

No. 18-1259

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IN THE  
**Supreme Court of the United States**

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BRETT JONES,  
*Petitioner,*

v.

STATE OF MISSISSIPPI,  
*Respondent.*

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**On Writ of Certiorari to the  
Mississippi Court of Appeals**

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**BRIEF FOR RESPONDENT**

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## QUESTION PRESENTED

*Miller v. Alabama*, 567 U.S. 460 (2012) held that mandatory life-without-parole sentencing schemes are unconstitutional as applied to juveniles. Four years later, this Court applied the constitutional prohibition on mandatory life-without-parole sentences announced in *Miller* retroactive to cases on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Because such mandatory sentences pose too great a risk of disproportionate punishment, the Eighth Amendment requires consideration of “youth and its attendant characteristics” before a juvenile may be sentenced to life without parole, but there is no “formal factfinding requirement.” *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465).

The question presented is:

Does a life-without-parole sentence imposed under a discretionary sentencing scheme where the sentencer considers youth and its attendant characteristics violate the Eighth Amendment if the sentencer does not make an express, on-the-record finding that a juvenile is permanently incorrigible?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	vi
INTRODUCTION.....	1
STATEMENT .....	2
A. Jones’s 2004 Murder of His Grandfather Bertis Jones.....	2
B. Jones’s Murder Conviction and Sentence Under Mississippi Law Prior to <i>Miller v.</i> <i>Alabama</i> .....	4
C. Mississippi Law and Jones’s Post- conviction Proceedings After <i>Miller v.</i> <i>Alabama</i> .....	5
SUMMARY OF ARGUMENT .....	12
ARGUMENT.....	15
I. <i>Miller</i> Invalidated Only Mandatory Juve- nile Life-Without-Parole Sentences and Establishes Individualized Sentencing as a Constitutional Requirement for Juvenile Homicide Offenders .....	15
A. <i>Miller</i> Addressed and Invalidated Only Mandatory Life-Without-Parole Sentences for Juvenile Homicide Offenders .....	16
B. <i>Miller</i> Treated Discretionary Sen- tencing Regimes as a Constitutional Benchmark Against Which to Measure the Risk of Mandatory Schemes .....	19

## TABLE OF CONTENTS—Continued

	Page
C. <i>Miller's</i> Rule Requires Individualized Sentencing That Considers Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence .....	21
II. Decisions Announcing a New Rule ( <i>Miller</i> ) are Distinct from Decisions about the Retroactivity of that Rule ( <i>Montgomery</i> ).	24
III. <i>Montgomery</i> Neither Addressed Nor Invalidated Discretionary Sentencing Schemes.....	28
A. Like <i>Miller</i> , <i>Montgomery</i> Involved Only a Mandatory Life-Without-Parole Sentence .....	29
B. <i>Miller's</i> Rule is Substantive and Retroactively Applicable Because it is Premised on the Substantive Right to be Free From Grossly Disproportionate Punishment .....	30
C. Neither <i>Miller</i> nor <i>Montgomery</i> Sets Forth a New Rule about Discretionary Life-Without-Parole Sentences .....	32
IV. The Eighth Amendment Requires Only That a Sentencer Consider the Mitigating Circumstances of Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence.....	36

## TABLE OF CONTENTS—Continued

	Page
V. Mississippi’s Discretionary Sentencing Regime, Requiring Sentencing Courts to Consider Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence on a Juvenile Homicide Offender, Complies with the Eighth Amendment .....	44
CONCLUSION .....	50

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Arizona v. Roberson</i> , 486 U.S. 675 (1988).....	26
<i>Armour &amp; Co. v. Wantock</i> , 323 U.S. 126 (1944).....	34
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983).....	40
<i>Beard v. Banks</i> , 542 U.S. 406 (2004).....	26
<i>Blystone v. Pennsylvania</i> , 494 U.S. 299 (1990).....	39
<i>Bucklew v. Precythe</i> , 139 S. Ct. 1112 (2019).....	20
<i>Butler v. McKellar</i> , 494 U.S. 407 (1990).....	26
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	26
<i>California v. San Pablo &amp; T.R. Co.</i> , 149 U.S. 308 (1893).....	30
<i>Chaidez v. United States</i> , 568 U.S. 342 (2013).....	26
<i>Chandler v. State</i> , 242 So. 3d 65 (Miss. 2018).....	11
<i>Clemons v. Mississippi</i> , 494 U.S. 738 (1990).....	26
<i>Cook v. State</i> , 242 So. 3d 865 (Miss. Ct. App. 2017) .....	11

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	26
<i>Danforth v. Minnesota</i> , 552 U.S. 264 (2008).....	27, 28
<i>Dodd v. United States</i> , 545 U.S. 353 (2005).....	26, 27
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	49
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982).....	24, 25, 38
<i>Espinosa v. Florida</i> , 505 U.S. 1079 (1992).....	26
<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	11, 46
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	<i>passim</i>
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987).....	27
<i>Henry v. City of Rock Hill</i> , 376 U.S. 776 (1964).....	36
<i>Jackson v. Hobbs</i> , 565 U.S. 1013 (2011).....	16
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	26
<i>Jones v. Commonwealth</i> , 795 S.E.2d 705 (Va. 2017) .....	36

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Jones v. Mississippi</i> , 122 So. 3d 725 (Miss. Ct. App. 2011) ..... <i>passim</i>	
<i>Jones v. Mississippi</i> , 122 So. 3d 698 (Miss. 2013) .....	<i>passim</i>
<i>Jones v. Mississippi</i> , 285 So. 3d 626 (Miss. 2017) .....	<i>passim</i>
<i>Jones v. Mississippi</i> , 938 So. 2d 312 (Miss. Ct. App. 2006) ....	2, 4, 46
<i>Kansas v. Carr</i> , 136 S. Ct. 633 (2016).....	43
<i>Lambrix v. Singletary</i> , 520 U.S. 518 (1997).....	24, 26
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996).....	36
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	<i>passim</i>
<i>Mackey v. United States</i> , 401 U.S. 667 (1971).....	25
<i>Maynard v. Cartright</i> , 486 U.S. 356 (1988).....	26
<i>Miller v. Alabama</i> , 565 U.S. 1013 (2011).....	16
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	<i>passim</i>
<i>Mills v. Maryland</i> , 486 U.S. 367 (1988).....	26

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	<i>passim</i>
<i>O'Dell v. Netherland</i> , 521 U.S. 151 (1997).....	26
<i>Oregon v. Ice</i> , 555 U.S. 160 (2009).....	39
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	26
<i>Parker v. Dugger</i> , 498 U.S. 308 (1991).....	49
<i>Parker v. Mississippi</i> , 119 So. 3d 987 (Miss. 2013) .....	5, 6, 22, 44
<i>Patterson v. New York</i> , 432 U.S. 197 (1977).....	38
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	38
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989).....	13, 25, 26
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020).....	26
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979).....	23
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	26, 44
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	40, 41

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	<i>passim</i>
<i>Saffle v. Parks</i> , 494 U.S. 484 (1990).....	24
<i>Sawyer v. Smith</i> , 497 U.S. 227 (1990).....	13, 26
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004).....	14, 26, 30, 31
<i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994).....	26
<i>Stringer v. Black</i> , 503 U.S. 222 (1992).....	26
<i>Tatum v. Arizona</i> , 137 S. Ct. 11 (2016).....	36
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	<i>passim</i>
<i>United States v. Brinson-Scott</i> , 714 F.3d 616 (D.C. Cir. 2013).....	40
<i>United States v. Carter</i> , 564 F.3d 325 (4th Cir. 2009).....	40
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005).....	40
<i>United States v. Kenny</i> , 846 F.3d 373 (D.C. Cir. 2017).....	44
<i>United States v. Mendoza-Mendoza</i> , 597 F.3d 212 (4th Cir. 2010).....	43

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Spiller</i> , 732 F.3d 767 (7th Cir. 2013).....	40
<i>Voorhees v. Jackson</i> , 35 U.S. 449 (1836).....	43
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990).....	43
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	26
<i>Whorton v. Bockting</i> , 549 U.S. 406 (2007).....	26
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976),.....	<i>passim</i>
<i>Wright v. West</i> , 505 U.S. 277 (1992).....	25
 CONSTITUTION	
U.S. Const. amend. VI.....	42
U.S. Const. amend. VIII.....	<i>passim</i>
 STATUTES	
18 U.S.C. § 3553(a).....	40, 41
Miss. Code Ann. § 47-7-3.....	5
Miss. Code Ann. § 47-7-3(1)(f).....	4, 5
Miss. Code Ann. § 47-7-3(1)(h).....	5
Miss. Code Ann. § 97-3-21 .....	4

## TABLE OF AUTHORITIES—Continued

COURT FILINGS	Page(s)
Pet., <i>Jackson v. Hobbs</i> (No. 10-9647) (March 21, 2011) .....	16, 17
Pet., <i>Miller v. Alabama</i> (No. 10-9646) (March 21, 2011) .....	16, 17
Pet., <i>Montgomery v. Louisiana</i> (No. 14- 280) (Sept. 5, 2014) .....	13, 29, 34, 41
 OTHER AUTHORITIES	
Stephen M. Shapiro et al., <i>Supreme Court Practice</i> (10th ed. 2013) .....	36
Webster’s <i>Third New Int’l Dictionary</i> (1993) .....	22, 23

## INTRODUCTION

Petitioner Jones contends that the Eighth Amendment categorically prohibits both mandatory and discretionary life-without-parole sentences for juvenile homicide offenders—unless the sentencer makes an express, on-the-record finding that a juvenile is permanently incorrigible. *Miller v. Alabama*, 567 U.S. 460 (2012) does not support such a premise, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) defeats it.

In *Miller*, this Court “h[e]ld 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. Four years later, in *Montgomery*, the Court held that “*Miller* announced a substantive rule that is retroactive to cases on collateral review.” *Montgomery*, 136 S. Ct. at 732. *Miller* and *Montgomery* both involved offenders sentenced to life without parole under mandatory sentencing schemes, and neither decision sets forth a new rule about discretionary sentences.

