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IN THE SUPREME COURT OF THE UNITED STATES

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HENRY MONTGOMERY, :

Petitioner : No. 14-280

v. :

LOUISIANA. :

- - - - - x

Washington, D.C.

Tuesday, October 13, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

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S. KYLE DUNCAN, ESQ., Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-280, *Montgomery v. Louisiana*.

Mr. Bernstein.

ORAL ARGUMENT OF RICHARD D. BERNSTEIN
ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

MR. BERNSTEIN: Mr. Chief Justice, and may it please the Court:

The issue is whether to decide the question of *Miller's* retroactivity in this case or in a Federal habeas case such as *Johnson v. Manis*, No. 15-1 on this Court's docket.

In today's case there is no jurisdiction over that question because the point of Section 1257 is to enforce the Supremacy Clause. And the Supremacy Clause States that when, quote, "the laws of the United States," unquote, apply, quote, "the judges" -- and this is -- these are the key words -- "in every State shall be bound thereby."

There is no such thing as supreme Federal law that depends on whether a particular State voluntarily makes Federal precedence binding. When a State does that, when a State voluntarily adopts

1 nonbinding Federal precedence, that creates no right
2 under Federal law, which is what 1257 requires, and
3 Michigan v. Long does not apply.

4 JUSTICE GINSBURG: So how would you describe
5 the adequate and independent State ground on which
6 the -- this decision rested?

7 MR. BERNSTEIN: I would say that the lack of
8 a binding Federal law question is an antecedent
9 requirement, to borrow the terminology of the S.G.'s
10 brief, before you get to the adequate and independent
11 State ground analysis.

12 JUSTICE SOTOMAYOR: So why don't we have
13 jurisdiction to answer that question?

14 MR. BERNSTEIN: You certainly have
15 jurisdiction to answer the question whether Teague is
16 constitutionally required in State collateral review
17 courts.

18 The second part of our brief said why it is
19 not constitutionally required in State collateral review
20 courts, and that's basically this Court's precedence
21 from Danforth back to the beginning in Desist and in
22 Kaufman, have said that the Teague -- what have become
23 the Teague exceptions are matters of equitable
24 discretion and not matters of the Constitution, and the
25 Federal habeas statute on its face only applies in

1 Federal court.

2 So the Federal habeas court can grant relief
3 if relief is warranted under the Teague exception.

4 JUSTICE KENNEDY: If a State says, we
5 acknowledge that we are holding a prisoner in
6 contravention of Federal law but we choose to do nothing
7 about it, then the answer is Federal habeas corpus;
8 there is not a second answer that the State can be
9 required under the Supremacy Clause, under its own
10 procedures, to enforce the Federal law?

11 And if -- if I'm -- and if I were to take --
12 to argue that second position, I'm not quite sure what
13 case I would have to support me. It wouldn't --

14 MR. BERNSTEIN: Well, I think that Your
15 Honor's opinion for the Court in Martinez v. Ryan --

16 JUSTICE KENNEDY: Yes.

17 MR. BERNSTEIN: -- 132 Supreme Court at 1319
18 to 1320 suggested that there are advantages to citing
19 the Federal habeas right in the Federal habeas statute
20 rather than what the Court called a freestanding
21 constitutional claim. A major advantage here is if you
22 say that the State courts are bound by the Teague
23 exceptions by the Constitution, then when it goes to
24 Federal habeas, there will be very deferential AEDPA
25 review.

1 If you say that the redress question, as the
2 rationale of Danforth indicated, in State court is a
3 matter of State law, then when the issue goes to Federal
4 habeas, AEDPA will not apply because the State court
5 will not have decided the Federal issue. And that is a
6 -- it is a major difference. You would actually be
7 weakening the Federal habeas statute to recognize
8 jurisdiction in this case.

9 And this Court will benefit from having de
10 novo percolation in the lower Federal courts, the lower
11 habeas courts, all of which will be out the window if
12 there's jurisdiction in this case, because the lower
13 Federal habeas courts will only be able, and the courts
14 reviewing them on appeal, to apply the highly
15 deferential AEDPA review.

16 JUSTICE KENNEDY: In effect, are you -- we
17 saying that the Supremacy Clause binds the States only
18 in direct criminal proceedings?

19 MR. BERNSTEIN: No.

20 JUSTICE KENNEDY: I mean, is that another
21 way of phrasing your argument?

22 MR. BERNSTEIN: It would be that the
23 Supremacy Clause only binds the States in direct
24 proceedings and in collateral proceedings where it's an
25 old rule, because that's the equivalent of a direct

1 proceeding. But if you are talking about the
2 retroactivity of a new rule, then the -- that's where
3 the Teague -- the two Teague exceptions apply. They
4 apply to new rules. They apply to collateral review.
5 And those are based in statutory equitable discretion
6 rather than the Constitution. But the Court has already
7 held that both direct review and the application of old
8 rules present Federal questions.

9 JUSTICE SOTOMAYOR: How do you differentiate
10 this case from Standard Oil?

11 MR. BERNSTEIN: Because in Standard Oil, the
12 issue was the underlying status of the Federal
13 government arm, and the Court said that question is
14 controlled by Federal law. Standard Oil is like Miller
15 itself, where the issue was: What does the Eighth
16 Amendment require? That's a Federal constitutional
17 issue it applied.

18 In Standard Oil, as a combination of statute
19 regulations and Federal common law, Federal law
20 controlled the question. Here the statute doesn't apply
21 in State court, as Danforth and numerous other cases
22 have held, like the Federal Rules of Evidence don't
23 apply in State court, even though many courts follow
24 similar provisions and certainly follow Federal
25 precedence in interpreting those similar rules.

1 JUSTICE SOTOMAYOR: But we did say that that
2 State could define the exemption any which way it
3 wanted.

4 MR. BERNSTEIN: Correct.

5 JUSTICE SOTOMAYOR: And so it could -- it's
6 almost identical here; we would announce what the
7 Federal law is, send it back. The State has already
8 said it's going to follow Teague, but I guess it might
9 or might not be free to change its mind about doing
10 that.

11 MR. BERNSTEIN: I think the difference and
12 what makes this case special is that this Court has held
13 since *Murdock v. City of Memphis*, almost 150 years ago,
14 87 U.S. at 326 to 327, that the 1267 jurisdiction is
15 question by question. It is not like 1331, case by
16 case. It is question by question.

17 And I do not believe the Court has
18 jurisdiction to skip over the question of whether
19 Federal law applies and then answer the hypothetical if
20 Federal law applied, what would it be. I think the
21 question of whether Federal law applies is a
22 jurisdiction question.

23 JUSTICE BREYER: How -- how -- suppose --
24 let's think of the first Teague exception. Suppose --
25 substantive matters. Suppose that many States had

1 sedition laws that make certain conduct unlawful so
2 there are a thousand people in prison. This Court in a
3 new rule holds you cannot criminalize that behavior.
4 All right. What is the law that would make that
5 retroactive to people in prison? It sounds to me that
6 it isn't like some kind of statutory discretion.
7 Rather, there are human beings who are in prison, who
8 are there without having violated any valid law, because
9 it was always protected by the First Amendment.

10 And if that's right, then it's the
11 Constitution, the Due Process Clause, that says they are
12 being held -- even though they committed the crime 22
13 years ago, they are now being held in confinement
14 without due process of law because you cannot
15 criminalize their behavior.

16 MR. BERNSTEIN: Well --

17 JUSTICE BREYER: Do you see where I'm going?

18 MR. BERNSTEIN: Yes.

19 JUSTICE BREYER: That being so, it's a
20 Federal Constitution rule, the exceptions of Teague,
21 Teague drops out of the case. The only question is
22 whether they satisfy the two exceptions.

23 MR. BERNSTEIN: Well, in your hypothetical,
24 respectfully, I don't think that would be a new rule.
25 It would be an old rule --

1 JUSTICE BREYER: I've made it a new rule.

2 MR. BERNSTEIN: If it were --

3 JUSTICE BREYER: For purposes of my
4 hypothetical, I'm making it a new rule.

5 MR. BERNSTEIN: If it were a genuinely new
6 rule --

7 JUSTICE BREYER: Yes.

8 MR. BERNSTEIN: -- then under Danforth and
9 going all the way back, the -- Justice Harlan's opinion
10 in Mackey said, we're not creating the substantive
11 exception because the Constitution requires that --

12 JUSTICE BREYER: Danforth was the case
13 saying that the States could be more generous. It
14 wasn't a case -- this is a case that -- the opposite of
15 being generous: Can they be more stingy? And I cannot
16 find anything in -- in Harlan -- maybe I'll read it
17 again, but I can't find anything there, nor can I find
18 anything in Danforth that answers the question.

19 So I thought it is a new question. Hence,
20 that question I posed to you, because I want to get your
21 response. I don't think you can answer it by means of
22 precedent. I think you have to try to figure it out
23 without the help of precedent.

24 MR. BERNSTEIN: Well, if it is a new rule,
25 the Court has held -- and sorry to cite a precedent --

1 JUSTICE BREYER: That's all right.

2 (Laughter.)

3 MR. BERNSTEIN: Linkletter has held that
4 retroactivity on collateral review is not
5 constitutional. That aspect --

6 JUSTICE BREYER: That's true. But then we
7 have Teague, and Teague is saying we don't like
8 Linkletter -- and -- and --

9 MR. BERNSTEIN: But Teague said, we don't
10 like Linkletter.

11 JUSTICE BREYER: All right. But you're
12 saying that we have -- then maybe that's wrong.

13 MR. BERNSTEIN: Because --

14 JUSTICE BREYER: I mean, why doesn't it
15 violate the Constitution to hold a person in prison for
16 20 years for conduct which the Constitution forbids
17 making criminal?

