

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL MATHENA, WARDEN,)
)
Petitioner,)
)
v.) No. 18-217
LEE BOYD MALVO,)
)
Respondent.)

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Mathena versus Malvo.

Mr. Heytens.

ORAL ARGUMENT OF TOBY J. HEYTENS

ON BEHALF OF THE PETITIONER

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

Fifteen years ago, Lee Malvo was tried, convicted, and sentenced for his role in the D.C. sniper attacks. Almost a decade later, Malvo sought federal habeas relief, relying exclusively on the new rule announced by this Court in Miller versus Alabama.

But Miller's rule does not cover Malvo's case, and the lower courts erred in holding otherwise. I'd like to make three points, one about Miller, one about Montgomery, and one about why this matters.

First, if Miller's holding isn't concerned with mandatory sentences, much of this Court's language in Miller makes very little sense. Miller repeatedly stated its own holding in terms of mandatory sentences, and the Court's

1 analysis specifically distinguished between
2 mandatory and non-mandatory states.

3 Second, Montgomery must be interpreted
4 both in light of Miller and in light of the
5 facts that were before the Court. All of the
6 defendants before the Court in both Miller and
7 Montgomery had received mandatory sentences, and
8 this Court should not lightly interpret a
9 decision about retroactivity as having
10 retroactively announced a new rule governing
11 non-mandatory sentences.

12 Finally, the reason why habeas is so
13 formal and restrictive is because habeas is
14 extraordinarily costly. Malvo's victims were
15 already required to endure one full trial and
16 sentencing hearing more than a decade ago, and
17 the Court should not lightly ask them to go
18 through another, particularly given that the
19 original sentencing fully complied with then
20 controlling constitutional restrictions.

21 I waive the remainder of my two
22 minutes.

23 So turning to the first point about
24 Miller, I -- I think it's just extremely hard,
25 as Malvo's brief now clarifies, that he only

1 sought habeas relief based on Miller. And if
2 you look at Malvo's original habeas petition --
3 it's on page 80, I believe, page 80 of the
4 petition appendix -- he doesn't just say that
5 he's seeking relief based on Miller; he says
6 he's seeking relief based on Miller's holding
7 that mandatory life without parole violates the
8 Eighth Amendment.

9 So I think even Malvo, when he
10 originally sought habeas in this case,
11 recognized the precise nature of Miller's
12 holding, and I think it's extraordinarily hard
13 to get away from that.

14 JUSTICE GINSBURG: Mr. Heytens, could
15 we back up a little and explain to me why these
16 sentences are not mandatory? I mean, the jury
17 had only two choices, death or life without
18 parole. And nobody seemed to have appreciated
19 at the time of Malvo's convictions that there
20 was any discretion.

21 And the -- and the piece of
22 information I'd like to have, has any Virginia
23 judge ever reduced a juvenile life without
24 parole to life with parole or a term of years?

25 MR. HEYTENS: Justice Ginsburg, I'm

1 not aware of any Virginia judge ever reducing a
2 juvenile life without parole sentence for a
3 person convicted of capital murder, which was
4 the offense that Malvo is convicted of. I -- I
5 believe that's factually true, that I'm not
6 aware of an example.

7 There have been examples of Virginia
8 courts considering whether to do so, although
9 those long pre-date Malvo's sentence -- I -- I
10 acknowledge that those post-date Malvo's
11 sentence.

12 To go to your question about what the
13 jury was instructed, that is what the jury was
14 instructed, but Virginia law is extremely clear
15 that the sentencer is not the jury. The
16 sentencer is the judge.

17 And under the Supreme Court of
18 Virginia's holding in Jones II, which Malvo does
19 not and cannot challenge, this trial judge had
20 the authority to suspend the sentence as a
21 matter of state law and not only had the
22 authority to do it but had the authority to do
23 it at the time of Malvo's trial. That's the
24 specific issue that the Supreme Court of
25 Virginia addressed in Jones, and I think that's

1 a binding holding as a matter of --

2 JUSTICE SOTOMAYOR: But did the judge
3 know he could, given that there was no history
4 of doing it? I think that's -- that's the
5 position of the SG in this case.

6 But, more fundamentally, the Fourth
7 Circuit concluded, I quote them, "Malvo's youth
8 and attendant circumstances were not considered
9 by either the jury or the judge to determine
10 whether to sentence him to life without parole
11 or some lesser sentence."

12 Do you disagree with that statement?

13 MR. HEYTENS: I think it's very hard
14 to tell, based on the record, whether they were.
15 I think the fairest description of the record is
16 that there is no affirmative indication one way
17 or another.

18 JUSTICE SOTOMAYOR: All right. So
19 tell me what the practical effect is or why
20 Montgomery and its language would have drawn a
21 difference between a juvenile who was not
22 sentenced to death because he was not
23 incorrigible and a youth who, under a
24 discretionary sentence, was sentenced not to
25 death, to life without parole, even though the

1 judge didn't think he was incorrigible but
2 thought the crime was horrible.

3 MR. HEYTENS: So --

4 JUSTICE SOTOMAYOR: So that really is
5 the nub of this case, which, given the language
6 of Montgomery and Miller, does it make any sense
7 to treat either of them differently?

8 MR. HEYTENS: So, Justice Sotomayor, I
9 think the first thing I'd say to that is I don't
10 think that, for Teague purposes, we can say
11 given the language of Montgomery and Miller. I
12 think we need to be very specific where the rule
13 that we're talking about is coming from.

14 And to address your question of what's
15 the difference, I think the difference is stated
16 in the last paragraph of the Miller opinion,
17 where the Court fundamentally identifies the
18 problem with the scheme invalidated in Miller.
19 The Court said that the sentencer was deprived
20 of "the opportunity to consider youth and its
21 mitigating factors" and instead that the states
22 at issue in that case had required that all
23 children receive life without parole sentences.

24 As a matter of Virginia state law,
25 that was not true here.

1 JUSTICE KAGAN: General, this is --
2 may be Justice Sotomayor's question phrased a
3 little bit differently. Of course, Miller talks
4 about mandatory schemes a lot because Miller was
5 about a mandatory scheme, but do you think after
6 Miller in a state where there was not a
7 mandatory scheme, a judge could say, you know
8 what, I just don't feel like thinking about the
9 defendant's youth, I don't think it's remotely
10 relevant, and I'm going to just sweep away
11 anything that the defendant presents to me about
12 that, I couldn't care less?

13 Do you think that that's permissible
14 under Miller?

15 MR. HEYTENS: Justice Kagan, I'm
16 sorry, I don't think that would be permissible,
17 but I think we need to distinguish between why
18 that's not permissible. I think, as a matter of
19 the Eighth Amendment, that's not permissible.
20 But I think that the articulation of the cases
21 following Woodson and the death penalty
22 illustrate why that is a new rule for Teague
23 purposes.

24 So I think that if a court were
25 properly presented with that argument after

1 Miller, it should hold that that's an Eighth
2 Amendment violation, but I think that would be a
3 new rule for Teague purposes.

4 And the way I know is how this played
5 out in the capital context, right? So the Court
6 first decides Woodson, which deals with a
7 mandatory death penalty, very similar to Miller,
8 and then the Court has a whole series of cases
9 after Woodson, some of which really are very
10 close to what you said, Justice Kagan, where the
11 sentencer is not formally required to impose
12 death but says I'm not going to consider youth.

13 And the Court, in later cases, said
14 that also violates the Eighth Amendment. But
15 there was no suggestion that Woodson --

16 JUSTICE KAGAN: I mean, it -- I guess
17 what you're saying is that it would take another
18 case to make that clear. But I think Miller
19 itself makes that clear. If there's anything
20 that Miller says -- I mean, all of Miller, it's
21 a 30-page opinion and it can be summarized in
22 two words, which is that youth matters and that
23 you have to consider youth in making these sorts
24 of sentencing determinations.

25 And, again, of course, it talks a lot

1 about mandatory schemes because a mandatory
2 scheme was in front of it, but the entire
3 reasoning was about how much youth matters and
4 how a judge or a jury, whoever the sentencer is,
5 has to take that youth into account.

6 That's the lesson of Miller.

7 MR. HEYTENS: So two responses to
8 that, Justice Kagan.

9 First, I do want to differentiate
10 because I think the habeas context matters here.
11 I agree with you that, after Miller, the right
12 interpretation of the Eighth Amendment is that
13 the thing you describe would violate it.

