No. 18-217

In the
Supreme Court of the United States

RANDALL MATHENA, WARDEN,

Petitioner,

v.

LEE BOYD MALVO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR JONATHAN F. MITCHELL AND ADAM K. MORTARA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. No "new rules," not even "substantive" ones, can unwind Malvo's plea agreement. 5

II. As for Malvo's other life sentences, Malvo never challenged those sentences in a Virginia court. 13

   A. Federal habeas courts are not courts of first review. 14

   B. There is no excuse for Malvo's procedural default. 18

III. The federal habeas writ is an equitable remedy that takes account of a petitioner's procedural default. 22

   A. Supervening Supreme Court precedents do not apply to procedurally defaulted claims. 23

   B. *Teague*'s exception for "substantive" new rules is not a free-standing ground for federal habeas relief. 26

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 29

Bousley v. United States, 523 U.S. 614 (1998) .. 10, 18

Brady v. United States, 397 U.S. 742 (1970) 2, 8, 9

Brown v. Allen, 344 U.S. 443 (1953) 26

Burns v. Warden of Sussex I State Prison,
609 S.E.2d 608 (Va. 2005) 29

Calderon v. Thompson,
523 U.S. 538 (1998) 16, 17, 25

Class v. United States, 138 S. Ct. 798 (2018) 12

Coleman v. Thompson, 501 U.S. 722 (1991) .....passim

Cone v. Bell, 556 U.S. 449 (2009) 25

Cullen v. Pinholster,
563 U.S. 170 (2011) 4, 5, 11, 29

Davis v. United States, 417 U.S. 333 (1974) 11

Day v. McDonough, 547 U.S. 198 (2006) 16

Desist v. United States, 394 U.S. 244 (1969) 26

Dingle v. Stevenson, 840 F.3d 171 (4th Cir.
2016) 8

Dretke v. Haley, 541 U.S. 386 (2004) 21

Duckworth v. Eagan, 492 U.S. 195 (1989) 10

Edwards v. Carpenter, 529 U.S. 446 (2000) 15, 21

Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830) 30

Felker v. Turpin, 518 U.S. 651 (1996) 30

Graham v. Florida, 560 U.S. 48 (2010) 7

Granberry v. Greer, 481 U.S. 129 (1987) 16

Greene v. Fisher, 565 U.S. 34 (2011) ....passim

Griffith v. Kentucky, 479 U.S. 314 (1987)............ 4, 12

Hardiman v. Reynolds,
971 F.2d 500 (10th Cir. 1992)................................ 16

Harrington v. Richter, 562 U.S. 86 (2011)........passim

Horn v. Banks, 536 U.S. 266 (2002).......................... 27

In re Lincoln, 202 U.S. 178 (1906) 22

Jackson v. Virginia, 443 U.S. 307 (1979) 26

Johnson v. Williams, 568 U.S. 289 (2013)............... 25

Jones v. Commonwealth,
795 S.E.2d 705 (Va. 2017) ....passim

Mackey v. United States, 401 U.S. 667 (1971)..... 4, 26

Malvo v. Mathena,
259 F. Supp. 3d 321 (D. Md. 2017).............. 1, 19, 31

Martinez v. Ryan, 566 U.S. 1 (2012) 18

McCleskey v. Zant, 499 U.S. 467 (1991) 13

McKay v. United States,
657 F.3d 1190 (11th Cir. 2011)............................. 21

McMann v. Richardson,
397 U.S. 759 (1970).. 2, 8

Miller v. Alabama, 567 U.S. 460 (2012) .. 2, 12, 17, 21

Montgomery v. Louisiana,
136 S. Ct. 718 (2016).......................................passim

Muhammad v. Warden,
646 S.E.2d 182 (Va. 2007) 9

Murray v. Carrier, 477 U.S. 478 (1986)................... 20

North Carolina v. Alford, 400 U.S. 25 (1970)............ 2

O'Sullivan v. Boerckel, 526 U.S. 838 (1999)........ 3, 14

Pinckney v. Clarke,
697 F. App'x 768 (4th Cir. 2017) 23

Premo v. Moore, 562 U.S. 115 (2011) 10

Reed v. Ross, 468 U.S. 1 (1984) 3, 18

Rhines v. Weber, 544 U.S. 269 (2005) 19

Roper v. Simmons, 543 U.S. 551 (2005) 7, 23

Russello v. United States, 464 U.S. 16 (1983) 29

Schlup v. Delo, 513 U.S. 298 (1995)......................... 21

Schriro v. Summerlin, 542 U.S. 348 (2004)............. 27

Slayton v. Parrigan, 205 S.E.2d 680 (1974) 9

Stone v. Powell, 428 U.S. 465 (1976)........................ 22

Teague v. Lane, 489 U.S. 288 (1989)........... 15, 19, 26

Tollett v. Henderson, 411 U.S. 258 (1973) 8

United States v. Broce, 488 U.S. 563 (1989)........ 8, 11

United States v. Timmreck,
441 U.S. 780 (1979).. 10

Virginia v. LeBlanc,
137 S. Ct. 1726 (2017).................................. 7, 17, 24

Wainwright v. Sykes, 433 U.S. 72 (1977)................... 3

Whorton v. Bockting, 549 U.S. 406 (2007)............... 27

Williams v. Taylor, 529 U.S. 362 (2000).................. 19

Withrow v. Williams, 507 U.S. 680 (1993)......... 22, 25

Wright v. West, 505 U.S. 277 (1992) 19, 25

Statutes

28 U.S.C. § 2241(a) 22

28 U.S.C. § 2243.. 22

28 U.S.C. § 2244(b) 28

28 U.S.C. § 2244(d) 28
28 U.S.C. § 2254(b) 14, 16
28 U.S.C. § 2254(d)(1).......................................passim
28 U.S.C. § 2254(e) 28
Va. Code § 18.2-10 7
Va. Code § 18.2-25 7
Va. Code § 18.2-31 7
Va. Code § 8.01-654 15
Va. Code § 8.01-654.2 29

STATEMENT OF INTEREST

Amici curiae have written and taught about this Court's criminal law and habeas corpus jurisprudence.[1] Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in criminal law and federal habeas cases, including by this Court in *Beckles v. United States*, No. 15-8544, and by the Eleventh Circuit in *Wilson v. Warden*, No. 14-10681 and *Bryant v. Warden, FCC Coleman-Medium*, No. 12-11212. The arguments made herein are solely those of *amici* and are not necessarily the views of the law schools where *amici* have taught or their other faculty.