*Miller* premised its reasoning on the idea that mandating life without parole for juvenile homicide offenders is constitutionally different than giving the sentencer discretion to impose that punishment. In applying *Miller* retroactively, *Montgomery* reiterated that, while a sentencer must consider “‘youth and its attendant characteristics’” before sentencing a juvenile to life without parole, there is not a requirement “to make a finding of fact regarding a child’s incorrigibility.” *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465).

There is no requirement to make a finding of incorrigibility because “permanent incorrigibility” is not the substantive Eighth Amendment standard for juvenile life-without-parole sentences. Instead, the Eighth Amendment requires an individualized sentencing hearing where a sentencer considers youth and its attendant characteristics before imposing a life-without-parole sentence on a juvenile homicide offender. Because Jones received precisely what the Eighth Amendment requires, the lower court was correct in affirming his sentence and should be affirmed.

## STATEMENT

### **A. Jones’s 2004 Murder of His Grandfather Bertis Jones.**

In 2004, Brett Jones murdered his grandfather by stabbing him to death with a steak knife and a filet knife. At the time, Jones was fifteen years old and living with his grandparents in Shannon, Mississippi. *See Jones v. Mississippi*, 938 So. 2d 312, 313-14 (Miss. Ct. App. 2006) (“*Jones I*”).

On August 9, 2004, Jones’s grandfather, Bertis Jones, discovered Jones’s girlfriend, Michelle Austin, in Jones’s bedroom. This angered Bertis, and he ordered Austin to leave his house, which she did. Thereafter, Jones warned Austin that “he was going to hurt his granddaddy.” *Jones v. Mississippi*, 122 So. 3d 725, 728 (Miss. Ct. App. 2011), *judgment affirmed in part, reversed in part by Jones v. Mississippi*, 122 So. 3d 698 (Miss. 2013) (“*Jones II*”).

Later that same day, Bertis walked into the kitchen of his home and found Jones making a sandwich. *Jones I*, 938 So. 2d at 314. According to Jones, Bertis’s temper escalated, and he yelled at Jones and pushed

him. *Jones II*, 122 So. 3d at 728. When Jones pushed back, Bertis purportedly tried to hit him. *Id.* After being cornered, Jones threw a steak knife—he claimed he already had in his hand from making a sandwich—which struck Bertis. *Id.* Apparently unfazed, Bertis allegedly attacked Jones, prompting Jones to stab Bertis. *Id.* As the fight continued, Jones grabbed a different knife (a filet knife) and stabbed Bertis with it. *Id.*

After repeatedly stabbing his grandfather, Jones claimed he attempted to perform CPR but could not revive Bertis. *Id.* Jones dragged Bertis’s dead body into the laundry room and shut the door. *Id.* Jones then tried to wash the blood off of himself with a water hose. *Id.* He also threw his blood-soaked shirt in the garbage. *Id.* In an effort to conceal blood stains on the carport floor, Jones parked Bertis’s car over them. *Id.*

A neighbor heard an old man “holler out he was in pain.” *Id.* A few minutes later, the neighbor encountered Jones, who was covered in blood. *Id.* The neighbor testified Jones was carrying a knife, trembling, and saying “Kill, kill.” *Id.* The neighbor conveyed his encounter with Jones to his landlord. *Id.* The landlord spotted Jones in the bushes near Jones’ grandparents’ house. *Id.*

When the landlord asked where Jones’s grandfather was, Jones claimed Bertis had left. *Id.* The landlord pointed out that Bertis’s car was in the carport. *Id.* Yet Jones still defended his false story that Bertis was not there. *Id.* Jones also told the landlord the blood on him was fake and “a joke.” *Id.* According to the landlord, Jones left with a young lady. *Id.* The landlord inspected the bushes where he had seen Jones and found an oil pan containing blood. *Id.*

Jones testified he and his girlfriend planned to travel to Walmart to meet his grandmother to explain what had happened. *Id.* But before they arrived, police apprehended the couple at a gas station. *Id.* Both Jones and Austin gave false names to the arresting officers. *Id.* During a pat down of Jones, an officer found a knife. *Id.* The officer asked if it was the knife Jones “did it with.” Jones told him, “No, I already got rid of it.” *Id.*

There were a total of eight stab wounds to the body of Bertis Jones. *Id.* at 729. There were also abrasions consistent with the body having been dragged, and cuts on the hand classified as “defensive posturing injuries.” *Id.* The cause of death was a stab wound to the chest. *Jones I*, 938 So. 2d at 315.

**B. Jones’s Murder Conviction and Sentence Under Mississippi Law Prior to *Miller v. Alabama*.**

The Circuit Court of Lee County, Mississippi tried Brett Jones for the murder of Bertis. Jones defended against the charge by arguing that he acted in self-defense. *Id.* at 316. The jury, however, returned a verdict of guilty of murder under Mississippi Code Section 97–3–21, and the court sentenced Jones to “imprisonment for life.” MISS. CODE ANN. § 97–3–21. The Mississippi Court of Appeals affirmed Jones’s conviction and sentence. *Jones I*, 938 So. 2d at 317.

While Section 97–3–21 does not carry a specific sentence of life “without parole,” Mississippi’s parole statute renders a life sentence under Section 97–3–21 tantamount to life without parole. Section 47–7–3(1)(f) reads, “[n]o person shall be eligible for parole who is convicted. . . except that an offender convicted of only nonviolent crimes. . . may be eligible for parole. . .

‘nonviolent crimes’ means a felony other than homicide. . .” MISS. CODE ANN. § 47–7–3(1)(f). “The legislative mandates, when read together, are tantamount to life without parole.” *Parker v. Mississippi*, 119 So. 3d 987, 997 (Miss. 2013).<sup>1</sup>

**C. Mississippi Law and Jones’s Postconviction Proceedings After *Miller v. Alabama*.**

1. In *Miller v. Alabama*, this Court announced a categorical rule that mandatory life-without-parole sentencing schemes are unconstitutional as applied to juveniles. After *Miller*, the Mississippi Supreme Court in *Parker* eliminated mandatory life without parole for juveniles and created a discretionary sentencing scheme where youth and its attendant characteristics are considered prior to sentencing. *Id.*<sup>2</sup>

The *Parker* court adopted *Miller*’s “hallmark features” of youth as factors to guide sentencing courts during “*Miller* hearings.” *Id.* Those factors include: “immaturity, impetuosity, and failure to appreciate risks and consequences”; “taking into account the family and home environment”; “the circumstances of the homicide offense, including the extent of [the juvenile’s] participation in the conduct and the way familial and peer pressures may have affected him”;

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<sup>1</sup> Mississippi Code Section 47-7-3 was amended following the *Parker* decision. Subsection (1)(f) now reads substantially the same as the prior subsection (1)(h), which was the subsection discussed in *Parker*.

<sup>2</sup> In *Parker*, the Mississippi Supreme Court determined that “[i]f the trial court should determine, after consideration of all circumstances set forth in *Miller*, that [a juvenile] should be eligible for parole, the court shall enter a sentence of life imprisonment with eligibility for parole notwithstanding the present provisions of Mississippi Code Section 47-7-3(1)([f]).” *Parker*, 119 So. 3d at 999.

and “the possibility of rehabilitation.” *Id.* at 995-96 (citations omitted) (quoting *Miller*, 567 U.S. at 477-78).

2. This Court decided *Miller* shortly after Jones had filed for postconviction relief in state court. Because Jones’s conviction and sentence had been final for nearly eight years at the time *Miller* was decided, the Mississippi Supreme Court had to decide whether *Miller* applied retroactively to cases, like Jones’s, on collateral review. Answering that question in the affirmative, the Mississippi Supreme Court set aside Jones’s sentence and remanded the case for a resentencing hearing where Jones’s youth and its attendant characteristics could be considered. *Jones II*, 122 So. 3d at 703.

3. The Circuit Court of Lee County conducted a *Miller* hearing on February 6, 2015. The resentencing judge appointed counsel for Jones and authorized him to retain an investigator and an expert. *Jones v. Mississippi*, 285 So. 3d 626, 629 (Miss. 2017) (“*Jones III*”). The court then provided Jones the opportunity to introduce any mitigating circumstances and evidence related to youth and its attendant characteristics before resentencing. *Id.* at 630.

a. Jones testified at the resentencing hearing and called five additional witnesses: his mother (Enette), his grandmother (Madge), his younger brother (Marty), a cousin (Sharon), and Jerome Benton, who worked at Walnut Grove Youth Correctional Facility and knew Jones while Jones was incarcerated at that facility. *Id.*

Jones, Marty, and Enette all testified that Jones’s stepfather was physically and verbally abusive. *Id.* Jones’s stepfather did not hit his stepsons with a closed fist, and Marty testified that there were no

“beatings, per se” or any injuries that required medical attention. *Id.* However, Jones testified that if he talked back, his stepfather might “reach out and grab [him] by the throat or slam [him] up against the wall by [his] neck or . . . by the front of [his] shirt.” *Id.*

Jones, Marty, and Enette testified that Enette abused alcohol and had mental health issues during Jones’s childhood. *Id.* Enette testified that she had suffered from depression, bipolar disorder, manic depressive disorder, and a self-injury disorder. *Id.* Jones also testified that he had taken medications for attention deficit hyperactivity disorder (ADHD), depression, and “some kind of psychosis.” *Id.* He also testified that he had issues with cutting himself. *Id.*

However, Jones did not introduce any medical records or offer the testimony of any mental health professional. *Id.* Further, Enette and Madge both testified that Jones was very intelligent, had a high IQ, and had been in gifted classes in school. *Id.*

b. A fight between Jones and his stepfather in the summer of 2004 precipitated Jones’s move back to Mississippi from Florida to live with his grandparents. *Id.* Jones testified that while he was living with his mother and stepfather in Florida, he came home late one night, and his stepfather grabbed him by the throat. *Id.* Jones then swung and hit his stepfather in the ear, and, when the police came, they arrested Jones for domestic violence. *Id.* As a result, Jones was required to take an anger management course. *Id.*

Jones then moved back to Lee County to live with his grandparents—and Jones murdered his grandfather about two months later. *Id.* There was no evidence that either of Jones’s grandparents ever abused or mistreated him. *Id.* The opposite—Jones

testified at the resentencing hearing that Bertis “was [his] dad in [his] eyes” and that Bertis “was the stable one.” J.A. 132-133.<sup>3</sup>

c. The resentencing court also allowed Jones to present evidence about events subsequent to Jones’s murder conviction, such as Jones’s experience in prison. Jones testified that he had been involved in only one significant disciplinary incident while in prison, which involved a fight at Walnut Grove. *Jones III*, 285 So. 3d at 631. And Jerome Benton, who worked at Walnut Grove Youth Correctional Facility, testified that Jones worked for him for about five years at Walnut Grove. *Id.* Benton testified that Jones was a good worker and obtained his GED. *Id.*

Jones never told Benton why he was in prison but only “said he had an accident . . . and did something that he regretted.” *Id.* Benton testified that Jones, as a juvenile, seemed “normal” and even “mature” for his age and did not exhibit any mental health issues. J.A. 113.

