No. 18-217

In the Supreme Court of the United States

RANDALL MATHENA, WARDEN, PETITIONER

v.

LEE BOYD MALVO

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In 2004, Lee Boyd Malvo, one of the D.C. snipers, was sentenced to life without parole in Virginia state court. Eight years later, 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* v. *Alabama*, 567 U.S. 460, 465 (2012). Four years later, the Court held that "*Miller* announced a substantive rule that is retroactive to cases on collateral review." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 732 (2016).

The question presented is:

Did the Fourth Circuit err in concluding that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review is properly interpreted as modifying and substantially expanding the very rule whose retroactivity was in question?

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INTRODUCTION

This case is not about the meaning of the Eighth Amendment. Instead, it is about how and when decisions announcing new constitutional interpretations are made retroactive to *other* cases that have long become final when those interpretations are announced.

- In *Miller* v. *Alabama*, 567 U.S. 460 (2012), 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.'" *Id.* at 465.
- In *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule that is retroactive to cases on collateral review." *Id.* at 732.
- In this case, the Fourth Circuit held that it "need not . . . resolve whether any of Malvo's sentences were mandatory because *Montgomery* has now made clear that" Malvo is entitled to relief either way. Pet. App. 19a.

The court of appeals was wrong and this Court should reverse.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–28a) is reported at 893 F.3d 265. The opinion of the district court (Pet. App. 31a–62a) is reported at 254 F. Supp. 3d 820.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2018 (Pet. App. 29a–30a). The petition for a writ of certiorari was filed on August 16, 2018, and granted on March 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT

This case involves one of the most notorious serial murderers in recent history, Lee Boyd Malvo, one of the D.C. snipers.

1. "Over the course of almost seven weeks in the fall of 2002," Malvo and John Allen Muhammad (who was executed in 2009) "murdered 12 individuals, inflicted grievous injuries on 6 others, and terrorized the entire Washington, D.C. metropolitan area." Pet. App. 4a. "Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of shootings had occurred at gas stations. Schools were placed on lock-down status. On one occasion, Interstate 95 was closed in an effort to apprehend the sniper[s]." *Muhammad* v. *State*, 934 A.2d 1059, 1066 (Md. Ct. Spec. App. 2007). "Malvo boasted that he had personally performed ten of the thirteen shootings, stating that he did so either lying

in the trunk of [a] car while shooting out of [a] bored hole in the trunk, or sometimes from a shooting position outside of the automobile." Pet. App. 69a (plea agreement).

The charges giving rise to this case involved three victims in Virginia, all of whom were shot during an 11-day period:

- "On October 4, 2002, Caroline Seawell, age 43, was shot in the back as she loaded her car outside the Michael's craft store near Spotsylvania Mall in Spotsylvania County, Virginia." Pet. App. 66a (emphasis removed). Seawell survived, but "[t]he bullet damaged her liver." *Muhammad* v. *Kelly*, 575 F.3d 359, 363 (4th Cir. 2009).
- "On October 11, 2002, Kenneth Bridges, age 53, was fatally shot in the upper back, while pumping gasoline at an Exxon station near the Massaponax/I-95 interchange in Spotsylvania County, Virginia." Pet. App. 67a (emphasis removed).
- "[On] October 14, 2002, Linda Franklin, age 47, was fatally shot in the head outside a Home Depot store in Fairfax County, Virginia." Pet. App. 67a. The shooting occurred as Franklin and her husband were "load[ing] their purchases in their car." *Muhammad* v. *Commonwealth*, 619 S.E.2d 16, 28 (Va. 2005).

See Pet. App. 65a–68a (recounting facts involving other victims); *Muhammad*, 934 A.2d at 1066–72 (same).

2. Malvo was indicted in two separate Virginia jurisdictions for (1) the murder of Linda Franklin (Fairfax County) and (2) the murder of Kenneth Bridges and the attempted murder of Caroline Seawell (Spotsylvania County). Pet. App. 7a, 70a–72a; see JA 65 (identifying Franklin as the victim in the Fairfax County proceeding). Because the criminal proceedings predated *Roper* v. *Simmons*, 543 U.S. 551 (2005)—which held that "[t]he Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed," *id.* at 578—Malvo's strategy focused on avoiding the death penalty.

a. Malvo was tried first for Linda Franklin's murder, to which he pleaded not guilty. Pet. App. 7. Because of pretrial publicity, the trial was moved approximately 200 miles—from Fairfax County (in the Washington, D.C. suburbs) to the City of Chesapeake (in the southeastern corner of Virginia). *Id.* At trial, "Malvo acknowledged his involvement in the killings but asserted an insanity defense based on the theory that he had been indoctrinated by Muhammad during his adolescence and was operating under Muhammad's control." *Id.*; see also *id.* at 7a–8a (noting that "defense counsel presented testimony from more than 40 witnesses"). "The jury rejected Malvo's insanity defense and convicted him of all charges." *Id.* at 8a. The jury declined to impose a death sentence, instead recommending a sentence of "imprisonment for life." JA

71.[1] During his sentencing hearing on March 10, 2004, Malvo did not ask the court to depart from the jury's recommendation in any respect, and the judge sentenced him in accordance with the jury's recommendation. JA 74–82. Malvo did not appeal.

b. After being sentenced for Franklin's murder, Malvo entered *Alford* pleas to the capital murder of Kenneth Bridges and the attempted murder of Caroline Seawell. Pet. App. 9a–10a, 72a–73a. On October 26, 2004, the trial court accepted Malvo's plea, and, as provided in the plea agreement, sentenced him to two additional terms of life without parole on those charges. *Id.* at 10a, 63a. Again, Malvo did not appeal.