18 MR. BERNSTEIN: Well, it does violate the
19 Constitution.

20 JUSTICE SCALIA: Well, it wasn't criminal at
21 the time. I mean, it wasn't prohibited by the
22 Constitution at the time he was convicted, right?

23 MR. BERNSTEIN: Fair enough.

24 JUSTICE BREYER: That would be the reason.

25 MR. BERNSTEIN: Fair enough. But the -- the

1 Constitution, according to the cases, is satisfied by
2 the Federal habeas remedy. I think this is where
3 Schweiker v. --

4 JUSTICE BREYER: Is there anything else you
5 can say? Because I can make -- you know, I can say,
6 which witch is being a witch? There were some people in
7 Salem who were imprisoned for being a witch. And lo and
8 behold in 1820, it was held by this Court that that
9 violated the Constitution.

10 Now, you see, I just make a more outrageous
11 example of the same thing.

12 MR. BERNSTEIN: Well --

13 JUSTICE BREYER: And -- and what I want you
14 to say, okay, I got your point. It didn't violate the
15 Constitution at the time. I've also got the point you
16 have some authority.

17 Anything else?

18 MR. BERNSTEIN: This Court has been
19 reluctant, even when there is a violation of the Due
20 Process Clause, to create a judicial remedy, an implied
21 judicial remedy on top of the Federal statutory remedy.
22 That's Schweiker v. Chilicky, cited in our briefs. And
23 I think you should be especially reluctant --

24 JUSTICE KAGAN: But that's -- that's not
25 what is happening here, Mr. Bernstein -- I mean, if you

1 assume the premise of Justice Breyer's question, which
2 is that there is a Constitutional violation in keeping
3 somebody in prison for some conduct that can't be
4 criminalized.

5 The State has set up a collateral review
6 mechanism. We're not asking it to set up a new
7 mechanism that it hasn't had before. It has a
8 collateral review mechanism, and the only question is
9 whether it's going to comply with Federal constitutional
10 law in that collateral review mechanism.

11 MR. BERNSTEIN: And the other question is
12 whether that issue of retroactivity is itself a Federal
13 constitutional issue. If it is, obviously there's
14 jurisdiction. If it is not, I would submit there is not
15 jurisdiction, and that the proper remedy is Federal
16 habeas.

17 If I may reserve the remainder of my time.
18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Plaisance.

21 ORAL ARGUMENT OF MARK D. PLAISANCE

22 ON BEHALF OF THE PETITIONER

23 MR. PLAISANCE: Mr. Chief Justice, and may
24 it please the Court:

25 Miller v. Alabama established a new

1 substantive rule prohibiting mandatory life without
2 parole for juveniles, which should be applied
3 retroactively.

4 This Court has jurisdiction to hear Henry
5 Montgomery's claim because the Louisiana Supreme Court
6 relied exclusively on Federal jurisprudence.

7 In Miller, this Court held that mandatory
8 life in prison was unconstitutional. It also held that
9 life in prison would be an uncommon, rare sentence, even
10 today.

11 JUSTICE GINSBURG: Isn't it just like a
12 State saying: We have a Fourth Amendment, and the
13 Federal Constitution has a Fourth Amendment; we are
14 going to apply our own Constitution, but in applying it,
15 we will follow the Federal precedent?

16 I think we would say, in that case, the case
17 has been decided on the State constitutional ground,
18 even though the State court, in interpreting that
19 ground, is looking to Federal decisions.

20 MR. PLAISANCE: In this case, Your Honor,
21 the Louisiana Supreme Court did not state that it was
22 exercising any independent grounds at all. Under
23 Michigan v. Long --

24 JUSTICE SCALIA: I thought that the -- the
25 case it cited said that.

1 MR. PLAISANCE: Well --

2 JUSTICE SCALIA: I thought it cited an
3 earlier Louisiana Supreme Court case which made it very
4 clear that it was following the Federal rule as a matter
5 of discretion and not because -- not because it had to,
6 and it could in a later opinion decide not to follow
7 Federal law.

8 MR. PLAISANCE: It is my interpretation of
9 that earlier case that the Louisiana Supreme Court said,
10 we have a choice, and they made the choice to apply
11 Teague. In fact, they said in that opinion, we are
12 dictated by the Teague analysis. And that's what was
13 done in this case.

14 Under Michigan v. --

15 JUSTICE ALITO: Did they not say in Taylor
16 that they were not bound to follow Teague? Didn't they
17 say, we're going to follow Teague but we -- we want to
18 make it clear we're not bound to do that?

19 MR. PLAISANCE: They did say that.

20 JUSTICE ALITO: They've never -- they've
21 never retracted that, have they?

22 MR. PLAISANCE: Correct, but the choice
23 itself is not necessarily a matter of State law. While
24 the Supreme Court had the authority to make that
25 decision, it said, we believe -- by choosing Teague, we

1 believe that is the better law, and therefore, we will
2 follow the Federal guidelines from Teague, the Federal
3 jurisprudence, in doing so.

4 And I believe that under Michigan v. Long,
5 unless they state a clear and independent ground, this
6 Court can conclusively presume that they applied Federal
7 law as they believed this Court would apply --

8 JUSTICE SCALIA: Well, I thought -- I
9 thought it's unless they clearly state otherwise, we
10 will assume that they're applying Federal law. And here
11 they did clearly state otherwise. They said, we don't
12 have to follow Federal law, but we're going to model our
13 State law on Federal law. It seems to me that satisfies
14 the -- the exception requirement of -- of Michigan.

15 MR. PLAISANCE: It is my opinion that
16 Michigan v. Long indicates the reverse, Your Honor, that
17 the State must say, we are following State law in making
18 this decision. We're applying State law rather than
19 Federal law.

20 JUSTICE SCALIA: Well, they did say that
21 here. They said that. This is a matter of State law;
22 we don't have to follow Teague, but we choose to as a
23 matter of State law. I thought that's what they said.

24 MR. PLAISANCE: And I believe that that's
25 sufficient to indicate to this Court that it is applying

1 Federal law; it is not applying State law.

2 JUSTICE KAGAN: But Mr. Plaisance, I think
3 what people are saying to you is that this is different
4 from your standard Michigan v. law question -- Long
5 question. It's a different question. It's a State that
6 says, we're not bound to follow Teague, we know we can
7 do something different, but we want to follow Teague.
8 That's what we want to do.

9 And then in -- in all its particulars. All
10 right? And then the question is: If the State commits
11 to following Teague, it's not -- it doesn't think
12 anybody else has committed it. It self-commits to
13 following Teague and to following Federal law. Then
14 what happens? Is there enough of a Federal question to
15 decide this case?

16 Now, that's not a Michigan v. Long question.
17 It's more like a Merrell Dow question or something like
18 that, where Federal law is -- the State has chosen it,
19 but it's just part and parcel of the claim, because the
20 State is so committed to following Federal law in all
21 its particulars.

22 MR. PLAISANCE: I agree with Your Honor.
23 And even in Danforth, this Court said that the question
24 of retroactivity is a pure question of Federal law.

25 CHIEF JUSTICE ROBERTS: But what's --

1 MR. PLAISANCE: That --

2 CHIEF JUSTICE ROBERTS: I'm sorry. Why
3 don't you finish?

4 MR. PLAISANCE: That's the answer to -- to
5 your -- to your explanation or hypothetical, that you --
6 you said if the State decided that they were choosing
7 Federal law, then what -- what's the next step? And in
8 the next step the question is retroactivity, which both
9 the majority and the dissent in Danforth said the
10 question of retroactivity is a pure question of Federal
11 law.

12 CHIEF JUSTICE ROBERTS: Federal statutory
13 law, right? I thought that was the point of Danforth,
14 that the reason the States can go beyond what the
15 Federal interpretation is is because we're talking about
16 the Federal habeas statute. Right?

17 MR. PLAISANCE: That's correct, Your Honor,
18 but even in Yates, this Court said that on State habeas,
19 if the State considers the merits of the Federal claim.
20 And the merits of this claim are: Is Mr. Montgomery
21 serving an unconstitutional sentence? Is Miller
22 retroactive to address the fact that he's serving an
23 unconstitutional sentence?

24 JUSTICE GINSBURG: How do you deal with
25 Mr. Bernstein's point that your client would be worse

1 off if -- if you are correct? That is, if the question
2 comes up on Federal habeas, then the Federal court
3 decide -- decides it without any AEDPA problem. But if
4 the State court goes first, then the Federal review is
5 truncated.

6 MR. PLAISANCE: That would be my
7 understanding, Your Honor, that while Mr. -- while
8 Henry -- while jurisdiction in this Court does not
9 depend on what has occurred so far, it depends upon what
10 this Court does decide. But again, whether he can go to
11 Federal court or this Court doesn't affect this
12 jurisdiction that this Court, I believe, has today. And
13 the question is: If --

14 JUSTICE GINSBURG: But in -- in -- how do
15 you answer the argument: All right, suppose you're
16 right, but your victory is going to leave your client in
17 a worse position because when he gets to the Federal
18 court, he will be saddled with AEDPA?

19 MR. PLAISANCE: Well, not if this Court
20 rules it has jurisdiction and makes Miller retroactive.
21 Then obviously, at that point, he would not be going to
22 Federal court.

23 And the question is: Is Mr. Montgomery
24 being held unconstitutionally? This Court in Miller
25 said that a mandatory life-in-prison sentence is

1 unconstitutional because it fails to address the fact of
2 the matter that this Court believed kids are different.

3 JUSTICE SCALIA: Mr. Plaisance, on the
4 jurisdictional point, let me see if I understand what
5 you're arguing. A lot of State rules of procedure are
6 modeled after Federal Rules of Procedure, and a lot of
7 State courts simply follow the Federal Rules. But they
8 follow it as a matter of choice and not because they
9 think they're bound by the Federal rules.