SUMMARY OF ARGUMENT

Lee Boyd Malvo filed two federal habeas petitions a decade after his notorious killing spree. *See* Pet. App. 4a. For the first time in any court, he challenged the constitutionality of four life sentences imposed for his crimes in Virginia (not to mention his six other life sentences for Maryland slayings).[2] Malvo has never

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

[2] *See Malvo v. Mathena*, 259 F. Supp. 3d 321, 325 (D. Md. 2017).

asked the Virginia courts to review his sentences—not in a direct appeal and not in a state postconviction proceeding. Compounding that error, Malvo's procedural default was rewarded in federal court. Applying *de novo* review, the courts below ordered Malvo resentenced based on Eighth Amendment rules conceived by this Court well after Malvo was last before the Virginia courts.

Two of Malvo's life sentences were imposed as a result of an *Alford* plea. *See North Carolina v. Alford*, 400 U.S. 25 (1970). Because those life sentences were lawful when they were imposed, they are lawful now. Federal habeas is not an opportunity for Malvo to dismantle a lawful plea agreement because, based on new legal developments, he now thinks he could have struck a better deal. *See Brady v. United States*, 397 U.S. 742, 757 (1970); *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970).

Malvo's two other life sentences were imposed following a trial where the jury "found unanimously and beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind." App. 71a; *compare Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) ("The Court [in *Miller v. Alabama*, 567 U.S. 460 (2012)] recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified."). Malvo never appealed these life sentences, and his collateral attack on their legality is procedurally defaulted.

The Fourth Circuit made not one mention of Malvo's procedural default, let alone required him to show cause and prejudice. *See Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). Consequently, Malvo finds himself in a *better* position than a state prisoner who, as a result of properly exhausting his claim, must overcome the Antiterrorism and Effective Death Penalty Act's relitigation bar. *See* 28 U.S.C. § 2254(d)(1). The Fourth Circuit has spun a perverse web of incentives for the future federal habeas petitioner—inviting him to run out the clock on his state-court remedies such that he has "technical[ly]" (but not "properly") exhausted his claim. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Then, once in federal court, he may take advantage of new rules that didn't exist at the time of the sentencing and that a state court never had the opportunity to consider.

Virginia has valid reasons for refusing to reopen Malvo's sentence. This Court should not ignore those reasons merely because Malvo bypassed the state courts, thereby depriving them of the opportunity to explain why his claim fails both procedurally and on the merits. If one stops and considers Malvo's procedural default, it becomes clear that he cannot establish "actual prejudice." Malvo's jury considered his depravity, and the sentencer had discretion. *See* App. 71a; *Jones v. Commonwealth*, 795 S.E.2d 705, 708, 711-12 (Va. 2017). *Miller* requires nothing more. Nor is there any "cause" justifying his procedural default. This Court's decision in *Reed v. Ross*, 468 U.S. 1, 15 (1984)—holding that the "novelty" of a claim can be cause—has been undermined by later precedents

and by AEDPA itself. Neither *Reed* nor any other reason can excuse Malvo's procedural default.

Even if Malvo could overcome his procedural default, the function of federal habeas is to assess the application of law existing at the time of sentencing, not to address any "supervening constitutional interpretation." *Mackey v. United States*, 401 U.S. 667, 687-88 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); *compare Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) (stating "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"). Applied here, the sentencing court correctly applied the law as it existed when Malvo was sentenced. And still today, *Miller* and *Montgomery* permit life-without-parole sentences.

Congress's revisions in AEDPA confirm that federal habeas is a backward-looking inquiry. The reasonableness of a state-court decision is measured against Supreme Court decisions that existed at the time the state-court decision was made. *See Greene v. Fisher*, 565 U.S. 34, 40 (2011); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). So too here. Malvo cannot now receive the benefit of new Eighth Amendment rules simply because he never gave the Virginia courts an opportunity to review the merits of his sentencing claim in the first instance.

The Constitution does not additionally require that federal habeas courts give effect to *Teague*'s exception for substantive new rules. Not even *Montgomery* requires state courts to recognize such a claim if it is not "properly presented." *Montgomery*,

136 S. Ct. at 732. Any contrary rule—that the Constitution compels a federal court to ignore Malvo's procedural default and vacate his then-lawfully imposed sentence—would afford Malvo more relief than a prisoner who properly sought adjudication of the merits of his claim in state court. While Malvo would receive all the benefits of the latest Eighth Amendment fashions, the prisoner who properly exhausted his claim would receive the benefit of only those Eighth Amendment rules in season at the time of the state-court adjudication under section 2254(d)(1). *See Cullen*, 563 U.S. at 182. That makes little sense. Malvo's sentence was lawful at the time it was imposed, and a reasonable jurist could so conclude even under today's law. He thus does not warrant federal habeas relief today.

ARGUMENT

I. No "new rules," not even "substantive" ones, can unwind Malvo's plea agreement.

In 2004, Malvo struck a deal with the Commonwealth of Virginia. *See* Pet. App. 63a-75a. As part of his plea agreement, Malvo admitted that Virginia had sufficient evidence to convict him of the murder of Kenneth Bridges—shot in the back as he pumped gas off the interstate—and the attempted murder of Caroline Seawell—shot in the back as she loaded her car outside a Michael's craft store. Pet. App. 64a, 66a-67a, 70a. He also admitted that Virginia had sufficient evidence to prove that his fingerprints were on the rifle used to kill Premkumar Walekar (fatally shot in the chest while pumping gas at age 54), Sarah Ramos (fatally shot in the head while sitting on a shopping center bench at age 34), Lori Lewis Rivera

