No. _____

In the Supreme Court of the United States

RANDALL MATHENA, WARDEN,

Petitioner,

v.

LEE BOYD MALVO,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARK R. HERRING
Attorney General

VICTORIA N. PEARSON
Deputy Attorney General

DONALD E. JEFFREY III
Senior Assistant Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General Designate*

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us

*Admitted in California and the District of Columbia; admission in Virginia pending.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Miller* v. *Alabama*, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 465. Four years later, in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague* v. *Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when *Miller* was decided. *Montgomery*, 136 S. Ct. at 736.

The question presented is:

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*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This case involves one of the most notorious serial murderers in recent history, Lee Boyd Malvo, one of the two D.C. snipers. Relying on this Court's 2016 decision in *Montgomery* v. *Louisiana*, 136 S. Ct. 718, the Fourth Circuit concluded that Virginia must resentence Malvo for crimes for which he was sentenced in 2004. Pet. App. 28a. The basis of that decision was the Fourth Circuit's conclusion that *Montgomery* expanded the prohibition against "*mandatory* life without parole for those under the age of 18 at the time of their crimes" announced in *Miller* v. *Alabama*, 567 U.S. 460, 465 (2012) (emphasis added), to include *discretionary* life sentences as well.

Virginia's highest court has adopted a diametrically opposed interpretation of *Montgomery*. In its view, *Montgomery* did not extend *Miller* to include discretionary sentencing schemes but rather held only that the new rule of constitutional law announced in *Miller* applied retroactively to cases on collateral review. See *Jones* v. *Commonwealth*, 795 S.E.2d 705, 721, 723 (Va.), cert. denied, 138 S. Ct. 81 (2017). The Supreme Court of Virginia acknowledged that prohibiting discretionary life sentences for juvenile homicide offenders may be the next step in this Court's Eighth Amendment jurisprudence, but it concluded that both *Montgomery* and *Miller* "addressed *mandatory* life sentences without possibility of parole." *Id.* at 721 (emphasis added).

The disagreement between the Fourth Circuit and Virginia's highest court about how to interpret this

Court's recent Eighth Amendment jurisprudence is the same direct split that warranted this Court's review in *Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam). The same justifications support granting certiorari here:

> The federalism interest implicated in [federal habeas] cases is of central relevance in this case, for the Court of Appeals for the Fourth Circuit's holding created the potential for significant discord in the Virginia sentencing process. Before today, Virginia courts were permitted to impose—and required to affirm—a sentence like respondent's, while federal courts presented with the same fact pattern were required to grant habeas relief. Reversing the Court of Appeals' decision in this case—rather than waiting until a more substantial split of authority develops—spares Virginia courts from having to confront this legal quagmire.

Id. at 1729-30. (This Court's review also would resolve a broader and deeper split among the lower courts about how to interpret *Miller* and *Montgomery*. See *infra* Part II.)

This case also presents an important question about how this Court's retroactivity jurisprudence works. One of the main justifications for the strong presumption that new rules governing the conduct of criminal proceedings do not apply to cases for which direct review has already been completed is "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when

entered." *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990). The Fourth Circuit's decision here flips that principle on its head by viewing *Miller* and *Montgomery* as having *developed* the law gradually while simultaneously directing that those developments be *applied* retroactively. But unless the Court revisits its long-established "unifying theme" for "how the question of retroactivity should be resolved for cases on collateral review," *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (opinion of O'Connor, J.), the proper approach is to treat decisions about retroactivity for what they are: explanations about *why* a specific new rule of constitutional law announced in a previous decision is or is not to be applied to cases on collateral review.

