

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 hold willing 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 think it's just extremely hard, as
25 Malvo's brief now clarifies, that he only sought

1 habeas relief based on Miller. And if you look
2 at Malvo's original habeas petition -- it's on
3 page 80, I believe, page 80 of the petition
4 appendix -- he doesn't just say that he's
5 seeking relief based on Miller; he says he's
6 seeking relief based on Miller's holding that
7 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 is the
4 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 history of
4 doing it? I think that's -- that's the position
5 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. So
20 that case, the first case was Arizona -- was,
21 excuse me, Edwards versus Arizona, the one that
22 says that when the defendant says he wants to
23 talk to a lawyer, police can't go and talk to
24 him without getting him a lawyer.

25 And then seven years later, the Court

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

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

11 JUSTICE KAVANAUGH: Can I --

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

14 JUSTICE KAVANAUGH: Can I ask --

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

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

1 juvenile offenders whose crime reflect the
2 transient immaturity of youth. It announced --
3 it says Miller announced a substantive rule of
4 constitutional law.

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

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

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

21 JUSTICE KAVANAUGH: Suppose I try to
22 read Miller and Montgomery together to figure
23 out what the substantive rule is and that I
24 conclude the substantive rule is that the state
25 cannot impose life without parole on youth who

1 are merely immature but can impose it on those
2 who are incorrigible. Okay? That's -- suppose
3 that's the substantive rule.

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

7 MR. HEYTENS: Correct.

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

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

24 JUSTICE KAVANAUGH: The "that" being a
25 discretionary sentencing issue?

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

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

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

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

22 JUSTICE KAVANAUGH: Let me ask it this
23 way. Do you think a discretionary sentencing
24 regime is enough to satisfy the substantive
25 Miller/Montgomery rule as I posit it that --

1 that you can't impose life without parole on
2 someone who's merely immature as opposed to
3 incorrigible?

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

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

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

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

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

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

19 JUSTICE KAVANAUGH: The hypothetical.

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

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

24 MR. HEYTENS: -- would be different
25 depending on --

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

3 MR. HEYTENS: Okay. So, if you know
4 -- if you know for sure say because the
5 sentencer specifically says on the record that
6 they didn't, I think for purposes of federal
7 habeas review the answer is still that that is
8 not a cognizable basis for retroactively
9 invalidating a conviction. I think on direct
10 review, I think that person would have a very
11 strong argument. I suspect that I would think
12 that person's going to have the better of the
13 argument, that the person's going to win, but
14 that's because the way the court's cases develop
15 is in a piecemeal fashion, and --

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

25 So, in that circumstance, is that

1 enough?

2 MR. HEYTENS: Yes. And the reason is
3 because as we explain in our brief --

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

10 MR. HEYTENS: Sure.

11 JUSTICE KAVANAUGH: -- the mere -- the
12 merely immature?

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

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

24 MR. HEYTENS: Yes, the Supreme Court
25 of Virginia in Jones II specifically articulates

1 the factors that sentencers are supposed to
2 consider including in deciding whether to
3 suspend a sentence, and one of those factors is
4 age.

5 JUSTICE GINSBURG: If I understand --

6 CHIEF JUSTICE ROBERTS: It specifies
7 in considering whether to suspend a sentence?

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

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

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

24 JUSTICE KAVANAUGH: What if we were
25 unsure about that? Shouldn't we re -- even if

1 you are correct on the law here, isn't there
2 still a question of whether Virginia's regime
3 was truly discretionary?

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

5 JUSTICE KAVANAUGH: Or do you think --
6 or do you think that's over?

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Feigin.

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

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

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

24 That's wrong for two reasons. First
25 of all, the substantive retroactive holding of

1 Miller is limited to mandatory sentences. Any
2 objection Malvo has to the particular sentencing
3 proceedings in his individual case would at best
4 fall under what Montgomery describes as Miller's
5 procedural component, which isn't retroactive.

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

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

19 I think we know that from a couple of
20 different places. First, in Miller itself, I
21 think the Court goes out of its way to compare
22 and contrast discretionary schemes and mandatory
23 schemes. I think you'll find this in particular
24 at page 484 of Miller, noting that, basically,
25 as -- as I read Miller, discretionary schemes

1 are generally getting it right and mandatory
2 schemes aren't. And I think it would be quite
3 surprising that the kind of scheme the Court
4 used as its baseline for comparison turns out,
5 in fact, to be unconstitutional.