14 But I think under this Court's Teague
15 jurisprudence, that doesn't resolve the question
16 of whether decision II is a new rule. I mean,
17 the Court has said ever since Teague that the
18 definition of new rule is extraordinarily broad
19 and includes anything that is not dictated by
20 the earlier decision, and I just don't see how
21 one can read Miller and conclude that a decision
22 that describes its holding in terms of mandatory
23 sentences dictates that Virginia's --

24 JUSTICE KAGAN: So --

25 MR. HEYTEN: -- non-mandatory.

1 JUSTICE KAGAN: -- I think I -- we're
2 just going to posit that I disagree with that.

3 MR. HEYTENS: Okay.

4 JUSTICE KAGAN: But suppose I didn't
5 disagree with that. Then -- then you also have
6 to deal with Montgomery because that's the way
7 Montgomery reads Miller. And Montgomery says
8 that's what Miller said, it's not some later new
9 rule, that's the rule for Miller, says
10 Montgomery.

11 MR. HEYTENS: And I certainly
12 acknowledge that Montgomery says that, Justice
13 Kagan, but I don't think that's controlling for
14 Teague purposes and I think the Court has
15 specifically actually confronted a case quite
16 similar where that happened. The case, this is
17 cited on page 17 of our brief, it's Butler
18 versus McKellar, where a very similar argument
19 was made and rejected in the habeas context.

20 So that case, the first case was
21 Arizona -- was, excuse me, Edwards versus
22 Arizona, the one that says that when the
23 defendant says he wants to talk to a lawyer,
24 police can't go and talk to him without getting
25 him a lawyer.

1 And then seven years later, the Court
2 in Arizona versus Roberson says that is true,
3 even if the thing you want to go back and talk
4 to him about is a different crime. And in
5 Roberson, the Court said "our decision is
6 controlled by Arizona versus Edwards."

7 And then, in Butler, in the habeas
8 context, the Court said that was a new rule for
9 Teague purposes. I just think that the argument
10 that Montgomery clarified or confirmed or any --
11 any of the language that the Fourth Circuit --

12 JUSTICE KAVANAUGH: Can I --

13 MR. HEYTENS: -- or the district court
14 --

15 JUSTICE KAVANAUGH: -- can I ask --

16 JUSTICE SOTOMAYOR: I'm sorry, we
17 couldn't under Teague have made Miller
18 retroactive, unless there was both a procedural
19 and substantive rule.

20 And so whether or not there are people
21 who misread Miller or not, some courts did, a
22 lot didn't, the substantive ruling of Miller was
23 very clear, that it rendered life without -- I'm
24 quoting it, parole, an unconstitutional penalty
25 for a class of defendants -- a class of

1 defendants because of their status. That is
2 juvenile offenders whose crime reflect the
3 transient immaturity of youth. It announced --
4 it says Miller announced a substantive rule of
5 constitutional law.

6 So it's not a new procedural rule.
7 It's a new -- it is an old substantive law that
8 it's embodying. That's the distinction that I
9 don't see.

10 Your case, the one you cited, was
11 applying it not reading the old case, it was
12 announcing a new take of that. Montgomery said
13 we're telling you what Montgomery -- what Miller
14 said.

15 MR. HEYTENS: Justice Sotomayor, I
16 certainly don't disagree that there is language
17 to that effect in Montgomery, but I think it is
18 important that that language you just quoted is
19 virtually all from Montgomery and appears
20 nowhere in Miller except for a few words that
21 are sort of included in that very long quote.

22 JUSTICE KAVANAUGH: Suppose I try to
23 read Miller and Montgomery together to figure
24 out what the substantive rule is and that I
25 conclude the substantive rule is that the state

1 cannot impose life without parole on youth who
2 are merely immature but can impose it on those
3 who are incorrigible. Okay? That's -- suppose
4 that's the substantive rule.

5 Suppose Miller and Montgomery, then we
6 have to figure out what the procedural rule
7 attached to that was.

8 MR. HEYTENS: Correct.

9 JUSTICE KAVANAUGH: The procedural
10 rule attached, you can read it in a couple
11 different ways, so I want to get your thoughts,
12 one is it rules out an on-the-record finding.
13 Right? Montgomery says you don't have to make a
14 record finding of incorrigible. It's explicit
15 about that. The question then for me comes down
16 to is a discretionary sentencing regime alone
17 enough to satisfy the procedural requirements to
18 implement that substantive rule, or does there
19 have to be something more on the record stated
20 by the sentencing judge about youth?

21 MR. HEYTENS: Justice Kavanaugh, I
22 think certainly in the habeas context, that
23 satisfies the -- the -- the holdings of Miller
24 and Montgomery. Now whether the court --

25 JUSTICE KAVANAUGH: The "that" being a

1 discretionary sentencing issue?

2 MR. HEYTENS: I'm sorry. Yes, I
3 apologize.

4 JUSTICE KAVANAUGH: And why is it --
5 why is something more procedurally not required?
6 We know -- we know a record -- a finding of fact
7 is explicitly ruled out by Montgomery and that's
8 very important. But why isn't something more
9 than just a discretionary sentencing regime
10 necessary?

11 MR. HEYTENS: Well, I -- I think
12 particularly because of the habeas context. So
13 I'm not -- I don't want to rule out the notion
14 that the Court couldn't in the further
15 elaboration of the Eighth Amendment require such
16 a thing. But I think, in the habeas context,
17 what's critical is that this trial and sentence
18 occurred long before either Montgomery or
19 Miller, and the Court has emphasized that
20 particularly in the habeas.

21 I mean, Teague is not restrictive for
22 the sake of being restrictive.

23 JUSTICE KAVANAUGH: Let me ask it this
24 way. Do you think a discretionary sentencing
25 regime is enough to satisfy the substantive

1 Miller/Montgomery rule as I posit it that --
2 that you can't impose life without parole on
3 someone who's merely immature as opposed to
4 incorrigible?

5 MR. HEYTENS: I would say that under
6 existing law on collateral review, yes, I would.

7 JUSTICE KAGAN: Even if you know for a
8 fact that the sentencer did not take youth into
9 account?

10 MR. HEYTENS: Well, Justice Kagan, I
11 guess first I would --

12 JUSTICE KAGAN: It's a discretionary
13 system. The sentencer could have taken youth
14 into account. But he didn't.

15 MR. HEYTENS: Justice Kagan, I just
16 want to make sure this is a hypothetical or if
17 you're asking about the facts of this case.

18 JUSTICE KAGAN: No, no, this is the
19 hypothetical.

20 JUSTICE KAVANAUGH: The hypothetical.

21 MR. HEYTENS: Okay. I just want to
22 make sure because my answer --

23 JUSTICE KAVANAUGH: I have a follow-up
24 --

25 MR. HEYTENS: -- would be different

1 depending on --

2 JUSTICE KAVANAUGH: -- I -- I have a
3 follow-up hypothetical to the hypothetical.

4 MR. HEYTENS: Okay. So, if you know
5 -- if you know for sure, say, because the
6 sentencer specifically says on the record that
7 they didn't, I think for purposes of federal
8 habeas review the answer is still that that is
9 not a cognizable basis for retroactively
10 invalidating a conviction.

11 I think on direct review, I think that
12 person would have a very strong argument. I
13 suspect that I would think that person's going
14 to have the better of the argument, that the
15 person's going to win, but that's because the
16 way the court's cases develop is in a piecemeal
17 fashion, and --

18 JUSTICE KAVANAUGH: Okay. Now suppose
19 the record does not have what Justice Kagan
20 posited, the record as it is in 99.99 percent of
21 the cases is youth is raised by the defense
22 counsel, and the sentencing judge either says
23 nothing, just imposes the sentence without
24 explaining anything about youth, or just
25 discusses youth but says ultimately still going

1 to stick with life without parole.

2 So, in that circumstance, is that
3 enough?

4 MR. HEYTENS: Yes. And the reason is
5 because, as we explain in our brief --

6 JUSTICE KAVANAUGH: How do we know --
7 and this is the tough part of the case for me,
8 it's right on this -- how do we know in that
9 circumstance that the sentencing judge separated
10 the incorrigible from the -- I'm using these
11 phrases as shorthand --

12 MR. HEYTENS: Sure.

13 JUSTICE KAVANAUGH: -- the mere -- the
14 merely immature?

15 MR. HEYTENS: I think the best way we
16 know that is because, as our brief and the
17 state's brief explains, in every single state
18 that has a discretionary sentencing scheme, the
19 sentencer is specifically instructed to consider
20 age, and I think the court particularly in the
21 habeas context can presume that judges follow
22 their obligation under state law.