10 So let's say that there is a -- a
11 disagreement in Federal court about what Federal Rule of
12 Evidence 403 means. The State court says, well, you
13 know, we're going to follow the -- the Federal rule, and
14 we think that the right course as between these two
15 divergent Federal courts of appeals is the Second
16 Circuit. So we're going to follow the Second Circuit's
17 interpretation of Federal Rule 403. What -- would we
18 have jurisdiction to -- to review that decision as -- as
19 a decision on a question of Federal law?

20 MR. PLAISANCE: If it was clear to this
21 Court that the State court made a conscious choice and
22 sent enough of a signal to this Court that it was
23 adopting Federal law to use as State law. But in this
24 case, there is no indication that the State of --
25 Supreme Court of Louisiana was making that decision.

1 They said that we are -- our analysis is dictated by
2 Teague, and in doing so, they found that Mr. -- they
3 would not apply Miller retroactively. That's the real
4 issue of this case.

5 JUSTICE ALITO: Suppose we hold that we can
6 review the -- the -- we have jurisdiction because the
7 State court said it was going to follow Teague. And
8 then we go on and we say that under Teague, Miller can
9 be applied on collateral review. And then the case goes
10 back to the Louisiana Supreme Court, and they say, well,
11 we said previously in Taylor that we were going to
12 follow Teague, but that was based on our understanding
13 of Teague at that time. But now that we see what it's
14 been interpreted to mean by the U.S. Supreme Court,
15 we're not going to follow Teague. Then what would
16 happen?

17 MR. PLAISANCE: I think Louisiana would be
18 bound to follow this Court's ruling as you set forth.
19 It's --

20 JUSTICE ALITO: It would be? Why? Because
21 it said that we would voluntarily follow it in Taylor?
22 That bound them?

23 MR. PLAISANCE: I think they made the
24 conscious choice to follow this Court's laws, this
25 Court's jurisprudence. In doing so, it must follow this

1 Court's jurisprudence, as I've said before.

2 JUSTICE SCALIA: They changed their mind.
3 They have now chosen the course not to follow our
4 jurisprudence. What forces them to stay where they
5 were? It's a matter of State law. They've decided,
6 we're going to change State law.

7 MR. PLAISANCE: But they didn't do that in
8 this case, Your Honor. They did not --

9 JUSTICE SCALIA: Well, not yet, but if we --
10 if we agree with you and then we send it back and they
11 look at it and they say, oh, if that's what Teague
12 means, we're not going to follow Teague, what stops them
13 from doing that? And doesn't that make us look foolish?

14 MR. PLAISANCE: No, it doesn't, Your Honor.

15 JUSTICE SCALIA: That we render decisions
16 that can be overruled by somebody else?

17 MR. PLAISANCE: If a State considers the
18 merits of a Federal claim, it must grant the relief the
19 Federal court --

20 JUSTICE SOTOMAYOR: You're not asking --

21 JUSTICE KENNEDY: But the question is:
22 What's a Federal claim?

23 MR. PLAISANCE: The Federal claim --

24 JUSTICE KENNEDY: Why didn't you cite
25 Standard Oil v. Johnson in your response to the

1 questions from Justice Scalia and Justice Alito?

2 MR. PLAISANCE: I believe my friend the
3 Solicitor General --

4 JUSTICE KENNEDY: Do I have --

5 MR. PLAISANCE: -- perhaps --

6 JUSTICE KENNEDY: -- the name of the case
7 right? Yes, Standard Oil v. Johnson.

8 MR. PLAISANCE: That was a case cited by the
9 Solicitor General. I believe my friend from the
10 Solicitor General's office can probably answer that
11 question a little bit better.

12 The point I'd like to make --

13 JUSTICE SOTOMAYOR: Are you asking us to
14 decide the question left -- left open in Danforth?

15 Danforth said that it was a minimum -- the
16 -- there could be a constitutional minimum, but it
17 wasn't answering that question.

18 Are you asking us to answer that question?

19 MR. PLAISANCE: I'm saying, Your Honor, I
20 don't believe you need to get to that question
21 because --

22 JUSTICE SOTOMAYOR: But let's assume we --
23 all right.

24 MR. PLAISANCE: Under Michigan v. Long, this
25 Court has jurisdiction.

1 I'll reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. PLAISANCE: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

5 ORAL ARGUMENT OF MICHAEL R. DREEBEN

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING PETITIONER

8 MR. DREEBEN: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This Court does have jurisdiction to decide
11 the question of Miller's retroactivity, because
12 Louisiana has voluntarily incorporated into its law a
13 wholly Federal standard.

14 And in this Court's decisions in Standard
15 Oil, Merrell Dow, Three Affiliated Tribes, and most
16 recently, Ohio v. Reiner, the Court has recognized that
17 when a State chooses to adopt Federal law to guide its
18 decisions and binds itself to Federal law, there is a
19 Federal question.

20 CHIEF JUSTICE ROBERTS: Do you think they
21 can change --

22 MR. DREEBEN: The United States --

23 CHIEF JUSTICE ROBERTS: They can change
24 their mind, right? You said "voluntarily chose to
25 follow it."

1 MR. DREEBEN: That's right.

2 CHIEF JUSTICE ROBERTS: And they can
3 voluntarily choose they're not going to follow it
4 anymore.

5 MR. DREEBEN: That's right.

6 And the same is true in any Michigan v. Long
7 case. What Michigan v. Long said is that this Court has
8 jurisdiction under Section 1257 to resolve State court
9 resolutions of Federal law, and it will presume that a
10 State constitutional decision of a mirror image, say, of
11 the Fourth Amendment, will be binding, but recognized
12 that the only circumstance in which the Court will not
13 treat Federal law as governing both questions is when
14 the State makes clear that it would reach the same
15 result under State constitutional law as it did under
16 Federal law.

17 It did not preclude the option of the State
18 going back and reaching a different decision once
19 enlightened by this Court as to the content of Federal
20 law.

21 Standard Oil is completely clear on this.
22 It says the State chose to use Federal law to determine
23 whether a Federal post exchange was a Federal
24 instrumentality. And we're going to correct its
25 understanding of Federal law.

1 But on remand, the State can now, freed from
2 its misapprehensions of Federal law, decide what it
3 thinks State law requires. And if it does that, then
4 there may be a Federal constitutional question.

5 JUSTICE BREYER: How -- how -- how does it
6 work? It -- it should be pretty elementary, but -- I
7 mean, I looked at the Indian case, and that seems a
8 little far out.

9 The -- the -- the -- though it definitely
10 gives you support on your statement here, suppose you
11 took Justice Scalia's example: We have Iowa State Rule
12 56. We interpret Iowa State Rule 56 the same way as the
13 Federal Rules of Civil Procedure. That's our rule. And
14 now this is what it means in that case. And they say,
15 but we're doing it under Iowa State rule.

16 Now, you say we can review that because they
17 said that Iowa State rule is the same as the Federal.

18 MR. DREEBEN: So I -- I --

19 JUSTICE BREYER: Is that right?

20 MR. DREEBEN: I --

21 JUSTICE BREYER: Now, I just -- how do you
22 fit that in the words in 1257?

23 MR. DREEBEN: Well, I doubt -- I doubt that
24 that would satisfy the Court.

25 There's a theoretical answer, and then

1 there's a practical answer. Let me give the practical
2 answer first.

3 The States that copy the Federal Rules of
4 Evidence and the Federal Rules of Civil --

5 JUSTICE BREYER: Yes.

6 MR. DREEBEN: -- Procedure pretty uniformly
7 say, we will treat Federal precedent as guidance in our
8 decisions as -- for its persuasive value. They
9 recognize that there are State rules of procedure and
10 State rules of evidence that will belong to the State.

11 JUSTICE BREYER: Well, they say in a
12 particular case, it's guidance. It's great guidance.
13 We agree. Our interpretation is the Federal
14 interpretation.

15 MR. DREEBEN: Well, I -- I think that --

16 JUSTICE BREYER: Now, can we review that --
17 because, in fact, it wasn't the Federal interpretation?
18 But can we review it?

19 MR. DREEBEN: I -- I --

20 JUSTICE BREYER: Yes or no?

21 MR. DREEBEN: There -- there is a
22 distinction between this case and that that may suggest
23 that this case, the Court has jurisdiction over, and
24 that one, the Court does not.

25 JUSTICE BREYER: So you say the Court does

1 not in the example of the Federal Rules of Civil
2 Procedure that Justice Scalia gave?

3 MR. DREEBEN: I think this is a stronger
4 case.

5 JUSTICE BREYER: Okay. It's a thought.

6 MR. DREEBEN: I'm doubtful that the Court
7 would have jurisdiction or choose to exercise it,
8 because -- I accept, for premises of the argument, Your
9 Honor's hypothetical. But in the real world, it doesn't
10 happen.

11 JUSTICE ALITO: Well, but when you say that
12 that's a doubtful case, I think you are implicitly
13 acknowledging that, if we adopt your argument, we are
14 going to get that case and lots of similar cases, and
15 we're going to have to parse the words that were --
16 were -- the words that were used by the State Supreme
17 Court: Well, we're following -- we're going to be
18 guided by it. We're going to be strongly guided by it.
19 We're going to adopt it. We're going to get all of
20 those cases.

21 Why should we go down that road --

22 MR. DREEBEN: Well, I think the Court --

23 JUSTICE ALITO: -- when there's a perfectly
24 available and possibly superior remedy available to the
25 Petitioner by filing a Federal habeas petition?

1 MR. DREEBEN: So there are several reasons,
2 Justice Alito.

3 First of all, I don't think that it is
4 that -- going to come up in that way to this Court,
5 because that's not the way States treat their own rules
6 of procedure. I don't think it will be very difficult.

