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"We make this ruling not with any satisfaction but to sustain the law. As for Malvo, who knows but God how he will bear the future."

—Judge Niemeyer, U.S. Court of Appeals for the Fourth Circuit

Abstract

At the age of 17, Donte Lamar Jones shot and killed a store clerk as she laid down on the floor during a robbery. He was spared the death penalty by agreeing instead to die in prison at the end of his life. Two years later in Virginia, 12 individuals were murdered for doing nothing more than being in the wrong place at the wrong time. Those individuals were killed by Lee Malvo and John Muhammad, better known as the "D.C. Snipers." While John Muhammad was given the death penalty for his heinous crimes, Lee Malvo, who was 17 during the murder spree, was given a life sentence. What these two cases have in common is one issue: as juveniles they were both condemned to die in prison. What separates their cases is their legal challenges and how two different courts have ruled—one federal, one state. While the facts of their cases might be different, there are hundreds, if not thousands, of cases across the United States that reflect similar legal proceedings, and until the Supreme Court clarifies its position, more state and federal courts will reach different conclusions.

Table of Contents

I. Introduction

Over the past two decades, Supreme Court jurisprudence has shifted markedly in how the courts treat juvenile offenders. From eliminating the death penalty for juveniles to overturning state courts on how they treat sentencing of those underage, the Court has moved quickly on the scope of the Eighth Amendment.[1] It is

1. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016), *as revised* (Jan. 25, 2016) ("This is another case in a series of decisions involving the sentencing of offenders who were juveniles when their crimes were committed."); *see also* Roper v. Simmons, 543 U.S. 551, 555–56 (2005).

> This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a

evident that the next issue the Court will likely take up is whether a juvenile may ever be sentenced to life in prison. While this Article does not take a position on how the court should decide on that situation, this Article contends that the court has two issues that it must deal with before fully grappling with a new Eighth Amendment change.

First, the Court must clarify the distinction, if any, between *Miller*[2] and *Montgomery*, both substantively and procedurally. The Court ruled in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[3] Several years later, the Court in *Montgomery* held that the holding in *Miller* applied retroactively to all of the states. This has caused a split between the Virginia Supreme Court and the Fourth Circuit. The Virginia Supreme Court has interpreted *Miller* as applying strictly to the sentencing statute in question (i.e., does the statute give the judge any discretion to amend the life sentence). The Fourth Circuit has taken a more expansive view of *Miller* and held that even if the sentencing scheme is not mandatory, the sentencing judge must have conducted a hearing before sentencing to determine if the juvenile deserved life based on his youth.

The second issue that the Court needs to clarify is whether plea waivers by juveniles bar the juvenile from having his case reheard under the new framework. Some courts believe that a defendant may waive his constitutional rights, and thus, be precluded from appealing his sentencing. While other courts believe that the new holding in *Montgomery* and *Miller* have overridden any plea waivers and do not bar an appeal, whether directly or collaterally. These two issues should be clarified by the Supreme Court.

II. Juvenile Punishment in the 21st Century

Over the past two decades, the Supreme Court has dramatically changed not only how the federal government views

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juvenile offender who was older than 15 but younger than 18 when he committed a capital crime.

2. Miller v. Alabama, 567 U.S. 460, 479 (2012).
3. *Id.* at 479.

punishment of juveniles, but how states are allowed to carry out punishments. These developments have forced some state courts to rehear old cases and allow the defendant to present mitigating evidence as to why he or she should not die in prison.[4] These cases paint a clear portrait of a trajectory: will the Supreme Court ultimately rule that life without parole for juveniles is unconstitutional?

A. Executions of Defendants with Intellectual Disability

In 2002, the Court in *Atkins v. Virginia* held that it would be a violation of the Eighth Amendment to execute a defendant who had an intellectual disability.[5] The Court looked to two issues in holding that the execution of these defendants was unconstitutional. First, the Court found that the practice was not common among the states, and secondly, the deterrent factor was not being furthered by these executions.[6]

B. Executions of Juvenile Defendants

Shortly after rendering its decision in *Atkins*, the Supreme Court continued their development of Eighth Amendment jurisprudence in *Roper v. Simmons*.[7] The Court followed the same framework of *Atkins* and held that the execution of a defendant who was 18 or younger at the time of their crime would be considered cruel and unusual punishment.[8] The Court held that

4. *See* Aiken v. Byars, 765 S.E.2d 572, 577–78 (S.C. 2014).

5. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (citation omitted) ("[W]e therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."); *see also* Emily Powell, *Underdeveloped and Over-Sentenced: Why Eighteen-to-Twenty-Year-Olds Should Be Exempt from Life Without Parole*, 52 U. RICH. L. REV. ONLINE 83 (2018).

6. Atkins, 536 U.S. at 317–21; Powell, *supra* note 5, at 86.

7. Roper, 543 U.S. at 551.

8. *Id.* at 563 ("Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment.").

these types of punishments were a violation of both the Eighth and Fourteenth Amendments.[9]

C. Life Without Parole for Non-Homicide Juveniles

In 2010, the Supreme Court held that it violated the constitution to sentence juvenile offenders to life without parole for a conviction of a non-homicide offense. The court followed its two-prong approach to these cases and found that even though many states had these penal laws on the books, they were rarely used. They also found that because of juveniles' youth and culpability level, the punishment was not proportional.10

D. Mandatory Life Without Parole for Juveniles

The Court continued to grow its jurisprudence in this arena with its decision in *Miller v. Alabama*.[11] Justice Kagan, writing for the majority, first explains the precedent that children are uniquely different than adults, and should thus be treated differently in the criminal justice system.[12] Kagan's extensive analysis of how juveniles are so unique and different from adults, lays the groundwork for her next conclusion. Because life without

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9. *Id.* at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

10. Graham v. Fla., 560 U.S. 48, 61 (2010), *as modified* (July 6, 2010) (citations omitted) ("In the cases adopting categorical rules the Court has taken the following approach. The Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."); *see also* Mary Berkheiser, *Death Is Not So Different After All:* Graham v. Florida *and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 Vt. L. Rev. 1 (2011).

11. Miller v. Alabama, 567 U.S. 460 (2012).

12. *Id.* at 471 ("To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.").

parole is essentially equivalent, or at least close to, the death penalty in its harshness, a judge or jury must consider the unique characteristics of a juvenile before sentencing them to the ultimate punishment.[13]

After this ruling, courts across the nation had to grapple with its effects. First, did this case apply retroactively to the states? And second, how does a court determine if a court had considered the defendant's youth at the time of sentencing?

The Court took up these issues in *Montgomery v. Louisiana*.[14] The Court held that *Miller* created a substantive new constitutional rule and because of that, the rule applied retroactively to the states. Justice Kennedy first had to address how retroactive application works, and if it would work in this situation. In *Teague v. Lane*,[15] the Court created a framework for determining when new Supreme Court precedent would apply retroactively to cases already decided. This framework held that ordinarily new constitutional rules of criminal procedure do not apply to cases that have been adjudicated. However, there are two exceptions. First, new substantive rules. The Court held that "[s]ubstantive rules include '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.'"[16] The second exception are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[17] The Court then created a new rule in its application of retroactivity: "The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That

13. *Id.* at 475 (citation omitted) ("That correspondence—*Graham*'s '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,'—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty.").

14. Montgomery v. Louisiana, 136 S. Ct. 718 (2016), *as_revised* (Jan. 27, 2016).

15. *Teague v. Lane*, 489 U.S. 288 (1989).

16. Montgomery, 136 S. Ct. at 728.

17. *Id.* (internal quotations omitted).

constitutional command is, like all federal law, binding on state courts."[18]

Justice Kennedy then had to decide if *Miller* did in fact create a new substantive rule. Following the same logic and analysis as Justice Kagan in *Miller*, Kennedy held that *Miller* indeed did create a new substantive rule that the states must apply retroactively.[19]

III. Malvo v. Mathena

The D.C. sniper case was one of the most horrific and disturbing cases witnessed in our nation. For almost two months, Lee Malvo and John Muhammad, terrorized the Washington, D.C. area and killed 12 individuals.[20] Malvo was 17 years old at the time of the killing. Of the dozen murders, Malvo admitted to committing two of them. Malvo was first tried in Fairfax County, Virginia as an adult for capital murder. He was found guilty of the crime and a jury, at the sentencing phase of the trial, decided to send Malvo to prison for the rest of his life. After this conviction, Malvo entered into an *Alford* plea for another capital charge in Chesapeake City Circuit Court. As part of his plea deal, the prosecution dropped several charges and agreed that Malvo would avoid the death penalty and instead receive two terms of life imprisonment. Under this plea deal, Malvo waived his right to appeal.

