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 THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
FREDERICK LIU
Assistants to the Solicitor General
ROBERT A. PARKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether *Miller* v. *Alabama*, which "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 567 U.S. 460, 479 (2012), entitles respondent to retroactive invalidation of the life-without-parole sentences he received for multiple murders he committed as a 17-year-old, even if they were imposed under a sentencing scheme that did not mandate them.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement:
A. Respondent's offense conduct 2
B. Respondent's convictions and sentencing 6
C. Collateral proceedings 9
Summary of argument 11
Argument:
Discretionary life-without-parole sentences for juveniles who commit homicide are not retroactively invalid under *Miller* 12
A. *Miller* neither addressed nor invalidated discretionary life-without-parole sentences for juveniles who commit homicide 13
B. Language in *Montgomery*, which held *Miller* retroactive, has created confusion about the scope of *Miller* 17
C. This Court should make clear that *Miller* did not retroactively invalidate discretionary life-without-parole sentences for juvenile homicide offenders 22
1. *Montgomery*'s core rationale does not cover discretionary sentences 23
2. The Court could also clarify that *Montgomery*'s holding rests on the narrower rationale suggested by the government in that case 28
D. This Court should remand for a determination of whether respondent's life-without-parole sentences were mandatory 30
Conclusion 31

TABLE OF AUTHORITIES

Cases: Page

Arkansas Game & Fish Comm'n v. *United States*, 568 U.S. 23 (2012) 22
Beard v. *Banks*, 542 U.S. 406 (2004) 27
Bousley v. *United States*, 523 U.S. 614 (1998) 24, 25
Buchanan v. *Angelone*, 522 U.S. 269 (1998) 28
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 22
Gaylor v. *United States*, 74 F.3d 214 (10th Cir.), cert. denied, 517 U.S. 1211 (1996) 21
Graham v. *Florida*, 560 U.S. 48 (2010) 14
Jones v. *Commonwealth*, 795 S.E.2d 705 (Va.), cert. denied, 138 S. Ct. 81 (2017) 7, 22, 30
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 22
Malvo v. *Mathena*, 259 F. Supp. 3d 321 (D. Md. 2017) ... 8, 9
Miller v. *Alabama*, 567 U.S. 460 (2012) .... *passim*
Montgomery v. *Louisiana*, 136 S. Ct. 718 (2016) .... *passim*
Muhammad v. *Commonwealth*, 619 S.E.2d 16 (Va. 2005), cert. denied, 547 U.S. 1136 (2006) 2, 3, 4, 5, 6, 9
Muhammad v. *State*, 934 A.2d 1059 (Md. Ct. Spec. App. 2007) 3, 4, 5, 6
North Carolina v. *Alford*, 400 U.S. 25 (1970) 8
O'Dell v. *Netherland*, 521 U.S. 151 (1997) 27
Penry v. *Lynaugh*, 492 U.S. 302 (1989), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002) 17, 18
People v. *Davis*, 6 N.E.3d 709 (Ill.), cert. denied, 135 S. Ct. 710 (2014) 29
People v. *Holman*, 91 N.E.3d 849 (Ill. 2017), cert. denied, 138 S. Ct. 937 (2018) 21
Roper v. *Simmons*, 543 U.S. 551 (2005) 14

Cases—Continued: Page

Saffle v. *Parks*, 494 U.S. 484 (1990) 27
Schriro v. *Summerlin*, 542 U.S. 348 (2004) 17, 23, 24, 27
State v. *Mantich*, 842 N.W.2d 716 (Neb.), cert. denied, 135 S. Ct. 67 (2014) 29
State v. *Montgomery*, 242 So. 2d 818 (La. 1970) 18
Steilman v. *Michael*, 407 P.3d 313 (Mont. 2017), cert. denied, 138 S. Ct. 1999 (2018) 22
Teague v. *Lane*, 489 U.S. 288 (1989) 17, 24
United States v. *Fareed*, 296 F.3d 243 (4th Cir.), cert. denied, 537 U.S. 1037 (2002) 21
United States v. *Stitt*, 139 S. Ct. 399 (2018) 30
Welch v. *United States*, 136 S. Ct. 1257 (2016) 29
Woodson v. *North Carolina*, 428 U.S. 280 (1976) 14
Yakus v. *United States*, 321 U.S. 414 (1944) 30

Constitution and statutes:

U.S. Const. Amend. VIII 2, 11, 13, 15, 20
28 U.S.C. 2244(d)(1) 9
28 U.S.C. 2254 9
Va. Code Ann. (2004):
§ 19.2-264.4(A) 7
§ 19.2-303 .... 7, 10, 30
§ 53.1-165.1 (2002) 7

In the Supreme Court of the United States

No. 18-217

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 THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether *Miller* v. *Alabama*, 567 U.S. 460 (2012), which "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[]," *id.* at 465, retroactively invalidated life-without-parole sentences irrespective of whether they were mandatory. The United States has an interest in whether federal prisoners sentenced to discretionary sentences of life imprisonment without parole before *Miller*, for homicide offenses those prisoners committed as juveniles, may collaterally attack their sentences. The United States also has a substantial interest in the circumstances in which this Court's rulings are given retroactive effect in criminal cases.

STATEMENT

Following a jury trial and guilty pleas in Virginia state court, respondent was convicted on three counts of capital murder and one count of attempted capital murder, among other charges. Pet. App. 8a-10a. He was sentenced to four terms of life imprisonment without parole. *Id.* at 9a-10a. Respondent did not appeal his convictions or sentences. *Id.* at 77a, 91a. Nearly nine years later, he filed petitions for writs of habeas corpus in federal district court, asserting that his life-without-parole sentences violated the Eighth Amendment. *Id.* at 76a-108a. The district court granted his petitions and ordered that he be resentenced. *Id.* at 31a-62a. The court of appeals affirmed. *Id.* at 1a-28a.