7 There is a principle in the Court's cases
8 that when Federal law has been adopted as Federal law,
9 the Court will review it even if the State could have
10 chosen a different path.

11 So --

12 JUSTICE SOTOMAYOR: Mr. Dreeben, what's the
13 problem --

14 JUSTICE KENNEDY: Pardon me.

15 Did you misspeak? When -- when Federal law
16 is adopted as State law, the Federal courts can review
17 it. Isn't that what you meant to say? Or -- or -- I
18 mean, you're very -- you're very careful, and you don't
19 make mistakes, but I --

20 MR. DREEBEN: Well, I -- I think, Justice
21 Kennedy --

22 JUSTICE KENNEDY: You -- you said --

23 MR. DREEBEN: This is -- this is what I'm
24 trying to --

25 JUSTICE KENNEDY: -- when -- when State law

1 adopts Federal law as Federal law, then there's review.
2 Okay.

3 MR. DREEBEN: The State has adopted Teague
4 for a reason that does not exist in any of these civil
5 procedure cases, and that is that the State knows that
6 that Federal law will be applied to the very case in a
7 habeas case. So the State has decided consciously to
8 synchronize its law with the law that it knows will be
9 applied.

10 And this actually serves a very important
11 Federalism purpose. The State says, if we have to
12 rectify in -- a -- a constitutional error in our case
13 that's become final, we would like the opportunity to do
14 it. And if the Federal habeas court is going to treat
15 this decision as retroactive, we would like the first
16 crack at it.

17 California --

18 JUSTICE SCALIA: You're -- you're -- you're
19 saying "hooray" that -- that the Federal habeas court
20 will thereafter be bound by it --

21 MR. DREEBEN: No, because --

22 JUSTICE SCALIA: -- because the State got
23 there first.

24 MR. DREEBEN: No. There's an elementary
25 reason why that's not so, Justice Scalia, and this

1 answers Justice Ginsburg's question earlier.

2 2254(d) applies to State determinations on
3 the merits. That's the only time that the deference
4 provision kicks in. And a determination under Teague is
5 a threshold determination that comes before the decision
6 on the merits. This Court has said that in any number
7 of cases. It's not a merits resolution of the case. So
8 deference to a State determination on retroactivity
9 would never occur.

10 What I --

11 JUSTICE SOTOMAYOR: Could you --

12 CHIEF JUSTICE ROBERTS: I was just going to
13 suggest maybe we hear a little bit more on the merits.

14 MR. DREEBEN: Certainly, Mr. Chief Justice.

15 The -- the rule in *Miller v. Alabama*, in our
16 view, is a substantive rule, because it goes far beyond
17 merely regulating the procedure by which youths are
18 sentenced for homicide crimes. It compelled the State
19 to adopt new substantive sentencing options, an option
20 that is less severe than life without parole.

21 The only other time that this Court has ever
22 invalidated a mandatory sentencing provision was
23 *Woodson v. North Carolina* in 1976. So we went something
24 like 36 years before we had another decision that
25 concluded that the law must change to accommodate the

1 compelling interests in having the characteristics of
2 youth that mitigate culpability considered in the
3 sentencing process.

4 CHIEF JUSTICE ROBERTS: Would it be
5 enough -- is -- is it enough if the States simply say,
6 okay, with respect to people who have been mandatorily
7 sentenced to life without parole, we're going to provide
8 parole?

9 MR. DREEBEN: Yes. I believe that it would
10 be. That would be the same remedy that the Court
11 ordered in a *Graham v. Florida* case for -- which is the
12 case that held that youths who do not commit homicide
13 but are convicted of other crimes cannot be sentenced to
14 life without parole at all.

15 And the Court's remedy for that problem
16 could either be a sentence of term of years, but it
17 could also be simply converting the life-without-parole
18 sentence to a life-with-parole sentence.

19 So that would be --

20 JUSTICE SOTOMAYOR: Mr. Dreeben, how do you
21 explain how your articulation of your test wouldn't
22 apply to the guideline changes in *Booker* that we made?

23 MR. DREEBEN: So I -- I think, Justice
24 Sotomayor, the key difference is that, with respect to
25 the guidelines, there was always a -- a minimum and a

1 maximum set by statute. And the guidelines, even when
2 they were mandatory, did not preclude judges from
3 sentencing outside the guidelines, depending upon the
4 presence of aggravating or mitigating factors that
5 weren't taken into account.

6 And as Justice Alito's opinion for the Court
7 in United States v. Rodriguez recognized, even the top
8 of a mandatory guidelines range was not truly mandatory.
9 So even under the mandatory guidelines, which for Sixth
10 Amendment purposes were treated as if they established
11 elements of the offense, for the purposes that we're
12 looking at here, they are not mandatory in the same way,
13 so that Booker brought about a procedural change.

14 JUSTICE SOTOMAYOR: What is the substantive
15 difference -- if you pardon the use of that word --
16 between your formulation and Petitioner's formulation?

17 He says this is substantive because it did
18 away with mandatory life imprisonment. You're
19 articulating it slightly different. Tell me what you
20 see as the difference and why your articulation is --

21 MR. DREEBEN: Justice Sotomayor, I don't
22 think there is any substantive, to use the word,
23 daylight between Petitioner's position and ours. The
24 description of the crime at issue as punishable by
25 mandatory life imprisonment and treating that as a

1 category, I think, sums up the reality of what is
2 happening.

3 We broke it out into its component parts
4 because I think it facilitates the analysis of it to
5 understand that Miller does have a procedural component.
6 Sentencing courts must now consider the mitigating
7 characteristics of age, but it also, and more
8 fundamentally in our view, contains a substantive
9 component that required a change in the law.

10 Now, the change here was expanding the range
11 of outcomes. Previously when this Court has analyzed
12 substantive changes in the law, there have been changes
13 that restricted the form of outcome; say, for example,
14 in Justice Breyer's hypothetical, forbidding punishment
15 at all.

16 But I think that if you trace back the
17 origins of the substantive category to Justice Harlan's
18 opinion in Mackey, this is still faithful to what
19 Justice Harlan had in mind. Justice Harlan said the
20 clearest case of an injustice in not applying a rule
21 retroactively is when it puts off-limits altogether
22 criminal punishment. He did not say that it was the
23 only case.

24 And I think that if you consider what is
25 going on in Miller and the reasons for the rule, the

1 Court made very clear that it believed that of the 2,000
2 people that were in prison and under mandatory life for
3 juvenile homicide, the Court believed that that penalty
4 was frequently disproportionate, that it would be
5 uncommonly imposed in the future, and that it was not a
6 sentence that was consistent in most cases with the
7 mitigating characteristics of youth that have been
8 recognized in Roper and in Graham and then in Miller.

9 JUSTICE ALITO: Would it be accurate to say
10 that a rule is substantive if it makes a particular
11 outcome less likely or much less likely or much, much
12 less likely than was previously the case?

13 MR. DREEBEN: Probably the last, Justice
14 Alito. When -- when the Court characterized substantive
15 rules, most recently in the Summerlin opinion --

16 JUSTICE ALITO: What's the difference
17 between much less likely and much, much less likely?

18 MR. DREEBEN: Well, I would put it in the
19 words that the Court has used previously. The Court has
20 said that a substantive rule creates a significant risk
21 that the person is serving a sentence that's not
22 appropriate for that person, maybe not even legally
23 available for that purpose. It did not say absolutely
24 conclusively proves it. It said significant risk.

25 And in contrast, when the Court has talked

1 about procedural rules, rules that govern the manner in
2 which a case is adjudicated, it has said that the
3 likelihood or potential for a different outcome is
4 speculative.

5 And I think if you put this case on the
6 speculative-significant risk axis, this case falls in
7 the significant risk domain precisely because of the
8 reasons why the Court said it was deciding Miller.

9 The reasons why the Court decided Miller had
10 to do with the reduced culpability of youth and the
11 capacity of youth to mature, change, and achieve a
12 degree of rehabilitation that is consistent with
13 something less than the most harsh sentence available
14 for youths who commit murder -- a terrible crime, but
15 still the harshest sentence, the Court thought, would be
16 reserved for the worst of the worst, which is, in fact,
17 what Louisiana said when it amended its statutes
18 substantively to conform them to Miller. It said life
19 without parole should be reserved for the worst
20 offenders who commit the worst crimes.

21 And so when you combine the fact that this
22 is not a rule that -- that only governs procedure -- it
23 doesn't just govern evidence; it also mandates changes
24 in outcomes as an available option -- with the very
25 genesis of the Miller rule in a conclusion that, for the

1 people in this class, the appropriateness of the
2 punishment of the harshest degree, life without parole,
3 will be relatively uncommon, it seems clear that the
4 Miller rule falls on the substantive side of the axis
5 rather than on the procedural side of the axis.

6 JUSTICE GINSBURG: Have any States treated
7 Miller as retroactive --

8 MR. DREEBEN: Yes.

9 JUSTICE GINSBURG: -- on State habeas?

10 MR. DREEBEN: Yes. The majority of
11 States -- it's a close call. I think it's maybe about
12 ten to seven or ten to eight. But the majority of
13 States that have reviewed this have concluded that
14 Miller is retroactive. Most of them have done it as a
15 matter of substantive law. There are a couple of
16 opinions that talk about the watershed exception, which
17 is not the way that we think that this case should be
18 analyzed.

19 But not only the -- the States have done
20 that, but the United States has taken that position with
21 respect to the juveniles that were sentenced before
22 Miller to life without parole as a mandatory sentence.
23 And in the resentencings of those that have taken place
24 so far -- it's only been about ten, but those -- those
25 defendants have almost uniformly received sentences that

1 are terms of years significantly shorter than life.

