No. 18-217

IN THE

Supreme Court of the United States

RANDALL MATHENA,

Petitioner,

v.

LEE BOYD MALVO,

Respondent.

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

BRIEF OF AMICI CURIAE CURRENT AND FORMER PROSECUTORS, DEPARTMENT OF JUSTICE OFFICIALS, AND JUDGES IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are current and former federal, state, and local prosecutors, Department of Justice officials, and judges with experience prosecuting, establishing policy for prosecuting, and sentencing in violent crime cases, including those committed by juveniles. As experienced prosecutors and judges, amici understand that the rule of law and institutional integrity are indispensable to the legitimacy of the justice system. Although homicide is a horrific crime, permanently ending a person's life and forever altering the lives of others, amici also understand that the rule of law and institutional integrity rely on the fair and evenhanded application of the law to all offenders.

This Court made clear in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), that the severe penalty of life without parole must be reserved for the rare juvenile homicide offender whose crimes reflect irreparable corruption rather than the transient immaturity of youth, and cannot be imposed constitutionally unless the sentencer first considers whether the salient characteristics of youth warrant a lesser sentence. Amici have an interest in the uniform application of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties received timely notice of the filing of this brief and consented to its filing.

this directive to all juvenile homicide offenders, without regard to whether they were sentenced under a mandatory or discretionary sentencing scheme. The disparate treatment urged by Petitioners would jeopardize the stability and predictability of the law and undermine principles of fairness crucial to the integrity of the criminal justice system.

SUMMARY OF ARGUMENT

Prosecutors and judges recognize that every homicide is tragic for victims and survivors. The punishment for those found guilty of such crimes should reflect the seriousness of the offense. But prosecutors and judges also have a strong interest in ensuring that those punishments are fair and proportionate, taking into account not only the circumstances of the crime and its impact on victims and survivors, but also the characteristics and culpability of the offender.

In a series of decisions culminating in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), this Court recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. The Court established a clear rule that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity" and therefore violates the Eighth Amendment when applied to those offenders. *Montgomery*, 136 S. Ct. at 735; *Miller*, 567 U.S. at 470, 479–80 (before sentencing a juvenile to life without parole, a sentencer must "distinguish[] . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'"). Accordingly, a sentence must "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476. This constitutional principle carries equal weight regardless of whether the initial sentencing occurred under a mandatory or discretionary scheme.

Applying this rule to all juvenile offenders will ensure that no child "whose crimes reflect the transient immaturity of youth," *Montgomery*, 136 S. Ct. at 734, receives a constitutionally disproportionate sentence.

The Commonwealth and its amici argue that, after having made clear that a sentence of life without parole is unconstitutional for the "vast majority" of juvenile offenders, *Montgomery*, 136 S. Ct. at 734, this Court should now ignore that holding and narrowly focus on the purportedly fact-specific outcomes in *Miller* and *Montgomery*. But this approach violates the longstanding rule that, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 66–67 (1996). Moreover, even if one disagrees with the underlying rationale in *Miller* and *Montgomery*, the integrity of the criminal justice system is based on its uniform and fair application. To create a double standard now, in which juveniles sentenced under state rules that prescribe mandatory sentences receive greater protections than those sentenced under discretionary regimes, would undermine the principles on which our criminal justice system is based, adversely impacting the ability of law enforcement, prosecutors, and judges to carry out their responsibilities effectively.

ARGUMENT

I. PROPORTIONATE SENTENCING PRINCIPLES FORBID THE MOST SEVERE PUNISHMENTS FOR MOST JUVENILE OFFENDERS

The Eighth Amendment's prohibition of cruel and unusual punishment "flows from the 'basic precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Miller* v. *Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper* v. *Simmons*, 543 U.S. 551, 560 (2005)). Therefore, when proscribing a particular punishment for a particular category of offenders, this Court considers "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Graham* v. *Florida*, 560 U.S. 48, 67 (2010).

As experienced prosecutors and judges, amici understand that proportionality in sentencing is important to the credibility of the criminal justice system. And although homicide is the most heinous of crimes—permanently ending a person's life and forever altering the lives of others—amici also understand that the culpability of juveniles is often different from that of adults. Disproportionate sentences undermine the perception that justice has been done in a particular case and give the impression of unfairness on a broader scale. As Justice Frankfurter put it, "justice must satisfy the

appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

Consistent with this principle, in a series of decisions spanning just over a decade, this Court has recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S at 471. Thus, some sentences that may be appropriate for adults are invalid under the Eighth Amendment when imposed on juvenile offenders.

