THE YOUNG AND THE REDEMPTIONLESS? JUVENILE OFFENDERS BEFORE *MILLER V. ALABAMA*

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ADDENDUM

The Supreme Court's decision on *Montgomery* was still pending at the time of writing. On Monday, January 25th, the Court issued its decision, holding that *Miller*'s prohibition on mandatory life without parole for juveniles announced a new substantive rule that is retroactive in cases on state collateral review. The Court largely articulated the reasoning in the Commentary below, stressing that *Miller* rendered life without parole an unconstitutional punishment for juvenile offenders whose crimes did not reflect irrevocable depravity. Such rules prohibiting certain punishments for certain classes of defendants are hallmark substantive rules, which must apply retroactively under Supreme Court precedent. The Court's decision departs somewhat from the Commentary below in its discussion of remedies. While my Commentary contemplates resentencing as an the sole appropriate remedy for adults who were sentenced as youths to life without parole, the Court held that a state may remedy a Miller violation by extending parole eligibility to those offenders.

INTRODUCTION

The Eighth Amendment prohibition against cruel and unusual punishment protects defendants from excessive sanctions.[1] Although this protection has long stood as central to American jurisprudence, our understanding of what constitutes cruel and unusual is far from

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* J.D. Candidate, Duke University School of Law, 2017. I would like to thank Lauren Fine '11, Co-Founder and Co-Director at the Youth Sentencing & Reentry Project and former member of the Duke Journal of Constitutional Law & Public Policy, for her invaluable assistance.

1. Roper v. Simmons, 543 U.S. 551, 560 (2005).

static. Rather, it is dynamic and tracks "the evolving standards of decency that mark the progress of a maturing society."[2] In recent years, the Supreme Court has analyzed the Eighth Amendment in the context of juvenile criminal law. The Court has recognized that children, much like our "maturing society," possess capacity for growth and change.[3] Generally speaking, the relative cognitive and emotional immaturity of children makes juvenile offenders less culpable for their actions than their adult counterparts. Children are thus more likely to rehabilitate and desist from unlawful behavior as they age.[4]

Our contemporary understanding of juvenile offenders is radically different from that of the 1970s.[5] Prompted by fear of escalating juvenile crime rates and media reports of juvenile "super predators," state legislatures passed laws that substantially increased the number of youth tried as adults.[6] Consequently, more children received "adult" sentences, such as life imprisonment without parole and the death penalty, which stood clearly in opposition to the juvenile system's emphasis on rehabilitation.[7]

In the new millennium, the Court began to realize that "adult time for adult crime"[8] was a persuasive mantra, but an unconstitutional approach to juvenile punishment under the Eighth Amendment. Thus, in 2005, the Court in *Roper v. Simmons* banned capital punishment for children.[9] Five years later, the Court invalidated life without parole (LWOP) sentences for non-homicide juvenile offenses in *Graham v. Florida*.[10] Most recently, in *Miller v. Alabama*, the court held that mandatory LWOP sentences for juveniles constitute cruel and unusual punishment under the Eighth Amendment.[11]

Few would dispute that these three decisions reflect a dramatically different understanding of juvenile sentencing from that of earlier decades. Courts across the country, however, disagree sharply about

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2. Trop v. Dulles, 356 U.S. 86, 101 (1958).
3. *See Roper*, 543 U.S. at 569.
4. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012).
5. *See* Vincent M. Southerland, *Youth Matters: The Need To Treat Children Like Children*, 27 J. CIV. RTS. & ECON. DEV. 765, 766 (2015).
6. *Id*. at 766.
7. *Id*. at 779.
8. *See* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457 at 473 (2012).
9. Roper v. Simmons, 543 U.S. 551 (2005).
10. 560 U.S. 48 (2010).
11. Miller v. Alabama, 132 S. Ct. 2455 (2012).

whether the holding in *Miller* applies retroactively on collateral review.[12] Many state and federal courts have held that the Court in *Miller* fashioned a substantive rule, which must apply on collateral review to individuals who were sentenced pre-*Miller* to mandatory LWOP for crimes they committed as juveniles.[13] As a result, these individuals are now entitled to new sentencing hearings, in which courts will take the mitigating factors of youth into account.[14] Other courts, however, treat *Miller*'s ban on mandatory LWOP for youths as simply a new procedural rule, not a substantive one.[15] Consequently, individuals in these jurisdictions who received mandatory LWOP sentences before *Miller* are not entitled to the benefit of new sentencing hearings, even though they are now effectively serving illegal sentences.[16]

The Louisiana Supreme Court adopted the latter view in *Montgomery v. Louisiana*, holding that *Miller* does not apply retroactively on collateral review to people sentenced to mandatory LWOP as juveniles.[17] Following *Miller*, Henry Montgomery petitioned the Supreme Court for a writ of certiorari in September of 2014.[18] The Court granted certiorari in March of 2015.[19] The State of Louisiana is the respondent.

