No. 18-217

In the Supreme Court of the United States

RANDALL MATHENA, WARDEN, PETITIONER

v.

LEE BOYD MALVO

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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The parties' dispute is a narrow one. Malvo acknowledges that he "committed heinous crimes," Resp. Br. 4, and that this Court's existing decisions do not categorically forbid a life-without-parole sentence for such crimes, see *id.* at 3–4. Malvo further acknowledges (see *id.* at 13) that the only basis on which he sought relief was this Court's decision in *Miller* v. *Alabama*, 567 U.S. 460 (2012).

For our part, we acknowledge that "*Miller* established a new rule of constitutional law" that, under *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), "must be given retroactive effect to cases pending on collateral review." Pet. Cert. Reply Br. 10. We also agree that the Court may wish to consider—in an appropriate case—whether "non-mandatory life-without-parole sentences for juveniles sometimes, often, or even always violate the Eighth Amendment." Pet. Br. 35.

But this federal habeas proceeding provides no occasion for announcing a new Eighth Amendment rule, and the Court should not distort the rule announced in *Miller* to achieve that end. Malvo's sentencing occurred years before *Miller*, and his convictions and sentences are long-since final. The only rule applicable to Malvo's case is thus the one announced in *Miller* and made retroactive in *Montgomery*: "that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 567 U.S. at 465 (emphasis added). That rule does not afford Malvo relief, and the courts below erred in concluding otherwise.

I. *Miller*'s holding was expressly limited to mandatory life-without-parole sentences

Malvo's argument confuses an extension of *Miller*'s holding with what *Miller* actually held. *Miller*'s holding was expressly limited to "mandatory" schemes —those that deprive "the sentencing authority [of] any discretion to impose a different punishment." *Miller*, 567 U.S. at 465.[1]

1. The *Miller* Court took pains to clarify that the sentences before it were "mandatory" in nature, see *Miller*, 567 U.S. at 467–69 & n.2, and it repeatedly described its own holding as applying to mandatory sentences as such. Here are the two clearest examples, one of which is from the first paragraph of the Court's opinion:

- "We therefore hold that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 567 U.S. at 466 (emphasis added);
- "We therefore hold that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to

[1] There is no need for us to "define[] 'mandatory' . . . sentencing schemes," Resp. Br. 31, when *Miller* itself carefully described what it meant by that term. Accord Resp. Br. 2 (describing "'[m]andatory' sentences" as those "in which sentencers have no alternative but to sentence all juvenile offenders to life without parole").

> imposition of that harshest prison sentence, *such a scheme* poses too great a risk of disproportionate punishment." *Id.* at 479 (emphasis added) (citation omitted).

See Pet. Br. 20–21 (listing other examples). That should be the end of the matter.

2. In contrast, Malvo's argument is framed around language that the *Miller* Court specifically acknowledged was unnecessary to its decision and claims about *Miller*'s "core rationale." Resp. Br. 2.[2] But that is a plea for extending *Miller*'s holding, not an application of it. And this Court's cases have repeatedly confirmed that federal habeas review is an inappropriate venue for such endeavors.

a. The critical first step in any *Teague* analysis is determining whether the principle under which a habeas petitioner seeks relief would constitute a "new rule." See *Teague* v. *Lane*, 489 U.S. 288, 299 (1988) (opinion of O'Connor, J.). A new rule is any result "not dictated by precedent." *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (internal quotation marks and citation omitted). Indeed, even "the most reasonable" reading of an earlier decision is still a new rule for collateral-review purposes unless "all reasonable jurists" would have reached the same conclusion. *Lambrix* v. *Singletary*, 520 U.S. 518, 528, 538 (1997); accord *Saffle*, 494 U.S. at 491 ("Even if we were to agree with Parks'

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[2] The only time Malvo's brief quotes either of the two statements reproduced above is in the factual background, where it removes the word "hold" from quotation marks. Compare Resp. Br. 12, with *Miller*, 567 U.S. at 479.

assertions that our decisions in *Lockett* and *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that Parks seeks.").

b. By those standards, Malvo's proposed interpretation of *Miller* plainly constitutes a new rule.

i. The very first words of Malvo's brief quote—but only in part—the following sentence that concludes Part II of the Court's opinion in *Miller*:

> Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller, 567 U.S. at 479; see Resp. Br. 1. Portions of that one sentence appear throughout Malvo's brief, including in the Statement (*id.* at 12), Summary of Argument (*id.* at 18), and Argument (*id.* at 22, 27, 29, 32, 33 n.11, 35, 40, 47).

