

No. 18-217

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IN THE  
*Supreme Court of the United States*

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RANDALL MATHENA, WARDEN,  
*Petitioner,*  
v.

LEE BOYD MALVO,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

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**BRIEF *AMICI CURIAE* OF ERWIN  
CHEMERINSKY, AZIZ HUQ, LEAH  
LITMAN, DAVID STRAUSS, CARLOS  
VÁZQUEZ, AND LARRY YACKLE IN  
SUPPORT OF RESPONDENT**

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## BRIEF OF *AMICI CURIAE*<sup>1</sup>

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### INTEREST OF THE *AMICI*

*Amici* Erwin Chemerinsky, Aziz Huq, Leah Litman, David Strauss, Carlos Vazquez, and Larry Yackle are federal courts scholars, studying the operation and purposes of federal jurisdiction and criminal law.<sup>2</sup> Although they have divergent legal and political outlooks, *amici* share a keen interest in the federal courts, having published extensively on these topics and collected decades of experience examining issues implicated in this case.

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<sup>1</sup> *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the Petitioner have provided blanket consent to filing any *amicus* brief on the merits, and Counsel for Respondent has consented to filing of this brief.

<sup>2</sup> The views contained herein are those of the *amici* and not their respective institutions.

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## SUMMARY OF THE ARGUMENT

This case concerns the scope of the constitutional rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012), and held applicable on collateral review in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Respondent Lee Boyd Malvo, who was sentenced to life without parole for crimes committed as a juvenile, maintains that *Miller* established a substantive rule that renders life without parole disproportionate for the vast majority of juveniles in light of their “diminished culpability and heightened capacity for change,” and that he is therefore entitled to a new sentencing proceeding at which his youth will be considered to implement that substantive rule. *Miller*, 567 U.S. at 479. The substantive character of this rule is precisely why this Court in *Montgomery*

held the *Miller* rule applied on collateral review under the retroactivity rules set forth in *Teague v. Lane*, 489 U.S. 288, 307, 311 (1989), and its progeny.

To conform to *Miller*, a sentencing scheme must require the sentencing authority to separate juveniles in the class who cannot be subjected to life without parole (juveniles whose crimes reflect “transient immaturity”) from the rare juveniles who fall outside that class (those whose crimes reflect “irreparable corruption”) and who may therefore receive that sentence. *Miller*, 567 U.S. at 479-80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). Because Virginia’s sentencing scheme offered no assurance that life without parole would be imposed only on the rare irreparably corrupt juveniles, Malvo’s sentence is unconstitutional.

The argument advanced by the warden and the United States as *amicus* treats *Miller* as applying only to “mandatory” life-without-parole sentences. They maintain that any discretion at all to impose a lesser sentence automatically takes a sentencing scheme outside *Miller*’s strictures. But that position fails to account for *Miller*’s reasoning or *Montgomery*’s holding that *Miller* is substantive precisely because it identifies a class of juveniles whom the state cannot condemn to life without parole. If all *Miller* required was a discretionary rather than a mandatory process, it would be a procedural rule, and likely would not have been given retroactive effect by *Montgomery*.

The warden’s view misunderstands not just *Miller* and *Montgomery*, but the very concept of a substantive rule set forth by *Teague* and its progeny. *Teague* established that most new constitutional



rules are not applicable on collateral review, *i.e.* after a criminal conviction has been rendered final through direct appeal. 489 U.S. at 307, 311. But it recognized two exceptions to that general rule: (1) for “watershed” procedural rules; and (2) for “substantive” rules, including those that place certain penalties beyond the state’s power to impose, because of either the nature of the offense or the offender. *Id.* at 311. *Montgomery* properly held that *Miller* announced a *substantive* rule, and therefore is applicable on collateral review.

The argument advanced by the warden and the United States cannot be squared with the distinction between substantive and procedural rules. This Court’s precedents treat a rule as substantive, and therefore applicable to collateral proceedings regardless of when a conviction became final, where it prohibits the imposition of a particular punishment on a category of offenders. *See Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). *Montgomery* held that the rule announced in *Miller* was substantive because it prohibits a life-without-parole sentence for a class of offenders (juveniles) and allows it only in aberrant cases of “the rare juvenile offender whose crime reflects irreparable corruption.” *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-80).