First, in *Roper* v. *Simmons*, the Court held that the Eighth Amendment prohibits capital punishment for crimes committed by juveniles because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." 543 U.S. 551, 572–73 (2005). The Court extended the logic of *Roper* in *Graham* v. *Florida* to bar sentences of life imprisonment without the possibility of parole for non-homicide offenses committed by juveniles. In doing so, the Court noted that, like a capital sentence, a sentence of life without parole "alters the offender's life by a forfeiture that is irrevocable" and that the "twice diminished moral culpability" of a juvenile non-homicide offender undermines the justification for such a severe sentence. 560 U.S. at 69. Finally, in *Miller* v. *Alabama* and as further explained in *Montgomery* v. *Louisiana*, this Court set out a clear rule for homicide child offenders: "[L]ife without parole is an excessive sentence for children whose crimes reflect transient immaturity" and therefore violates the Eighth Amendment when applied to those offenders.

Montgomery v. *Louisiana*, 136 S. Ct. 718, 735 (2016); *see also Miller*, 567 U.S. at 470, 477–80.

The Commonwealth and its amici now argue that *Miller* and *Montgomery* should be read to invalidate only those life-without-parole sentences imposed on juveniles under *mandatory* sentencing schemes, and that those under "discretionary" schemes suffer no constitutional infirmity. But this Court could not have been clearer that *any* child whose crime reflects transient immaturity—regardless of the sentencing procedure used—is constitutionally ineligible for life without parole, and that, at a minimum, "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735. Backtracking from that rule now would create an untenable double standard in the nation's administration of criminal justice under which juveniles receiving the same sentence are treated differently based solely on whether their state has a mandatory or discretionary sentencing scheme. Such a result would disregard this Court's clearly articulated rule and allow the persistence of disproportionate sentences that the Eighth Amendment forbids. Moreover, its blatant unfairness would undermine trust in the criminal justice system, ultimately making it more difficult for prosecutors, law enforcement officials, and judges to do their jobs.

This Court in *Miller* plainly stated that, before sentencing any juvenile homicide offender to life without parole, a sentencer must "take into account

how children are different [from adults], and how those differences counsel against irrevocably sentencing [that child] to a lifetime in prison." *Miller*, 567 U.S. at 480. The Court reiterated three key differences between children and adults that its previous cases had recognized:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievable depravity."

Id. at 471 (quoting *Roper*, 543 U.S. at 569–70) (brackets and citations omitted). Because of these differences, a sentencer must "distinguish[] . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479–80. Accordingly, this Court observed that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.*

Although *Miller* specifically addressed mandatory schemes, which, by their very nature, do not allow the sentencing court to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it," *id.* at 476, the reasoning that dictated *Miller*'s outcome is applicable to all juveniles at sentencing: *i.e.*, that life without parole may be unconstitutionally disproportionate if imposed without distinguishing between juveniles whose crimes reflect "unfortunate yet transient immaturity" and those rare juvenile offenders whose crimes reflect "irreparable corruption." *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573, and *Graham*, 560 U.S. at 68).

Four years later, this Court in *Montgomery* concluded that the constitutional rule announced in *Miller* was a "substantive" rule under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989), because 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." *Montgomery*, 136 S. Ct. at 734 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989)). As the Court explained, such a rule applies retroactively 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." *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004)) (brackets and internal quotation marks omitted). Moreover, the Court made clear that, under *Miller*, "[e]ven 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." *Montgomery*, 136 S. Ct. at 734 (internal quotation marks omitted). Accordingly, "*Miller* did bar life without parole . . . *for all but the rarest of juvenile offenders*, those whose crimes reflect permanent incorrigibility." *Id.* (emphasis added).

This rule carries no less weight for juveniles who were sentenced under state law that does not mandate a sentence of life without parole for their offense. The categorical ineligibility of juveniles who are not irreparably corrupt for sentences of life without parole and the necessity of a hearing to make such a determination cannot square with the formalistic and unprincipled approach urged by the Commonwealth and its amici. Having been in positions of advocating for, setting policy on, and imposing juvenile sentences, amici have considered the substantive rule announced in *Miller* and *Montgomery* to be binding in all juvenile homicide cases, as it should be. Constitutional principles of proportionality and fairness require it.