A. Respondent's Offense Conduct

In fall 2002, when respondent was 17 years old, he and John Allen Muhammad murdered 12 people and seriously wounded six others during a seven-week shooting spree that "terrorized the entire Washington, D.C. metropolitan area." Pet. App. 4a.

1. The shootings began on September 5, 2002, when respondent approached Paul LaRuffa outside a pizzeria that LaRuffa owned in Clinton, Maryland. Pet. App. 5a, 65a; *Muhammad* v. *Commonwealth*, 619 S.E.2d 16, 25 (Va. 2005) (*Muhammad (Va.)*), cert. denied, 547 U.S. 1136 (2006). Respondent shot LaRuffa six times with a .22-caliber handgun and stole LaRuffa's laptop computer and $3500 in cash. *Ibid.*

Ten days later, respondent used the same handgun to shoot Muhammad Rashid in the stomach as Rashid was in the process of closing a liquor store in Prince George's County, Maryland. Pet. App. 5a, 65a. Respondent stole Rashid's wallet and fled. *Id.* at 65a. Both

LaRuffa and Rashid survived their gunshot wounds. See *Muhammad (Va.)*, 619 S.E.2d at 25, 53.

2. Shortly after the Rashid shooting, respondent and Muhammad traveled south. Pet. App. 5a. On September 21, 2002, Muhammad used a high-powered Bushmaster rifle to shoot Claudine Parker and Kelly Adams right after they had closed a liquor store in Montgomery, Alabama. *Ibid.*; *Muhammad (Va.)*, 619 S.E.2d at 25-26. The shots killed Parker and seriously injured Adams. *Ibid.* Respondent was seen running up to Parker and Adams as they were being shot and then rummaging through their purses. Pet. App. 5a; *Muhammad (Va.)*, 619 S.E.2d at 26.

Two days later, respondent and Muhammad used the same Bushmaster rifle to shoot and kill Hong Im Ballenger as she was walking to her car after closing a beauty-supply store in Baton Rouge, Louisiana. Pet. App. 5a; *Muhammad (Va.)*, 619 S.E.2d at 26. Respondent was seen leaving the scene with Ballenger's purse. Pet. App. 5a.

3. Respondent and Muhammad then returned to the Washington, D.C. area. Pet. App. 5a. At about 6 p.m. on October 2, 2002, they used the Bushmaster rifle to shoot and kill James Martin, a systems analyst for the National Oceanic and Atmospheric Administration, as he was standing in a supermarket parking lot in Wheaton, Maryland. *Id.* at 5a-6a; *Muhammad* v. *State*, 934 A.2d 1059, 1066 (Md. Ct. Spec. App. 2007) (*Muhammad (Md.)*).

The next morning, over a span of about two-and-a-half hours, respondent and Muhammad used the same rifle to murder four more people in Montgomery County, Maryland. Pet. App. 6a; *Muhammad (Md.)*, 934 A.2d at 1067-1068. They shot and killed James Buchanan

while he was mowing a lawn outside an auto store near White Flint Mall; they shot and killed Premkumar Walekar while he was fueling his car at a Mobil station in Aspen Hill; they shot and killed Maria Sarah Ramos while she was sitting outside on a shopping-center bench in Silver Spring; and they shot and killed Lori Lewis-Rivera while she was vacuuming her minivan at a Shell station in Kensington. Pet. App. 6a, 65a-66a; *Muhammad (Md.)*, 934 A.2d at 1067-1068; *Muhammad (Va.)*, 619 S.E.2d at 26.

That evening, respondent and Muhammad used the rifle to murder a 72-year-old man, Pascal Charlot, as he was crossing a street in northwest Washington, D.C. Pet. App. 6a, 66a; *Muhammad (Md.)*, 934 A.2d at 1069-1070.

4. On October 4, 2002, respondent and Muhammad expanded their "killing zone" to Northern Virginia. *Muhammad (Md.)*, 934 A.2d at 1069 (capitalization altered; emphasis omitted); see *Muhammad (Va.)*, 619 S.E.2d at 27. That afternoon, they used the Bushmaster rifle to shoot and seriously injure Caroline Seawell as she was loading goods into her minivan outside a Michael's art-supply store in Fredericksburg, Virginia. Pet. App. 6a, 66a; *Muhammad (Va.)*, 619 S.E.2d at 27.

On the morning of October 7, respondent and Muhammad returned to Maryland, where they used the rifle to shoot and seriously injure a 13-year-old boy, Iran Brown, right after he had been dropped off at his middle school in Prince George's County. Pet. App. 6a, 66a-67a; *Muhammad (Md.)*, 934 A.2d at 1070. Respondent and Muhammad then drove back to Northern Virginia, where they used the rifle to commit three more murders. Pet. App. 6a.

On October 9, respondent and Muhammad shot and killed Dean Harold Meyers while he was pumping

gas in Manassas. Pet. App. 67a; *Muhammad (Va.)*, 619 S.E.2d at 24. On October 11, they shot and killed Kenneth Bridges while he was pumping gas near Fredericksburg. Pet. App. 67a; *Muhammad (Md.)*, 934 A.2d at 1071. And on October 14, they shot and killed Linda Franklin, an intelligence analyst for the Federal Bureau of Investigation (FBI), while she was loading her car outside a Home Depot store in Falls Church. Pet. App. 67a; *Muhammad (Md.)*, 934 A.2d at 1072; *Muhammad (Va.)*, 619 S.E.2d at 28.