(fatally shot in the back while vacuuming her car at age 25), and Pascal Charlot (fatally shot at a busy intersection at age 72), all in a single day. Pet. App. 65a-66a, 68a-69a. He further admitted that Virginia had evidence sufficient to prove that the same rifle was used to seriously wound a 13-year-old shot outside his middle school and another individual shot outside a Ponderosa steakhouse, and to kill Dean Harold Meyers (fatally shot in the head while pumping gas at age 53), Linda Franklin (fatally shot in the head outside a Home Depot at age 47), and Conrad Johnson (fatally shot while standing in the doorway of a public bus at age 35). Pet. App. 66a-69a. He admitted that a Virginia detective could testify that when Malvo first talked to police, he "boasted that he had personally performed ten of the thirteen shootings" and acted as a "spotter" for others. Pet. App. 69a-70a. For its part of the plea agreement, Virginia agreed to recommend two sentences of life imprisonment without parole for the murder of Mr. Bridges and attempted murder of Ms. Seawell, 8 years' imprisonment for related firearms offenses, plus an agreement to *nolle prosequi* all remaining Spotsylvania County indictments. Pet. App. 72a. Malvo affirmed that he "freely and voluntarily" entered into the plea, that his attorney discussed the charges with him, explained to him the elements of the offenses, and advised him of any possible defenses. Pet. App. 63a, 73a. As with many plea agreements, Malvo waived his right to an appeal. Pet. App. 71a.

Consistent with that plea agreement, Malvo did not directly appeal and never filed a motion for state postconviction relief. *See* Pet. App. 77a-78a. He filed no state habeas petitions or motions to vacate his

sentence after *Roper v. Simmons*, 543 U.S. 551 (2005), decided roughly a year after he was sentenced. Nor did he challenge his sentence after *Graham v. Florida*, 560 U.S. 48, 89 (2010), holding "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (Indeed, it appears Malvo has never raised a *Graham* claim for his agreed-upon life sentence for the attempted murder of Ms. Seawell, not even in his current habeas petitions. Perhaps that is because Malvo anticipated *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017), respecting the Virginia Supreme Court's decision that Virginia's geriatric release program satisfies *Graham*. Or, more likely, he understood that he agreed to a life sentence for the attempted murder even though he could have received a lesser sentence then and even though new legal developments might permit a lesser sentence now.[3])

Just as *Roper* and *Graham* were not grounds for revisiting Malvo's plea agreement (as Malvo has seemingly recognized), this Court's more recent decisions in *Miller* and *Montgomery* are not either. The lawfulness of that agreement is measured against the law existing at the time Malvo entered the plea. As this Court made clear in *Brady*, "absent misrepresentation or other impermissible conduct by

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[3] At the time of the plea agreement, Malvo's maximum sentence for the capital murder of Mr. Bridges was the death penalty. Va. Code § 18.2-10(a) (2004); *see id.* § 18.2-31. Malvo avoided that punishment by agreeing to the *Alford* plea. For the attempted murder of Ms. Seawell, Malvo could have gone to trial and asked for the statutory minimum punishment of 20 years' imprisonment. Va. Code § 18.2-10(b); *id.* § 18.2-25. But he instead entered the *Alford* plea in exchange for a life sentence.

state agents, a voluntary plea of guilty intelligently made in the light of the *then applicable law* does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U.S. at 757 (emphasis added and citation omitted). Again in *McMann*, this Court rejected the argument that habeas petitioners who have pleaded guilty are entitled the same retroactive application of new Supreme Court decisions as those who have gone to trial: "We are unimpressed with the argument that because the decision in *Jackson* [*v. Denno*] has been applied retroactively to defendants who had previously gone to trial, the defendant whose confession allegedly caused him to plead guilty prior to *Jackson* is also entitled to a hearing" on his constitutional claim. *McMann*, 397 U.S. at 773.

Like the defendants in *Brady* and *McMann*, Malvo made "a bet on the future," permitting him "to gain a present benefit in return for the risk that he may have to forego future favorable legal developments." *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016); *see also Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (deciding that even though the facts relating to the petitioner's constitutional claim were unknown to him and his attorney at the time of the guilty plea, the plea agreement foreclosed collateral attack); *United States v. Broce*, 488 U.S. 563, 573 (1989) ("Our decisions have not suggested that conscious waiver is necessary with regard to each potential defense relinquished by a plea of guilty."). Malvo cannot now unravel the plea agreement for the chance—hardly a guarantee—that he receives

something less than a life-without-parole sentence at resentencing.[4]

Put another way, Malvo's agreement to the *Alford* plea waived all future sentencing claims.[5] Having waived his right to proceed to trial and present mitigation evidence at sentencing, Malvo cannot now argue that "he was never afforded an opportunity to

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[4] The Fourth Circuit distinguished *Brady* (and *Dingle*) because they involved defendants' relying on "new sentencing case law to attack their convictions—their guilty pleas—without any claim that the sentences they actually received were unlawful." Pet. App. 24a. That elides the retroactivity question: whether new sentencing caselaw can upset sentences lawful at the time of the plea agreement. *Brady* already answered that question: this Court's Eighth Amendment cases have "neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent.'" *Brady*, 397 U.S. at 747.

[5] The Fourth Circuit deemed Malvo's *Alford* plea a waiver of his right to direct appeal but not his right to collateral review. Pet. App. 26a-27a. That contradicts the Virginia Supreme Court's decision in *Jones*, also involving a juvenile offender who entered an *Alford* plea. *Jones* decided that the defendant who "expressly waived his right to challenge his sentence on direct appeal," "*a fortiori*," waived his right to challenge his sentence "on collateral attack." 795 S.E. 2d at 714; *see also*, *e.g.*, *Muhammad v. Warden*, 646 S.E.2d 182, 192 (Va. 2007) (explaining claim was "procedurally defaulted" because a "non-jurisdictional issue" that "could have been raised at trial and on direct appeal…is not cognizable in a petition for a writ of habeas corpus" (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (1974))). It also does not appear that Malvo understood his plea agreement to be so limited. His habeas petition states that he filed no direct appeals and no "other petitions applications, or motions" concerning his judgment of conviction. Pet. App. 78a. When asked why, he said, "By plea agreement." Pet. App. 80a.

present evidence that he never offered" about his youth and immaturity "and to request relief that he never sought" about the legality of his agreed-upon sentence. *Jones*, 795 S.E.2d at 714. Later changes in Eighth Amendment law do not call into question the legality of Malvo's plea. If it was lawful then, it is lawful now.[6]