II. INSTITUTIONAL INTEGRITY DEMANDS THAT THIS COURT REJECT THE COMMONWEALTH'S INVITATION TO IGNORE THE RULE IN *MILLER* AND *MONTGOMERY*

Throughout our careers, amici have understood what the law is by reading this Court's opinions—both the results and the rationale explaining those results. In explaining its decision to invalidate the sentences in *Miller* and *Montgomery*, this Court stated clearly and repeatedly that the Eighth Amendment bars life without parole for any juvenile

whose crime reflects the transient immaturity of youth. This Court should reject the Commonwealth's proposal to discard the very portions of *Miller* and *Montgomery* that give those opinions meaning, and to permit disproportionate sentences in certain states while outlawing them in others.

A. The Commonwealth's Approach Violates the Longstanding Rule That Both a Case's Result and the Rationale Essential to That Result are Binding

The Commonwealth stakes its case on convincing this Court to ignore crucial portions of *Miller* and *Montgomery*. In particular, it urges the Court to focus on the narrow outcome of those cases by confining them to their facts and disregarding altogether their underlying rationale. This approach runs counter to the well-established rule that both a case's specific result *and* the rationale necessary to that result have binding effect in subsequent cases.

The Commonwealth's proposal to ignore the rationale in *Miller* and *Montgomery* is at odds with this Court's longstanding recognition that the outcome in a particular case cannot be treated as if in a vacuum. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) ("[W]hen the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself."). Rather, when the Court decides cases, it "adhere[s] . . . to the well-established rationale upon

which the Court based the results of its earlier decisions." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 66–67 (1996). Accordingly, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Id.*; *see also Burnham* v. *Superior Court of California, Cty. of Marin*, 495 U.S. 604, 613 n.2 (1990) (plurality) (noting that the Court's explanation of the basis of a judgment is binding); *County of Allegheny* v. *American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part) (explaining that the Court generally "adhere[s] not only to the holdings of our prior cases, but also to their explications of the governing rules of law"). This method of decision making promotes the efficient and coherent development of the law over time, "eliminating the need to relitigate every relevant proposition in every case." *See Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

Notwithstanding this well-established practice, the Commonwealth urges this Court to focus solely on the narrow outcome in *Miller* and *Montgomery*: the invalidation of three juvenile life-without-parole sentences imposed under mandatory sentencing schemes. Pet. Br. 18–23, 32–33. But far from having had "no impact on" the outcome of *Miller* and *Montgomery*, Pet. Br. 31, all of the reasoning that the Commonwealth would now discard was indispensable to the result in those cases. That reasoning thus is binding in subsequent cases, including this one.

Among other things, the Commonwealth's approach requires disregarding *Miller*'s mandate that sentencers "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480. It also necessitates ignoring *Miller*'s unambiguous directive that sentencers must distinguish "between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479–80. These propositions mandated the invalidation of Alabama's mandatory sentencing scheme, which, "by [its] nature," precluded sentencers from making these determinations. *Id.* at 476.

Likewise, the Commonwealth's position also requires ignoring the very rationale that led to the result in *Montgomery*. Specifically, the Commonwealth would have this Court now disregard *Montgomery*'s explanation that *Miller* necessarily announced a substantive rule with retroactive effect because 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." *Montgomery*, 136 S. Ct. at 734 (quoting *Penry*, 492 U.S. at 330). The Commonwealth's argument flies in the face of *Montgomery*'s next sentence, which made clear that this rationale dictated its ultimate conclusion: "*As a result*, *Miller* announced a

substantive rule of constitutional law." *Id.* (emphasis added).[2]

The Commonwealth thus would have this Court eviscerate key portions of *Miller* and *Montgomery*—including their foundational rule that the Eighth Amendment prohibits imposing a sentence of life without parole on any juvenile whose crime reflects the transient immaturity of youth. This Court should decline this invitation, which runs contrary to this Court's longstanding general practice of giving binding effect to both a case's outcome and the reasoning necessary to that outcome.