The framework under which Malvo was sentenced does not ensure that the sentencing authority performs the necessary sorting function. Virginia’s applicable statutes make no distinctions between juveniles and adults, let alone between those juveniles who can and cannot be sentenced to life without parole. The warden nonetheless contends that the trial court could have considered Malvo’s youth and

related factors if Malvo had requested that the court suspend his sentence.

This argument fails. It distorts the purpose of a proceeding on the propriety of suspending a sentence, and, most important, it misses the point of the sentencing hearing that *Miller* demands. The salient objective of the hearing that comports with *Miller* is to isolate the exceedingly rare juvenile who is “permanently incorrigible” from the class of juvenile offenders who cannot constitutionally be given a life-without-parole sentence. The warden makes no assertion that the sentencing judge in fact engaged in the sorting required by *Miller*; he apparently argues that it is sufficient that it could have happened, even if it never did. The mere formal availability of suspension in no way assures that that determination was made in Malvo’s case.

## ARGUMENT

**I. *TEAGUE V. LANE* AND ITS PROGENY PROVIDE THAT SUBSTANTIVE RULES OF CONSTITUTIONAL LAW ARE APPLICABLE ON COLLATERAL REVIEW AFTER A CRIMINAL CONVICTION HAS BECOME FINAL.**

This case concerns the proper scope of the rule announced in *Miller* and held applicable on collateral review in *Montgomery*. That determination, in turn, must be guided by a proper understanding of the retroactivity principles announced in *Teague* and its progeny. Those principles make clear that *Miller* announced a substantive, not a procedural rule, holding that imposing life without parole on a class of juveniles was constitutionally beyond the substantive power of any state.

*Teague* and *Griffith v. Kentucky*, 479 U.S. 314 (1987), together establish the basic framework for when new rules apply “retroactively,” namely, on collateral review after a criminal conviction has become final. Generally speaking, new rules do not apply on collateral review, with two exceptions: (1) watershed rules of criminal procedure and (2) substantive rules of constitutional or statutory law. The only “watershed” rule of procedure the Court has ever recognized is the right to an attorney announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The second category, substantive rules of constitutional or statutory law, is more expansive. As the Court explained in *Penry v. Lynaugh*, decided four months after *Teague*, substantive rules include rules that exempt either certain *conduct* from criminal punishment or certain *classes of individuals* from

particular punishments. 492 U.S. 302, 330 (1989). These rules are “substantive” because, no matter what process a state follows, the penalty cannot be imposed. Thus, regardless of procedure, the state may not criminalize flag burning. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). And regardless of procedure, a state may not impose the death penalty on juveniles. *Roper*, 543 U.S. at 578. As the Court explained in *Montgomery*, “even the use of impeccable factfinding procedures could not legitimate a verdict’ where ‘the conduct being penalized is constitutionally immune from [the] punishment [imposed].” *Montgomery*, 136 S. Ct. 730 (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) (alterations added)).

The rules barring execution of juveniles, the intellectually disabled, or those who have not killed are all examples of such substantive rules, because they apply regardless of the process followed in deciding upon a sentence. *Roper*, 543 U.S. at 578; *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008). They derive from the substantive Eighth Amendment principle that such punishments are constitutionally disproportionate for those groups of people. The same holds true for sentencing juveniles to life without the possibility of parole for nonhomicide offenses. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

In these instances, finality and comity give way to retroactive application of new rules because “a new rule placing a certain class of individuals beyond the state’s power to punish by death is analogous to a new rule placing certain conduct beyond the state’s power to punish at all.” *Penry*, 492 U.S. at 330.

Where the state is proscribed from imposing a particular punishment, “the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan’s view of retroactivity have little force.” *Id.* “There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.” *Williams v. United States*, 401 U.S. 646, 675 (1971) (Harlan, J., concurring in part and dissenting in part).

The rule announced in *Miller* was just such a substantive rule. It was not merely a procedural ruling that “some discretion” must be afforded before a juvenile is sentenced to life without parole, but a substantive ruling that, in light of the characteristics of youth, life without parole is a disproportionate punishment for the great majority of juveniles, even for homicide. By definition, that is true regardless of the procedure—“mandatory” or not—followed in imposing a sentence.