2 JUSTICE GINSBURG: So what is the population
3 we're dealing with if most States do apply Miller
4 retroactively? I think that there was a figure of 2,000
5 people with life without parole.

6 MR. DREEBEN: I haven't broken it down --
7 may I answer, Mr. Chief Justice?

8 CHIEF JUSTICE ROBERTS: Sure.

9 MR. DREEBEN: I have not broken it down
10 numerically, Justice Ginsburg, but Michigan has not
11 applied it retroactively, and it has a very large
12 population of juveniles who are in the Miller class.
13 And I don't think that Pennsylvania has resolved it,
14 certainly not favorably yet for the defendants.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. DREEBEN: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Duncan.

18 ORAL ARGUMENT OF MR. S. KYLE DUNCAN

19 ON BEHALF OF THE RESPONDENT

20 MR. DUNCAN: Mr. Chief Justice, and may it
21 please the Court:

22 I was going to begin by saying I would
23 proceed directly to the merits, but I gather from the
24 drift of the argument that the Court has serious
25 questions about jurisdiction, and so I'd like to briefly

1 begin there.

2 We're in an odd position with respect to
3 jurisdiction because we won below and we'd win in the
4 Fifth Circuit on Federal habeas, which has found that
5 Miller is not retroactive. Why then do we not contest
6 jurisdiction?

7 We believe and still believe that this is a
8 straightforward case. Not -- and Justice Kagan, it's
9 not a standard Michigan v. Long case, but it's an
10 interwoven case, meaning that the -- the State court
11 took Teague lock, stock, and barrel.

12 Now, there is no doubt, Justice Scalia, that
13 in the -- in the Taylor -- in the previous Louisiana
14 Supreme Court opinions, that the State said we are
15 voluntarily adopting Teague. There is no doubt about
16 that. So we think the question is whether that raises
17 the possibility of an advisory opinion from this Court.
18 And why do we say it doesn't?

19 Well, because in cases like Coleman v.
20 Thompson and Eddings v. Oklahoma, the Court said where
21 the Federal law holding is integral to the State court's
22 disposition of the matter, there is no risk of an
23 advisory opinion. And later, in Coleman, the Court said
24 only if resolution of the Federal issue in court could
25 not affect the judgment is it at risk of an advisory

1 opinion.

2 So here we don't think there is a risk of an
3 advisory opinion. Of course, it is within the realm of
4 possibility. We doubt that it's going to happen, but it
5 could happen that on remand the Louisiana Supreme Court
6 could say, well, we've seen what you think about Teague
7 and we're going to adopt our own retroactivity
8 standards, as some States have done. They could do
9 that. The question is: Does that make this Court's
10 opinion advisory? And we think not.

11 The Solicitor General -- the Assistant
12 Solicitor General has talked about cases like Standard
13 Oil v. Johnson, where the -- the State was under no
14 obligation to tether its State law to Federal standards,
15 and --

16 JUSTICE SCALIA: It didn't say so, though.
17 In -- in -- in Standard Oil, the -- this is a quote from
18 the opinion: "The relationship between Post Exchanges;
19 and the government of the United States is controlled by
20 Federal law."

21 MR. DUNCAN: Right. That's right. My
22 point, Justice Scalia, is that the -- the tax -- that
23 was embedded in a tax-exemption statute. The tax
24 exemption made certain taxes exempt from the statute,
25 and -- and the exemption --

1 JUSTICE SCALIA: Well, that would have been
2 true no matter what the State did, right?

3 MR. DUNCAN: Well, no, the State --

4 JUSTICE SCALIA: We're deciding a question
5 of Federal law that -- that would have applied on its
6 own.

7 MR. DUNCAN: Well -- well, no -- well, with
8 respect to Standard Oil, I think the -- my point is, is
9 that the State didn't have to make its tax-exemption
10 status turn on a Federal question. It did, and so the
11 Court had jurisdiction to resolve it. That's all.

12 JUSTICE ALITO: Well, don't you think that
13 the State made its tax-exemption law turn on Federal law
14 because there are Federal constitutional requirements in
15 that area? Could the -- could the State have taxed -- I
16 mean, there was the question of whether or not the --
17 the Supremacy Clause would permit the State to tax sales
18 to the Post Exchanges.

19 MR. DUNCAN: I think that's possible, but
20 this Court didn't make its jurisdiction dependent on
21 that. And so take a case like Ohio v. Reiner --

22 JUSTICE SCALIA: Well, it did. In the
23 provision I just quoted, it said that the relationship
24 between Post Exchanges and the government of the United
25 States is controlled by Federal law. That's what our

1 opinion says.

2 MR. DUNCAN: Well, so take the -- the
3 Assistant Solicitor General brought up the case of Ohio
4 v. Reiner, where a State made its transactional immunity
5 statute turn on the validity of a Fifth Amendment
6 privilege. This Court -- this Court addressed that
7 embedded and discrete Federal issue with --

8 JUSTICE KAGAN: And Mr. Duncan, isn't it
9 quite similar when Justice Scalia used this "controlled"
10 language? The Louisiana Supreme Court has used similar
11 language. It's dictated by Teague. Now, it's only
12 dictated by Teague because they've chosen to make it
13 dictated by Teague, but once that choice has been made,
14 all outcomes are dictated by Teague. It's the same
15 issue.

16 MR. DUNCAN: Well, we think -- we agree with
17 that. We think it's binding -- quote/unquote, "binding"
18 within the meaning of binding Federal law, because the
19 State has chosen to do it and it's never shown that it
20 wouldn't do it. You know, so -- we -- we think that.
21 Look, if the Court disagrees with us on that, we don't
22 take a position --

23 JUSTICE ALITO: Well, in Ohio v. Reiner,
24 which you just cited, was there any other way in which
25 the State could have obtained review of the State

1 supreme court's erroneous determination that the witness
2 in question there did not have a Fifth Amendment
3 privilege because she said that she didn't commit the
4 crime?

5 MR. DUNCAN: Well, I don't think so, because
6 this --

7 JUSTICE ALITO: And do you think that's not
8 a distinction between that case and this case?

9 MR. DUNCAN: Well, if -- if -- if the
10 Teague -- if the Teague standard is a discrete Federal
11 standard that the State has made -- has -- has
12 incorporated, then the only way -- well, the Louisiana
13 Supreme Court could -- the defendant could go to Federal
14 habeas, sure, and you could get an interpretation that
15 way.

16 But it doesn't seem to us that the
17 difference between Federal habeas and review of the
18 State supreme court decision makes any difference with
19 respect to this Court's jurisdiction. It might mean
20 that this Court would wait, you know, for a -- for -- I
21 don't know, a more robust split to develop and take a
22 Federal case that way.

23 But in this case -- and this -- this goes to
24 the second reason why we haven't strongly contested
25 jurisdiction at all -- because there is a robust split

1 on this direct -- on this specific issue that extends to
2 something like 21 State and Federal courts, they're all
3 deciding the same Federal issue, so it seems to us that
4 as a practical matter, this Court ought to weigh in.
5 It's going to weigh in sooner or later. It's going to
6 weigh in either on a Federal habeas case or from a State
7 court.

8 JUSTICE SCALIA: Well, we weigh in when we
9 have jurisdiction. You don't think that matters at all?

10 MR. DUNCAN: No, of course jurisdiction
11 matters, Justice Scalia. We just -- of course it does.

12 JUSTICE SCALIA: Well, so what you said
13 doesn't make much sense.

14 MR. DUNCAN: Well, I think it makes sense.

15 JUSTICE SCALIA: Let's get in there quickly,
16 whether we have jurisdiction or not. You're not saying
17 that, are you?

18 MR. DUNCAN: Well, no, we're not saying
19 that. We're not saying that. We're saying if the
20 Federal issue is genuinely interwoven with State law and
21 there's no independent State grounds, then this Court
22 has jurisdiction to decide the question. Otherwise,
23 it's going to have to wait for a Federal habeas case.

24 Proceeding to the merits: In Miller, this
25 Court was invited --

1 JUSTICE BREYER: We clearly have
2 jurisdiction, don't we? Why -- I'm just trying to
3 figure this out in my mind.

4 We have jurisdiction where there is a
5 person -- that's the defendant -- and the defendant says
6 the court's decision -- that's your court's decision --
7 is contrary to the Constitution or statute of the
8 United States. That's just what they say.

9 MR. DUNCAN: That answers the question --

10 JUSTICE BREYER: So we have jurisdiction to
11 answer the question.

12 Now, the question is: How do we dispose of
13 the case --

14 MR. DUNCAN: Exactly.

15 JUSTICE BREYER: -- in which we have
16 jurisdiction? And in three instances, I guess, the
17 Court has done, in disposing of such a case, what the
18 Solicitor General says; namely, they have said, we
19 are -- we are not going to say whether he's right in
20 saying it's contrary to the Constitution. That's
21 because there might be an adequate State ground; there
22 might not be. Their adequate State ground was one that
23 was -- was elucidated or explained as being -- flowing
24 from a certain interpretation of Federal law.

25 MR. DUNCAN: Well, that's --

1 JUSTICE BREYER: We will say their
2 interpretation of Federal law was wrong, and now we'll
3 send it back to see what they do.