3. In 2013—nearly nine years after his final sentencing—Malvo filed two petitions for writs of habeas corpus in federal district court, arguing that the life sentences he received in Virginia violated the Eighth Amendment in light of this Court's then-recent decision in *Miller* v. *Alabama*, 567 U.S. 460 (2012). See Pet.

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[1] Although the transcript states that the jury "fix[ed]" Malvo's "punishment at imprisonment for life," JA 71, under Virginia law, "[t]he punishment as fixed by the jury is not final or absolute" but rather establishes the "maximum punishment which may be served." *Duncan* v. *Commonwealth*, 343 S.E.2d 392, 394 (Va. Ct. App. 1986) (quotation marks and citation omitted); see, *e.g.*, *Rankin* v. *Commonwealth*, 825 S.E.2d 81, 82 (Va. 2019) (stating that "[t]he jury recommended a sentence of two years and six months' imprisonment, and the circuit court sentenced Rankin in accordance with the jury's recommendation").

App. 76a–108a. The sole "ground for relief" stated, in full:

> The ground for the relief [is] based on the "new rule" announce[d] in *Miller* v. *Alabama*, 132 S. Ct. 2455 (June 25, 2012). The Court held that mandatory life imprisonment 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. This rule applies retroactively to Mr. Malvo under *Teague* v. *Lane*, 489 U.S. 288 (1989).

Pet. App. 80a (Spotsylvania convictions); accord *id.* at 96a (Fairfax conviction).

4. The district court originally dismissed Malvo's petitions as time-barred, "concluding that *Miller* was not retroactively applicable to cases on collateral review." Pet. App. 11a (internal quotation marks and citation omitted). Malvo appealed. After this Court's decision in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the court of appeals remanded "for further consideration in light of *Montgomery*." Pet. App. 11a.

5. On remand, the warden argued that *Montgomery* did not change the outcome because—unlike the sentencing schemes at issue in *Miller* and *Montgomery*—Virginia does not impose mandatory life-without-parole sentences. See Notice at 1, ECF No. 54, Case 2:13-cv-00375-RAF-LRL (E.D. Va. April 3, 2017) (discussing the Supreme Court of Virginia's decision in *Jones* v. *Commonwealth*, 795 S.E.2d 705 (Va. 2017), which concluded that Virginia's sentencing regime is

non-mandatory because it allows for discretionary suspensions, in whole or in part).

The district court concluded, however, that it "need not determine whether Virginia's penalty system is mandatory or discretionary." Pet. App. 42a. Rather, in its view, "the rule announced in *Miller* applies to all situations in which juveniles receive a life-without-parole sentence." *Id*. The court vacated Malvo's three Virginia life-without-parole sentences and ordered him resentenced. *Id.* at 62a.

6. The court of appeals affirmed. Pet. App. 1a–30a. Like the district court, the court of appeals determined it "need not . . . resolve whether any of Malvo's sentences were mandatory because *Montgomery* has now made clear that *Miller*'s rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence." *Id.* at 19a. The court of appeals acknowledged that "all the penalty schemes before the Supreme Court in both *Miller* and *Montgomery* were mandatory." *Id.* at 19a–20a. But, like the district court, the Fourth Circuit read *Montgomery* as "confirm[ing] that . . . a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility.'" *Id.* at 20a (citation omitted).

SUMMARY OF ARGUMENT

Both decisions below are premised on the idea that—for purposes of determining Malvo's entitlement to federal habeas relief—it *does not matter* "whether Virginia's penalty system is mandatory or discretionary." Pet. App. 42a. That was error.

A. For more than thirty years, this Court has emphasized the distinction between two questions: (1) determining what the Constitution requires (rights); and (2) determining what impact (if any) new constitutional rules should have on other convictions and sentences that predated the announcement of the new rule (retroactivity).

For cases that are not yet "final"—that is, those still pending on direct review when the new rule is announced—the Court has adopted an across-the-board approach of full retroactivity. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

Matters are fundamentally different, however, when it comes to cases that are already final when a law-changing decision first issues. "The principle that collateral review is different from direct review resounds throughout [this Court's] habeas jurisprudence," *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993), and the applicability of new constitutional rules highlights the differences. On collateral review, the presumption about retroactivity is reversed: "[A]s a general matter, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.' " *Welch* v. *United States*, 136 S. Ct. 1257, 1264

(2016) (quoting *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion)).

Beyond pointing in different directions, the rules associated with *Griffith* and *Teague* are different in kind as well. Post-*Griffith*, this Court need never take another case to decide whether an earlier decision applies to other cases still pending on direct review (because it always does). In contrast, even after *Teague*, this Court has taken at least 11 cases to decide whether an earlier ruling may serve as a basis for collaterally attacking convictions and sentences for which direct review had already concluded. That fact, in turn, illustrates a critical point: the decision whether to recognize a new constitutional rule is separate—and analytically distinct—from the decision about whether that same new rule should be applied retroactively to convictions and sentences that were already final when the new rule was first announced.