**II. MILLER HELD THAT STATES MAY NOT IMPOSE LIFE WITHOUT PAROLE ON JUVENILES WHOSE CRIMES REFLECT TRANSIENT IMMATURITY, ANNOUNCING A SUBSTANTIVE RULE OF CONSTITUTIONAL LAW.**

The essential question in this case is whether the scheme Virginia employed to sentence Malvo meets the constitutional standard this Court recognized in *Miller*. It does not. To pass constitutional muster under *Miller*, a sentencing scheme must ensure that the sentencing authority separates the vast majority of juveniles who cannot be sentenced to life without

parole from the rare irreparably corrupt individuals who can be. 567 U.S. at 479-80.

The Court “established” in *Miller* that “the penological justifications for life without parole collapse in light of ‘the distinctive attributes of youth.’” *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 472). Accordingly, *Miller* held that life without parole is an unconstitutional penalty for “a class of defendants”—namely, “juvenile offenders whose crimes reflect the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734 (quoting *Penry*, 492 U.S. at 330). Almost all juveniles, by virtue of their youth, have “diminished culpability and heightened capacity for change” and so are members of the class and cannot constitutionally be sentenced to life without parole. *Miller*, 567 U.S. at 479.

Yet, the warden and his *amici*, including the United States, contend that all that *Miller* condemned was a procedural flaw: only those sentencing schemes that mandate life without parole for all juveniles. They argue that *Miller* has no bearing on a scheme that gives the sentencing authority power to impose a different sentence, even if the life without parole sentence is mandatory. That position cannot be squared with *Miller*.

Any supposed distinction between “mandatory” and “discretionary” systems fails if a “discretionary” scheme does not enforce *Miller*’s distinction between youth immaturity and irreparable corruption. The defect in mandating life without parole in all cases is not merely that juries and judges are unable to consider age and age-related factors and, on that basis, impose an alternative penalty. It is that mandating life without parole prevents the sentencing

authority from separating the class of juveniles who cannot constitutionally be sentenced to life without parole from the rare exceptions who are constitutionally eligible for this punishment. The mere provision of the formal power to suspend a sentence, without any guidance as to how or even whether to consider the distinctive attributes of youth with respect to a life-without-parole sentence, fails to ensure that the constitutionally required distinction will be drawn, as it must be, in *every* case.

The warden and the United States confuse the constitutional principle recognized in *Miller* with the application of that principle in the Alabama and Arkansas cases at bar. The mandatory character of the statutes in those states was important, indeed, dispositive—but only for the *reason* that the scheme prevented the sentencing authority from separating juveniles who are in the exempt class from those who are not. *Miller*, 567 U.S. at 479-80. As the Fourth Circuit explained below,

even though imposing a life-without-parole sentence on a juvenile homicide offender pursuant to a mandatory penalty scheme *necessarily* violates the Eighth Amendment as construed in *Miller*, a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's "crimes reflect permanent incorrigibility," as distinct from "the transient immaturity of youth."

*Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018) (emphasis original) (quoting *Montgomery*, 136 S. Ct. at 734).

To pass constitutional muster under *Miller*, a sentencing scheme must ensure that the sentencing authority performs this crucial sorting function. A scheme directing life without parole in all instances obviously does not. A scheme allowing for discretion may or may not. It does not if it merely gives juries and trial courts discretion without specifying any standards. It does not if it merely allows, without requiring, juries and judges to take account of age and age-related factors. A discretionary sentencing scheme *does* comply with *Miller* if, and only if, it requires the sentencing authority to address those age and age-related factors *and* permits a life-without-parole sentence solely in the case of an offender who, because of “irreparable corruption,” is not a member of the constitutionally immune class. *Miller*, 567 U.S. at 479-80 (quoting *Roper*, 543 U.S. at 573).

As this Court explained in *Montgomery*, the function of the sentencing hearing required in *Miller* is to effectuate “*Miller’s* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” 136 S. Ct. at 735. The sentencing authority is “required” to consider and give appropriate weight to age and age-related factors in order “to separate those juveniles who may be sentenced to life without parole from those who may not.” *Id.* A hearing is necessary, therefore, to determine whether a particular juvenile does *not* exhibit the “diminished culpability and heightened capacity for change” that typically make life without parole unconstitutional for most juveniles. *Miller*, 567 U.S. at 471, 479.

