No. 14-280

In the Supreme Court of the United States

HENRY MONTGOMERY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF RESPONDENT STATE OF LOUISIANA

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to the decision in *Miller v. Alabama*, 567 U.S. ___ (2012)?

2. Did *Miller* announce a new substantive rule that applies retroactively to cases on collateral review under the analysis in *Teague v. Lane*, 489 U.S. 288 (1989)?

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INTRODUCTION

Over fifty years ago petitioner Henry Montgomery shot deputy Charles Hurt to death, leaving Hurt's wife and three young children to spend the rest of their lives without a husband or a father.[1] Montgomery, who was seventeen when he killed Hurt, was automatically sentenced to life-without-parole for his crime. If he committed the same crime today, he could receive precisely the same sentence. The question in this case is whether the new procedure announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)—requiring a judge or jury to consider a juvenile murderer's youth before sentencing him to life-without-parole—should retroactively invalidate Montgomery's punishment and require the State to afford him a new sentencing hearing.

Under a straightforward application of the framework in *Teague v. Lane*, 489 U.S. 288 (1989), the answer is no. *Teague* requires retroactive application of new rules that deny government the power to criminalize primary conduct or the power to impose a category of punishment. The rule in *Miller* does neither. *Miller* explicitly recognizes that a life-without-parole sentence is still a constitutionally valid category of punishment, and that, today, a judge or jury must "only … follow a certain process" before imposing that punishment on a juvenile murderer. 132 S. Ct. at 2471. As the court below correctly ruled, those are the hallmarks of a procedural rule that is non-retroactive

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[1] *See* Joe Gyan, Jr., *High Court to Reconsider Juvenile Life Terms*, THE ADVOCATE, March 25, 2015, http://theadvocate.com/news/11929154-123/us-supreme-court-to-consider.

under *Teague*. The Court should affirm that decision and leave in place Montgomery's life-without-parole sentence, which is just as constitutional today as when it was imposed in 1969.

STATEMENT OF THE CASE

A. Factual Background

On November 13, 1963, Montgomery murdered Charles Hurt, an East Baton Rouge Parish sheriff's deputy. *State v. Montgomery*, 181 So.2d 756, 757, 759 (La. 1966). Montgomery was seventeen when he killed Hurt. *Id.* at 757. He was convicted and sentenced to death. La. Rev. Stat. Ann. § 14:30 (1942) ("Whoever commits the crime of murder shall be punished by death."). The Louisiana Supreme Court, however, reversed Montgomery's conviction, finding that adverse publicity had compromised his trial. *Montgomery*, 181 So.2d at 762. Following a brief escape from the parish jail, Montgomery was retried and again convicted of murder. *State v. Montgomery*, 242 So.2d 818, 818-20 (La. 1970).

This time the jury returned a verdict of guilty without capital punishment, which carried a mandatory sentence of life without possibility of parole. *Id.* at 818; *see* La. Code Crim. Proc. art. 817 (1969) (capital jury "may qualify" guilty verdict as "'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life"); La. Rev. Stat. Ann. § 15:574.4(B)(1) (1969) (providing "[n]o prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years"). The Louisiana Supreme Court affirmed Montgomery's conviction and

sentence on November 9, 1970, and denied rehearing on December 14, 1970. *Montgomery*, 242 So.2d at 818, 821. Montgomery did not seek certiorari from this Court.

B. Procedural History

Forty-one years later, this Court decided in *Miller* that a judge or jury must have the opportunity to consider youth as a mitigating circumstance before sentencing a juvenile murderer to life-without-parole. *Miller*, 132 S. Ct. at 2475. Relying on *Miller*, Montgomery moved to correct his sentence in July 2012. JA 8-37. The state district court denied his motion on January 8, 2013, ruling that *Miller* did not apply retroactively. Pet. App. 1. Montgomery's application for review of that decision was properly transferred to the Louisiana Supreme Court. JA 132.

On June 20, 2014, the Louisiana Supreme Court affirmed, concluding that *Miller* was non-retroactive. The court relied on its decision in *State v. Tate*, 2012-2763, p. 13 (La. 11/05/13); 130 So.3d 829, 838, which had concluded *Miller* was non-retroactive under the analysis in *Teague v. Lane*. Pet. App. 3.

On September 5, 2014, Montgomery timely sought certiorari, which this Court granted on March 23, 2015.

SUMMARY OF ARGUMENT

1. This Court has jurisdiction to review the judgment below because it is interwoven with federal law. In finding *Miller* non-retroactive, the Louisiana Supreme Court followed the framework established by this Court in *Teague v. Lane*: the court relied exclusively on *Teague*, cited only *Teague* precedents,

and cited no state-law retroactivity principles. For purposes of jurisdiction, therefore, the decision below is "'interwoven with federal law.'" *Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

Contrary to the court-appointed *amicus*, this Court does not risk issuing an "advisory" opinion merely because the court below hypothetically could have applied a standard broader than *Teague*. What matters for jurisdictional purposes is that the Louisiana Supreme Court applied *Teague*, as it has for over twenty years. The risk of an advisory opinion arises where the decision below was based on a state ground that would justify it regardless of what this Court says about federal law. That is plainly not the case here. It is undisputed that the Louisiana Supreme Court's decision relied on *Teague* and *Teague* alone.

2. Under a straightforward application of *Teague*, the rule announced in *Miller* is non-retroactive.

Teague bars retroactive application of most new criminal rules, with a narrow exception for new "substantive" rules. In over a quarter-century of *Teague* jurisprudence, this Court has taught that a rule is substantive if it denies the government the power to criminalize primary conduct or to impose a particular category of punishment. Thus, this Court has found substantive under *Teague* (1) new rules that narrow a federal criminal statute to de-criminalize formerly illegal conduct; (2) new rules that interpret the Constitution to deny the government power to criminalize certain primary conduct; and (3) new rules that interpret the Constitution to deny the government power to impose a category of punishment on a class of

defendants or for a type of crime. *See generally Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The rule announced in *Miller* does none of these things and is therefore not substantive under *Teague*.

Miller decided that the Eighth Amendment requires a sentencer to consider youth as a mitigating factor before sentencing a juvenile murderer to life-without-parole. The Court candidly explained, however, that *Miller* "does not categorically bar" a life-without-parole sentence and mandates only that a judge or jury "follow a certain process" before imposing that sentence on a juvenile murderer. *Miller*, 132 S. Ct. at 2471. Because *Miller* only requires a sentencing procedure and does not deny the government power to impose a category of punishment, *Miller* does not qualify as a substantive rule under *Teague*'s exception.

Recognizing this, the United States invites the Court to extend *Teague*'s exception to include procedural rules, like *Miller*, that "expand[ ] the range of possible sentencing outcomes." Br. 8. The Court should decline. Re-defining *Teague*'s exception to include "outcome-expanding" rules would contradict the reasons that justified the exception to begin with. It would require overturning final sentences despite the fact that defendants are facing a constitutionally valid punishment. And it would require burdensome re-litigation of facts buried in the past or irretrievably lost. *Teague* originally recognized its substantive exception because retroactively applying such categorical rules would *not* undermine finality and drain government resources. The United States' proposed expansion of *Teague* would do both and should therefore be rejected.

This case vividly illustrates why *Miller*'s new procedure should not apply retroactively. Montgomery received an automatic life-without-parole sentence for murdering Deputy Hurt over fifty years ago. Applying *Miller* would annul that sentence, despite the fact that Montgomery could receive the same sentence today for the same conduct. Moreover, re-sentencing Montgomery today under *Miller*'s new procedure would pose severe difficulties. The sentencer would have to determine whether Montgomery's youth *should* have impacted the sentence he received for a crime he committed a half-century ago. This would occur in a case where, as far as counsel can tell, virtually everyone involved in Montgomery's 1969 trial is dead. If those conceptual and practical obstacles were not enough, one must also consider the effect of the re-sentencing process on Deputy Hurt's surviving children, who would be forced to publicly relive the anguish of having been deprived of a father for the better part of their lives.