The Commonwealth's amici similarly have taken positions that would require upending *Miller*, *Montgomery*, and other settled law in violation of this Court's usual practice. This Court should reject these arguments for all of the same reasons discussed previously. For example, like the Commonwealth, the United States attempts to bifurcate the outcome and the rule in *Miller* and *Montgomery*, emphasizing the mandatory nature of the sentencing schemes in those

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[2] To the extent the Commonwealth suggests that this reasoning is not binding because it is the Court's post hoc interpretation of its rationale in a previous case, that argument lacks merit. As demonstrated above, *Montgomery* reaffirmed the rule this Court announced in *Miller*. At any rate, this Court's interpretation of the significance of its own decisions, when it constitutes reasoning necessary to the outcome in a case, is entitled to stare decisis effect. *See CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 447 (2008) (treating the Court's rationale in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167, 176 (2005), as an authoritative interpretation of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969)).

cases at the expense of the essential underlying rationale. U.S. Br. 22–28. In the alternative, the United States suggests that this Court adopt a wholly new rationale for *Montgomery*'s conclusion that the rule in *Miller* is retroactive—a rationale that this Court could have, but did not, adopt in 2016 when it decided *Montgomery*. *See* U.S. Br. 28 (suggesting that the Court "clarify[] that *Montgomery*'s holding rests on the narrow rationale set forth in the government's brief in *Montgomery*"); *see also* U.S. Br., *Montgomery* v. *Louisiana*, No. 14–280, 13–25 (July 2015) (proposing an alternative rationale that this Court did not adopt in *Montgomery*).

Similarly, a brief filed on behalf of several States rests heavily on the argument that the bedrock "proposition that the Eighth Amendment prohibits 'disproportionate' sentences" is "in serious tension with the historical evidence of the Amendment's meaning." Indiana Br. 5. In essence, the States' approach would have this Court overturn recent binding precedent to permit sentences of life without parole even under mandatory schemes, with devastating effect to the rule of law and this Court's legitimacy. Similarly, the Criminal Justice Legal Foundation urges this Court to reconsider *Miller's* and *Montgomery*'s core conclusions that children under the age of 18 are constitutionally different for sentencing purposes. In addition, it argues that a line of cases requiring individualized sentencing from the mid-1970s on which *Miller* relied "is a train wreck and should be scaled back." CJLF Br. 21–23, 23–26. These arguments, untethered to the issues at bar here and directly contrary to this Court's jurisprudence, do not support reversal.

B. Predictability and Fairness Require Giving Binding Effect to the Rationale of *Miller* and *Montgomery*

1. It is for good reason that this Court generally gives stare decisis effect to both a case's outcome and its necessary rationale. Doing so "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Gamble* v. *United States*, 139 S. Ct. 1960, 1969 (2019) (internal quotation marks omitted). Moreover, the practice of "confining cases to their facts" presents significant dangers, including the erosion of stare decisis and unprincipled decision making by lower courts. *See* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865 (2019). The Commonwealth's position that the rationale necessary to the outcomes of this Court's cases should not be given binding effect gives rise to these precise dangers. In amici's experience, this kind of disparate and outcome-based application of the law lessens public confidence in the predictability and fairness of the criminal justice system. The Court should reject the Commonwealth's argument and continue to adhere to the rule it announced in *Miller* and reaffirmed in *Montgomery* for all juvenile offenders.

When the Court "adhere[s] . . . to the well-established rationale upon which [it] based the results of its earlier decisions," *Seminole Tribe of Florida*, 517 U.S. at 66–67, it ensures the predictable development of the law and guarantees that similarly situated litigants are, as a general matter, treated

similarly. *See Moragne*, 398 U.S. at 403. If this Court were to ignore its rationale in *Miller* and *Montgomery*, it would free lower courts to do the same, leading to inconsistent and potentially unfair results.

This Court has held unambiguously that "life without parole [is] an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734. Multiple state and lower courts appropriately have taken that rule at face value, applying it to all juvenile offenders, including those sentenced under nominally discretionary regimes.[3] The United States, too, has relied on that rule in its representations to federal courts, conceding (until now) that *Miller* and *Montgomery* apply to all juveniles sentenced to life without parole, regardless of the particulars of the sentencing schemes. U.S. Br. 21-22; *see also, e.g.*, *Mejia-Velez* v. *United States*, 320 F.Supp.3d 496, 505 (E.D.N.Y. 2018) (noting the United States' concession that *Miller* and *Montgomery* applied to discretionary sentences). To back away now from the constitutional rule announced in *Miller* and *Montgomery* would undercut reliance on this Court's precedent by lower courts and prosecutors like amici.