But incanting the same language again and again cannot transform dicta into holding. That is particularly true where, as here, the cited language is being read as having gone "far beyond" the specific issue before the earlier court. *Cohens* v. *Virginia*, 19 U.S. 264, 400 (1821) (Marshall, C.J.). In *Cohens* itself, for example, the Marshall Court unanimously rejected an argument based on "*dicta* of this Court, in the case of *Marbury* v. *Madison*," citing the "maxim . . . that general expressions, in every opinion, are to be taken in conjunction with the case in which those expressions

are used." *Id*. at 399. More recently, the Court recalled *Cohens*' "sage observation" when it "resist[ed] reading a single sentence unnecessary to the decision" as creating a "definitive rule" for future cases. *Arkansas Fish & Game Comm'n* v. *United States*, 568 U.S. 23, 35 (2012); accord *McCray* v. *Illinois*, 386 U.S. 300, 311 n.11 (1967) (declining to grant controlling weight to a previous decision's statement that the government was "required to" do something where "the quoted statement was clearly not necessary for decision").

The same reasoning applies here. The only prison terms before the Court in *Miller* were "mandatory" life sentences, and the only question the Court had occasion to decide was whether a sentencing scheme "that categorically precludes consideration of the offender's young age or any other mitigating circumstances" violates the Eighth Amendment. Pet. Br. 19 (quoting the question presented in *Miller*). The *Miller* Court specifically acknowledged that its "holding" rejecting mandatory sentencing schemes was "sufficient to decide these cases" and that it thus need "not consider" various other issues encompassed by the questions on which it had granted review. *Miller*, 567 U.S. at 479; see *id.* (referencing the petitioners' "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger"). Because *Miller*'s holding did not address the constitutional restrictions governing non-mandatory sentences, Malvo errs in suggesting that "general expressions" in that opinion—largely encapsulated in a "single sentence"—must "control the

judgment in a subsequent" case (Malvo's) that became final long before *Miller* was even decided. *Arkansas Fish & Game*, 568 U.S. at 35 (quoting *Cohens*, 19 U.S. at 399).[3]

ii. Even though *Miller*'s articulation of its own holding was expressly framed in terms of *mandatory* life-without-parole sentences, Malvo insists that "*Miller*'s core rationale" shows that its holding actually applies to *all* life-without-parole sentences for juvenile offenders. Resp. Br. 2. That argument fails for two reasons: *one*, it cannot be squared with *Miller*'s own language and analysis; and *two*, it is simply a repackaged version of the forfeited argument that the Court either announced a new Eighth Amendment rule in *Montgomery* or that it should do so in this case. See Pet. Br.

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[3] Malvo attempts to disguise his myopic focus on a single sentence in *Miller* by making passing reference to three other portions of the Court's opinion. See, *e.g.*, Resp. Br. 32–33. But those passages are no closer to a holding than the sentence Malvo repeats. As Malvo acknowledges (at 32), the first passage is contained in a brief footnote attached to the same sentence discussed above. And in that footnote, the Court again took pains to note that the sentencing schemes at issue were mandatory. See *Miller*, 567 U.S. at 480 n.8 (noting that "the sentencing schemes that the dissents find permissible altogether preclude considering" "the differences among defendants and crimes"). The second passage—which Malvo selectively knits together from parts of two different sentences (Resp. Br. 33)—is addressed to a wholly different point: explaining why *Miller* was "different from the typical [case] in which [the Court] ha[s] tallied legislative enactments." *Miller*, 567 U.S. at 483. And the third (see Resp. Br. 33) occurs immediately before the Court restated and reiterated its precise "hold[ing]": "that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479 (emphasis added).

28 (noting that "Malvo has expressly disclaimed any argument that *Montgomery* announced a new rule").

As we have already explained, *Miller* was quite clear in describing its own holding. Malvo's argument that the Court's explanation shows that the *actual* holding was far broader is thus a bit like saying that a statute's introductory expression of purpose shows that its operative language sweeps far beyond what the text plainly says.