ARGUMENT

I. The Court has jurisdiction to review the judgment of the Louisiana Supreme Court.

The Court has asked whether it has jurisdiction to review the Louisiana Supreme Court's judgment. Finding no jurisdiction would be to Louisiana's advantage, given that Louisiana prevailed below and would also prevail in any federal habeas proceeding. *Craig v. Cain*, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished) (finding *Miller* non-retroactive under *Teague*). Nonetheless, Louisiana concedes this Court has jurisdiction, because the state supreme court's

decision was based solely on the federal *Teague* framework.

1. Louisiana agrees with the United States that the decision below is interwoven with federal law and that the Court thus has jurisdiction to review it. *See* US Br. 25-26.

It is undisputed that the Louisiana Supreme Court relied exclusively on *Teague* and applied no independent state-law retroactivity standard. *See* Pet. App. 3 (relying solely on *Tate* decision); *Tate*, 130 So.3d at 834 (explaining "our analysis is directed by the *Teague* inquiry"); *id.* at 834-41 (applying only *Teague* cases); *see also* US Br. 27 (observing that the Louisiana Supreme Court "relied solely on federal precedents[,] applied solely federal reasoning," and "did not apply an independent state standard of retroactivity"). Plainly, the state court's retroactivity analysis was "interwoven with federal law," *Coleman*, 501 U.S. at 733 (quotations omitted), and therefore its judgment "rest[s] upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (citation omitted).

By tethering state retroactivity to *Teague*, the Louisiana Supreme Court "treat[s] state and federal law as interchangeable and interwoven," *Florida v. Powell*, 559 U.S. 50, 57 (2010). This Court therefore has jurisdiction to review the decision in this case on the same grounds that it has reviewed state decisions that interpret state constitutional provisions or statutes in lockstep with federal standards. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979) (finding no independent state ground where Delaware Constitution was "automatically … interpreted at least

as broadly as the Fourth Amendment"); *Oregon v. Guzek*, 546 U.S. 517, 520-21 (2006) (concluding state decision "rest[ed] on federal law" because Oregon statute incorporated Eighth Amendment standards). In those cases, like this one, the state court's "interpretation of state law has been influenced by an accompanying interpretation of federal law," and this Court therefore has jurisdiction to review it. *Three Affiliated Tribes of Fort Berthold Reserv'n v. Wold Eng'ing, P.C.*, 467 U.S. 138, 152 (1984).

2. Louisiana also agrees with the United States that this Court has jurisdiction notwithstanding the fact that the Louisiana Supreme Court could have adopted a retroactivity standard broader than *Teague*. *See* US Br. 26-32; *see also Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) (explaining that *Teague* "does not in any way limit the authority of a state court … to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*"). What matters for jurisdictional purposes is not what retroactivity standard the state court *could* have applied, but what standard it actually *did* apply. It is undisputed that the Louisiana Supreme Court has long applied the *Teague* framework and did so here. The *amicus* is therefore mistaken to claim that an opinion from this Court respecting *Teague* would be "advisory" under *Michigan v. Long*, 463 U.S. 1032. *See* Court-Appointed *Amicus* Br. 9-16.[2]

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[2] Because the jurisdictional issue may be resolved on this narrower ground, Louisiana agrees that the Court should not address "whether the Constitution compels retroactivity in state collateral review when an exception to *Teague* applies." US Br. 33. Resolving

The *amicus* reads *Long* too narrowly. *Long* teaches that a state law issue is "interwoven" with federal law where state and federal law are governed by identical standards. *See Long*, 463 U.S. at 1040-41 (explaining Court may review state issue "interwoven with" federal law); *id.* at 1044 n.10 (finding jurisdiction to review decision applying state constitutional provision that was "governed by a standard identical to that imposed by the Fourth Amendment"). Thus, the Court had jurisdiction to review a Michigan Supreme Court decision that relied "exclusively" on federal precedent in interpreting a state constitutional provision in lockstep with the Fourth Amendment. *Id.* at 1043. In this case, there is no question that the Louisiana Supreme Court has similarly adopted a federal standard to govern state law and exclusively relies on federal precedent to apply it.

To be sure, *Long* cautioned against rendering an "advisory opinion" in cases where the decision below was grounded on "adequate and *independent* state grounds." *Id.* at 1041 (emphasis added). The Court explained, however, that a state-law decision is not "independent" of federal law where state law is tethered to federal standards and where the state decision "relie[s] *exclusively* on its understanding of … federal cases." *Id.* at 1043 (emphasis in original). The Court has applied this principle from *Long* in numerous cases involving state constitutional provisions or statutes that incorporate federal

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that issue should await a case where the Court's jurisdiction turns on it, unlike this one.

standards.[3] In none of those cases did the Court suggest its opinion risked being "advisory" merely because state courts might elect on remand to interpret state law more broadly than its federal counterpart.

As the United States points out, this case is somewhat different from *Michigan v. Long* and its progeny because here the federal retroactivity standards do not apply "of their own force" in state collateral proceedings. US Br. 28. That distinction is immaterial for purposes of this Court's jurisdiction, however. The United States correctly explains that, in several cases, this Court has exercised jurisdiction "to review certain embedded federal-law issues in state cases because those cases raise federal questions." *Id.* at 28-31 (citing *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Three Affiliated Tribes*,

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[3] *See, e.g., Powell*, 559 U.S. at 57 (reliance on state constitution did not defeat jurisdiction to review *Miranda* issue where state court "treated state and federal law as interchangeable and interwoven," and "at no point expressly asserted that state-law sources gave [respondent] rights distinct from, or broader than, those delineated in *Miranda*"); *Guzek*, 546 U.S. at 521 (finding jurisdiction where state evidentiary statute incorporated Eighth Amendment standards and therefore "rest[ed] upon federal law"); *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (finding jurisdiction to review state court's interpretation of state immunity statute where outcome rested on whether witness had a valid Fifth Amendment privilege); *South Dakota v. Neville*, 459 U.S. 553, 556-67 n.5 (1983) (state court's interpretation of state constitution was not "independent" of federal law because state provision was interpreted co-extensively with Fifth Amendment); *Prouse*, 440 U.S. at 653 (reliance on state constitutional provision did not defeat jurisdiction because state court's holding "depended upon [its] view of the reach of the Fourth and Fourteenth Amendments").

467 U.S. 138; *Ohio v. Reiner*, 532 U.S. 17). The discrete federal law component in those cases was sufficient to support this Court's jurisdiction. *See, e.g., Three Affiliated Tribes*, 467 U.S. at 151-52 (explaining this Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

That principle applies here. It is undisputed that the Louisiana Supreme Court relied solely on the *Teague* framework in determining that *Miller* is non-retroactive on collateral review. The state court's application of *Teague* thus raises a discrete issue of federal law sufficient to support this Court's jurisdiction. *See, e.g., Danforth*, 552 U.S. at 291 (explaining that the availability of a state remedy for violation of a federal constitutional right "'is a mixed question of state and federal law'") (quoting *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting)).

II. *Miller* is a procedural rule that does not apply retroactively under *Teague*'s first exception.

As discussed above, Montgomery received a mandatory life-without-parole sentence for a 1963 murder he committed when he was seventeen years old. *See supra* I.A. His conviction and sentence became final on March 15, 1971, when the time elapsed for seeking certiorari from this Court on direct review. *See Montgomery*, 242 So.2d at 818 (denying rehearing December 14, 1970). Forty-one years later this Court decided *Miller v. Alabama*. This case asks whether *Miller* applies retroactively to invalidate Montgomery's life-without-parole sentence.