At the conclusion of the *Miller* hearing, the resentencing court took the matter under advisement.

d. Two months later, the resentencing court reconvened to announce the sentencing decision. The judge both commenced and concluded his ruling from the bench by making clear that he had considered *Miller* and understood *Miller*’s “hallmark features” of youth. The sentencing judge began his ruling from the bench as follows:

I’m going to read into the record a long dissertation about the facts and circumstances in this case, as much as anything to

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<sup>3</sup> “J.A.” refers to the Joint Appendix.

demonstrate that I have considered each and every factor that is identifiable in the *Miller* case and its progeny and those decisions which followed . . . .

. . . .

This cause is before the Court for resentencing in accord with the dictates of *Miller versus Alabama*.

. . . [T]he Court conducted a hearing and heard evidence offered by [Jones] and the State. . . bearing on those factors to be considered by the Court as identified by *Miller*. The ultimate question is whether or not, in consideration of those factors. . . relief is appropriate [on] the facts and circumstances in this case.

. . . .

The Court is cognizant of the fact that children are generally different; that consideration of the *Miller* factors and others relevant to the child's culpability might well counsel against irrevocably sentencing a minor to life in prison. All such factors must be considered on a case-by-case basis.

J.A. 148-149.

The resentencing judge then discussed that the jury at Jones's trial was properly instructed on his defense of self-defense, the lesser-included offense of manslaughter, and the difference between murder and manslaughter. Yet the jury returned a unanimous verdict finding Jones guilty of deliberate-design murder. J.A. 148-152. The judge also discussed that a "fair consideration of the evidence" showed that Jones

committed a “particularly brutal” murder. J.A. 150. Jones “stabbed [his grandfather] eight times and was forced to resort to a second knife when the first knife broke while used in the act.” J.A. 150. Jones then “attempted to conceal” his crime by hiding his grandfather’s body and trying to wash away a “great amount of blood” with a water hose. J.A. 150.

The judge found that there was no evidence that Jones was under any sort of family or peer pressure to commit the crime. J.A. 150-151. The judge did find that Jones “grew up in a troubled circumstance,” but Jones’s grandfather had “provide[d] him with a home away from” his troubled family environment in Florida. J.A. 151-152.

The judge concluded his bench ruling by stating: “the Court, having considered each of the *Miller* factors, finds that the defendant, Brett Jones, does not qualify as a minor . . . entitled to be sentenced in such manner as to make him eligible for parole consideration.” J.A. 152. Thus, before imposing a life-without-parole sentence, the sentencing judge considered age and age-related factors—among them: immaturity, the family and home environment, the circumstances of the homicide offense, including the extent of Jones’s participation in the homicide, and the possibility of rehabilitation.

4. Jones appealed the resentencing decision to the Mississippi Court of Appeals. *Jones III*, 285 So. 3d 626.<sup>4</sup> The appellate court reviewed the resentencing decision under the well-established abuse of discretion standard—the traditional standard also applied by the

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<sup>4</sup> This Court decided *Montgomery* after Jones’s *Miller* resentencing hearing—but before the Mississippi Court of Appeals affirmed the trial court’s resentencing decision.

federal courts in reviewing a sentence. *See Gall v. United States*, 552 U.S. 38, 41, 49 (2007). Specifically, in Mississippi, “there are two applicable standards of review in a *Miller* case. First, whether the trial court applied the correct legal standard is a question of law subject to de novo review.” *Chandler v. State*, 242 So. 3d 65, 68 (Miss. 2018). “If the trial court applied the proper legal standard, its sentencing decision is reviewed for abuse of discretion.” *Id.* (citation omitted).

The *Jones III* court first rejected the arguments that there is a “presumption” against life-without-parole sentences and that Jones had a constitutional right to a jury at his resentencing hearing. *Jones III*, 285 So. 3d at 631-32 (citing *Cook v. State*, 242 So. 3d 865, 876 (Miss. Ct. App. 2017)). The state court next rejected the argument that reversal is required because the judge did not make a “finding” that Jones is “permanently incorrigible.” Quoting this Court in *Montgomery*, *Jones III* reiterated that “*Miller* did not require trial courts to make a finding of fact regarding a child’s incorrigibility.” *Id.* at 632 (quoting *Montgomery*, 136 S. Ct. at 735).

The Mississippi Court of Appeals then affirmed Jones’s sentence because the sentencing court’s ruling was sufficient to explain the reasons for the sentence; the judge recognized the correct legal standard (*Miller* and its progeny); the judge’s decision was not arbitrary; and the judge’s findings were supported by substantial evidence. *Id.* at 634. After the Mississippi Supreme Court dismissed Jones’s writ of certiorari, this Court granted Jones’s petition for writ of certiorari.

**SUMMARY OF ARGUMENT**

Unlike this case, neither *Miller* nor *Montgomery* involved a juvenile homicide offender who received what *Miller* and *Montgomery* say the Eighth Amendment requires: an individualized sentencing hearing where the sentencer considers youth and its attendant characteristics before imposing a life-without-parole sentence on a juvenile homicide offender.

1. *Miller* reasoned that “[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, [a mandatory life-without-parole sentencing] scheme poses too great a risk of disproportionate punishment.” *Miller*, 567 U.S. at 479. To “support[ ] [its] holding” invalidating schemes that mandate such sentences, *Miller* looked to evidence “indicat[ing] that when given the choice, sentencers impose life without parole on children relatively rarely.” *Id.* at 485 n.10.

Nowhere did this Court suggest that those “relatively rare[ ]” discretionary life-without-parole sentences were themselves unconstitutional. Quite the opposite, *Miller* treated discretionary sentencing schemes as a constitutional benchmark against which to measure the risk of mandatory schemes.

2. Because *Miller* neither addressed nor retroactively invalidated discretionary sentencing regimes, Jones must look to *Montgomery* for his position that this Court has announced a new rule of constitutional law applicable to discretionary sentences. But *Montgomery* was an appeal from a state postconviction court, and this Court does not announce new rules in cases, like *Montgomery*, that involve final sentences.

In 1989, this Court expressly “adopt[ed] Justice Harlan’s view of retroactivity for cases on collateral

review.” *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality op.); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). In contrast to cases still on direct review, “[u]nder *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions.” *Penry*, 492 U.S. at 313. Relatedly, whether a new rule should be announced for cases still pending on direct review is separate—and analytically distinct—from whether that same rule should be “applied or announced” in cases (like *Montgomery*) where direct review has concluded. *Id.* Allowing new constitutional rules to be expanded as part of the retroactivity determination would allow the law to develop piecemeal while being applied retroactively, one of the very things *Teague* aims to prevent. See *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

Thus, for good reasons, *Montgomery* did not retroactively expand *Miller*’s rule—it simply applied *Miller*’s rule invalidating mandatory juvenile life-without-parole sentences retroactively.

3. *Montgomery* also was never asked to expand *Miller*. Henry Montgomery had been sentenced under a scheme that “required the trial court to impose a sentence of life without parole.” *Montgomery*, 136 S. Ct. at 726. And the only question the Court in *Montgomery* had been asked or agreed to decide was whether *Miller*’s holding about “mandatory sentencing schemes” “applies retroactively on collateral review.” *Montgomery* Pet. at i.

In answering that question in the affirmative, *Montgomery* recognized that *Miller*’s core rationale turns on substantive Eighth Amendment principles of proportionality. The distinction between a substantive rule that is retroactively applicable and a non-retroactive procedural rule is that the former, unlike

the latter, “necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.” *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citation and internal quotation marks omitted). *Montgomery* held *Miller*’s rule invalidating mandatory life-without-parole sentences retroactively applicable by finding precisely such a risk. Discretionary sentencing schemes, however, do not create a grave or significant risk of disproportionate punishment, which is why *Miller* did not invalidate them.

Further, neither *Miller* nor *Montgomery* require sentencing courts to make any particular “finding” before exercising discretion to impose a life-without-parole sentence. According to this Court in *Montgomery*, *Miller* did not “impose a formal factfinding requirement” and “did not require trial courts to make a finding of fact regarding a child’s incorrigibility.” *Montgomery*, 136 S. Ct. at 735.

4. The reason a “finding” of permanent incorrigibility is not required is because the Eighth Amendment’s substantive standard for juvenile life-without-parole sentences is not permanent incorrigibility. Instead, the Eighth Amendment requires that sentencers consider the mitigating circumstances of youth before sentencing a juvenile to life without parole. *Miller* demonstrates exactly this; *Montgomery* explicitly says it; and it is implied in the analogy that *Miller* drew between juvenile life without parole and capital punishment for adult offenders.