4 MR. DUNCAN: Yes. The cases that we all --

5 JUSTICE BREYER: Is that right? Have I got
6 it right?

7 MR. DUNCAN: That's our position. And by
8 the way --

9 JUSTICE SCALIA: What is -- what is the
10 Federal law you're talking about?

11 MR. DUNCAN: The application of Teague to
12 Miller.

13 JUSTICE SCALIA: Yes. That's not a Federal
14 law, it's -- the Federal habeas statute is a Federal law,
15 right?

16 MR. DUNCAN: Well, the interpretation --

17 JUSTICE SCALIA: And Teague is an
18 interpretation of that Federal law.

19 MR. DUNCAN: Well --

20 JUSTICE SCALIA: Was that Federal law at
21 issue in this case?

22 MR. DUNCAN: The Teague -- the Teague
23 standard --

24 JUSTICE SCALIA: Of course it wasn't.

25 JUSTICE BREYER: But the Teague standard --

1 the Teague exceptions could well be constitutionally
2 required. The Teague exception --

3 JUSTICE SCALIA: Have we -- have we ever
4 said that?

5 JUSTICE BREYER: -- means Teague doesn't
6 apply.

7 MR. DUNCAN: You have not. That's why we
8 don't take a position on it. That's particularly --

9 JUSTICE SCALIA: You want us to hold that in
10 this case?

11 MR. DUNCAN: We do not want you to hold that
12 in this case, Your Honor.

13 CHIEF JUSTICE ROBERTS: Did we say the
14 opposite in Danforth, or did the majority say the
15 opposite in Danforth?

16 MR. DUNCAN: You left the question open in
17 Danforth, Your Honor.

18 JUSTICE SOTOMAYOR: Could you tell me why
19 you would think that something like Atkins would not be
20 retroactive to States? As a compulsion, meaning not as
21 by election of Teague retroactivity.

22 MR. DUNCAN: That is a difficult question
23 that we don't take a position on.

24 But to answer your question, Justice
25 Sotomayor, the -- the -- the argument goes that Danforth

1 made clear that Teague is an -- is an equitable
2 interpretation to Federal habeas statute, it's not
3 constitutionally binding on the States, and the Court
4 left open whether the exceptions are binding, but the
5 exceptions were part and parcel of Justice Harlan's
6 Mackey understanding of -- of how he thought Federal
7 habeas ought to apply.

8 And so whereas -- whereas Atkins -- I mean,
9 Atkins creates a binding constitutional right. The
10 question of remedy, though. The question is: Is the
11 State constitutionally bound to offer that remedy? And
12 this Court has recognized, in cases like Pennsylvania v.
13 Finley, for example, that States have wide discretion in
14 structuring their post-conviction.

15 And the -- the next point, though, has to do
16 with finality.

17 JUSTICE SOTOMAYOR: It has to do something
18 different, because as Justice Breyer pointed out, you
19 have wide discretion to structure it as you want, but if
20 you structured it in a way that you're going to say, I'm
21 offering due process, isn't there a check, a substantive
22 check by due process --

23 MR. DUNCAN: Well --

24 JUSTICE SOTOMAYOR: -- that you have to
25 offer the minimum?

1 MR. DUNCAN: Well, I mean, that is -- that
2 is the question. So this Court has found that there's a
3 substantive check on due process in Griffith, where
4 we're talking about direct review.

5 When we're talking about collateral
6 review -- I mean, our view, although we haven't taken a
7 position on it, collateral review is a different animal
8 for purposes of --

9 JUSTICE SOTOMAYOR: But we have any number
10 of cases where States have viewed the exceptions as
11 controlling the fact that they have to offer the
12 constitutional minimum.

13 MR. DUNCAN: But this Court has never held
14 that.

15 JUSTICE SOTOMAYOR: Hasn't yet.

16 MR. DUNCAN: Unless --

17 JUSTICE SOTOMAYOR: And why shouldn't we?

18 MR. DUNCAN: I understand.

19 JUSTICE SOTOMAYOR: That's really the
20 serious question.

21 MR. DUNCAN: It -- it -- it is a serious
22 question. We -- we -- and, again, we have not taken a
23 position on that question because we feel that this case
24 is interwoven with Federal law as a matter of State
25 retroactivity.

1 In Miller, this -- on to the merits: In
2 Miller, this Court was invited to categorically bar the
3 penalty of life without parole for juveniles who commit
4 murder, but it decided not to do so.

5 Now, that decision leads directly to the
6 conclusion, in our view, that Miller is not a
7 substantive rule under Teague's first exception.
8 Consideration of the Teague framework, Teague policies,
9 and Teague precedent points instead to the conclusion
10 that Miller is a procedural and not a substantive rule.

11 So we think Summerlin most helpfully sets
12 out the framework that ought to govern this question.

13 JUSTICE KAGAN: Mr. Duncan --

14 MR. DUNCAN: Yes.

15 JUSTICE KAGAN: -- can I give you just a
16 hypothetical? I mean --

17 MR. DUNCAN: Sure.

18 JUSTICE KAGAN: -- suppose that there is a
19 State and it has a -- a mandatory minimum for a theft.
20 It says the mandatory minimum for theft is 20 years.

21 And suppose a court looks at that and says,
22 you know what? That's incredibly disproportionate to a
23 lot of theft, and so strikes the mandatory minimum.
24 Says, you just can't have a mandatory minimum like that;
25 make it lower.

1 Would that be a substantive ruling?

2 MR. DUNCAN: We don't think so, Justice
3 Kagan, because the mandatory aspect of it goes to the
4 manner of imposing a penalty.

5 JUSTICE KAGAN: It does not go to the manner
6 of imposing. It says nothing about the manner of
7 imposing.

8 What it does is it just increases the range
9 of sentencing possibilities. It actually leaves it to
10 the -- to the courts. It says absolutely nothing about
11 what factors ought to be taken into account. Nothing
12 about that at all.

13 All it says is, you can't have a mandatory
14 minimum of 20 years for theft; make it lower.

15 MR. DUNCAN: Well, so in -- in -- if in that
16 hypothetical that doesn't go to the manner of imposing
17 the penalty, then it's different than Miller, because
18 Miller made very clear that the mandatory aspect of the
19 penalty goes to the manner of imposing the penalty --

20 JUSTICE KAGAN: But I think --

21 MR. DUNCAN: -- not something substantive.

22 JUSTICE KAGAN: So if you're saying, no,
23 that's different because there was something else in
24 Miller -- there is something else in Miller. There is a
25 bunch. There -- there is -- there is a process

1 component of Miller, no question about it, where the
2 Court says what courts are supposed to look at is -- are
3 the characteristics of youth and are supposed to try to
4 figure out whether these terrible crimes are functions,
5 in part, of immaturity or -- or -- or not, whether
6 you -- you really are looking at an incorrigible
7 defendant.

8 So there is that process component. But
9 that process component does not take away the fact that
10 there is a completely separate, self-sufficient
11 component as to what the range of punishment has to be.
12 That's completely on all fours with the hypothetical
13 that I gave you.

14 MR. DUNCAN: Well, your -- Justice Kagan,
15 the -- the relevant difference in terms of the Teague
16 analysis is that this Court in Miller did not take the
17 punishment of life without parole, the distinct category
18 of punishment of life without parole, off the table.
19 This Court has never held that a noncategorical rule is
20 substantive under Teague.

21 And it's done that for good reasons:
22 Because that would fly in the face of the policies that
23 inform the Teague analysis.

24 JUSTICE KAGAN: No, you're exactly right.
25 It did not take the LWOP punishment off the table. But

1 similarly, in my hypothetical, a 20-year sentence for
2 theft has not been taken off the table.

3 What the Court has done is to say, there
4 have to be other options. There has to be an option of
5 ten years or five years or two years, whatever it is.

6 So they've expanded the range of
7 possibilities. They've just made the sentence
8 different, because a sentence is defined both by its
9 upper end and by its lower end.

10 MR. DUNCAN: I --

11 JUSTICE KAGAN: And so they've made the
12 sentence different.

13 MR. DUNCAN: I understand that. But making
14 the sentence different doesn't necessarily mean make it
15 substantive under the Teague framework.

16 Here's another way of looking at it. The
17 defendant in a -- a juvenile murderer who committed --
18 who committed murder and is serving a
19 life-without-parole sentence today, pre-Miller, is not
20 facing a punishment that the law cannot impose on him.
21 And we know that from Miller because Miller said the
22 Court's decision does not preclude that punishment.

23 And so that goes to finality. The finality
24 interests underlying convictions do not yield where the
25 State still has the power to impose that punishment.

1 Finality interests yield -- Justice Harlan explained in
2 Mackey and this Court adopted in Teague, finality
3 interests yield only where the State lacks the power.
4 That's where the finality interests crumble, so to
5 speak, because the State no longer can impose that
6 category of penalty.

7 So that would go for Roper. It would go for
8 Graham. It would go for Justice Breyer's sedition or
9 witch crimes. If -- if -- if somebody's in jail because
10 they were accused of being a witch, then the State has
11 no finality interest in keeping that person in jail.
12 But by the same token, if -- if -- if the punishment is
13 death for a juvenile, the State has no finality interest
14 in doing that.

15 So leaving the punishment on the table is
16 crucial. If he doesn't take it off, it's not
17 substantive.

18 The second policy reason for Teague is
19 avoiding the adverse consequences of retrial. And we
20 think Miller is even more clearly not substantive under
21 that standard, because categorical rules apply
22 retroactively, Justice Harlan explained, because they
23 don't carry the adverse consequences of retrial. They
24 don't make you go back and redo the trial and unearth
25 old facts and -- and drain State resources and come up

1 with distorted -- distorted retrials.

2 Miller, by its nature, envisions a
3 fact-intensive hearing that considers multiple
4 characteristics at the time of the crime.

5 JUSTICE KENNEDY: But you don't have a
6 distorted new trial if you just grant a parole hearing.

7 MR. DUNCAN: That's right. That -- that's
8 right. But that's, of course, not what Miller would
9 require. That's what Graham would require, Justice
10 Kennedy, because Graham is obviously a categorical rule
11 that says you can no longer impose that punishment, so
12 you have to give them a parole hearing or some
13 meaningful way of release.

14 Miller is about the step before whether to
15 give a parole hearing, whether the person can be
16 eligible for parole at the outset. That's the inquiry
17 that we're talking about in Miller, and that's quite
18 different from a parole hearing.