After the conclusion of these cases, the Supreme Court came out with its decision in *Miller*, holding that mandatory life imprisonment for juveniles was unconstitutional. Malvo attempted to have his cases reheard under this framework, but the district court denied his request concluding that the *Miller* case was not retroactive.[21] However, several years later, the Court handed down its opinion in *Montgomery* clarifying that *Miller* was in fact retroactive. Malvo again appealed his sentencing, and this time was successful. The district court granted Malvo's habeas petitions and vacated his life imprisonment sentences.

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18. *Id.* at 729.

19. *Id.* at 736 ("The Court now holds that *Miller* announced a substantive rule of constitutional law.").

20. Malvo v. Mathena, 893 F.3d 265, 267 (4th Cir. 2018).

21. *Id.* at 270.

The Fourth Circuit accepted this appeal on behalf of the warden of the detention facility and upheld the lower court. The court analyzed and addressed the warden's three arguments as to why Malvo should not be granted a rehearing as to sentencing.

A. Mandatory vs. Discretionary

The warden argues that *Miller* does not apply in this situation because the defendant was not given a mandatory life imprisonment sentence. Rather, the judge had the discretion to suspend parts of the sentence. Under Virginia law, a judge has the discretion to suspend, in whole or part, life sentences following a conviction of a capital offense.[22] Because the judge has this discretion, then Malvo was not automatically sentenced to life imprisonment. The warden contends that because there was a sentencing phase, where the defense argued against the death penalty, the judge could have suspended part of his sentence.

The Fourth Circuit disagreed with this assertion. The court held that *Montgomery* not only applied *Miller* retroactively, but it also expanded *Miller's* holding:

> To be sure, all the penalty schemes before the Supreme Court in both *Miller* and *Montgomery* were mandatory. Yet the *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."[23]

While the court denied that it was expanding *Montgomery*, it appears based on their reasoning that whether or not they were doing the expanding, the second Supreme Court case at the very least broadly interpreted *Miller*. The warden claimed that this

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22. *Id.* at 273 ("As the Warden asserts, the Virginia Supreme Court has now twice recognized that Virginia trial courts have long had the authority to suspend life sentences in whole or in part even following a capital murder conviction—an interpretation of Virginia law that is, of course, binding here.").

23. *Id.* at 274.

broadening of the rule was not simply enforcing substantive law retroactively, but rather they were "rewriting it."[24]

B. Miller Was Complied With

The warden then argues that even if the Supreme Court intended for *Miller* to apply to all mandatory and discretionary life sentences, the trial court complied with the rule. *Miller* did not forbid courts from sentencing a juvenile to life imprisonment for homicide cases. But rather, the court required the judge or jury to make a finding, based on culpability and youth, as to whether that punishment fit the crime.

In Malvo's case, the court held a post-verdict sentencing phase to determine whether or not the defendant should receive the death penalty of life in prison. The court was not persuaded by this argument because in its application the jury never actually had the chance to reduce the sentence. The choice for the jury, even after hearing mitigating evidence, was either life or death. The court held that this did not comply with *Miller's* holding. The court also found that the trial judge and jury were not presented with the specific mitigating factors relating to youth and culpability as required by *Montgomery*.[25]

C. Plea Waiver

The warden's final argument is that the defendant waived any claim he would have under *Miller* because of the substantial benefit he received from his plea deal.[26] He cited to two Supreme Court cases to "argue that both the 'Supreme Court and this Court

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24. *Id.*

25. *Id.* at 275

> Moreover, the Chesapeake City jury was never charged with finding whether Malvo's crimes reflected irreparable corruption or permanent incorrigibility, a determination that is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender. Nor were Malvo's 'youth and attendant circumstances' considered by either the jury or the judge to determine whether to sentence him to life without parole or some lesser sentence.