The Court should grant certiorari and reverse the decision below.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2018 (Pet. App. 29a-30a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

Along with John Allen Muhammad (who was executed in 2009), respondent Lee Boyd Malvo committed one of the most notorious strings of terrorist acts in modern American history. Between September 5, 2002, and October 22, 2002, Malvo and Muhammad murdered ten people and wounded numerous others in Virginia, Maryland, and Washington, D.C. while their victims went about their daily business. "Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of the shootings had occurred at gas stations. Schools were placed on lock-down status. On one occasion, Interstate 95 was closed in an effort to apprehend the sniper." *Muhammad* v. *State*, 934 A.2d 1059, 1066 (Md. Ct. Spec. App. 2007). Malvo admitted he was the triggerman in ten of the shootings. Pet. App. 69a.

1. Malvo was indicted in two separate Virginia jurisdictions for the murders of Linda Franklin and Kenneth Bridges and the attempted murder of Caroline Seawell. C.A. App. 33-34; Pet. App. 70a-71a. Malvo was first tried for the murder of Ms. Franklin. The trial was held in Chesapeake, Virginia (having been moved from Fairfax, Virginia due to concerns about an impartial jury pool), where Malvo was convicted by a jury but spared a death sentence. Gov't C.A. Br. 11-17. The jury recommended a life-without-parole sentence, and Malvo did not ask the judge to depart from that recommendation in any respect. *Id.* at 17. After being convicted of Ms. Franklin's murder, Malvo pleaded guilty under *North Carolina* v. *Alford*, 400 U.S. 25 (1970),

with agreed life-without-parole sentences to the murder of Mr. Bridges and the attempted murder of Ms. Seawell. Pet. App. 63a-73a. Malvo did not appeal any of those convictions or sentences.

2. On June 25, 2013, Malvo filed two petitions for a writ of habeas corpus in federal court, arguing that the life sentences he received in Virginia violated the Eighth Amendment in light of this Court's then-recent decision in *Miller*. Pet. App. 76a-108a. The district court dismissed Malvo's petitions as time-barred, concluding that *Miller*'s prohibition on mandatory life-without-parole sentences did not apply retroactively to cases in which direct review had concluded when *Miller* was decided. C.A. App. 126-30, 225-29. Malvo appealed, and, after this Court's January 2016 decision in *Montgomery*, the Fourth Circuit remanded the case for further proceedings before the district court. *Id.* at 132-33.

On remand, the warden argued that *Montgomery* did not change the outcome because Virginia does not impose mandatory life-without-parole sentences like those prohibited by *Miller* and because the new constitutional rule announced in *Miller* does not extend to discretionary sentencing schemes. The district court disagreed, concluding that, after *Montgomery*, it "need not determine whether Virginia's penalty scheme is mandatory or discretionary because [it concluded] that the rule announced in *Miller* applies to *all situations* in which a juvenile *receives* a life-without-parole sentence." Pet. App. 42a (emphasis added). The district court determined that judges have an affirmative duty

to "consider the factors articulated in [*Miller* and *Montgomery*] *every time* a juvenile is sentenced to life imprisonment without parole," even if the sentence is discretionary and the defendant does not ask for such consideration. Pet. App. 46a. The court vacated all of Malvo's life sentences in Virginia and ordered him resentenced. Pet. App. 62a.

3. The Fourth Circuit affirmed. Pet. App. 30a. Like the district court, the court of appeals determined that it "need not . . . resolve whether any of Malvo's sentences were mandatory because *Montgomery* has now made clear that *Miller*'s rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence." Pet. App. 19a. And, again like the district court, the Fourth Circuit read *Montgomery* as "confirm[ing] that . . . a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'" Pet. App. 20a (citation omitted).[1]

[1] Malvo has not been resentenced, and the parties have jointly agreed to postpone any proceedings regarding resentencing until after this Court completes its review.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's decision has created a direct split with Virginia's highest court on the same important matter

1. This case presents the same split that warranted this Court's review in *Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam). In *LeBlanc*, the Fourth Circuit had granted habeas relief based on an interpretation of the Eighth Amendment rules governing sentencing of juvenile offenders that was directly contrary to a decision of the Supreme Court of Virginia. See *LeBlanc*, 137 S. Ct. at 1728. Due to the "central relevance" of "[t]he federalism interest implicated in [federal habeas] cases" and the fact that a decision denying review would have created a situation where Virginia state courts would be required to affirm sentences that federal district courts would then be compelled to set aside on federal habeas review, this Court granted certiorari "rather than waiting until a more substantial split of authority develop[ed]." *Id.* at 1729-30.