5. After *Miller*, the State of Mississippi eliminated mandatory life without parole for juveniles and developed an individualized sentencing process for juvenile homicide offenders where sentencers are required to

consider youth and its attendant characteristics before imposing a life-without-parole sentence. Accordingly, when Jones was resentenced after *Miller*, he received precisely what the Eighth Amendment requires.

### ARGUMENT

Jones mistakenly believes *Miller* and/or *Montgomery* announced a new constitutional rule applicable to discretionary sentences. Those decisions, however, dealt only with mandatory sentencing schemes that left sentencers with no discretion but to indiscriminately sentence all offenders to life without parole. *Miller*, 567 U.S. at 469; *Montgomery*, 136 S. Ct. at 726. Neither *Miller* nor *Montgomery* sets forth a new rule about discretionary life-without-parole sentences, and neither decision requires a finding of permanent incorrigibility because the Eighth Amendment does not require a finding of permanent incorrigibility.

Rather, the Eighth Amendment requires only that a sentencer consider the mitigating circumstances of youth and its attendant characteristics before imposing a life-without-parole sentence on a juvenile homicide offender. Such consideration of the mitigating circumstances of youth reduces the risk of disproportionate punishment—and stops short of intruding further into the “States’ sovereign administration of their criminal justice system.” *Montgomery*, 136 S. Ct. at 735.

#### **I. *Miller* Invalidated Only Mandatory Juvenile Life-Without-Parole Sentences and Establishes Individualized Sentencing as a Constitutional Requirement for Juvenile Homicide Offenders.**

In recent years, this Court has declared various state sentencing schemes unconstitutional when applied to juvenile offenders. In 2005, the Court held

that the Eighth Amendment forbids “the death penalty [for] offenders who were under the age of 18 when their crimes were committed.” *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Five years later, in *Graham v. Florida*, 560 U.S. 48, 82 (2010), the Court held that the Eighth Amendment “prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”

The year following *Graham*, the Court granted certiorari in two cases and ordered them “argued in tandem.” *Miller v. Alabama*, 565 U.S. 1013 (2011); *Jackson v. Hobbs*, 565 U.S. 1013 (2011). *Miller* and *Jackson* both involved 14-year-old homicide offenders who had received “a mandatory sentence of life imprisonment.” Pet. at i, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646) (Miller Pet.); Pet. at i, *Jackson v. Hobbs* (No. 10-9647) (Jackson Pet.).

**A. *Miller* Addressed and Invalidated Only Mandatory Life-Without-Parole Sentences for Juvenile Homicide Offenders.**

Jones mistakenly believes *Miller* announced a new constitutional rule applicable to discretionary sentencing schemes. But *Miller* addressed only mandatory life-without-parole sentencing schemes for juvenile homicide offenders. *Miller*, 567 U.S. at 465. *Miller* and *Jackson* had argued that their sentences were unconstitutional for two reasons: (1) because the Eighth Amendment categorically forbids life-without-parole sentences for 14-year-old offenders; and/or (2) because imposing a “mandatory sentence of life imprisonment without parole on” a juvenile defendant—a sentence “that categorically precludes consideration of the offender’s young age or any other mitigating circumstances—violate[s] the Eighth”

Amendment. *Miller* Pet. at i; *Jackson* Pet. at i.5. This Court answered only the second question.

In concluding that mandatory life-without-parole sentences are constitutionally infirm, *Miller* wove together two strands of precedent. First, *Miller* relied on cases holding that the Eighth Amendment “categorically” forbids certain punishments for a class of offenders or type of crime. *Miller*, 567 U.S. at 470. For example, this Court has held that imposing the death penalty for crimes other than murder, or imposing it on the intellectually disabled or those under the age of eighteen at the time of the offense, violates the Eighth Amendment. *Id.*

Second, *Miller* drew on cases prohibiting the “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.” *Miller*, 567 U.S. at 470 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976), which held that a statute requiring a mandatory death sentence was unconstitutional, and *Lockett v. Ohio*, 438 U.S. 586 (1978), which held that sentencing authorities must have discretion to consider mitigating factors in determining whether to impose a death sentence). Those decisions reasoned that because capital punishment is “different from all other sanctions in kind rather than degree,” the sentencer must consider “the character and record of the individual offender and the circumstances of the particular offense.” *Woodson*, 428 U.S. at 303-304 (plurality op.).

*Miller* extended the first line of precedent—the *Roper/Graham* line—to conclude that juveniles are “constitutionally different” for sentencing purposes, even when they commit homicide. *Miller* then extended the second line of precedent—the *Woodson/*

*Lockett* line—beyond the death-penalty context to hold that sentencers must consider the characteristics of juvenile offenders and the circumstances of their offenses before imposing life without parole. *Miller*, 567 U.S. at 470. The “confluence of these two lines of precedent” drove the result and led the Court to conclude that a juvenile murderer may be sentenced to life-without-parole only if “a judge or jury” first has “the opportunity to consider [the] mitigating circumstances” of the offender’s youth. *Id.* at 470, 489.

While drawing on cases like *Graham* and *Roper*, *Miller* did not ban life-without-parole sentences for juvenile murderers: “Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*.” *Id.* at 483. Rather, *Miller* premised its holding on the fact that the state laws at issue “mandated” life without parole and that “[i]n neither case did the sentencing authority have any discretion to impose a different punishment.” *Id.* at 465.

Thus, by its own terms, *Miller* invoked the Eighth Amendment to invalidate *only* mandatory life-without-parole sentencing schemes. In fact, *Miller* uses some variation of the word “mandatory” over 40 times in the 27-page opinion of the Court. And each of *Miller*’s statements concerning the Court’s holding is phrased in terms of life-without-parole sentences that are “mandatory.” *Id.* at 465, 479, 489. This Court unequivocally did not address broader arguments that would have encompassed discretionary sentences. *Miller* explained that its “holding” that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders” was “sufficient to decide these cases.” *Id.* at 479. The Court also did not adopt the

view advanced in Justice Breyer’s concurrence, which was that one of the defendants’ sentences may have been unconstitutional, “regardless of whether its application [wa]s mandatory or discretionary under state law.” *Id.* at 490.

With this, if Jones’s understanding of *Miller* is correct—that *Miller* announced a new constitutional rule applicable to discretionary sentences—much of *Miller* does not make sense. For example, if *Miller*’s holding actually reached mandatory *and* discretionary life-without-parole sentences, why did this Court survey the number of jurisdictions that it believed had mandatory life-without-parole sentences for juvenile homicide offenders? *Miller*, 567 U.S. at 482–87 & nn.9–13. And why did the Court spend time confirming that one of the petitioners’ sentences was actually mandatory? *See id.* at 467 n.2. Contrary to Jones’s position, the mandatory nature of the sentences at issue was essential to *Miller*’s reasoning and holding.

**B. *Miller* Treated Discretionary Sentencing Regimes as a Constitutional Benchmark Against Which to Measure the Risk of Mandatory Schemes.**

*Miller* premised its reasoning on the idea that mandating life without parole for juvenile homicide offenders is constitutionally different than giving the sentencer discretion to impose that punishment. *Id.* at 489; *see id.* at 477. *Miller* reasoned that “[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, [a mandatory life-without-parole sentencing] scheme poses too great a risk of disproportionate punishment.” *Miller*, 567 U.S. at 479.

*Miller* distinguished between the “29 jurisdictions [that it believed made] a life-without-parole term mandatory for some juveniles convicted of murder in adult court” and the 15 “jurisdictions [that it believed made] life without parole discretionary for juveniles.” *Id.* at 482, 485 n.10. To “support[ ] [its] holding” invalidating schemes that mandate such sentences, this Court looked to evidence “indicat[ing] that when given the choice, sentencers impose life without parole on children relatively rarely.” *Id.* at 485 n.10. Nowhere did this Court suggest that those “relatively rare[ ]” discretionary life-without-parole sentences were themselves unconstitutional.

The Court instead emphasized that its decision in *Miller* was not “a flat ban” on life-without-parole sentences for juvenile homicide offenders. *Id.* at 474 n.6. For example, the Court explained that *Miller* was “different from the typical [case] in which [the Court] ha[s] tallied legislative enactments” to inform its consideration of whether a particular practice is cruel and unusual, precisely because *Miller* “does not categorically bar a penalty for a class of offenders or type of crime.” *Id.* at 483. *Miller* stressed that its decision “mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.*

In this regard, and as discussed more below in Section IV, *Miller* is similar to *Woodson*. Like life-without-parole sentences for juvenile homicide offenders, “[t]he Constitution allows capital punishment” for adult offenders. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019). But “making death the mandatory sentence” violates the Eighth Amendment. *Woodson*, 428 U.S. at 286 (plurality op.). *Woodson* and *Miller*

both demonstrate that the problem with mandatory sentencing lies in its *prevention of* individualized consideration of relevant factors that might warrant a lesser sentence.

*Miller's* premise is that “mandatory sentences are categorically different from discretionary ones.” *Miller*, 567 U.S. at 497 n.2 (Roberts, C.J., dissenting). And because *Miller* looked to discretionary life-without-parole sentencing schemes as a benchmark for what *is* constitutional, it would be surprising if such discretionary sentences are now actually unconstitutional.

**C. *Miller's* Rule Requires Individualized Sentencing That Considers Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence.**

*Miller* listed several non-exhaustive “features” of youth that sentencers are “preclude[d]” from considering under mandatory sentencing regimes. *Id.* at 477-78. Those features include:

- “immaturity, impetuosity, and failure to appreciate risks and consequences”;
- “the family and home environment that surrounds. . .from which [a juvenile] cannot usually extricate himself—no matter how brutal or dysfunctional”;
- “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him” or whether “he might have been charged and convicted of a lesser offense if not for

incompetencies associated with youth”;  
and

- “the possibility of rehabilitation.”

*Id.* After *Miller*, some States, including Mississippi, adopted these “hallmark features” of youth as factors for sentencers to consider before imposing a life-without-parole sentence. *See Parker*, 119 So. 3d at 995-96.

