

Moreover, the United States' theory that any rule "expand[ing] … sentencing outcomes" is "substantive" cannot be reconciled with settled retroactivity principles, as demonstrated by the lack of any authority supporting it. The definition of "substantive" the United States proposes is different from—and potentially far more capacious than—the definition used in *Teague* and its progeny. As the United States conceded in *Montgomery*, this Court's substantive rules have all "nar-

rowed, rather than expanded, the range of permissible outcomes of the criminal process." U.S. Br. 16, *Montgomery*, No. 14-280 (U.S. July 29, 2015).

The United States argues (at 29) that "expanding" the set of possible outcomes is simply the "flip side" of a traditional substantive rule. But it does not explain why the "flip side" of a substantive rule is necessarily also a substantive rule under *Teague* and its progeny. And it makes no attempt to tie its new definition to the reason new substantive Eighth Amendment rules apply retroactively: namely, that such rules bar the State from imposing a particular sentence on a certain class of defendants, meaning that defendants who fall into that class and are serving that sentence are by definition facing cruel and unusual punishment. By contrast, a rule that merely expands the range of possible sentences, without restricting the State's ability to impose any particular sentence on any particular class of defendants, does not pose that same risk and thus is not "substantive" under any definition this Court has used to date. This Court should not abandon well-established retroactivity principles for the United States' novel approach.

III. MALVO'S SENTENCING DID NOT SATISFY *MILLER*

No fair reading of *Miller* permits the Warden to evade the requirement that sentencers "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before imposing life without parole on a juvenile. 567 U.S. at 480. The court of appeals found, and the Warden does not contest, that the judge and jury who sentenced Malvo in 2004 never undertook that required consideration of his youth. Pet. App. 22a. That should be the end of the matter.

As discussed above, *see supra* pp.8-9, at the time of Malvo's crimes, Virginia law authorized only two punishments for capital murder: "death … or imprisonment for life." Va. Code Ann. §§18.2-10(a), 18.2-31 (2002). The sentencing proceeding before the jury was "limited to" determining which of those two punishments was appropriate. *Id.* §19.2-264.4(A). The law also mandated that where, as here, the jury did not recommend the death penalty, "the defendant shall be sentenced to imprisonment for life." *Id.* Because Virginia had abolished parole for felony offenses, that meant life without parole. *Id.* §53.1-165.1.[15]

The jury was instructed that if it concluded the death penalty was not justified, it must sentence Malvo to life without parole, and it did so for each of the two capital-murder counts on which Malvo was convicted. JA67-68, 71. Although the jury found two statutory aggravating circumstances that made Malvo death-eligible—future dangerousness and vileness—it chose not to recommend a death sentence. As the Warden does not dispute, the jury was therefore required by Virginia law to recommend life without parole. Pet. App. 22a. While the jury heard substantial mitigating evidence regarding Malvo's age, vulnerability, and domination by Muhammad, it could give effect to that evidence only by choosing a life-without-parole sentence in lieu of death—which it did. The jury had no

[15] Virginia law contains a "geriatric release" provision, under which a prisoner who has reached age 60 and served at least 10 years may "petition the Parole Board for conditional release." Va. Code Ann. §53.1-40.01. But prisoners convicted of capital murder, which is a Class 1 felony, are not eligible for geriatric release. *Id.*; *see id.* §18.2-31. Amicus Maryland Crime Victims Resource Center's contrary claim (at, *e.g.*, 5-6, 30, 39, 45-46) is incorrect.

ability to consider or recommend a sentence less than life without parole.

It is likewise undisputed that the trial judge never considered "Malvo's 'youth and attendant circumstances'" to determine whether a sentence less than life without parole might be warranted. Pet. App. 22a. To the contrary, at Malvo's brief sentencing hearing before the judge, his age was never mentioned, much less considered as a basis for a lower sentence. JA74-82. Acknowledging that there were not "a lot of alternatives," Malvo's counsel presented no evidence and asked only that Malvo be placed in a facility where he could receive mental-health treatment. JA79-80. The prosecutor also put on no evidence and simply "ask[ed] the Court … to impose the sentence" that the jury had fixed. JA81. The judge then sentenced Malvo to two terms of life without parole. *Id.*

