

No. 17-1511

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IN THE  
*Supreme Court of the United States*

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LARRY W. NEWTON, PETITIONER,

v.

STATE OF INDIANA, RESPONDENT.

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On Petition For A Writ Of Certiorari To The  
Court Of Appeals Of Indiana

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**SUPPLEMENTAL BRIEF  
FOR PETITIONER**

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## SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Rule 15.8, Petitioner Larry Newton files this supplemental brief related to *Mathena v. Malvo*, No. 18-217 (U.S.) and recently enacted legislation in Virginia. Virginia recently amended section 53.1-165.1 of the Virginia Annotated Code to allow inmates to apply for parole after serving at least twenty years of a sentence of life without the possibility of parole for a juvenile offense. H.B. 35, 2020 Assemb. Sess. (Va. 2020). The parties in *Malvo* have stipulated to a Rule 46.1 dismissal. Stipulation of Dismissal, *Mathena v. Malvo*, No. 18-217 (Feb. 24, 2020).

In light of these changes to Virginia law and the related stipulation, the Court should grant Mr. Newton's Petition, which presents nearly identical questions to those in *Malvo*. In *Malvo*, the Court had certified the following question:

Did the Fourth Circuit err in concluding – in direct conflict with Virginia's highest court and other courts – that a decision of this Court (*Montgomery*[ *v. Louisiana*, 136 S. Ct. 718 (2016)] addressing whether a new constitutional rule announced in its earlier decision (*Miller*[ *v. Alabama*, 567 U.S. 460 (2012)]) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

*Malvo*, No. 18-217 (Mar. 18, 2019). The Warden argued in *Malvo* that, at least prior to *Montgomery*, discretionary sentences of life without the possibility

of parole for juvenile offenses could not violate the Eighth Amendment. *See Malvo v. Mathena*, 893 F.3d 265, 273 (4th Cir. 2018) (“First, the Warden contends that because the *Miller* rule is limited to *mandatory* sentences of life imprisonment without parole . . . .”); Pet. 9–11, *Malvo*, No. 18-217 (filed Aug. 16, 2018) (discussing split of authority on question of discretion). That issue is squarely before this Court in Mr. Newton’s case (Pet. i), and this Court should grant the Petition to resolve it.

Mr. Newton’s case also compares favorably to the other cases presently pending before this Court with related issues. First, *United States v. Briones*, No. 19-720 (U.S.) is pending after a re-sentencing proceeding and, therefore, does not implicate the same questions concerning retroactivity that were central to *Malvo* and are at the forefront of Mr. Newton’s appeal from denial of post-conviction relief.<sup>1</sup> That case also concerns a federal sentence of juvenile life without the possibility of parole, and, therefore, necessarily does not present the State with any opportunity to raise federalism concerns. *But see Montgomery*, 136 S. Ct. at 735 (“Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue.”).

Next, *Kelly v. White*, No. 19-264 (U.S.) relies on *Miller* and *Montgomery*, but concerns a term-of-years sentence that may ultimately be shorter than the petitioner’s lifetime and was resolved at least in part on state-law grounds. Br. in Opp. 8, *White*, No. 19-264 (“the Oregon Supreme Court concluded that

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<sup>1</sup> *Robinson v. Davis*, No. 19-883 (U.S.), although relying on *Miller* and *Montgomery*, concerns a sentence of life *with* possibility of parole.

the state post-conviction statute permitted the Court to apply the merits of *Miller* and *Montgomery* to Mr. White's case.").<sup>2</sup> *White* is therefore a poor vehicle for addressing the federal constitutional questions present in both Mr. Newton's and Mr. Malvo's respective cases.

Because Mr. Newton's case squarely presents the question the Court was considering in *Malvo*, it should grant review.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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<sup>2</sup> *Kelly v. White*, No. 19-265 (U.S.) presents identical questions with identical limitations as a vehicle to resolve the questions in *Malvo*. Pet. at 1 n.1, *White*, No. 19-264 (U.S.) (noting similarity of the cases involving twin brothers who committed the underlying offense together).