Any contrary rule would subject the States to endless litigation about the legality of sentences imposed in exchange for guilty pleas—antithetical to the States' interest in finality, an interest that "has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979); *see also Premo v. Moore*, 562 U.S. 115, 132 (2011) ("The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have

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[6] This Court has allowed some exceptions to this rule, including in *Bousley v. United States*, 523 U.S. 614 (1998). But *Bousley*, involving a federal prisoner and the reinterpretation of a federal statute, does not present the same comity and federalism concerns intrinsic in federal habeas review of a state prisoner's sentence. *See Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) (describing habeas review of state-court convictions as "intrud[ing] on state sovereignty to a degree matched by few exercises of federal judicial authority" (quotation marks omitted)). Moreover, Bousley claimed he was misinformed as to the true nature of the charge against him. *Bousley*, 523 U.S. at 618-19. Malvo, on the other hand, was "correctly informed as to the essential nature of the charge[s] against him" in a court with jurisdiction to convict and sentence him. *Id*. Even today, a life-without-parole sentence for a juvenile homicide offender is not categorically unconstitutional.

disappeared, but also in cases where witnesses and evidence were not presented in the first place.").

Permitting Malvo to reopen his plea agreement would also put Malvo in a better position than other defendants who face a trial, directly appeal their sentences, and otherwise properly exhaust their claims in state court. Malvo sought (and received) plenary review of his claim for the first time in the federal courts. And those federal courts applied new sentencing rules that did not exist at the time of the plea agreement. The other defendants who went to trial and properly exhausted their claims? Those defendants face AEDPA's more stringent review standards and do not get the benefit of new decisions announced after the state court last reviewed the defendant's claim. *See* 28 U.S.C. § 2254(d)(1); *see*, *e.g.*, *Greene*, 565 U.S. at 38 ("review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the prisoner's claim on the merits" and measured "'against this Court's precedents *as of the time the state court renders its decision*'" (quotation marks omitted) (quoting *Cullen*, 563 U.S. at 182)).

This is not a case where a defendant was convicted for "an act that the law does not make criminal," or where the trial court was without jurisdiction to convict and sentence. *Davis v. United States*, 417 U.S. 333, 346 (1974); *see Broce*, 488 U.S. at 569 (noting exception to *Brady*'s rule where "on the face of the record the court had no power to enter the conviction or impose the sentence").[7] Still today, the

[7] Importantly, it is also not a case on direct review, where Malvo could have received the benefit of newly announced constitutional rules before his sentence became final. *Compare*

trial court could sentence Malvo to life imprisonment without parole. *See Montgomery*, 136 S. Ct. at 734 ("*Miller*, it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*."); *Miller*, 567 U.S. at 480 (stating the decision does "not foreclose" a sentence of life without parole in homicide cases). Federal habeas is not a do-over for a petitioner who regrets his decision to enter into a plea agreement, especially when the very same punishment could be reimposed today.

Applying *Miller* retroactively to those who have pleaded guilty upsets the compromise that Virginia and other States made with criminal defendants in 2012 and before. Had Virginia known that Malvo would challenge his sentence, then Virginia might have instead proceeded to trial to make a full record of the depravity of his crimes and have a jury decide his punishment. Had Virginia known that Malvo would challenge his sentence, then Virginia might well not have agreed to *nolle prosequi* the remaining indictments. Malvo's sentence cannot be picked off from the broader plea agreement, but that is precisely what the courts below have instructed Virginia to do. Now, more than fifteen years after the slayings, Virginia must put on nothing short of a trial to establish the depravity of Malvo's crimes so that the sentencer may consider "the youth and attendant characteristics" of a defendant who is now more 30 years old. *Miller*, 567 U.S. at 483. These resentencing proceedings will be tainted by "the erosion of memory

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Class v. United States, 138 S. Ct. 798, 805 (2018) (holding "[a] guilty plea does not bar a *direct appeal*" in certain circumstances) (emphasis added); *see Griffith*, 479 U.S. at 322-23.

and dispersion of witnesses that occur with the passage of time," prejudicing Virginia's ability to conduct any sort of reliable inquiry under *Miller*. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (quotation marks omitted); *see also Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).[8] Upsetting the plea agreement is irreconcilable with *Brady* and extends far beyond the scope of the federal habeas writ.

II. As for Malvo's other life sentences, Malvo never challenged those sentences in a Virginia court.

In addition to the sentences imposed as a result of his *Alford* plea, Malvo also challenges two life sentences imposed after a trial in Chesapeake County. Before recommending the life sentences, the jury considered extensive argument and testimony regarding Malvo's background and upbringing at trial.[9] The jury ultimately "found unanimously and

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[8] Or, as *Montgomery* proposed, Virginia could just concede defeat and allow Malvo—who, mere months before his eighteenth birthday, perpetrated a weeks-long crime spree ending the lives of ten people and seriously wounding three more, Pet. App. 65a-68a—to be considered for parole. *See Montgomery*, 136 S. Ct. at 736.

[9] *See*, *e.g.*, Joint App. 1868-69, ECF No. 16-5, *Malvo v. Mathena*, 17-6746 (4th Cir.) (defense counsel's argument that "our greatest worry is who our children come to associate with…when they get to be 15, 16, and 17, because that's the point in time where they begin to search for themselves," when they are "most susceptible to peer pressure and to outside influence"); *id.* at 1873-74 (defense counsel's argument that "[i]ntelligence does not equate to maturity" and that "[a]s a society, we have elected to say that children do not have sufficient life experiences, training, and development to understand and appreciate the consequences of their acts"); *id.* at 1229-1393, ECF No. 16-4 (trial

beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind." App. 71a. Then at sentencing, Malvo waived his right to allocution, and the trial court sentenced him in accordance with the jury's recommendation. App. 80a-81a. Malvo never appealed and never filed a motion for state postconviction relief claiming that his sentence was unlawful. Accordingly, Malvo's claim is procedurally defaulted.

A. Federal habeas courts are not courts of first review.

Malvo has technically met AEDPA's exhaustion requirement. By letting time expire for any direct appeal or postconviction proceedings, Virginia remedies are no longer "available" to him. 28 U.S.C. § 2254(b). But that is only half of the inquiry.