But Malvo's argument also fails on its own terms. If Malvo's understanding of *Miller*'s holding were right, much of *Miller*'s reasoning would make little sense. For example, if *Miller*'s holding actually reached *all* life-without-parole sentences for juvenile homicide offenders (not just mandatory ones):

- Why did the Court spill so much ink parsing the number of jurisdictions that had mandatory (as opposed to non-mandatory) life-without-parole sentences for juvenile offenders? See *Miller*, 567 U.S. at 482–87 & nn.9–13;
- Why did the Court spend time confirming that one of the petitioners' sentences was actually mandatory? See *id.* at 467 n.2; and
- Why did the Court use some variation of the word "mandatory" 48 times in a 25-page opinion? See Pet. Br. 21.

Malvo is right that many of "the same risk[s]" and "concern[s]" that *Miller* identified with mandatory life-without-parole sentences "exist[] whenever a sentencer imposes life without parole on a juvenile without considering whether youth might warrant a lesser

sentence." Resp. Br. 2, 32; see *id.* at 20, 27, 35. For that reason, it can reasonably be maintained that, even though *Miller* invalidated only mandatory life-without-parole sentences, the "principle it stands for is broader," *id.* at 34—*i.e.*, that the Eighth Amendment should properly be understood as imposing limits on *all* life-without-parole sentences for juvenile offenders. See Pet. Br. 35 (so acknowledging). But those are arguments for an extension of *Miller*'s holding rather than an application of it.[4]

II. *Montgomery* cannot mean what Malvo says

For the reasons we have already explained, see Pet. Br. 22–23, 30–33, our interpretation of *Miller* is fully consistent with *Montgomery*. In contrast, Malvo's use of *Montgomery* has numerous problems.

1. Malvo insists that *Montgomery* "confirms [his] reading of *Miller*." Resp. Br. 20. But that argument is, at its core, a thinly disguised claim that *Montgomery* (not *Miller*) announced a new rule that entitles Malvo

[4] Decisions by lower courts in the wake of *Miller* only confirm the point. See *Saffle*, 494 U.S. at 490–91 (examining decisions of lower courts in conducting "new rule" analysis). Between *Miller* and *Montgomery*, numerous state and federal appellate courts specifically concluded that *Miller*'s holding did not apply to non-mandatory sentences. See Pet. 10 (citing cases). Indeed, even after this Court's decision in *Montgomery*, a state trial court in Maryland denied Malvo's request for post-conviction relief in connection with one of his other life-without-parole sentences, concluding that *Miller*'s "new substantive rule . . . is that *mandatory* life-without-parole sentences for juveniles are disproportionate sentences which violate the Eighth Amendment." *State* v. *Malvo*, No. 102675-C, 2017 WL 3579711, at *7 (Md. Cir. Ct. June 15, 2017).

to relief. That is apparent from the language Malvo quotes from *Montgomery*, which characterizes and (if read as Malvo urges) meaningfully extends beyond anything the Court actually held in *Miller*. See Resp. Br. 36 (quoting *Montgomery*'s statement that *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"); see also *id.* at 23–27. Because *Miller*'s holding was expressly limited to mandatory sentences—and because Malvo has disclaimed any reliance on a "new rule" created in *Montgomery*, see Pet. Br. 28—the language he quotes does not advance his argument.

2. Malvo's reading of *Montgomery* is inconsistent with this Court's retroactivity cases.

a. As Malvo acknowledges, this Court has repeatedly described non-retroactive "procedural" rules as those regulating only "the *manner of determining* the defendant's culpability." *Montgomery*, 136 S. Ct. at 730, 732 (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004)). But a rule dictating a particular penalty—or a decision of this Court forbidding mandatory penalties—does not merely regulate the procedures for determining a given offender's culpability. Rather, as *Miller* explained, the constitutional problem with "mandatory life-without-parole" sentences is that they "pos[e] too great a risk of disproportionate punishment" "[b]y making youth (and all that accompanies it) *irrelevant* to imposition of th[e] harshest prison sentence." *Miller*, 567 U.S. at 479 (emphasis added).