2. The same split is present here and the same course is warranted as well.

a. In *Jones* v. *Commonwealth*, 795 S.E.2d 705 (Va.) (*Jones II*), cert. denied, 138 S. Ct. 81 (2017)—a case that had been GVR'd in light of *Montgomery*, see *Jones* v. *Virginia*, 136 S. Ct. 1358 (2016)—the Supreme Court of Virginia reaffirmed its pre-*Montgomery* conclusion that the rule announced in *Miller* is limited to "*mandatory* life sentences without [the] possibility of parole." *Jones II*, 795 S.E.2d at 721. The court

further reiterated that Virginia does not impose such sentences "because Virginia law does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else." *Id.* at 708.

Jones II also squarely rejected the argument that *Montgomery* had modified or expanded the rule announced in *Miller*. "The main 'question' for decision in *Montgomery*," Virginia's highest court explained, "was . . . 'whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders' should be applied retroactively." *Id.* at 721. Because "[b]oth [*Miller* and *Montgomery*] addressed *mandatory* life sentences without possibility of parole" the court "reinstated" its pre-*Montgomery* holding that "even if *Miller* applied retroactively, it would not apply to the Virginia sentencing statutes relevant here." *Id.*; *Jones* v. *Commonwealth*, 763 S.E.2d 823, 823 (Va. 2014) (*Jones I*).

b. The Fourth Circuit was unquestionably aware of the Supreme Court of Virginia's decision in *Jones II*, because it was discussed extensively in the warden's briefs and is cited in the Fourth Circuit's opinion. See Pet. App. 19a. Nevertheless, the Fourth Circuit reached precisely the opposite conclusion. The court of appeals determined that it "need not . . . resolve whether any of Malvo's sentences were mandatory because *Montgomery has now made clear* that *Miller*'s rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence." *Id.* at 19a (first emphasis added). In the Fourth Circuit's view, "the *Montgomery* Court

confirmed that . . . a sentencing judge also violates *Miller*'s rule any time it imposes a *discretionary* life-without-parole sentence" without first making a finding of permanent incorrigibility. *Id.* at 20a (emphasis added); see *id.* at 21a (concluding that "*Miller*'s holding potentially applies to *any* case where a juvenile homicide offender *was sentenced to* life imprisonment without the possibility of parole") (emphasis added).

3. Absent this Court's intervention, courts in Virginia will be placed in the same untenable situation that existed before *LeBlanc*. Virginia state courts will be bound by the Supreme Court of Virginia's decision in *Jones II*, and thus be compelled to reject claims like those Malvo pressed here. In contrast, federal courts will be bound by the Fourth Circuit's published decision in this case, and thus be required to grant habeas relief unless the state trial court made an express permanent-incorrigibility finding—a finding that the Supreme Court of Virginia has disclaimed any need to make. This Court should grant certiorari to "spare[] Virginia courts from having to confront this legal quagmire." *LeBlanc*, 137 S. Ct. at 1730.

II. The nationwide split of authority about how to interpret *Miller* and *Montgomery* also weighs in favor of granting review

In addition to the direct conflict between the Fourth Circuit and the Supreme Court of Virginia, there is a nationwide split about how to interpret *Miller* and *Montgomery*. State high courts in Arkansas, Colorado, Georgia, Indiana, Missouri, New Mexico,

South Dakota, and Texas,[2] as well as the First, Fifth, and Eighth Circuits,[3] agree with the Supreme Court of Virginia that *Miller* does not apply to discretionary life-without-parole sentences. By contrast, the courts of last resort in Connecticut, Montana, Ohio, Oklahoma, Utah, and Wyoming agree with the Fourth Circuit that *Miller* announced a new rule that applies to all life-without-parole sentences, both mandatory and discretionary.[4] And the Seventh Circuit appears to