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

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

21 CHIEF JUSTICE ROBERTS: And his --

22 MR. FEIGIN: But --

23 CHIEF JUSTICE ROBERTS: -- his
24 opportunity came from what?

25 MR. FEIGIN: So his opportunity came

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

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

19 And if that is correct and that is --
20 and if that is sufficient for a scheme to be
21 considered discretionary under Miller, then I
22 don't think he has a claim under Miller. What
23 he might have, I suppose, is a very untimely
24 ineffective assistance of counsel claim,
25 although I'm not even sure he would succeed on

1 the merits of that. But we don't usually excuse
2 defendants from their failure to raise
3 particular considerations and decide that their
4 substantive rights have been violated for that
5 reason.

6 As Justice Kavanaugh noted, in
7 99.9 percent of these cases, youth is going to
8 be raised, and that's because everyone realizes
9 that youth is important when you're sentencing
10 someone to life without parole.

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

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

20 JUSTICE KAVANAUGH: Right.

21 MR. FEIGIN: -- contrary to the
22 Virginia Supreme Court's view -- sorry, even if,
23 consistent with the Virginia Supreme Court's
24 view, this is a discretionary scheme, then he
25 would have a Miller claim.

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

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

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

22 JUSTICE KAGAN: Right. So let's --
23 let's assume that, and, in fact, Miller says
24 several times, not just requires an opportunity
25 to consider but requires consideration.

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

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

15 MR. FEIGIN: So, Justice Kagan, let me
16 give you the sort of short answer to your
17 question and then I have a slightly longer
18 answer. I think the shorter answer to your
19 question is yes, the procedural right protects a
20 substantive one, but because it's a procedural
21 right it's not retroactive. The only thing that
22 is retroactive under Montgomery is what
23 Montgomery describes itself to be considering,
24 and this is on page 732, is it says that what
25 it's considering is whether Miller's holding

1 that precludes mandatory sentences of life
2 without parole for juvenile offenders is
3 retroactive.

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

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

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

21 And to the extent that the Court has
22 to preference some language over other language,
23 we'd urge the Court to preference the language
24 that adheres to the common scenario in both
25 cases which involved only mandatory sentences.

1 JUSTICE KAVANAUGH: Maybe I thought --

2 MR. FEIGIN: The --

3 JUSTICE KAVANAUGH: Keep going. Keep
4 going.

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

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

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

23 The terms transient, immaturity, and
24 irreparable corruption come from earlier cases
25 like Roper and like Graham where they're used

1 descriptively, not prescriptively, to describe
2 the kind of judgment a sentencer necessarily
3 makes in imposing this kind of sentence on a
4 juvenile.

5 JUSTICE KAVANAUGH: But if it is --

6 MR. FEIGIN: I don't --

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

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

24 JUSTICE KAVANAUGH: Well, the object
25 --

1 MR. FEIGIN: -- what crime the
2 defendant --

3 JUSTICE KAVANAUGH: Sorry. The
4 objective fact is the incorrigible.

5 MR. FEIGIN: So, Your Honor, I think
6 --

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

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

13 JUSTICE KAVANAUGH: Right.

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

19 JUSTICE KAVANAUGH: But that's the
20 category -- that's -- I'm done.

21 CHIEF JUSTICE ROBERTS: You can --

22 MR. FEIGIN: I guess I'd just finish
23 with the thought that Montgomery's framing of
24 this I don't think is particularly problematic
25 if it's limited to the only context anyone was

1 considering in that case, mandatory sentences.

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

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

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

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

25 And to the extent that we have changed

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. FEIGIN: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Spinelli.

17 ORAL ARGUMENT OF DANIELLE SPINELLI ON
18 BEHALF OF THE RESPONDENT

19 MS. SPINELLI: Mr. Chief Justice, and
20 may it please the Court:

21 Miller and Montgomery control this
22 case. The warden and the United States have
23 just conceded that in order to rule for them,
24 this Court would have to discard the reasoning
25 of Montgomery.

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

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

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

25 Malvo was sentenced in 2004. That was

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

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

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

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

21 JUSTICE KAVANAUGH: That argument you
22 are making -- that argument you are making is
23 about the Virginia scheme, and we will get to
24 that, I think, but there's an initial question
25 about what Miller and Montgomery mean.

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

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

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

22 JUSTICE KAVANAUGH: Okay. I'm sorry
23 to interrupt.

24 MS. SPINELLI: Please.

25 JUSTICE KAVANAUGH: I'm sorry to

1 interrupt but this is important. You said two
2 things there, "must consider," and you said
3 "must make a determination."

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

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

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

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

20 JUSTICE KAVANAUGH: Yeah.

21 MS. SPINELLI: Miller makes very clear
22 that sentencers must actually consider the
23 characteristics of youth and determine whether
24 life without parole is a proportional sentence
25 --

1 JUSTICE KAVANAUGH: So --

2 MS. SPINELLI: -- for the individual
3 defendant.

4 JUSTICE KAVANAUGH: I'm going to stop
5 you again. I'm sorry.

6 But in most sentencing regimes, as you
7 well know, throughout the country in the variety
8 of sentencing courts, judges are required to
9 consider all sorts of factors, by state law.