*Miller* itself, however, did not require sentencers to assess any one particular feature of youth before sentencing a juvenile homicide offender. Instead, *Miller* recognized that “a sentencer misses too much if he treats every child as an adult,” *id.* at 477, and that mandatory schemes “prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender,” *id.* at 474. Accordingly, *Miller* does not require express findings as to any one particular feature of youth—much less does *Miller* require that a sentencer utter the words “permanent incorrigibility” on the record before imposing a sentence.<sup>5</sup>

*Miller* phrased its rule in terms of sentencers being required to “consider” and “take into account” youth. *Id.* at 474, 476, 480, 483, 489. And the conclusion that *Miller* does not require any express, on-the-record finding is consistent with the dictionary definitions of “consider” and “take into account.” *See Webster’s Third New Int’l Dictionary* 483 (1993) (“consider” means “to reflect on: think about with a degree of care or caution,” or “to think of: come to view, judge, or

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<sup>5</sup> In fact, *Miller* uses the word “incorrigibility” only once, and that is in its discussion of *Roper* and *Graham*—decisions that *Miller* did not treat as sufficient in themselves to justify its holding.

classify”; it “often indicates little more than think about”); *id.* at 2331 (“take into account” means “to make allowance for (as in passing judgment)”).

Notably, although *Miller* does not require a finding of permanent incorrigibility, *Miller*’s “hallmark features” of youth necessarily embody concerns such as whether a juvenile’s “crime” could be *described* as “reflect[ing] irreparable corruption” versus “unfortunate yet transient immaturity.” *Miller*, 567 U.S. at 479-80 (internal quotations omitted) (emphasis supplied). Indeed, the so-called *Miller* factors focus on features such as “immaturity,” “impetuosity,” and the “possibility of rehabilitation.” *Id.* at 477-78. As a result, when Mississippi adopted *Miller*’s features of youth as sentencing factors, and when the sentencing judge here unequivocally stated that he considered each of those factors, the judge considered whether a juvenile’s “crime” could be *described* as “reflect[ing] irreparable corruption.” *Id.* at 479-80 (emphasis supplied).

When a sentencer makes the agonizing decision to sentence a violent juvenile homicide offender to life imprisonment without parole, after considering youth and its attendant characteristics, the sentencer necessarily understands the implications of such a judgment. And *that* is the point of *Miller*. When not barred by the law from doing so (such as with mandatory sentencing schemes), a juvenile homicide offender may present evidence on all relevant mitigating factors and circumstances, including youth, which the sentencer must consider before deciding the offender’s sentence.

By invalidating mandatory life-without-parole sentences, *Miller* requires individualized sentencing that considers youth and its attendant characteristics before imposing a life-without-parole sentence. Such

an individualized sentencing hearing itself reduces the risk of disproportionate punishment. *Id.* at 485 n.10. Beyond that, *Miller* leaves it to the States to structure their discretionary sentencing regimes and implement their own state law criminal trial rules and procedures. And this makes sense, as “[t]he States possess primary authority for defining and enforcing the criminal law.” *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

**II. Decisions Announcing a New Rule (*Miller*)  
are Distinct from Decisions about the  
Retroactivity of that Rule (*Montgomery*).**

Because *Miller* neither addressed nor retroactively invalidated discretionary sentencing schemes, Jones is left with *Montgomery* for his position that this Court has announced a new rule of constitutional law applicable to discretionary sentences.

*Montgomery* was an appeal from a state post-conviction court. Henry Montgomery committed murder in 1963, his sentence had been final for decades, and he was 69 years old at the time of the *Montgomery* decision. Thus, to accept Jones’s argument, *Montgomery* both (i) decided that *Miller*’s rule governing *mandatory* life-without-parole sentences is retroactively applicable to offenders like Henry Montgomery; and (ii) announced a new rule of constitutional law applicable to *discretionary* sentencing regimes.<sup>6</sup> That argument quickly goes nowhere. This Court does not announce new rules in cases, like *Montgomery*, that involve final sentences.

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<sup>6</sup> *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (defining “new rule” as one “not dictated by precedent”) (internal quotation marks and citation omitted); *Lambrix v. Singletary*, 520 U.S. 518, 528, 538 (1997).

1. Some of this Court’s rulings on the meaning of the United States Constitution apply retroactively—to cases already concluded—and some do not. Over thirty years ago, this Court expressly “adopt[ed] Justice Harlan’s view of retroactivity for cases on collateral review.” *Teague*, 489 U.S. at 310; *Penry*, 492 U.S. at 313 (formally adopting *Teague*’s approach). In contrast to cases still on direct review, “[u]nder *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions.” *Penry*, 492 U.S. at 313.

The Court has identified a host of reasons for treating direct and collateral review differently. Most fundamentally, “[w]hile the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law . . . fairly implicated by the trial process below . . . federal courts have never had a similar obligation on habeas corpus.” *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part). “The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have *as much* place in criminal as in civil litigation, not that they should have *none*.” *Teague*, 489 U.S. at 309 (plurality op.) (internal quotation marks omitted) (emphasis in original). Additionally, “[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [federal habeas] proceeding, new constitutional commands.” *Engle*, 456 U.S. at 128 n.33. For all those reasons, *Teague*’s general rule of non-retroactivity furthers “important interests of comity and finality.” *Wright v. West*, 505 U.S. 277, 311 (1992) (Souter, J., concurring) (internal quotation marks and citation omitted).

2. Whether a new rule should be announced for cases still pending on direct review is separate—and analytically distinct—from whether that same rule should be “applied or announced,” *Penry*, 492 U.S. at 313, in cases (like *Montgomery*) where direct review has concluded. Indeed, as a matter of practice, this Court “does not ordinarily make retroactivity judgments at the time a new right is recognized.” *Dodd v. United States*, 545 U.S. 353, 364 (2005) (Stevens, J., dissenting); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020) (plurality op.) (“Whether the right to jury unanimity applies to cases on collateral review is a question for a future case[.]”). Rather, the Court addresses rights and retroactivity in separate cases and has frequently granted review to determine whether a rule announced in an earlier decision applies to cases that were already final when that rule was announced.<sup>7</sup>

Allowing new constitutional rules to be expanded as part of the retroactivity determination would allow

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<sup>7</sup> *Welch v. United States*, 136 S. Ct. 1257 (2016) (retroactivity of *Johnson v. United States*, 135 S. Ct. 2551 (2015)); *Montgomery*, 136 S. Ct. 718 (retroactivity of *Miller*); *Chaidez v. United States*, 568 U.S. 342 (2013) (retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010)); *Whorton v. Bockting*, 549 U.S. 406 (2007) (retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004)); *Beard v. Banks*, 542 U.S. 406 (2004) (retroactivity of *Mills v. Maryland*, 486 U.S. 367 (1988)); *Summerlin*, 542 U.S. 348 (retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002)); *O’Dell v. Netherland*, 521 U.S. 151 (1997) (retroactivity of *Simmons v. South Carolina*, 512 U.S. 154 (1994)); *Lambrix v. Singletary*, 520 U.S. 518 (1997) (retroactivity of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); *Stringer v. Black*, 503 U.S. 222 (1992) (retroactivity of *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *Maynard v. Cartright*, 486 U.S. 356 (1988)); *Sawyer v. Smith*, 497 U.S. 227 (1990) (retroactivity of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)); *Butler v. McKellar*, 494 U.S. 407 (1990) (retroactivity of *Arizona v. Roberson*, 486 U.S. 675 (1988)).

the law to develop piecemeal while being applied retroactively, one of the very things *Teague* aims to prevent. *See Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (“The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered.”).

Moreover, accepting that *Montgomery* announced a new rule of constitutional law as part of its retroactivity determination violates another important goal of this Court’s retroactivity jurisprudence by risking disparate treatment of similarly situated defendants. *See Teague*, 489 U.S. at 316 (explaining the Court’s new approach to retroactivity “avoids the inequity resulting from the uneven application of new rules to similarly situated defendants”); *see also Griffith v. Kentucky*, 479 U.S. 314, 322, 323 (1987); *Danforth v. Minnesota*, 552 U.S. 264, 301 (2008) (Roberts, C.J., dissenting).

Arguably, at least some juvenile offenders currently serving discretionary life sentences opted *not* to seek relief under *Miller*—because *Miller*’s unequivocal statements of its limited holding made clear that its rule did not apply to discretionary sentencing schemes. Further, because a habeas applicant “has one year from the date on which the right he asserts was initially recognized by this Court,” *Dodd*, 545 U.S. at 357, the time for seeking federal habeas relief based on *Miller* (which was decided in 2012) has long since passed. Accordingly, such offenders would not benefit from the position Jones advocates here. And this prospect only underscores why it would be deeply inequitable both to the States and to offenders, who seek to file habeas petitions based on a good-faith

understanding of current law, to change substantive constitutional rules (*Miller*) in a decision about retroactivity (*Montgomery*).

In short, reading *Montgomery* as Jones suggests would collapse *Teague*'s careful distinction between whether to recognize a new right and whether to make that right retroactive to cases on collateral review.

### **III. *Montgomery* Neither Addressed Nor Invalidated Discretionary Sentencing Schemes.**

After *Miller*, federal and state lower courts had reached conflicting conclusions about whether *Miller* had announced a substantive rule retroactively applicable to cases on collateral review. This Court granted certiorari in *Montgomery* to resolve that conflict and concluded that “*Miller* announced a substantive rule that is retroactive in cases on collateral review.” *Id.* at 732.