This commentary begins by detailing the relevant factual background of *Montgomery*, including the contemporaneous development of Supreme Court jurisprudence about juvenile sentencing. It proceeds by detailing the procedural history of *Louisiana v. Miller* as well as the Supreme Court of Louisiana's holding in the case below. It then examines the arguments advanced

12. Collateral review is a non-appeal proceeding to attack a judgment. A petition for a writ of habeas corpus is one type of collateral attack. *See Collateral Review*, BLACK'S LAW DICTIONARY (10th ed. 2014).

13. *See* Brief in Opposition at 14, Montgomery v. Louisiana, No. 14-280 (U.S. Dec. 1, 2014) (listing federal courts in New York, California, New Jersey, and Minnesota and state courts in Florida, California, Iowa, Illinois, Nebraska, Mississippi, Texas, and Wyoming as applying *Miller* retroactively).

14. *See id*.

15. *See id*. (describing state courts in Alabama, Kansas, Michigan, Minnesota, Missouri, and Pennsylvania as not applying retroactively, as well as the Fifth and Eleventh Circuits).

16. *See id*.

17. *See* State v. Montgomery, 2013-1163 (La. 06/20/14), 141 So. 3d 264.

18. *See* Brief for Petitioner at 9, Montgomery v. Louisiana, No. 14-280 (U.S. June 22, 2015) [hereinafter Brief for Petitioner].

19. The Court granted Montgomery's petition after *Toca v. Louisiana*, the case the Court had initially agreed to review in order to resolve *Miller*'s retroactivity issue, became moot because of an actual innocence issue.

by both parties, concluding that the Court should reverse the Louisiana decision and resolve the existing split among state and federal courts by holding that *Miller* applies retroactively.[20]

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1963, Henry Montgomery, an African-American teenager, was arrested for the murder of a white law enforcement officer in Louisiana.[21] Following a jury trial in Baton Rouge, a city permeated by KKK activity, Montgomery was convicted of murder and sentenced to mandatory life imprisonment without parole.[22] As a result, under Louisiana law, Montgomery would never have the opportunity to alter or reduce his sentence by demonstrating rehabilitated character during a parole hearing.[23]

The Supreme Court recently recognized that the sentence Montgomery received is unconstitutional under the Eighth Amendment.[24] In *Miller v. Alabama*, the Court held that imposing mandatory LWOP sentences on juveniles constitutes cruel and unusual punishment.[25] Sentencers must have the ability to consider "the mitigating qualities of youth," which a mandatory LWOP sentence precludes by automatically and irrevocably requiring an individual to die in prison, regardless of that individual's level of culpability and capacity for rehabilitation.[26]

Although *Miller* rendered Montgomery's sentence unlawful, the Louisiana Supreme Court denied his motion to correct an illegal sentence.[27] The court declared that *Miller* created a new procedural rule, not a new substantive rule.[28] Under the Supreme Court's analysis in the 1989 decision *Teague v. Lane*,[29] only new substantive rules apply retroactively. If a new rule is merely procedural, it will not apply retroactively on collateral review.[30] Even though the continued

20. The Court will also determine whether it has jurisdiction to decide this case, but this commentary will only focus on the retroactivity issue.
21. *See* Brief for Petitioner, *supra* note 18, at 3.
22. *See id*. at 3–5.
23. *See id*. at 5–8.
24. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).
25. *Id*.
26. *Id*. at 2459.
27. *See* State v. Montgomery, 2013-1163 (La. 06/20/14), 141 So. 3d 264.
28. *Id*.
29. 489 U.S. 288, 109 (1989).
30. *See id*.

implementation of Miller's sentence constitutes ongoing cruel and unusual punishment, the Supreme Court of Louisiana believed that *Teague* tied its hands from ending the affliction of the unconstitutional penalty against Montgomery.[31] This decision ignored the fact that evidence strongly suggests that Montgomery "has been rehabilitated" after spending more than fifty years in prison.[32]

II. LEGAL BACKGROUND

A. Supreme Court Jurisprudence Concerning Juveniles

The Eighth Amendment's prohibition against cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense."[33] The concept of cruel and unusual punishment is "not static."[34] Rather, it must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[35] As a result, courts conform their analyses to "currently prevail[ing] standards of whether a punishment is 'excessive' or 'cruel and unusual.'"[36]