On October 19, 2002, respondent and Muhammad used the Bushmaster rifle to shoot and seriously injure Jeffrey Hopper as he was leaving a Ponderosa steakhouse in Ashland, Virginia. Pet. App. 6a, 67a-68a; *Muhammad (Va.)*, 619 S.E.2d at 28. Three days later, they returned to Aspen Hill, Maryland, where they used the rifle to shoot and kill a bus driver, Conrad Johnson, as he was exiting his bus. Pet. App. 6a, 68a; *Muhammad (Md.)*, 934 A.2d at 1068-1069.

5. Throughout their shooting spree, respondent and Muhammad placed telephone calls to the police and left notes near the crime scenes, demanding $10 million to stop the killing. Pet. App. 65a; *Muhammad (Va.)*, 619 S.E.2d at 29. In several of their messages, respondent and Muhammad referred to themselves as "God" and taunted the police, accusing them of responsibility for the killings and warning that "[y]our children are not safe anywhere at anytime." *Muhammad (Va.)*, 619 S.E.2d at 29; see *id.* at 27-29.

The crimes had a paralyzing effect on the entire Washington, D.C. area. "Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline." *Muhammad (Md.)*, 934 A.2d at 1066. "Schools were placed on lock-down status."

Ibid. And “[o]n one occasion, Interstate 95 was closed in an effort to apprehend the sniper.” *Ibid.*

6. Finally, early in the morning of October 24, 2002, FBI agents found respondent and Muhammad sleeping in a blue Chevrolet Caprice at a rest stop in Frederick County, Maryland. Pet. App. 6a, 64a; *Muhammad (Va.)*, 619 S.E.2d at 29. The car matched the description of a vehicle that had been traced to the snipers. See *Muhammad (Md.)*, 934 A.2d at 1074. The agents arrested both of them. Pet. App. 64a.

Inside the car, the agents found the Bushmaster rifle, two walkie-talkies, maps with Bethesda and Silver Spring circled, messages that matched those left for the police, LaRuffa’s laptop computer, and other incriminating evidence. Pet. App. 6a, 64a; *Muhammad (Va.)*, 619 S.E.2d at 29-30; *Muhammad (Md.)*, 934 A.2d at 1075-1076. The car itself had been converted into a “killing machine”: a hole had been “cut into the lid of the trunk, just above the license plate, through which a rifle barrel could be projected,” and “the backrest of the rear seat had been modified so as to permit easy access into the trunk from inside the car.” *Muhammad (Md.)*, 934 A.2d at 1075; see Pet. App. 6a-7a, 64a.

Following his arrest, respondent admitted that he and Muhammad “had acted as a sniper team, randomly shooting people up and down the I-95 corridor in Maryland and Virginia, in an effort to extort ten million dollars from the ‘media and the government.’ ” Pet. App. 69a. Respondent also admitted to having been the “triggerman” in a number of the shootings. *Id.* at 7a; see *id.* at 69a-70a.

B. Respondent’s Convictions And Sentencing

1. A grand jury in Fairfax County, Virginia, returned an indictment charging respondent as an adult

with, among other crimes, two counts of capital murder. Pet. App. 7a. The Commonwealth sought the death penalty. *Ibid.* Respondent pleaded not guilty, and the case was transferred to the state trial court in the City of Chesapeake, Virginia, "to ensure an impartial jury pool." *Ibid.* At trial, respondent asserted an insanity defense and argued that his youth and difficult upbringing had made him susceptible to the "control" of Muhammad, whom respondent viewed as a "surrogate father." *Id.* at 7a-8a. The jury rejected respondent's insanity defense and found him guilty. *Id.* at 8a.

Under Virginia law at the time, a jury could recommend a sentence of either death or life imprisonment without parole for a juvenile offender convicted of capital murder. See Va. Code Ann. § 19.2-264.4(A) (2004); see also *id.* § 53.1-165.1 (2002) (abolishing parole for felony offenses committed after January 1, 1995). A Virginia jury's recommendation of the appropriate sentence, however, is "not final or absolute." *Jones* v. *Commonwealth*, 795 S.E.2d 705, 713 n.12 (Va.) (citation omitted), cert. denied, 138 S. Ct. 81 (2017). The defendant retains the right to ask the sentencing court to "suspend [a] life sentence in whole or in part," including based on mitigating circumstances related to "his 'youth and attendant characteristics.'" *Id.* at 713 (citation omitted); see Va. Code Ann. § 19.2-303 (2004).

During the penalty phase of his trial, respondent presented mitigating evidence about his "background and history," as well as his "youth and immaturity." Pet. App. 8a. After considering that evidence, the jury recommended that respondent be sentenced to life imprisonment on each capital murder conviction. *Id.* at 8a-9a; J.A. 71. Respondent did not request that the sentencing court suspend a portion of his sentence, see J.A.

74-82, and the court sentenced him to two terms of life imprisonment without parole, Pet. App. 9a; J.A. 81. Respondent did not appeal his convictions or sentences. Pet. App. 91a.

2. After his sentencing in Chesapeake, respondent entered into a plea agreement on separate charges in Spotsylvania County, Virginia. Pet. App. 9a. Respondent admitted that the Commonwealth had sufficient evidence to convict him of, among other crimes, another count of capital murder and a count of attempted capital murder. *Id.* at 9a, 71a-72a; see *North Carolina* v. *Alford*, 400 U.S. 25, 37-38 (1970).

The plea agreement stated that respondent's counsel had advised respondent that he faced a sentence of death or life imprisonment on the capital murder charge and a sentence of 20 years to life imprisonment on the attempted capital murder charge. Pet. App. 10a, 70a. The plea agreement further stated that respondent "understood and agreed" that he would be sentenced to life imprisonment without parole on each charge. *Id.* at 72a. Accordingly, after accepting respondent's guilty pleas, the state court sentenced respondent to two terms of life imprisonment without parole. *Id.* at 10a. Respondent did not appeal those convictions or sentences. *Id.* at 77a.