23 CHIEF JUSTICE ROBERTS: Is this one of
24 those states where the sentencer is given a list
25 of criteria that he's supposed to consider?

1 MR. HEYTENS: Yes, the Supreme Court
2 of Virginia in Jones II specifically articulates
3 the factors that sentencers are supposed to
4 consider including in deciding whether to
5 suspend a sentence, and one of those factors is
6 age.

7 JUSTICE GINSBURG: If I understand --

8 CHIEF JUSTICE ROBERTS: It specifies
9 in considering whether to suspend a sentence?

10 MR. HEYTENS: I believe it does. This
11 is again from the Supreme Court of Virginia's
12 decision in Jones II that responds to this
13 Court's GVR in light of Montgomery and I believe
14 they specifically say as a matter of state law,
15 yes.

16 JUSTICE KAGAN: But that was not --
17 Jones II was many years after this sentencing
18 took place.

19 MR. HEYTENS: Absolutely, Justice
20 Kagan. But Jones II critically did not purport
21 to change or alter what Virginia law was. All
22 of the statutes that are discussed in Jones II
23 were on the books at the time of this
24 sentencing. It's not like Virginia changed its
25 law after its sentencing.

1 JUSTICE KAVANAUGH: What if we were
2 unsure about that? Shouldn't we re -- even if
3 you are correct on the law here, isn't there
4 still a question of whether Virginia's regime
5 was truly discretionary?

6 MR. HEYTENS: I don't think there --

7 JUSTICE KAVANAUGH: Or do you think --
8 or do you think that's over?

9 MR. HEYTENS: I -- I apologize,
10 Justice Kavanaugh. I think the Supreme Court of
11 Virginia was very clear in Jones II about that.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Feigin.

16 ORAL ARGUMENT OF ERIC J. FEIGIN
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONER

19 MR. FEIGIN: Thank you, Mr. Chief
20 Justice, and may it please the Court:

21 Malvo is arguing that his life without
22 parole sentences for his murders are
23 retroactively invalid under Miller even if
24 Virginia law allowed him to seek a lower
25 sentence based on his age.

1 That's wrong for two reasons. First
2 of all, the substantive retroactive holding of
3 Miller is limited to mandatory sentences. Any
4 objection Malvo has to the particular sentencing
5 proceedings in his individual case would at best
6 fall under what Montgomery describes as Miller's
7 procedural component, which isn't retroactive.

8 Second, all that procedural component
9 requires is the opportunity to raise age as a
10 reason for a lower sentence. Neither Montgomery
11 nor Miller prescribes a precise formula for
12 taking age into account, let alone requires a
13 sentencer to consider age even when a defendant
14 himself fails to put it at issue.

15 Now, Justice Kavanaugh, you asked how
16 we know that a discretionary scheme -- the
17 existence of a discretionary scheme is
18 sufficient to protect against the substantive
19 right that Montgomery finds that Miller
20 recognizes.

21 I think we know that from a couple of
22 different places. First, in Miller itself, I
23 think the Court goes out of its way to compare
24 and contrast discretionary schemes and mandatory
25 schemes. I think you'll find this in particular

1 at page 484 of Miller, noting that, basically,
2 as -- as I read Miller, discretionary schemes
3 are generally getting it right and mandatory
4 schemes aren't. And I think it would be quite
5 surprising that the kind of scheme the Court
6 used as its baseline for comparison turns out,
7 in fact, to be unconstitutional.

8 But the second place we know it I
9 think is from page 734 of Montgomery, where the
10 Court says that the ability -- and you combine
11 that with page 735 that makes clear it's the
12 opportunity to consider age. That the
13 procedural component of Miller, which is the
14 opportunity to consider age, is what protects
15 the substantive right.

16 And if, as the Fourth Circuit supposed
17 and the Virginia Supreme Court held in Jones II,
18 Malvo actually did have the opportunity to seek
19 a lower sentence based on his age, then I don't
20 think he can recast his claim as a substantive
21 claim under Miller that he had his substantive
22 rights violated.

23 CHIEF JUSTICE ROBERTS: And his --

24 MR. FEIGIN: But --

25 CHIEF JUSTICE ROBERTS: -- his

1 opportunity came from what?

2 MR. FEIGIN: So his opportunity came
3 from the fact that the Virginia Supreme Court --
4 again, Your Honor, we're not taking a position
5 on whether this should, in fact, be considered a
6 mandatory or discretionary scheme under Miller.
7 We are just assuming, along with the Fourth
8 Circuit -- and I think, as Justice Kavanaugh's
9 recent questioning got at, we do think this
10 should be remanded if the Court agrees with us
11 for some further exploration of the nature of
12 Virginia's scheme.

13 But assuming that this was a
14 discretionary scheme, Jones II, the Virginia
15 Supreme Court's decision in that case, says that
16 a defendant in Malvo's position -- and Jones
17 was, I think, similarly situated to Malvo in
18 this respect -- was able to seek suspension of
19 all or part of his sentence on any ground,
20 including youth.

21 And if that is correct and that is --
22 and if that is sufficient for a scheme to be
23 considered discretionary under Miller, then I
24 don't think he has a claim under Miller. What
25 he might have, I suppose, is a very untimely

1 ineffective assistance of counsel claim,
2 although I'm not even sure he would succeed on
3 the merits of that. But we don't usually excuse
4 defendants from their failure to raise
5 particular considerations and decide that their
6 substantive rights have been violated for that
7 reason.

8 As Justice Kavanaugh noted, in
9 99.9 percent of these cases, youth is going to
10 be raised, and that's because everyone realizes
11 that youth is important when you're sentencing
12 someone to life without parole.

13 JUSTICE KAVANAUGH: You -- you want us
14 to hold that a discretionary regime satisfies
15 Miller and Montgomery and remand for
16 consideration of all these things, forfeiture,
17 whether it was really discretionary?

18 MR. FEIGIN: That's correct, Your
19 Honor. We -- that's our only submission in the
20 case, is that you should reverse the Fourth
21 Circuit on its view that even if --

22 JUSTICE KAVANAUGH: Right.

23 MR. FEIGIN: -- contrary to the
24 Virginia Supreme Court's view -- sorry, because
25 even if, consistent with the Virginia Supreme

1 Court's view, this is a discretionary scheme,
2 then he would have a Miller claim.

3 JUSTICE KAGAN: But, again -- and this
4 is the same question that I asked Mr. Heytens --
5 if it's a discretionary scheme, a judge could
6 simply say, well, I don't think that that
7 consideration matters at all; I refuse to
8 consider it. And you think that Miller does not
9 have anything to say about that?

10 MR. FEIGIN: No, I think our answer to
11 that is a little bit different from General
12 Heytens' answer. I do think Miller, as it's
13 currently written, and Montgomery would that say
14 that a procedural right has been violated in
15 that case.

16 But what we have here is a question of
17 retroactivity. And that's a procedural -- what
18 you're talking about is a procedural right that
19 I think Miller does require at least the
20 opportunity to consider age. And, given its
21 analogy to cases like Eddings against Oklahoma
22 and Lockett against Ohio, I think the sentencer
23 can't decide that legally youth has no weight.

24 JUSTICE KAGAN: Right. So let's --
25 let's assume that, and, in fact, Miller says

1 several times not just requires an opportunity
2 to consider but requires consideration.

3 And then what Montgomery does, as I
4 understand it, is Montgomery makes clear that
5 that procedural requirement is in service of a
6 substantive requirement; in other words, the --
7 it's in service of a substantive rule, and that
8 rule is the one that Justice Kavanaugh made
9 reference to, which is the rule that the
10 irretrievably corrupt, and only those people,
11 can be subject to life in prison without parole.

12 So the -- the -- the requirement of
13 consideration is in service of the substantive
14 rule that says, except for the irretrievably
15 corrupt, you can't sentence a juvenile to life
16 without parole.

17 MR. FEIGIN: So, Justice Kagan, let me
18 give you the sort of short answer to your
19 question and then I have a slightly longer
20 answer. I think the shorter answer to your
21 question is yes, the procedural right protects a
22 substantive one, but because it's a procedural
23 right, it's not retroactive. The only thing
24 that is retroactive under Montgomery is what
25 Montgomery describes itself to be considering,

1 and this is on page 732, is it says that what
2 it's considering is whether Miller's holding
3 that precludes mandatory sentences of life
4 without parole for juvenile offenders is
5 retroactive.