Like these standards of decency, scientific research and knowledge of adolescent development is similarly evolving and deepening. That knowledge has informed the prevailing standards of what constitutes cruel and unusual punishment against juveniles, which has in turn informed the Supreme Court's understanding of the Eighth Amendment's application to juveniles.[37] The Court articulated that understanding most recently in *Miller v. Alabama*, when it invalidated a state law requiring LWOP for juveniles convicted of murder.[38] The Court's decision in *Miller* was a logical progression from *Graham v. Florida*, which held as unconstitutional LWOP sentences for non-homicide juvenile offenses.[39] *Graham* was the first decision in which

31. *See* State v. Montgomery, 2013-1163 (La. 06/20/14), 141 So. 3d 264.

32. *Id*. at 5 ("Even without hope of release, he has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates.").

33. *Id*.

34. Trop v. Dulles, 356 U.S. 86, 101 (1958).

35. *Id*.

36. State v. Lyle, 854 N.W.2d 378, 384 (Iowa 2014).

37. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) ("Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well.").

38. *Id*. at 2475.

39. *See id*. at 2458.

the Court imposed a categorical ban on the use of a term of imprisonment.[40] The Court in *Miller* described LWOP as "akin to the death penalty" when imposed on a juvenile, given that he will likely spend the vast majority of his life behind bars.[41] The Court in *Graham* did not ban LWOP for all juvenile offenders, as it did with capital punishment in *Roper v. Simmons*, but it did require that sentencers reserve it for crimes of homicide, given that it is the law's second most "severe punishment."[42]

Together, the *Graham*, *Roper*, and *Miller* decisions reflect the Court's view that children are "less deserving of the most severe punishments" than adults because they are still in the process of developing the cognitive and emotional maturity expected of law-abiding adults.[43] In all three cases, the Court cited extensive scientific research illustrating juveniles' heightened susceptibility to psychological damage, peer pressure, "transient rashness, proclivity for risk, and inability to assess consequences."[44] Furthermore, the Court found many children were confined to the "family and home environment that surrounds [them]—and from which [they] cannot usually extricate [themselves]—no matter how brutal or dysfunctional."[45] Also, children are often ill-equipped to deal with the adult criminal justice system, including police officers, which can adversely contribute to their convictions.[46] All of these characteristics lessen children's "moral culpability" and indicate that as they continue to neurologically develop, they will desist in their unlawful behavior without outside intervention.[47] When judges are allowed to exercise discretion in the juvenile sentencing process, they are able to fashion a penalty that encourages rehabilitation, as children are "less fixed" in their behavior than adults and their "actions are less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[48]

The *Miller* Court condemned mandatory life without parole sentences for juveniles by stating that:

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40. *See id*.
41. *Id*. at 2466.
42. Graham v. Florida, 560 U.S. 48, 72 (2010).
43. *Id*. at 50.
44. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).
45. *Id*. at 2468.
46. *Id*.
47. *See id*. at 2465.
48. *Id*. at 2458.

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses. So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.[49]

The Court stated that this cabining of judicial discretion contravenes the Eighth Amendment's prohibition against disproportionate punishments. As the Court stated, "youth matters for purposes of meting out the law's most serious punishments."[50] The Court pointed out that judges were still allowed to issue a LWOP sentence to a juvenile defendant only after "tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[51]

B. Retroactivity Under Mackey *and* Teague

While *Miller* undoubtedly created a new constitutional rule—the imposition of mandatory LWOP sentence on a juvenile constitutes cruel and unusual punishment—a new constitutional rule must also be substantive, and not merely procedural, in order to apply retroactively.[52] In other words, the roughly 2,100[53] individuals serving mandatory LWOP sentences for crimes they committed as juveniles will not be entitled to resentencing hearings if the Court holds that *Miller* created a procedural rule. If, however, the Court holds that the *Miller* rule is substantive, those individuals may be entitled to such hearings.[54] *Montgomery*'s outcome will therefore have substantive implications, but those implications have no bearing on the determination of the *Miller* rule as substantive or procedural.

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49. *Id*. at 2467.
50. *Id*. at 2471.
51. *Id*. at 2469.
52. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).
53. Joshua Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (May 2015), http://www.sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf.
54. *See* Brief for Petitioner, *supra* note 18, at 10.