26. *Id.*

have made clear that guilty pleas are not open to revision when future changes in the law alter the calculus that caused the defendant to enter his plea.'"[27]

The Fourth Circuit disagreed with the interpretations and applications of both *Brady*[28] and *Dingle*[29] in this case. The court differentiated the facts and circumstances in those two previous cases because the defendants in those cases were attacking their actual convictions based on new constitutional law, whereas here, Malvo is attacking his sentence.

After finding that the defendant in this situation is not barred from appealing because of his plea waiver, the court then looks to the specific waiver to determine if he did indeed waive his right to appeal. The court found that there was nothing specific in the plea agreement that waived his right "to challenge the constitutionality of his sentence in a collateral proceeding in light of future Supreme Court holdings[.]"[30]

What is more interesting about this argument though, is not the finding that the specific plea waiver did not expressly preclude the defendant from appealing, but that the court held that the state could likely not even enforce a broad waiver of a substantive constitutional right.[31] The decision to affirm the lower court was not one made lightly. However, the Fourth Circuit found that the defendant had certain constitutional rights, and those rights needed to be applied retroactively.[32]

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27. *Id.*

28. *Brady v. United States*, 397 U.S. 742 (1970).

29. *Dingle v. Stevenson*, 840 F.3d 171 (4th Cir. 2016).

30. Malvo, 893 F.3d at 277.

31. *Id.*; *see also* Montgomery, 136 S. Ct. at 725 ("*Miller* therefore announced a substantive rule of constitutional law, which, like other substantive rules, is retroactive because it 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'"); *see also* United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005) ("Lemaster does not argue that his allegations fall within the narrow class of claims that we have allowed a defendant to raise on direct appeal despite a general waiver of appellate rights.); *see United States v. Marin,* 961 F.2d 493, 496 (4th Cir. 1992) ("[A] defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race.").

32. Malvo, 893 F.3d at 277 ("Because we are bound to apply those constitutional rules, we affirm the district court's grant of habeas relief awarding

IV. Jones v. Commonwealth

In 2000, the defendant Jones shot and killed a store clerk at the age of 17. He subsequently pled guilty under *Alford* to capital murder. The "court held a sentencing hearing and received a presentence report from a probation officer. The court imposed the life sentence pursuant to the plea agreement, as well as a 68-year term of incarceration on the remaining 10 felony charges."[33] After the decision in *Miller*, Jones filed a motion for resentencing pursuant to that holding. He sought to have a judge reconsider his life sentence in light of his youth and culpability at the time of the incident. After the trial court denied his motion, the Virginia Supreme Court affirmed the trial court.[34] They held that Jones did not actually receive a mandatory life sentence as required for *Miller* to apply. Rather, under Virginia law, the trial judge had the opportunity to suspend any portion of his life sentence but chose not to. Jones filed a petition of certiorari with the Supreme Court, but shortly after that, the Court decided *Montgomery*.[35] The Supreme Court vacated and remanded Jones' case for Virginia to rehear in light of *Montgomery*. In *Jones II*, the Virginia Supreme Court again held that Jones' sentencing was not unconstitutional because the trial judge gave a discretionary life sentence and not a mandatory one.[36]

The Virginia Supreme Court addresses the three arguments that Jones makes in regards to his life sentence. He first argues that his life sentence was mandatory in violation of *Miller*.[37] He next argues that *Miller* requires a presentencing hearing to consider youth and culpability and that Virginia did not hold such a hearing.[38] His final argument is that his plea waiver agreement should not be held against him.[39]

Malvo new sentencings. We make this ruling not with any satisfaction but to sustain the law. As for Malvo, who knows but God how he will bear the future.").

33. Jones v. Commonwealth, 795 S.E.2d 705, *cert. denied*, 138 S. Ct. 81 (2017).

34. *Id.* at 723.

35. *Id.* at 707–10.

36. *Id.*

37. *Jones* , 293 Va. at 39.

38. *Id.* at 42.

39. *Id.* at 46.