In other words, the flaw in mandatory sentencing schemes lies in the judgment that the extent of a particular offender's culpability *does not matter* in determining the nature of the offender's punishment. See Pet. Br. 26 n.9. By invalidating such schemes, the *Miller* Court announced a substantive rule.

b. Malvo claims that "if *Miller* [did] nothing more than invalidate 'mandatory' sentencing schemes," it could not have properly been held retroactive in *Montgomery* because "[a] mere requirement that sentencers have the 'discretion' to impose a lesser sentence" cannot be a substantive rule for *Teague* purposes. Resp. Br. 36. But that counterfactual claim ignores the fact that *Miller*'s holding took an entire *category* of punishment ("mandatory life without parole") off the table for an entire *category* of offenders ("those under the age of 18 at the time of their crimes")—which makes it a substantive rule. *Miller*, 567 U.S. at 465.[5]

Malvo acknowledges that, under his view, the Court's decision in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976) (plurality opinion), would not have been retroactive. See Resp. Br. 37 n.12. That striking

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[5] It also is odd to use the words "nothing more" (Resp. Br. 36) to describe a decision of this Court that invalidated sentencing schemes used by dozens of States and the Federal Government. See *Miller*, 567 U.S. at 487 (referencing "29 relevant jurisdictions"). And because there were no "Virginia inmates" before this Court in *Miller* or *Montgomery*, Malvo's assertion that reversing here "would have the same effect as overruling" those decisions "as far as . . . Virginia inmates . . . are concerned," Resp. Br. 3–4, simply assumes the answer to the question presented in this case.

concession confirms that something has gone awry with how Malvo understands the category of "substantive" rules. In contrast, *Woodson*'s retroactivity makes perfect sense once it is recognized that mandatory penalties create distinct Eighth Amendment problems, as both *Miller* and *Woodson* emphasized. Indeed, on the same day that it held that "making death the *mandatory* sentence" violates the Eighth Amendment, *Woodson*, 428 U.S. at 286 (plurality opinion), the Court also upheld three other States' *non-mandatory* capital sentencing regimes on the grounds "that the punishment of death does not invariably violate the Eighth Amendment." *Gregg* v. *Georgia*, 428 U.S. 153, 169 (1976) (principal opinion); accord *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976). That combination of results is hard to square with Malvo's refrain that mandatory life without parole is not a distinct punishment for Eighth Amendment purposes.

c. For all his criticism of our reading of *Miller*, Malvo frames his own plea for relief in quintessentially procedural terms. Malvo is not arguing—and he has never argued—that the Eighth Amendment actually prohibits a life-without-parole sentence for his crimes. See Resp. Br. 4 (stating that "[w]hether life without parole is the appropriate punishment for Malvo . . . is not the question here"); see Pet. App. 80a, 96a (original habeas petitions). Instead, Malvo takes issue with the *manner* in which he was sentenced to life without parole, specifically the trial court's (asserted) failure "to consider youth and its characteristics in the way" that Malvo believes that *Miller* requires. Resp. Br.

53; see note 6, *infra*. But a sentencer's failure to consider a certain factor—or to consider it in an adequate manner—is a classic example of a procedural violation, not a substantive one. See *Graham* v. *Collins*, 506 U.S. 461, 463, 470, 477 (1993) (describing a claim that state law failed to ensure "constitutionally adequate consideration" of "mitigating evidence of [the defendant's] youth, family background, and positive character traits" as "[p]lainly" procedural for *Teague* purposes).

3. Malvo's reading of *Miller* also would impose on courts a cumbersome remedial process at odds with the *Montgomery* Court's assurance that its holding would not be unduly burdensome.

a. In *Montgomery*, the Court assured the States that "[g]iving *Miller* retroactive effect" would "not require [them] to relitigate sentences, let alone convictions, in every case where a juvenile offender received *mandatory* life without parole." *Montgomery*, 136 S. Ct. at 736 (emphasis added). Yet, under Malvo's view, States would have to "relitigate sentences" in *every* case where a juvenile offender was sentenced to life without parole, whether the sentence was mandatory or not. That would be an extraordinary burden for this Court to have imposed while simultaneously assuring the States that implementing *Montgomery* would be minimally intrusive.

Consider the multiple steps that would be required to implement the rule Malvo claims this Court adopted in *Miller* and made retroactive in *Montgomery*. *First*, the habeas court would need to obtain and review the original sentencing transcript—if such a

transcript is available. *Second*, if the sentencing authority did not recite certain specific words (*e.g.*, "I find the defendant incorrigible"), the parties would have to litigate whether particular statements by the sentencer (either during the formal sentencing or at another point) reflect sufficient consideration of youth and/or a determination that the defendant was incorrigible. See *Rita* v. *United States*, 551 U.S. 338, 356 (2007) (noting that courts often "rely[ ] upon context and the parties' prior arguments to make the[ir] reasons clear").[6] *Third*, because in Malvo's view this Court