---

[2] *State* v. *Nathan*, 522 S.W.3d 881, 891 (Mo. 2017) (en banc); *Lucero* v. *People*, 394 P.3d 1128, 1133 (Colo. 2017), cert. denied, 138 S. Ct. 641 (2018); *State* v. *Charles*, 892 N.W.2d 915, 919 (S.D.), cert. denied, 138 S. Ct. 407 (2017); *Foster* v. *State*, 754 S.E.2d 33, 37 (Ga. 2014); *Conley* v. *State*, 972 N.E.2d 864, 876 (Ind. 2012); *Murry* v. *Hobbs*, 2013 Ark. 64, at 4, 2013 WL 593365, at *4 (Ark. Feb. 14, 2013); *State* v. *Gutierrez*, No. 33,354, 2013 WL 6230078, at *2 (N.M., Dec. 2, 2013); *Turner* v. *State*, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014).

[3] *United States* v. *Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016), cert. denied, 137 S. Ct. 2290 (2017); *Evans-García* v. *United States*, 744 F.3d 235, 240-41 (1st Cir. 2014); *United States* v. *Walton*, 537 F. App'x 430, 437 (5th Cir. 2013); see also *Davis* v. *McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015) ("*Miller* said nothing about non-mandatory life-without-parole sentencing schemes.").

[4] *Steilman* v. *Michael*, 407 P.3d 313, 315 (Mont. 2017) ("hold[ing] that *Miller* and *Montgomery* apply to discretionary sentences in Montana"), cert. denied, 138 S. Ct. 1999 (2018); *Luna* v. *State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016) ("[T]here is no genuine question that the rule in *Miller* as broadened in *Montgomery* rendered a life without parole sentence constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term, unless the sentence 'take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" (internal quotation marks and citation omitted)); *Casiano* v. *Commissioner of Corr.*, 115 A.3d 1031, 1043 (Conn. 2015); *State* v. *Houston*, 353

have gone both ways.[5] Granting certiorari here will thus resolve this widespread confusion and entrenched circuit split as well.

III. The Fourth Circuit's decision is incorrect and will have significant consequences in future cases

"It is important at the outset to define the question before [the Court]." *Renico v. Lett*, 559 U.S. 766, 772 (2010). So, to be clear: We are not asking the Court to overrule *Montgomery* or turn a blind eye to large portions of the decision. Instead, this case is about how this Court's decisions are made retroactive to cases pending on collateral review and the consequences of the decisions that make those retroactivity determinations. The question here thus could have arisen in any number of contexts in the past and likely will continue to arise in the future absent this Court's intervention: whether decisions about the retroactive *application* of new rules of constitutional law can properly be read as *expanding* the very rules whose retroactivity was being considered.

1. In recent years, the Court has held that various categories of punishment violate the Eighth Amendment's prohibition on cruel and unusual punishment based on "the evolving standards of decency

---

P.3d 55, 75 (Utah 2015); *State* v. *Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Bear Cloud* v. *State*, 334 P.3d 132, 141-43 (Wyo. 2014); see also *State* v. *Young*, 794 S.E.2d 274 (N.C. 2016).

[5] Compare *McKinley* v. *Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (applying *Miller* to discretionary sentences), with *Croft* v. *Williams*, 773 F.3d 170, 171 (7th Cir. 2014) (*Miller* is inapplicable to discretionary sentences).

that mark the progress of a maturing society." *Roper* v. *Simmons*, 543 U.S. 551, 561 (2005) (internal quotation marks and citation omitted). In 2005, the Court held that the Eighth Amendment precludes "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578. In 2010, the Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham* v. *Florida*, 560 U.S. 48, 82 (2010). And in 2012, the Court held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479.