A. Mandatory vs. Discretionary

The Virginia Supreme Court held that their state law in this case does not require a mandatory life sentence. Their law allows for judges to suspend sentences and thus gives a juvenile an opportunity to avoid receiving the full term. In a rather lengthy footnote, the court lays out multiple examples of criminal statutes with some requiring mandatory life sentences and others that are suspendable.[40] The court then concludes that whether or not a statute allows or disallows judicial discretion is completely governed by state law.[41] And because the Virginia Supreme Court has concluded that the Virginia statute allows judicial discretion, then that is the case.[42]

B. Presentencing Hearing

Jones next argues that *Miller* requires a hearing for a judge to consider youth and culpability when sentencing and that Virginia does not have that type of hearing.[43] In other words, even if Virginia does have a discretionary sentencing scheme, the judge did not actually utilize his discretion properly. The Virginia Supreme Court disagreed with this assertion on a factual level. First, the court pointed out that both *Montgomery* and *Miller* were dealing with mandatory schemes from a state.[44] Second, the court explains that a defendant does indeed have an "opportunity" to present mitigating evidence for sentencing.[45] And in this case,

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40. *Id.*, at 41 n.6 ("See Code § 18.2–61(B)(2) (rape by adult offender) for an example of a life sentence that cannot be suspended. For non-life sentences—of varying severity—that cannot be suspended see, for example, Code §§ 3.2–4212(D) . . . .").

41. *See id.* ("Whether a state sentencing statute authorizes or precludes judicial discretion is a matter solely governed by state law.").

42. *Id.*; *See also* Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886, 44 L. Ed. 2d 508 (1975) (citations omitted) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law; and that we are bound by their constructions except in extreme circumstances not present here.").

43. *Jones*, 293 Va. at 42.

44. *Id.* ("Like the sentencing statutes in *Miller*, the Louisiana statute imposing a sentence of life imprisonment on Montgomery was not subject to suspension in whole or in part by the sentencing court.").

45. *Id.* at 43 ("In Virginia, however, a criminal defendant has a statutorily

Jones expressly waived this opportunity and stipulated to a life sentence.[46] The court also disagrees with the contention that a *Miller-Montgomery* claim cannot be waived. The court sites several of their opinions holding that a defendant may waive many of his constitutional rights.[47]

C. Plea Waiver

The last argument Jones makes is that his sentence and plea waiver were void ab initio (void from the start). However, the court, in a long and painstakingly in depth analysis of procedural law, held that *Miller* did not render previous life sentences as void but rather voidable. If the sentence was void from the start, then the proposed solution in *Montgomery* (i.e., new hearings for resentencing) would not be allowed.[48] How could a court address a sentence when that sentence would not even exist at law anymore?

V. Petition for Certiorari

On March 18, 2019, the Supreme Court granted the petition for certiorari to hear the *Malvo* case. I believe that the Court needs to address two issues. First, the Court needs to clarify its holding in *Montgomery* and what it means by "an opportunity to be heard." Second, because this new substantive right is retroactive, state courts across the country are going to have to decide which defendants are entitled to a new sentencing hearing and this will surely involve plea agreements with waivers.[49]

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provided opportunity to present mitigation evidence at his sentencing hearing.").

46. *Id.* at 45 ("He affirmatively waived that right as part of a negotiated plea agreement.").

47. *Id.*

48. *Id.*, at 55 ("A nonexistent nullity cannot be resurrected by some future, uncertain event. In this respect, the *Montgomery* remedy is irreconcilable with the dissent's claim that a violation of *Miller* ipso facto renders the sentence void ab initio.").

49. Stephen K. Harper, *Resentencing Juveniles Convicted of Homicide Post-Miller*, THE CHAMPION MAG., https://www.nacdl.org/Champion.aspx?id=32657 (last updated Mar. 2014) (last visited Apr. 15, 2019) (on file with the Washington and Lee Law Review).

A. An Opportunity to Be Heard

The Supreme Court should clarify two issues that have arisen with *Montgomery*. First, did *Montgomery* create a new substantive aspect of the Eighth Amendment when applied to discretionary life sentences for juveniles. And second, if *Montgomery* has created (or clarified) that the Eighth Amendment applies to discretionary life sentences, then does this rule also apply retroactively. If the Court did create new substantive law in *Montgomery*, then I believe they would have to rule again and make *Montgomery* retroactive. Because cert was granted for *Montgomery* to decide a procedural/retroactive issue, then it would have been improper to simply go ahead and create new substantive law.[50] However, by taking cert on *Malvo*, the Court could reaffirm or deny that *Montgomery* expanded the law and then have the option to retroactively apply it (and not add any new or additional substantive law).