1. *Miller*'s retroactivity is governed by the analysis in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* discarded the previous retroactivity analysis in *Linkletter v. Walker*, 381 U.S. 618 (1965), because *Linkletter* "ha[d] not led to consistent results." *Teague*, 489 U.S. at 302 (plurality op.). In its place, *Teague* adopted Justice Harlan's analysis from his separate opinion in *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).[4] *See Teague*, 489 U.S. at 310 ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review.") (plurality op.); *Penry v. Lynaugh*, 492 U.S. 302, 314, 329 (1989) (applying "Justice Harlan's approach to retroactivity" as adopted by *Teague* plurality). *Teague* promised to bring consistency to what Justice Harlan had called "the Court's ambulatory retroactivity doctrine." *Mackey*, 401 U.S. at 681.

Teague teaches that new rules[5] of criminal law generally do not apply retroactively to cases on collateral review. *Teague*, 489 U.S. at 310; *see also Mackey*, 401 U.S. at 689 (arguing "it is sounder, in adjudicating habeas petitions, generally to apply the

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[4] All citations to *Mackey* are to Justice Harlan's separate opinion.

[5] Both parties, as well as the United States, agree that *Miller* is a new rule. *See* Pet. Br. 16 n.8; Resp. Br. in Opp. 10-11; US Br. 10-13; *see also Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (a new rule is one not "'*dictated* by precedent existing at the time the defendant's conviction became final'") (quoting *Teague*, 489 U.S. at 301).

law prevailing at the time a conviction became final").[6] *Teague*'s presumption against retroactivity furthers society's compelling interest in the finality of convictions. *See Teague*, 489 U.S. at 309 (retroactive application of constitutional rules "seriously undermines the principle of finality which is essential to the operation of our criminal justice system"). Applying new rules to final cases "may be more intrusive than the enjoining of criminal prosecutions," *id.* at 310 (citation omitted), because it "subvert[s] the criminal process itself" and forces States "to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed." *Mackey*, 401 U.S. at 691.

Teague also adopted two "narrow" exceptions from Harlan's *Mackey* opinion. *See Teague*, 489 U.S. at 307 (observing "Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review"); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (*Teague* has "two narrow exceptions"). The first exception is for a new rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* (quoting *Mackey*, 401 U.S. at 692). The second exception is for a new rule that "requires the observance of those procedures that … are implicit in the concept of ordered liberty." *Id.* (quoting *Mackey*, 401 U.S. at 693) (internal quotes omitted). The Court has characterized the first exception as distinguishing between "substantive" rules that apply retroactively,

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[6] Prior to *Teague*, the Court adopted Justice Harlan's view that new criminal rules apply retroactively to cases still on *direct* review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

and "procedural" rules that do not.[7] *See Summerlin*, 542 U.S. at 351-52. The Court has characterized *Teague*'s second exception as limited to "watershed" procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495.

2. The issue in this case is whether the Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, announced a procedural or substantive rule under *Teague*'s first exception.[8] The answer will determine whether *Miller* applies retroactively to cases on collateral review.

Miller held that the Eighth Amendment forbids the mandatory imposition of life-without-parole sentences on juveniles who commit murder. To reach this result, *Miller* wove together two strands of precedent. First, it drew on cases holding that the Eighth Amendment "categorically" forbids certain punishments for a class of offenders or type of crime. *Miller*, 132 S. Ct. at 2463-66; *see, e.g., Graham v. Florida*, 130 S. Ct. 2011 (2010)

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[7] The "substantive" and "procedural" terminology arose because Justice Harlan referred to non-retroactive rules as "procedural due process rules" and retroactive rules as "substantive due process rules." *See Mackey*, 401 U.S. at 692 & nn. 6-7. The provenance of this terminology is relevant because "[t]he meaning of 'substance' and 'procedure' in a particular context is 'largely determined by the purposes for which the dichotomy is drawn.'" *Jinks v. Richland County, S.C.*, 538 U.S. 456, 465 (2003) (citation omitted).

[8] Montgomery also claims *Miller* is a "watershed" rule under *Teague*'s second exception. Pet. Br. 28-30. The Court should not consider this issue because it is not fairly included within the questions on which the Court granted certiorari. *See infra* II.D. In any event, the claim lacks merit. *Id.*; *see also* US Br. 19 n.8.

(barring life-without-parole for juveniles who commit non-homicide crimes); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring death penalty for juveniles). Second, it drew on cases requiring "individualized sentencing" before someone receives the death penalty. *Id.* at 2466-68; *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (jury must consider "the character and record of the individual offender and the circumstances of the particular offense"). The "confluence of these two lines of precedent" led the Court to conclude that a juvenile murderer may be sentenced to life-without-parole only if the sentencer first has "the opportunity to consider [the] mitigating circumstances" of the offender's youth. *Miller*, 132 S. Ct. at 2464, 2475.

Miller candidly described what it did and did not do. While drawing on cases like *Graham* and *Roper*, *Miller* explained that—unlike those decisions—it did not categorically ban life-without-parole sentences for juvenile murderers: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*." *Id.* at 2471. Furthermore, *Miller* explained that it "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Provided a sentencing judge or jury follows that "process," *Miller* confirmed that imposing a life-without-parole sentence on a juvenile murderer is permitted by the Eighth Amendment. *See id.* at 2469 (explaining "we do not foreclose a sentencer's ability to make that judgment in homicide cases").

A. *Miller* is not "substantive," because it only prescribes a sentencing process and does not categorically bar life-without-parole sentences.

1. With respect to the first *Teague* exception, the Court has identified three kinds of decisions that announce substantive rules applicable retroactively to cases on collateral review. First, a rule is substantive if it narrows a criminal statute, making conduct lawful that was formerly thought unlawful. *See Summerlin*, 542 U.S. at 351 (a substantive rule "narrow[s] the scope of a criminal statute by interpreting its terms") (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). Second, a rule is substantive if it "places a class of private conduct beyond the power of the State to proscribe," *Saffle*, 494 U.S. at 494—for instance, when a decision announces the government cannot criminalize flag burning or using contraceptives. *See Texas v. Johnson*, 491 U.S. 397 (1989); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Third, a rule is substantive if it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330—for instance, when a decision categorically prohibits the death penalty for juveniles, rapists, or vicarious felony murderers. *See Roper*, 543 U.S. at 578; *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality op.).

2. *Miller* obviously does not fall into the first two categories, and Montgomery does not argue otherwise. *Miller* did not interpret a federal criminal statute and narrow its terms; it interpreted the Eighth

Amendment. *Cf. Bousley*, 523 U.S. at 617 (discussing decision that narrowed part of a federal criminal statute). Nor did *Miller* place any "private conduct beyond the power of the State to proscribe." *Saffle*, 494 U.S. at 494. *Miller* prescribed a process for sentencing juvenile murderers; it did not bar the government from criminalizing the underlying homicide.