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[3] *See, e.g.*, *Malvo* v. *Mathena*, 893 F.3d 265 (4th Cir. 2018); *Mejia-Velez* v. *United States*, 320 F.Supp.3d 496, 505 (E.D.N.Y. 2018); *Jessup* v. *Ryan*, 2018 WL 4095130, at *10 (D. Ariz. 2018); *Lewis* v. *Wolfe*, 2017 WL 1354938, at *3 (E.D. Pa. 2017); *People* v. *Holman*, 91 N.E.3d 849, 861 (Ill. 2017); *Windom* v. *State*, 398 P.3d 150, 155 (Idaho 2017); *Steilman* v. *Michael*, 407 P.3d 313, 315 (Mont. 2017); *Luna* v. *State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *Veal* v. *State*, 784 S.E.2d 403, 410 (Ga. 2016); *Landrum* v. *State*, 192 So. 3d 459, 466 (Fla. 2016).

The Commonwealth's argument also has implications for this Court as an institution. At bottom, applying a uniform, predictable standard across cases helps to preserve this Court's institutional integrity. For all of the reasons discussed above, encouraging stability in the development of the law goes a long way toward "maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne*, 398 U.S. at 403. And specifically giving a case's underlying rationale stare decisis effect "ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986). That stability "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Id.* at 265–66.

2. These principles—uniformity, the predictable development of the law, its evenhanded application, and the integrity of the courts—are crucially important, especially in the arena of criminal justice. These interests foster public confidence in the justice system by dispelling the perception that the law is being applied in an arbitrary and unfair manner. In particular, applying a consistent, uniform rule in similar cases not only engenders equal treatment of similarly situated defendants but also creates "the appearance of equal treatment." Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. at 1178.

This public *perception* of fairness is nearly as important to the legitimacy of the justice system as fairness itself. Indeed, "[w]hen a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it is *seen to be so*." *Id.*; *see also Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *Press-Enterprise Co.* v. *Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508 (1984) (discussing the importance of "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system").

Failure to apply a uniform rule—such as that announced in *Miller* and reaffirmed in *Montgomery*—undermines the impression that justice has been done in a particular case and gives the impression of unfairness on a broader scale. It has the practical effect of lessening the value of prior decisions, presenting similar dangers to the practice of directly overruling precedent, which threatens to "overtax the country's belief in the Court's good faith." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866 (1992); *see also* Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107, 1111 (1995) ("The more overruling there is, the less confidence the public may have in the correctness of current decisions.").

In amici's experience prosecuting and presiding over criminal cases, the effectiveness of the criminal justice system relies heavily on public confidence in its equitable application. The people most adversely

impacted by crime are often from communities where crime is more prevalent. It is not uncommon for victims and witnesses on whom prosecutors and courts rely, or their family members or friends, to have been charged with a crime at some point. The willingness of these victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully depends in part on their confidence that the judicial system will treat them and their loved ones fairly. The uneven application of life without parole—the harshest sentence a juvenile can receive, "alter[ing] the remainder of his life 'by a forfeiture that is irrevocable,'" *Miller*, 567 U.S. at 474–75—based solely on whether their state has a mandatory or discretionary sentencing regime, undermines any claim of fairness in the treatment of similarly situated offenders. And the perception of unfairness causes lasting damage to the legitimacy of the criminal justice system and the credibility of those entrusted to prosecute and adjudicate crimes within it.

The Commonwealth's approach in this case would do violence to the principles that are essential to public confidence in the justice system. This Court twice has made clear that the Eighth Amendment bars life without parole for juveniles whose crimes reflect the transient immaturity of youth—in the Court's words, "the vast majority of juvenile offenders." *Montgomery*, 136 S. Ct. at 734. But now, despite this Court's clear language, the Commonwealth seeks to treat a significant number of juvenile offenders differently from the juveniles whose sentences were at issue in *Miller* and

Montgomery. Such an approach necessarily creates both the reality and the appearance of unequal treatment—and flies in the face of the Court's unambiguous directive that its rule applies to *all* juvenile offenders. *Montgomery*, 136 S. Ct. at 734 ("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." (internal quotation marks omitted)).

