No. 18-217

IN THE

Supreme Court of the United States

RANDALL MATHENA, Warden,

Petitioner,

vs.

LEE BOYD MALVO,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did *Montgomery* v. *Louisiana* expand the reach of *Miller* v. *Alabama* beyond mandatory juvenile LWOP cases so as to require new sentencing proceedings for 17-year-old murderers who have already had one discretionary sentencing hearing?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

A mandatory sentence of life without the possibility of parole cannot be imposed on a homicide offender

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

under age 18. This rule is retroactive to cases on collateral review. The Fourth Circuit's expansive application of this rule to defendant's discretionary life-without-parole sentence opens up the possibility of courts reexamining all juvenile life sentences imposed long ago. Such a result would be severely detrimental to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In the fall of 2002, 17-year-old defendant Lee Boyd Malvo, and his adult accomplice, John Muhammad, embarked on a weeks-long crime spree that terrorized the Washington, D.C. metropolitan area. *Malvo* v. *Mathena*, 893 F. 3d 265, 267 (CA4 2018). The pair "embarked on a series of indiscriminate sniper shootings" that killed twelve people and critically wounded six others. *Id.*, at 267-268. Malvo and Muhammad were finally captured while sleeping in their car at a rest stop in Frederick County, Maryland. *Id.*, at 268.

Malvo was charged as an adult with capital murder in two separate Virginia jurisdictions, Fairfax County and Spotsylvania County. The Fairfax case was transferred to Chesapeake where Malvo was convicted by a jury of two counts of capital murder. *Id.*, at 268-269. At sentencing, the jury had the choice between the death penalty or life in prison. *Id.*, at 269.[2] The jury

2. Muhammad was sentenced to six terms of life in prison without parole in Maryland and to two death sentences in Virginia. *Muhammad* v. *State*, 934 A. 2d 1059, 1065 (Md. Spec. App. 2007); *Muhammad* v. *Commonwealth*, 619 S. E. 2d 16, 24 (Va. 2005). Muhammad was put to death in Virginia by lethal injection on November 10, 2009. Clark County Prosecuting Attorney, John Allen Muhammad, http://www.clarkprosecutor

selected life in prison. After the jury was excused, the trial court conducted a final sentencing hearing on March 10, 2004, and Malvo was formally sentenced to two terms of life in prison. Under Virginia law, Malvo was not eligible for parole. Malvo subsequently entered an "*Alford* plea"[3] pursuant to a plea agreement in Spotsylvania County, pleading guilty to another count of capital murder and one count of attempted capital murder, and he was sentenced to two additional terms of life in prison without parole. *Id.*, at 269-270. Malvo did not appeal.

In 2013, Malvo filed two petitions for writs of habeas corpus in the U. S. District Court for the Eastern District of Virginia pursuant to 28 U. S. C. § 2254, challenging his life without parole ("LWOP") sentences imposed by the two Virginia trial courts. Malvo argued that his sentences were rendered unconstitutional by this Court's then-recent decision in *Miller* v. *Alabama*, 567 U. S. 460 (2012). The District Court denied both petitions after concluding that *Miller* was not retroactive to cases on collateral review and that the claim was also time barred. *Malvo*, 893 F. 3d, at 270. While an appeal to the Fourth Circuit was pending, this Court decided *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). *Montgomery* held that *Miller* applies retroactively. Malvo's petition was remanded to the District Court for further consideration in light of *Montgomery*. The District Court subsequently granted both of Malvo's habeas petitions. *Malvo* v. *Mathena*, 254 F. Supp. 3d 820, 835 (ED Va. 2017). The state appealed.

.org/html/death/US/muhammad1181.htm (as visited June 7, 2019).

3. *North Carolina* v. *Alford*, 400 U. S. 25 (1970).

The Fourth Circuit affirmed the District Court and held that under *Montgomery*, an LWOP sentence imposed on a juvenile homicide offender violates the Eighth Amendment if it was imposed "without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.' " *Malvo*, 893 F. 3d, at 274 (quoting *Montgomery*, 136 S. Ct., at 734). Because Malvo did not receive such a proceeding when he was initially sentenced, which according to the Fourth Circuit "is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender," *id*., at 275, he is entitled to "the retroactive benefit of new constitutional rules that treat juveniles different for sentencing." *Id*., at 277.

This Court granted certiorari on March 18, 2019.