3. Montgomery does claim, however, that *Miller* is substantive under the third category. Specifically, he argues that *Miller* "prohibits a 'category of punishment' (mandatory life without parole) for a 'class of defendants' (juveniles)." Br. 16. Montgomery misunderstands *Miller*.

a. "*Mandatory* life without parole" refers, not to a category of punishment, but to a particular manner of imposing a punishment. That is why *Miller* expressly said it does *not* categorically bar a life-without-parole "penalty," but only requires the sentencer to "follow a certain process" before imposing it. 132 S. Ct. at 2471. *Miller* thus makes plain that the relevant punishment category is simply "life without parole." *That* category, *Miller* confirmed, remains valid for juvenile murderers—unlike the categories banned in *Roper* (juvenile death penalty) and *Graham* (life-without-parole for juvenile non-homicide offenders). *See Miller*, 132 S. Ct. at 2469 (explaining "we do not foreclose a sentencer's ability to make [a life-without-parole] judgment in homicide cases"). Many courts have noted *Miller*'s distinction between the mandatory imposition of a life-without-parole punishment and the punishment itself. *See, e.g., People v. Carp*, 852 N.W.2d 801, 825 & n.13 (Mich. 2014) (explaining "[t]he *category* of punishment implicated by *Miller* is a sentence of 'life

without parole,'" not "'mandatory' life without parole"), *petitions for cert. filed* __ U.S.L.W. __ (U.S. Jan. 13 & 23, 2015) (Nos. 14-824, 14-8106).[9]

To be sure, the *Miller* petitioners *asked* the Court to bar the life-without-parole punishment for certain juveniles. *Miller*, 132 S. Ct. at 2469 (noting "[petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger"). If the Court had accepted that suggestion, then it would be accurate to say *Miller* prohibited a category of punishment. *Miller*, however, did nothing of the sort. *See id.* at 2469 (explaining that "we do not consider" petitioners' alternative argument).[10]

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[9] *See also Beach v. State*, 348 P.3d 629, 640 (Mont. 2015) (plurality op.) (*Miller* only "'dictated what process must take place before a life-without-parole sentence could be imposed'") (quoting 7 W. Lafave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §28.6(e) (3rd ed. 2007, 2014-15 suppl.) ("LaFave")); *Ex parte Williams*, __ So.3d __, 2015 WL 1388138, at *9 (Ala. 2015) (distinguishing "the mandatory … imposition of a [life-without-parole] sentence" from "the actual sentence of [life-without-parole]"); *In re Morgan*, 717 F.3d 1186, 1192 (11th Cir. 2013) (Pryor, J., concurring in denial of reh'g en banc) (*Miller* "did not prohibit any category of punishment for juveniles … but only the mandatory procedure by which [a life-without-parole] punishment had been imposed"); *Tate*, 130 So.3d at 837 (*Miller* "d[id] not categorically bar a penalty" but "simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life-without-parole") (quotes omitted); *Craig*, 2013 WL 69128, at *2 (*Miller* "does not categorically bar all [life-without-parole] sentences, … [but] only those sentences made mandatory by a sentencing scheme").

[10] Contrary to Montgomery's argument (Br. 17), *Alleyne v. United States*, 133 S. Ct. 2151 (2013), has no bearing on whether

b. The Eighth, Fourth, Eleventh, and Fifth Circuits—the only federal circuits to have addressed *Miller*'s retroactivity—all agree that *Miller* did not prohibit a category of punishment but only prescribed a process a sentencer must follow before imposing life-without-parole. Based on that straightforward reasoning, those circuits have correctly concluded that *Miller* is non-retroactive under *Teague*. *See Martin v. Symmes*, 782 F.3d 939, 942 (8th Cir. 2015) (reasoning that "*Miller* does not prohibit a category of punishment … for a class of defendants"); *Johnson v. Ponton*, 780 F.3d 219, 225 (4th Cir. 2015) (observing "*Miller* expressly does not" prohibit a "certain category of punishment"), *petition for cert. filed sub nom. Johnson v. Manis* __ U.S.L.W. __ (U.S. June 29, 2015) (No. 15-1) (quotes omitted); *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (finding *Miller* procedural because it "did not prohibit the imposition of a [life-without-parole] sentence" on juvenile murderers, but only "changed the procedure by which a sentencer may impose [that sentence]"); *Craig v. Cain*, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013) (unpublished) (*Miller* "does not categorically bar" life-without-parole

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mandatory and discretionary life-without-parole schemes are substantively different under *Teague*. *Alleyne* addressed the entirely different issue of whether the Sixth Amendment requires a jury, rather than a judge, to find facts that increase a mandatory minimum sentence. *See Alleyne*, 133 S. Ct. at 2160 (applying rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to "facts increasing the mandatory minimum").

sentences for juveniles and is therefore procedural under *Teague*).[11]

4. Montgomery also claims that *Miller* should apply retroactively because it establishes a "*substantive* right to individualized sentencing." Br. 19 (emphasis added). This begs the question. No one disputes that *Miller* established a new right. The question is whether that right is procedural or substantive under *Teague*. *Miller* explicitly described the difference between mandatory and discretionary life-without-parole sentencing schemes in terms of *process*, not substance. As *Miller* explained, its new rule "mandate[s] only that a sentencer follow a certain *process*" before imposing a

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[11] Eight state supreme courts have also correctly found *Miller* procedural under *Teague*: **Alabama** (*Williams*, 2015 WL 1388138, at *8-9); **Colorado** (*People v. Tate*, __ P.3d __, 2015 WL 3452609, at *10-11 (Colo. 2015)); **Connecticut** (*Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1040-41 (2015)); **Louisiana** (*Tate*, 130 So.3d at 836); **Michigan** (*Carp*, 852 N.W.2d at 823); **Minnesota** (*Chambers v. State*, 831 N.W.2d 311, 327 (Minn. 2013)); **Montana** (*Beach*, 348 P.3d at 639-40); and **Pennsylvania** (*Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013)). The Connecticut Supreme Court, however, found *Miller* to be a "watershed" procedural rule. *Casiano*, 115 A.3d at 1040-41. By contrast, nine state supreme courts have incorrectly found *Miller* to be substantive under *Teague*: **Illinois** (*Illinois v. Davis*, 6 N.E.3d 709 (Ill. 2014)); **Iowa** (*State v. Ragland*, 836 N.W.2d 107 (Iowa 2013)); **Massachusetts** (*Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013)); **Mississippi** (*Jones v. State*, 122 So.3d 698 (Miss. 2013)); **Nebraska** (*State v. Mantich*, 842 N.W.2d 716 (Ne. 2014)); **New Hampshire** (*Petition of State*, 103 A.3d 227 (N.H. 2014), *petition for cert. filed sub nom. New Hampshire v. Soto*, __ U.S.L.W. __ (U.S. Nov. 26, 2014) (No. 14-639)); **Texas** (*Ex parte Maxwell*, 424 S.W.3d 66 (Tex. 2014)); **South Carolina** (*Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014)); **Wyoming** (*State v. Mares*, 335 P.3d 487 (Wyo. 2014)).

life-without-parole sentence, which remains a valid penalty for juvenile murderers. 132 S. Ct. at 2471 (emphasis added). *Miller*'s own description of its new procedural right places it outside of *Teague*'s exception for substantive rules. *See, e.g., Carp*, 852 N.W.2d at 827 (noting "*Miller*, in describing the nature and scope of its rule, repeatedly employs language typically associated with nonretroactive procedural rules").