B. The court of appeals' basic error was viewing a decision about retroactivity as one about rights.

In *Miller* v. *Alabama*, 567 U.S. 460 (2012), this Court announced a new constitutional rule, "hold[ing] that mandatory life without parole for those under the age of 18 at the time of the crimes violates the Eighth Amendment's prohibition on 'cruel and unusual' punishments." *Id.* at 465. Both of the challenged state laws in *Miller* "carri[ed] a mandatory minimum punishment of life without parole," *id.* at 469; see also *id.* at 467 n.2, and all of the Court's numerous statements of its holding were specifically expressed in terms of mandatory life-without-parole sentences.

See, *e.g.*, *id.* at 470 ("[T]he confluence of these two lines of precedent leads to the conclusion that *mandatory life-without-parole sentences* for juveniles violate the Eighth Amendment.") (emphasis added); *id.* at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders.") (emphasis added); *id.* at 489 ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, *the mandatory-sentencing schemes* before us violate . . . the Eighth Amendment[.]") (emphasis added).

Four years later, this Court granted certiorari to decide "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review." Pet. at i, *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016) (No. 14–280). The first page of Henry Montgomery's petition for certiorari advised the Court that he was "serving a mandatory life sentence," *id.*, and the Court specifically decided the case on that understanding. See *Montgomery*, 136 S. Ct. at 726–27. The Court framed the question before it as "whether [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided," *id.* at 725, and answered that question in the affirmative. *Id.* at 732.

C. For Malvo to be entitled to habeas relief, one of two things would have to be true. Option 1: The rule announced in *Miller* applies directly to non-mandatory

life-without-parole sentences (and is thus applicable to cases on collateral review by virtue of this Court's subsequent decision in *Montgomery*). Option 2: In addition to its retroactivity holding, *Montgomery* also announced a new rule of constitutional law that is itself applicable to cases that became final before *Montgomery* was decided. See *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (defining "new rule" as one "not dictated by precedent") (internal quotation marks and citation omitted).

Neither idea holds water. The Court's 25-page opinion in *Miller* uses some variation of the word "mandatory" 48 times, and *every* statement that is even arguably a holding is specifically limited to mandatory life-without-parole sentences. In addition, one of "two strands of precedent" on which *Miller* drew is specifically concerned with "mandatory imposition of capital punishment," *Miller*, 567 U.S. at 470, which defeats any claim that the Eighth Amendment draws no distinction between mandatory and non-mandatory punishments.

Any argument that *Montgomery* announced a new rule that applies retroactively to Malvo's case fails for multiple reasons. First, Malvo has expressly disclaimed such an argument, and any request for relief based on a new rule arising from *Montgomery* would be both untimely and forfeited at this point. In addition, the *Montgomery* Court was not asked to announce a new rule about non-mandatory life-without-parole sentences, the petitioner in that case was in no need of (and would have been in no position to benefit from)

such a new rule, and 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." *Montgomery*, 136 S. Ct. at 736 (emphasis added). The Court should not view *Montgomery* as doing something that the Court was not asked to do, did not purport to do, and to the best of our knowledge has never done.

ARGUMENT

Our position is straightforward. *Miller* v. *Alabama*, 567 U.S. 460 (2012), repeatedly and consistently stated its holding (the new constitutional right) in terms of mandatory life-without-parole sentences, and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), held that *Miller*'s "holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Id.* at 725. In this case, however, the courts below determined that it does not matter whether three life sentences imposed on one of the D.C. snipers more than 15 years ago were mandatory because Malvo is entitled to habeas relief even if his sentences were non-mandatory. That decision was wrong, and this Court should reverse.

I. Under *Teague*, rights and retroactivity are separate steps

This case is not on direct review. Malvo is challenging sentences that were imposed in 2004 and have long since become final. See *Clay* v. *United States*, 537 U.S. 522, 527 (2003) (defining "finality"). Because Malvo is

seeking "the extraordinary remedy of habeas corpus," *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998), we begin by describing the distinct rules this Court has developed for determining when—and how—new rules are made retroactive to cases on collateral review.[2]

1. Until 1965, newly announced rules applied automatically to all cases in which review could still be had. See *Robinson* v. *Neil*, 409 U.S. 505, 507 (1973) (describing state of the law before *Linkletter* v. *Walker*, 381 U.S. 618 (1965)). Under that regime, the Court had no occasion to decide whether a rule announced in one case also applied to all others—the answer was obviously yes. Cf. *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

Starting in 1965, however, the Court began "charting new ground." *Robinson*, 409 U.S. at 507. Confronted with a "swift pace of constitutional change," *Pickelsimer* v. *Wainwright*, 375 U.S. 2, 4 (1963) (Harlan, J., dissenting), the Court "developed a doctrine under which [it] could deny retroactive effect to a newly announced rule of criminal law." *Harper* v. *Virginia Dep't*

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[2] This case raises no issues of deference under 28 U.S.C. § 2254(d) because the state courts never adjudicated Malvo's claims "on the merits." See *Jones* v. *Commonwealth*, 795 S.E.2d 705, 719 (Va. 2017) (establishing that a Virginia state court would have lacked jurisdiction to entertain a motion to vacate Malvo's sentences). But "[t]he retroactivity rules that govern federal habeas review on the merits—which include *Teague* [v. *Lane*, 489 U.S. 288 (1993)]—are quite separate from the relitigation bar imposed by" § 2254(d), and "neither abrogates or qualifies the other." *Greene* v. *Fisher*, 565 U.S. 34, 39 (2011).

of Taxation, 509 U.S. 86, 94 (1993) (discussing *Linkletter*).