6 JUSTICE KAGAN: No, Montgomery says
7 Miller's holding that only the irretrievably
8 corrupt can be sentenced to life without parole.
9 That's what Montgomery says.

10 And that's -- you know, in fact, it's
11 taken language from Miller and saying that's the
12 substantive rule that comes out of Miller, which
13 is this distinction between those who commit
14 crimes based on transient immaturity, blah blah
15 blah.

16 MR. FEIGIN: So this gets at my
17 somewhat longer answer, Justice Kagan, which is
18 that, you know, as we acknowledge in our brief,
19 I think it's very difficult to completely square
20 some of the language in Montgomery with the
21 language in Miller, which I think is very
22 clearly focused on mandatory sentences.

23 And to the extent that the Court has
24 to preference some language over other language,
25 we'd urge the Court to preference the language

1 that adheres to the common scenario in both
2 cases which involved only mandatory sentences.

3 JUSTICE KAVANAUGH: Maybe I thought --

4 MR. FEIGIN: The --

5 JUSTICE KAVANAUGH: Keep going. Keep
6 going.

7 MR. FEIGIN: The other thing I would
8 say about the particular paragraph on which
9 we're focusing here is I think it makes more
10 sense if you view Montgomery as really being
11 focused on mandatory sentences, which is all
12 anyone was thinking about in the case.

13 And I think what Montgomery is trying
14 to do in that paragraph is to fit Miller's
15 holding, which, again, Montgomery recognizes in
16 several places is limited to mandatory
17 sentences, into the language that this Court has
18 used to describe substantive rules.

19 And it does so in a kind of unique
20 way. It describes the boundaries of the class
21 of defendants who are benefitted under Miller
22 using the procedural language of what a
23 sentencer who sentences under a discretionary
24 scheme would necessarily need to find.

25 The terms "transient immaturity" and

1 "irreparable corruption" come from earlier cases
2 like Roper and like Graham, where they're used
3 descriptively, not prescriptively, to describe
4 the kind of judgment a sentencer necessarily
5 makes in imposing this kind of sentence on a
6 juvenile.

7 JUSTICE KAVANAUGH: But if it is --

8 MR. FEIGIN: I don't --

9 JUSTICE KAGAN: That's just to say you
10 wish Montgomery was a different opinion. It's
11 not a different opinion. It -- it -- it creates
12 the test that it creates based on the language
13 in Miller, which, you're right, was based on the
14 language in Roper, so there's a chain of
15 decisions and -- but there's a clear rule that
16 comes out of it, which is this distinction
17 between the irretrievably corrupt and all
18 others.

19 MR. FEIGIN: Well, Your Honor, I don't
20 think it's an especially clear rule, in part
21 because it kind of -- if I may use the word
22 fudges a little bit the way this Court's
23 described substantive rules by describing it in
24 procedural terms. Usually, you describe a class
25 by reference to some objective fact, like --

1 JUSTICE KAVANAUGH: Well, the object

2 --

3 MR. FEIGIN: -- what crime the
4 defendant --

5 JUSTICE KAVANAUGH: Sorry. The
6 objective fact is the incorrigible.

7 MR. FEIGIN: So, Your Honor, I think
8 --

9 JUSTICE KAVANAUGH: And that's not
10 necessarily objective, but that is the fact that
11 distinguishes the --

12 JUSTICE KAGAN: Those are the people
13 who can't -- you cannot sentence in a certain
14 kind of way.

15 JUSTICE KAVANAUGH: Right.

16 MR. FEIGIN: Well, Your Honor, I
17 think, and Justice Kavanaugh was just getting at
18 this, it's not really an objective fact. It's a
19 judgment that someone's going to have to make.
20 As the Court --

21 JUSTICE KAVANAUGH: But that's the
22 category -- that's -- I'm done.

23 CHIEF JUSTICE ROBERTS: You can --

24 MR. FEIGIN: I guess I'd just finish
25 with the thought that Montgomery's framing of

1 this I don't think is particularly problematic
2 if it's limited to the only context anyone was
3 considering in that case, mandatory sentences.

4 But it becomes very problematic if the
5 language is extended to invalidate all life
6 without parole sentences under discretionary
7 schemes.

8 JUSTICE GINSBURG: Mr. Feigin, I would
9 like to ask you about the government's change in
10 position because, as I understood it, the
11 government originally argued that juveniles --
12 juveniles sentenced to life without parole must
13 be resentenced after Miller and Montgomery,
14 whether life without parole is mandatory or
15 imposed as a matter of discretion.

16 That was the position that the
17 government took, and most of the lower courts
18 are in accord with it. What led the -- to the
19 SG's change in position?

20 MR. FEIGIN: Well, a couple things,
21 Your Honor. First of all, as our brief notes,
22 that wasn't invariably our position. That was
23 our position in the Mejia-Velez brief that Malvo
24 cites, but in other briefs, we took a position
25 that is more consistent with the one we are

1 taking here.

2 And to the extent that we have changed
3 our position here, it's because it's very
4 difficult, as I've acknowledged, to reconcile
5 the language of Montgomery and Miller and it's
6 not something that we lightly ask lower courts
7 to do as a matter of clarification. We try to
8 follow the letter of this Court's decisions.

9 I think this Court has frankly
10 somewhat more leeway to kind of explain what it
11 had in mind in Montgomery, which I think were
12 only the discretionary sentences -- excuse me,
13 mandatory sentences that were actually at issue
14 in that case.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. FEIGIN: Thank you.

18 CHIEF JUSTICE ROBERTS: Ms. Spinelli.

19 ORAL ARGUMENT OF DANIELLE SPINELLI ON
20 BEHALF OF THE RESPONDENT

21 MS. SPINELLI: Mr. Chief Justice, and
22 may it please the Court:

23 Miller and Montgomery control this
24 case. The warden and the United States have
25 just conceded that in order to rule for them,

1 this Court would have to discard the reasoning
2 of Montgomery.

3 Miller held that before imposing life
4 without parole on a juvenile a sentencer must
5 consider how the characteristics of youth
6 counsel against that sentence. That
7 individualized sentencing hearing, as Montgomery
8 explained, effectuates the Eighth Amendment rule
9 that life without parole is an excessive
10 sentence for most juveniles, those who are not
11 permanently incorrigible.

12 Miller is not limited to mandatory
13 schemes where life without parole is the only
14 possible punishment. It invalidated those
15 schemes because they guarantee that courts won't
16 consider whether youth warrants a lower
17 sentence, which creates an unacceptable risk of
18 excessive punishment, but when a court has the
19 theoretical power to consider a lower sentence
20 but doesn't do so, which is what happened here,
21 it creates precisely the same risk, as the
22 warden admits in his reply brief.

23 And I'd like to correct some of the
24 statements about what actually happened at the
25 sentencing hearing here because this is -- this

1 is important.

2 Malvo was sentenced in 2004. That was
3 not only before Miller, it was before Roper.
4 The prosecutor sought a death sentence for him.
5 The issue before the jury was should he be
6 sentenced to death or life without parole. That
7 was the only issue they were allowed to decide.

8 At the sentencing hearing before the
9 judge, which is extremely short, it's eight
10 pages at the end of the Joint Appendix, there
11 was no consideration at all of imposing a
12 sentence less than life without parole.

13 And until a footnote in his reply
14 brief, the warden hadn't contested that. It's
15 pretty hard to contest.

16 The notion that, you know, somehow --
17 somehow Miller was satisfied by, you know, the
18 opportunity, the -- you know, the theoretical
19 opportunity to consider youth, when it wasn't
20 actually considered, simply can't be squared
21 with the language of Miller itself or the
22 language and reasoning of Montgomery.

23 JUSTICE KAVANAUGH: That argument
24 you're making -- that argument you're making is
25 about the Virginia scheme, and we'll get to

1 that, I think, but there's an initial question
2 about what Miller and Montgomery mean.

3 And you heard my question about the
4 substantive rule being something that separates
5 the incorrigible from the merely immature. And
6 the procedural rule particularly articulated in
7 Montgomery is you don't need to make a finding
8 of fact, a discretionary regime satisfies it.

9 And my question to you is why isn't a
10 discretionary regime -- and I know you disagree
11 that Virginia is such a thing, but we'll put
12 that aside for the moment -- why isn't a
13 discretionary sentencing regime enough
14 procedurally to satisfy the substantive rule
15 articulated in Miller and Montgomery?