Although the Virginia Supreme Court later held that trial courts may suspend life-without-parole sentences for capital murder, *Jones* v. *Virginia*, 795 S.E.2d 705, 713 (Va. 2017) ("*Jones II*"), at no time during Malvo's trial and sentencing did anyone—the court, the prosecutor, or Malvo's counsel—suggest that any sentence less than life without parole was possible. The Virginia Supreme Court is, of course, the final arbiter of Virginia law, and Malvo does not challenge its holding here. As the court of appeals noted, however, there is no indication that anyone involved in Malvo's sentencing was aware in 2004 that the trial court had the power to suspend life-without-parole sentences for capital murder. Pet. App. 19a. It is thus not surprising that the sentencing court undertook no consideration of

Malvo's youth or whether it might warrant a lesser sentence.[16]

Indeed, Malvo's sentencing was typical for juveniles convicted of capital murder in Virginia before *Miller*. In none of those cases was there any meaningful consideration of whether juveniles' lesser culpability and greater capacity for change warranted a sentence less than life without parole. The possibility of a suspended sentence was almost never even mentioned. In one of the rare cases where defense counsel raised it, the prosecutor responded that the court had no discretion to impose anything less than a life-without-parole sentence, and the court in fact imposed that sentence.[17] The Warden has identified no case prior to *Miller*, and counsel is aware of none, in which a Virginia court sen-

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[16] Of course, the Spotsylvania County court that took Malvo's guilty plea, in which he accepted life-without-parole sentences to avoid a potential death sentence, also never considered whether his youth warranted a sentence less than life without parole. Pet. App. 9a-10a, 25a-27a. As noted, *see supra* p.18 n.10, the court of appeals rejected the Warden's argument that the plea agreement waived Malvo's right to challenge those life-without-parole sentences under *Miller*, and the Warden has not renewed that argument in this Court. While certain amici attempt to revive the waiver argument the Warden has abandoned, *see* Mitchell Br. 5-13, it is not within the scope of the question presented, and this Court should not address it. Sup. Ct. R. 14.1(a).

[17] *See* State Sentencing Tr. 41-43, *Landry* v. *Baskerville*, No. 3:13-cv-367 (E.D. Va. Aug. 26, 2013) (Dkt. 11-1) (defense counsel conceded that sentence was "mandated" to be "either death or life imprisonment" but pleaded with the court to show mercy by suspending sentence); *id.* at 46 (prosecutor responded: "This defendant committed capital murder…. That offense, by statute in this Commonwealth, has two punishments: Life imprisonment or the death penalty.").

tenced a juvenile convicted of capital murder to anything less than life without parole.[18]

Given that backdrop, it is understandable that *Miller* itself identified Virginia as one of twenty-eight states that "ma[d]e a life-without-parole term mandatory for some juveniles convicted of murder in adult court." *Miller*, 567 U.S. at 482 & n.9 (citing Alabama's brief); Alabama Br. 17-19, 21, *Miller*, No. 10-9646 (U.S. Feb. 14, 2012) (noting that Virginia statute "expressly say[s] that if the defendant is a juvenile, the punishment for capital murder 'shall be' life without parole"). Before *Miller*, life without parole was the minimum sentence for juveniles convicted of capital murder—*de facto*, if not *de jure*.

To be clear, the point is not that Virginia's sentencing scheme was in fact "mandatory" as the Warden uses the term.[19] The point is that *Miller*'s require-

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[18] *Jones II* stated that "Virginia trial courts can—and do—suspend life sentences." 795 S.E.2d at 711 & n.8. But none of the cases it cited involved a conviction for capital murder or a conviction under any other statute that specified that the defendant "shall be sentenced to imprisonment for life," Va. Code Ann. §19.2-264.4(A). *See Tyson* v. *Commonwealth*, No. 140917, 2015 WL 10945037, at *1 (Va. Aug. 14, 2015) (child rape, convicted in 2002); *Hamilton* v. *Director of the Dep't of Corrs.*, No. 131738, 2014 Va. LEXIS 201, at *1 (Va. June 6, 2014) (abduction, robbery, felony eluding, firearms offenses); *Harris* v. *Commonwealth*, 688 S.E.2d 279, 280 n.2 (Va. 2010) (abduction with intent to defile); *Moore* v. *Hinkle*, 527 S.E.2d 419, 422 (Va. 2000) (abduction); *Jefferson* v. *Commonwealth*, No. 2172-12-2, 2013 WL 5801746, at *1 (Va. Ct. App. Oct. 29, 2013) (possession with intent to distribute more than 100 kilograms of marijuana); *White* v. *Commonwealth*, No. 1998-96-2, 1997 WL 583578, at *1-2 (Va. Ct. App. Sept. 23, 1997) (cocaine distribution).