Instead, the Court has historically relied on Justice Harlan's concurring opinion in the 1971 decision *Mackey v. United States* to distinguish substantive rules from procedural rules.[55] Justice Harlan in *Mackey* set an exacting standard that a new constitutional rule must meet before it can be deemed "substantive" and thus apply retroactively.[56] Justice Harlan employed a stringent standard because he was a strong proponent of preserving the finality of criminal convictions.[57] He believed that "at some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted."[58] Justice Harlan espoused the traditionally conservative belief that the expansion of the writ of habeas corpus, a tool that convicted individuals can use to challenge the legality of their convictions, posed a threat to finality in the criminal justice system.[59] In his view, habeas should be invoked in limited circumstances, such as when "attack[ing] the constitutionality of the federal . . . or state . . . statute under which [a convicted individual has] been convicted."[60]

Justice Harlan lamented the Court's decision in *Brown v. Allen*,[61] which allowed all constitutional claims to be relitigated on habeas, and did not want the Court to officially sanction the then-popular assumption that "habeas courts should apply current constitutional law to habeas petitioners before them."[62] Doing so would further widen the floodgates that *Brown* had already opened:

> While men languish in jail . . . awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final continually inquiring into the current constitutional validity of criminal convictions . . . . No one . . . is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow

55. *See* Mackey v. United States, 401 U.S. 667, 692–95 (1971) (Harlan, J., concurring).
56. *See id*.
57. *See id*. at 691.
58. *Id*.
59. *See id*. at 685.
60. *Id*. at 684.
61. 344 U.S. 443 (1953).
62. *Mackey*, 401 U.S. at 686.

> and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[63]

Justice Harlan further believed that relitigation does not produce accurate results, as a "state that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed."[64] In his view, the "speculative effect" that applying a new procedural rule may have on a preexisting conviction or sentence did not justify undermining the principle of finality in the criminal justice system.[65] Thus, new procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."[66]

Justice Harlan did pronounce a crucial caveat to his general opposition to applying new constitutional rules on collateral review. He only opposed the retroactive application of new procedural due process rules, or "those applications of the Constitution that forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior."[67] On the other hand, he believed that new "substantive due process" rules that "placed certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," should apply retroactively.[68] For example, *Loving v. Virginia*[69] invalidated anti-miscegenation laws under the Fourteenth Amendment, while *Griswold v. Connecticut*[70] struck down a state contraception ban by formulating a constitutional right to privacy.[71] New substantive due process rules like these complied with his traditional view of habeas, as "the writ has historically been available for attacking convictions on such grounds."[72]

Justice Harlan believed that a matter involving a new substantive due process rule "represents the clearest instance where finality interests should yield . . . . There is little societal interest in permitting

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63. *Id*. at 690–91.
64. *Id*.
65. *Id*.
66. Schriro v. Summerlin, 542 U.S. 345, 352 (2004).
67. *Mackey*, 401 U.S. at 692.
68. *Id*.
69. 388 U.S. 1 (1967).
70. 381 U.S. 479 (1965).
71. *Mackey*, 401 U.S. at 692 n.7.
72. *Id*. at 693.

the criminal process to rest at a point where it ought properly never to repose."[73] In the words of U.S. Solicitor Donald Verrilli, the creation of new substantive rules raises "a real risk that a person has been subjected to an unjustified punishment," and that risk outweighs society's interests in finality.[74] Furthermore, applying new substantive rules does not entail the "adverse collateral consequences of retrial."[75]

The plurality of the Court in *Teague v. Lane* adopted Justice Harlan's concurring opinion in *Mackey*,[76] defining substantive rules as those that forbid punishment of certain primary conduct.[77] The Court's subsequent decision in *Penry v. Lynaugh*[78] took the holding in *Teague* to its next logical step. Writing for the majority, Justice O'Connor explained that *Teague* articulated an erroneously narrow view of Justice Harlan's concurrence in *Mackey*: "Although *Teague* read this exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed."[79]

As a result, substantive rules that have retroactive force include "not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[80] For example, a new rule that "the Eighth Amendment prohibits the execution of mentally retarded persons . . . regardless of the procedures followed," would be substantive and therefore apply retroactively.[81] This is because "a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous

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73. *Id*.

74. Brief for United States as Amicus Curiae Supporting Petitioner at 13, Montgomery v. Louisiana, No. 14-280, (U.S. July 29, 2015) [hereinafter Brief for United States as Amicus Curiae].

75. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring).