16 MS. SPINELLI: Because the substantive
17 rule, which I think you -- I agree with your
18 articulation, the substantive rule requires that
19 in order to ensure that juveniles don't receive
20 an unconstitutionally disproportionate
21 punishment, a court must consider the
22 characteristics of youth and must make a
23 determination as to whether that juvenile --

24 JUSTICE KAVANAUGH: Okay. Can I --
25 I'm sorry to --

1 MS. SPINELLI: Please.

2 JUSTICE KAVANAUGH: -- sorry to
3 interrupt, but this is important. You said two
4 things there, "must consider," and you said
5 "must make a determination."

6 The -- both opinions definitely say
7 "consider" over and over again. "Consider" or
8 "take into account" are the words used over and
9 over. Assessed used a few times. It never says
10 make a determination. Neither opinion ever, I
11 think, says make a finding of fact.

12 MS. SPINELLI: It does not say make a
13 finding of fact. I agree with that.

14 JUSTICE KAVANAUGH: Okay. And then
15 the question becomes if a discretionary regime
16 suffices to allow consideration, isn't a
17 discretionary regime sufficient to satisfy
18 Miller and Montgomery?

19 MS. SPINELLI: No, it's not. In this
20 case -- actually, let's just stick to the
21 broader question.

22 JUSTICE KAVANAUGH: Yeah.

23 MS. SPINELLI: Miller makes very clear
24 that sentencers must actually consider the
25 characteristics of youth and determine whether

1 life without parole is a proportional sentence

2 --

3 JUSTICE KAVANAUGH: So --

4 MS. SPINELLI: -- for the individual
5 defendant.

6 JUSTICE KAVANAUGH: -- I'm going to --
7 I'm going to stop you again. I'm sorry.

8 But, in most sentencing regimes, as
9 you well know, throughout the country in the
10 variety of sentencing courts, judges are
11 required to consider all sorts of factors by
12 state law. And arguments are raised to the
13 state court judge, the trial judge, about all
14 sorts of factors.

15 The judge will often impose sentence
16 without marching through a checklist of all
17 those factors. Yet, it is routinely accepted
18 that the judge has "considered the factor" if it
19 has been raised or even if it's required as a
20 matter of state law. There are lots of state
21 cases and federal cases that say, so long as the
22 issue's been raised, we assume the judge
23 "considered it."

24 Now, if that's true, and you can
25 disagree with that, but if that's true, doesn't

1 a discretionary regime where the argument can be
2 raised necessarily satisfy Miller and
3 Montgomery's requirement of consideration?

4 MS. SPINELLI: No, it doesn't, and let
5 me explain why. In this particular case, it
6 doesn't because this was decided not -- this --
7 he was sentenced not only before Miller but
8 before Roper. There's no possible way that the
9 judge could have, you know, silently in her head
10 considered the factors that weren't even
11 articulated in the first instance by this Court
12 until much later.

13 JUSTICE KAVANAUGH: I may or may not
14 agree with that. Assume going forward a
15 sentencing judge, though, in a discretionary
16 sentencing regime is presented with arguments
17 that you should not sentence this juvenile to
18 life without parole because of his or her youth
19 and then explains that.

20 The judge then sentences the juvenile
21 to life without parole. In that circumstance,
22 has the judge considered the youth?

23 MS. SPINELLI: It's possible that that
24 could be sufficient under Miller. One would
25 have to make a determination looking at the

1 record whether -- whether there was some
2 judgment made that life without parole was, in
3 fact, the proportionate --

4 JUSTICE SOTOMAYOR: Ms. Spinelli --

5 MS. SPINELLI: -- sentence for that
6 juvenile.

7 JUSTICE SOTOMAYOR: -- what -- what
8 I'm -- there is a line in Miller that says --
9 and this is the one they hang their hat on --
10 that Miller "did not impose a formal
11 fact-finding requirement," that Miller did not
12 impose -- this is from Montgomery --

13 MS. SPINELLI: Yes.

14 JUSTICE SOTOMAYOR: -- that Miller
15 "did not impose a formal fact-finding
16 requirement, does not leave states free to
17 sentence a child whose crimes reflect transient
18 immaturity to life without parole."

19 So there's a substantive right --

20 MS. SPINELLI: Precisely, Your Honor.

21 JUSTICE SOTOMAYOR: -- if your -- if
22 your crime was of transient immaturity, not to
23 be sentenced. Now, presumably, what I think my
24 colleague -- and he can correct me if I'm wrong
25 -- is saying, in a discretionary sentencing,

1 moving forward after Jones, courts know that
2 they have to take age and youth into account.

3 MS. SPINELLI: Correct.

4 JUSTICE SOTOMAYOR: So it's like now,
5 3553 of the federal criminal code requires a
6 laundry list of things for judges to consider.
7 Most judges do not tick off each one of those.
8 Doesn't say I find this but I don't find that.
9 I don't do this. I don't do that. Most judges
10 just say: I've thought of them all, and this is
11 my answer.

12 Now I think what Justice Kavanaugh --
13 he's shaking his head yes is --

14 JUSTICE KAVANAUGH: Yes.

15 JUSTICE SOTOMAYOR: -- in that kind of
16 system, assuming that this was a post-Jones
17 case, not a pre-Jones case, for which there's
18 some ambiguity, why isn't that system enough?

19 Are you requiring a formal
20 fact-finding? Are you saying as long as it's
21 clear that the judge knew that he had to find
22 incorrigibility and that was argued before him,
23 and he didn't have to say I find it, but he
24 sentenced the person to parole, that you assume
25 he knows what he's doing, that in the absence of

1 those arguments, that then you're not sure and
2 the substantive right should trump? I'm not
3 sure how you --

4 MS. SPINELLI: So, if we were dealing
5 with a situation in which there was a statute
6 that mirrored the requirements that Miller set
7 out, it would be in a completely different case.
8 That is not what we have here. This judge --

9 JUSTICE SOTOMAYOR: Well, but they --

10 MS. SPINELLI: -- was not required to
11 consider youth or even --

12 JUSTICE SOTOMAYOR: But a lot of -- a
13 lot of the state statutes -- and this is what I
14 think is concerning some of my colleagues --
15 have -- have since Miller said it's
16 discretionary now.

17 MS. SPINELLI: Yes. There are --

18 JUSTICE SOTOMAYOR: Courts don't have
19 to do mandatory life and they should consider --
20 they should consider -- consider age. Now --

21 MS. SPINELLI: That's correct.

22 JUSTICE SOTOMAYOR: -- I must admit
23 that I read Jones, but I don't remember if Jones
24 said it -- age must be considered in light of
25 Miller.

1 MS. SPINELLI: It did not say that.

2 JUSTICE SOTOMAYOR: Or in light of
3 Montgomery's substantive rule.

4 MS. SPINELLI: It did not say that.

5 JUSTICE SOTOMAYOR: All right? But
6 that's the assumption being made.

7 MS. SPINELLI: Yes. And --

8 JUSTICE SOTOMAYOR: What are you --
9 what are you asking for, all of those other
10 systems, post-Jones, that let or tell judges to
11 consider age but don't say in accordance with
12 Miller and Montgomery? Don't we presume that
13 they know the law and follow it? That those
14 judges --

15 MS. SPINELLI: Going forward, yes, I
16 agree. If a judge sentences a juvenile under
17 one of the post-Montgomery statutes that sets
18 out the factors that are articulated in Miller
19 and Montgomery, then, yes, I think it might be
20 reasonable.

21 JUSTICE KAGAN: It sets those out and
22 -- and requires courts to evaluate them?

23 MS. SPINELLI: Precisely, yes. Yes
24 Justice Kagan.

25 JUSTICE KAGAN: As opposed to, for

1 example, either that doesn't set them out or
2 that just, you know, permits courts to do
3 whatever they want?

4 MS. SPINELLI: Yes.

5 JUSTICE KAGAN: Right?

6 CHIEF JUSTICE ROBERTS: So --

7 JUSTICE KAGAN: And there's different
8 kinds of --

9 MS. SPINELLI: And here --

10 JUSTICE KAGAN: -- non-mandatory
11 schemes.

12 CHIEF JUSTICE ROBERTS: So --

13 MS. SPINELLI: I apologize.

14 CHIEF JUSTICE ROBERTS: Well, no, I
15 don't know which one of you I was interrupting.

16 MS. SPINELLI: No, please, Mr. Chief
17 Justice.

18 CHIEF JUSTICE ROBERTS: Sets them out
19 like in 3553, is that the sentencing
20 considerations?

21 MS. SPINELLI: Well, it's --

22 CHIEF JUSTICE ROBERTS: Is that
23 enough? Here are the things you need to
24 consider and transient youth or incorrigibility
25 is one of them?