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[6] This case highlights the challenges such assessments would pose. Quoting from his final hearing before the Fairfax trial court, Malvo asks this Court to conclude, as a factual matter, "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." Resp. Br. 49. But that one hearing cannot be viewed in isolation. Malvo's youth and attendant characteristics were the heart of his defense during the guilt phase, where Malvo's entire argument was that he had been under Muhammad's control. See JA 63–64 (trial judge noting that "a great deal of mitigation evidence came in during [Malvo's] case-in-chief in the guilt phase" and that "[i]t is a rare case that had as much mitigation evidence in the guilt phase."). The same characteristics were again front and center during the penalty phase, both during the proceedings before the jury, see CA JA 1787–1829, 1868–80, and when the trial judge "order[ed] a presentence investigation," JA 73, to include "all . . . relevant facts" about "the history of the accused," Va. Code Ann. § 19.2–299(A). See JA 75–76 (reviewing report with counsel before imposing sentence). It is unrealistic and unfair to presume that the trial judge simply disregarded all of that evidence and argument. That is, however, exactly the conclusion Malvo asks this Court to bless. See also Part III, *infra* (addressing Malvo's suggestion that he is entitled to habeas relief because the state trial court (erroneously) believed that it had no discretion to sentence Malvo to anything besides life without parole).

has already held that the Eighth Amendment forbids life without parole for all juvenile offenders whose crimes "reflect[] unfortunate yet transient immaturity," *Miller*, 567 U.S. at 479, the habeas court would next have to decide whether the particular offender before it was permanently incorrigible[7]—a determination that would be made years or even decades after the underlying crimes, when memories have faded and witnesses have become unavailable. Even more problematic, to actually comply with what Malvo regards as *Miller*'s mandate, the habeas court would have to evaluate the offender's potential for reform *as of the time of the original sentencing*—an unusual judicial exercise at best.[8]

b. Fortunately, none of this is necessary. *Miller*'s "new substantive rule . . . is that *mandatory* life-without-parole sentences for juveniles are disproportionate sentences which violate the Eighth Amendment." *Malvo*, 2017 WL 3579711, at *7. By making that rule retroactive to cases pending on collateral review,

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[7] That Malvo does not and has not asked for this finding demonstrates how his brief belies the substantive/procedural distinction it purports to draw. Malvo asks for a do-over to rectify the sentencing court's alleged procedural failures. He does not ask for relief on the ground that the Eighth Amendment actually bars his life-without-parole sentences.

[8] The only alternative would be to "remedy [the] *Miller* violation by permitting [all] juvenile homicide offenders" sentenced before *Miller* "to be considered for parole." *Montgomery*, 136 S. Ct. at 736. At that point, however, the Court would have invalidated every pre-*Miller* life-without-parole sentence for a juvenile offender—a step the Court specifically declined to take in *Miller* itself. See *Miller*, 567 U.S. at 480.

Montgomery required habeas courts to make a single determination: whether, at the time of sentencing, "[s]tate law mandated that [the] juvenile die in prison." *Miller*, 567 U.S. at 465. That straightforward analysis is far more in keeping with *Montgomery*'s assurances than the multi-stage, factbound, and forward-looking-but-backdated assessment that Malvo's proposed rule would require.

III. Malvo's arguments for affirmance are without merit

Malvo expressly seeks affirmance on one ground and appears to suggest the Court could affirm on at least two others. None warrants doing so.

1. Malvo asserts that, regardless of whether Virginia's sentencing regime is mandatory or non-mandatory, this Court should affirm because "the judge and jury who sentenced Malvo in 2004 never undertook th[e] required consideration of his youth." Resp. Br. 47; accord *id.* at 51–52. That is simply one last reprise of Malvo's erroneous reading of what *Miller* requires for cases that were pending on collateral review when it was decided, and the Court should be clear in rejecting it.

2. At other points, Malvo suggests both that: (a) his sentences were actually mandatory; or (b) regardless of whether they were mandatory, the sentences were still unconstitutional because "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." Resp. Br. 49. But Malvo has expressly disclaimed the

former argument, and the latter is not an Eighth Amendment argument.

a. In 2014, Virginia's highest court unanimously held that, under a provision of state law that existed at the time Malvo was sentenced, trial judges "had the authority . . . to suspend the sentence" in whole or in part for those (like Malvo) convicted of capital murder. *Jones* v. *Commonwealth*, 763 S.E.2d 823, 824 (Va. 2014) (*Jones I*). For that reason, the court held—again, unanimously—that "the sentencing scheme applicable to [such] conviction[s] was not a mandatory life without the possibility of parole sentence." *Id.* at 823.[9]