76. Harlan offered one other category of new constitutional rules that should apply retroactively on collateral review: procedural rules that are "implicit in the concept of ordered liberty." Harlan cited *Gideon v. Wainwright*'s formulation of a rule endowing criminal defendants with the right to counsel as an example of such a rule. Today, this type of rule is referred to as a "watershed rule," but *Gideon* remains the only decision that the Court has cited as an example of such a rule. *See* Brief for United States as Amicus Curiae, *supra* note 74, at 19 n.8.

77. *See* Teague v. Lane, 489 U.S. 288, 307 (1989) (plurality opinion).

78. 492 U.S. 302 (1989).

79. *Id*. at 329

80. *Id*. at 330.

81. *Id*.

to a new rule placing certain conduct beyond the State's power to punish at all."[82] In both instances, the Constitution "deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force."[83] A court's failure to apply a new substantive rule retroactively poses "a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him [or her]."[84] The need to correct an unjust sentence trumps any concerns about finality in that instance.[85]

III. ARGUMENTS

A. Louisiana's Argument

The Respondent State of Louisiana argues that *Miller v. Alabama* created merely a procedural rule, and not a substantive one.[86] After all, in the *Miller* court's *own words*, its ban on mandatory LWOP for juveniles did not "categorically bar a penalty for a class of offenders or type of crime."[87] In other words, the *Miller* court did not impose an outright ban on LWOP sentences for juveniles. A juvenile homicide offender therefore could still receive a discretionary LWOP sentence following *Miller*. The *Miller* court merely mandated "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a LWOP penalty.[88] Essentially, "the defendant's 'category of punishment' is life-without-parole, and its 'mandatory' nature simply reflects the state's failure to follow 'a certain process' before imposing it."[89] Therefore, according to Louisiana, *Miller* was a prototypical procedural holding under *Teague v. Lane* and its progeny, because it simply required "a new

82. *Id*.

83. *Id*.

84. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).

85. *See* Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring) ("This, I believe is because it represents the clearest instance where finality interests should yield.").

86. *See* Brief in Opposition, *supra* note 13, at 19–20 ("What *Miller* did was regulate the procedure for determining the culpability of a juvenile who commits murder . . . .").

87. Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

88. Brief in Opposition, *supra* note 13, at 19–20 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012)).

89. Brandon Buskey & Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of* Miller v. Alabama *Under* Teague v. Lane, 18 CUNY L. REV. 21, 30 (2015).

procedure—a penalty phase before a sentence of life without parole is imposed for a crime committed by a juvenile."[90]

B. Montgomery's Argument

Petitioner Montgomery and his amici, including the United States and the American Bar Association,[91] argue that *Miller* created an inherently substantive rule that applies retroactively.[92] Unlike respondent Louisiana, Montgomery argues that mandatory LWOP constitutes an entirely separate punishment from discretionary LWOP.[93] Montgomery maintains that since *Miller* banned the imposition of mandatory LWOP on a juvenile, he is facing "a punishment that the law cannot impose on him."[94] Montgomery is, in effect, wrongfully imprisoned, so Louisiana must cure this unconstitutional sentence.

Montgomery relies on the Supreme Court's decision in *Alleyne v. United States*[95] to support his characterization of mandatory LWOP as "substantively distinct and harsher than" discretionary life without parole sentences.[96] In *Alleyne*, the Court stated that "[m]andatory minimum sentences increase the penalty for a crime."[97] It follows logically that the "legally prescribed range *is* the penalty affixed to the crime."[98] Accordingly, it is "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime," as "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime."[99] Stated differently, "substantive rules are those that reshape permissible outcomes."[100] By invalidating

90. Erwin Chemerinsky, *Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, ABA JOURNAL (Aug. 8, 2015), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without parole_case_means_courts_must_look_at_sen/.

91. *See* Brief for Am. Bar Ass'n. as Amicus Curiae Supporting Petitioner at 8, Montgomery v. Louisiana, No. 14-280, (S. Ct. July 29, 2015); Brief for the United States as Amicus Curiae, *supra* note 74, at 8.

92. Brief for Petitioner, *supra* note 18, at 13–15.

93. *See id*. at 10 (treating discretionary LWOP and mandatory LWOP differently in discussion).

94. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (citing Bousley v. United States, 523 U.S. 614, 620 (1998)).

95. 133 S. Ct. 2151 (2013).

96. Brief for Petitioner, *supra* note 18, at 16.

97. *Alleyne*, 133 S. Ct. at 2155 (2013).

98. *Id*. at 2160.

99. *Id*. at 2160–61.