SUMMARY OF ARGUMENT

Miller's holding is limited to sentencing schemes that mandate life without parole for juvenile homicide offenders. The *Miller* Court was concerned that an automatic life sentence without parole deprives a juvenile of the opportunity to present mitigating evidence of "youth and attendant characteristics" that may justify a lesser sentence. Malvo was sentenced to life in prison without parole for capital murder. However, under Virginia law, the trial court retained the authority to suspend all or part of his life sentences. The power to suspend the sentence renders Virginia's sentencing scheme discretionary. The question in *Montgomery* was limited to whether *Miller*'s holding was retroactive to final cases. Because *Miller* is limited to mandatory life-without-parole sentences upon which a juvenile had no opportunity to present mitigating evidence of youth, the Fourth Circuit's expansive

application of *Montgomery* to Malvo's life sentences was erroneous.

ARGUMENT

I. The Fourth Circuit's expansive application of *Montgomery* to Malvo's discretionary life sentences was erroneous.

All 50 states currently have laws that allow juveniles who commit serious crimes to be prosecuted and sentenced as an adult either by transfer from juvenile court or by direct filing.[4] Malvo was 17 years old at the time of his murder spree, and he was charged as an adult with capital murder. *Malvo* v. *Mathena*, 893 F. 3d 265, 268 (CA4 2018). He was convicted and sentenced to two terms of LWOP and also entered into a plea deal agreeing to two more terms of LWOP. *Id*., at 269.[5] Virginia trial courts are not required to accept a jury's sentencing decision and may suspend imposition of a sentence altogether, or suspend it in whole or in part.

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4. Today, the majority of states set the maximum age of juvenile court jurisdiction at age 17. National Conference of State Legislatures, Juvenile Age of Jurisdiction and Transfer to Adult Court Laws, http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx (as visited June 7, 2019). A few states draw the line even younger, at age 16. *Ibid*.

5. Prosecutors sought the death penalty for Malvo, which at the time was permitted for juvenile homicide offenders age 16 and older. *Id*., at 266; *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), overruled in part by *Roper* v. *Simmons*, 543 U. S. 551 (2005). After deliberation in which evidence of Malvo's youth and family life was introduced, the jury declined to recommend the death penalty and, under Virginia law, he was sentenced to life in prison. *Malvo*, 893 F. 3d, at 269. State law required his sentence to be without possibility of parole. *Ibid*.

Va. Code Ann. § 19.2-303; *Jones* v. *Commonwealth*, 795 S. E. 2d 705, 711-712 (Va. 2017). The trial court judge in Malvo's case did not exercise this opportunity to suspend Malvo's sentences.

After Malvo's convictions became final, this Court decided a series of cases involving the constitutionality of juvenile sentencing practices. At issue was whether these sentencing practices violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. Beginning with *Roper* v. *Simmons*, 543 U. S. 551 (2005), the focus on juvenile offenders being generally less culpable than adults, more amenable to reformation, and thus less deserving of severe penalties came to fruition. *Roper* categorically barred imposition of the death penalty for defendants under age 18. *Id.*, at 570-571. The *Roper* Court assured the nation that the penalty of life imprisonment without parole remained available for deterrence. See *ibid.*; see also *Graham* v. *Florida*, 560 U. S. 48, 90 (2010) (Roberts, J., concurring in judgment) ("*Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders"). Next, *Graham*, *supra*, at 74, categorically barred LWOP for juveniles convicted of nonhomicide offenses. At issue in this case is the application and interpretation of this Court's two most recent decisions on juvenile sentencing: *Miller* v. *Alabama*, 567 U. S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). To adequately analyze *Miller* and *Montgomery*, the constitutional framework as established by *Roper* and *Graham* must first be briefly discussed.

A. Roper and Graham.

Christopher Simmons was 17 years old when he told his friends "he wanted to murder someone." *Roper*, 543 U. S., at 556. He planned the details of the intended murder and set his plan into action when he

broke into Shirley Crook's home. He subdued her, covered her eyes and mouth with duct tape, and bound her hands. *Ibid*. Simmons and two teenage friends stole her minivan and drove her to a state park. Upon arrival, they covered her head with a towel and walked her to a railroad trestle that ran above a river. *Id*., at 556-557. They then tied her hands and feet together with electrical wire, wrapped duct tape around her face, and threw her from the bridge. Her dead body was later discovered by two fisherman. *Ibid*.