1. Substantive

In *Malvo*, the Fourth Circuit essentially held that two things can be unconstitutional at once. If a state has a statutory or judicial scheme that enforces mandatory life sentences for juveniles, then that scheme is unconstitutional. However, even if a state does not have a mandatory life imprisonment scheme, the sentence can still be unconstitutional if the judge does not take into consideration the age, youth, culpability, etc. of the defendant when determining the life sentence. The Virginia Supreme court disagreed in this analysis and held that if the state statute for life imprisonment gives the judge discretion and the ability to suspend part of the sentence, then it is not mandatory and thus neither *Miller* nor *Montgomery* apply.

Why have these two courts reached such opposite conclusions? It is possible that as a state court Virginia feels it is necessary to "protect its turf" when it comes to interpreting state statutes. If the Virginia courts defer to the federal courts in this regard, then they are likely to open a can of worms that will surely spread to other

50. Reply Brief of Petitioner Randall Mathena, Malvo v. Mathena, 893 F.3d 265, 267 (4th Cir. 2018).

areas of the law. Also, the Virginia courts most likely believe that they are better at deciding what their statutes mean and how to apply them.

On the other hand, the Fourth Circuit makes a clear and direct argument based on reality and not technicality. Merely because the judge had the opportunity to consider youth and culpability (and apparently, it isn't clear that all judges even knew they had this authority[51]) does not mean that the defendant was actually afforded the opportunity to present his mitigating evidence. The court even agrees with the Virginia Supreme Court that their interpretation of the statute is correct and binding: the trial judge has the discretion to suspend life sentences.[52] However, this is of no importance to them "because *Montgomery* has now made clear that *Miller's* rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence." It is not just the mandatory scheme that violates the Eighth Amendment, "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.'"[53]

So how can the Supreme Court resolve this split? It is actually quite simple. The Court needs to decide if *Miller* is a two-part or one-part test. The one-part test is whether the state has a mandatory life sentencing scheme for juveniles. The Court would need to look at the actual penal statute as well as how the state court has interpreted that statute. If the Court determines that the state's statute is mandatory, then it would violate the Eighth Amendment, and thus, must be overturned.

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51. *See* Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018) ("But also, as Malvo asserts, it is far from clear that anyone involved in Malvo's prosecutions actually understood at the time that Virginia trial courts retained their ordinary suspension authority following a conviction for capital murder.").

52. *See id.* ("As the Warden asserts, the Virginia Supreme Court has now twice recognized that Virginia trial courts have long had the authority to suspend life sentences in whole or in part even following a capital murder conviction—an interpretation of Virginia law that is, of course, binding here.").

53. *Id.*

The two-part part test would follow the ruling in *Malvo*. First, is the state's life sentencing scheme mandatory? If it is, then go no further. The statute and sentencing are unconstitutional and must be corrected. If the statute is not mandatory, but rather gives the trial judge discretion in sentencing, then the next question is whether the judge used his discretion in sentencing the juvenile to life in prison. The trial judge would have to consider whether the acts of the juvenile "reflected irreparable corruption or permanent incorrigibility."[54]

The Virginia Supreme Court was forthright and intuitive when they proclaimed that the decision on *Montgomery* and *Miller* would have to come from a higher authority:

> We acknowledge that, perhaps, some post-*Montgomery* opinion from the United States Supreme Court might expand the Eighth Amendment to "mandatory or discretionary" juvenile life sentences generally, as the dissent proposes, with the evident purpose of moving the bar so high that all life sentences for convicted juvenile murderers and rapists, or juveniles convicted of other similarly serious crimes, eventually will be judicially deemed cruel and unusual punishment as a matter of law. The question before us, however, "is what the law is now, not what it may be in the future. We are not in the speculative business of plotting the future course of federal precedents."[55]

Both the Virginia Supreme Court and the Fourth Circuit make compelling arguments as to both interpretations of *Miller*. However, only the Supreme Court can make a final decision to clear up this split in authority.