100. Brief of the Equal Justice Initiative on Behalf of Dozens Sentenced to Die in Prison When They Were Children as Amicus Curiae in support of Petitioner at 11, Montgomery v. Louisiana, No. 14-280 (S. Ct. July 29, 2015).

statutes that resulted in life without parole as the sole permissible outcome in the sentencing of a juvenile, Montgomery argues that the *Miller* rule reshaped permissible outcomes.[101] Thus, to Montgomery, a "mandatory life without parole sentence . . . is substantively different from [a discretionary life without parole sentence]; it is harsher, more aggravated, and imposes a heightened loss of liberty."[102]

Montgomery also finds Supreme Court capital punishment jurisprudence to be supportive of his position that *Miller* is substantive. In *Woodson v. North Carolina*, the Court struck down a mandatory death penalty statute, holding that "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[103] Two years later, in *Lockett v. Ohio*,[104] the Court made a critical distinction "between the substantive right to individualized sentencing that is required under the Eighth Amendment and the specific procedures states adopt in implementing such individualized," discretionary sentencing schemes.[105] The court said:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense . . . creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.[106]

Essentially, while states may utilize different procedures in deciding which cases merit the death penalty, it is "'constitutionally indispensable"[107] and "essential" that sentencers be afforded discretion in their decision-making.[108]

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101. *See* Brief for Petitioner, *supra* note 18, at 17 ("*Miller* requires that juveniles be afforded an *expanded* range of sentencing options by prohibiting *mandatory* life without parole punishments.").
102. *Id*.
103. Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).
104. 438 U.S. 586 (1978).
105. Brief for Petitioner, *supra* note 18, at 20.
106. Lockett v. Ohio, 438 U.S. 586, 605 (1978).
107. *Id.* at 601 (quoting *Woodson*, 428 U.S. at 304).
108. *Id*. at 605.

Miller relied on *Woodson* and its progeny because LWOP sentences for juveniles are "akin to the death penalty."[109] Both LWOP and capital punishment result in the convicted individual's death while in custody of the state. By implication, then, *Miller*'s requirement "of individualized sentencing for youth facing life without parole is, as in the death penalty cases, 'constitutionally indispensable' and 'essential.'"[110] Also, as in the context of capital punishment, there is an impermissible risk that a juvenile convicted under a mandatory LWOP scheme is sentenced to "a punishment that the law cannot impose on him."[111] In Justice Harlan's opinion, this very scenario of a person being "subjected to an unjustified punishment" requires the principle of finality to yield to greater concerns of justice.[112]

Montgomery also favorably compares *Schriro v. Summerlin*,[113] another Supreme Court case concerning capital punishment that distinguishes between substantive and procedural rules.[114] The Court in *Summerlin* set out to determine whether its previous holding—that a jury, not a judge, was required to find an aggravating circumstance necessary for imposition of the death penalty—was substantive or procedural.[115] The Court held that it was procedural, because it regulated "only the manner of determining the defendant's culpability."[116] Such procedural rules do not merit retroactive application because they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."[117] By contrast, decisions that the Supreme Court has classified as substantive have altered the range of potential outcomes of the criminal process.[118] *Miller* in no way regulates the

109. Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).

110. Brief for Petitioner, *supra* note 18, at 21 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *Lockett*, 438 U.S. at 605).

111. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).

112. *See* Brief for Petitioner, *supra* note 18, at 13 ("[S]ubstantive rules that expand the available sentences raise a real risk that a person has been subjected to an unjustified punishment—a situation serious enough to justify reopening final cases."); Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring) ("This, I believe is because it represents the clearest instance where finality interests should yield.").

113. 542 U.S. 348 (2004).

114. *Id*. at 353.

115. *Id*.

116. *Id*.

117. *Id*. at 352.

118. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (narrowing the range of

"manner of determining the defendant's culpability."[119] Instead, by giving defendants like Montgomery the chance to obtain a more favorable outcome than was possible before *Miller*, *Miller* alters the "range of permissible [sentencing] outcomes of the criminal proceeding" and is therefore substantive.[120] The Court in *Summerlin* further stated that if a court held that "a certain fact [was] essential to the death penalty," that holding would be substantive.[121] Montgomery analogizes such a holding to *Miller*'s holding that prescribes a sentencer to consider certain enumerated factors, such as the juvenile defendant's capacity for rehabilitation and his home environment, before imposing LWOP.[122] Montgomery finds both holdings sufficiently similar to one another, meaning that both must be substantive.[123]

Finally, the Montgomery has mentioned another compelling reason why the Court should apply *Miller* retroactively: it already has. The Court in *Miller* granted resentencing hearings as relief to two juveniles serving mandatory LWOP—the petitioner Evan Miller, and Kuntrell Jackson, the petitioner in Miller's companion case.[124] Miller's case was on direct review, while Jackson's case was on collateral review.[125] Per *Teague*, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[126] Montgomery is similarly situated to Jackson, as his case is also on collateral

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possible outcomes by eliminating capital punishment for juveniles); Graham v. Florida, 560 U.S. 48, 82 (2010) (narrowing the range of possible outcomes by eliminating LWOP sentences for non-homicide juvenile offenders).