The "bright line" of adulthood is considered age 18 not because the "qualities that distinguish juveniles from adults" magically disappear at the stroke of midnight on an individual's 18th birthday, but because the majority concluded that "a line must be drawn" that can be broadly applied. *Id.*, at 574. Simmons was sentenced to death. He argued that the Eighth Amendment prohibited the execution of a juvenile. This Court agreed and categorically barred the imposition of the death penalty for all juveniles under age 18. *Ibid*.

"[T]he death penalty is reserved for a narrow category of crimes *and* offenders." *Id*., at 569 (emphasis added). There is no question that Christopher Simmons' heinous murder of Shirley Crook fell within the "narrow category of crimes" most deserving of a death sentence. However, in *Roper* great focus was placed on the "diminished culpability" of juvenile offenders as a class. *Id*., at 571. *Roper* identified three general differences between adults and juveniles that signify why "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569. "Juveniles are relatively more (1) immature and irresponsible, (2) vulnerable to negative pressures from their peers and environment, and (3) fragile and unstable in their identities." Denno, The Scientific

Shortcomings of *Roper v. Simmons*, 3 Ohio St. J. Crim. L. 379, 380 (2006).

"It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U. S., at 573. Because "trained psychiatrists" have difficulty making that distinction, this Court held that "States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty." *Ibid*. A sentence of death is very different from life in prison and the ever evolving death penalty jurisprudence over the years is indicative of that difference. *Id*., at 568 ("[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force").

Five years later, this Court was asked to decide if sentencing a juvenile to LWOP for a nonhomicide crime violates the Eighth Amendment in *Graham* v. *Florida*, 560 U. S. 48 (2010). Terrance Graham was a month short of his 18th birthday when he committed a robbery for which he received a life sentence. *Id.*, at 55-57. This Court was asked for the first time to categorically exclude a class of offenders (nonhomicide juveniles) from receiving an LWOP sentence. Up until this point, categorical exclusions from punishment under the Eighth Amendment had been limited to death sentences. This Court relied heavily on *Roper* and delved further into selective studies on brain science and research into developmental psychology to again lump

all juveniles into one generic group of individuals with diminished culpability. *Id.*, at 67-68.[6]

In support of its finding that a juvenile's "transgression[s]" are "'not as morally reprehensible as that of an adult,'" *Graham* points to *Roper*'s "hallmark features of adolescence" and again states that experts have difficulty differentiating "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" 560 U. S., at 68 (quoting *Roper*, 543 U. S., at 573).

Because *Graham* was considering a categorical challenge, it examined culpability in light of the nature of the crimes committed. *Id.*, at 68-69. *Graham* distinguished murder from other violent nonhomicide offenses against individuals. *Id.*, at 69; see also *Kennedy* v. *Louisiana*, 554 U. S. 407, 437-438 (2008) (nonhomicide offenders cannot be sentenced to death). "[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U. S., at 69. A line is drawn between murder and violent nonhomicide offenses and the two cannot be compared. *Ibid.*; *Kennedy*, *supra*, at 438.

Even though crimes such as robbery and rape are "'devastating in their harm,'" murder is distinguishable in both its "'severity and irrevocability.'" *Graham*, 560 U. S., at 69 (quoting *Kennedy*, 554 U. S., at 438). Despite the fact that 37 states, the District of

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6. "*Graham* suffers from the faulty premise that juveniles who commit heinous crimes are typical juveniles, and that they are categorically less culpable than young adult offenders." Lerner, Sentenced to Confusion: *Miller v. Alabama* and the Coming Wave of Eighth Amendment Cases, 20 Geo. Mason L. Rev. 25, 26 (2012).

Columbia, and the Federal Government all allowed LWOP for juvenile nonhomicide offenders, *Graham* categorically excluded all juveniles who did not commit homicide from being sentenced to LWOP. *Id.*, at 62, 74-75.[7]

It is no doubt true that the "hallmark features of adolescence" include immaturity, irresponsibility, vulnerability to peer pressure, impulsivity, and less understanding of the consequences of their actions. See *Roper*, 543 U. S., at 588 (O'Connor, J., dissenting); *Miller*, 567 U. S., at 471-472. *Roper* described these " 'signature qualities of youth [as] transient.' " 543 U. S., at 570 (quoting *Johnson* v. *Texas*, 509 U. S. 350, 368 (1993)). However, to broadly conclude that *all* individuals under age 18 "cannot with reliability be classified among the worst offenders" or that "'their irresponsible conduct is not as morally reprehensible as that of an adult' " is ludicrous. Many families of loved ones who were brutally murdered by juveniles would agree with this sentiment. See *id*., at 558 (evidence of devastation the murder victim's death brought to her family's lives); see also Stimson & Grossman, Adult Time for Adult Crimes, Life Without Parole for Juvenile Killers and Violent Teens (2009) (case studies).[8]

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7. "This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Ibid.*

8. The National Organization of Victims of Juvenile Murderers ("NOVJM") advocates for family members and friends of loved ones who were murdered by teenagers. "Murder victims families and friends are traumatized, and damaged for life. They need to be supported and embraced by the community in their long journey post-homicide. All of their victims' rights must be respected and enforced for the duration. This means for a lifetime." http://www.teenkillers.org/index.php/about-us/

Roper and *Graham* prohibited categories of punishment from being imposed upon offenders under age 18 "[b]ecause juveniles have diminished culpability and greater prospects for reform" and are thus " 'less deserving of the most severe punishments.' " *Miller*, 567 U. S., at 471 (quoting *Graham*, 560 U. S., at 68).[9] *Roper* prohibited the death penalty for juveniles who murder because of their "diminished culpability" and because the "penological justifications" (retribution and deterrence) for the death penalty apply to juveniles with less force. 543 U. S., at 571. *Graham* prohibited LWOP for nonhomicide offenses because of "diminished culpability" and because "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." 560 U. S., at 69.

A juvenile murderer's culpability must be considered "*in light of their crimes* and characteristics, along with the severity of the punishment in question." *Id*., at 67 (emphasis added). Thus, if a teen commits the heinous crime of intentional homicide, then *Graham*'s logic dictates that he or she is categorically *more* deserving of the most serious punishment. Because *Roper* prohibits a sentence of death, and because LWOP "is 'the second

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(as visited June 10, 2019). NOVJM "stand[s] for the importance of giving devastated victims' families LEGAL FINALITY in their cases so that they do not have to spend much of the rest of their lives constantly having to re-engage with the person who destroyed their lives by murdering their loved ones." http://www.teenkillers.org (as visited June 10, 2019).

9. For an explanation of why the science cited in *Graham* does not actually support this blanket statement or the rule of that case, see Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Graham* v. *Florida*, No. 08-7412, at 14-25, http://www.cjlf.org/program/briefs/GrahamSullivan.pdf.

most severe penalty permitted by law,'" *id*., at 69 (quoting *Harmelin* v. *Michigan*, 501 U. S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)), then LWOP should be considered a proportionate sentence.[10] However, "[t]he jurisprudence of the Eighth Amendment was long ago untethered from its text ...," Lerner, *supra*, at 25; see also Stimson & Grossman, *supra*, at 23-39, and *Miller* took *Graham*'s logic and threw it out the window.

B. Miller and Montgomery.

In *Miller*, the two 14-year-old defendants were convicted of murder. State law mandated they be automatically sentenced to LWOP upon their convictions and in neither case did a judge or jury have the discretion to impose a lesser punishment. 567 U. S., at 465. Both defendants argued that the mandatory nature of their states' sentencing schemes violated the Eighth Amendment. *Id.*, at 467. This Court agreed and held that a mandatory LWOP sentence imposed upon a convicted teenage murderer under the age of 18 is considered cruel and unusual. *Id.*, at 465. This Court built upon the reasoning and analysis of both *Roper* and *Graham*, but unlike those two cases, did not categorically bar sentencing a teenage killer to LWOP. Only mandatory sentencing schemes were held to be unconstitutional.

Miller expressly declined the invitation to bar all juvenile offenders from being sentenced to LWOP. See

10. "A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment." *Id*., at 89 (Roberts, C.J., concurring in judgment).

567 U. S., at 483.[11] This Court acknowledged that *Graham* "took care to distinguish [nonhomicide] offenses from murder, based on both moral culpability and consequential harm." *Id.*, at 473. But, the Court found that "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Ibid*. Because *Miller* refused to ban all juvenile LWOP's, this Court turned its focus to the mandatory nature of the sentencing schemes involved.

Miller was particularly concerned that all of these mandatory schemes provided no opportunity for a judge or jury to consider youth as a mitigating factor and impose any other lesser punishment. *Id*., at 473-474. "[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*., at 476-477. In reaching that conclusion, this Court focused on (1) precedent discussing the differences in culpability between juveniles and adults for purposes of sentencing and that (2) mandatory sentencing schemes preclude the consideration of those differences. See *id.*, at 471, 483.

Graham equated some aspects of juvenile LWOP with death in that it "alters the offender's life by a forfeiture that is irrevocable." 560 U. S., at 69. *Miller* picked up on this comparison and in turn implicated the line of cases "demanding individualized sentencing when imposing the death penalty." 567 U. S., at 475.

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11. "Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process . . . before imposing a particular penalty." *Ibid*. Those two sentences establish conclusively that *Montgomery*'s *Teague* analysis is wrong. See *infra* at 18.

The mandatory imposition of a death sentence for murder was held to be unconstitutional in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). In the death penalty context, individualized sentencing permits capital defendants the opportunity to introduce evidence of mitigating circumstances pertaining to their individual characteristics (family background, etc.) and also the details attendant to their crime. The introduction of such evidence allows a sentencer to evaluate this evidence when deciding the appropriate sentence under the circumstances. *Miller*, 567 U. S., at 475-476 ("[t]he death penalty is reserved only for the most culpable defendants committing the most serious offenses").

In the capital context, youth is to be considered as a mitigating factor when assessing an offender's culpability. *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993); see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 115-116 (1982). Although a mandatory LWOP scheme imposed on an adult does not run afoul of the Eighth Amendment, see *Harmelin* v. *Michigan*, 501 U. S. 957, 996 (1991), *Miller* stated that the same cannot be true when applied to juveniles. "Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." 567 U. S., at 476.

Miller's holding declared unconstitutional mandatory sentencing schemes in 29 jurisdictions and invalidated over 2000 LWOP sentences, many of which were imposed for aggravated murder. *Id.*, at 482, and n. 9; *id.*, at 493-494 (Roberts, C.J., dissenting). Four years later, this Court was asked to decide in *Montgomery* if *Miller*'s holding applied retroactively. 136 S. Ct., at

725.[12] This Court's answer to that question was yes. *Id*., at 734. However, the route this Court took in *Montgomery* to reach that conclusion is problematic and has been the source of much confusion for many lower state and federal courts trying to apply the correct rule.

Miller clearly held that sentencing schemes that *automatically sentence* juveniles to LWOP without any opportunity to consider youth as a mitigating factor violate the Eighth Amendment. 567 U.S., at 470.[13] In so holding, *Miller* stated:

> "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. . . . But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a

12. "In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Ibid*.

13. "[T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id*., at 474.

> sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*, at 479-480 (internal citations omitted).

Montgomery cites to the above paragraph from *Miller*, and "explains" it as follows:

> "These considerations underlay the Court's holding in *Miller* that mandatory life-without-parole sentences for children 'pos[e] too great a risk of disproportionate punishment.' *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of 'children's diminished culpability and heightened capacity for change,' *Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon.' " 136 S. Ct., at 733-734.

This portion of the analysis tracks language in *Miller*, though arguably dicta rather than holding. *Miller* prohibits sentencing schemes that mandate LWOP and do not allow a judge or jury the *opportunity* to consider how juveniles are "constitutionally different" from adults. *Miller*, 567 U. S., at 474, 489. In the next paragraph, however, *Montgomery* went beyond the scope of *Miller* and imposed a new categorical ban on punishment not found in *Miller*:

> *"Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.' *Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'* Because *Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S. Ct., at 734 (emphasis added; internal citations omitted).

Miller does not hold what this portion of *Montgomery* purports it to hold. *Roper*, *Graham*, and *Miller* all discussed "transient immaturity" and "irreparable corruption" in the context of its difficulty to ascertain. *Roper* and *Graham* decided that such a determination was too difficult to leave in the hands of a judge or jury, and thus withdrew it altogether. *Miller*, however, mandates individualized sentencing in homicide cases, which includes "tak[ing] into account the differences among defendants and crimes." 567 U. S., at 480, n. 8.

Miller requires the opportunity for "a sentencer [to] follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*., at 483. Given that opportunity, a sentencer can consider whether the crime reflected transient immaturity or irretrievable corruption while evaluating the defendant's youth and other attendant circumstances. But for *Montgomery* to say

that a specific finding of irretrievable corruption must be established in order to sentence a juvenile to LWOP is not what *Miller* mandates.

As noted, *Montgomery*'s sole issue was whether *Miller* applied retroactively to cases on collateral review. *Miller* announced a new rule, and generally new constitutional rules of criminal procedure will not be applied retroactively on collateral review. *Teague* v. *Lane*, 489 U. S. 288, 310 (1989). One exception to this rule is for "substantive rules of constitutional law." *Montgomery*, 136 S. Ct., at 728. *Montgomery* described these as " 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Ibid*. (quoting *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989)).

Montgomery determined that *Miller* announced a substantive rule and was therefore retroactive. 136 S. Ct., at 734. In order to fit a square peg (*Miller*) into a round hole (substantive rule) so that existing mandatory sentences would be reconsidered, *Montgomery* focused on the class (juveniles) and then divided the class by status (those who are irretrievably corrupt and those who are experiencing transient immaturity). *Roper* acknowledged that distinguishing the two types was nearly impossible, see *supra* at 8, but *Montgomery* claims that *Miller* made it constitutionally required.

Montgomery could not focus on class alone because *Miller* expressly refused to categorically ban all LWOP sentences for juvenile homicide offenders. See *Montgomery*, 136 S. Ct., at 743 (Scalia, J., dissenting). "This new description of the *Miller* holding is utilized by the majority to fit the holding nicely into a retroactive application exception." Comment, *Montgomery v. Louisiana*: An Attempt to Make Juvenile Life Without Parole a Practical Impossibility, 32 Touro L. Rev. 679,

702 (2016). The Eighth Amendment contains no substantive standard that mandates what a court must consider and *Montgomery*'s "intellectually dishonest" reinterpretation of *Miller* has left lower state and federal courts in a difficult position. *Id*., at 704. This case is a prime example.

In 2013, Malvo submitted two 28 U. S. C. § 2254 petitions for writs of habeas corpus in Federal District Court. *Malvo* v. *Mathena*, 254 F. Supp. 3d 820, 823 (ED Va. 2017). Malvo argued that *Miller* and *Montgomery* rendered his LWOP sentences unconstitutional. *Id.*, at 824. In response, the Warden (Mathena) argued that because Virginia's LWOP sentencing scheme is not mandatory, *Miller* and *Montgomery* do not apply to Malvo's sentences. *Ibid*. The District Court held that it "need not determine whether Virginia's penalty scheme is mandatory or discretionary because this Court finds that the rule announced in *Miller* applies to all situations in which juveniles receive a life-without-parole sentence." *Id.*, at 827.

The District Court stated that *Montgomery* "clarified the scope of the rule in *Miller*" and thus "the purpose of the *Miller* rule [is] to evaluate *all* juveniles facing life imprisonment without parole and sort out which ones are irreparably corrupted and which are not." *Ibid*. The District Court granted Malvo's petitions, vacated his sentences, and remanded for resentencing. *Id.*, at 835. The Fourth Circuit agreed and affirmed the finding that *Montgomery* applies to both mandatory and discretionary sentences. *Malvo*, 893 F. 3d, at 274.

> "[T]he *Montgomery* Court confirmed that, 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.' " *Ibid*. (quoting *Montgomery*, 136 S. Ct., at 734) (emphasis in original).

Miller's core holding is that LWOP sentencing cannot be mandatory for murderers under age 18. There must be a discretionary individualized sentencing process upon which a judge or jury has the opportunity to consider mitigating evidence. *Miller*, 567 U. S., at 489. *Montgomery* was asked to decide whether that core holding was retroactive to final cases. *Montgomery* reinterpreted *Miller* in an intellectually dishonest way in order to reach a desired result. Although acknowledging this reality undermines the rationale of *Montgomery* with regard to the *Teague* rule, this Court need not reconsider *Montgomery*'s core holding in this case because it is not at issue, and given the passage of time that question is rapidly becoming moot. Those juveniles who were sentenced under the mandatory schemes deemed unconstitutional in *Miller* have reaped the benefit of *Montgomery* and have been provided with the opportunity to present mitigating evidence of youth that may justify a lesser sentence than LWOP, which is all that *Miller*, and therefore *Montgomery*, demand.

Malvo was sentenced to LWOP, and under Virginia law, the trial court had the discretion to order a lesser sentence. State judgments should not be reopened when a state's sentencing scheme in effect at the time of sentencing gave the trial court the opportunity to impose a less severe sentence. The Fourth Circuit's expansive application of *Montgomery* to Malvo's discretionary LWOP sentences was erroneous.

II. A murderer close to legal adulthood is not a "child" and should be held responsible for his acts.

Malvo was 17 years and 246 days old when he murdered his last victim. Two days later, Malvo and Muhammad's reign of terror came to an end.[14] Malvo and others like him are not "children," but rather are on the cusp of legal adulthood. It is no secret that the majority of homicides committed by juveniles increases as they age. In 2016, there were 877 homicides committed by juveniles in the United States.[15] The breakdown by age is as follows: 14 years old—46; 15 years old—115; 16 years old—262; and 17 years old—429. *Ibid*. The number of murders committed by 17-year-olds is greater than the number committed by offenders 14-16 years old combined.[16]

Had Malvo's killing spree continued after his 18th birthday, either a sentence of death or LWOP could

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14. Malvo's birth date is February 18, 1985. He murdered his last victim, Conrad Johnson, on October 22, 2002. He was arrested on October 24, 2002. *Muhammad* v. *Commonwealth*, 619 S. E. 2d, 16, 29 (Va. 2005); Murderpedia, http://www.murderpedia.org/male.M/m/malvoleeboyd1.htm (as visited June 7, 2019).

15. United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, Offending by Juveniles: Homicide, https://www.ojjdp.gov/ojstatbb/offenders/qa03104.asp?qaDate=2016&text=yes (as visited June 7, 2019).

16. The incidents of school shootings nationwide since 1970 also show that the greatest number of shooters are older juveniles: age 17 (160) and age 16 (150). Center for Homeland and Defense and Security, K-12 School Shooting Database, http://www.chds.us/ssdb/incidents-by-age-of-shooter/ (as visited June 7, 2019).

have (and should have) been imposed upon him without violating the Eighth Amendment. *Roper*, 543 U. S., at 574 (18 is "the age at which the line for death eligibility ought to rest"); *Harmelin* v. *Michigan*, 501 U. S. 957, 996 (1991) (mandatory LWOP imposed on individual age 18 or older is constitutional).

Too often in these cases, the victims of juvenile murderers are relegated to the background. Charles Moose, Chief of the Montgomery County, Maryland Police Department who was instrumental in tracking down and apprehending Malvo and Muhammad, sums up the gravity of these crimes as follows:

> "The three-week sniper siege left a permanent mark on Montgomery County and the Washington D.C., area. The snipers' bullets did permanent damage. They left ten people dead. They seriously wounded three others. The snipers' marksmanship shot holes in the lives of the families of these victims. Some of that damage can never be repaired. The people who died will be missed, forever, by their loved ones. Some of the people who lived through the siege will be frightened, forever, by what happened to them. The sniper shootings will be the defining moment in the childhoods of little boys and girls who had to go to school terrified that some unknown person was going to shoot them down on the playground." Moose & Fleming, *Three Weeks in October, The Manhunt for the Serial Sniper* 309 (2003).

Dean Harold Meyers was shot to death as he was pumping gas.[17] Kenneth Bridges, a father of six chil-

17. Earl Swift, The Beltway Sniper's seventh victim: Dean Meyers, The Virginian Pilot, Nov. 7, 2009, https://pilotonline.com/news/article_689ad6a6-56cd-5433-938e-2697ea39a4b2.html (as visited June 10, 2019).

dren, had just left a business meeting. Like Meyers, he stopped for gas and was similarly assassinated.[18] Linda Franklin had just sold her house and was in the process of moving. She stopped at Home Depot with her husband. As they were loading a shelf into the trunk of their car, Franklin was shot in the head and instantly died.[19] Nine other unsuspecting victims were similarly hunted down and savagely killed. The victims must always remain at the forefront of the discussion. *Morris* v. *Slappy*, 461 U. S. 1, 14 (1983).

III. The *Lockett* line of cases is a train wreck and should be scaled back, not expanded.

One particularly disturbing aspect of *Miller* is its invocation of *Lockett* v. *Ohio*, 438 U. S. 586, 602-608 (1978) (plurality opinion), expanding that case and its progeny beyond its explicit "death is different" boundary. Cf. *id*., at 604-605 ("in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy written into statutes"). The *Lockett* line of cases is a train wreck which should be scaled back, not expanded.

It is one thing to say that there must be a discretionary process where mitigating evidence is considered. That is the holding for capital cases in *Woodson* and that is the core holding of *Miller*. It is quite another for

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18. Kenny Waters, Recalling a Father and Worthy Friend, Philadelphia Tribune, Oct. 25, 2005, republished at http://kenbridges.org/ (as visited June 10, 2019).

19. Associated Press, Sniper Victim's Husband: Something Hit My Face, Fox News (updated January 13, 2015), https://www.foxnews.com/story/sniper-victims-husband-something-hit-my-face (as visited June 10, 2019).

this Court to usurp to itself the power to decide what criteria must be employed in sentencing, stripping the people of the states of the power to decide that important question of policy through the democratic process. That is what this Court did for capital cases in *Lockett* and its progeny, and that is what *Montgomery* claimed for *Miller* in cases of under-18 murderers facing life without parole.

Lockett is a train wreck. It was illegitimate the day it was decided. Conspicuously absent from the plurality opinion on this point is any basis in the text or history of the Constitution.[20] It contradicted precedents less than two years old without expressly overruling them. See *id*., at 622-624 (White, J., dissenting in part); *id*., at 629-631 (Rehnquist, J., dissenting in part). This led to decades of confusion, and the line that followed dismantled "[w]hatever contribution to rationality and consistency [this Court] made in *Furman* [v. *Georgia*, 428 U. S. 153 (1972)] .... " *Graham* v. *Collins*, 506 U. S. 461, 492 (1993) (Thomas, J., concurring). This Court's "two quite incompatible sets of commands" regarding the death penalty was due to the fact that at least one of them, the *Lockett* line, had been "invented without benefit of any textual or historical support ...." *Callins* v. *Collins*, 510 U. S. 1141, 1141-1142 (1994) (Scalia, J., concurring in denial of certiorari).[21]

The wreckage of *Lockett* includes miscarriages of justice on a vast scale, as well-deserved sentences for

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20. A more thorough examination of this line of cases than is possible in this brief is forthcoming in the Ohio State Journal of Criminal Law in the Fall in an article by CJLF's Legal Director Kent Scheidegger.

21. Justice Scalia believed that neither had any support, see *ibid*., but there is no need to reconsider *Furman*.

atrocious crimes were overturned merely because state courts and legislatures had not been clairvoyant and failed to anticipate the extent to which this Court would contradict its earlier decisions. For example, in *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987), a man who molested his niece and strangled her to death to keep her quiet had his sentence overturned because at trial the judge had "violated" the Eighth Amendment by instructing the jury according to the statute that had just been upheld in *Proffitt* v. *Florida*, 428 U. S. 242 (1976).

The damage of *Lockett* is not limited to old cases, though. The "dog's breakfast of divided, conflicting, and ever-changing analyses" continues to cause problems in relatively recent cases. See *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 267 (2007) (Roberts, C.J., dissenting).

Between the *Lockett* line's initial illegitimacy, its conflict with other precedents, the amount of damage it has caused, its continuing incoherence, and the number of Justices of this Court who have denounced it over the years, it is most surprising to see *Miller* blithely extending its antidemocratic mandate into territory that *Lockett* itself expressly says remains within the legislative authority of the states. Such encroachment on the people's right of self-government requires much more justification.

At this point, the discussion should be about whether and how much of the *Lockett* doctrine can be pruned back consistently with the principles of respect for precedent.[22] Extension of a line of cases that has no

22. "Although the doctrine of *stare decisis* is of fundamental importance to the rule of law, our precedents are not sacrosanct. [Citation.] We have overruled prior decisions where the necessity and propriety of doing so has been established." *Ring* v. *Arizona*, 536 U. S. 584, 608 (2002) (internal quotation

basis whatever in the text or original understanding of the constitutional provision at issue should not even be open to serious consideration.

Overruling or limiting *Lockett* is not an issue in this case, but this Court should "decline to go beyond it, by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961). Any implication in *Miller* and *Montgomery* that the "dog's breakfast" of the *Lockett* line extends to any noncapital cases should be expressly disclaimed.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be reversed.

June, 2019

Respectfully submitted,

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marks and alterations omitted).