10 And arguments are raised to the state
11 court judge, the trial judge, about all sorts of
12 factors. The judge will often impose sentence
13 without marching through a checklist of all
14 those factors. Yet it is routinely accepted
15 that the judge has "considered the factor" if it
16 has been raised or even if it's required as a
17 matter of state law. There are lots of state
18 cases and federal cases that say, so long as the
19 issue has been raised, we assume the judge
20 "considered it."

21 Now if that's true, and you can
22 disagree with that, but if that's true, doesn't
23 a discretionary regime where the argument can be
24 raised necessarily satisfy Miller and
25 Montgomery's requirement of consideration?

1 MS. SPINELLI: No, it doesn't. And
2 let me explain why. In this particular case it
3 doesn't, because this was decided -- he was
4 sentenced not only before Miller, but before
5 Roper.

6 There's no possible way that the judge
7 could have, you know, silently in her head
8 considered the factors that weren't even
9 articulated in the first instance by this Court
10 until much later.

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

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

21 MS. SPINELLI: It's possible that that
22 could be sufficient under Miller. One would
23 have to make a determination looking at the
24 record whether -- whether there was some
25 judgment made that life without parole was, in

1 fact the proportionate --

2 JUSTICE SOTOMAYOR: Ms. Spinelli --

3 MS. SPINELLI: -- sentence for that
4 juvenile.

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

11 MS. SPINELLI: Yes.

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

17 So there's a substantive right.

18 MS. SPINELLI: Precisely, Your Honor.

19 JUSTICE SOTOMAYOR: If you're -- if
20 your crime was of transient immaturity, not to
21 be sentenced. Now, presumably what I think my
22 colleague -- and he can correct me if I'm wrong
23 -- is saying in a discretionary sentencing,
24 moving forward after Jones, courts know that
25 they have to take age and youth into account.

1 MS. SPINELLI: Correct.

2 JUSTICE SOTOMAYOR: So it's like now,
3 3553 of the federal criminal code requires a
4 laundry list of things for judges to consider.
5 Most judges do not tick off each one of those.
6 Doesn't say I find this but I don't find that.
7 I don't do this. I don't do that.

8 Most judges just say: I've thought of
9 them all, and this is my answer.

10 Now I think what Justice Kavanaugh --
11 he's shaking his head yes is --

12 JUSTICE KAVANAUGH: Yes.

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

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

1 sure of how you --

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

7 JUSTICE SOTOMAYOR: Well, but they --

8 MS. SPINELLI: This judge was not
9 required to consider youth.

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

15 MS. SPINELLI: Yes. There are --

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

19 MS. SPINELLI: That's correct.

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

23 MS. SPINELLI: It did not say that.

24 JUSTICE SOTOMAYOR: Or in light of
25 Montgomery's substantive rule.

1 MS. SPINELLI: It did not say that.

2 JUSTICE SOTOMAYOR: All right? But
3 that's the assumption being made.

4 MS. SPINELLI: Yes. And --

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

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

17 JUSTICE KAGAN: It sets those out and
18 requires courts to evaluate them?

19 MS. SPINELLI: Precisely, yes, Justice
20 Kagan.

21 JUSTICE KAGAN: As opposed to, for
22 example, either that doesn't set them out or
23 that just, you know, permits courts to do
24 whatever they want?

25 MS. SPINELLI: Yes.

1 JUSTICE KAGAN: Right?

2 CHIEF JUSTICE ROBERTS: So --

3 JUSTICE KAGAN: And there is different
4 kinds of non-mandatory schemes.

5 CHIEF JUSTICE ROBERTS: So --

6 MS. SPINELLI: I apologize.

7 CHIEF JUSTICE ROBERTS: Well, no, I
8 don't know -- I don't want to interrupt.

9 MS. SPINELLI: Please go ahead, Mr.
10 Chief Justice.

11 CHIEF JUSTICE ROBERTS: Sets them out
12 in like 3553, is that the sentencing
13 considerations, is that enough?

14 MS. SPINELLI: Well --

15 CHIEF JUSTICE ROBERTS: Here are the
16 things you need to consider and transient youth
17 or incorrigibility is one of them?

18 MS. SPINELLI: If there is a statute
19 that expressly sets out these factors and if the
20 judge considers them --

21 JUSTICE KAGAN: And -- and --

22 CHIEF JUSTICE ROBERTS: Well, that's
23 the --

24 JUSTICE KAGAN: -- requires a court to
25 consider them.

1 MS. SPINELLI: And requires the courts
2 to consider them, then we can presume that the
3 judge followed the law and did so. But this is
4 not a case where the judge was required to
5 consider anything.