119. *Summerlin*, 542 U.S. at 353.

120. *See Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255* at 13, Johnson v. United States, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744) [hereinafter Government's Response to Petitioner's Application].

121. *Summerlin,* 542 U.S. at 354.

122. *See* Brief for Petitioner, *supra* note 18, at 22–23 (outlining *Miller*'s requirements and comparing them to court precedent about aggravating factors in capital cases, and describing the substantive nature of each).

123. *See id*. at 22–23.

124. *See id*. at 15 n.7 ("Because the new rule announced in *Miller* was applied to Mr. Jackson on collateral review, Mr. Montgomery should likewise benefit from this Court's ruling in Miller.").

125. *See id*. *(*"This Court's decision in Miller provided immediate relief to two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in *Miller*'s companion case, *Jackson v. Hobbs*, whose case was on collateral review.").

126. Teague v. Lane, 489 U.S. 288, 300 (1989).

review.[127] Because Jackson's case benefited from the *Miller* rule on collateral review, "evenhanded justice" requires that *Miller* apply retroactively to Montgomery's case.[128]

IV. ANALYSIS: *MILLER* APPLIES RETROACTIVELY ON COLLATERAL REVIEW

The Supreme Court should characterize the *Miller v. Alabama* rule as substantive and apply it retroactively to Montgomery's case. A decision otherwise would signal that vague and unsubstantiated concerns about finality trump Montgomery's essential constitutional rights. And, at a more basic level, such a decision would defy common sense. When the Supreme Court deems a punishment unconstitutional, the simple assumption is that the continued infliction of it is also unconstitutional. For example, if the Supreme Court definitively ruled that torture was unconstitutional, should society continue to torture people just because it had already begun to do so before the Court outlawed torture? In law, the simple assumption is not always the correct one. In this case, however, ample precedent supports the common-sense assumption.

It is true that the language the Court used in *Miller*—describing the rule as simply a requirement "that a sentencer follow a certain process"[129]—did not do Montgomery any favors before imposing a particular sentence. In using a word closely related to "procedure," the Court inadvertently left a red herring that has misled Lousiana. Lousiana's argument is myopic and formalistic in focusing on the procedural aspects of the *Miller* rule while neglecting the substantive aspects. Indeed, as the United States government has noted, "nothing in *Miller* implies that the Court viewed its decision as purely procedural—and its holding makes clear that it is not."[130] By mandating "that new and more favorable potential outcomes be made available to defendants who previously had faced only" the outcome of life without parole, *Miller* articulated an inherently substantive change in the law.[131]

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127. *See* Brief for Petitioner, *supra* note 18, at 15 n.7.
128. *Teague*, 489 U.S. at 300.
129. Miller v. Alabama, 132 S. Ct. 2455, 2459 (2012).
130. *Government's Response to Petitioner's Application*, *supra* note 120, at 15.
131. *Id*.

The Supreme Court of Iowa reached this conclusion in *State v. Ragland*, holding that *Miller* applies retroactively.[132] The court in *Ragland* conceded that, broadly speaking, *Miller* "does mandate a new procedure."[133] The new procedural requirement of a sentencing hearing, however, "is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing."[134] By prohibiting mandatory LWOP, the Court in *Miller* effectively "require[d] states to . . . *expand* the range of permissible punishments for juveniles to always include one sentencing option that carries the possibility of release."[135] The *Miller* rule "is not akin to a procedural rule that simply requires admission of a class of evidence or changing the factfinder [sic] from judge to jury. It requires that new sentencing options be available," which is a substantive requirement.[136]

As Montgomery has consistently argued, this requirement has enormous implications for juveniles at the sentencing phase in states that imposed mandatory LWOP before *Miller*. Still, justice requires that *Miller* have enormous implications for those 2,100 individuals like Montgomery who were sentenced to mandatory LWOP before *Miller* as well. To "hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others," merely because individuals like Montgomery had the misfortune of being sentenced before *Miller*.[137] This would be "an intolerable miscarriage of justice."[138] Resentencing hearings would utilize judicial resources, but far less than would retrials.[139] States therefore have a less compelling interest in finality when only the sentence, and not the underlying conviction, is challenged.[140]

Finally, *Miller* itself illustrates the substantive nature of its holding by predicting that LWOP sentences will rarely be imposed against

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132. *See* State v. Ragland, 836 N.W.2d 107, 115 (Iowa 2013) ("Miller applies retroactively.").