3. In separate proceedings that are not directly at issue here, respondent also pleaded guilty to, and was convicted of, six counts of first-degree murder in Maryland, for which he was sentenced to six terms of life imprisonment without parole. *Malvo* v. *Mathena*, 259 F. Supp. 3d 321, 325 (D. Md. 2017). He has challenged those sentences on grounds similar to the grounds on which he has challenged his sentences here. See *id.* at 326, 332-333. Muhammad was tried separately in Virginia, was sentenced to death, and was executed in 2009.

Id. at 324-325; *Muhammad (Va.)*, 619 S.E.2d at 30; see *Muhammad* v. *Kelly*, 558 U.S. 1019 (2009) (No. 09-7328).

C. Collateral Proceedings

In 2013, nearly nine years after all of his sentences had become final, respondent filed petitions for writs of habeas corpus in federal district court collaterally attacking his four Virginia life-without-parole sentences. Pet. App. 80a, 96a; J.A. 1, 20; see 28 U.S.C. 2254.

1. Respondent asserted an entitlement to relief based on this Court's then-recent decision in *Miller* v. *Alabama*, 567 U.S. 460 (2012), which "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[]," *id.* at 465. Pet. App. 80a, 96a. The district court initially denied respondent's petitions on the ground that *Miller* did not apply retroactively to cases on collateral review and that his petitions therefore were untimely. *Id.* at 11a; see 28 U.S.C. 2244(d)(1).

While respondent's appeal was pending, this Court decided *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), which considered "whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders * * * announce[d] a new substantive rule that, under the Constitution, must be retroactive" to judgments that were final before *Miller*. *Id.* at 732. *Montgomery* held "that *Miller* announced a substantive rule of constitutional law" that applies on collateral review. *Id.* at 736. The court of appeals remanded respondent's case to the district court for further consideration in light of *Montgomery*. Pet. App. 11a.

2. On remand, the Commonwealth maintained that *Miller* and *Montgomery* apply only to "mandatory" sentences of life imprisonment without parole and that

"Virginia's life-without-parole penalty scheme" is "discretionary" because Virginia law "gives sentencing courts the option of suspending a defendant's sentence in whole or in part." Pet. App. 41a; see Va. Code Ann. § 19.2-303 (2004). The district court, however, concluded that "the rule announced in *Miller*," as "clarified" by *Montgomery*, "applies to all situations in which juveniles receive a life-without-parole sentence." Pet. App. 42a.

In the district court's view, respondent was entitled to vacatur of all four of his life-without-parole sentences, irrespective of whether they were mandatory, on the ground that that his sentences did not reflect a specific finding of "irreparable corruption." Pet. App. 41a-51a; see *id.* at 51a-61a (finding that respondent's Spotsylvania County plea agreement had not waived his *Miller* claim). The court cited, among other things, *Montgomery*'s statement that "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. 479-480) (citation and internal quotation marks omitted); see Pet. App. 42a.

3. The court of appeals affirmed. Pet. App. 1a-28a. Like the district court, the court of appeals deemed it unnecessary to "resolve whether any of [respondent's] sentences were mandatory." *Id.* at 19a. The court reasoned that "*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." *Ibid.* In particular, the court read *Montgomery* to "confirm[]" that a sentencing court "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,' as distinct from 'the transient immaturity of youth.'" *Id.* at 20a (citation omitted). And it agreed with the district court that the cases should return to state court for a determination of whether respondent's "crimes reflect permanent incorrigibility." *Id.* at 4a (citation omitted).

SUMMARY OF ARGUMENT

No decision of this Court should be construed to provide an escape hatch that would entitle respondent to retroactively invalidate discretionary life-without-parole sentences for his heinous crimes.

In *Miller* v. *Alabama*, 567 U.S. 460 (2012), the Court held only that the Eighth Amendment forbids "mandatory" sentences of life without parole for homicides committed by juveniles. *Id.* at 465. The sentencing schemes at issue in *Miller* required sentences of life without parole in all cases, irrespective of any age-related factors, and the Court's reasoning relied on the conjunction of its juvenile-sentencing *and* individualized-sentencing precedents. The Court expressly limited its holding to mandatory punishments and declined to consider broader rationales that would have applied equally to discretionary sentences.

In *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the Court held that *Miller*'s rule is retroactive to sentences that became final before that rule was announced. That case, like *Miller*, involved a defendant who had received a mandatory sentence of life without parole, not a discretionary one. Some of the language in *Montgomery*, however, did not distinguish between mandatory and discretionary sentences. Accordingly, the government and lower courts have generally (though not invariably) felt constrained to understand *Montgomery*'s reasoning (though not its actual holding) as

requiring the retroactive invalidation of both types of sentences.

This Court, however, is not so constrained, and it should take the opportunity in this case to reemphasize the express limits of *Miller*. One way to do so is to clarify that *Montgomery*'s core rationale—that retroactive application of the *Miller* rule was necessary to eliminate a "substantial risk" of disproportionate sentences, 136 S. Ct. at 736—applies only to mandatory sentences, not discretionary ones. Under *Miller*, only mandatory sentences, imposed indiscriminately on all juvenile offenders, create the degree and kind of risk that would require retroactive invalidation. Another way is to clarify that *Miller*'s retroactivity rests on the narrow rationale advocated by the government in *Montgomery*—namely, that a rule invalidating a mandatory sentencing scheme is retroactive because it alters the range of possible substantive outcomes. Under either approach, the decision below should be vacated and the case remanded so that the lower courts can determine in the first instance whether respondent was sentenced under a mandatory regime of the sort that is covered by *Miller*.