6 And, in fact, she did not consider
7 imposing any lesser sentence than life without
8 parole. And the warden's position and the
9 United States' position is that that's good
10 enough.

11 JUSTICE KAVANAUGH: Back on Justice
12 Kagan's question for a second. In a
13 discretionary regime where the sentencer is
14 required to consider certain factors or even if
15 not, it's just a discretionary regime, the
16 defense counsel in any case where a juvenile's
17 facing life without parole as a possibility is,
18 of course, I would think, you would agree, any
19 competent defense counsel is going to argue the
20 youth to the sentencing judge. Do you agree
21 with that?

22 MS. SPINELLI: Going forward, yes.

23 JUSTICE KAVANAUGH: Yes. Okay. And,
24 therefore, can't you presume, and don't we do
25 this, as Justice Sotomayor was indicating, I'm

1 not putting words in her mouth, but in 3553-A
2 cases we also presume when something's been
3 argued to the sentencing judge, that the judge
4 has "considered" that factor.

5 MS. SPINELLI: Yes. And let me be
6 clear. I don't think this Court needs to say
7 anything about how to handle cases going forward
8 after Miller where there is a requirement that
9 the judge consider the Miller factors.

10 The -- the question here is does
11 Miller apply, can -- can Malvo invoke --

12 JUSTICE KAVANAUGH: Well, I think we
13 have to say what Miller and Montgomery -- well,
14 I don't know what we have to do, but we might
15 want to say what Miller and Montgomery mean as a
16 rule together because that's been a lot of the
17 focus of the briefs.

18 So we may have to indicate what is the
19 substantive rule and what is the procedure and
20 then we can figure out the Virginia --

21 MS. SPINELLI: Well, yes, the
22 substantive rule is that the Eighth Amendment
23 forbids states to impose life without parole on
24 juveniles who are not permanently incorrigible.

25 JUSTICE GORSUCH: Okay, counsel --

1 JUSTICE ALITO: And that's the holding
2 -- that is the holding of Miller?

3 MS. SPINELLI: That is -- that is what
4 Montgomery --

5 JUSTICE ALITO: Well, could Montgomery
6 change Miller? Montgomery, in Montgomery, the
7 issue was whether Miller was retro -- whether
8 the -- the rule adopted in Miller was
9 retroactive to cases on collateral --

10 MS. SPINELLI: Correct.

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

13 MS. SPINELLI: It shouldn't and it
14 didn't. What Miller --

15 JUSTICE ALITO: Okay. If it didn't,
16 then we can disregard whatever Montgomery said
17 and look at what Miller said. Where does Miller
18 say what you say that it is?

19 MS. SPINELLI: It says it --

20 JUSTICE ALITO: It says --

21 MS. SPINELLI: -- on page --

22 JUSTICE ALITO: -- exactly what it
23 held. It says, we hold, "we therefore hold that
24 the Eighth Amendment forbids a sentencing scheme
25 that mandates life imprisonment without

1 possibility of parole for juvenile offenders."

2 That was -- that was the holding.

3 MS. SPINELLI: That was the result.

4 There is also the reasoning that was necessary

5 to that result --

6 JUSTICE ALITO: So that --

7 MS. SPINELLI: -- which --

8 JUSTICE ALITO: -- wasn't the holding

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

10 holding?

11 MS. SPINELLI: It was certainly part

12 of the holding. But the court also said we

13 require a sentencer to take into account how

14 children are different. And the reason that it

15 requires that is in order to effectuate the

16 Eighth Amendment prohibition on disproportionate

17 sentences for juveniles.

18 JUSTICE GORSUCH: Counsel, if -- if

19 there were a requirement of a finding -- a

20 substantive right to a finding of

21 incorrigibility before the -- the sentence of

22 life without parole were permissible under the

23 Eighth Amendment, wouldn't it follow also that

24 there's a Sixth Amendment under Apprendi to have

25 a jury decide that rather than a judge?

1 MS. SPINELLI: I don't think that
2 necessarily would follow.

3 JUSTICE GORSUCH: How?

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

5 JUSTICE GORSUCH: Any time we increase
6 a sentence, a statutory maximum or otherwise, a
7 sentence, we say: Jury -- this Court has said a
8 jury has to make that finding.

9 MS. SPINELLI: There's a -- there is
10 actually a split of authority --

11 JUSTICE GORSUCH: There is no
12 indication of any of that in Montgomery or
13 Miller, is there?

14 MS. SPINELLI: Agreed. There is a
15 split of authority on that. There is a pending
16 cert petition that raises it. We don't have any
17 position on it.