The warden and the United States claim that the central holding of *Montgomery*, as well as its descrip-



tion of *Miller*, is nothing but misleading *dicta*. It is neither. It is both accurate and necessary to the *Montgomery* Court's holding. *Montgomery* presented the question whether *Miller* applied on collateral review. In order to answer that question, the *Montgomery* Court had to determine what rule *Miller* imposed and whether it was "substantive"—and thus retroactive—or merely "procedural." In order to determine whether the rule recognized in *Miller* is substantive, the Court in *Montgomery* had to examine and describe that rule. The discussion in *Montgomery* was therefore essential to the decision in that case. It is an authoritative statement of the *Miller* rule and has as much precedential force as *Miller* itself.<sup>3</sup>

The Court in *Montgomery* unmistakably held that the rule announced in *Miller* was substantive precisely because it barred imposition of life without parole on a class of juveniles. While "a procedural rule 'regulate[s] only the *manner of determining* the defendant's culpability,'" a substantive rule "prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 136 U.S. at 732 (alteration and emphasis in original) (quoting *Schiro*, 542 U.S. at 353). *Miller*'s rule was substantive under that definition because it did not concern merely the *procedure* for imposing

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<sup>3</sup> Justice Scalia recognized in *Montgomery* that the Court read *Miller* to announce a substantive rule that life without parole can be imposed only on juveniles who are not in the class of offenders who share the usual characteristics of youth. He thought that understanding of *Miller* was wrong; that is one of the reasons he dissented. *Montgomery*, 136 S. Ct. at 743-44 (Scalia, J., dissenting).

life without parole, but rested on a determination that such a sentence was, as a *substantive* matter, unconstitutional for the class of most juvenile offenders—those whose crimes reflect “unfortunate yet transient immaturity.” *Id.* at 734.

To repudiate *Montgomery’s* account of *Miller*, as the warden and United States urge, would negate the Eighth Amendment’s restriction on imposing life without parole only on rare juveniles. The consequences would be felt not only in cases like this one, in which an offender was sentenced before *Miller*, but in future cases in which states with “discretionary” sentencing schemes would be free to sentence juveniles to life without parole even where they possess the distinct attributes of most juveniles as a class. The Court said explicitly that its decision would make life without parole an extremely rare sentence. *Miller*, 576 U.S. at 479. The warden and the United States invite the Court now to thwart that purpose—by disregarding the reasoning behind both *Miller* and *Montgomery*.

The United States further argues that *Miller* is limited to mandatory life-without-parole schemes. It posits that the Court in *Montgomery* deemed the *Miller* rule substantive because mandatory sentences impose a “significant risk” that a defendant would receive an unlawful sentence. According to the United States, a scheme in which there is any remote possibility to depart from the otherwise mandated life without parole sentence poses no such risk. It follows, the United States argues, that *Montgomery* could not have deemed substantive a rule prohibiting a sentencing framework that allows for exceptions.

This reasoning rests on a faulty premise: namely, that a framework that permits any exceptions presents no “significant risk” that an unlawful life-without-parole sentence will be imposed. The Court in *Montgomery* explicitly held otherwise. The Court explained that a sentencing framework poses the necessary danger if it permits the imposition of life without parole on juveniles in the immune class. *Montgomery*, 136 S. Ct. at 734. The United States quotes the relevant passage from *Montgomery*, but neglects the salient words: “*Miller* is retroactive because it ‘necessarily carries significant risk that a defendant,’—*here the vast majority of juvenile offenders*—‘faces a punishment that the law cannot impose upon him.’” *Montgomery*, 136 S. Ct. at 734 (alteration omitted) (emphasis added) (quoting *Schriro*, 542 U.S. at 352). Both mandatory and discretionary sentencing schemes pose that risk if they lack a mechanism for distinguishing who can be subject to such punishment from the vast majority of juveniles who cannot be.

The United States cites precedents in which this Court held that new rules of law were procedural rather than substantive and so were not enforceable in federal habeas proceedings. The rules in those cases condemned practices that might have produced invalid sentences in some cases. According to the United States, a rule barring a “discretionary” sentencing scheme in this context similarly presents “some” risk, but not a “significant risk,” of unlawful sentences to life without parole. Therefore, the United States argues, a rule invalidating a “discretionary” framework would also have to be procedural. Not so. The Court itself noted the same precedents in *Montgomery* and distinguished them on the

straightforward ground that they dealt with new rules that “altered the processes” required before sentencing an offender (to death in the cases cited). *Montgomery*, 136 S. Ct. at 736. None of them “rendered a certain penalty unconstitutionally excessive for a category of offenders.” *Id.* The only procedural element in *Miller* is a hearing to effectuate the substantive rule that only the rare juvenile can constitutionally be sentenced to life without parole.