ARGUMENT

DISCRETIONARY LIFE-WITHOUT-PAROLE SENTENCES FOR JUVENILES WHO COMMIT HOMICIDE ARE NOT RETROACTIVELY INVALID UNDER *MILLER*

In *Miller* v. *Alabama*, 567 U.S. 460 (2012), this Court "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479. Four years later, in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the Court "h[eld] that *Miller* announced a substantive rule of constitutional law" that is retroactive to

sentences that were already final when *Miller* was decided. *Id.* at 736. Neither *Miller* nor *Montgomery* involved a defendant who received a life-without-parole sentence as a matter of discretion. Although some of *Montgomery*'s language went beyond the mandatory nature of the sentences at issue in both cases, this Court should make clear that it has not in fact retroactively invalidated discretionary life-without-parole sentences for juvenile homicide offenders. And it should remand respondent's case for a determination of whether the life-without-parole sentences for his horrific crimes were in fact "mandatory," 567 U.S. at 465, for purposes of *Miller*.[*]

A. *Miller* Neither Addressed Nor Invalidated Discretionary Life-Without-Parole Sentences For Juveniles Who Commit Homicide

Miller did not consider whether, much less hold that, a life-without-parole sentence imposed as a matter of discretion for a murder committed by a juvenile violates the Eighth Amendment. The two defendants in *Miller* had been sentenced under schemes that mandated life without parole for their homicide offenses. 567 U.S. at 466-467 & n.2, 469. "In neither case did the sentencing authority have any discretion to impose a different punishment." *Id.* at 465. Accordingly, the Court's descriptions of its "hold[ing]" limited that holding to the invalidation of sentences that were "mandatory." *Ibid.*; see *id.* at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in

[*] The Commonwealth has not requested that *Miller* be overruled, so the government takes no position on that issue in this brief.

prison without possibility of parole for juvenile offenders."). And the mandatory nature of the sentences at issue was integral to the Court's reasoning.

The Court grounded its "conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment" in the "confluence of * * * two lines of precedent." *Miller*, 567 U.S. at 470. The "first" of those lines of precedent consists of decisions that have "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Ibid.* The Court identified *Roper* v. *Simmons*, 543 U.S. 551 (2005), which "held that the Eighth Amendment bars capital punishment for children," and *Graham* v. *Florida*, 560 U.S. 48 (2010), which "concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense," as examples. *Miller*, 567 U.S. at 470. The Court understood *Roper* and *Graham* to "establish that children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. And *Miller* reasoned that the "mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations," because they "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 474.

The "second line" of relevant precedent the Court identified in *Miller* consists of decisions "demanding individualized sentencing when imposing the death penalty." *Miller*, 567 U.S. at 475. The Court cited *Woodson* v. *North Carolina*, 428 U.S. 280 (1976) (plurality opinion), which "held that a statute mandating a death sentence for first-degree murder violated the Eighth

Amendment." *Miller*, 567 U.S. at 475. The Court also cited "[s]ubsequent decisions [that] have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors," including the "'mitigating qualities of youth.'" *Id.* at 475-476 (citation omitted). The Court reasoned that "these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders" because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476; see *id.* at 477-478 (detailing individualized sentencing considerations that a mandatory scheme precludes).

The Court emphasized that its decision in *Miller* established "individualized sentencing" as a constitutional requirement for juvenile homicide offenders (similar to *Woodson*), not "a flat ban" on life-without-parole sentences for such offenders. *Miller*, 567 U.S. at 474 n.6. For example, the Court explained that *Miller* was "different from the typical [case] in which [it] ha[s] tallied legislative enactments" to inform its consideration of whether a particular practice is cruel and unusual under the Eighth Amendment, because the decision it was issuing "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Id.* at 483. "Instead," the Court stressed, the decision "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Ibid.* And the Court distinguished "mandatory" schemes from "discretionary" schemes in

observing that, "when given the choice, sentencers impose life without parole on children relatively rarely." *Id.* at 484 n.10; see *id.* at 482 & n.9 (counting the number of jurisdictions that "make a life-without-parole term mandatory for some juveniles convicted of murder in adult court").

The Court additionally made clear that it was not addressing, let alone adopting, broader arguments that would have encompassed discretionary sentences. The Court 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." *Miller*, 567 U.S. at 479. It thus did not consider the defendants' "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger," *ibid.*, which would apply equally to mandatory and discretionary sentences. The Court also did not adopt the view—advanced in Justice Breyer's concurrence—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.

While allowing for life-without-parole sentences for juvenile homicide offenders, the Court expressed the belief that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," "especially * * * because of 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.'" *Miller*, 567 U.S. at 479-480 (citations omitted). "Although we do not foreclose a sentencer's ability to make that judgment in homicide

cases," the Court continued, "we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

B. Language In *Montgomery*, Which Held *Miller* Retroactive, Has Created Confusion About The Scope Of *Miller*

After *Miller*, the lower courts reached conflicting conclusions about whether it had announced a "retroactive" rule—*i.e.*, a rule applicable not only to future sentences, or those still on direct review, but also those that had already become final. *Montgomery*, 136 S. Ct. at 725. This Court granted certiorari in *Montgomery* to resolve the conflict about *Miller*'s retroactivity, see *ibid.*, and concluded that "*Miller* announced a substantive rule that is retroactive in cases on collateral review," *id.* at 732. See Pet. for Cert. at i, *Montgomery*, *supra* (No. 14-280). Although the circumstances of *Montgomery*, like *Miller*, involved mandatory sentencing, some of *Montgomery*'s language was not tied to that fact.

1. As described in *Teague* v. *Lane*, 489 U.S. 288 (1989), "new" constitutional rules—those not "dictated by precedent existing at the time the defendant's conviction became final"—generally "will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 301, 310 (plurality opinion) (emphasis omitted); see *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989) (adopting the *Teague* plurality's approach to retroactivity), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002). That general limitation accords comity to the judgments of the States and respects their strong interests in the finality of criminal cases. See, *e.g.*, *Montgomery*, 136 S. Ct. at 736; *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004).