"Over time, *Linkletter* proved difficult to apply in a consistent, coherent way." *Davis* v. *United States*, 564 U.S. 229, 242 (2011). Whereas *Linkletter* itself concluded that the rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), "would not . . . be applied to convictions that were final before the date of the *Mapp* decision," other decisions drew the retroactivity line at "cases in which trials had not yet commenced," "cases in which tainted evidence had not yet been introduced at trial," or "cases in which the proscribed official conduct had not yet occurred." *Danforth* v. *Minnesota*, 552 U.S. 264, 273–74 (2008).

In 1969, the second Justice Harlan issued a "classic dissent," *Danforth*, 552 U.S. at 273, criticizing the "incompatible rules and inconsistent principles" that had emerged from the Court's then-recent decisions. *Desist* v. *United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). " 'Retroactivity'," he declared, "must be rethought." *Id.*; see also *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part) (refining and expanding arguments from *Desist*).

2. The Court eventually adopted both halves of Justice Harlan's proposed solution. In 1987, the Court accepted Justice Harlan's argument that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." *Desist*, 394 U.S. at 258 (Harlan, J.,

dissenting); see *Griffith* v. *Kentucky*, 479 U.S. 314, 322 (1987). Having restored the pre-1965 status quo for cases on direct appeal, *Griffith* removed any need for further decisions about whether newly announced constitutional rules are applicable to such cases.

Collateral review was a different story. In 1989, the 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 opinion); see *Penry* v. *Lynaugh*, 492 U.S. 302, 313 (1989) (formally adopting *Teague*'s approach); accord *Danforth*, 552 U.S. at 299 (Roberts, C.J., dissenting) (explaining that *Teague* "completed the project of conforming our view on the retroactivity of new rules of criminal procedure to those of Justice Harlan"). In sharp 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—and those reasons matter here. 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*, 401 U.S. at 682 (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 opinion) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)). "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U.S. 107, 127–28 (1982). What is more, "[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).

3. This Court's decisions underscore that 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*, 490 U.S. at 313, in cases where direct review has concluded. This Court typically addresses rights and retroactivity in separate cases, and it 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.[3] At other times, the Court has declined to

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[3] See *Welch* v. *United States*, 136 S. Ct. 1257 (2016) (retroactivity of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015));

entertain a habeas petitioner's claim on the merits, concluding that any decision for the petitioner would necessarily be based on a forbidden "new rule."[4]

This consistent practice reflects a critical point. In determining whether a new rule should be applied to other cases that were final when that rule was announced, "[t]he relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." *Teague*, 489 U.S. at 306 (plurality opinion) (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in

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Montgomery v. *Louisiana*, 136 S. Ct. 718 (2016) (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)); *Schriro* v. *Summerlin*, 542 U.S. 348 (2004) (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)). Cf. *Gilmore* v. *Taylor*, 508 U.S. 333, 339–46 (1993) (addressing retroactivity of a court of appeals decision).

[4] See, *e.g.*, *Gray* v. *Netherland*, 518 U.S. 152, 166–70 (1996); *Goeke* v. *Branch*, 514 U.S. 115 (1995) (per curiam); *Caspari* v. *Bohlen*, 510 U.S. 383, 389–97 (1994); *Graham* v. *Collins*, 506 U.S. 461, 463 (1993); *Saffle* v. *Parks*, 494 U.S. 484, 486 (1990); *Teague*, 489 U.S. at 316 (plurality opinion).

part)). In short, decisions about rights are distinct from decisions about retroactivity, and the Court has long been careful not to conflate the two.

II. *Miller* was about rights; *Montgomery* was about retroactivity

The court of appeals' fundamental error was treating a decision about retroactivity (*Montgomery*) as also announcing another new rule that should, in turn, be applied retroactively to Malvo's case. As we pointed out at the cert stage, we are aware of no post-*Teague* decision by this Court endorsing such an approach, which 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. To reiterate: "Our view is not that this Court *could never* announce a new rule of constitutional law while simultaneously deciding that that rule applies retroactively to cases on federal habeas review." Pet. Cert. Rep. Br. 9. Our point is more limited and straightforward: *Montgomery* was never asked to establish a new rule, it never purported to do so, and it should not be interpreted as breaking sharply from the Court's usual approach to these matters.

1. In recent years, the Court has held that various punishments violate the Eighth Amendment when imposed on juveniles. 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). In 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." *Graham* v. *Florida*, 560 U.S. 48, 82 (2010).