* * *

Amici recognize that the crimes Respondent Lee Boyd Malvo committed were reprehensible, deprived blameless people of their lives, and caused unimaginable suffering by their families. Malvo was 17 years old when he committed the offenses. He was sentenced to life without parole without any consideration of whether he was "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct at 733. No hearing was held to consider Malvo's youthful characteristics and, accordingly, no determination was made that his crimes reflected "irreparable corruption" rather than the "transient immaturity of youth." *Id.* at 734. This Court has made it clear that imposition of a sentence of life without parole on a juvenile offender is unconstitutionally disproportionate without such a determination.

Although amici take no position on the appropriate sentence that should be applied in this

particular case, amici believe that the Constitution, the rule of law, and the integrity of the justice system require that a sentencer in Virginia, no less than sentencers in Alabama and Louisiana, must consider an offender's youth and make the appropriate findings before imposing a life-without-parole sentence. Malvo should be granted a new sentencing hearing that comports with this Court's constitutional rule.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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AUGUST 27, 2019

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Bobbe J. Bridge, former Justice, Supreme Court of Washington State.

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John Geise, former Chief of the Professional Misconduct Review Unit, U.S. Department of Justice; former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia; former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Maryland.

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Mark Gonzalez, District Attorney, Nueces County, Texas.

Andrea Harrington, District Attorney, Berkshire County, Massachusetts.

Peter Holmes, City Attorney, Seattle, Washington.

Bruce Jacob, former Assistant Attorney General, State of Florida.

Gerald Kogan, former Chief Justice, Supreme Court of Florida; former Judge, Eleventh Judicial Circuit of Florida; former Assistant State Attorney, Dade County, Florida.

Lawrence S. Krasner, District Attorney, Philadelphia, Pennsylvania.

Miriam Aroni Krinsky, former Chief, Criminal Appeals Section, U.S. Attorney's Office for the Central District of California; former Assistant U.S. Attorney, U.S. Attorney's Office for the Central District of California; former Chair, Solicitor General's Advisory Group on Appellate Issues.

Corinna Lain, former Assistant Commonwealth's Attorney, Richmond, Virginia.

Alex Little, former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia; former Assistant U.S. Attorney, U.S. Attorney's Office for the Middle District of Tennessee.

Mary B. McCord, former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security, U.S. Department of Justice; former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney's Office for the District of Columbia.

Kenneth Mighell, former U.S. Attorney for the Northern District of Texas.

Wendy Olson, former U.S. Attorney for the District of Idaho.

Stephen M. Orlofsky, former Judge, U.S. District Court for the District of New Jersey.

Terry L. Pechota, former U.S. Attorney for the District of South Dakota.

Jim Petro, former Attorney General, State of Ohio.

Ira Reiner, former District Attorney, Los Angeles County, California; former City Attorney, City of Los Angeles, California.

James Reynolds, former U.S. Attorney for the Northern District of Iowa.

James G. Richmond, former U.S. Attorney for the Northern District of Indiana.

Rachael Rollins, District Attorney, Suffolk County, Massachusetts.

Heidi Rummel, Director, Post-Conviction Justice Project; former Assistant U.S. Attorney, U.S. Attorney's Office for the Central District of California; former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia.

Barry Schneider, former Judge, Maricopa County Superior Court, Arizona.

Kevin H. Sharp, former Chief Judge, U.S. District Court for the Middle District of Tennessee.

Carol A. Siemon, former Prosecuting Attorney, Ingham County, Michigan.

Thomas P. Sullivan, former U.S. Attorney for the Northern District of Illinois.

Marsha Ternus, former Chief Justice, Supreme Court of Iowa.

Joyce White Vance, former U.S. Attorney for the Northern District of Alabama.

William H. Webster, former Judge, U.S. Court of Appeals for the Eighth Circuit; former Judge, U.S. District Court for the Eastern District of Missouri; former U.S. Attorney for the Eastern District of Missouri; former Director, Federal Bureau of Investigation; former Director, Central Intelligence Agency.

Alfred Wolin, former Judge, U.S. District Court for the District of New Jersey; former Prosecutor, Town of Westfield, New Jersey; former Special Assistant Prosecutor, Union County, New Jersey.