19 The fact of the matter is, though, is that
20 applying Miller retroactively inevitably turns the
21 Miller -- the retroactive Miller hearing into a parole
22 hearing, which -- which shows that it doesn't quite work
23 in terms of adverse --

24 JUSTICE BREYER: You were going to say -- at
25 some point you started -- suppose you look at the

1 watershed procedural change. My -- my impression from
2 the case you cited, Summerlin, is that deciding whether
3 that's retroactive has two parts. I think we were
4 unanimous on this point.

5 The two parts were: Is it implicit in the
6 concept of ordered liberty? And here it would seem to
7 be, because it's applicable to the States. And the
8 second is: Is it central to an accurate determination
9 that life without parole is a legally appropriate
10 punishment? And the -- the -- the rule that a mandatory
11 can't exist is central to making that -- that was the
12 whole point of the Miller opinion.

13 So if that's the correct analysis for
14 watershed rule, procedural rule that's retroactive -- if
15 I'm right about that, why doesn't it fit within that
16 category?

17 MR. DUNCAN: Well, let's take the first one,
18 the point.

19 It's not just implicit in the concept of
20 ordered liberty. The way that the -- the watershed rule
21 has been stated, the first -- the first prong of it is
22 it has to alter our understanding of bedrock procedural
23 elements necessary to fundamental fairness. And this
24 would be a strange case to find that in, because Miller
25 itself doesn't represent a bedrock revolution in

1 sentencing practices. It takes a sentencing practice
2 from another area and puts it in this new area. So it's
3 an incremental change in that sense. It's not a
4 wholesale discovery of a new bedrock procedural element,
5 the way we had in -- in a case like Gideon v.
6 Wainwright.

7 So -- and -- and I think this Court
8 explained in Whorton v. Bockting that it's not enough
9 that the rule be fundamental in some -- in some abstract
10 sense -- right? -- but it has to itself represent a
11 change in bedrock procedural understandings. And we
12 don't think Miller does that.

13 We also don't think it's necessary to an
14 accurate determination of a sentence. It would enhance
15 the accuracy of the sentence, but it's not necessary.

16 And the other point there is this Court has
17 never hold that a -- held that a pure sentencing rule
18 can qualify under watershed, because, after all, this
19 Court has on many occasions said that a watershed rule
20 is necessary to the accurate determination of guilt or
21 innocence, and here we're talking about a sentence.

22 So we -- we agree with the United States
23 that watershed procedural analysis is not the way to go
24 here, but it does raise an interesting question.

25 In Summerlin -- because, after all, we do --

1 we do part company quite strongly from the United States
2 when -- when the United States says we need an
3 outcome-expanding alteration to the definition of
4 substantive rules under Teague. We say that's -- that's
5 not just a slight tweak to Teague. What that is is a
6 change in the understanding of what a substantive rule
7 is.

8 Substantive rules under Teague analysis have
9 never depended on the frequency with which new outcomes
10 might -- might come about under the new procedures. In
11 fact, in Summerlin -- and this goes back to my original
12 point about the framework. Summerlin explained that a
13 criminal defendant under a procedural rule does have the
14 opportunity of getting a more lenient outcome under the
15 new procedures. So -- and nonetheless, Summerlin said
16 that such procedural rules are not applied
17 retroactively.

18 And so, as -- Justice Alito, as you were
19 saying, the difference between a substantive and a
20 procedural rule under Teague is not whether it's very
21 likely or very, very likely to result in a new outcome.
22 It's about whether the new rule categorically removes
23 the power of the State to impose a category of
24 punishment. That's what a -- that's what a categorical
25 rule does. That is not what Miller does, right?

1 Miller may express an expectation about the
2 way that Miller hearings will come out. And that may or
3 may not come -- come to pass in the future. Who knows,
4 right? We can point to cases where criminal defendants
5 have had Miller hearings and have still received life
6 without parole, and I can point to several in particular
7 from the State of Louisiana under its new Miller
8 procedures, but the point being is that the idea of
9 changing outcomes, which is what the United States'
10 entire argument depends on, is built into the procedural
11 side of Teague and not the substantive side.

12 The substantive side is about --

13 JUSTICE KAGAN: Mr. Duncan, I -- I -- I
14 think not. I think by your own definition this fits on
15 the substantive side.

16 You said you -- you categorically remove a
17 certain outcome. And -- and -- and that's exactly what
18 Miller does. If you -- as long as you understand a
19 sentence, which I think you agreed with, as defined both
20 by its upper end and by its lower end, effectively what
21 the Court said in Miller was that that sentence, which
22 was the mandatory LWOP sentence, cannot control for
23 juveniles.

24 MR. DUNCAN: And --

25 JUSTICE KAGAN: There has to be a different

1 sentence, one that includes other punishments.

2 MR. DUNCAN: Well, there's no doubt --

3 JUSTICE KAGAN: That -- that increases the
4 range.

5 MR. DUNCAN: Right.

6 Miller -- Miller quite clearly said, as you
7 know, Justice Kagan, that it does not categorically bar
8 a penalty, but -- and -- and so -- and what did it mean
9 by that penalty? It's --

10 JUSTICE KAGAN: It allows something within
11 the range, but it has -- it has completely changed the
12 range that's -- that is -- that is given for any
13 juvenile defendant.

14 MR. DUNCAN: Well, we think that's --

15 JUSTICE KAGAN: The range is important.
16 It's not just the top end. This is what we said in
17 *Alleyne*, that you can't think about a sentence without
18 thinking about both parts of the sentence, both the
19 maximum and the minimum. And when you decide whether a
20 substantive change in that sentence has been made, you
21 look at both the maximum and the minimum.

22 MR. DUNCAN: Well, I -- look, I -- I -- I
23 hope this is responsive. I mean, I think after *Miller*
24 we would see two categories of punishment on the table.
25 We would see a life-without-parole category and a

1 life-with-parole, for example.

2 But my point is, is that Miller doesn't ban
3 the first category, and that is determinative for
4 whether something is a substantive rule or not.

5 JUSTICE SCALIA: I'm -- I would -- I would
6 not describe changing the range of sentences available
7 as changing the sentence.

8 MR. DUNCAN: It -- it puts an element on the
9 table, I think, is the most you could say.

10 JUSTICE SCALIA: It doesn't change the
11 sentence --

12 MR. DUNCAN: Yes.

13 JUSTICE SCALIA: -- necessarily.

14 MR. DUNCAN: Right.

15 JUSTICE KAGAN: But this is what we --

16 JUSTICE SCALIA: You still get the same
17 sentence.

18 MR. DUNCAN: You could still -- absolutely
19 still -- and what -- what did you --

20 JUSTICE KAGAN: Which is what we said last
21 year. We said, it's impossible to disassociate the
22 floor of a sentencing range from the penalty affixed to
23 the crime. And similarly, we said criminal statutes
24 have long specified both the floor and ceiling of
25 sentencing ranges, which is evidence that both define

1 the legally prescribed penalty.

2 MR. DUNCAN: Well --

3 JUSTICE KAGAN: That is the penalty --

4 MR. DUNCAN: Right.

5 JUSTICE KAGAN: -- is the range.

6 MR. DUNCAN: It -- it -- life without parole
7 has the same floor and ceiling, of course. It's --
8 it's -- it's got the same floor and ceiling. What
9 Miller does is create the -- the -- the procedural
10 circumstances for finding -- for putting a new penalty
11 on the table, which is the -- the -- that's the point of
12 the United States' argument: There is a new
13 possibility.

14 And our point is to say that putting a new
15 possibility on the table doesn't take away the State's
16 power to impose the old category of punishment.

17 JUSTICE SOTOMAYOR: Mr. Winsor --
18 Mr. Winsor --

19 MR. DUNCAN: Duncan. I'm sorry.

20 JUSTICE SOTOMAYOR: I know that we didn't
21 ever look at this issue.

22 I'm sorry. Reading the wrong one. I
23 apologize.

24 But do you really think that we -- that any
25 State would have not applied Woodson retroactively?

1 MR. DUNCAN: That -- that --

2 JUSTICE SOTOMAYOR: They all did.

3 MR. DUNCAN: Probably -- probably not, Your
4 Honor. But the -- the question -- that -- that, of
5 course, is a pre-Teague case. It raises the question:
6 Is Woodson substantive or procedural under Teague? And
7 our argument is it's a procedural rule.

8 JUSTICE SOTOMAYOR: Why?

9 MR. DUNCAN: It's a procedural rule --

10 JUSTICE SOTOMAYOR: It just said you
11 couldn't have mandatory death penalties, just like here:
12 You can't have mandatory life without parole.

13 MR. DUNCAN: But it required an
14 individualized sentencing --

15 JUSTICE SOTOMAYOR: The sentence -- exactly
16 --

17 MR. DUNCAN: -- process, which we say is a
18 procedure.

19 JUSTICE SOTOMAYOR: And to give sentences
20 less than --

21 MR. DUNCAN: It -- it would put new --

22 JUSTICE SOTOMAYOR: -- mandatory death. But
23 they could have still given death.

24 MR. DUNCAN: They certainly could have, so
25 the question is whether it's substantive or procedural

1 under the Teague rubric, which, of course, it was a
2 pre-Teague case. And I think the most we can say about
3 it is it's not substantive under Teague for the reasons
4 that we've said.

5 Now, raise the question: Is it a watershed
6 procedural rule? Perhaps that's --

7 JUSTICE BREYER: All right. But that's the
8 language -- "bedrock" is -- I don't think is the right
9 language, because that was the language he referred to
10 in a sentence in Mackey, correct? I've just been
11 looking it up.