The Court in *Montgomery* asked only “whether and to what extent [*Miller*'s] rule will be retroactively applied”—that is, “[the Court] ask[ed] what law—new or old—will apply.” *Danforth*, 552 U.S. at 304 (Roberts, C.J., dissenting). In concluding *Miller*'s new rule applies retroactively, *Montgomery* establishes only that every juvenile homicide offender who “received mandatory life without parole,” *Montgomery*, 136 S. Ct. at 736, and filed a timely postconviction/habeas petition was entitled to be resentenced or deemed eligible for parole under *Miller*. *See id.*

**A. Like *Miller*, *Montgomery* Involved Only a Mandatory Life-Without-Parole Sentence.**

*Montgomery* was never asked to expand *Miller*. At issue in *Montgomery* was a Louisiana law where “th[e] verdict required the trial court to impose a sentence of life without parole.” *Montgomery*, 136 S. Ct. at 726. “The sentence was automatic upon the jury’s verdict, so *Montgomery* had no opportunity to present mitigation evidence to justify a less severe sentence.” *Id.*

In addressing the question of retroactivity, nothing in *Montgomery* questioned, undermined, or otherwise altered the well-established *Teague* framework. The question this Court granted certiorari to decide in *Montgomery* was “whether *Miller* adopts a new substantive rule that applies retroactively on collateral review.” Pet. i, *Montgomery v. Louisiana* (No. 14-280). The Court’s opinion also framed the issue for decision and its holding in well-established, *Teague*-based terms. *Montgomery*, 136 S. Ct. at 725; *id.* at 736 (“The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague*.”).

Along the same lines, the “rules later deemed unconstitutional” at issue in *Montgomery*, *id.* at 736, were rules that gave defendants “no opportunity to present mitigation evidence to justify a less severe sentence,” *id.* at 726. And consistent with the limited scope of *Miller*’s holding, *Montgomery* specifically framed the “effect” of its decision in terms of whether States would be “require[d] . . . to relitigate sentences . . . in every case where a juvenile offender received *mandatory* life without parole.” *Id.* at 736 (emphasis supplied).

What is more, the only “new” constitutional rule *Montgomery* could have adopted—that *Miller* applies to mandatory and discretionary sentencing schemes—would have done nothing to benefit Henry Montgomery himself. “Montgomery [was] serving a mandatory life sentence.” *Montgomery* Pet. at i; *Montgomery*, 136 S. Ct. at 726, 727 (same). Thus, accepting that *Montgomery* announced a new constitutional rule applicable to discretionary sentencing schemes would necessarily be accepting that this Court announced a new constitutional rule having no impact on the case before it. See *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893) (emphasizing that this Court “is not empowered to . . . declare, for the government or future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it”).

**B. *Miller’s* Rule is Substantive and Retroactively Applicable Because it is Premised on the Substantive Right to be Free From Grossly Disproportionate Punishment.**

*Montgomery* concerned *Teague’s* first exception, which encompasses rules “more accurately characterized as substantive rules not subject to the [retroactivity] bar.” *Summerlin*, 542 U.S. at 351-52 n.4. While *Miller* does not categorically bar life-without-parole sentences, *Montgomery* affirmed that *Miller* falls on the substantive side of the retroactivity line.

*Miller’s* rule prohibiting mandatory juvenile life-without-parole sentences is an outgrowth of a constitutional mandate that is fundamentally substantive. As *Miller* explained, the constitutional problem with “mandatory life-without-parole” sentences is that they “pos[e] too great a risk of disproportionate punish-

ment” “[b]y making youth (and all that accompanies it) irrelevant to imposition of th[e] harshest prison sentence.” *Miller*, 567 U.S. at 479. Thus, *Miller*’s core rationale turns on substantive Eighth Amendment principles of proportionality. *Miller*, 567 U.S. at 489 (“mandatory-sentencing schemes. . .violate th[e] principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment.”).

Although *Miller* did “not categorically bar a penalty for a class of offenders,” *Miller*, 567 U.S. at 483, *Miller* presumed that life without parole would be unconstitutionally disproportionate for many juveniles, as mandatory sentencing schemes “by definition remove a judge’s or jury’s discretion” to impose a “lesser sentence,” even if the sentencer thought a lesser sentence “more appropriate,” *id.* at 485 n.10, 465. Therefore, according to *Montgomery*, *Miller* altered the “class of persons that the law punishes.” *Montgomery*, 136 S. Ct. at 732.

Because *Miller* applied the “[p]rotection against disproportionate punishment[,] . . . the central substantive guarantee of the Eighth Amendment,” *Montgomery*, 136 S. Ct. at 732-33 (emphasis supplied), *Miller*’s rule is substantive and retroactively applicable to cases on collateral review under *Teague*. The distinction between a substantive rule that is retroactively applicable and a non-retroactive procedural rule is that the former, unlike the latter, “necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.” *Summerlin*, 542 U.S. at 352 (citation and internal quotation marks omitted).

*Montgomery* held *Miller*’s rule invalidating mandatory life-without-parole sentences retroactively appli-

cable by finding precisely such a risk. In reiterating that its holding that *Miller* states a substantive rule of constitutional law “comports with the principles that informed *Teague*,” *Montgomery* focused on the “grave risk” raised by “*Miller*’s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders.” *Montgomery*, 136 S. Ct. at 736.

Importantly, though, neither *Montgomery* nor *Miller* concluded that discretionary sentencing schemes create a grave or significant risk of disproportionate punishment. In fact, that discretionary sentencing schemes do not create such a grave or significant risk of disproportionate punishment is why *Miller* did not invalidate such schemes in the first instance. *Miller*, 567 U.S. at 480.

**C. Neither *Miller* nor *Montgomery* Sets Forth a New Rule about Discretionary Life-Without-Parole Sentences.**

As a limitation on the scope of its decision, *Montgomery* explicitly acknowledges the mandatory aspect of the life-without-parole sentencing schemes at issue in both *Miller* and *Montgomery*. For example, in the second line of the opinion, the Court described *Miller* as holding “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 in light of the principles and purposes of juvenile sentencing.” *Montgomery*, 136 S. Ct. at 725. And the Court described *Miller* as setting forth a “prohibition on mandatory life without parole for juvenile offenders.” *Id.* at 732; see also *id.* at 726.

*Montgomery* also framed its retroactivity inquiry as presenting “the question whether *Miller*’s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive.” *Id.* at 732. And, without any mention of discretionary sentences, the Court specifically framed the “effect” of its decision in terms of whether States would be “require[d] . . . to relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole.” *Id.* at 736. Thus, *Montgomery*’s articulation of *Miller*’s rule did not retroactively expand the rule. In fact, that was the dissent’s position, and the Court rejected it.

Relatedly, *Montgomery* never once stated that discretionary life-without-parole sentences are retroactively invalid. And nowhere did the Court articulate standards or findings necessary for discretionary sentencing regimes. Instead, *Montgomery* explained exactly what the Eighth Amendment requires:

A hearing where “youth and its attendant characteristics” are considered as sentencing factors, [which] is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.

*Id.* at 735 (quoting *Miller*, 567 U.S. at 465).

To be sure, *Montgomery*’s retroactivity analysis contains statements about the premises of *Miller*’s rule—some of which could be read to sweep beyond the narrow retroactivity issue before the Court. *Id.* at 733–34. For example, Jones extracts the following language from *Montgomery* to support his position: “*Miller*, then, did more than require a sentencer to consider a juvenile offender’s youth before imposing life without

parole . . . Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.” *Id.* at 734 (internal quotations omitted); see Pet. Br. at 2, 14, 31.

But even that language in *Montgomery* is introduced by a sentence emphasizing that *Miller*’s holding was limited to “mandatory life-without-parole sentences.” *Montgomery*, 136 S. Ct. at 733. In *Montgomery*’s words, “[t]hese considerations underlay the Court’s holding in *Miller* that *mandatory* life-without-parole sentences for children ‘pos[e] too great a risk of disproportionate punishment.’” *Id.* (quoting *Miller*, 567 U.S. at 479) (emphasis supplied).

Moreover, this Court has long “remind[ed] counsel that words of our opinions are to be read in light of the facts of the case under discussion.” *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). And “the facts of the case under discussion” in *Montgomery* include: (i) Henry Montgomery had been sentenced under a scheme that “required the trial court to impose a sentence of life without parole,” *Montgomery*, 136 S. Ct. at 726; and (ii) the only question the Court had been asked or agreed to decide was whether *Miller*’s holding about “mandatory sentencing schemes” “applies retroactively on collateral review,” *Montgomery* Pet. at i.

What is more, while *Montgomery* repeatedly references *Miller*’s reliance on *Graham* and *Roper*, it never once mentions the *Woodson* “individualized sentencing” line of cases on which *Miller* relied. But *Miller* did not treat *Roper* and *Graham* as alone sufficient to justify its holding. Rather, *Roper* and *Graham*

informed *Miller*'s reasoning that juveniles are constitutionally different for sentencing purposes—while *Woodson* and *Lockett* supplied the grounds for establishing “individualized sentencing” as a constitutional requirement for juvenile homicide offenders. *Miller*, 567 U.S. at 470.

*Montgomery* also assured 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. Yet under Jones’s view—that *Miller* and/or *Montgomery* also announced a rule applicable to discretionary sentences, 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*.

Consider some of what that would entail if Jones’s case were to arise in the context of federal habeas. Under Jones’s view, if the sentencer did not recite particular verbiage on the record (e.g., “I find the offender permanently incorrigible”), the parties would have to litigate whether statements by the sentencer (either during sentencing or at another point) reflect the purported “finding” of “permanent incorrigibility” that Jones contends is required. That would be an extraordinary burden on States—all while this Court assured States in *Montgomery* that retroactively implementing *Miller*'s rule would not impose an onerous burden.<sup>8</sup>

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<sup>8</sup> 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, though, the Court would have

All in all, the proper approach is to treat *Montgomery* as what it is: a holding that the substantive constitutional rule actually announced in *Miller* is retroactive to cases on collateral review.<sup>9</sup>

**IV. The Eighth Amendment Requires Only That a Sentencer Consider the Mitigating Circumstances of Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence.**

The Eighth Amendment does not require a “finding” of permanent incorrigibility because the Eighth Amendment’s substantive standard for juvenile life-without-parole sentences is not permanent incorrigibility. *Miller* demonstrates this; *Montgomery* explicitly says it; and it is implied in the analogy that *Miller* drew between juvenile life without parole and capital punishment for adult offenders.