18 JUSTICE GORSUCH: Well, the Court has
19 held several times if you increase the -- the --
20 the statutory permissible range of penalty, a
21 jury has to be involved, right? I mean, that's
22 not --

23 MS. SPINELLI: So it depends on --

24 JUSTICE GORSUCH: So there is no
25 circuit split on that.

1 MS. SPINELLI: It depends on how you
2 conceptualize it, but, you know, that's clearly
3 not one of the issues that's before the Court in
4 this case.

5 And I am not arguing, just to be
6 clear, that there is requirement of a specific
7 factual finding. Montgomery said there wasn't,
8 but what it also said is there has to be a
9 hearing that separates juveniles who may
10 constitutionally --

11 JUSTICE GORSUCH: Right. And a
12 hearing, if the right, if the substantive right
13 is that you cannot do life without parole for an
14 incorrigible youth, there has to be a hearing
15 and somebody has to make a finding about that.
16 It's not just a matter of discretion any more.
17 It's a matter of a factual finding. It's not a
18 sentencing factor. It's a -- it's a finding.

19 And I would have thought in those
20 circumstances we might have specified who would
21 do that finding and how that hearing would be
22 conducted, consistent with the Constitution.

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

1 JUSTICE GORSUCH: Isn't that -- isn't
2 that a further strike, though, against your
3 interpretation of Miller and Montgomery that the
4 Court would have created a new substantive right
5 that implicates the Sixth Amendment and not ever
6 said so or even hinted at it or even
7 acknowledged the question?

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

14 JUSTICE GORSUCH: This is a pretty --

15 MS. SPINELLI: -- happened in Atkins.

16 JUSTICE GORSUCH: -- big issue,
17 though, right? You know, the -- the judge or
18 the jury, you know, if we're creating a new
19 substantive right, we might want to say a few
20 words about, hey, there's an issue whether the
21 judge should do it or the jury should do it and
22 we'll take that up in the next case?

23 MS. SPINELLI: That is what happened
24 with Atkins. Atkins is very similar to this
25 case in that it barred the imposition of the

1 death penalty on the intellectually disabled.
2 As in this case, there needs to be a procedure
3 to sort out the intellectually disabled from
4 those who are not.

5 And the question arose after Atkins
6 does that determination have to be made by a
7 judge or a jury under Apprendi? And the
8 majority of courts that I know of, the majority
9 have said no, it doesn't have to be made by a
10 jury. It -- it can be made by a judge. And
11 states have allocated that determination in
12 different ways.

13 So it's not at all unusual that the
14 court wouldn't have addressed the Apprendi issue
15 in these decisions, but, I mean, to return to
16 Justice Kavanaugh's question about procedure and
17 substance, the two necessarily go together.

18 The -- the necessary procedure has to
19 effectuate the substantive rule. And,
20 therefore, as Montgomery says, it has to -- it
21 has to involve a determination as to whether
22 life without parole will be a proportionate
23 sentence --

24 CHIEF JUSTICE ROBERTS: But -- but we
25 know --

1 MS. SPINELLI: -- for that particular
2 defendant.

3 CHIEF JUSTICE ROBERTS: We know it
4 doesn't require a formal finding, right?

5 MS. SPINELLI: That -- that is
6 correct.

7 CHIEF JUSTICE ROBERTS: From
8 Montgomery?

9 MS. SPINELLI: It doesn't require --
10 it doesn't require any particular form of words.
11 It does require a substantive result.

12 CHIEF JUSTICE ROBERTS: But -- but you
13 said it requires a determination. And to me
14 that sounds like a formal finding. And one
15 thing we do know is that a formal finding is not
16 required.

17 So it would seem that consideration --
18 and I thought we had gotten that far before --
19 sort of it being included with respect to
20 factors that must be considered in imposing a
21 sentence. We're talking about 3553, which has a
22 list of things that have to be considered, and
23 this would be -- be one of them.

24 MS. SPINELLI: Yes. And, again, we --
25 you know, we're not presented here with a

1 question of what exactly a fact finder would
2 have to say.

3 CHIEF JUSTICE ROBERTS: Well, you are,
4 because I -- because I asked it.

5 (Laughter.)

6 MS. SPINELLI: I'm sorry, Your Honor.
7 I apologize, Mr. Chief Justice.

8 What I -- what I meant is, you know,
9 that is -- that is going to be an issue no
10 matter how the Court decides this case. There
11 have already been 2,000 resentencings under
12 Miller at which courts have made an effort to
13 apply the Miller factors.