2. Procedural

While I can see how the Fourth Circuit drew the conclusion that both mandatory and discretionary life sentences should be treated the same under the Eighth Amendment, it is how they came to that conclusion that I believe is troublesome. The court held that the "distinction without a difference" in regard to mandatory versus discretionary rule came from *Montgomery*:

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54. *Id.* at 275.

55. Jones v. Commonwealth, 293 Va. 29, 57 (2017).

> To be sure, all the penalty schemes before the Supreme Court in both *Miller* and *Montgomery* were mandatory. **Yet the *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."[56]

However, we must look at the facts and purpose of *Montgomery*. Why can't a court simply say: "The Supreme Court, in *Montgomery*, expanded and clarified the rule in *Miller*."? Even though most attorneys would say the Supreme Court can rule how it sees fit, in actuality, the Court must stick to the facts and issues that are before it for that specific case. In *Armour & Co. v. Wantock*, the Court emphasized that the

> words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.[57]

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56. *Id.* (emphasis added).

57. Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944); *See also* Ameur v. Gates, 759 F.3d 317, 324 (4th Cir. 2014) ("Ameur's broadest-possible-reading approach is inconsistent with the analysis that we undertake in applying Supreme Court opinions. '[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.'"); *see also* Vasquez v. Commonwealth, 291 Va. 232, 242 (2016) (citation omitted). But the duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding. Though perhaps a subtle distinction, Chief Justice John Marshall emphasized its importance to the judicial process: It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Our judicial system is based in part on predictability. Appellate courts are even stricter in enforcing this type of predictability and accountability because they only prepare for what they are told the issues will be (of course no appellate attorney would say that to a judge during oral arguments).

So, then we must ask, what was the issue and what were the facts before the Court in *Montgomery*? The issue appears to be straightforward:

> Montgomery sought state collateral relief, arguing that Miller rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that Miller does not have retroactive effect in cases on state collateral review.
>
> Held: This Court has jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to Miller.[58]

Justice Kennedy states in the third sentence of the opinion that "the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided."[59] And because different courts had reached different conclusions to that question, "[c]ertiorari was granted in this case to resolve the question."[60] From the beginning of the opinion, it is apparent that the issue being addressed in *Montgomery* is retroactivity.

What about the facts? In both *Miller* and *Montgomery*, the state sentencing schemes required mandatory life sentences for the juvenile defendants.[61] The Virginia Supreme Court has clearly pointed out, and the Fourth Circuit agreed, that the Virginia statute was not mandatory, but allowed judicial discretion.[62]

Based on Justice Kennedy's opinion, as well as an agreement between *Jones* and *Malvo*, *Montgomery* was addressing a very

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58. Montgomery v. Louisiana, 136 S. Ct. 718, 723 (2016).

59. *Id.*

60. *Id.*

61. *See Jones*, 293 Va. at 56–57 ("Both cases addressed *mandatory* life sentences *without possibility of parole."); Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018) ("To be sure, all the penalty schemes before the Supreme Court in both *Miller* and *Montgomery* were mandatory.").

62. *Malvo*, 893 F.3d at 274.

specific issue. Therefore, the potential "clarification" or "addition" to *Miller* should be considered dicta because it would not have been procedurally proper for the Court to address legal areas outside of the specific issues before it. The reasoning in *Malvo* is that the Court in *Miller* created a rule, then *Montgomery* clarified that rule, because of that clarification, the new rule in *Miller* applies. This appears to be circular reasoning to reach the correct conclusion, but a conclusion that only the Supreme Court may reach.

B. Plea Waiver

Even if a defendant is found to have had his Eighth Amendment rights violated because of a mandatory sentencing scheme, what happens if the juvenile defendant waived his right to appeal any constitutional issues that may arise? This is addressed in both *Malvo* and *Jones*, and not surprisingly, each court reaches a different conclusion.