2. The next year, the Court granted certiorari in two cases and ordered them "argued in tandem." *Miller* v. *Alabama*, 565 U.S. 1013 (2011) (No. 10-9646); accord *Jackson* v. *Hobbs*, 565 U.S. 1013 (2011) (No. 10-9647). Both cases involved 14-year-old 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.); accord Pet. at i, *Jackson* v. *Hobbs* (No. 10-9647) (Jackson Pet.). And both Miller and Jackson argued that their sentences were unconstitutional for two separate reasons: (1) because the Eighth Amendment categorically forbids life-without-parole sentences for 14-year-old offenders; and, separately, (2) because imposing a "mandatory sentence of life imprisonment without parole on" such a defendant—one "that categorically precludes consideration of the offender's young age or any other mitigating circumstances—violate[s] the Eighth" Amendment. Miller Pet. at i; accord Jackson Pet. at i.[5]

This Court resolved both cases based solely on the latter question. Rejecting one of the respondent State's

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[5] Jackson (who had been convicted of felony murder) also argued that his sentence was unconstitutional because he "did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed." Jackson Pet. at i.

belated arguments that "Jackson's sentence was not mandatory," the Court decided the cases on the premise that "[s]tate law mandated that each juvenile die in prison" and that "[i]n neither case did the sentencing authority have any discretion to impose a different punishment." *Miller* v. *Alabama*, 567 U.S. 460, 464, 465 n.2 (2012).

By its own terms, *Miller*'s holding is limited to mandatory life-without-parole sentences. *Miller*'s opening paragraph concludes with the following sentence: "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment prohibition on 'cruel and unusual' punishments." *Miller*, 567 U.S. at 465.

That one sentence is hardly alone. Five pages later, the Court states that "the confluence of . . . two lines of precedent leads to the conclusion that *mandatory life-without-parole* sentences for juveniles violate the Eighth Amendment." *Miller*, 567 U.S. at 470 (emphasis added). Still later, the Court writes: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders," *id.* at 479 (emphasis added), and that the number of States "mandating life without parole for children" "does not preclude our determination that *mandatory life without parole* for juveniles violates the Eighth Amendment," *id.* at 486 & 487 (emphasis added). The final substantive sentence of the Court's opinion once again references "the mandatory-sentencing schemes before

us," stating that such schemes "violate . . . the Eighth Amendment[ ]" "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes." *Id.* at 489.

All told, the Court's 25-page opinion in *Miller* uses some version of the word "mandatory" 48 times, and every sentence that is even arguably a holding (or a summary of the Court's holding) specifically references the mandatory nature of the challenged life-without-parole sentences. The repeated expression and unusual clarity of its precise holding belies any argument that *Miller* actually announced a rule that sweeps much farther.[6]

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[6] Just over halfway through the Court's opinion in *Miller*, there are three sentences that, in turn, state that "appropriate occasions for sentencing juveniles to this harshest possible penalty [*i.e.*, life without parole] will be uncommon," cite "the great difficulty . . . of distinguishing . . . between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption," and state that "a sentencer[ ]" is "require[d] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 479–80 (internal quotation marks and citations omitted). Those observations are weighty and important and could (in an appropriate case) provide strong justification for extending *Miller*'s holding to non-mandatory sentencing schemes as well. But the Court acknowledged that *Miller* presented no occasion do so, emphasizing—immediately before the statements quoted above—that its rejection of mandatory life-without-parole sentences for juvenile offenders was "sufficient to decide these cases." *Id.* at 479.

3. After *Miller*, there was considerable debate among lower courts about whether "its holding [was] retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 725 (2016) (citing eight decisions that "reached different conclusions on this point"). In *Montgomery*, this Court granted review "to resolve th[at] question," *id.*, in a case brought by a person "serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age." Pet. at i, *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (No. 14-280) (Montgomery Pet.). Henry Montgomery's question presented specifically described *Miller*'s holding as limited to "mandatory sentencing schemes" and asked the Court to decide "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison." *Id.*

The Court concluded that Montgomery was entitled to relief. Like the petition it had granted, the Court took as its point of departure the fact that Montgomery's sentence had been mandatory—*i.e.*, that the jury's verdict "*required* the trial court to impose a sentence of life without parole" and that "Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." *Montgomery*, 136 S. Ct. at 726; see *id.* at 726, 727 (referencing Montgomery's "mandatory life-without-parole sentence"). On multiple occasions, the Court framed the issue before it in the same way as the petition for certiorari: "[W]hether *Miller*'s prohibition on mandatory life without parole

for juvenile offenders did indeed announce a new substantive rule that, under the Constitution, must be retroactive." *Id.* at 732; accord *id.* at 725. The Court also stated its holding in well-established, *Teague*-based terms reflecting the distinction between announcing a new rule and retroactivity: "The Court now holds that *Miller* announced a substantive rule of constitutional law" and thus must be given "retroactive effect." *Id.* at 736. And, consistent with the limited scope of *Miller*'s holding, the *Montgomery* 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." *Montgomery*, 136 S. Ct. at 736 (emphasis added).

4. Together, *Miller* and *Montgomery* established that every juvenile offender who "received mandatory life without parole," *Montgomery*, 136 S. Ct. at 736, and filed a timely habeas petition after *Miller* was entitled to be resentenced or deemed eligible for parole. See *id.* (stating that such a procedure would "remedy a *Miller* violation"). Because in this case both courts below specifically declined to decide whether Malvo was such an offender, see Pet. App. 19a, 42a, this Court should vacate the court of appeals' judgment and remand for further proceedings.[7]

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[7] This Court should not attempt to decide whether Malvo's sentences were "mandatory" for purposes of the *Miller* rule. Although *Miller* included Virginia among the list of "relevant jurisdictions" in two footnotes, *Miller*, 567 U.S. 487–88 & nn.15–16, that was before the Commonwealth's highest court clarified (in direct response to *Miller*) that Virginia's sentencing scheme is

III. Neither *Miller* nor *Montgomery* sets forth a new rule about non-mandatory life-without-parole sentences

For the court of appeals' decision to be correct, one of two things would need to be true. Either: (1) *Miller* announced a new constitutional rule that applies to non-mandatory life-without-parole sentences (which was then made retroactive to cases on collateral review by *Montgomery*); or (2) *Montgomery* itself announced such a new rule and, in so doing, also made that new rule applicable to cases like this one. Both arguments fail.