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invalidated every pre-*Miller* life-without-parole sentence for a juvenile offender—a step the Court declined to take in *Miller* itself. See *Miller*, 567 U.S. at 480.

<sup>9</sup> Nor do this Court’s post-*Montgomery* orders in *Tatum v. Arizona*, 137 S. Ct. 11 (2016) and four other cases from Arizona show otherwise. Those cases were in addition to “[r]oughly 40 petitions for certiorari implicating *Miller*” that were held and then GVRed in light of *Montgomery*. *Jones v. Commonwealth*, 795 S.E.2d 705, 709 (Va. 2017); see *id.* at 709 n.4 (listing cases). But it is well-established that such an order “require[s] only further consideration” by the court below, *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam), and is not “a final determination on the merits,” *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964); Stephen M. Shapiro et al., *Supreme Court Practice* 350 (10th ed. 2013) (stating that “[i]t seems clear that,” under this Court’s current GVR practice, “the lower court is being told merely to reconsider the entire case in light of the intervening precedent—which may or may not require a different result”).

1. *Miller* demonstrates what the Eighth Amendment requires—and what it doesn't. Because the Eighth Amendment does not impose a substantive standard of permanent incorrigibility, *Miller* did not impose a finding of such incorrigibility. Rather, *Miller* imposed what the Eighth Amendment requires: that sentencers consider youth and its attendant characteristics before sentencing a juvenile to life without parole. *Miller*, 567 U.S. at 465, 480, 483; *id.* at 480 n.8 (“Our holding requires factfinders. . .to take into account the differences among defendants and crimes.”). This consideration of mitigating circumstances, including youth, ensures that a life-without-parole sentence is not disproportionate in light of the circumstances of the particular juvenile and the nature of the particular offense.

2. For his contrary argument that a finding of incorrigibility is required, Jones relies primarily on *Montgomery*. But *Montgomery* expressly rejects that argument. According to *Montgomery*, *Miller* did not “impose a formal factfinding requirement” and “did not require trial courts to make a finding of fact regarding a child’s incorrigibility.” *Montgomery*, 136 S. Ct. at 735. The reason *Montgomery* could affirmatively state that a finding as to incorrigibility is not required is precisely because incorrigibility is not the substantive Eighth Amendment standard. Consequently, reading *Montgomery* as Jones suggests conflicts with *Miller*—and other portions of *Montgomery*.

*Montgomery* also made explicit what is implicit in *Miller*: why the Eighth Amendment does not require such findings. “When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary

upon the States' administration in their criminal justice systems." *Montgomery*, 136 S. Ct. at 735.

This Court, in fact, routinely has expressed its unwillingness to micro-manage the States' differing sentencing schemes and the discretionary decisions of prosecutors and judges. *Engle*, 456 U.S. at 128; *Patterson v. New York*, 432 U.S. 197, 201-202 (1977) ("[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government. . .and. . .we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out[.]") (internal quotation marks omitted); *Payne v. Tennessee*, 501 U.S. 808, 824 (1991) ("Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States.").

Importantly, if the Eighth Amendment requires, as a substantive matter, that a juvenile actually be "permanently incorrigible" before a sentencer may impose a life-without-parole sentence, there necessarily will have to be factfinding on the juvenile's purported incorrigibility. And, if permanent incorrigibility is indeed the substantive Eighth Amendment standard, federal courts will then be required to review the correctness of such a finding made by state courts. That is, federal courts will be drawn into Eighth Amendment factual findings and difficult criminal sentencing decisions made by state sentencing courts on the "permanent incorrigibility" of a juvenile homicide offender.

That is not what the Eighth Amendment requires. In fact, such a requirement would create a distinct set of federalism concerns. Calibrating juvenile sentences—and making the agonizing decision of how severely to sentence violent juvenile homicide offenders—implicates profound political, sociological, philosophical, and moral issues. Such a profound task lies at the core of politically-accountable state sovereignty. *Oregon v. Ice*, 555 U.S. 160, 170 (2009) (“Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status.”).

Thus, even setting *Miller* and *Montgomery* aside, Jones’s premise is incorrect. The Eighth Amendment does not substantively mandate “permanent incorrigibility” before a discretionary juvenile life-without-parole sentence may be imposed. Instead, the Eighth Amendment requires individualized sentencing that considers youth and its attendant characteristics before imposing a life-without-parole sentence.

3. The analogy *Miller* drew between juvenile life-without-parole sentences and capital punishment for adult offenders also illustrates why Jones’s Eighth Amendment position is wrong. *Miller* explicitly relied on the *Woodson/Lockett* line of cases for its rule establishing individualized sentencing as a constitutional requirement for juvenile homicide offenders. *Miller*, 567 U.S. at 470.

In capital cases, the individualized sentencing requirement “is satisfied by allowing the [sentencer] to consider all relevant mitigating evidence,” *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990), and ensures “that the death penalty is reserved only for the most culpable defendants committing the most serious

offenses,” *Miller*, 567 U.S. at 476; *compare id.* at 485 n.10 (“when given the choice, sentencers impose life without parole on children relatively rarely”) *with Woodson*, 428 U.S. at 295-96 & n.31 (“juries with sentencing discretion do not impose the death penalty ‘with any great frequency’”).

There is “no perfect procedure for deciding in which cases governmental authority should be used to impose death.” *Lockett*, 438 U.S. at 605. And the Court has “never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors.” *Barclay v. Florida*, 463 U.S. 939, 950–51 (1983) (plurality op.) (citation omitted). Individualized sentencing for juvenile life-without-parole sentences is similar.

Relatedly, even when there are federal sentencing guidelines, 18 U.S.C. § 3553(a), federal district courts are not required to issue “robotic incantations” to “demonstrate discharge of the duty to ‘consider’” the guidelines. *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005); *United States v. Carter*, 564 F.3d 325, 329 (4th Cir. 2009); *United States v. Brinson-Scott*, 714 F.3d 616, 626–27 (D.C. Cir. 2013) (“Granted, the district court’s explanation did not invoke any of the section 3553(a) factors by name. But we do not require that it do so. Sentencing, after all, is not a game of Simon Says.”).

As long as the sentencing judge “set[s] forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority,” the judgment may be affirmed. *See United States v. Spiller*, 732 F.3d 767, 769 (7th Cir. 2013) (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)). “Some-

times the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation.” *Id.* at 357.

So, too, with *Miller*. See *United States v. Sparks*, 941 F.3d 748, 756 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1281 (2020) (“We reject the view that a procedurally proper sentence imposed under § 3553(a) can be vacated merely because the district court failed to quote certain magic words from the Supreme Court’s *Miller* decision.”).

4. To be sure, *Miller* assumes that juveniles whose crimes merit life without parole would be “rare.” But the Court’s prediction of rarity did not set a ceiling on how many juveniles may receive life imprisonment without parole. Instead, the Court’s forecast looks to the whole—whether that group is all juveniles or even all juvenile offenders—whereas an individual juvenile offender’s sentence looks to that individual juvenile.

Moreover, *Miller* noted that the largest number of offenders were concentrated in states with automatic sentencing laws. *Miller*, 567 U.S. at 486 (“Of the 29 jurisdictions mandating life without parole. . . more than half do so by virtue of generally applicable penalty provisions.”); *id.* at 485 n.10. As a result, this Court anticipated that an individualized sentencing process would reduce the number of juvenile murderers who would receive life-without-parole sentences.<sup>10</sup>

At any rate, Jones’s argument that the sentencing court here erred by not finding “*him* permanently incorrigible,” falls out of step with the actual language of *Miller* and *Montgomery*. Pet. Br. 14. *Miller* recog-

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<sup>10</sup> The Court’s prediction of rarity also reflects a reality that those under 18 years of age do not ordinarily commit brutal murders. It already is the rare person.

nized that life without parole may be appropriate for a juvenile homicide offender “whose *crime reflects irreparable corruption.*” *Miller*, 567 U.S. at 479-80. (emphasis supplied). Similarly, *Montgomery* discussed “the rare juvenile offender whose *crime reflects irreparable corruption*” as compared to the offender “whose *crimes reflect* the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734 (emphasis supplied) (internal citation and quotation marks omitted).

Likewise, if “irreparable corruption” or “permanent incorrigibility” constituted a discrete fact to be found and formally uttered on the record, would a jury have to be the one to do the purported factfinding? *Miller* and *Montgomery* both indicate “no.” *Montgomery* twice referred to “sentencing courts” as the ones who would be making the decisions about whether to impose a life-without-parole sentence. *Montgomery*, 136 S. Ct. at 726, 734. And both *Miller* and *Montgomery* explicitly state that a judge may sentence the juvenile offender to life without parole. *Miller*, 567 U.S. at 489; *Montgomery*, 136 S. Ct. at 733.

That the Eighth Amendment does not require any particular finding before imposing a life-without-parole sentence comports with *Miller* and *Montgomery*’s statements indicating that the Sixth Amendment is not violated by allowing the sentencing court to decide whether to impose life without parole. It also accords with this Court’s suggestion that it is for the juvenile homicide offender to show that “mitigating circumstances” warrant a lesser sentence. *Miller*, 567 U.S. at 489; *see also Montgomery*, 136 S. Ct. at 726. In the final analysis, then, the sentence imposed encompasses the sentencer’s judgment after considering “age and age-related characteristics and

the nature of the[ ] crime” and what sentence would best serve interests such as deterrence, punishment, and rehabilitation. *Miller*, 567 U.S. at 489; see *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (“Whether mitigation exists. . .is largely a judgment call (or perhaps a value call)[.]”).