As Malvo acknowledges, "[t]he Virginia Supreme Court is . . . the final arbiter of Virginia law." Resp. Br. 49. For that reason, Malvo "does not contest *Jones II*'s [sic] holding that, as a matter of Virginia law, trial courts have the authority to suspend capital-murder sentences." Resp. Br. 51–52 n.19; accord *id.* at 49.[10] Indeed, Malvo goes farther, affirming that he does not contend "that Virginia's sentencing scheme was in fact

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[9] This Court vacated and remanded *Jones I* in light of *Montgomery*. See *Jones* v. *Virginia*, 136 S. Ct. 1358, 1358 (2016) (No. 14-1248). On remand, the state supreme court "reinstate[d] [its] holding in *Jones I*" and denied relief. *Jones* v. *Commonwealth*, 795 S.E.2d 705, 707 (Va. 2017) (*Jones II*), cert. denied, 138 S. Ct. 81 (2017) (No. 16-1337). Although the justices divided over whether *Montgomery* rendered *Miller*'s holding applicable to non-mandatory sentences, even the dissenters continued to agree that, under Virginia law, a sentence for capital murder is "not a mandatory life sentence." *Jones II*, 795 S.E.2d at 723 (Powell, J., dissenting).

[10] As explained above, the relevant holding was in *Jones I*, not *Jones II*. See Resp. Br. 14 n.7 (so acknowledging).

'mandatory' as the Warden uses the term." *Id.* at 51; see note 1 and accompany text, *supra* (defining "mandatory" sentences).[11]

b. Malvo also suggests that his life-without-parole sentences were "*de facto*, if not *de jure*" mandatory because "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." Resp. Br. 49, 51. But that is not an Eighth Amendment "cruel and unusual punishments" argument. And to the extent the issue Malvo identifies implicates other legal protections, he never sought relief on those grounds and cannot do so now.

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[11] Malvo's selective recounting of Virginia law, see Resp. Br. 8–9, 48, appears designed to suggest that his life-without-parole sentences were, in fact, mandatory. But as Virginia's highest court unanimously explained in *Jones I*, the provisions Malvo references do not give the complete picture. Virginia law has long contained a statute providing that "[a]fter conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or in part." *Jones I*, 763 S.E.2d at 824–25 (quoting Va. Code Ann. § 19.2-303 (2000)). As *Jones I* explained, nothing in this statute's language "restrict[s] its application to a certain type of sentence," *id.* at 825, and Virginia's highest court has squarely held that "[o]nly where the General Assembly has prescribed a mandatory minimum sentence imposing an inflexible penalty has it 'divested trial judges of all discretion respecting punishment,' " *id.* (quoting *In re: Commonwealth*, 326 S.E.2d 695, 697 (Va. 1985)); see *id.* (stating that "[t]he absence of the phrase 'mandatory minimum' in [the capital-murder statute] underscores the flexibility afforded a trial court in sentencing pursuant to th[at] statute"). Cf. Va. Code Ann. § 18.2-248(H2)(5) (stating that particular life sentences "shall be served with no suspension in whole or in part").

For example, Malvo's trial counsel could have argued—as Virginia's highest court later unanimously held in *Jones I*—that, notwithstanding the jury's verdict, the trial court was not required to sentence him to life without parole. See JA 78–79 (defense counsel addressing court at sentencing); see also Pet. Br. 5 n.1 (explaining that, under longstanding Virginia law, "[t]he punishment as fixed by the jury is not final or absolute but rather establishes the maximum punishment which may be served" (internal quotation marks and citation omitted)). If the trial court rejected that argument, Malvo could have appealed, ultimately to the same court that decided *Jones I*. See JA 82 (trial court advising Malvo of his right to appeal). Having failed to raise the issue before the state courts, Malvo could have sought habeas relief, either on Sixth Amendment ineffective-assistance-of-counsel grounds or, conceivably, under the Due Process Clause on the theory that the Supreme Court of Virginia's unanimous decision in *Jones I* was an "unforeseeable" (and thus not properly retroactive) application of Virginia law. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). But Malvo did not take any of those steps or make any of those arguments, and he cannot now force the square peg of those claims into the round hole of the Eighth Amendment holding in *Miller* and thus obtain "the extraordinary remedy of habeas corpus." *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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