14 There is -- Montgomery did not specify
15 a turn of phrase or a specific finding that has
16 to be made, but what's absolutely clear is that
17 the Court does have to decide whether, in light
18 of the characteristics of youth, this is a
19 proportionate -- life without parole is a
20 proportionate sentence for this particular
21 defendant.

22 JUSTICE KAVANAUGH: I don't -- I don't
23 --

24 MS. SPINELLI: -- and that didn't even
25 come close --

1 JUSTICE KAVANAUGH: -- think
2 Montgomery says decide. I mean, decide, to pick
3 up on the Chief Justice's question, sounds like
4 determination, sounds like finding.

5 Maybe -- maybe I'm --

6 MS. SPINELLI: Well, what it -- what
7 it says --

8 JUSTICE KAVANAUGH: In the key
9 paragraph, it says --

10 MS. SPINELLI: -- what it says is a
11 hearing where youth and its attendant
12 characteristics are considered as sentencing
13 factors is necessary to separate those juveniles
14 who may be sentenced to life without parole from
15 those who may not.

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

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

21 MS. SPINELLI: Correct, it just says
22 finding of fact. But it then says that Miller
23 did not impose a formal fact-finding
24 requirement, doesn't leave states free to
25 sentence a child whose crime reflects transient

1 immaturity to life without parole.

2 So Montgomery doesn't provide a lot of
3 guidance, but what we do know is that juveniles
4 are entitled to at least one opportunity to show
5 that they are not permanently incorrigible and
6 that it is not right to make a determination now
7 that they are foreclosed from ever attempting to
8 show that they have changed.

9 JUSTICE KAVANAUGH: And your argument
10 that Virginia did not provide that is?

11 MS. SPINELLI: It absolutely did not
12 provide that. There was --

13 JUSTICE KAVANAUGH: You know --

14 MS. SPINELLI: -- there was no -- so
15 let's assume that Jones was correct and that
16 there was an ability to request suspension.
17 That was not even remotely clear at that -- at
18 the time of --

19 JUSTICE GORSUCH: Let's say it was
20 hypothetically. Then what?

21 MS. SPINELLI: If -- if it was clear
22 that he could request suspension, I still don't
23 think it would matter because a suspension
24 hearing is not a Miller hearing. At the time,
25 Roper hadn't even been decided.

1 JUSTICE GORSUCH: I understand that.

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

3 JUSTICE GORSUCH: But let's just say
4 hypothetically that it was available to the
5 defendant to argue whatever he wanted with
6 respect to his youth and attendant
7 characteristics in any fashion that he wanted
8 and that the judge had to consider whatever
9 arguments were presented about youth before
10 imposing a life sentence and that the judge
11 could not impose that life sentence
12 automatically.

13 Let's say that's the state of the law
14 in Virginia hypothetically. Now we don't --
15 maybe we don't know that, but let's just assume
16 that, that all arguments are available, not just
17 incorrigibility, any arguments about youth are
18 available, even better for the defendant, all of
19 it has to be considered.

20 MS. SPINELLI: The hearing --

21 JUSTICE GORSUCH: Then what?

22 MS. SPINELLI: -- that Miller
23 requires, however, is not a -- is not only a
24 hearing that requires that youth be considered.
25 Youth is considered in all kinds of contexts.

1 But there -- Miller's specific holding
2 is that the characteristics of youth that were
3 identified first in Roper need to be considered
4 in order to determine whether or not life
5 without parole --

6 JUSTICE GORSUCH: And I'm positing --

7 MS. SPINELLI: -- is a proportionate
8 sentence.

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

12 MS. SPINELLI: I mean, it was
13 available to him to argue in the sense that, you
14 know, every new rule is available to the
15 defendant to argue before the rule is announced.

16 In fact, you know, he had no way of
17 anticipating that -- that this new
18 constitutional rule would be announced. The
19 Court hadn't even taken the first step down the
20 road toward that.

21 So, you know, even if it were the case
22 that he absolutely could have gotten the same
23 consideration had he, you know, been able to
24 look into the future, that is not what we
25 typically require defendants to do. And that's

1 why the Miller rule is retroactive in the first
2 place.

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

8 MS. SPINELLI: Yes.

9 JUSTICE SOTOMAYOR: -- whether the
10 judges understood they could have done that.

11 MS. SPINELLI: But let's look at
12 what --

13 JUSTICE SOTOMAYOR: But let's move --
14 let's move forward after Jones, okay? And Jones
15 is after Miller and Montgomery, correct?

16 MS. SPINELLI: Correct.

17 JUSTICE SOTOMAYOR: So it's now,
18 they're saying, judges can have complete
19 discretion, just the way that Justice Gorsuch
20 has posited. Moving forward, they should
21 consider age and all its attendant
22 circumstances.