Furthermore, Montgomery is incorrect to claim that the *Woodson* line of capital-sentencing cases "differentiates" between a "substantive" right to individualized sentencing and "procedures" for implementing that right. Br. 20. *Woodson* itself referred to individualized sentencing as "part of the *process* of inflicting the [death] penalty." 428 U.S. at 304 (emphasis added). And *Lockett*—on which Montgomery places particular weight (Br. 20)—calls a jury's consideration of mitigating factors part of the "*procedure* for deciding in which cases governmental authority should be used to impose death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).[12] Moreover, Montgomery ignores decisions from this Court subsequent to *Woodson* and *Lockett* finding that new rules requiring capital juries to consider specific

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[12] *See also, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (characterizing individualized capital sentencing as "the *manner* of the imposition of the ultimate penalty"); *Sumner v. Shuman*, 483 U.S. 66, 83 (1987) (comparing "[a] mandatory capital-sentencing *procedure*" with "a guided-discretion sentencing *procedure*"); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 334 (1976) (explaining *Furman* requires that "standardless jury discretion be replaced by *procedures*" to guide juries in the "imposition of death sentences") (citing *Furman v. Georgia*, 408 U.S. 238 (1972)) (emphases added).

mitigating evidence are procedural under *Teague*. *See infra* II.B (discussing capital sentencing cases).[13]

5. Montgomery also argues that *Miller* is substantive because it requires the sentencer to consider "specific factors" (such as age, background, and the circumstances of the crime) before sentencing a juvenile to life-without-parole. Br. 22-23. Montgomery is again mistaken.

Montgomery's argument relies solely on *Summerlin*, but he misreads that decision. *Summerlin* does not suggest that a decision is substantive merely because it requires a sentencer to consider specific factors before imposing a sentence. Rather, in *Summerlin* the Court explained that a decision is substantive if it "modifies the elements of an offense" by, for instance, "alter[ing] the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." 542 U.S. at 354 (citation omitted). In that case, a decision would be substantive because it would "mak[e] … certain fact[s] essential" to imposing a particular penalty. *Id.*

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[13] In a footnote, Montgomery suggests that *Miller* should apply retroactively because the Court applied it in *Jackson v. Hobbs*, 132 S. Ct. 2455 (2015), a companion case on state collateral review. Br. 15 n.7. Montgomery is mistaken. *Teague* was not raised in *Jackson* and the Court therefore did not address *Miller*'s retroactivity. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (federal courts "may … decline to apply *Teague* if the State does not raise it"); US Br. 8 n.2 (noting that *Miller*'s retroactivity "was not before the Court" in *Jackson*).

Miller does nothing of the kind. It requires only that a judge or jury consider the potentially mitigating circumstances of youth before imposing a life-without-parole sentence. *Miller*, 132 S. Ct. at 2471 (requiring consideration of "youth and attendant characteristics … before imposing a particular penalty"). *Miller* does not modify the elements of the underlying crime, whether by "alter[ing] the range" of punishable conduct or by doing anything else. *Summerlin*, 542 U.S. at 354. Moreover, *Miller* teaches that an offender's youth is to be considered in *mitigation* of a potential life-without-parole sentence. *See Miller*, 132 S. Ct. at 2475 (holding "a judge or jury must have the opportunity to consider mitigating circumstances"). As this Court has long recognized, facts that may mitigate punishment (as opposed to facts that may *aggravate* it) do not constitute "elements" of an offense. *See Apprendi*, 530 U.S. at 490 n.16 (noting "the distinction the Court has often recognized … between facts in aggravation of punishment and facts in mitigation") (citing *Martin v. Ohio*, 480 U.S. 228 (1987)). Several lower courts have correctly rejected the argument that *Miller* introduces new "elements" and is therefore substantive. *See, e.g., Chambers*, 831 N.W.2d at 329 (concluding that "the *Miller* rule does not announce a new 'element,'" because it "does not mandate that a certain aggravating factor be proven before the State imposes the sentence in question").[14]

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[14] *See also Beach*, 348 P.3d at 640 (rejecting argument that *Miller* creates new "elements" because "it does not make the finding of 'certain fact[s] essential' to a life without parole sentence") (citing *Alleyne*, 133 S. Ct. at 2155; *Summerlin*, 542 U.S. at 354); *Williams*, 2015 WL 1388138, at *9 ("*Miller* did not make a certain fact essential to the imposition of the sentence."); *Tate*, 130 So.3d at

B. The Court's *Teague* precedents strongly support finding *Miller* to be procedural.

Finding *Miller* to be non-retroactive is also strongly supported by this Court's *Teague* precedents, which have found non-retroactive other sentencing rules closely resembling the new rule adopted in *Miller*.

Miller requires a judge or jury to consider certain kinds of mitigating evidence before imposing a life-without-parole sentence on a juvenile murderer. *See Miller*, 132 S. Ct. at 2475 (stating "judge or jury must have the opportunity to consider mitigating circumstances"); *id.* at 2471 (sentencer must "consider[] an offender's youth and attendant characteristics"). This Court has considered the retroactivity of similar rules in the capital sentencing context—rules that require the jury to consider specific mitigating evidence before imposing the death penalty. These cases have particular relevance in assessing *Miller*'s retroactivity, since *Miller* drew its sentencing rule, in part, from these individualized capital sentencing cases. *See id.* at 2466 (drawing on precedents "demanding individualized sentencing when imposing the death penalty"). In each of these cases, the Court has found a new sentencing rule non-retroactive under *Teague*. It should reach the same result with respect to *Miller*.

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837 (*Miller* "did not alter the elements necessary for a homicide conviction"); *and see Carp*, 852 N.W.2d at 829 n.20 (suggesting in *dicta* that *Miller* did not add elements because of its "repeated statements that individualized sentencing hearings could occur because a '*judge* or jury'") (quoting *Miller*, 132 S. Ct. at 2460)).

For example, in *O'Dell v. Netherland* the Court considered the rule providing that, if the prosecutor argues that a defendant's future dangerousness supports the death penalty, the defendant must be allowed to inform the jury he is ineligible for parole. *O'Dell v. Netherland*, 521 U.S. 151, 155 (1997) (considering rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994)). The Court found that new sentencing rule non-retroactive under *Teague*. *O'Dell*, 521 U.S. at 153, 156-67. In *Beard v. Banks* the Court considered the rule that forbids instructing a jury to disregard mitigating factors on which it fails to reach unanimity. *Beard v. Banks*, 542 U.S. 406, 408 (2004) (considering rule of *Mills v. Maryland*, 486 U.S. 367 (1988); *McCoy v. North Carolina*, 494 U.S. 433 (1990)). The theory behind the *Mills* rule was that, by requiring unanimity, the State had effectively barred the jury from "giv[ing] mitigating evidence any effect whatsoever." *Mills*, 486 U.S. at 375. Nonetheless, the Court found that new sentencing rule non-retroactive under *Teague*. *Beard*, 542 U.S. at 420 ("We hold that *Mills* announced a new rule of constitutional criminal procedure that falls within neither *Teague* exception."). Similarly, the Court has found non-retroactive (1) a new sentencing rule that forbids a jury from recommending a death sentence based on invalid aggravating factors (*Lambrix v. Singletary*, 520 U.S. 518, 539 (1997) (considering rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); and (2) a new sentencing rule that forbids suggesting to a capital jury that it is not ultimately responsible for a death sentence (*Sawyer v. Smith*, 497 U.S. 227, 229 (1990) (considering rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

The Court has also declined to consider certain proposed capital sentencing rules because—even if such rules were constitutionally required—they would not apply retroactively under *Teague*. Thus, in *Graham v. Collins*, the Court refused to consider whether the Eighth Amendment requires a special jury instruction—going beyond the instructions already provided in Texas—"concerning [the defendant's] mitigating evidence of youth, family background, and positive character traits." *Graham v. Collins*, 506 U.S. 461, 478 (1993). The Court reasoned that the proposed sentencing rule would "plainly" not fall within *Teague*'s first exception and thus would not apply retroactively. *Id.* at 477. Similarly, in *Saffle v. Parks* the habeas petitioner argued that the Eighth Amendment forbids instructing a jury to avoid "sympathy" in deciding whether to impose the death penalty. *Saffle*, 494 U.S. at 486. The Court declined to reach that question because such a rule would not apply retroactively under *Teague*. *Id.* at 495.