1 MS. SPINELLI: If there is a statute
2 that expressly sets out these factors and if the
3 judge considers them --

4 JUSTICE KAGAN: And -- and --

5 CHIEF JUSTICE ROBERTS: Well, that's
6 the -- that's --

7 JUSTICE KAGAN: -- requires a court to
8 consider them.

9 MS. SPINELLI: And requires the courts
10 to consider them, then we can presume that the
11 judge followed the law and did so. But this is
12 not a case where the judge was required to
13 consider anything.

14 And, in fact, she did not consider
15 imposing any lesser sentence than life without
16 parole. And the warden's position and the
17 United States' position is that that's good
18 enough.

19 JUSTICE KAVANAUGH: Back on Justice
20 Kagan's question for a second. In a
21 discretionary regime where the sentencer is
22 required to consider certain factors or even if
23 not, it's just a discretionary regime, the
24 defense counsel in any case where a juvenile's
25 facing life without parole as a possibility is,

1 of course, I would think, you would agree, any
2 competent defense counsel is going to argue the
3 youth to the sentencing judge. Do you agree
4 with that?

5 MS. SPINELLI: Going forward, yes.

6 JUSTICE KAVANAUGH: Yes. Okay. And,
7 therefore, can't you presume, and don't we do
8 this, as Justice Sotomayor was indicating, I'm
9 not putting words in her mouth, but in 3553-A
10 cases, we also presume when something's been
11 argued to the sentencing judge that the judge
12 has "considered" that factor.

13 MS. SPINELLI: Yes. And let me be
14 clear. I don't think this Court needs to say
15 anything about how to handle cases going forward
16 after Miller where there is a requirement that
17 the judge consider the Miller factors.

18 The -- the question here is does
19 Miller apply, can -- can Malvo invoke --

20 JUSTICE KAVANAUGH: Well, I think we
21 have to say what Miller and Montgomery -- well,
22 I don't know what we have to do, but we might
23 want to say what Miller and Montgomery mean as a
24 rule together, because that's been a lot of the
25 focus of the briefs.

1 So we may have to indicate what is the
2 substantive rule and what is the procedure and
3 then we can figure out the Virginia --

4 MS. SPINELLI: Well, yes, the
5 substantive rule is that the Eighth Amendment
6 forbids states to impose life without parole on
7 juveniles who are not permanently incorrigible.

8 JUSTICE GORSUCH: Okay, counsel --

9 JUSTICE ALITO: And that's the holding
10 of -- that is the holding of Miller?

11 MS. SPINELLI: That is -- that is what
12 Montgomery --

13 JUSTICE ALITO: Well, can -- could
14 Montgomery change Miller? Montgomery, in
15 Montgomery, the issue was whether Miller was
16 retro -- whether the -- the rule adopted in
17 Miller was retroactive to cases on collateral --

18 MS. SPINELLI: Correct.

19 JUSTICE ALITO: Doesn't it have to
20 take Miller as it stands? Can it change that?

21 MS. SPINELLI: It shouldn't and it
22 didn't. What Miller -- what --

23 JUSTICE ALITO: Okay. If it didn't,
24 then we can disregard whatever Montgomery said
25 and look at what Miller said. Where does Miller

1 say what you say that it says?

2 MS. SPINELLI: It says it --

3 JUSTICE ALITO: It says --

4 MS. SPINELLI: -- on page --

5 JUSTICE ALITO: -- exactly what it

6 held. It says, we hold, "we therefore hold that

7 the Eighth Amendment forbids a sentencing scheme

8 that mandates life imprisonment without

9 possibility of parole for juvenile offenders."

10 That was -- that -- that was the holding.

11 MS. SPINELLI: That was the result.

12 There is also the reasoning that was necessary

13 to that result --

14 JUSTICE ALITO: So that --

15 MS. SPINELLI: -- which --

16 JUSTICE ALITO: -- wasn't the holding

17 -- when they said "we hold," that wasn't the

18 holding?

19 MS. SPINELLI: It was certainly part

20 of the holding. But the court also said we

21 require a sentencer to take into account how

22 children are different. And the reason that it

23 requires that is in order to effectuate the

24 Eighth Amendment prohibition on disproportionate

25 sentences for juveniles.

1 JUSTICE GORSUCH: Counsel, if -- if
2 there were a requirement of a finding -- a
3 substantive right to a finding of
4 incurrigibility before the -- the sentence of
5 life without parole were permissible under the
6 Eighth Amendment, wouldn't it follow also that
7 there's a Sixth Amendment right under Appendi
8 to have a jury decide that rather than a judge?

9 MS. SPINELLI: I don't think that
10 necessarily would follow.

11 JUSTICE GORSUCH: How?

12 MS. SPINELLI: I -- I think that --

13 JUSTICE GORSUCH: Any time we increase
14 a sentence, a statutory maximum or otherwise, a
15 sentence, we say: Jury -- this Court has said a
16 jury has to make that finding.

17 MS. SPINELLI: There's a -- there's
18 actually a split of authority --

19 JUSTICE GORSUCH: There's no
20 indication of any of that in Montgomery or
21 Miller, is there?

22 MS. SPINELLI: Agreed. There's a --
23 there's a split of authority on that. There's a
24 pending cert petition that raises it. We don't
25 have any position on it.

1 JUSTICE GORSUCH: Well, the Court has
2 held several times if you increase the -- the --
3 the statutory permissible range of penalty, a
4 jury has to be involved, right? I mean, that's
5 not --

6 MS. SPINELLI: Yes. So it depends
7 on --

8 JUSTICE GORSUCH: So there's no
9 circuit split on that.

10 MS. SPINELLI: It depends on how you
11 conceptualize it, but, you know, that's clearly
12 not one of the issues that's before the Court in
13 this case.

14 And I'm not arguing, just to be clear,
15 that there is a requirement of a specific
16 factual finding. Montgomery said there wasn't,
17 but what it also said is there has to be a
18 hearing that separates juveniles who may
19 constitutionally --

20 JUSTICE GORSUCH: Right. And a
21 hearing -- if the right, if the substantive
22 right is that you cannot do life without parole
23 for an incorrigible youth, there has to be a
24 hearing and somebody has to make a finding about
25 that. It's not just a matter of discretion any

1 more. It's a matter of a factual finding. It's
2 not a sentencing factor. It's -- it's a
3 finding.

4 And I would have thought in those
5 circumstances we might have specified who would
6 do that finding and how that hearing would be
7 conducted, consistent with the Constitution.

8 MS. SPINELLI: Well, that -- that
9 issue was not resolved in Miller or Montgomery,
10 and I don't think it needs to be resolved today.

11 JUSTICE GORSUCH: Isn't that -- isn't
12 that a further strike, though, against your
13 interpretation of Miller and Montgomery that the
14 Court would have created a new substantive right
15 that implicates the Sixth Amendment and not ever
16 said so or even hinted at it or even
17 acknowledged the question?

18 MS. SPINELLI: I actually don't think
19 that's unusual. It happens, you know -- it
20 happened with some regularity that a right will
21 -- a new rule will be announced and then later
22 the issue of, you know, who makes this decision,
23 a jury or a judge, will come up. That's what --

24 JUSTICE GORSUCH: This is a pretty --

25 MS. SPINELLI: -- happened in Atkins.

1 JUSTICE GORSUCH: -- this is a pretty
2 big issue, though, right? I mean, you know, the
3 -- the judge or the jury, you know, if we're
4 creating a new substantive right, we might want
5 to say a few words about, hey, there's an issue
6 whether the judge should do it or the jury
7 should do it and we'll take that up in the next
8 case?

9 MS. SPINELLI: That is what happened
10 with Atkins. Atkins is very similar to this
11 case in that it barred the imposition of the
12 death penalty on the intellectually disabled.
13 As in this case, there needs to be a procedure
14 to sort out the intellectually disabled from
15 those who are not.

16 And the question arose after Atkins,
17 does that determination have to be made by a
18 judge or a jury under Apprendi? And the
19 majority of courts that I know of, the majority
20 have said no, it doesn't have to be made by a
21 jury. It -- it can be made by a judge. And
22 states have allocated that determination in
23 different ways.

24 So it's not at all unusual that the
25 court wouldn't have addressed the Apprendi issue

1 in these decisions, but, I mean, to return to
2 Justice Kavanaugh's question about procedure and
3 substance, the two necessarily go together.