1. Malvo insists that *Miller*'s "reasoning" shows that its holding sweeps beyond mandatory life-without-parole sentencing schemes. Br. in Opp. 20. That argument cannot be squared with the fact that *every single one* of *Miller*'s repeated statements of its own holding is phrased in terms of "mandatory" sentences. See pp. 20–21, *supra*. What is more, the language from *Miller* that Malvo block quotes on page 21 of his brief in opposition is specifically introduced by an acknowledgment that the Court's rejection of mandatory

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"not . . . mandatory." *Jones* v. *Commonwealth*, 763 S.E.2d 823, 823 (Va. 2014), holding reinstated by 795 S.E.2d 705 (Va. 2017). Malvo acknowledges that neither court below addressed this issue, Br. in Opp. 9 & n.2, and his brief in opposition never argued that Virginia's sentencing regime is, in fact, mandatory. See *id.* at 2 (referring to "'discretionary' schemes, like Virginia's"). Because this Court is one of "review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it should deem any such argument waived and allow the lower courts to determine, in the first instance, the proper characterization of Virginia's particular sentencing scheme. See Sup. Ct. R. 15(3).

life-without-parole sentencing schemes was "sufficient to decide these cases." *Miller*, 567 U.S. at 479.

Malvo next argues that *Miller*'s holding about mandatory life-without-parole sentences *must* apply to non-mandatory life-without-parole sentences as well because " 'mandatory life without parole' is not a punishment." Br. in Opp. 25. This Court's decisions—including *Miller*—disagree.

As *Miller* explained, its "conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment" was supported by "the confluence of . . . two lines of precedent." *Miller*, 567 U.S. at 470. "[T]he first set of cases . . . establish that children are constitutionally different from adults for purposes of sentencing" by "adopt[ing] categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 470, 471 (citing *Roper* and *Graham*).

But *Miller* also relied on "a second line of [this Court's] precedents," *Miller*, 567 U.S. at 470, and those decisions are directly relevant here.

Like life-without-parole sentences, "[t]he Constitution allows capital punishment." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1122 (2019). Yet the Court also has held that "making death the mandatory sentence" violates the Eighth Amendment. *Woodson* v. *North Carolina*, 428 U.S. 280, 286 (1976) (plurality opinion).[8]

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[8] See *Woodson*, 428 U.S. at 286–87 (plurality opinion) (statute mandating death penalty "for all persons convicted of first-degree murder"); see also *Sumner* v. *Shuman*, 483 U.S. 66, 67 (1987) (mandatory death penalty for prisoners who commit

Malvo's insistence that making a particular penalty mandatory does not create a distinct Eighth Amendment problem cannot be squared with this Court's repeated and explicit holdings that "mandatory death penalty statute[s]"—unlike non-mandatory ones—"cannot be applied consistently with the Eighth and Fourteenth Amendments." *Id.* at 301 (plurality opinion) (internal quotation marks and citation omitted).[9]

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murder while serving life without parole); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113 (1982) (sentencing scheme providing "that, *as a matter of law*, [sentencer] was unable to consider [certain mitigating] evidence"); *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion) (sentencing scheme that "preclude[d] consideration of relevant mitigating factors"); *Roberts* v. *Louisiana*, 431 U.S. 633, 635 (1977) (per curiam) (mandatory death for killing a police officer); *Roberts* v. *Louisiana*, 428 U.S. 326, 331 (1976) (plurality opinion) (mandatory death penalty where "there was a specific intent to kill or to inflict great bodily harm, and the offender was engaged in an armed robbery").

[9] Malvo's assertion that "[i]f 'mandatory life without parole' for juveniles were what *Miller* had forbidden, *Montgomery* would have come out the other way," Br. in. Opp. 25, appears contrary to what happened post-*Woodson*. To be sure, *Woodson* was decided well before *Teague*. But we are aware of no evidence that the Court's holding was deemed inapplicable to cases on collateral review. Accord U.S. Amicus Br. 23, *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016) (No. 14–280) (describing it as "unlikely that, after holding mandatory death penalty statutes unconstitutional, the Court would have denied collateral relief on non-retroactivity grounds for a capital defendant who never had an opportunity to argue for a sentence less than death").