[19] The Warden's contention (at 23-24 n.7) that Malvo has "waived" this argument is thus immaterial. Malvo does not con-

ments—which do not depend on whether Virginia's scheme was "mandatory"—were not met here. Virginia's so-called "discretionary" system thus resulted here in the same risk of disproportionate punishment that a "mandatory" sentence would have entailed.

Finally, the Warden and the United States at times appear to suggest that it is Malvo's fault that the trial court failed to consider the characteristics of youth, since he never asked the court to suspend his life-without-parole sentences. Pet. Br. 5; U.S. Br. 30. But, as the court of appeals noted, it was hardly clear in 2004 that the trial court had the power to do that. Pet. App. 19a. And even assuming that Malvo should have known that he had the ability to seek suspension, he cannot have known that he had any basis to do so. At the time, States were still permitted to sentence juveniles to death—a fate Malvo had just escaped—and no one had any inkling that this Court would recognize constitutional limits on life without parole for juveniles.[20]

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test *Jones II*'s holding that, as a matter of Virginia law, trial courts have the authority to suspend capital-murder sentences. But he has never conceded that Virginia courts have actually exercised such "discretion," or that the existence of such "discretion" affects the application of *Miller*. *See* Opp. 2 ("[T]he rule of *Miller* applies [not] only to 'mandatory' schemes that preclude sentencers from considering age [but also] to 'discretionary' schemes, like Virginia's, that purportedly permit them to do so.").

[20] Relatedly, certain amici argue that Malvo defaulted his *Miller* claim by not bringing it within the limitations period for state habeas and that, therefore, he should not receive the benefit of *Miller*. Mitchell Br. 13-32. The Court should not address this issue. The Warden has expressly conceded that there was no state process available to Malvo, Pet. Br. 13 n.2; *see supra* pp.15-16 n.8, and the issue is outside the question presented, Sup. Ct. R. 14.1(a). In any event, amici's argument makes no sense. Malvo had no *Miller* claim to raise until after the window for state habe-

No one disputes that *Miller* articulated a new rule of constitutional law—which, by definition, "breaks new ground or imposes a new obligation on the States" that defendants could not have anticipated. *Teague*, 489 U.S. at 301. That is precisely why Malvo—and many other prisoners serving life without parole for crimes committed as juveniles—have been able to bring *Miller* claims in federal habeas in the first place. *See* 28 U.S.C. §2244(d)(1)(C). Malvo cannot have "forfeited" (U.S. Br. 30) a right he had no reason to know existed. Because Malvo's sentencers did not consider youth and its characteristics in the way *Miller* requires, he is entitled to be resentenced.

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as had closed. He was not required to pursue a time-barred, and therefore futile, state process.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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ADDENDUM

RELEVANT 2002 STATUTORY PROVISIONS

Va. Code Ann. §18.2-10. Punishment for conviction of felony; penalty

The authorized punishments for conviction of a felony are:

> (a) For Class 1 felonies, death, if the person so convicted was sixteen years of age or older at the time of the offense, or imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000. If the person was under sixteen years of age at the time of the offense, the punishment shall be imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000.
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> * * *

Va. Code Ann. §18.2–31. Capital murder defined; punishment

A. The following offenses shall constitute capital murder, punishable as a Class 1 felony:

> * * *
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> 8. The willful, deliberate, and premeditated killing of more than one person within a three-year period;
>
> * * *
>
> 13. The willful, deliberate, and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in §18.2-46.4;
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> * * *

Va. Code Ann. §19.2-264.2. Conditions for imposition of death sentence

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. §19.2-264.4. Sentence proceeding

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

* * *

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of

§19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ....., foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ....., foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

Va. Code Ann. §19.2-303. Suspension or modification of sentence; probation; taking of fingerprints as condition of probation

After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the accused on probation under such conditions as the

court shall determine or may, as a condition of a suspended sentence, require the accused to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted, or to perform community service, or both, under terms and conditions which shall be entered in writing by the court. …

* * *

Va. Code Ann. §53.1-40.01. Conditional release of geriatric prisoners

Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

Va. Code Ann. §53.1-165.1. Limitation on the application of parole statutes

The provisions of this article, except §§53.1-160 and 53.1-160.1, shall not apply to any sentence imposed or to any prisoner incarcerated upon a conviction for a felony offense committed on or after January 1, 1995. Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense.