

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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RANDALL MATHENA, WARDEN, )  
 )  
Petitioner, )  
 )  
v. ) No. 18-217  
LEE BOYD MALVO, )  
 )  
Respondent. )  
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Pages: 1 through 70  
Place: Washington, D.C.  
Date: October 16, 2019

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 3       RANDALL MATHENA, WARDEN,                    )  
 4                               Petitioner,                    )  
 5                               v.                               ) No. 18-217  
 6       LEE BOYD MALVO,                               )  
 7                               Respondent.                                        )  
 8       - - - - -

9                               Washington, D.C.  
 10                             Wednesday, October 16, 2019

11  
 12                             The above-entitled matter came on for  
 13 oral argument before the Supreme Court of the  
 14 United States at 1:00 p.m.

15  
 16       APPEARANCES:

17  
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 19       Virginia; on behalf of the Petitioner.  
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 22       for the United States, as amicus curiae,  
 23       supporting the Petitioner.  
 24       DANIELLE SPINELLI, ESQ., Washington, D.C.; on behalf  
 25       of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

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

Mr. Heytens.

ORAL ARGUMENT OF TOBY J. HEYTENS

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

21 I waive the remainder of my two  
22 minutes.

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

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

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

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

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

25 MR. HEYTENS: Justice Ginsburg, I'm

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

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

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

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

1 a binding holding as a matter of --

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

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

12 Do you disagree with that statement?

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

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



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

3 MR. HEYTENS: So --

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

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

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

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

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

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

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

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

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

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

13 And the Court, in later cases, said  
14 that also violates the Eighth Amendment.

15 JUSTICE KAGAN: But --

16 MR. HEYTENS: But there was no  
17 suggestion that Woodson --

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

1 making these sorts of sentencing determinations.

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

8           That's the lesson of Miller.

9           MR. HEYTENS: So two responses to  
10 that, Justice Kagan.

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

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

1 JUSTICE KAGAN: So --

2 MR. HEYTEN: -- non-mandatory.

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

5 MR. HEYTENS: Okay.

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

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

22 So that case, the first case was  
23 Arizona -- was, excuse me, Edwards versus  
24 Arizona, the one that says that when the  
25 defendant says he wants to talk to a lawyer,

1 police can't go and talk to him without getting  
2 him a lawyer.

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

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

14           JUSTICE KAVANAUGH: Can I --

15           MR. HEYTENS: -- or the district court  
16 --

17           JUSTICE KAVANAUGH: -- can I ask --

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

22           And so whether or not there are people  
23 who misread Miller or not, some courts did, lot  
24 didn't, the substantive ruling of Miller was  
25 very clear, that it rendered life without -- I'm

1 quoting it, parole, an unconstitutional penalty  
2 for a class of defendants -- a class of  
3 defendants because of their status. That is  
4 juvenile offenders whose crime reflect the  
5 transient immaturity of youth. It announced --  
6 it says Miller announced a substantive rule of  
7 constitutional law.

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

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

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

24 JUSTICE KAVANAUGH: Suppose I try to  
25 read Miller and Montgomery together to figure

1 out what the substantive rule is and that I  
2 conclude the substantive rule is that the state  
3 cannot impose life without parole on youth who  
4 are merely immature but can impose it on those  
5 who are incorrigible. Okay? That's -- suppose  
6 that's the substantive rule.

7 I suppose Miller and Montgomery, then  
8 we have to figure out what the procedural rule  
9 attached to that was.

10 MR. HEYTENS: Correct.

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

23 MR. HEYTENS: Justice Kavanaugh, I  
24 think certainly in the habeas context, that  
25 satisfies the -- the -- the holdings of Miller



1 and Montgomery. Now whether the court --

2 JUSTICE KAVANAUGH: The -- the "that"  
3 being a discretionary sentencing issue?

4 MR. HEYTENS: I'm sorry. Yes, I  
5 apologize.

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

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

23 I mean, Teague is not restrictive for  
24 the sake of being restrictive.

25 JUSTICE KAVANAUGH: Let me ask it this

1 way. Do you think a discretionary sentencing  
2 regime is enough to satisfy the substantive  
3 Miller/Montgomery rule as I posit it that --  
4 that you can't impose life without parole on  
5 someone who's merely immature as opposed to  
6 incorrigible?

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

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

12 MR. HEYTENS: Well, Justice Kagan, I  
13 guess first I would --

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

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

20 JUSTICE KAGAN: No, no, is this the  
21 hypothetical.

22 JUSTICE KAVANAUGH: The hypothetical.

23 MR. HEYTENS: Okay. I just want to  
24 make sure because my answer --

25 JUSTICE KAVANAUGH: I have a follow-up

1 --

2 MR. HEYTENS: -- would be different  
3 depending on --

4 JUSTICE KAVANAUGH: -- I -- I have a  
5 follow-up hypothetical to the hypothetical.

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

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

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

1 explaining anything about youth, or just  
2 discusses youth but says ultimately still going  
3 to stick with life without parole.

4 So, in that circumstance, is that  
5 enough?

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

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

14 MR. HEYTENS: Sure.

15 JUSTICE KAVANAUGH: -- the mere -- the  
16 merely immature?

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

25 CHIEF JUSTICE ROBERTS: Is this one of

1 those states where the sentencer is given a list  
2 of criteria that he's supposed to consider?

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

9 JUSTICE GINSBURG: If I understand --

10 CHIEF JUSTICE ROBERTS: It specifies  
11 in considering whether to suspend a sentence?

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

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

21 JUSTICE KAVANAUGH: Yeah.

22 MR. HEYTENS: Absolutely, Justice  
23 Kagan. But Jones II critically did not purport  
24 to change or alter what Virginia law was. All  
25 of the statutes that are discussed in Jones II

1 were on the books at the time of this  
2 sentencing. It's not like Virginia changed its  
3 law after its sentencing.

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

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

10 JUSTICE KAVANAUGH: Or do you think --  
11 or do you think that's over?

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

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Feigin.

19 ORAL ARGUMENT OF ERIC J. FEIGIN

20 FOR THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONER

22 MR. FEIGIN: Thank you, Mr. Chief

23 Justice, and may it please the Court:

24 Malvo is arguing that his life without  
25 parole sentences for his murders are

1 retroactively invalid under Miller even if  
2 Virginia law allowed him to seek a lower  
3 sentence based on his age.

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

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

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

24           I think we know that from a couple of  
25 different places. First, in Miller itself, I

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

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

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



1 CHIEF JUSTICE ROBERTS: And his --

2 MR. FEIGIN: At --

3 CHIEF JUSTICE ROBERTS: -- his  
4 opportunity came from what?

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

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

24 And if that is correct and that is --  
25 and if that is sufficient for a scheme to be

1 considered discretionary under Miller, then I  
2 don't think he has a claim under Miller. What  
3 he might have, I suppose, is a very untimely  
4 ineffective assistance of counsel claim,  
5 although I'm not even sure he would succeed on  
6 the merits of that. But we don't usually excuse  
7 defendants from their failure to raise  
8 particular considerations and decide that their  
9 substantive rights have been violated for that  
10 reason.

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

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

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

25 JUSTICE KAVANAUGH: Right.

1           MR. FEIGIN: -- contrary to the  
2 Virginia Supreme Court's view -- sorry, because  
3 even if, consistent with the Virginia Supreme  
4 Court's view, this is a discretionary scheme,  
5 then he would have a Miller claim.

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

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

19           But what we have here is a question of  
20 retroactivity. And that's a procedural -- what  
21 you're talking about is a procedural right that  
22 I think Miller does require at least the  
23 opportunity to consider age. And, given its  
24 analogy to cases like Eddings against Oklahoma  
25 and Lockett against Ohio, I think the sentencer

1 can't decide that legally youth has no weight.

2 JUSTICE KAGAN: Right. So let's --  
3 let's assume that, and, in fact, Miller says  
4 several times not just requires an opportunity  
5 to consider but requires consideration.

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

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

20 MR. FEIGIN: So, Justice Kagan, let me  
21 give you the sort of short answer to your  
22 question and then I have a slightly longer  
23 answer. I think the shorter answer to your  
24 question is yes, the procedural right protects a  
25 substantive one, but because it's a procedural

1 right, it's not retroactive. The only thing  
2 that is retroactive under Montgomery is what  
3 Montgomery describes itself to be considering,  
4 and this is on page 732, is it says that what  
5 it's considering is whether Miller's holding  
6 that precludes mandatory sentences of life  
7 without parole for juvenile offenders is  
8 retroactive.

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

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

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

1           And to the extent that the Court has  
2           to preference some language over other language,  
3           we'd urge the Court to preference the language  
4           that adheres to the common scenario in both  
5           cases which involved only mandatory sentences.

6           JUSTICE KAVANAUGH:  Maybe I thought --

7           MR. FEIGIN:  The --

8           JUSTICE KAVANAUGH:  Keep going.  Keep  
9           going.

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

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

22          And it does so in a kind of unique  
23          way.  It describes the boundaries of the class  
24          of defendants who are benefitted under Miller  
25          using the procedural language of what a

1       sentencer who sentences under a discretionary  
2       scheme would necessarily need to find.

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

10              JUSTICE KAVANAUGH:  But if it is --

11              MR. FEIGIN:  I don't --

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

22              MR. FEIGIN:  Well, Your Honor, I don't  
23       think it's an especially clear rule, in part  
24       because it kind of -- if I may use the word  
25       fudges a little bit the way this Court's

1 described substantive rules by describing it in  
2 procedural terms. Usually, you describe a class  
3 by reference to some objective fact, like --

4 JUSTICE KAVANAUGH: Well, the object  
5 --

6 MR. FEIGIN: -- what crime the  
7 defendant --

8 JUSTICE KAVANAUGH: Sorry. The  
9 objective fact is the incorrigible.

10 MR. FEIGIN: So, Your Honor, I think  
11 --

12 JUSTICE KAVANAUGH: And that's not  
13 necessarily objective, but that is the fact that  
14 distinguishes the -- yeah.

15 JUSTICE KAGAN: Those are the people  
16 who can't -- you cannot sentence in a certain  
17 kind of way.

18 JUSTICE KAVANAUGH: Right.

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

24 JUSTICE KAVANAUGH: But that's the  
25 category -- that's -- I'm done.



1 CHIEF JUSTICE ROBERTS: You can --

2 JUSTICE GINSBURG: Mr. --

3 MR. FEIGIN: I guess I'd just finish  
4 with the thought that Montgomery's framing of  
5 this I don't think is particularly problematic  
6 if it's limited to the only context anyone was  
7 considering in that case, mandatory sentences.

8 But it becomes very problematic if the  
9 language is extended to invalidate all life  
10 without parole sentences under discretionary  
11 schemes.

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

20 That was the position that the  
21 government took, and most of the lower courts  
22 are in accord with it. What led the -- to the  
23 SG's change in position?

24 MR. FEIGIN: Well, a couple things,  
25 Your Honor. First of all, as our brief notes,

1 that wasn't invariably our position. That was  
2 our position in the Mejia-Velez brief that Malvo  
3 cites, but in other briefs, we took a position  
4 that is more consistent with the one we are  
5 taking here.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 MR. FEIGIN: Thank you.

22 CHIEF JUSTICE ROBERTS: Ms. Spinelli.

23 ORAL ARGUMENT OF DANIELLE SPINELLI ON  
24 BEHALF OF THE RESPONDENT

25 MS. SPINELLI: Mr. Chief Justice, and

1 may it please the Court:

2 Miller and Montgomery control this  
3 case. The warden and the United States have  
4 just conceded that in order to rule for them,  
5 this Court would have to discard the reasoning  
6 of Montgomery.

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

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

1 warden admits in his reply brief.

2           And I'd like to correct some of the  
3 statements about what actually happened at the  
4 sentencing hearing here because this is -- this  
5 is important.

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

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

17           And until a footnote in his reply  
18 brief, the warden hadn't contested that. It's  
19 pretty hard to contest.

20           The notion that, you know, somehow --  
21 somehow Miller was satisfied by, you know, the  
22 opportunity, the -- you know, the theoretical  
23 opportunity to consider youth, when it wasn't  
24 actually considered, simply can't be squared  
25 with the language of Miller itself or the

1 language and reasoning of Montgomery.

2 JUSTICE KAVANAUGH: That argument  
3 you're making -- that argument you're making is  
4 about the Virginia scheme, and we'll get to  
5 that, I think, but there's an initial question  
6 about what Miller and Montgomery mean.

7 MS. SPINELLI: Mm-hmm.

8 JUSTICE KAVANAUGH: And you heard my  
9 question about the substantive rule being  
10 something that separates the incorrigible from  
11 the merely immature. And the procedural rule  
12 particularly articulated in Montgomery is you  
13 don't need to make a finding of fact, a  
14 discretionary regime satisfies it.

15 And my question to you is why isn't a  
16 discretionary regime -- and I know you disagree  
17 that Virginia is such a thing, but we'll put  
18 that aside for the moment -- why isn't a  
19 discretionary sentencing regime enough  
20 procedurally to satisfy the substantive rule  
21 articulated in Miller and Montgomery?

22 MS. SPINELLI: Because the substantive  
23 rule, which I think you -- I agree with your  
24 articulation, the substantive rule requires that  
25 in order to ensure that juveniles don't receive

1 an unconstitutionally disproportionate  
2 punishment, a court must consider the  
3 characteristics of youth and must make a  
4 determination as to whether that juvenile --

5 JUSTICE KAVANAUGH: Okay. Can I --  
6 I'm sorry to --

7 MS. SPINELLI: Please.

8 JUSTICE KAVANAUGH: -- sorry to  
9 interrupt, but this is important. You said two  
10 things there, "must consider," and you said  
11 "must make a determination."

12 The -- both opinions definitely say  
13 "consider" over and over again. "Consider" or  
14 "take into account" are the words used over and  
15 over. Assessed used a few times. It never says  
16 make a determination. Neither opinion ever, I  
17 think, says make a finding of fact.

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

20 JUSTICE KAVANAUGH: Okay. And then  
21 the question becomes if a discretionary regime  
22 suffices to allow consideration, isn't a  
23 discretionary regime sufficient to satisfy  
24 Miller and Montgomery?

25 MS. SPINELLI: No, it's not. In this

1 case -- actually, let's just stick to the  
2 broader question.

3 JUSTICE KAVANAUGH: Yeah.

4 MS. SPINELLI: Miller makes very clear  
5 that sentencers must actually consider the  
6 characteristics of youth and determine whether  
7 life without parole is a proportional sentence  
8 --

9 JUSTICE KAVANAUGH: So --

10 MS. SPINELLI: -- for the individual  
11 defendant.

12 JUSTICE KAVANAUGH: -- I'm going to --  
13 I'm going to stop you again. I'm sorry.

14 But, in most sentencing regimes, as  
15 you well know, throughout the country in the  
16 variety of sentencing courts, judges are  
17 required to consider all sorts of factors by  
18 state law. In arguments are raised to the state  
19 court judge, the trial judge, about all sorts of  
20 factors.

21 The judge will often impose sentence  
22 without marching through a checklist of all  
23 those factors. Yet, it is routinely accepted  
24 that the judge has "considered the factor" if it  
25 has been raised or even if it's required as a

1 matter of state law. There are lots of state  
2 cases and federal cases that say, so long as the  
3 issue's been raised, we assume the judge  
4 "considered it."

5 Now, if that's true, and you can  
6 disagree with that, but if that's true, doesn't  
7 a discretionary regime where the argument can be  
8 raised necessarily satisfy Miller and  
9 Montgomery's requirement of consideration?

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

19 JUSTICE KAVANAUGH: I may or may not  
20 agree with that. Assume going forward a  
21 sentencing judge, though, in a discretionary  
22 sentencing regime is presented with arguments  
23 that you should not sentence this juvenile to  
24 life without parole because of his or her youth  
25 and then explains that.



1           The judge then sentences the juvenile  
2           to life without parole. In that circumstance,  
3           has the judge considered the youth?

4           MS. SPINELLI: It's possible that that  
5           could be sufficient under Miller. One would  
6           have to make a determination looking at the  
7           record whether -- whether there was some  
8           judgment made that life without parole was, in  
9           fact, the proportionate --

10          JUSTICE SOTOMAYOR: Ms. Spinelli --

11          MS. SPINELLI: -- sentence for that  
12          juvenile.

13          JUSTICE SOTOMAYOR: -- what -- what  
14          I'm -- there is a line in Miller that says --  
15          and this is the one they hang their hat on --  
16          that Miller "did not impose a formal  
17          fact-finding requirement," that Miller did not  
18          impose -- this is from Montgomery --

19          MS. SPINELLI: Yes.

20          JUSTICE SOTOMAYOR: -- that Miller  
21          "did not impose a formal fact-finding  
22          requirement, does not leave states free to  
23          sentence a child whose crimes reflect transient  
24          immaturity to life without parole."

25          So there's a substantive right --

1 MS. SPINELLI: Precisely, Your Honor.

2 JUSTICE SOTOMAYOR: -- if your -- if  
3 your crime was of transient immaturity, not to  
4 be sentenced. Now, presumably, what I think my  
5 colleague -- and he can correct me if I'm wrong  
6 -- is saying, in a discretionary sentencing,  
7 moving forward after Jones, courts know that  
8 they have to take age and youth into account.

9 MS. SPINELLI: Correct.

10 JUSTICE SOTOMAYOR: So it's like now,  
11 3553 of the federal criminal code requires a  
12 laundry list of things for judges to consider.  
13 Most judges do not tick off each one of those.  
14 Does -- doesn't say I find this but I don't find  
15 that. I don't do this. I don't do that. Most  
16 judges just say: I've thought of them all, and  
17 this is my answer.

18 Now I think what Justice Kavanaugh --  
19 he's shaking his head yes is --

20 JUSTICE KAVANAUGH: Yes.

21 JUSTICE SOTOMAYOR: -- in that kind of  
22 system, assuming that this was a post-Jones  
23 case, not a pre-Jones case, for which there's  
24 some ambiguity, why isn't that system enough?

25 Are you requiring a formal

1 fact-finding? Are you saying as long as it's  
2 clear that the judge knew that he had to find  
3 incorrigibility and that was argued before him,  
4 and he didn't have to say I find it, but he  
5 sentenced the person to parole, that you assume  
6 he knows what he's doing, that in the absence of  
7 those arguments, that then you're not sure and  
8 the substantive right should trump? I'm not  
9 sure how you --

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

15 JUSTICE SOTOMAYOR: Well, but they --

16 MS. SPINELLI: -- was not required to  
17 consider youth or even --

18 JUSTICE SOTOMAYOR: But a lot of -- a  
19 lot of the state statutes -- and this is what I  
20 think is concerning some of my colleagues --  
21 have -- have since Miller said it's  
22 discretionary now.

23 MS. SPINELLI: Yes. There are --

24 JUSTICE SOTOMAYOR: Courts don't have  
25 to do mandatory life and they should consider --

1 they should consider -- consider age. Now --

2 MS. SPINELLI: That's correct.

3 JUSTICE SOTOMAYOR: -- I must admit  
4 that I read Jones, but I don't remember if Jones  
5 said it -- age must be considered in light of  
6 Miller.

7 MS. SPINELLI: It did not say that.

8 JUSTICE SOTOMAYOR: Or in light of  
9 Montgomery's substantive rule.

10 MS. SPINELLI: It did not say that.

11 JUSTICE SOTOMAYOR: All right? But  
12 that's the assumption being made.

13 MS. SPINELLI: Yes. And --

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

21 MS. SPINELLI: Going forward, yes, I  
22 agree. If a judge sentences a juvenile under  
23 one of the post-Montgomery statutes that sets  
24 out the factors that are articulated in Miller  
25 and Montgomery, then, yes, I think it might be

1 reasonable.

2 JUSTICE KAGAN: It sets those out and  
3 -- and requires courts to evaluate them?

4 MS. SPINELLI: Precisely, yes. Yes  
5 Justice Kagan.

6 JUSTICE KAGAN: As opposed to, for  
7 example, either that doesn't set them out or  
8 that just, you know, permits courts to do  
9 whatever they want?

10 MS. SPINELLI: Yes.

11 JUSTICE KAGAN: Right?

12 CHIEF JUSTICE ROBERTS: So --

13 JUSTICE KAGAN: And there's different  
14 kinds of --

15 MS. SPINELLI: And here --

16 JUSTICE KAGAN: -- non-mandatory  
17 schemes.

18 CHIEF JUSTICE ROBERTS: So --

19 MS. SPINELLI: I apologize.

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

22 MS. SPINELLI: No, please, Mr. Chief  
23 Justice.

24 CHIEF JUSTICE ROBERTS: Sets them out  
25 like in 3553, is that the sentencing

1 considerations?

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

3 CHIEF JUSTICE ROBERTS: Is -- is that  
4 enough? Here are the things you need to  
5 consider and transient youth or incorrigibility  
6 is one of them?

7 MS. SPINELLI: If there is a statute  
8 that expressly sets out these factors and if the  
9 judge considers them --

10 JUSTICE KAGAN: And -- and --

11 CHIEF JUSTICE ROBERTS: Well, that's  
12 the -- that's --

13 JUSTICE KAGAN: -- requires a court to  
14 consider them.

15 MS. SPINELLI: And requires the courts  
16 to consider them, then we can presume that the  
17 judge followed the law and did so. But this is  
18 not a case where the judge was required to  
19 consider anything.

20 And, in fact, she did not consider  
21 imposing any lesser sentence than life without  
22 parole. And the warden's position and the  
23 United States' position is that that's good  
24 enough.

25 JUSTICE KAVANAUGH: Back on Justice

1 Kagan's question for a second. In a  
2 discretionary regime where the sentencer is  
3 required to consider certain factors or even if  
4 not, it's just a discretionary regime, the  
5 defense counsel in any case where a juvenile's  
6 facing life without parole as a possibility is,  
7 of course, I would think, you would agree, any  
8 competent defense counsel is going to argue the  
9 youth to the sentencing judge. Do you agree  
10 with that?

11 MS. SPINELLI: Going forward, yes.

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

19 MS. SPINELLI: Yes. And let me be  
20 clear. I don't think this Court needs to say  
21 anything about how to handle cases going forward  
22 after Miller where there is a requirement that  
23 the judge consider the Miller factors.

24 The -- the question here is does  
25 Miller apply, can -- can Malvo invoke --

1 JUSTICE KAVANAUGH: Well, I think we  
2 have to say what Miller and -- well, I don't  
3 know what we have to do, but we might want to  
4 say what Miller and Montgomery mean as a rule  
5 together, because that's been a lot of the focus  
6 of the briefs.

7 So we may have to indicate what is the  
8 substantive rule and what is the procedure and  
9 then we can figure out the Virginia --

10 MS. SPINELLI: Yes, well, the  
11 substantive rule is that the Eighth Amendment  
12 forbids states to impose life without parole on  
13 juveniles who are not permanently incorrigible.

14 JUSTICE GORSUCH: Okay, counsel --

15 JUSTICE ALITO: And that's the holding  
16 of -- that is the holding of Miller?

17 MS. SPINELLI: That is -- that is what  
18 Montgomery --

19 JUSTICE ALITO: Well, can -- could  
20 Montgomery change Miller? Montgomery, in  
21 Montgomery, the issue was whether Miller was  
22 retro -- whether the -- the rule adopted in  
23 Miller was retroactive to cases on collateral --

24 MS. SPINELLI: Correct.

25 JUSTICE ALITO: Doesn't it have to



1 take Miller as it stands? Can it change that?

2 MS. SPINELLI: It shouldn't and it  
3 didn't. What Miller -- what --

4 JUSTICE ALITO: Okay. If it didn't,  
5 then we can disregard whatever Montgomery said  
6 and look at what Miller said. Where does Miller  
7 say what you say that it says?

8 MS. SPINELLI: It says it --

9 JUSTICE ALITO: It says --

10 MS. SPINELLI: -- on page --

11 JUSTICE ALITO: -- exactly what it  
12 held. It says, we hold, "we therefore hold that  
13 the Eighth Amendment forbids a sentencing scheme  
14 that mandates life imprisonment without  
15 possibility of parole for juvenile offenders."  
16 That was -- that -- that was the holding.

17 MS. SPINELLI: That was the result.  
18 There is also the reasoning that was necessary  
19 to that result --

20 JUSTICE ALITO: So that --

21 MS. SPINELLI: -- which --

22 JUSTICE ALITO: -- wasn't the holding  
23 -- when they said "we hold," that wasn't the  
24 holding?

25 MS. SPINELLI: It was certainly part

1 of the holding. But the court also said we  
2 require a sentencer to take into account how  
3 children are different. And the reason that it  
4 requires that is in order to effectuate the  
5 Eighth Amendment prohibition on disproportionate  
6 sentences for juveniles.

7 JUSTICE GORSUCH: Counsel, if -- if  
8 there were a requirement of a finding -- a  
9 substantive right to a finding of  
10 incorrigibility before the -- the sentence of  
11 life without parole were permissible under the  
12 Eighth Amendment, wouldn't it follow also that  
13 there's a Sixth Amendment right under Apprendi  
14 to have a jury decide that rather than a judge?

15 MS. SPINELLI: I don't think that  
16 necessarily would follow.

17 JUSTICE GORSUCH: How?

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

19 JUSTICE GORSUCH: Any time we increase  
20 a sentence, a statutory maximum or otherwise, a  
21 sentence, we say: Jury -- this Court has said a  
22 jury has to make that finding.

23 MS. SPINELLI: There's a -- there's  
24 actually a split of authority --

25 JUSTICE GORSUCH: There's no

1 indication of any of that in Montgomery or  
2 Miller, is there?

3 MS. SPINELLI: Agreed. There's a --  
4 there's a split of authority on that. There's a  
5 pending cert petition that raises it. We don't  
6 have any position on it.

7 JUSTICE GORSUCH: Well, the Court has  
8 held several times if you increase the -- the --  
9 the statutory permissible range of penalty, a  
10 jury has to be involved, right? I mean, that's  
11 not --

12 MS. SPINELLI: Yes. So it depends  
13 on --

14 JUSTICE GORSUCH: So there's no  
15 circuit split on that.

16 MS. SPINELLI: It depends on how you  
17 conceptualize it, but, you know, that's clearly  
18 not one of the issues that's before the Court in  
19 this case.

20 And I'm not arguing, just to be clear,  
21 that there is a requirement of a specific  
22 factual finding. Montgomery said there wasn't,  
23 but what it also said is there has to be a  
24 hearing that separates juveniles who may  
25 constitutionally --

1 JUSTICE GORSUCH: Right. And a  
2 hearing -- if the right, if the substantive  
3 right is that you cannot do life without parole  
4 for an incorrigible youth, there has to be a  
5 hearing and somebody has to make a finding about  
6 that. It's not just a matter of discretion any  
7 more. It's a matter of a factual finding. It's  
8 not a sentencing factor. It's -- it's a  
9 finding.

10 And I would have thought in those  
11 circumstances we might have specified who would  
12 do that finding and how that hearing would be  
13 conducted, consistent with the Constitution.

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

17 JUSTICE GORSUCH: Isn't that -- isn't  
18 that a further strike, though, against your  
19 interpretation of Miller and Montgomery that the  
20 Court would have created a new substantive right  
21 that implicates the Sixth Amendment and not ever  
22 said so or even hinted at it or even  
23 acknowledged the question?

24 MS. SPINELLI: I actually don't think  
25 that's unusual. It happens, you know -- it

1 happened with some regularity that a right will  
2 -- a new rule will be announced and then later  
3 the issue of, you know, who makes this decision,  
4 a jury or a judge, will come up. That's what --

5 JUSTICE GORSUCH: This is a pretty --

6 MS. SPINELLI: -- happened in Atkins.

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

15 MS. SPINELLI: That is what happened  
16 with Atkins. Atkins is very similar to this  
17 case in that it barred the imposition of the  
18 death penalty on the intellectually disabled.  
19 As in this case, there needs to be a procedure  
20 to sort out the intellectually disabled from  
21 those who are not.

22 And the question arose after Atkins,  
23 does that determination have to be made by a  
24 judge or a jury under Apprendi? And the  
25 majority of courts that I know of, the majority

1 have said no, it doesn't have to be made by a  
2 jury. It -- it can be made by a judge. And  
3 states have allocated that determination in  
4 different ways.

5 So it's not at all unusual that the  
6 court wouldn't have addressed the Apprendi issue  
7 in these decisions, but, I mean, to return to  
8 Justice Kavanaugh's question about procedure and  
9 substance, the two necessarily go together.

10 The -- the necessary procedure has to  
11 effectuate the substantive rule. And,  
12 therefore, as Montgomery says, it has to -- it  
13 has to involve a determination as to whether  
14 life without parole will be a proportionate  
15 sentence --

16 CHIEF JUSTICE ROBERTS: But -- but we  
17 know --

18 MS. SPINELLI: -- for that particular  
19 defendant.

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

22 MS. SPINELLI: That -- that -- that is  
23 correct.

24 CHIEF JUSTICE ROBERTS: From  
25 Montgomery?

1 MS. SPINELLI: It doesn't require --  
2 it doesn't require any particular form of words.  
3 It does require a substantive result.

4 CHIEF JUSTICE ROBERTS: But -- but you  
5 said it requires a determination. And to me,  
6 that sounds like a formal finding. And one  
7 thing we do know is that a formal finding is not  
8 required.

9 So it would seem that consideration --  
10 and I thought we had gotten that far before --  
11 sort of it being included with respect to  
12 factors that must be considered in imposing a  
13 sentence. We're talking about 3553, which has a  
14 list of things that have to be considered, and  
15 this would be -- be one of them.

16 MS. SPINELLI: Yes. And, again, we --  
17 you know, we're not presented here with a  
18 question of what exactly a fact finder would  
19 have to say.

20 CHIEF JUSTICE ROBERTS: Well, you are,  
21 because I -- because I asked it.

22 (Laughter.)

23 MS. SPINELLI: I'm sorry, Your Honor.  
24 I apologize, Mr. Chief Justice.

25 What I -- what I meant is, you know,

1 that is -- that is going to be an issue no  
2 matter how the Court decides this case. There  
3 have already been 2,000 resentencings under  
4 Miller at which courts have made an effort to  
5 apply the Miller factors.

6 There is -- Montgomery did not specify  
7 a turn of phrase or a specific finding that has  
8 to be made, but what's absolutely clear is that  
9 the Court does have to decide whether, in light  
10 of the characteristics of youth, this is a  
11 proportionate -- life without parole is a  
12 proportionate sentence for this particular  
13 defendant.

14 JUSTICE KAVANAUGH: I don't -- I don't  
15 think Montgomery --

16 MS. SPINELLI: -- and that didn't even  
17 come close --

18 JUSTICE KAVANAUGH: -- I don't think  
19 Montgomery says decide. I mean, decide, to pick  
20 up on the Chief Justice's question, sounds like  
21 determination, sounds like finding.

22 Maybe -- maybe I'm --

23 MS. SPINELLI: Well, what it -- what  
24 it says --

25 JUSTICE KAVANAUGH: In the key



1 paragraph, it says --

2 MS. SPINELLI: -- what it says is a  
3 hearing where youth and its attendant  
4 characteristics are considered as sentencing  
5 factors is necessary to separate those juveniles  
6 who may be sentenced to life without parole from  
7 those who may not.

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

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

13 MS. SPINELLI: Correct, it just says  
14 finding of fact. But it then says that Miller  
15 did not impose a formal fact-finding  
16 requirement, doesn't leave states free to  
17 sentence a child whose crime reflects transient  
18 immaturity to life without parole.

19 So Montgomery doesn't provide a lot of  
20 guidance, but what we do know is that juveniles  
21 are entitled to at least one opportunity to show  
22 that they are not permanently incorrigible and  
23 that it is not right to make a determination now  
24 that they are foreclosed from ever attempting to  
25 show that they have changed.

1 JUSTICE KAVANAUGH: And your argument  
2 that Virginia did not provide that is?

3 MS. SPINELLI: It absolutely did not  
4 provide that. There was --

5 JUSTICE KAVANAUGH: You know --

6 MS. SPINELLI: -- there was no -- so  
7 let's assume that Jones was correct and that  
8 there was an ability to request suspension.  
9 That was not even remotely clear at that -- at  
10 the time of --

11 JUSTICE GORSUCH: Let's say it was  
12 hypothetically. Then what?

13 MS. SPINELLI: If -- if it was clear  
14 that he could request suspension, I still don't  
15 think it would matter because a suspension  
16 hearing is not a Miller hearing. At the time,  
17 Roper hadn't even been decided.

18 JUSTICE GORSUCH: I understand that.

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

20 JUSTICE GORSUCH: But let's just say  
21 hypothetically that it was available to the  
22 defendant to argue whatever he wanted with  
23 respect to his youth and attendant  
24 characteristics in any fashion that he wanted  
25 and that the judge had to consider whatever

1 arguments were presented about youth before  
2 imposing a life sentence and that the judge  
3 could not impose that life sentence  
4 automatically.

5 Let's say that's the state of the law  
6 in Virginia hypothetically. Now we don't --  
7 maybe we don't know that, but let's just assume  
8 that, that all arguments are available, not just  
9 incorrigibility, any arguments about youth are  
10 available, even better for the defendant, all of  
11 it has to be considered.

12 MS. SPINELLI: The hearing --

13 JUSTICE GORSUCH: Then what?

14 MS. SPINELLI: -- that Miller  
15 requires, however, is not a -- is not only a  
16 hearing that requires that youth be considered.  
17 Youth is considered in all kinds of contexts.

18 But there -- Miller's specific holding  
19 is that the characteristics of youth that were  
20 identified first in Roper need to be considered  
21 in order to determine whether or not life  
22 without parole --

23 JUSTICE GORSUCH: And I'm positing --

24 MS. SPINELLI: -- is a proportionate  
25 sentence.

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

4 MS. SPINELLI: I mean, it was  
5 available to him to argue in the sense that, you  
6 know, every new rule is available to the  
7 defendant to argue before the rule is announced.

8 In fact, you know, he had no way of  
9 anticipating that -- that this new  
10 constitutional rule would be announced. The  
11 Court hadn't even taken the first step down the  
12 road toward that.

13 So, you know, even if it were the case  
14 that he absolutely could have gotten the same  
15 consideration had he, you know, been able to  
16 look into the future, that is not what we  
17 typically require defendants to do. And that's  
18 why the Miller rule is retroactive in the first  
19 place.

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

25 MS. SPINELLI: Yes.

1 JUSTICE SOTOMAYOR: -- whether judges  
2 understood they could have done that.

3 MS. SPINELLI: But let's look at  
4 what --

5 JUSTICE SOTOMAYOR: But let's move --  
6 let's move forward after Jones, okay? And Jones  
7 is after Miller and Montgomery --

8 MS. SPINELLI: Correct.

9 JUSTICE SOTOMAYOR: -- correct? So  
10 it's now, they're saying, judges can have  
11 complete discretion, just the way that Justice  
12 Gorsuch has posited. Moving forward, they  
13 should consider age and all its attendant  
14 circumstances.

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

23 MS. SPINELLI: Well, first, Jones  
24 didn't -- did not say that courts had to  
25 consider age in light of Miller or that they had

1 to consider age at all. What it held is Miller  
2 is completely inapplicable in Virginia because  
3 we have a "discretionary system."

4 JUSTICE SOTOMAYOR: I -- oh, I --

5 MS. SPINELLI: Going --

6 JUSTICE SOTOMAYOR: -- have to read  
7 Jones more carefully.

8 MS. SPINELLI: -- going forward,  
9 however, and -- and going forward, Virginia is  
10 not doing anything to comply with Miller. So  
11 let's be clear.

12 When Miller was issued, there were  
13 about 2800 juvenile lifers in "mandatory and  
14 non-mandatory schemes." Almost every state has  
15 already resolved this issue and complied with  
16 Miller and understood it the way we understand  
17 it.

18 There are only 60 states which only  
19 have 60 juvenile lifers that haven't either made  
20 them parole-eligible or begun resentencing --

21 JUSTICE SOTOMAYOR: We don't have --  
22 did I --

23 MS. SPINELLI: -- in response to  
24 Miller.

25 JUSTICE SOTOMAYOR: -- did I mishear

1 you? Did you say 60 states or six states?

2 MS. SPINELLI: Six states with 60  
3 juvenile lifers out of 2800. That's --

4 JUSTICE SOTOMAYOR: All right.

5 MS. SPINELLI: That is the scope of  
6 the problem that we're dealing with.

7 JUSTICE GORSUCH: But let's --

8 MS. SPINELLI: And --

9 JUSTICE GORSUCH: If you could answer  
10 Justice Sotomayor's hypothetical, that would be  
11 very helpful to me as well.

12 Let -- let us assume that all  
13 arguments are available at -- at hearing, at the  
14 hearing, and the defendant makes some, not  
15 others.

16 MS. SPINELLI: I am not arguing that  
17 --

18 JUSTICE GORSUCH: Would that be --

19 MS. SPINELLI: -- this right cannot be  
20 waived. Going forward, this is a known right.

21 JUSTICE GORSUCH: Okay, but -- but --

22 MS. SPINELLI: It can be waived just  
23 like any other constitutional right.

24 JUSTICE GORSUCH: Counsel, if I might.  
25 So just all arguments are available and the --

1 and the -- and the district judge has to  
2 consider them. Would that, in your mind,  
3 satisfy Miller and Montgomery?

4 MS. SPINELLI: It -- it might very  
5 well.

6 JUSTICE GORSUCH: Okay.

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

15 In none of those cases was there any  
16 meaningful consideration of a lower sentence,  
17 let alone consideration of whether youth made  
18 life without parole unconstitutional.

19 In the only two cases where defense  
20 counsel raised the possibility of a lower  
21 sentence, the prosecutor said absolutely not,  
22 life without parole is the mandatory minimum  
23 sentence.

24 So we know that -- and -- and we know  
25 and the Fourth Circuit made a finding and the



1 district court made a finding to this effect,  
2 that youth was not considered in the way Miller  
3 requires. And --

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

9 MS. SPINELLI: I -- I have not  
10 described him as a child who committed these  
11 crimes because of transient immaturity.

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

17 MS. SPINELLI: The question is whether  
18 the juvenile committed the crimes based on  
19 transient immaturity or permanent  
20 incorrigibility. And what we are asking for is  
21 a hearing in Virginia court where the Virginia  
22 sentencer will make that determination.

23 He has not had that hearing yet, the  
24 hearing that Miller and Montgomery require. And  
25 he is entitled to have one opportunity to make

1 the case that he is not permanently  
2 incorrigible.

3 JUSTICE ALITO: Is not now or was not  
4 at the time?

5 MS. SPINELLI: Well, I think by  
6 hypothesis --

7 JUSTICE ALITO: At the time of the  
8 sentencing?

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

17 JUSTICE ALITO: So, if he can  
18 demonstrate, as a result of good behavior in  
19 prison, for example, that he has been  
20 rehabilitated, then he must be released?

21 MS. SPINELLI: No. No, absolutely  
22 not. That's one piece of evidence that the  
23 sentencer can consider. The sentencer then can  
24 decide what is the sentence going to be.

25 And, you know, on resentencing, there

1 are occasions when juvenile offenders are  
2 resentenced to life without parole. Even if he  
3 were given parole eligibility, that would not  
4 mean that he would be released.

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

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

15 All of the arguments that they've  
16 raised were also raised in Montgomery, and the  
17 Court declined to adopt them, and it shouldn't  
18 change here.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 MS. SPINELLI: Thank you.

22 CHIEF JUSTICE ROBERTS: General  
23 Heytens, three minutes.

24

25

1 REBUTTAL ARGUMENT OF TOBY J. HEYTENS

2 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

18 Mr. Malvo never requested such an  
19 opportunity. And had he requested such an  
20 opportunity, he could have pursued -- sorry, if  
21 he requested that opportunity and the trial  
22 court refused to do it, he could then have  
23 appealed to the very same court that decided  
24 Jones II and said the language that I just  
25 quoted. If I --

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

9 This case, they sentence him to life  
10 without parole. And the odds are greater than  
11 50/50 that no one ever thought about whether he  
12 was, in fact, immature. Okay? Now it sounds to  
13 me like the same case.

14 Now, leaving all these words out of  
15 it, why isn't it the same case? I mean, I know  
16 words like opportunity, dah-dah-dah-dah-dah, but  
17 isn't there enough to say the odds are better  
18 than 50/50 --

19 MR. HEYTENS: Well, Justice Breyer --

20 JUSTICE BREYER: -- no one ever  
21 thought about that?

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

25 JUSTICE BREYER: No, no, you can say

1 anything you want. I'm just trying to --

2 (Laughter.)

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

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

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

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

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