No court asked whether Malvo "*properly* exhausted" his state remedies. *Boerckel*, 526 U.S. at 848.[10] The obvious answer is no. And Malvo's federal

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testimony of defense expert, describing his opinions as covering Malvo's "childhood history and upbringing in order to determine what factors in his background would have led him to become involved in these terrible crimes," "how he became susceptible to the influence of John Muhammad and what factors there might be to help us understand his involvement"); *id.* at 1519-1715, ECF No. 16-5 (trial testimony of another defense expert who testified "Lee was unable to distinguish between right and wrong, and he was unable to resist the impulse to commit the offense"); *see also id.* at 1794, ECF No. 16-5 (trial court's statement that "[i]t is a rare case that had as much mitigation evidence in the guilt phase").

[10] Discussed below, the only apparent reference to Malvo's procedural default appears to be the magistrate judge's 2014

habeas case should not proceed without his first establishing cause and prejudice, or that failure to review his federal claim will result in a "fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("We therefore require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim."); *see also Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality op.) (stating the Court has "declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, or on the State's interest in the enforcement of its procedural rule" (citation omitted)).

A state procedural bar—for example, requiring Virginia prisoners to file state habeas petitions within a certain amount of time, Va. Code § 8.01-654(A)(2)—is an adequate and independent state-law ground for rejecting a federal habeas petition. *See Coleman*, 501 U.S. at 730-32. When a federal court ignores these procedural bars, it "ignores the State's legitimate reasons for holding the prisoner." *Id.* at 730. Especially where, as here, a state prisoner has not once attempted to present his claim to a state court, procedural default is a failsafe. It prevents such a prisoner from running out the clock in state court and then arguing that he has met "the technical

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report and recommendation, mentioning it in a footnote. *See* Joint App. 97-98 n.6 & 221 n.2, ECF No. 16-1, *Malvo v. Mathena*, No. 17-6746 (4th Cir.). According to the footnote, the novelty of Malvo's Eighth Amendment argument was cause for his default. But not even the magistrate judge explained how Malvo had been actually prejudiced.

requirements for exhaustion" because there are no longer any state remedies "'available'" to him. *Id*. at 732 (quoting 28 U.S.C. § 2254(b)). If a federal court ignores a prisoner's procedural default in such circumstances, then what's to stop every future prisoner from doing the same—depriving the state courts of the opportunity to rule on the merits of a constitutional claim. That sort of gamesmanship is antithetical to "the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).[11]

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[11] At the inception of these habeas proceedings, Virginia argued Malvo's claims were "simultaneously exhausted and defaulted for purposes of federal habeas review." Br. in Supp. of Mot. to Dismiss 3, ECF No. 9, *Malvo v. Mathena*, No. 2:13-cv-375 (E.D. Va.). Even if Virginia had never raised procedural default—and even though Virginia has not raised the issue in this Court—"the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default, *i.e.*, a petitioner's failure properly to present an alleged constitutional error in state court, and the consequent adequacy and independence of state-law grounds for the state-court judgment." *Day v. McDonough*, 547 U.S. 198, 206 (2006) (collecting cases); *see also Granberry v. Greer*, 481 U.S. 129, 133-134 (1987) (deciding courts may raise *sua sponte* petitioner's failure to exhaust state remedies). This is such an appropriate circumstance. Malvo's procedural default "substantially implicates important values that transcend the concerns of the parties." *Hardiman v. Reynolds*, 971 F.2d 500, 503-04 (10th Cir. 1992). Ignoring Malvo's procedural default ignores "concerns of comity between sovereigns." *Id.*; *see*, *e.g.*, *Jones*, 795 S.E.2d at 723 (rejecting Virginia juvenile offender's *Miller* claim). It also ignores the victims' undeniable interest in finality. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Acknowledging Malvo's procedural default is not merely a formality. Had Malvo presented his claim to a state court, that court might have considered it on the merits. Such a court would have been bound by *Jones*, deciding there is no basis for a *Miller* claim in Virginia. According to the Virginia Supreme Court, *Miller* is "inapplicable" because "Virginia law does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else," and nothing in Virginia's law "suggests that the offender's youth be legally irrelevant to the exercise of the sentencing court's discretion." *Jones*, 795 S.E.2d at 708; *compare Miller*, 567 U.S. at 474 (faulting mandatory sentencing schemes at issue in *Miller* as preventing the sentencer from taking account of the offender's age). That state-court decision would trigger section 2254(d)(1)'s deferential standard in any future federal habeas proceeding. *See, e.g.*, *LeBlanc*, 137 S. Ct. at 1728-29.

Or perhaps the Virginia courts would have concluded Malvo's collateral attack was procedurally defaulted without reaching the merits of his claim. That, too, would warrant deference. As this Court has said time and again, respect for a State's procedural bars is essential to the State's interest in finality, and "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556. When a federal court "unsettle[s] these expectations," it "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (quotation marks and citations omitted).

B. There is no excuse for Malvo's procedural default.

1. The "novelty" of a constitutional claim is not cause for procedural default.

In the lone reference to Malvo's procedural default, a magistrate judge suggested that Malvo's procedural default is excused "because the legal basis of the claim was not reasonably available to Malvo during the time to file a state habeas." *See supra* note 10. However, it is doubtful that the "novelty" of a claim is today a valid excuse for a federal habeas petitioner's failure to present his claim to a state court. First articulated in *Reed v. Ross*, a pre-AEDPA decision, this Court has said "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Reed*, 468 U.S. at 16.