23 Why would that system, moving
24 forward -- I'm not looking backwards. If
25 someone is sentenced today and their attorney

1 failed at the hearing to argue incorrigibility
2 or the lawyer argued it and the judge didn't say
3 one way or another what I posited earlier; he
4 just said: I've considered all the factors they
5 told me to consider in Jones, X sentence.

6 MS. SPINELLI: Well, first, Jones
7 didn't -- did not say that courts had to
8 consider age in light of Miller or that they had
9 to consider age at all. What it held is Miller
10 is completely inapplicable in Virginia because
11 we have a "discretionary system." Going --

12 JUSTICE SOTOMAYOR: I -- oh, I have to
13 read Jones more carefully.

14 MS. SPINELLI: -- going forward,
15 however, and -- and going forward, Virginia is
16 not doing anything to comply with Miller. So
17 let's be clear.

18 When Miller was issued, there were
19 about 2800 juvenile lifers in "mandatory and
20 non-mandatory schemes." Almost every state has
21 already resolved this issue and complied with
22 Miller and understood it the way we understand
23 it.

24 There are only 60 states which only
25 have 60 juvenile lifers that haven't either made

1 them parole-eligible or begun resentencing --

2 JUSTICE SOTOMAYOR: We don't have --
3 did I --

4 MS. SPINELLI: -- in response to
5 Miller.

6 JUSTICE SOTOMAYOR: Did you I mishear
7 you? Did you say 60 states or six states?

8 MS. SPINELLI: Six states with 60
9 juvenile lifers out of 2800. That's -- that is
10 the scope of the problem that we're dealing
11 with.

12 JUSTICE GORSUCH: But let's --

13 MS. SPINELLI: And --

14 JUSTICE GORSUCH: If you could answer
15 Justice Sotomayor's hypothetical, that would be
16 very helpful to me as well.

17 Let us assume that all arguments are
18 available at hearing, at the hearing, and the
19 defendant makes some, not others.

20 MS. SPINELLI: I am not arguing that
21 --

22 JUSTICE GORSUCH: Would that be --

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

25 JUSTICE GORSUCH: Okay, but -- but --

1 MS. SPINELLI: It can be waived just
2 like any other constitutional right.

3 JUSTICE GORSUCH: Counsel, if I might.
4 So just all arguments are available and the --
5 and the -- and the district judge has to
6 consider them. Would that, in your mind,
7 satisfy Miller and Montgomery?

8 MS. SPINELLI: It -- it might very
9 well.

10 JUSTICE GORSUCH: Okay.

11 MS. SPINELLI: Yeah. I -- I am -- I
12 -- I am not arguing that it would not. We're
13 only talking about the situation here, where
14 there was no consideration of youth, not only
15 with Malvo, but all 13 of the people who are
16 serving juvenile life without parole for capital
17 murder in Virginia were sentenced in exactly the
18 same way.

19 In none of those cases was there any
20 meaningful consideration of a lower sentence,
21 let alone consideration of whether youth made
22 life without parole unconstitutional.

23 In the only two cases where defense
24 counsel raised the possibility of a lower
25 sentence, the prosecutor said absolutely not,

1 life without parole is the mandatory minimum
2 sentence.

3 So we know that -- and -- and we know
4 and the Fourth Circuit made a finding and the
5 district court made a finding to this effect,
6 that youth was not considered in the way Miller
7 requires. And --

8 JUSTICE ALITO: In what way was it
9 necessary for the -- the youth of your client to
10 be considered? Do you think -- you describe him
11 as a child who committed these crimes because of
12 transient immaturity?

13 MS. SPINELLI: I -- I have not
14 described him as a child who committed these
15 crimes because of transient immaturity.

16 JUSTICE ALITO: Well, I thought that
17 was the test that you're saying that the court
18 has to apply, whether that -- whether it is a
19 child who committed the crimes because of
20 transient immaturity.

21 MS. SPINELLI: The question is whether
22 the juvenile committed the crimes based on
23 transient immaturity or permanent
24 incorrigibility. And what we are asking for is
25 a hearing in Virginia court where the Virginia

1 sentencer will make that determination.

2 He has not had that hearing yet, the
3 hearing that Miller and Montgomery require. And
4 he is entitled to have one opportunity to make
5 the case that he is not permanently
6 incurable.

7 JUSTICE ALITO: Is not now or was not
8 at the time?

9 MS. SPINELLI: Well, I think by
10 hypothesis --

11 JUSTICE ALITO: At the time of the
12 sentencing?

13 MS. SPINELLI: -- this is -- you know,
14 if one is permanently incurable, that's a
15 permanent quality. So it certainly is relevant
16 on resentencing what someone has done since they
17 committed the crime. They may well have, you
18 know, been able to provide evidence based on
19 what they did after the crime, that they are
20 not, in fact, permanently incurable.