The *Teague* doctrine, however, recognizes "two categories of rules that are not subject to its general retroactivity bar"—namely, "new 'watershed rules of criminal procedure'" and "new substantive rules of constitutional law." *Montgomery*, 136 S. Ct. at 728 (citation omitted). Only the category of "substantive rules" was at issue in *Montgomery*. The Court's conclusion that it had jurisdiction rested on its determination "that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. at 729; see *ibid.* (declining to address corresponding issue with respect to "watershed rules of procedure"). And its consideration of retroactivity was limited to whether *Miller* set forth a "substantive" rule, which *Montgomery* defined as one that "forbids 'criminal punishment of certain primary conduct' or prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'" *Id.* at 732 (quoting *Penry*, 492 U.S. at 330).

2. The defendant in *Montgomery*, like the defendants in *Miller*, received a mandatory sentence of life without parole for a murder that he had committed as a juvenile. *Montgomery*, 136 S. Ct. at 726; see *State* v. *Montgomery*, 242 So. 2d 818 (La. 1970). "Under Louisiana law, 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." *Ibid.*

The opinion in *Montgomery* recognizes the mandatory aspect of the sentencing schemes at issue in *Miller* and *Montgomery* as a limitation on the decisions' scope.

For example, the Court described *Miller* as having "held that *mandatory* life without parole for juvenile homicide offenders violates the Eighth Amendment[]." *Montgomery*, 136 S. Ct. at 726 (emphasis added). The Court correspondingly 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 (emphasis added). And without any mention of discretionary sentences, it assuaged practical concerns about "[g]iving *Miller* retroactive effect" by emphasizing that doing so "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole," because a "State may remedy a *Miller* violation" by instead "permitting juvenile homicide offenders to be considered for parole." *Id.* at 736.

3. Unlike *Miller* itself, however, *Montgomery* did not consistently tether its discussion to mandatory sentences. For example, *Montgomery* highlighted *Miller*'s reliance on decisions such as *Roper* and *Graham*—which held "certain punishments disproportionate when applied to juveniles," *Montgomery*, 136 S. Ct. at 732 (citation omitted)—without also mentioning the line of "individualized sentencing" decisions whose "confluence" with the *Roper*-*Graham* line had undergirded *Miller*'s holding about mandatory sentencing schemes, 567 U.S. at 475; see *Montgomery*, 136 S. Ct. at 732-734.

In addition, one paragraph after referring to "the Court's holding in *Miller* that *mandatory* life-without-parole sentences for children pose too great a risk of

disproportionate punishment," 136 S. Ct. at 733 (emphasis added; brackets, citation, and internal quotation marks omitted), *Montgomery* stated that *Miller*

> did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." 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." Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.

Id. at 734 (quoting *Miller*, 567 U.S. at 472, 479-480) (brackets, citations, and internal quotation marks omitted).

Although that passage quotes *Miller*, it does not provide the same context to the quoted language as *Miller* itself. The first quotation from *Miller* ("the distinctive attributes of youth") is from *Miller*'s discussion of *Roper* and *Graham*—decisions that *Miller* did not treat as sufficient in themselves to justify its holding. See

Miller, 567 U.S. at 472 ("*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."); see *id.* at 470 (relying on "the confluence of * * * two lines of precedent"). The other two quotations from *Miller* ("unfortunate yet transient immaturity" and "the rare juvenile offender whose crime reflects irreparable corruption") are from the same paragraph in which *Miller* stressed that its "hold[ing] that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders * * * is sufficient to decide these cases." *Id.* at 479-480 (emphasis added; citation omitted). Language from those latter two quotations is also reflected in *Montgomery*'s later statement that *Miller* "bar[red] life without parole * * * for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734.

4. Litigants and lower courts cannot lightly disregard any statements in an opinion of this Court. Cf., *e.g.*, *United States* v. *Fareed*, 296 F.3d 243, 247 (4th Cir.) (explaining that federal courts of appeals are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings") (quoting *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir.), cert. denied, 517 U.S. 1211 (1996)), cert. denied, 537 U.S. 1037 (2002). Accordingly, in light of *Montgomery*'s language, the government and lower courts have generally (although not invariably) viewed *Montgomery*'s reasoning as implicating the validity of discretionary sentences as well as mandatory ones. See, *e.g.*, Gov't Letter at 2-3, *United States* v. *Mejia Velez*, No. 13-cv-3372 (E.D.N.Y. July 24, 2017); Pet. App. 20a; *People* v. *Holman*, 91 N.E.3d 849, 861

(Ill. 2017), cert. denied, 138 S. Ct. 937 (2018); *Steilman* v. *Michael*, 407 P.3d 313, 318-319 (Mont. 2017), cert. denied, 138 S. Ct. 1999 (2018). But see, *e.g.*, Gov't Supp. Br. at 1-2, *Johnson* v. *United States*, No. 08-cr-10 (W.D. Va. May 24, 2016) (arguing that the rule announced in *Miller* and made retroactive in *Montgomery* applies only to mandatory life-without-parole sentences); *Jones* v. *Commonwealth*, 795 S.E.2d 705, 721 (Va.) (declining to read the holdings of *Miller* and *Montgomery* to apply to "non-mandatory life sentences") (emphasis omitted), cert. denied, 138 S. Ct. 81 (2017). This Court, however, is not so constrained, and it should take this opportunity to clarify the limits of *Miller* and *Montgomery*.

C. This Court Should Make Clear That *Miller* Did Not Retroactively Invalidate Discretionary Life-Without-Parole Sentences For Juvenile Homicide Offenders

The Court's grant of certiorari in this case provides an opportunity to make clear that *Miller* does not, in fact, require courts to revisit final life-without-parole sentences imposed as a matter of discretion. This Court has previously "recall[ed] Chief Justice Marshall's sage observation that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). That "canon of unquestionable vitality," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994), is applicable here.