But this Court's more recent decisions, and AEDPA itself, cast doubt on *Reed*.[12] It is at odds with *Coleman*'s statement that the Court's "independent and adequate state ground doctrine" for procedurally

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[12] Since AEDPA's enactment, this Court has cited *Reed* only a handful of times and never to excuse the procedural default of a "novel" constitutional claim. In *Bousley*, for example, this Court rejected the argument that a federal prisoner's claim was "novel." 523 U.S. at 622; *see also*, *e.g.*, *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (citing *Reed* as an example of the proposition that procedural default "rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default").

defaulted claims "ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Coleman*, 501 U.S. at 732. It runs counter to *Teague*'s rejection of new procedural rules (or "novel" legal theories) as grounds for collateral relief. *See Teague*, 489 U.S. at 310 (plurality op.). It is difficult to square with Justice Thomas's opinion in *Wright v. West*, discussing how "different standards should apply on direct and collateral review," 505 U.S. 277, 292-93 (1992), including for habeas petitions raising novel claims predicated on new rules. And it is tension with AEDPA's revisions to the federal habeas statute, requiring retrospective review of the reasonableness of state-court decisions, not prospective application of new constitutional developments unforeseen by the state courts. *See Williams v. Taylor*, 529 U.S. 362, 410-12 (2000); *Greene*, 565 U.S. at 40 (holding later-decided Supreme Court cases are not "'clearly established Federal law' against which [a federal habeas court] could measure the [state court's] decision"). And *Montgomery* itself—requiring state habeas courts to honor *Teague*'s exception for substantive new rules—calls into question *Reed*'s expectation that state prisoners may raise such novel claims for the first time in federal court. *See Montgomery*, 136 S. Ct. at 731-32.

After *Montgomery*, the novelty of a claim at most justifies a federal court's decision to stay a federal habeas proceeding while the petitioner exhausts that new claim in state court. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *see also*, *e.g.*, *Malvo*, 259 F. Supp. 3d at 332-33 (applying *Rhines* to stay Malvo's Maryland habeas petition). But the novelty of a claim is not cause for avoiding state court altogether.

2. Malvo cannot establish "actual prejudice" or a "fundamental miscarriage of justice."

Even if the novelty of Malvo's claim could be cause for his procedural default, the claim is nevertheless procedurally defaulted. He cannot establish "pervasive actual prejudice," which demands a "significantly greater" showing than plain error. *Murray v. Carrier*, 477 U.S. 478, 493-94 (1986).

Applied here, the Virginia Supreme Court has held that life sentences like Malvo's were not "mandatory." *Jones*, 795 S.E.2d at 708. That is all *Miller* requires, and federal habeas is not the forum for second-guessing Virginia's highest court's interpretation of Virginia sentencing law.

Montgomery confirmed *Miller*'s limited holding: "*Miller* held that *mandatory* life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Montgomery*, 136 S. Ct. at 726 (emphasis added). To say that *Montgomery* goes a step further—extending *Miller* to discretionary sentencing schemes where an offender could (and in Malvo's case, did) put his "youth and attendant characteristics" at issue—ignores the question presented in *Montgomery*. No party asked for an extension of *Miller* in that case. No party briefed whether *Miller* extends to all fifty States' sentencing schemes, even discretionary ones. The only questions before this Court were whether *Miller* was retroactive and, if so, whether this Court could require *Miller*'s retroactive application in state habeas courts. *See Montgomery*, 136 S. Ct. at 727.

Even if *Miller* and *Montgomery* reached Virginia's sentencing scheme, those decisions confirm that a life-without-parole sentence is still constitutional for certain offenders. *See Miller*, 567 U.S. at 483. It blinks reality to say that Malvo is not one of the "rare juvenile offender[s] who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733. After defense counsel's extensive presentation of mitigation evidence, the jury in Malvo's case "found unanimously and beyond a reasonable doubt" that his crimes were vile, horrible, inhuman, and depraved. App. 71a. Having already established the depravity of Malvo's crimes, there is nothing more for the Virginia courts to do.

Nor is it necessary to overlook Malvo's procedural default to avoid a "fundamental miscarriage of justice." *Edwards*, 529 U.S. at 451. That exception is ordinarily reserved for habeas petitioners asserting they are actually innocent of their offense or their death sentence. *See Dretke v. Haley*, 541 U.S. 386, 388-89 (2004); *Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim"). But here, Malvo cannot be "actually innocent" of his non-capital sentence when that same sentence could be reimposed today. *See*, *e.g.*, *McKay v. United States*, 657 F.3d 1190, 1196-99 (11th Cir. 2011) (declining to extend "miscarriage of justice" exception to reach a non-capital sentencing claim); *see also Dretke*, 541 U.S. at 388-89 (declining to resolve whether the "miscarriage of justice" exception applies to a

petitioner asserting he is "innocent" of his non-capital sentence). Malvo has no excuse for his procedural default, and that should end this case.

III. The federal habeas writ is an equitable remedy that takes account of a petitioner's procedural default.

Even if Malvo could overcome his procedural default, the mere articulation of a constitutional claim does not automatically compel habeas relief. The federal habeas statute says the writ "'*may* be granted'—not that [it] *shall* be granted—and enjoins the court to 'dispose of the matter as law *and justice* require.'" *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part) (quoting 28 U.S.C. §§ 2241(a), 2243). That discretionary text confirms that a constitutional infirmity is a necessary but not sufficient condition for granting federal habeas relief. *See*, *e.g.*, *Stone v. Powell*, 428 U.S. 465, 493-94 (1976) (excluding Fourth Amendment claims as grounds for federal habeas relief). And while this Court's habeas jurisdiction "may be conceded, there is in every case a question whether the exercise of such jurisdiction is appropriate." *In re Lincoln*, 202 U.S. 178, 180 (1906). The exercise of that jurisdiction "is tempered by the restraints that accompany the exercise of equitable discretion." *Withrow*, 507 U.S. at 716 (Scalia, J., concurring in part and dissenting in part). This Court has exercised that discretion by considering petitioners' procedural default, finality, comity, and federalism. *Id.* at 717-18 (collecting cases). The through-line in this Court's habeas jurisprudence is that new rules do not upset old sentences. And

AEDPA's revisions confirm that even new substantive rules cannot undo old sentences when petitioners like Malvo fail to present their sentencing claims to the state courts.

A. Supervening Supreme Court precedents do not apply to procedurally defaulted claims.

Malvo denied the Virginia courts the chance to review the merits of his constitutional claim. Indeed, the last time Malvo appeared before the Virginia courts (for sentencing), the death penalty was legal.[13] But Malvo has now received his reward: federal court–ordered resentencing based on new Eighth Amendment rules. That bears little resemblance to the treatment of federal habeas petitioners who present sentencing claims to state courts, including petitioners in the Fourth Circuit. *See*, *e.g.*, *Pinckney v. Clarke*, 697 F. App'x 768, 777 (4th Cir. 2017) (dismissing petition based on petitioner's "fail[ure] to place a Virginia court on notice" of his particular *Miller* claim). Those petitioners will be subject to section 2254(d)(1)'s deferential standard of review, asking whether the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. But not Malvo.