The holdings in these cases were clear, direct, and specific: Each prohibited a particular category of punishment for a particular category of offenders. Indeed, the *Miller* Court carefully and repeatedly stated its holding in terms of *mandatory* life-without-parole sentences. See 567 U.S. at 465 ("We . . . hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); *id.* at 470 ("[M]andatory life-without-parole sentences for juveniles violate the Eighth Amendment."); *id.* at 479 ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."); *id.* at 489 ("[T]he mandatory sentencing schemes before us violate this principle of proportionality, and so the

Eighth Amendment's ban on cruel and unusual punishment.").

2. This Court has long recognized that the question of whether a new constitutional rule should be adopted or a current constitutional rule should be modified or extended is analytically distinct from whether that newly adopted or expanded rule should be applied retroactively to cases that had become final on direct review before the new rule was announced. See generally *Teague* v. *Lane*, 489 U.S. 288 (1989). Although any new rule automatically "applies to all criminal cases still pending on direct review," such rules only apply to "convictions that are already final . . . in limited circumstances." *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004). In fact, this Court applies a presumption that "new rule[s]"—defined as those "not *dictated* by precedent existing at the time the defendant's conviction became final," *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (internal quotation marks and citation omitted)—*do not* apply to cases for which direct review has already concluded. See *Montgomery*, 136 S. Ct. at 728 (stating that, "[u]nder *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced").

This presumption against retroactivity for cases on collateral review rests on a number of bases. As this Court has explained, "the application of new rules to cases on collateral review . . . *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to

then-existing constitutional standards." *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted). In addition, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Butler* v. *McKellar*, 494 U.S. 407, 414 (1990) (alterations in original) (citation omitted). *Teague*'s general rule of nonretroactivity thus respects "important interests of comity and finality." *Wright* v. *West*, 505 U.S. 277, 311 (1992) (internal quotation marks and citation omitted).[6]

This Court has repeatedly been required to decide whether a new rule is retroactive under the *Teague* framework. See, *e.g.*, *Welch* v. *United States*, 136 S. Ct. 1257 (2016) (retroactivity of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)); *Montgomery*, 136 S. Ct. at 725 (retroactivity of *Miller*); *Whorton* v. *Bockting*, 549 U.S. 406 (2007) (retroactivity of *Crawford* v. *Washington*, 541 U.S. 36 (2004)); *Beard*, 542 U.S. at 406

[6] Congress has also indicated its strong preference for finality in criminal cases in enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Carey* v. *Saffold*, 536 U.S. 214, 220 (2002) (referencing "AEDPA's goal of promoting comity, finality, and federalism") (internal quotation marks and citation omitted); see also 142 Cong. Rec. H3605-06 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) (referring to "endless appeals" that were making a "mockery of the law"); *id.* at H3609 (statement of Rep. Buyer) (lamenting petitions that "delay[ ] endlessly the carrying out of sentences handed down by judges and juries"). Among other things, AEDPA further restricted the right of habeas petitioners to file second or successive petitions in light of new constitutional rules. See *Panetti* v. *Quarterman*, 551 U.S. 930, 966 (2007).

(retroactivity of *Mills* v. *Maryland*, 486 U.S. 367 (1988)); *Schriro*, 542 U.S. at 349 (retroactivity of *Ring* v. *Arizona*, 536 U.S. 584 (2002)). In other cases, the Court has declined to entertain a habeas petitioner's claim on the merits, concluding that any decision for the petitioner would itself necessarily constitute a forbidden "new rule." See, *e.g.*, *Saffle*, 494 U.S. at 486.

3. Nothing in *Montgomery* questioned, undermined, or otherwise altered the well-established *Teague* framework. The question this Court granted certiorari to decide in *Montgomery* was "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review." Pet. i, *Montgomery* v. *Louisiana* (No. 14-280). The Court's opinion also framed the issue for decision and its holding in well-established, *Teague*-based terms. See *Montgomery*, 136 S. Ct. at 725 (describing issue before the Court as "whether [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided"); *id.* at 736 ("The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague*.").