Neither *Montgomery* nor *Miller* involved a defendant who had received a non-mandatory sentence following a proceeding that included the opportunity to seek

a lower sentence based on the mitigating qualities of youth. Retroactively invalidating such sentences would implicate a distinct set of issues, and disrupt a distinct set of final judgments, that neither case discussed. And adherence to the actual holdings of *Miller* and *Montgomery*—that mandatory life-without-parole sentences are unconstitutional both prospectively and retrospectively—does not require that result. Instead, the Court should clarify either that *Montgomery*'s core rationale does not encompass discretionary sentences or that *Montgomery*'s holding rests on the narrower rationale that the government advocated in that case.

1. **Montgomery***'s core rationale does not cover discretionary sentences*

Nowhere did the Court in *Montgomery* expressly state that discretionary life-without-parole sentences are retroactively invalid. And to the extent that some of the opinion's statements have that implication, they are at odds with the crux of *Montgomery*'s logic. *Montgomery* concluded that "*Miller* is retroactive because it '*necessarily carries significant risk* that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'" 136 S. Ct. at 736 (quoting *Summerlin*, 542 U.S. at 352) (emphasis added; brackets, citation, and internal quotation marks omitted). That reasoning is consistent only with the retroactive invalidation of a mandatory sentence, which carries such a risk, as opposed to a discretionary sentence, which does not.

a. The fundamental premise of this Court's modern retroactivity jurisprudence is that final criminal judgments should be disturbed only when the risk of an erroneous judgment is unacceptably high. "The *Teague*

doctrine is founded on the notion that one of the principal functions of habeas corpus is to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (brackets, citations, and internal quotation marks omitted); see *Teague*, 489 U.S. at 312 (plurality opinion).

Montgomery could not hold *Miller* retroactive without finding such a risk. The key distinction between a retroactive "substantive" rule—as *Montgomery* held the *Miller* rule to be—and a non-retroactive "procedural" rule is that only the former "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). Accordingly, in emphasizing that its "hold[ing] that *Miller* announced a substantive rule of constitutional law * * * comports with the principles of *Teague*," the *Montgomery* opinion 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." 136 S. Ct. at 736.

b. *Montgomery*'s conclusion that *Miller* created a "grave" or "significant" risk of a disproportionate punishment, 136 S. Ct. at 736, was necessarily limited to mandatory sentences. Whatever else *Montgomery* said about *Miller*, its discussion of risk in connection with *Miller* was expressly tied to the mandatory aspect of the sentences at issue.

Both of *Montgomery*'s references to the high risk of an unconstitutional outcome in the absence of *Miller* were cabined to mandatory sentencing schemes. First, *Montgomery* referenced risk in describing why "*Miller*

held that *mandatory* life without parole for juvenile homicide offenders violates the Eighth Amendment[]." 136 S. Ct. at 726 (emphasis added). "'By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,'" *Montgomery* explained, "*mandatory* life without parole 'poses too great a risk of disproportionate punishment.'" *Ibid.* (quoting *Miller*, 567 U.S. at 479) (emphasis added). Second, *Montgomery* described the differences between juveniles and adults as "considerations underl[ying] the Court's holding in *Miller* that *mandatory* sentences for children 'pos[e] too great a risk of disproportionate punishment.'" *Id.* at 733 (quoting *Miller*, 567 U.S. at 479) (emphasis added).

At the core of *Montgomery*'s reasoning, then, is the recognition that a *mandatory* life-without-parole sentence, which is invariably applied, naturally creates "a significant risk that a defendant * * * faces a punishment" that is unconstitutionally disproportionate. *Summerlin*, 542 U.S. at 352 (citation and internal quotation marks omitted); see *Montgomery*, 136 S. Ct. at 734. That risk is analogous to the "significant risk" that marks other substantive rules—such as the "significant risk that a defendant" convicted under an overly broad interpretation of a criminal statute "stands convicted of an act that the law does not make criminal," *Bousley*, 523 U.S. at 620 (citation and internal quotation marks omitted). A new rule invalidating the application of a mandatory sentence, like a new rule invalidating the application of a criminal statute, focuses on the categorical risk that inherently exists when a criminal prohibition or punishment is applied indiscriminately to all offenders.

c. *Montgomery* did not find that discretionary sentences likewise present the excessive degree of risk necessary to justify retroactive invalidation. And *Miller* itself had treated discretionary sentencing schemes as a *benchmark* against which to measure the risk of mandatory schemes. See 567 U.S. at 484 n.10.

Miller viewed evidence "indicat[ing] that when given the choice, sentencers impose life without parole on children relatively rarely" to "support[] [its] holding" invalidating schemes that mandate such sentences. 567 U.S. at 484 n.10. *Miller* did not suggest any substantial risk that those "relatively rare[]" discretionary life-without-parole sentences were themselves erroneous. To the contrary, *Miller* created a constitutional regime—one that "d[oes] not foreclose a sentencer's ability" to impose a life-without-parole sentence, but anticipates that "occasions for sentencing juveniles to this harshest possible penalty will be uncommon," *id.* at 479-480—that corresponded to the discretionary sentencing schemes that it surveyed.

Courts imposing discretionary life-without-parole sentences on juvenile homicide offenders before *Miller* may not have framed their exercise of discretion specifically in terms of distinguishing between crimes showing "irreparable corruption" and those showing "transient immaturity," 567 U.S. at 479-480, as *Miller* later would. But a conscientious decisionmaker would be aware of the implications of a life-without-parole sentence for a juvenile offender. If not barred by law from doing so, it would ordinarily take into account age-related factors in assessing the propriety of such punishment for the offense and offender, regardless of the degree to which those factors were made explicit.