These capital sentencing precedents strongly support finding the new sentencing rule in *Miller* to be non-retroactive. In each case, the new sentencing rule required the jury to consider mitigating evidence that could have significantly influenced its decision to impose the death penalty. Yet the Court concluded that each rule was procedural and therefore non-retroactive under *Teague*. *See, e.g., Craig*, 2013 WL 69128, at *2 (relying on these cases in finding *Miller* non-retroactive). The same result should obtain here. As in the capital sentencing cases, the rule in *Miller* is a procedural rule requiring the sentencer to consider particular mitigating evidence (youth) before imposing a particular sentence (life-without-parole). The Court's

capital sentencing cases teach that such a sentencing rule is procedural, not substantive, and therefore does not apply retroactively under *Teague*.

Montgomery does not address these capital sentencing cases, nor does he acknowledge that the Court has consistently held the rules at issue in those cases to be non-retroactive. He does, however, suggest that the Court's *Woodson* line of cases—requiring individualized capital sentencing—has been applied retroactively. Pet. Br. 26-27 (discussing *Woodson*, 428 U.S. at 280; *Lockett*, 438 U.S. at 608; *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982)). Montgomery is mistaken. He relies principally on pre-*Teague* lower court decisions that by definition could not have addressed whether *Woodson* was substantive under *Teague*. *See* Pet. Br. at 27 n.12. The one post-*Teague* decision he cites does not address *Woodson*'s retroactivity. *See Thigpen v. Thigpen*, 926 F.2d 1003, 1005 (11th Cir. 1991) (addressing "only one issue"—whether admission of evidence deprived petitioner of due process); *see also Carp*, 852 N.W.2d at 827-29 & nn. 17-19 (rejecting argument that this Court, "or even any federal court of appeals, has declared any of the individualized sentencing capital-punishment cases retroactive under *Teague*"). Unlike Montgomery, the United States acknowledges that this Court has never held that *Woodson* applies retroactively under *Teague*. Br. 24.[15]

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[15] Nor did this Court apply *Woodson* retroactively in *Sumner v. Shuman*, 483 U.S. 66, when it invalidated a "mandatory capital-sentencing procedure" for inmates who commit murder while serving a life sentence. *Id.* at 83, 85. The prisoner's murder conviction in *Sumner* became final on direct review nearly two

C. The Court should decline the United States' invitation to create a new category of substantive *Teague* rules.

The United States concedes, as it must, that *Miller* allows life-without-parole sentences for juvenile murderers under the Eighth Amendment. *See* Br. 21 (*Miller* "did not preclude a life-without-parole sentence for a juvenile homicide defendant"). Nonetheless, the United States argues that *Miller* is a substantive rule under *Teague*'s first exception because it is "outcome-expanding" (*id.* at 16), meaning that the decision affords juvenile murderers the possibility of receiving a lesser sentence.[16]

The United States' complex argument unfolds in several steps: (1) under *Teague*'s first exception a substantive rule "alter[s] the range of permissible outcomes," whereas a procedural rule "alter[s] only the manner of determining" guilt or sentence (*id.* at 13-15); (2) *Miller* falls on the substantive side because, instead of altering how a sentence is determined, it "expands the range of permissible sentencing outcomes" (*id.* at

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years after *Woodson* was decided. *See Carp*, 852 N.W.2d at 828 (concluding *Woodson* was not applied retroactively in *Sumner*). In any event, *Sumner* predated *Teague* and so could not stand for the proposition that *Woodson* announced a substantive rule. *Id.* at 828 n. 18.

[16] Montgomery makes a more abbreviated form of the same argument. *See* Br. 16 (arguing *Miller* "alters the range of available sentencing options"). Montgomery's version, however, depends on his assertion that *Miller* prohibits "a 'category of punishment'" for juvenile murderers. *Id.* As already explained, Montgomery is plainly wrong. *See supra* II.A.3.

14-15); (3) *Miller* has a "procedural component" but is not "entirely" procedural; rather, *Miller* has "necessary implications for the substantive criminal law" because it allows juvenile murderers to obtain "different and more favorable outcomes" (*id.* at 18-19); and (4) finding *Miller* substantive "accords with *Teague*'s objectives" because *Miller*'s potential effects are "sufficiently profound" to justify upsetting final sentences (*id.* at 21).

The United States' argument is mistaken. Under a straightforward application of *Teague*'s first exception, *Miller* is a procedural rule. *See supra* II.A. The United States does not ask the Court to apply *Teague*'s exception for substantive rules, but to expand it—adding a new category of substantive rules to *Teague* for the first time since *Teague* was decided a quarter-century ago. This unwieldy addition would upend *Teague*'s settled distinction between substantive and procedural rules and frustrate the policy reasons for which the Court adopted the *Teague* exception to begin with. The Court should decline the United States' invitation to expand and complicate *Teague*.

1. The United States concededly asks the Court to extend the first Teague *exception.*

The United States acknowledges that the first *Teague* exception, as this Court has described it for the past 25 years, does not encompass the rule adopted in *Miller*. Br. 16 (admitting that "*Miller* differs from previous decisions in which this Court has announced substantive rules"). Furthermore, none of this Court's cases has ever adopted, or even discussed, the United States' proposed formulation that punishment rules are

substantive if they are "outcome-expanding." *Id*. To the contrary, the law has always been that punishment rules are substantive only if they *categorically* forbid the government from imposing a particular penalty because of an offender's status or offense. The same year as *Teague*, the Court explained in *Penry* that "the first exception set forth in *Teague* should be understood to cover … rules *prohibiting a certain category of punishment* for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330 (emphasis added). The Court has never deviated from *Penry*'s categorical formulation. *See, e.g., Beard*, 542 U.S. at 416 (*Teague*'s bar "does not apply to … rules prohibiting a certain category of punishment") (quoting *Penry*, 492 U.S. at 330); *O'Dell*, 521 U.S. at 157 (*Teague*'s "first, limited exception is for new rules … 'prohibiting a certain category of punishment for a class of defendants because of their status or offense'") (quoting *Penry*, 492 U.S. at 330).

Penry could not have made the categorical nature of *Teague*'s first exception any clearer. It explained that categorical punishment rules are retroactive because "the Constitution itself deprives the State of the power to impose a certain penalty." 492 U.S. at 330. It analogized such rules to rules "placing certain conduct beyond the State's power to punish at all." *Id.* And it drew its holding from Justice Harlan's formulation finding retroactive rules that place "'certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe.'" *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692).

The United States suggests that this Court's *Summerlin* decision supports its "outcome-expanding"

formulation, *see* US Br. 13, 15, but *Summerlin* does not. To the contrary, *Summerlin* hews to *Penry*'s original formulation that a substantive rule is one that "prohibit[s] the imposition of … punishment on a particular class of persons," 542 U.S. at 353 (quoting *Saffle*, 494 U.S. at 495). In the same vein, *Summerlin* explains that a substantive rule applies retroactively because otherwise a defendant would have "face[d] a punishment *that the law cannot impose on him*." *Summerlin*, 542 U.S. at 352 (citation omitted) (emphasis added). Nowhere does *Summerlin* hint that a substantive rule *also* includes rules expanding an offender's "range of outcomes." When *Summerlin* speaks of "ranges," it refers not to a range of *outcomes*, but instead to rules that alter the "range of *conduct*" the law punishes *Id.* at 353 (emphasis added). That phrase, however, refers to the entirely different situation where a decision recognizes as lawful previously unlawful conduct. *See id.* (citing *Bousley*, 523 U.S. at 620-21). Such a rule, unlike the United States' newly-minted "outcome-expanding" rule, falls easily within *Teague*'s exception for rules that de-criminalize primary conduct.