The Virginia Supreme Court questions how a defendant can now raise an issue on appeal, when he voluntarily waived his right to that very appeal.[63] And in practicality, it would be impossible for a court to hold a presentencing hearing if a defendant waived his right to such a hearing. It would also violate the plea agreement and negatively affect the juvenile defendant if the court rejected the plea offer and insisted on having a presentencing hearing. The court did not distinguish between waiving a constitutional right under the Eighth Amendment from any other constitutional right a defendant may waive.[64]

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63. *Jones*, 293 Va. at 45 ("We are thus free to employ traditional waiver principles applicable to plea agreements. Those principles, in our opinion, are dispositive in this case.").

64. *Id.* ("[W]e fail to see how his *Miller-Montgomery* claim can be immunized from waiver principles that govern all other constitutional challenges."); *see also* Brown v. Epps, 91 Va. 726, 21 S.E. 119, 122 (1895) ("That a prisoner may waive many of his constitutional rights is beyond a doubt."); *But see* Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009) (citation omitted)

> Today we adopt the following rule that is designed to ensure that all criminal defendants whose punishments have been fixed in violation of the statutorily prescribed ranges are treated uniformly without any speculation. We hold that a sentence imposed in violation of a prescribed statutory range of punishment is void *ab initio* because 'the character of the judgment was not such as the [C]ourt had the power

In *Malvo*, the court first seeks to clarify what the defendant is seeking to overturn. It is the actual sentence he received as a juvenile that was unconstitutional, not the underlying conviction.[65] This distinction is important because the Supreme Court has previously held "that guilty pleas are not open to revision when future changes in the law alter the calculus that caused the defendant to enter his plea."[66] The actual sentence Malvo received was an illegal sentence and therefore it does not fall under the "but for" type of analysis. The next issue the court addresses is whether a defendant can waive this type of constitutional right. They speculate that "it is far from clear that a broad waiver of a *substantive* constitutional right, as the Warden maintains happened here, would even be enforceable."[67]

The distinction between these two courts, when it applies to plea waivers, appears to fall on the question of whether the sentence was unlawful or not. The Virginia Supreme Court does not believe that the sentence Jones received was unlawful because a judge did not go outside of the statutorily proscribed term. Because the judge did not violate the sentencing statute, then he did not go outside of his jurisdiction, and thus the sentence in itself was not void ab initio.[68] The Fourth Circuit took the view that that Malvo's sentence was actually unlawful based on the new substantive rule by the Supreme Court and that procedurally there was not an issue in how the defendant appealed.[69] Because of these

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to render.

65. *See Malvo*, 893 F.3d at 276 ("In this case, by distinction, Malvo seeks to challenge his *sentences*, not his guilty-plea *convictions*, on the ground that they were retroactively made unconstitutional under the rule announced in *Miller*.").

66. *Id.* at 275.

67. *Id.* at 276; Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) ("Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose.").

68. *See* Jones v. Commonwealth, 795 S.E.2d 705, 720 (2017). In Virginia, a *Miller* violation can be addressed on direct review or in a habeas proceeding. Because the violation, if proven, does not render the sentence void ab initio but merely voidable, it cannot be addressed by a motion to vacate filed years after the sentence became final. *See also* Costello, *supra* note 11, § 62.12, at 1087 (noting that "a voidable judgment may be attacked only while the trial court that rendered it still has jurisdiction").

69. *Malvo*, 893 F.3d at 276

[T]here is a narrow class of claims that we have allowed a defendant to

two interpretations, the Court should declare whether or not a *Miller* violation is such a substantive right that a defendant may attack the sentence both on direct appeal and collateral appeal. They should also explain whether a juvenile defendant can knowingly and voluntarily waive an unknown and nonexistent (at the time) constitutional right.

VI. Conclusion

As long as there are defendants currently incarcerated who were sentenced to life as a juvenile, courts are going to have to continue to address their legal remedies, if any. However, while the law might be settled in some areas, the issues in *Jones* and *Malvo* have opened a rift between how some courts apply Supreme Court precedent. It is important for the Court to clarify once more how states and lower federal courts are to handle juveniles who have been sentenced to die in prison.

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raise on direct appeal despite a general waiver of appellate rights, including a claim that the sentence imposed [was] in excess of the maximum penalty provided by statute, and indicating that we see no reason to distinguish between waivers of direct-appeal rights and waivers of collateral-attack rights. (Citations and quotations omitted.)