Accordingly, *Miller*’s requirement to consider the mitigating circumstances of youth does not mean that the sentencer must discuss every mitigating fact that was considered on the record—or that a sentencer’s failure to mention a factor necessarily means that it was not taken into account. Nor does it mean that a life-without-parole sentence violates the Eighth Amendment simply because a sentencer did not recite particular verbiage on the record.

The Eighth Amendment is not a tool for policing state sentencing hearings and flyspecking state sentencing transcripts.<sup>11</sup> Quite the opposite—there is (and should be) a presumption that the sentencing court properly considered all arguments presented, including the mitigating circumstances of youth—unless the record clearly suggests otherwise. See *Voorhees v. Jackson*, 35 U.S. 449, 469 (1836) (“There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears.”); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled*

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<sup>11</sup> See, e.g., *United States v. Mendoza-Mendoza*, 597 F.3d 212, 218 (4th Cir. 2010) (“Appellate flyspecking. . .wastes both courts’ time, discourages sentencing courts from freely and fully explaining their reasoning, and distorts the proper relationship between trial courts and courts of appeal. . .It would be wholly contrary to the Supreme Court’s conferral of discretion on trial courts if we were to play a game of ‘Gotcha!’ with respect to the sentencing transcripts we review.”).

on other grounds by *Ring*, 536 U.S. at 609 (“Trial judges are presumed to know the law and to apply it in making their decisions.”); *United States v. Kenny*, 846 F.3d 373, 376 (D.C. Cir. 2017) (same).

**V. Mississippi’s Discretionary Sentencing Regime, Requiring Sentencing Courts to Consider Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence on a Juvenile Homicide Offender, Complies with the Eighth Amendment.**

Taking *Miller* at its word, the State of Mississippi eliminated mandatory life without parole for juveniles and developed an individualized sentencing process for juvenile homicide offenders. After *Miller*, sentencing courts in Mississippi are required to provide an individualized sentencing hearing and consider *Miller*’s “hallmark features” of youth before imposing a life-without-parole sentence.

1. The Mississippi Supreme Court substantively addressed *Miller* in *Parker v. Mississippi*, 119 So. 3d 987 (Miss. 2013). The *Parker* court explained that, “[p]rior to *Miller*, our trial courts were not required to hold an individualized sentencing hearing for juveniles before imposing a life sentence.” *Id.* at 995. As a result, the State’s sentencing and parole scheme “contravene[d] the dictates of *Miller*.” *Id.* Consequently, the Mississippi Supreme Court eliminated mandatory life-without-parole sentences for juvenile offenders.

The *Parker* court also adopted *Miller*’s “hallmark features” of youth as factors for state sentencing courts. *Parker*, 119 So. 3d at 995-96. As discussed, *Miller* itself did not require sentencers to consider any

one particular feature of youth. However, in exercising its responsibility to structure and define state criminal procedures, Mississippi adopted the so-called “*Miller* factors” beat for beat. Thus, in Mississippi, sentencing courts must consider *Miller*’s “hallmark features” of youth prior to sentencing a juvenile to life without parole.

2. Between *Miller* and *Montgomery*, lower courts had to grapple with whether *Miller* applies retroactively to cases on collateral review. Mississippi answered that question in the affirmative in 2013 in *Jones II*. See *Jones II*, 122 So. 3d at 703.

a. After Jones’s conviction and sentence were upheld on direct appeal, the Mississippi Supreme Court granted Jones leave to seek post-conviction relief. While Jones’s post-conviction relief petition was pending, this Court decided *Miller*. *Jones II*, 122 So. 3d at 701. After analyzing *Teague* and its progeny, *Jones II* applied *Miller*’s substantive rule retroactively. And, because permanent incorrigibility is not the substantive Eighth Amendment standard, the Mississippi Supreme Court did not require state trial courts in Mississippi to make any such “finding” of permanent incorrigibility.

Because the Mississippi Supreme Court held that *Miller* applies retroactively in 2013, Jones’s resentencing complies with the Eighth Amendment—even though he was resentenced prior to *Montgomery*. After the sentencing judge held a *Miller* hearing and “considered each and every factor that is identifiable in the *Miller* case and its progeny,” J.A. 148, he resentenced Jones to life without parole.

b. Jones now contends that the state court reached the wrong result in resentencing him to life without

parole. But this argument is simply another reprise of Jones’s erroneous reading of *Miller* and what the Eighth Amendment requires.

i. Criminal sentencing decisions, especially those impacting juveniles, are among the most difficult judgment calls trial judges face. And because this task is so difficult, it must rest heavily on judges closest to the facts of the case—those hearing and seeing the witnesses, taking into account their verbal and nonverbal communication, and placing all of it in the context of the entire case. *See Gall*, 552 U.S. at 51.

Indeed, nuances wholly undetectable from the cold, printed record often are clear to the sentencing judge who has seen and heard the witnesses. And such a truism is truer here—where the postconviction resentencing judge and the original trial judge were one and the same. *Jones III*, 285 So. 3d at 634 n.4 (“The sentencing judge, who also presided over Jones’s trial, took into account the testimony and evidence from Jones’s trial. . . Jones’s girlfriend testified at trial that earlier on the day of the murder, Jones did not respond when she asked him whether he was going to kill his grandfather, and Jones did say that ‘he was going to hurt his granddaddy.’”) (quoting *Jones I*, 938 So. 2d at 313–14). The trial and resentencing judge heard and considered all the evidence and all mitigating circumstances, including youth, before resentencing Jones. *See Miller*, 567 U.S. at 477–78.

ii. Consider, for example, the facts this Court outlined as relevant to the sentence imposed on petitioner Jackson in *Miller*:

Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson’s conviction

was instead based on an aiding-and-abetting theory. . . To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. . . And so too does Jackson's family background and immersion in violence[.]

*Id.* at 478. According to *Miller*, “[a]t the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison.” *Id.*

Here, the sentencer indeed “look[ed] at such facts,” and all other facts. Before sentencing Jones to life without parole, the court considered (i) evidence pertaining to Jones's age and maturity, such as testimony that he was “mature” and “intelligent” as a juvenile; (ii) his family and home environment, including the fact that the grandfather he murdered had provided him a “stable” environment away from his troubled family environment; (iii) the full extent of Jones's participation in single-handedly murdering his grandfather by stabbing him eight times with two kitchen knives and attempting to conceal the crime; (iv) the circumstances of the murder, such as the fact that, before Jones committed the murder, he told his girlfriend he was going to hurt his grandfather; and (v) Jones's more recent experiences in a controlled setting, such as prison. Plainly put, a legal brief and an oral argument cannot replace a multi-day murder trial, followed by a *Miller* hearing, at which multiple witnesses testified, including Jones himself.

c. Jones, however, faults the sentencing court for not further discussing his purported “evidence of

rehabilitation, including his evolution in prison into a model inmate” after his conviction and sentence. Pet. Br. 31. After *Miller*, Mississippi requires state sentencing courts to consider *Miller*’s age-related characteristics—including a juvenile’s “possibility” of rehabilitation and “capacity” for change. *Miller*, 567 U.S. at 473, 47. Jones’s conviction and sentence, however, were final long before *Miller*.

When *Miller* is applied retroactively, such as to Jones, the sentencing court is not resentencing a “juvenile.” Indeed, Jones was an adult who had been in prison for over a decade when he was resentenced. Taking advantage of this lapse in time, Jones expressly advocated for the resentencing court to consider not only evidence about his mindset as a juvenile and at the time he murdered his grandfather—but also his experience in prison in the years since the crime.

Yet retroactively applying *Miller* should simply mean equal treatment for offenders on postconviction. That is, the postconviction court should ask the same question as the original sentencing court. However, because that isn’t always (or ever) possible given the lapse in time between an original sentencing and postconviction resentencing, postconviction *Miller* hearings can involve an inquiry that is fundamentally different from the inquiry at ordinary *Miller* hearings.

While the judge here arguably was not constitutionally required to assess Jones’s subsequent experience in prison, he nevertheless allowed and considered this evidence. J.A. 148 (“[T]he Court conducted a hearing and heard evidence offered by the defendant, Brett Jones, and the State of Mississippi bearing on those factors to be considered by the Court as identified by *Miller*.”). And courts “must assume that the trial judge

considered all th[e] evidence before passing sentence,” particularly when “he said he did.” *Parker v. Dugger*, 498 U.S. 308, 314 (1991).<sup>12</sup>

Jones received precisely what the Eighth Amendment requires: an individualized sentencing hearing where the sentencing judge considered youth and its attendant characteristics before imposing a life-without-parole sentence.

\* \* \*

No one wants to believe that a juvenile can commit the great tragedy of a brutal murder. But there are the rare juveniles that do. And no one wants to consider whether a juvenile homicide offender should serve a lengthy prison term or be sentenced to life without parole. But States must consider it—since States are responsible to their own citizens for protecting them, for deterring crime, for assuaging the victims, and for punishing the guilty. After all, a “decent society protects the innocent from violence.” *Miller*, 567 U.S. at 495 (Roberts, C.J., dissenting).

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<sup>12</sup> While *Woodson*, *Lockett*, and their progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority. *Lockett*, 438 U.S. at 604 (A jury or sentencing court may “not be precluded from considering, as a *mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”) (emphasis in original); *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982) (The sentencing authority “may determine the weight to be given relevant mitigating evidence,” “[b]ut it may not give [this evidence] no weight *by excluding such evidence from [its] consideration.*”) (emphasis supplied). Thus, the Constitution does not require a capital sentencer to find the existence of a mitigating factor, only to consider all of the evidence offered in mitigation.

Accordingly, while youth matters in sentencing, the Eighth Amendment is satisfied when the State provides an individualized sentencing “hearing where ‘youth and its attendant characteristics’ are considered.” *Montgomery*, 136 S. Ct. at 735. Such an individualized sentencing hearing itself reduces the risk of disproportionate punishment—and stops short of intruding further into the “States’ sovereign administration of their criminal justice system.” *Id.*

### CONCLUSION

The judgment of the Mississippi Court of Appeals should be affirmed.

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