Thus, when *Teague*'s first exception—as often described by this Court—is properly stated, *Miller* falls squarely on the procedural side of the line. Unlike a substantive rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime." *Miller*, 132 S. Ct. at 2471. A state court could constitutionally impose a life-without-parole sentence upon Montgomery before *Miller*; it can constitutionally impose a life-without-parole sentence

upon Montgomery after *Miller*. Unlike a rule that affords a "substantive constitutional guarantee[ ] … regardless of the procedures followed," *Penry*, 492 U.S. at 329, Miller "mandates *only* that the sentencer follow a certain *process*" before imposing a life-without-parole sentence that the decision concededly "do[es] not foreclose." *Miller*, 132 S. Ct. at 2471, 2469 (emphasis added).

The upshot is that the United States is asking the Court, not to apply *Teague*'s first exception as it has long been understood, but to expand it. The United States admits that no *Teague* case recognizes a distinct category of "outcome-expanding" rules. *See* Br. at 16 (admitting *Miller* "differs" from previous *Teague* cases because they "narrowed, rather than expanded" permissible outcomes); *id.* (admitting "the Court has not considered" retroactivity of rules that "expanded possible sentencing outcomes"). The United States says only that *Teague* jurisprudence has "not precluded" recognizing this new substantive category, and that doing so would accord with "the expansion over time of what constitutes a substantive rule." *Id.* The Court should reject the United States' invitation to extend *Teague*.

2. *Neither precedent nor policy supports the United States' proposed extension of the first* Teague *exception.*

As an initial matter, the United States is wrong in contending (Br. 14) that this Court has regularly expanded the scope of *Teague*'s first exception. The parameters of that exception have been settled since *Teague* was decided: substantive rules either categorically de-criminalize primary conduct or

categorically preclude a particular punishment. *See Summerlin*, 542 U.S. at 351-52; *Penry*, 492 U.S. at 329-330. The United States relies on *Penry* (Br. 14), but *Penry* does not "expand" *Teague*. To the contrary, *Penry*—decided the same year as *Teague*—merely applies to punishment what *Teague* said about conduct. *Penry* explained that a rule categorically precluding a punishment is substantive for the same reason as a rule forbidding punishment of primary conduct: "In both cases, the Constitution itself deprives the State of the power to impose a certain penalty." *Penry*, 492 U.S. at 330.

Nor did *Bousely* "expand" *Teague*. Br. 14 (citing *Bousely*, 523 U.S. at 620-21). *Bousely* merely held that *Teague*'s first exception applies to a decision that decriminalizes conduct by narrowing a federal criminal statute. *See, e.g., Summerlin*, 542 U.S. at 351-52 (explaining *Bousley* "narrowed the scope of a criminal statute by interpreting its terms"). The United States is thus wrong that *Penry*, or any other decision, has ever "expanded" what *Teague* recognized as a substantive rule. The Court should hesitate before expanding *Teague* for the first time in a quarter-century to recognize a new category of purported substantive rules.

On a more basic level, the United States' proposed extension of *Teague*'s exception contradicts *Teague* itself. The United States essentially argues as follows: If a new rule is substantive because it *precludes* a punishment, then so is a new rule that "*expands* the range of permissible sentencing outcomes." Br. 15 (emphasis added). That argument ignores, however, the profound difference between those two kinds of

rules and the reason why *Teague* recognized its narrow substantive exception to begin with.

a. *Teague* announced a sweeping principle that new rules of criminal procedure do not apply retroactively on collateral review. It relied on two propositions from Justice Harlan's *Mackey* opinion. First, non-retroactivity protects society's interest in the finality of convictions. *See Mackey*, 401 U.S. at 690 ("It is … a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process."). As Justice Harlan memorably wrote: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his incarceration shall be subject to fresh litigation on issues already resolved." *Id.* at 691. Second, non-retroactivity avoids the "adverse collateral consequences" of upsetting final convictions. *Teague*, 489 U.S. at 302-10; *Mackey*, 401 U.S. at 693. Those adverse consequences are the disruptions to the criminal justice system caused by having to re-litigate facts "buried in the remote past." *Mackey*, 401 U.S. at 691.

At the same time, *Teague* also adopted Justice Harlan's exception allowing retroactive application of new substantive rules. *Teague*, 489 U.S. at 307. As Harlan explained, new rules prohibiting the government from "utiliz[ing] certain *techniques or processes* in enforcing concededly valid societal proscriptions on individual behavior" are not to be applied retroactively. *Mackey*, 401 U.S. at 692 (emphasis added). By contrast, rules that place "certain kinds of primary, private individual conduct beyond the

power of criminal law-making authority to proscribe must … be placed on a different footing." *Id.* Unlike procedural rules, these substantive rules apply retroactively because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693. Moreover, retroactive application of such rules "entails none of the adverse collateral consequences of retrial" that justified the general non-retroactivity principle. *Id.*

In *Penry*, the Court confirmed that this reasoning applies to new rules that categorically ban particular punishments. 492 U.S. at 330 (explaining *Teague*'s exception "should cover … rules prohibiting a certain category of punishment"). In contrast to a procedural rule, *Penry* explained that a rule banning a particular punishment is a "substantive categorical guarantee[ ]" that applies "regardless of the procedures followed." *Id.* at 329. *Penry* also emphasized that, regarding such invalid punishments, society lacks an "'interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" *Id.* at 330 (quoting *Mackey*, 401 U.S. at 693).

b. This reasoning does not apply to a rule like the one recognized in *Miller*, where the State is required only to adopt a new procedure before imposing a concededly valid punishment. It is immaterial that this new procedure would "alter[ ] the range of permissible outcomes." US Br. 13.

In such a case, the State's finality interests should not yield because the punishment imposed remains constitutional. In Montgomery's case, for example, the "criminal process" is *not* "rest[ing] at a point where it

ought properly never to repose." *Mackey*, 401 U.S. at 693. For instance, it has not sentenced a juvenile to death, as in *Roper*. The criminal process *may* rest with Montgomery serving a life-without-parole sentence, so long as certain procedures are followed. *See Miller*, 132 S. Ct. at 2471 ("Our decision … mandates only that a sentencer follow a certain process … before imposing a [life-without-parole sentence]"). The same, of course, cannot be said of a defendant like Terrance Graham, the beneficiary of the categorical prohibition on life-without-parole sentences for non-homicide crimes adopted in *Graham*.

Furthermore, applying *Miller* retroactively creates precisely the same "adverse collateral consequences" that *Teague* sought to avoid. When, for example, a state criminal law is invalidated for violating the First Amendment, prisoners convicted under the invalid statute cannot be retried. "[F]acts buried in the remote past" will not have to be unearthed. *Mackey*, 401 U.S. at 691. By contrast, the *Miller* rule will require a new hearing at which "a judge or jury must have the opportunity to consider mitigating circumstances." 132 S. Ct. at 2475. To determine whether those mitigating circumstances justify a reduced sentence, the court will also need to revisit *aggravating* circumstances, including the facts of the crime and the impact on the victims. And so—in contrast to new *categorical* prohibitions—retroactive application of *Miller* will force the criminal justice system to endure hearings burdened by the "[p]assage of time, erosion of memory, and dispersion of witnesses." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

c. At bottom, therefore, the rule announced in *Miller* is no different for *Teague* purposes than new rules requiring that capital juries be given a full opportunity to consider various forms of mitigating evidence. *See supra* II.B.2 (discussing new rules in *O'Dell*, *Beard*, *Lambrix*, and *Sawyer*). In each of those cases, the Court held that the new rule did not apply retroactively—even though, if applied to already final cases, it would have afforded prisoners "the opportunity to obtain different and more favorable outcomes." US Br. 19.