4 The -- the necessary procedure has to
5 effectuate the substantive rule. And,
6 therefore, as Montgomery says, it has to -- it
7 has to involve a determination as to whether
8 life without parole will be a proportionate
9 sentence --

10 CHIEF JUSTICE ROBERTS: But -- but we
11 know --

12 MS. SPINELLI: -- for that particular
13 defendant.

14 CHIEF JUSTICE ROBERTS: -- we know it
15 doesn't require a formal finding, right?

16 MS. SPINELLI: That -- that -- that is
17 correct.

18 CHIEF JUSTICE ROBERTS: From
19 Montgomery?

20 MS. SPINELLI: It doesn't require --
21 it doesn't require any particular form of words.
22 It does require a substantive result.

23 CHIEF JUSTICE ROBERTS: But -- but you
24 said it requires a determination. And to me,
25 that sounds like a formal finding. And one

1 thing we do know is that a formal finding is not
2 required.

3 So it would seem that consideration --
4 and I thought we had gotten that far before --
5 sort of it being included with respect to
6 factors that must be considered in imposing a
7 sentence. We're talking about 3553, which has a
8 list of things that have to be considered, and
9 this would be -- be one of them.

10 MS. SPINELLI: Yes. And, again, we --
11 you know, we're not presented here with a
12 question of what exactly a fact finder would
13 have to say.

14 CHIEF JUSTICE ROBERTS: Well, you are,
15 because I -- because I asked it.

16 (Laughter.)

17 MS. SPINELLI: I'm sorry, Your Honor.
18 I apologize, Mr. Chief Justice.

19 What I -- what I meant is, you know,
20 that is -- that is going to be an issue no
21 matter how the Court decides this case. There
22 have already been 2,000 resentencings under
23 Miller at which courts have made an effort to
24 apply the Miller factors.

25 There is -- Montgomery did not specify

1 a turn of phrase or a specific finding that has
2 to be made, but what's absolutely clear is that
3 the Court does have to decide whether, in light
4 of the characteristics of youth, this is a
5 proportionate -- life without parole is a
6 proportionate sentence for this particular
7 defendant.

8 JUSTICE KAVANAUGH: I don't -- I don't
9 think Montgomery --

10 MS. SPINELLI: -- and that didn't even
11 come close --

12 JUSTICE KAVANAUGH: -- I don't think
13 Montgomery says decide. I mean, decide, to pick
14 up on the Chief Justice's question, sounds like
15 determination, sounds like finding.

16 Maybe -- maybe I'm --

17 MS. SPINELLI: Well, what it -- what
18 it says --

19 JUSTICE KAVANAUGH: In the key
20 paragraph, it says --

21 MS. SPINELLI: -- what it says is a
22 hearing where youth and its attendant
23 characteristics are considered as sentencing
24 factors is necessary to separate those juveniles
25 who may be sentenced to life without parole from

1 those who may not.

2 You know, it then goes on to say, no,
3 we didn't require a specific finding of fact,
4 you know, we are leaving it to the states to --

5 JUSTICE KAVANAUGH: Doesn't even say
6 specific. It just says finding of fact.

7 MS. SPINELLI: Correct, it just says
8 finding of fact. But it then says that Miller
9 did not impose a formal fact-finding
10 requirement, doesn't leave states free to
11 sentence a child whose crime reflects transient
12 immaturity to life without parole.

13 So Montgomery doesn't provide a lot of
14 guidance, but what we do know is that juveniles
15 are entitled to at least one opportunity to show
16 that they are not permanently incorrigible and
17 that it is not right to make a determination now
18 that they are foreclosed from ever attempting to
19 show that they have changed.

20 JUSTICE KAVANAUGH: And your argument
21 that Virginia did not provide that is?

22 MS. SPINELLI: It absolutely did not
23 provide that. There was --

24 JUSTICE KAVANAUGH: You know --

25 MS. SPINELLI: -- there was no -- so

1 let's assume that Jones was correct and that
2 there was an ability to request suspension.
3 That was not even remotely clear at that -- at
4 the time of --

5 JUSTICE GORSUCH: Let's say it was
6 hypothetically. Then what?

7 MS. SPINELLI: If -- if it was clear
8 that he could request suspension, I still don't
9 think it would matter because a suspension
10 hearing is not a Miller hearing. At the time,
11 Roper hadn't even been decided.

12 JUSTICE GORSUCH: I understand that.

13 MS. SPINELLI: The court hadn't --

14 JUSTICE GORSUCH: But let's just say
15 hypothetically that it was available to the
16 defendant to argue whatever he wanted with
17 respect to his youth and attendant
18 characteristics in any fashion that he wanted
19 and that the judge had to consider whatever
20 arguments were presented about youth before
21 imposing a life sentence and that the judge
22 could not impose that life sentence
23 automatically.

24 Let's say that's the state of the law
25 in Virginia hypothetically. Now we don't --

1 maybe we don't know that, but let's just assume
2 that, that all arguments are available, not just
3 incorrigibility, any arguments about youth are
4 available, even better for the defendant, all of
5 it has to be considered.

6 MS. SPINELLI: The hearing --

7 JUSTICE GORSUCH: Then what?

8 MS. SPINELLI: -- that Miller
9 requires, however, is not a -- is not only a
10 hearing that requires that youth be considered.
11 Youth is considered in all kinds of contexts.

12 But there -- Miller's specific holding
13 is that the characteristics of youth that were
14 identified first in Roper need to be considered
15 in order to determine whether or not life
16 without parole --

17 JUSTICE GORSUCH: And I'm positing --

18 MS. SPINELLI: -- is a proportionate
19 sentence.

20 JUSTICE GORSUCH: -- I'm positing a
21 hearing, counsel, in which all of that is
22 available to the defendant to argue. Then what?

23 MS. SPINELLI: I mean, it was
24 available to him to argue in the sense that, you
25 know, every new rule is available to the

1 defendant to argue before the rule is announced.

2 In fact, you know, he had no way of
3 anticipating that -- that this new
4 constitutional rule would be announced. The
5 Court hadn't even taken the first step down the
6 road toward that.

7 So, you know, even if it were the case
8 that he absolutely could have gotten the same
9 consideration had he, you know, been able to
10 look into the future, that is not what we
11 typically require defendants to do. And that's
12 why the Miller rule is retroactive in the first
13 place.

14 JUSTICE SOTOMAYOR: We're -- we're in
15 an awkward place because of what the Virginia
16 court did with Jones, which is sort of look at
17 something retroactively and say this is what you
18 could have done. There's lack of clarity --

19 MS. SPINELLI: Yes.

20 JUSTICE SOTOMAYOR: -- whether judges
21 understood they could have done that.

22 MS. SPINELLI: But let's look at
23 what --

24 JUSTICE SOTOMAYOR: But let's move --
25 let's move forward after Jones, okay? And Jones

1 is after Miller and Montgomery --

2 MS. SPINELLI: Correct.

3 JUSTICE SOTOMAYOR: -- correct? So
4 it's now, they're saying, judges can have
5 complete discretion, just the way that Justice
6 Gorsuch has posited. Moving forward, they
7 should consider age and all its attendant
8 circumstances.

9 Why would that system, moving
10 forward -- I'm not looking backwards. If
11 someone is sentenced today and their attorney
12 failed at the hearing to argue incorrigibility
13 or the lawyer argued it and the judge didn't say
14 one way or another what I posited earlier; he
15 just said: I've considered all the factors they
16 told me to consider in Jones, X sentence.

17 MS. SPINELLI: Well, first, Jones
18 didn't -- did not say that courts had to
19 consider age in light of Miller or that they had
20 to consider age at all. What it held is Miller
21 is completely inapplicable in Virginia because
22 we have a "discretionary system."

23 JUSTICE SOTOMAYOR: I -- oh, I --

24 MS. SPINELLI: Going --

25 JUSTICE SOTOMAYOR: -- have to read

1 Jones more carefully.

2 MS. SPINELLI: -- going forward,
3 however, and -- and going forward, Virginia is
4 not doing anything to comply with Miller. So
5 let's be clear.

6 When Miller was issued, there were
7 about 2800 juvenile lifers in "mandatory and
8 non-mandatory schemes." Almost every state has
9 already resolved this issue and complied with
10 Miller and understood it the way we understand
11 it.