To be sure, the Court's opinion in *Montgomery* also contains a lengthy analysis of the bases, premises, and justifications for the *Miller* rule. See *Montgomery*, 136 S. Ct. at 732-34. But the role of that discussion in the Court's analysis of the question before it was clear: to explain *why* the new rule adopted in *Miller* "indeed did announce a new substantive rule that, under the

Constitution, must be retroactive." *Id.* at 732. At no point did *Montgomery* purport to expand the rule announced in *Miller*—a step that would have been irreconcilable with the premises of *Teague*'s entire approach to retroactivity. Indeed, the Court framed the "effect" of its decision in terms of whether States would be "require[d] . . . to relitigate sentences . . . in every case where a juvenile offender received *mandatory* life without parole." *Id.* at 736 (emphasis added).

4. The Fourth Circuit's fundamental error was in viewing a decision that explained *why* the new rule of constitutional law announced in a previous decision was retroactive to cases on collateral review—a rule that was, by its terms, limited to "*mandatory* life without parole" sentences, *Miller*, 567 U.S. at 465 (emphasis added)—as *expanding* the category of punishments prohibited by the Eighth Amendment to include *discretionary* life-without-parole sentences as well. We are aware of no post-*Teague* decision by this Court endorsing such an approach (and the Fourth Circuit cites nothing in support of its decision on this issue).

But the problems with the Fourth Circuit's approach go beyond its novelty. Allowing new constitutional rules to be expanded as part of the retroactivity determination would allow the law to *develop* piecemeal while being *applied* retroactively, one of the very things *Teague* aims to prevent. See *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990) ("The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are

not later used to upset the finality of state convictions valid when entered.").

The Fourth Circuit's holding also violates another important goal of this Court's retroactivity jurisprudence by risking "disparate treatment of similarly situated defendants." *Danforth* v. *Minnesota*, 552 U.S. 264, 301 (2008) (citation omitted). It seems plausible that at least some juvenile offenders currently serving discretionary life sentences opted not to seek relief under *Miller* because *Miller*'s unequivocal statements of its holding made clear that it did not apply to them. See *supra* pp. 12-13. Because an applicant for federal habeas corpus relief "has one year from the date on which the right he asserts was initially recognized by this Court," *Dodd* v. *United States*, 545 U.S. 353, 357 (2005), the time for seeking relief based on *Miller* (which was decided in 2012) has long since passed. Accordingly, such offenders would not benefit from what was, in the Fourth Circuit's view, *Montgomery*'s substantial expansion of the underlying right initially recognized in *Miller*. This prospect only underscores why it would be deeply inequitable both to the States and to offenders who seek to file habeas petitions based on a good-faith understanding of current law to change substantive constitutional rules in a decision about retroactivity.

5. We recognize that *Montgomery* makes a number of powerful points about why juveniles should, or even must, be treated differently under the Eighth Amendment. If the Court believes that discretionary life-without-parole sentences for juveniles sometimes,

often, or even always violate the Eighth Amendment, it should follow the path of *Roper*, *Graham*, and *Miller* and take a case that is pending on direct review. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). But unless the Court intends to revisit *Teague*'s "unifying theme" for "how the question of retroactivity should be resolved for cases on collateral review," *Teague*, 489 U.S. at 300 (opinion of O'Connor, J.), the only proper approach is to treat *Montgomery* as what it is: a holding and explanation of why the particular (and clearly stated) constitutional rule actually announced in *Miller* is retroactive to cases on collateral review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK R. HERRING
Attorney General

VICTORIA N. PEARSON
Deputy Attorney General

DONALD E. JEFFREY III
Senior Assistant
Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy
Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor
General Designate*

OFFICE OF THE VIRGINIA
ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us

August 16, 2018

*Admitted in California and the District of Columbia; admission in Virginia pending.