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[13] A year after Malvo's sentencing, this Court assured the States that life imprisonment without the possibility of parole, "itself a severe sanction," was still an available substitute for the now-outlawed death penalty for juvenile offenders. *Roper*, 543 U.S. at 572.

Worse still, Virginia's highest court—now having grappled with *Miller* and *Montgomery*—disagrees that Virginia juvenile offenders are entitled to resentencing under *Miller*. *See Jones*, 795 S.E.2d at 708, 711-12. Those who present their claims to the Virginia courts will be bound by that ruling. But not Malvo.

Ignoring these disparities ignores the equitable nature of the habeas remedy. Malvo is entitled to no more searching review than federal habeas petitioners who properly present their claims to state courts. Had Malvo directly appealed his sentence, section 2254(d)(1) would have limited the federal habeas court's review to the Eighth Amendment precedents existing at the time of that direct appeal, without regard to later developments. *See Greene*, 565 U.S. at 40.[14] Presumably, his sentence would have been affirmed. And had Malvo collaterally attacked his sentence even after *Miller* and *Montgomery*, his sentence would likely still have been affirmed. The Virginia Supreme Court's decision in *Jones* is not unreasonable under section 2254(d)(1). *See Jones*, 795 S.E.2d at 708, 711-12; *see also*, *e.g.*, *LeBlanc*, 137 S. Ct. at 1728-29. But in a complete circumvention of AEDPA's design, the courts below applied something akin to *de novo* review to Malvo's defaulted claim, with all the benefits of *Miller* and *Montgomery*'s newly announced Eighth Amendment rules.

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[14] *Greene* did not reach the question whether, after AEDPA, *Teague*'s exceptions for substantive new rules or watershed rules of criminal procedure operate as extratextual grounds for federal habeas relief. *See Greene*, 565 U.S. at 39, n*. Discussed in Part III.B, they do not.

To be sure, this Court has at times reviewed federal habeas claims *de novo*. But in those cases, the state courts were given the opportunity to pass upon the merits of the federal habeas petitioners' claims. *See Cone v. Bell*, 556 U.S. 449, 472 (2009). In the "rare cas[e]" where a state court's decision is contrary to clearly established Supreme Court precedent, "AEDPA permits *de novo* review." *Johnson v. Williams*, 568 U.S. 289, 303 (2013). But this Court, even pre-AEDPA, "implicitly questioned" the application of *de novo* review to claims relying on new constitutional rules. *Wright*, 505 U.S. at 291-92 (opinion of Thomas, J.).

Here, there is no sense in applying *de novo* review (including this Court's latest Eighth Amendment precedents), when Malvo never gave the Virginia courts an opportunity to consider his claim in the first instance. In such a case, it is well within the discretion of this Court to consider the legality of his sentence based only on Eighth Amendment precedents existing at the time the sentence became final. *See Withrow*, 507 U.S. at 717-18 (Scalia, J., concurring in part and dissenting in part). Any alternative rule would reward habeas petitioners for running out the clock on their state court remedies—affording them a federal forum to attack their sentences based on new constitutional rules announced after their sentences became final. That ignores AEDPA's unifying theme that the state courts are to be "the principal forum for asserting constitutional challenges to state convictions." *Harrington*, 562 U.S. at 103. And it obliterates a State's interest in finality. *See Coleman*, 501 U.S. at 730; *Calderon*, 523 U.S. at 556.

B. *Teague*'s exception for "substantive" new rules is not a free-standing ground for federal habeas relief.

Teague is a distraction in this case, as it is in most cases. It makes no difference that *Montgomery* deemed *Miller* a "substantive" new rule under *Teague*. *See Montgomery*, 136 S. Ct. at 734. Neither *Teague* nor *Montgomery*'s gloss on *Teague* (requiring its application in *state* habeas courts) requires a *federal* habeas court to apply new rules to claims never before presented to a state court.

Federal habeas is a backward-looking enterprise, as *Teague* itself confirms. *See Teague*, 489 U.S. at 309 (plurality op.). It is not the time for derivation (or application) of new constitutional rules that could have (but were not) raised either before the prisoner's sentence became final or during the prisoner's state postconviction proceedings. It is not a substitute for a direct appeal, especially a direct appeal not taken. *See Jackson v. Virginia*, 443 U.S. 307, 332 & n.5 (1979) (Stevens, J., concurring in judgment); *Mackey*, 401 U.S. at 682-83 (Harlan, J., concurring in judgments in part and dissenting in part); *see also Brown v. Allen*, 344 U.S. 443, 545-48 (1953) (Jackson, J., concurring in judgment). Federal habeas instead focuses on the law existing at the time of the state-court proceeding. First articulated by Justice Harlan and later adopted in *Teague*, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting); *see Teague*, 489 U.S. at 310 (plurality op.) (criticizing "application of new rules to cases on

collateral review," which "*continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.").

All of the focus in federal habeas review is on the question whether "the State faithfully applied the Constitution as we understood it *at the time*." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (emphasis added). Again, that focus is critical to ensuring that the state proceedings deciding the legality of the state prisoner's custody "are the central process, not just a preliminary step for a later federal habeas proceeding." *Harrington*, 562 U.S. at 103.

With AEDPA, Congress confirmed that the benchmark for federal habeas proceedings is the law existing at the time a petitioner's sentence became final. Claims based on new procedural rules announced after finality are still off limits. *See Horn v. Banks*, 536 U.S. 266, 272 (2002). AEDPA adds to that the requirement that a state-court adjudication will not be invalidated unless it is an unreasonable application of (or contrary to) Supreme Court precedent existing *at the time* of the adjudication. *See Greene*, 565 U.S. at 40.