21 JUSTICE ALITO: So, if he can
22 demonstrate, as a result of good behavior in
23 prison, for example, that he has been
24 rehabilitated, then he must be released?

25 MS. SPINELLI: No. No, absolutely

1 not. That's one piece of evidence that the
2 sentencer can consider. The sentencer then can
3 decide what is the sentence going to be.

4 And, you know, on resentencing, there
5 are occasions when juvenile offenders are
6 resentenced to life without parole. Even if he
7 were given parole eligibility, that would not
8 mean that he would be released.

9 It would mean that he would have the
10 opportunity sometime in the future to make the
11 case to a parole board that he has changed. So
12 we are -- we are nowhere near any prospect of
13 being released.

14 So, I mean, the Court -- the warden
15 and the United States have made it extremely
16 clear that they are asking this Court to discard
17 the reasoning of Montgomery. And there's
18 absolutely no reason for the Court to do that.

19 All of the arguments that they raised
20 were also raised in Montgomery, and the Court
21 declined to adopt them, and it shouldn't change
22 here.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MS. SPINELLI: Thank you.

1 CHIEF JUSTICE ROBERTS: General
2 Heytens, three minutes.

3 REBUTTAL ARGUMENT OF TOBY J. HEYTENS
4 ON BEHALF OF THE PETITIONER

5 MR. HEYTENS: So I'd just like to
6 address three points: what Miller requires, the
7 shifting nature of Malvo's arguments, and why
8 this matters.

9 So I think Miller is quite clear what
10 it requires because it's in the very last
11 paragraph of Miller. The Court says on page
12 489, "The judge or jury must have the
13 opportunity to consider mitigating evidence."

14 And, Mr. Chief Justice, you asked how
15 do I know he had that opportunity? I can report
16 Virginia code 19.2, 264.4, which is in the red
17 appendix at 3, says he had that opportunity.
18 And the Virginia Supreme Court's decision in
19 Jones says that at 795 S.E.2d at 722. They
20 specifically say, "Nor are we aware of any case
21 in which a sentencing statute gave the juvenile
22 offender the opportunity to present mitigating
23 evidence but the sentencing court arbitrarily
24 refused to consider it. If there were such a
25 case, we would not need the Eighth Amendment

1 because that would be reversed as a matter of"

2 --

3 JUSTICE SOTOMAYOR: And how about the
4 case they cited where counsel did raise this
5 argument about the youth and the judge said, I
6 have no power?

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

10 JUSTICE SOTOMAYOR: But it does
11 provide some evidence that -- and that plus the
12 history that before Jones, there was no juvenile
13 convicted of life without parole who was ever --
14 whose sentence was ever suspended.

15 MR. HEYTENS: But -- but I think at
16 most, under Jones, that establishes that that
17 individual was sentenced in violation of state
18 law, not in violation of the Eighth Amendment,
19 and that's not Mr. Malvo.

20 Mr. Malvo never requested such an
21 opportunity. And had he requested such an
22 opportunity, he could have pursued -- sorry, if
23 he requested that opportunity and the trial
24 court refused to do it, he could then have
25 appealed to the very same court that decided

1 Jones II and said the language that I just
2 quoted.

3 JUSTICE BREYER: The practical -- the
4 practical reading that I would give of these
5 cases, possibly, first case, you cannot sentence
6 under state law that's mandatory a -- a juvenile
7 to life without parole. Why not? Because
8 nobody's really considered whether he's
9 immature.

10 So it's the reasoning, it's not this
11 procedural. That's the reasoning.

12 This case, they sentence him to life
13 without parole. And the odds are greater than
14 50/50 that no one ever thought about whether he
15 was, in fact, immature. Okay? Now it sounds to
16 me like the same case.

17 Now, leaving all these words out of
18 it, why isn't it the same case? I mean, I know
19 words like opportunity, dah-dah-dah-dah-dah, but
20 isn't there enough to say that the odds are
21 better than 50/50 no one ever thought about
22 that?

23 MR. HEYTENS: Well, Justice Breyer, I
24 -- I won't say opportunity then. I will say
25 Teague.

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

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: But you will
5 have an opportunity at your rebuttal to say it.

6 MR. HEYTENS: Thank you. So I think
7 under Teague, it's clear as day that for Mr.
8 Malvo to get retroactive relief he needs a new
9 rule. The only new rule he saw habeas based on
10 was Miller. And most of his discussion today
11 was about Montgomery. The Court should reverse.
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 2:02 p.m., the case was
16 submitted.)

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