A defendant who had the opportunity to argue for a lesser sentence based on age-related factors, and who nonetheless received a sentence of life without parole as a matter of discretion, is thus far less likely to have suffered a disproportionate punishment than a defendant for whom a life-without-parole sentence was mandatory. To the extent that a defendant sentenced under a discretionary scheme may in fact have received a constitutionally disproportionate life-without-parole sentence, see *Montgomery*, 136 S. Ct. at 734, the question for retroactivity purposes is whether an erroneous outcome of that sort was *so likely* that it "produce[d] an impermissibly large risk of injustice," *Summerlin*, 542 U.S. at 356 (citation and internal quotation marks omitted). And this Court's precedents illustrate that a rule does not meet that bar when it simply changes the contours of a preexisting discretionary sentencing determination. See, *e.g.*, *Beard* v. *Banks*, 542 U.S. 406, 408, 420 (2004) (rule that capital-sentencing juries may consider mitigating factors even if not found unanimously was not retroactive); *Saffle* v. *Parks*, 494 U.S. 484, 486, 494-495 (1990) (proposed rule about capital-sentencing jury instruction not to rely on sympathy for the defendant would not be retroactive).

That is true even though such a rule inherently has "*some* effect on the likelihood that [a particular] punishment would be imposed," *Montgomery*, 136 S. Ct. at 736 (emphasis added). In *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), for example, the Court rejected retroactive application of a rule that altered the parameters of a "future dangerousness" determination, necessary to trigger eligibility for death sentence, by requiring that the determination take into account a defendant's permanent incarceration. *Id.* at 154 n.1; see *id.* at 153, 167;

see also *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998) (noting that determination of such an aggravating factor "narrow[s] the class of defendants eligible for the death penalty"). The risk that defendants were misclassified as death-eligible before the rule changed the classification factors was insufficient to justify reopening final discretionary sentences.

Any similar misclassification risk with respect to the "rare[]" juvenile homicide offenders who received life-without-parole sentences under a scheme that allowed consideration of age-related factors, *Miller*, 567 U.S. 484 n.10, would likewise fail to justify invalidating those sentences. And *Montgomery* does not require this Court to say otherwise.

2. The Court could also clarify that **Montgomery***'s holding rests on the narrower rationale suggested by the government in that case*

Although *Montgomery*'s core rationale can be reconciled with a limitation to mandatory sentences, the Court could also reaffirm the limits of *Miller* by clarifying that *Montgomery*'s holding rests on the narrower rationale set forth in the government's brief in *Montgomery*—namely, that by foreclosing mandatory life-without-parole sentences for juvenile homicide offenders, *Miller* expanded the substantive range of possible sentencing outcomes. Gov't Br. at 13-25, *Montgomery*, *supra* (No. 14-280). Holding *Miller* retroactive on that basis would not implicate the constitutionality of discretionary life-without-parole sentences for juvenile homicide offenders and would create no tension with existing retroactivity doctrine.

Before *Miller*, a juvenile convicted of homicide in a jurisdiction that mandated life without parole for that offense could receive only one possible sentence. After

Miller, a juvenile offender convicted in the same jurisdiction for the same offense could receive a range of possible sentences—not only life imprisonment without parole but also some lesser sentence (either life imprisonment with parole or a term of years). See 567 U.S. at 489. That change—from a mandatory sentence to a range of possible discretionary sentences—is a substantive one. Indeed, expanding the set of possible sentencing outcomes is the flip side of narrowing the set of possible sentencing outcomes, which is traditionally substantive. See, *e.g.*, *Welch* v. *United States*, 136 S. Ct. 1257, 1264-1265 (2016). Such a rule changes not just *how* a sentencing determination is made—as a procedural rule would, see *id.* at 1265—but also *what* the bottom-line determination can be.

The experience post-*Miller* confirms that distinction. After *Miller*, every homicide statute that mandates a sentence of life without parole cannot be enforced as written in cases involving juvenile offenders. States and the federal government must instead either modify the sentence to allow for parole or else provide a range of sentencing outcomes that includes the possibility of a lesser sentence. See, *e.g.*, *People* v. *Davis*, 6 N.E.3d 709, 722 (Ill.) (recognizing that "*Miller* mandates a sentencing range broader than that provided by statute" for certain juvenile offenders) (citation omitted), cert. denied, 135 S. Ct. 710 (2014); *State* v. *Mantich*, 842 N.W.2d 716, 731 (Neb.) (recognizing that "*Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile"), cert. denied, 135 S. Ct. 67 (2014). A requirement that courts and legislatures provide sentencing options that did not previously exist is a substantive change in the law.

D. This Court Should Remand For A Determination Of Whether Respondent's Life-Without-Parole Sentences Were Mandatory

The lower courts granted relief in this case based on their view that, after *Montgomery*, *Miller*'s holding applies equally to mandatory and discretionary sentences of life without parole. Pet. App. 19a, 42a. Clarifying or revising *Montgomery* to eliminate any such implication would therefore necessitate a remand for further proceedings.

In *Jones* v. *Commonwealth*, *supra*, the Supreme Court of Virginia made clear that, under state law, a capital defendant retains the right to ask the sentencing court to "suspend [his] life sentence in whole or in part," including based on mitigating circumstances related to "his youth and attendant characteristics." 795 S.E.2d at 713 (citation and internal quotation marks omitted). Although the statutory provision authorizing sentence suspension existed at the time of respondent's state sentencings, see Va. Code Ann. § 19.2-303 (2004), he did not invoke it. See Pet. App. 9a-10a; cf. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). The implications of those facts would appropriately be addressed in the first instance on remand. See *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) ("[W]e are a court of review, not of first view.") (citation omitted).

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
FREDERICK LIU
Assistants to the Solicitor General
ROBERT A. PARKER
Attorney

JUNE 2019