12 And -- and -- but then in Teague itself,
13 Justice O'Connor tries to get the right words, and --
14 what she ends up with here is that the procedural is the
15 first test, the first part, is -- can be addressed by
16 limiting the scope of the second exception -- that's the
17 watershed rule -- to those new procedures without which
18 the likelihood of an accurate conviction is seriously
19 diminished. Okay.

20 MR. DUNCAN: That's the first one.

21 JUSTICE BREYER: And that's joined by the
22 Chief Justice, Justice Scalia, and the fourth I can't
23 remember.

24 But -- so is it seriously diminished? Now,
25 we read through Miller. It's pretty hard to say -- I

1 mean, my goodness, Miller is just filled with paragraph
2 after paragraph about how a mandatory requirement for
3 life without parole fails to take account of all the
4 characteristics or many characteristics adherent in
5 youth.

6 And it's pretty hard to come away from that
7 without thinking, gee, accuracy under a mandatory life
8 without parole does seriously diminish the accuracy of
9 imposing life without parole when you apply the
10 mandatory to a youth.

11 MR. DUNCAN: But in -- every Eighth
12 Amendment sentencing rule goes to accuracy in some
13 significant --

14 JUSTICE BREYER: No, no. But you have to
15 say the accuracy is seriously diminished. And she says,
16 then I don't think there will be too many such cases.

17 MR. DUNCAN: Well, again, take a -- we
18 haven't talked about the capital sentencing cases, but
19 take a case like O'Dell, where the capital jury was not
20 informed of the defendant's parole and eligibility while
21 considering his future dangerousness. I mean, one could
22 easily say that the accuracy of the resulting death
23 sentence under the old rule was seriously diminished,
24 and yet this Court said in O'Dell that that is not a
25 watershed procedural rule. And you can go down the line

1 with all those cases, the Beard case and the Sawyer
2 case. Those are cases in which the defendant could have
3 said, well, seriously -- seriously diminished accuracy.
4 And yet the Court found no watershed rule. And, of
5 course, the bedrock is what the word that this Court has
6 used in referring to that exception, particularly in
7 Whorton v. Bockting.

8 JUSTICE GINSBURG: Is there any watershed
9 procedural rule other than Gideon?

10 MR. DUNCAN: Well, this Court has said it's
11 -- it's doubtful that any will emerge. And so we think
12 this case is an implausible case for a new watershed
13 rule to emerge, since this rule -- and back to the
14 bedrock point -- is not a creating a -- it's not -- it's
15 not a revolution in bedrock understanding of procedure.
16 It's -- it's an incremental step in sentencing
17 juveniles. So if a case -- if a case like Crawford is
18 not a watershed procedural rule, then it's difficult to
19 understand how this one would be.

20 JUSTICE GINSBURG: We have one brief that
21 tells us that this Court has never barred punishment as
22 cruel and unusual under the Eighth Amendment, but
23 refused to make the decision retroactive.

24 MR. DUNCAN: Well, we --

25 JUSTICE GINSBURG: Is that --

1 MR. DUNCAN: -- disagree with that. There
2 are cases -- take the -- take the case that refused to
3 make retroactive the rule in *Caldwell v. Mississippi*.
4 That's an Eighth Amendment case that goes to the
5 accuracy of a capital jury sentence in determination of
6 death. And this Court didn't make that rule
7 retroactive, and found that it was procedural and
8 non-watershed at the same time. So we take issue with
9 that.

10 Just a few more words about the
11 United States' proposed expansion of *Teague*. It
12 would -- it would shift the whole focus of what a
13 substantive rule is from the categorical nature of the
14 rule to the effects of the rule. And so that -- if --
15 any defendant in these capital sentencing cases we've
16 just been talking about, *O'Dell* and *Sawyer* and *Beard*,
17 would now have the argument handed to them by the
18 United States new rule that says, well, that new rule
19 gave me the opportunity for a better outcome. I might
20 have not gotten the death penalty if my jury had been
21 properly instructed.

22 We don't understand how the United States'
23 new rule in this case can be cabined only to where a
24 mandatory sentence is taken off the table.

25 JUSTICE KAGAN: Well, but I think that you

1 yourself cabined it when you said that the difference is
2 one -- there is some category of cases which do refer to
3 process, to how a decisionmaker makes a particular
4 result, and another category of cases which refer to
5 what we've called substance, which is: What results are
6 on the table? What category of punishment is on the
7 table? And that's the difference between this and all
8 the other kinds of things that you're mentioning.

9 MR. DUNCAN: Well, I --

10 JUSTICE KAGAN: This is not about the how --
11 or it's partly about the how, but there's also about
12 what punishments are on the table.

13 MR. DUNCAN: Well, I just have to -- just
14 have to push back on the premise a little bit, where --
15 our -- our position is not that a substantive rule is
16 about what punishments are on the table. A substantive
17 rule is about whether a State categorically no longer
18 has the power to impose a category of punishment.

19 Here, it's clear from the Miller opinion and
20 from the Grayer -- from the Graham opinion that the
21 relevant category is life without parole. The State
22 still has the ability to impose that punishment. And
23 that's what -- that's a sharp distinction from what a
24 procedural rule is. And the United States' new
25 conception of what a substantive rule is would blur

1 that. It would blur that, and it would call into
2 question all of the capital sentencing cases.

3 And I heard a question -- I don't remember
4 which Justice asked it -- about Booker. And my reaction
5 to that is -- but Booker as a matter of the Sixth
6 Amendment made a sentencing guideline non-mandatory, and
7 it surely opened up new sentencing outcomes.

8 And so by -- by what reason could a -- could
9 a Federal habeas petitioner now not say under the
10 United States' new test Booker is now retroactive, or
11 Alleyne, for that matter? Alleyne overturned the
12 mandatory minimum under the Sixth Amendment, opening up
13 new sentencing outcomes. Why couldn't a Federal
14 defendant on Federal habeas say, now I ought to get the
15 benefit of that rule retroactively?

16 Our position is those cases -- Booker,
17 Alleyne, Apprendi -- are clearly procedural, as this
18 Court explained in -- in Summerlin -- Schriro v.
19 Summerlin. They're clearly procedural under the Teague
20 rubric. And what the United States would do is blur
21 those categories.

22 If there are no further questions.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Bernstein, you have three minutes
25 remaining.

1 REBUTTAL ARGUMENT OF RICHARD D. BERNSTEIN
2 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

3 MR. BERNSTEIN: What this fantastic
4 discussion has shown is why the Court, as it always has
5 in the past, should keep the Teague exceptions a matter
6 of equitable discretion, rather than constitutional
7 requirement.

8 The Court has much more freedom, generally
9 speaking, on the matter of equitable discretion than it
10 does on constitutional requirements. There is no way to
11 look at the prior precedents of the Court in Teague in
12 any of those courts to say, oh, here's what our
13 equitable discretion is. The only time you get
14 retroactivity is when the Constitution requires it.
15 That would have been a really short opinion. And that
16 was not that.

17 Now, to turn quickly to the cases that have
18 been cited: The critical difference between this case
19 on the one hand and Merrell Dow and Three Affiliated
20 Tribes on the other hand is that jurisdiction under this
21 statute is question by question under Murdock.

22 In Merrell Dow, the question of whether the
23 defendant's conduct had violated the Federal drug
24 labeling laws was a Federal question. The Court never
25 would have gone on to say, and we're also going to

1 Federalize the remedy. We're going to decide whether
2 it's lost profits or out-of-pocket costs.

3 Similarly, in Three Affiliated Tribes, there
4 was no question that there was a Federal statute that
5 limited State court jurisdiction. The only issue was
6 the scope of that statute.

7 Here we have the opposite. There is no
8 question that the Federal statute does not apply to the
9 State court, and yet people say you should decide the
10 scope question, even though the underlying issue may be
11 one of State law.

12 And then, finally, to the Solicitor
13 General's new cake-and-eat-it-too argument that there is
14 going to be review in this Court and de novo review on
15 habeas: The statutory language in 2254(d) is pretty
16 broad. Quote: "Any claim that was adjudicated on the
17 merits in State court proceeding."

18 The only claim in this case is remedy. This
19 case was filed after Miller was decided. The only issue
20 in this case is redress. And it would be a very
21 wonderful turn if you could say on the one hand that
22 2254(d) doesn't apply, but on the other hand, 1257
23 applies when it -- when it requires a, quote, "right
24 claimed under Federal law," which gets to your question,
25 Justice Kagan.

1 Is it enough that a State court says, we
2 voluntarily want to be bound? And the best answer to
3 that is not only in the cases I would recommend --
4 Moore, which is cited in Merrell Dow, which goes out of
5 its way to show how Federal law is binding on the
6 intrastate commerce conduct in that case before saying
7 the Court could review it -- but it's also plain in the
8 language of the Supremacy Clause. Binding Federal law
9 means binding in all 50 States, and that's why the
10 statute also says "right under Federal law."

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 And, Mr. Plaisance, you have three minutes
14 remaining.

15 MR. PLAISANCE: Your Honors, I'd like to
16 make two quick points.

17 First of all, in jurisdiction: Resolving
18 this case under Teague avoids the serious constitutional
19 question of whether due process requires retroactivity
20 for Miller.

21 A second point on the merits: Miller said
22 that juvenile homicide offenders should not have to die
23 in prison with no chance for rehabilitation and no
24 consideration of youth. That important rule changed the
25 substantive outcomes available. Indeed, this Court said

1 that life without prison should be uncommon.

2 The individuals sentenced before Miller --
3 that remains about 1,500 -- deserve a chance at
4 redemption.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Bernstein, the Court appointed you as an
8 amicus curiae to brief and argue this case against this
9 Court's jurisdiction. You have ably discharged that
10 responsibility, for which the Court is grateful.

11 The case is submitted.

12 (Whereupon, at 11:18 a.m., the case in the
13 above-entitled matter was submitted.)

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