Nor is *Woodson*'s (apparent) retroactivity surprising. Requiring a particular outcome for all cases is not a "procedural" rule, nor does it "regulate only the *manner of determining* the defendant's culpability." *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004). To the contrary, mandatory sentencing schemes are defined by the absence of any procedure and reflect a judgment that the

What is more, *Miller* itself is premised on the idea that mandating life without parole for juvenile offenders is constitutionally different from giving the sentencer discretion to impose that punishment. In the second line of its opinion, the Court emphasized that the schemes before it deprived the sentencer of "any discretion to impose a different punishment," "even if a judge or jury would have thought . . . a lesser sentence more . . . appropriate." *Miller*, 567 U.S. at 465. Again and again, the Court spoke of the problems with "prevent[ing] the sentencer from taking account of" important considerations, *id.* at 474, the need for "a sentencer [to] have the ability to consider the 'mitigating qualities of youth,'" *id.* at 476 (quoting *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)), and the constitutional difficulties with "preclud[ing] consideration of [an offender's] chronological age and its hallmark features," *id.* at 477. The Court also specifically 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, 484 n.10; see note 7, *supra*. If "'mandatory life without parole' is not a punishment," Br. in Opp. 25, *Miller* spilled a great deal of ink drawing a distinction that makes no difference.[10]

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extent of a particular offender's culpability is simply irrelevant. See, *e.g.*, *Miller*, 567 U.S. at 475–77; *Woodson*, 428 U.S. at 304 (plurality opinion).

[10] The lead dissenting opinion in *Miller* likewise viewed "[t]he premise of the Court's decision" as being "that mandatory sentences are categorically different from discretionary ones." 567

2. Because Malvo is not entitled to relief under *Miller* for non-mandatory life-without-parole sentences, his only other possible argument could be that *Montgomery* announced a new rule that went well beyond the facts of the case before it and also made that rule applicable to cases (like Malvo's) that were final when *Montgomery* was decided. See *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (defining "a new rule" as one that "breaks new ground" or "was not dictated by precedent") (internal quotation marks and citation omitted); see also *Lambrix* v. *Singletary*, 520 U.S. 518, 528, 538 (1997) (stating that even a decision that represents "the most reasonable" reading of prior law is still a new rule unless "all reasonable jurists" would have reached the same conclusion). Any such argument would fail for multiple reasons.

a. To begin, Malvo has expressly disclaimed any argument that *Montgomery* announced a new rule. See Br. in Opp. 22 ("*Montgomery* did not expand or modify the rule of *Miller*."); *id.* at 28 ("*Montgomery* did not 'modif[y]' or 'substantially expan[d]' the rule of *Miller*."); see also Amicus Holly M. Landry C.A. Br. 13 (stating that "Malvo [does not] rely on any right recognized in *Montgomery*").

b. What is more, Malvo did not seek habeas relief below based on any new rule announced in

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U.S. at 497 n.2 (Roberts, C.J., dissenting) (citation omitted). Miller's brief also argued that "[t]he mandatory nature of the life-without-parole sentence imposed on Evan Miller provide[d] an independently sufficient ground for its invalidation." Pet. Br. at 8, *Miller* v. *Alabama*, 567 U.S. 460 (2012) (No. 10–9646).

Montgomery and any attempt to do so now would be time-barred. See Pet. C.A. Br. 33, 35 (making the same argument).

Because Malvo's 2004 convictions have long since become final, any habeas petition had to be filed within one year of "the date on which the [pertinent] constitutional right was initially recognized by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C). Malvo's habeas petitions were filed on June 25, 2013, see Pet. App. 88a, 107a, and expressly sought "relief based on the 'new rule' announce[d] in *Miller* v. *Alabama*," *id.* at 80a, 96a. Malvo never attempted to file a new or amended petition in light of this Court's January 25, 2016, decision in *Montgomery*, the one-year period for filing a new petition expired several years ago, and any request to amend Malvo's 2013 petitions would plainly be untimely at this point. See *Dodd* v. *United States*, 545 U.S. 353, 358–59 (2005) (holding that motions to vacate a federal sentence filed under the parallel provisions of 28 U.S.C. § 2255 must be filed within one year of the announcement of the new rule, not the decision holding it retroactive); see generally Fed. R. Civ. P. 15. Accordingly, even had *Montgomery* announced a new rule that applied to his case, Malvo would be unable to gain relief based on it.[11]

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[11] For similar reasons, the Fourth Circuit's holding also violates another important goal of this Court's retroactivity jurisprudence by risking "disparate treatment of similarly situated defendants." *Danforth*, 552 U.S. at 301 (citation omitted). It seems plausible that at least some juvenile offenders currently serving non-mandatory life-without-parole sentences opted not to seek relief under *Miller* because *Miller*'s unequivocal statements

c. *Montgomery* did not purport to establish any new rule of constitutional law, and that decision should not be read to do silently something that (to the best of our knowledge) the Court has never done before. In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), for example, this Court granted certiorari in a habeas case to decide whether to adopt a new Eighth Amendment rule that would have benefitted the particular prisoner who was before it. *Id.* at 313. Before reaching that question, however, the Court first considered the "threshold matter" of whether the prisoner would be entitled to benefit from the new rule under *Teague*, *id.* at 329, and it specifically concluded that he would, see *id.* at 330.