133. *Id*.

134. *Id*.

135. Buskey & Korobkin, *supra* note 89, at 34.

136. *Government's Response to Petitioner's Application*, *supra* note 120, at 15.

137. Hill v. Snyder, Case No. 10-14568, 2013 U.S. Dist. LEXIS 12160, at *5 (E.D. Mich. Jan. 30, 2013).

138. *Id*.

139. *See* Brief for Petitioner, *supra* note 18, at 49 (explaining that "a sentencing hearing, particularly for a juvenile, is more forward-looking," than a trial and would not require relitigating events that ocurred far in the past).

140. *See* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 152 (2014) ("[T]he strongest justifications for limiting reconsideration of final convictions are less compelling with respect to final sentences.").

juveniles. The Court stated that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[141] If fact, it is "the rare juvenile offender whose crime reflects irreparable corruption."[142] Montgomery is not that rare offender—ample available evidence indicates "his young age and related characteristics mitigated against a sentence of life without possibility of parole."[143] Montgomery of course never received an individualized sentencing hearing at which a sentencing judge or jury could consider that mitigating evidence or his capacity for rehabilitation.[144] Had he received such a hearing, Montgomery would likely not be fated to die in prison.

The same can likely be said for the majority of individuals currently serving LWOP for crimes they committed as children. Most of these individuals were sentenced under a mandatory scheme where the sentencer was required to issue a LWOP sentence.[145] Had a sentencer been able to consider mitigating circumstances before "irrevocably sentencing them to a lifetime in prison,"[146] many of those juveniles could have been eligible for parole. This is particularly true for those persons sentenced to LWOP following conviction on a felony murder charge. These individuals received mandatory LWOP for participating "in a robbery or burglary during which a co-participant committed murder, without the knowledge or intent of the teen."[147]A juvenile is typically less culpable in the felony-murder scenario than in a traditional homicide, so a LWOP sentence seems particularly outsized in the felony-murder context.[148]

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141. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

142. *Id*. (quoting Roper v. Simmons, 543 U.S. 551, 573).

143. *See* Brief for Petitioner, *supra* note 18, at 5–7 (describing Montgomery's difficult upbringing, low IQ, and lack of counsel when his confession was allegedly coerced).

144. *Id*.

145. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENTENCING PROJECT (March 2012), http://www.sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

146. *Miller*, 132 S. Ct. at 2469.

147. Alison Parker, *The Rest of Their Lives: Life Without Parole for Child Offenders in the U.S.,* HUMAN RIGHTS WATCH 1–2 (2005), http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

148. *See id*. at 27 ("[F]elony murder . . . is . . . imposed . . . on teens who participated in a felony such as robbery during which another participant in the crime killed someone without the child offender having intended the murder to occur and sometimes without even knowing the other participant was armed.").

After *Miller*, it is harder than ever to justify that Montgomery and 2,100 similarly situated individuals have been condemned to die in prison, and will never have the opportunity to put forth evidence of mitigation or rehabilitation. It is even harder to justify this reality when all future juvenile offenders will not have this misfortune. Justice Harlan developed the substantive rule exception precisely to prevent against the "real risk that a person has been subjected to an unjustified punishment."[149] By applying *Miller* retroactively, the Court would put an end to the infliction of many of these unjustified punishments. Until then, the law will continue to "rest at a point where it ought properly never to repose."[150]

CONCLUSION

Those who support applying *Miller v. Alabama* retroactively take heart in the fact that this is the second time the Court has granted certiorari on a case concerned with the retroactivity of *Miller*.[151] Many predict that Kennedy will cast the deciding vote.[152] Whichever way the Court rules, it will likely have implications for questions beyond the scope of this case, including the constitutionality of the felony-murder rule, the imposition of discretionary LWOP on juveniles, and the wisdom of trying youth as adults.[153] At the very least, it will bring greatly needed clarity to the *Teague v. Lane* doctrine.

149. Brief for the United States as Amicus Curiae, *supra* note 74, at 6.

150. Mackey v. United States, 401 U.S. 667, 693 (Harlan, J., concurring).

151. Telephone Interview with Lauren Fine, Co-Founder and Co-Director at the Youth Sentencing & Reentry Project (Sept. 9, 2015).

152. *Id*.

153. *Id*.