12 There are only 60 states which only
13 have 60 juvenile lifers that haven't either made
14 them parole-eligible or begun resentencing --

15 JUSTICE SOTOMAYOR: We don't have --
16 did I --

17 MS. SPINELLI: -- in response to
18 Miller.

19 JUSTICE SOTOMAYOR: -- did I mishear
20 you? Did you say 60 states or six states?

21 MS. SPINELLI: Six states with 60
22 juvenile lifers out of 2800. That's -- that is
23 the scope of the problem that we're dealing
24 with.

25 JUSTICE GORSUCH: But let's --

1 MS. SPINELLI: And --

2 JUSTICE GORSUCH: If you could answer
3 Justice Sotomayor's hypothetical, that would be
4 very helpful to me as well.

5 Let us assume that all arguments are
6 available at -- at hearing, at the hearing, and
7 the defendant makes some, not others.

8 MS. SPINELLI: I am not arguing that
9 --

10 JUSTICE GORSUCH: Would that be --

11 MS. SPINELLI: -- his right cannot be
12 waived. Going forward, this is a known right.

13 JUSTICE GORSUCH: Okay, but -- but --

14 MS. SPINELLI: It can be waived just
15 like any other constitutional right.

16 JUSTICE GORSUCH: Counsel, if I might.
17 So just all arguments are available and the --
18 and the -- and the district judge has to
19 consider them. Would that, in your mind,
20 satisfy Miller and Montgomery?

21 MS. SPINELLI: It -- it might very
22 well.

23 JUSTICE GORSUCH: Okay.

24 MS. SPINELLI: Yeah. I -- I am -- I
25 -- I am not arguing that it would not. We're

1 only talking about the situation here, where
2 there was no consideration of youth, not only
3 with Malvo, but all 13 of the people who are
4 serving juvenile life without parole for capital
5 murder in Virginia were sentenced in exactly the
6 same way.

7 In none of those cases was there any
8 meaningful consideration of a lower sentence,
9 let alone consideration of whether youth made
10 life without parole unconstitutional.

11 In the only two cases where defense
12 counsel raised the possibility of a lower
13 sentence, the prosecutor said absolutely not,
14 life without parole is the mandatory minimum
15 sentence.

16 So we know that -- and -- and we know
17 and the Fourth Circuit made a finding and the
18 district court made a finding to this effect,
19 that youth was not considered in the way Miller
20 requires. And --

21 JUSTICE ALITO: In what way was it
22 necessary for the -- the youth of your client to
23 be considered? Do you think -- you describe him
24 as a child who committed these crimes because of
25 transient immaturity?

1 MS. SPINELLI: I -- I have not
2 described him as a child who committed these
3 crimes because of transient immaturity.

4 JUSTICE ALITO: Well, I thought that
5 was the test that you're saying that the court
6 has to apply, whether that -- whether it is a
7 child who committed the crimes because of
8 transient immaturity.

9 MS. SPINELLI: The question is whether
10 the juvenile committed the crimes based on
11 transient immaturity or permanent
12 incorrigibility. And what we are asking for is
13 a hearing in Virginia court where the Virginia
14 sentencer will make that determination.

15 He has not had that hearing yet, the
16 hearing that Miller and Montgomery require. And
17 he is entitled to have one opportunity to make
18 the case that he is not permanently
19 incorrigible.

20 JUSTICE ALITO: Is not now or was not
21 at the time?

22 MS. SPINELLI: Well, I think by
23 hypothesis --

24 JUSTICE ALITO: At the time of the
25 sentencing?

1 MS. SPINELLI: -- this is -- you know,
2 if one is permanently incorrigible, that's a
3 permanent quality. So it certainly is relevant
4 on resentencing what someone has done since they
5 committed the crime. They may well have, you
6 know, been able to provide evidence based on
7 what they did after the crime, that they are
8 not, in fact, permanently incorrigible.

9 JUSTICE ALITO: So, if he can
10 demonstrate, as a result of good behavior in
11 prison, for example, that he has been
12 rehabilitated, then he must be released?

13 MS. SPINELLI: No. No, absolutely
14 not. That's one piece of evidence that the
15 sentencer can consider. The sentencer then can
16 decide what is the sentence going to be.

17 And, you know, on resentencing, there
18 are occasions when juvenile offenders are
19 resentenced to life without parole. Even if he
20 were given parole eligibility, that would not
21 mean that he would be released.

22 It would mean that he would have the
23 opportunity sometime in the future to make the
24 case to a parole board that he has changed. So
25 we are -- we are nowhere near any prospect of

1 being released.

2 So, I mean, the Court -- the warden
3 and the United States have made it extremely
4 clear that they are asking this Court to discard
5 the reasoning of Montgomery. And there's
6 absolutely no reason for the Court to do that.

7 All of the arguments that they raised
8 were also raised in Montgomery, and the Court
9 declined to adopt them, and it shouldn't change
10 here.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MS. SPINELLI: Thank you.

14 CHIEF JUSTICE ROBERTS: General
15 Heytens, three minutes.

16 REBUTTAL ARGUMENT OF TOBY J. HEYTENS

17 ON BEHALF OF THE PETITIONER

18 MR. HEYTENS: So I'd just like to
19 address three points: what Miller requires, the
20 shifting nature of Malvo's arguments, and why
21 this matters.

22 So I think Miller is quite clear what
23 it requires because it's in the very last
24 paragraph of Miller. The Court says on page
25 489, "The judge or jury must have the

1 opportunity to consider mitigating evidence."

2 And, Mr. Chief Justice, you asked how
3 do I know he had that opportunity? I can report
4 Virginia code 19.2, 264.4, which is in the red
5 appendix at 3, says he had that opportunity.
6 And the Virginia Supreme Court's decision in
7 Jones says it at 795 S.E.2d at 722. They
8 specifically say, "Nor are we aware of any case
9 in which a sentencing statute gave the juvenile
10 offender the opportunity to present mitigating
11 evidence but the sentencing court arbitrarily
12 refused to consider it. If there were such a
13 case, we would not need the Eighth Amendment
14 because that would be reversed as a matter of"
15 --

16 JUSTICE SOTOMAYOR: And how about the
17 case they cited where counsel did raise this
18 argument about the youth and the judge said, I
19 have no power?

20 MR. HEYTENS: I think that would be --
21 first of all, that's not this case, because
22 there was no such objection.

23 JUSTICE SOTOMAYOR: But -- but it does
24 provide some evidence that -- and that plus the
25 history that before Jones, there was no juvenile

1 convicted of life without parole who was ever --
2 whose sentence was ever suspended.

3 MR. HEYTENS: But -- but I think at
4 most, under Jones, that establishes that that
5 individual was sentenced in violation of state
6 law, not in violation of the Eighth Amendment,
7 and that's not Mr. Malvo.

8 Mr. Malvo never requested such an
9 opportunity. And had he requested such an
10 opportunity, he could have pursued -- sorry, if
11 he requested that opportunity and the trial
12 court refused to do it, he could then have
13 appealed to the very same court that decided
14 Jones II and said the language that I just
15 quoted.

16 JUSTICE BREYER: The practical -- the
17 practical reading that I would give of these
18 cases, possibly, first case, you cannot sentence
19 under state law that's mandatory a -- a juvenile
20 to life without parole. Why not? Because
21 nobody's really considered whether he's
22 immature. So it's the reasoning, it's not this
23 procedural. That's the reasoning.

24 This case, they sentence him to life
25 without parole. And the odds are greater than

1 50/50 that no one ever thought about whether he
2 was, in fact, immature. Okay? Now it sounds to
3 me like the same case.

4 Now, leaving all these words out of
5 it, why isn't it the same case? I mean, I know
6 words like opportunity, dah-dah-dah-dah-dah, but
7 isn't there enough to say the odds are better
8 than 50/50 --

9 MR. HEYTENS: Well, Justice Breyer --

10 JUSTICE BREYER: -- no one ever
11 thought about that?

12 MR. HEYTENS: Well, Justice Breyer, I
13 -- I won't say opportunity then. I will say
14 Teague.

15 JUSTICE BREYER: No, no, you can say
16 anything you want. I'm just trying to --

17 (Laughter.)

18 CHIEF JUSTICE ROBERTS: But you have
19 an opportunity at your rebuttal to say it.

20 MR. HEYTENS: Thank you. So I think
21 under Teague, it's clear as day that for Mr.
22 Malvo to get retroactive relief he needs a new
23 rule. The only new rule he saw habeas based on
24 was Miller. And most of his discussion today
25 was about Montgomery. The Court should reverse.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 2:02 p.m., the case was
5 submitted.)

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