This situation is worlds away from *Penry*. For one thing, the only question that *Montgomery* granted review to decide involved the retroactivity of *Miller*, not the meaning of the Eighth Amendment. Compare Montgomery Pet. at i (presenting question of "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review"), with Pet. at i, *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (No. 87–6177) (presenting three questions, all involving the meaning of the Fifth or Eighth Amendments). What is more, the only new constitutional rule that *Montgomery* possibly

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of its holding made clear it did not apply to them. See pp. 20–21, *supra*. Because an applicant for federal habeas corpus relief "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 relief based on *Miller* (which was decided in 2012) has long passed. Accordingly, such offenders would not benefit from what was, in the court of appeals' view, *Montgomery*'s material expansion of the right initially recognized in *Miller*.

could have adopted—that "*Miller* applies more broadly than only to mandatory life-without-parole sentences," Pet. App. 18a—would have done nothing to benefit Henry Montgomery himself, because "Montgomery [was] serving a mandatory life sentence." Montgomery Pet. at i; accord *Montgomery*, 136 S. Ct. at 726, 727 (same). This Court is not in the habit of announcing new constitutional rules that have no impact on the case before it. See *California* v. *San Pablo & T.R. Co.*, 149 U.S. 308 (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").

The Court's language in *Montgomery* is consistent with this interpretation. *Montgomery* framed the question before it as "whether [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided," *Montgomery*, 136 S. Ct. at 725, and it specifically summarized *Miller*'s holding as being "that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments," *id.* at 726 (quotation marks omitted). 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. For that reason, the "it" in *Montgomery*'s statement that "[l]ike other substantive rules, *Miller* is retroactive because *it* necessarily carries a significant risk that a defendant

. . . faces a punishment that the law cannot impose upon him," *id.* at 734 (internal quotation marks, brackets, and citation omitted) (emphasis added), is best understood as referring to the specific sentencing schemes at issue in both *Miller* and *Montgomery*: those mandating life-without-parole sentences for certain categories of juvenile offenders. See *id.* at 736 (emphasizing that the Court's holding does not even "require States to relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole"). For similar reasons, the Court's reference to "prisoners like Montgomery" in the final substantive sentence of its opinion, *id.*, is likewise best understood as referring to those who, like Montgomery, were sentenced to life imprisonment pursuant to mandatory sentencing schemes.

To be sure, *Montgomery*'s retroactivity analysis also contains a number of statements about the premises, justifications, and nature of the *Miller* rule, some of which could be read to sweep well beyond the narrow issue before the Court in *Montgomery*. See *Montgomery*, 136 S. Ct. 733–34. Even that language, however, is introduced by a sentence emphasizing that *Miller*'s holding was limited to "mandatory life-without-parole sentences." See *id.* at 733 ("These 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.' ") (quoting *Miller*, 567 U.S. at 479). What is more, this Court has long "remind[ed] counsel that words in 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); accord *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute."). And "the facts of the case under discussion" in *Montgomery* include the facts that: (a) like Miller and Jackson, 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 (emphasis added); and (b) 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 to people compelled to die in prison," Montgomery Pet. at i.

3. Nor do this Court's post-*Montgomery* orders in *Tatum* v. *Arizona*, 137 S. Ct. 11 (2016) and four other cases from Arizona, see Br. in Opp. 25–26, show otherwise.[12] As Virginia's highest court has explained, those five 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

[12] Malvo's claim that these orders shed light on the meaning of *Miller*, see Br. in Opp. 25–26, cannot be squared with the fact that they took place in 2016, not 2012, and provided for "further consideration in light of *Montgomery*," not *Miller*. See, *e.g.*, *Tatum*, 137 U.S. at 11.

(1996) (per curiam) and is not "a final determination on the merits," *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964); accord 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"). For that reason, those unsigned orders—all of which are either two or three sentences long and state only that a case is being "remanded . . . for further consideration in light of *Montgomery*," *Tatum*, 137 S. Ct. at 11—cannot bear the weight Malvo seeks to place on them.[13]

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[13] In *Tatum*, Justice Sotomayor filed an opinion concurring in the decision to grant, vacate, and remand, reasoning that "the sentencing judge did not undertake the evaluation that *Montgomery* requires." 137 S. Ct. at 12 (Sotomayor, J., concurring in the decision to grant, vacate, and remand). That analysis presupposes that *Montgomery*'s explanation for its retroactivity holding also sheds light on the standards lower courts should apply going forward. See *id.* at 12 ("As *Montgomery* made clear. . . ."); *id.* at 13 ("It is clear after *Montgomery*. . . ."). The Court need not resolve that issue here. For one thing, as explained in the text, the question of whether *Montgomery* announced a new rule is not presented in this case because Malvo has never asserted (and, indeed, he has forfeited any argument) that it did so. What is more, even if *Montgomery* did announce a new rule about non-mandatory sentences, the Court had no occasion to decide whether that new rule would itself be retroactive, because Montgomery would have been entitled to relief either way.

We recognize that *Montgomery* makes a number of powerful observations about why juvenile offenders should, or even must, be treated differently under the Eighth Amendment. If the Court believes that non-mandatory life-without-parole sentences for juveniles sometimes, often, or even always violate the Eighth Amendment, it should follow the path of *Roper*, *Graham*, and *Miller* and take a case pending on direct review. See *Griffith*, 479 U.S. at 328 (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). But unless the Court intends to revisit *Teague*'s "unifying theme" for "how the question of retroactivity should be resolved for cases on collateral review," *Teague*, 489 U.S. at 300 (plurality opinion), the only proper approach is to treat *Montgomery* as what it is: a holding and explanation of why the particular (and clearly stated) constitutional rule actually announced in *Miller* is retroactive to cases on collateral review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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