To be sure, the Court has avoided the particular question of whether *Teague*'s exceptions survive AEDPA—that is, whether a prisoner could get federal habeas relief for his *Miller* claim even if a state court reasonably applied this Court's pre-*Miller* precedents.[15] But AEDPA's revised text, combined

[15] Though briefed in *Whorton v. Bockting*, 549 U.S. 406 (2007), the Court dodged that question by deciding *Crawford v. Washington*, 541 U.S. 36 (2004), did not fall within *Teague*'s

with *Montgomery*'s expectation that state habeas courts will apply *Teague*, confirms that a habeas petitioner cannot depend on a "substantive" new rule in federal habeas when he never presented his claim to a state court.

AEDPA's revisions leave little doubt that a decision post-dating the last state-court adjudication on the merits—even if it announces a substantive new rule—does not warrant federal habeas relief. Had Congress intended to codify the *Teague* exceptions as grounds for upsetting state-court judgments, it knew how to do so. Both AEDPA's exceptions for second-or-successive petitions and its statute of limitations echo *Teague*: permitting successive and otherwise untimely petitions relying "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A); *see id.*, § 2244(d)(1)(C). Similarly, section 2254(e)(2) anticipates that "a new rule of constitutional law," if "made retroactive by this Court," may be grounds for an evidentiary hearing if other requirements are also met.

But no such language appears in section 2254(d)(1), AEDPA's standard of review for claims adjudicated on the merits in state courts. Instead, section 2254(d)(1) refers to the reasonableness of

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exception for watershed procedural rules. *See Whorton*, 549 U.S. at 421. For similar reasons in *Greene*, the Court had no need to resolve "[w]hether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*." *Greene*, 565 U.S. at 39 n.* (citation omitted).

state-court adjudications in the past tense, "requir[ing] an examination of the state-court decision at the time it was made." *Cullen*, 563 U.S. at 181-82. Congress deliberately excluded new Supreme Court decisions announced after the state court adjudicated the merits of a prisoner's claim as grounds for relief. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks omitted)).

That is not to say AEDPA altogether forecloses claims based on new substantive rules. If a habeas petitioner presents such a claim to a state court—and if not procedurally barred—then a federal habeas court may later review the state court's decision, asking whether it was an "unreasonable application of" or "contrary to" the new rule. 28 U.S.C. § 2254(d)(1). This is what *Montgomery* envisions.[16]

Montgomery—separate from its discussion of *Miller*—holds "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." *Montgomery*, 136

[16] Additionally, the Virginia General Assembly could create a special procedure for prisoners sentenced before *Miller* to raise a *Miller* claim on collateral review, just as it did for *Atkins* claims. *See Burns v. Warden of Sussex I State Prison*, 609 S.E.2d 608, 609 (Va. 2005) (discussing Va. Code § 8.01-654.2); *see also Atkins v. Virginia*, 536 U.S. 304 (2002). But that is Virginia's choice, not the choice of the federal courts.

S. Ct. at 729 (emphasis added).[17] But nothing in *Montgomery* requires state collateral review courts (or federal courts reviewing those state-court judgments) to ignore a State's procedural rules limiting the availability of state postconviction relief. *Montgomery* leaves a State's procedural requirements intact by clarifying that the state courts "may not deny a controlling right asserted under the Constitution, assuming the claim is *properly presented* in the case." *Id.* at 732 (emphasis added). In other words, courts must give effect to a rule like *Miller*, but *only if* the claim is "properly presented." *Id.* For a prisoner like

[17] *Montgomery* also described *Teague*'s exception for substantive new rules as "best understood as resting upon constitutional premises" and said state courts have "no authority to leave in place a conviction or sentence that violates a substantive rule…." *Montgomery*, 136 S. Ct. at 729, 731. But the notion that the Constitution requires state courts (let alone federal courts) to vacate state prisoners' then-lawfully imposed sentences contradicts the traditional understanding of the scope of the habeas writ. For most of this country's history, federal habeas relief for state prisoners in custody pursuant to a state-court judgment was substantially limited, if not foreclosed. *See Felker v. Turpin*, 518 U.S. 651, 663-64 (1996); *see*, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830) (Marshall, C.J.). As Justice Scalia put it, "Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription." *Montgomery*, 136 S. Ct. at 739-41 (Scalia, J., dissenting). The notion that such relief is constitutionally required would also cast serious doubt on section 2254(d)(1)'s constitutionality, which can only be read to exclude new rules announced after the state court's adjudication. *See supra* pp. 28-29. In any event, *Montgomery*'s clarification that such claims must be "properly presented," 136 S. Ct. at 732, assures courts that they do in fact have the authority to leave in place a sentence in some circumstances even if sentencing violated a substantive new rule.

Malvo, *Montgomery* does not require a state court to ignore his failure to abide by the State's procedural rules. *Compare id.* at 726-27 (noting Louisiana courts had considered motions to correct illegal sentences). *A fortiori*, there is no constitutional requirement compelling a federal court to consider that procedurally defaulted claim. *See Coleman*, 501 U.S. at 730 ("When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review.").

It makes little sense to allow Malvo to take advantage of *Miller*'s "new rule" when AEDPA prohibits a prisoner who has properly presented his claim to the state courts from doing the same. The disparity is not merely hypothetical. Compare these proceedings with Malvo's ongoing habeas proceedings in Maryland. Malvo is currently exhausting his *Miller* claim for six other life-without-parole sentences in Maryland state court. *See Malvo*, 259 F. Supp. 3d at 333. If a state court adjudicates his claim on the merits and he loses, Malvo can resume his Maryland federal habeas proceedings. But he will face section 2254(d)(1)'s relitigation bar. Before ordering Malvo resentenced, the Maryland federal habeas court must decide "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington*, 562 U.S. at 102. That inquiry looks nothing like that of the Fourth Circuit's in this case.

Resentencing Malvo affords him every procedural advantage even though he broke every procedural rule. He did not directly appeal, he did not file a motion for state postconviction relief, and he let nearly a decade pass without arguing that his sentence was unconstitutional. He waited until someone else made that argument for him in *Miller*. And what resulted? He received the equivalent of direct review in a federal court, without any regard to the fact that courts would have considered his sentence constitutional at the time it was imposed or that the Virginia Supreme Court would consider that sentence constitutional even now. Malvo's sentence should be left in place, and his petitions dismissed.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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