The warden argues that the availability of a mechanism for the trial court to depart from the mandatory life without parole sentence by invoking its authority to suspend sentences generally—regardless of whether the sentencing authority actually *concluded* that the juvenile fell outside of the class—is sufficient to comply with the rule announced in *Miller* and reaffirmed in *Montgomery*. As demonstrated above, that argument ignores the reasoning of both cases.

This Court has used several formulations to describe juveniles who are outside the constitutionally exempt class. They lack the usual “diminished culpability and heightened capacity for change,” *Miller*, 567 U.S. at 479; their crimes reflect “irreparable corruption,” *id.* at 479-80; they are beset by “permanent incorrigibility,” *Montgomery*, 136 S. Ct. at 734; they “exhibit such irretrievable depravity that rehabilitation is impossible.” *Id.* at 733. Those references are not terms of art. But they all underscore that the juveniles they describe are uncommon, precisely because they lack what virtually all juveniles have by reason of their youth—diminished culpability and increased capacity for rehabilitation. The substantive rule in *Miller* is that no juvenile offender can be

sentenced to life without parole unless he or she lacks the usual characteristics of youth.

**III. VIRGINIA'S SENTENCING  
SCHEME DOES NOT CONFORM TO  
THE PRINCIPLE RECOGNIZED IN  
*MILLER V. ALABAMA.***

The Virginia system under which Malvo was sentenced does not ensure that the sentencing authority performs the essential sorting function required by *Miller*. On their face, the pertinent statutes prescribe life without parole across the board in the manner of the “mandatory” schemes in *Miller*. They treat juveniles in the same way they treat adults, thus taking no account of a juvenile’s reduced culpability and greater capacity for change. Once *any* defendant is convicted of a capital offense (and the death penalty is not recommended), Virginia law specifies that “the defendant shall be sentenced to imprisonment for life.” Va. Code Ann. § 19.2-264.4(A). And it specifies that *any* defendant sentenced to life imprisonment for capital murder is ineligible for parole of any kind. Va. Code Ann. §§ 53.1-165.1, 53.1-40.01.

Despite these statutes, the warden contends that the Virginia sentencing scheme is distinguishable from the Alabama and Arkansas arrangements in *Miller*. The only difference the warden offers is that Virginia formally allows the trial court to suspend an offender’s sentence, while Alabama and Arkansas did not. That difference provides no principled basis for distinction.

As noted *supra*, to satisfy *Miller*, a sentencing proceeding must supply a means by which the sentencing authority separate juveniles who may not constitutionally be sentenced to life without parole

from those rare juveniles who may. The mere availability of the court's ability to depart from the mandatory sentence by exercising its general authority to suspend a sentence in no way satisfies this constitutional requirement. The warden evidently imagines that, before *Miller*, a trial court could have considered youth in the process of deciding whether to suspend a life-without-parole sentence, if the defendant had requested suspension. That conjecture is unsound.

The purpose of suspending a sentence is to exercise the sentencer's discretion to spare an offender a lawful punishment based on case-specific circumstances. It is often one of the many requests a defendant makes at sentencing. It is not to ensure that the offender's punishment is constitutionally valid. And it certainly is not to ferret out a youth who, despite his or her age, is irretrievably beyond redemption. The formal availability of a suspended sentence is of no more consequence in that regard than the possibility of a pardon immediately upon conviction. *See Graham*, 560 U.S. at 70 (holding the "the remote possibility of [executive clemency]. . . does not mitigate the harshness of [a] sentence"). The warden's argument therefore fails, as it distorts the purpose of a suspension proceeding, and it misses the point of the constitutional standard to be enforced.

In Malvo's case, the court never considered suspending his life-without-parole sentences. But even if a court did consider suspending such a sentence, considering suspension does not ensure that the trial court will apply the standard *Miller* announced for distinguishing the majority of juveniles who cannot be sentenced to life without parole from the uncom-

mon youthful offender who can receive this penalty. Mere unguided discretion to depart from a mandatory sentence cannot satisfy *Miller*, which requires a system that limits the authority to impose a life-without-parole sentence on youthful offenders to those rare juveniles whose crimes reflect irreparable corruption rather than transient immaturity.

### CONCLUSION

For the foregoing reasons, the Court should affirm the Fourth Circuit Court of Appeals' award of habeas corpus relief.

Respectfully Submitted,

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