Take, for instance, a defendant whose death sentence became final prior to *Simmons*, where (contrary to *Simmons*) his prosecutor urged the defendant's future dangerousness without the jury being informed he would never leave prison. *See Simmons*, 512 U.S. at 171 (plurality op.) (where capital defendant's future dangerousness was at issue, "he was entitled to inform the jury of his parole ineligibility"). In holding *Simmons* non-retroactive under *Teague*, this Court never suggested that *Simmons* was anything other than a "procedural" rule—even though it is plausible that some juries would have imposed a lesser sentence had they been informed of the defendant's parole ineligibility. *See O'Dell*, 521 U.S. at 167 (concluding *Simmons* did not apply retroactively under *Teague*); *id.* at 172-73 (Stevens, J., dissenting) (urging that *Simmons* should apply retroactively because it results in a significant "decline in the number of death sentences" and enhances "the accuracy and fairness of a capital sentencing hearing").

The only difference between those cases and this one is that the lesser sentence a person might receive

under *Miller* had not been on the books prior to *Miller*. The United States never explains, however, why that difference makes the *Miller* rule equivalent to a categorical prohibition for purposes of the first *Teague* exception. In the end, if a rule affording a defendant a better opportunity to convince a judge or jury to impose life instead of death is procedural, so too is a rule affording the defendant the opportunity to convince a judge or jury to impose life-with-parole instead of life-without-parole. And that is no less true merely because life-with-parole had not previously been a sentencing option for the particular crime.

On this point, the United States emphasizes that the federal government and some states (like Louisiana) have amended their sentencing laws in response to *Miller*. Br. 18; *see also* Pet. Br. 18 n.9 (noting amendments). This does not prove *Miller* is substantive, however. Many new rules that are non-retroactive under *Teague* have triggered enactment of new sentencing laws. For instance, following *Apprendi* the New Jersey Legislature deleted its unconstitutional aggravating provision and enacted a new crime of bias intimidation. *See Apprendi,* 530 U.S. at 468-69 (discussing N.J. Stat. Ann. § 2C:44-3(e) (West. Supp. 1999-2000)); 2001 N.J. Sess. Law. Serv. Ch. 443 (West) (deleting § 2C:44-3(e) and enacting N.J. Stat. Ann. § 2C:16-1). Following *Blakely v. Washington*, 542 U.S. 296 (2004), the Washington Legislature "responded … by amending the [Sentencing Reform Act]" to require juries to find aggravating factors. *State v. Kinneman*, 119 P.3d 350, 353 n.8 (Wash. 2005). Following *Ring*, the Arizona Governor "called a special legislative session" to enact "several revisions intended to conform Arizona law to [this Court's] … mandate." *State v.*

Ring, 65 P.3d 915, 926 (Ariz. 2003). Just as those states did, Louisiana revised its sentencing laws to conform to *Miller*.[17] The fact that a new rule prompts alteration of sentencing laws simply begs the question of whether the underlying decision announcing that rule is substantive or procedural under *Teague*.

d. The United States also tries to dilute the first *Teague* exception by suggesting (Br. 21) it should apply when the "effects" of a new rule "on the fairness of a defendant's conviction or sentence are sufficiently profound to justify upsetting settled expectations." But none of this Court's decisions has ever suggested that the first *Teague* exception is an amorphous collection of whatever new rules are deemed to have "sufficiently profound" effects on a conviction or sentence. To the contrary, the Court has carefully limited the exception to conduct the State may not criminalize and punishment the State may not impose. Thus, the Court has explained that a punishment rule applies retroactively in order to prevent a defendant from "fac[ing] a punishment *that the law cannot impose on him*." *Summerlin*, 542 U.S. at 352 (emphasis added). In other words, *Teague* did not adopt a distinction between substantive and procedural rules that turns on the *degree* to which a new rule affects a sentence, but one that turns on whether a new rule categorically bars the government from imposing the sentence at all. *See, e.g., Penry*, 492 U.S. at 330 (explaining that, "if we

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[17] *See Tate*, 130 So.3d at 841-44 (finding that Louisiana's "new procedure" for determining whether juvenile life sentences will be served with or without parole applies "prospectively only"); *see also* La. Code Crim. Proc. art. 878.1(A); La. Rev. Stat. Ann. § 15:574.4(E) (added by 2013 La. Acts 239, § 2).

held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons … regardless of the procedures followed, such a rule would fall under [*Teague*'s] first exception").

In the place of this straightforward test, the United States proposes an opaque inquiry requiring the Court to speculate whether a new rule's effects on a sentence are "sufficiently profound." Br. 21. The United States does not say which effects are "profound" enough to tip the scales from the procedural into the substantive realm—no doubt because such a thing cannot possibly be determined *ex ante*. There is no place in the *Teague* analysis for such guesswork. Under a straightforward application of *Teague*'s first exception, *Miller* is procedural. Given that *Miller* did not disturb the government's power to sentence a juvenile murderer to life-without-parole, it is impossible to maintain that a juvenile murderer now serving that sentence "faces a punishment that the law cannot impose on him." *Summerlin*, 542 U.S. at 352. Plainly he does not: both before and after *Miller*, the Eighth Amendment "do[es] not foreclose" a life-without-parole sentence. *Miller*, 132 S. Ct. at 2469. That is the end of the analysis under *Teague*.

e. Finally, the United States suggests that *Miller* is akin to a categorical prohibition because, as a supposed practical matter, "life without parole would be an 'uncommon' sentence." Br. 22 (quoting *Miller*, 132 S. Ct. at 2469). Again, however, the United States would distort the nature of the first *Teague* exception, which has never turned on the frequency with which a new rule might lead to different outcomes. In prior

cases, the Court could have easily predicted that any number of new capital sentencing rules would lower the number of death sentences. *See, e.g., Simmons*, 512 U.S. at 171 (plurality op.) (Eighth Amendment requires capital defendant be allowed to inform jury he is ineligible for parole if prosecutor argues future dangerousness); *Mills*, 486 U.S. at 384 (Eighth Amendment forbids instructing jury to disregard non-unanimous mitigating factors); *Caldwell*, 472 U.S. at 328-29 (Eighth Amendment forbids suggesting a capital jury is not ultimately responsible for death sentence). In all of those cases, however, the Court recognized that the new rules would not apply retroactively to prisoners who had been sentenced to death without the new rule's benefit. *See O'Dell*, 521 U.S. at 153 (recognizing *Simmons* rule non-retroactive); *Beard*, 542 U.S. at 408 (recognizing *Mills* rule non-retroactive); *Sawyer*, 497 U.S. at 229 (recognizing *Caldwell* rule non-retroactive); *see also supra* II.B (discussing these cases). The same result should obtain here.

After *Miller*, life-without-parole sentences for juvenile murderers remain a valid punishment, but their frequency will be a function of how the considerations sketched out in *Miller* interact with concrete cases. *Miller*, 132 S. Ct. at 2468. It is not something that can be gauged prospectively, and *Miller* did not purport to do so. How "common" or "uncommon" life-without-parole sentences turn out to be will depend, in the final calculation, on how a judge or jury weighs "an offender's youth and attendant circumstances," *id.* at 2471, against the human life he has irrevocably taken.

D. While *Miller* is not a watershed procedural rule, the Court should not reach the issue.

Montgomery also claims *Miller* is a "watershed" rule under *Teague*'s second exception. Br. 28-30. The Court should not consider this issue—which Montgomery did not raise below (*see* JA 89-98)—because it is not fairly included within the questions on which the Court granted certiorari. *Cf.* Pet. for Cert. in No. 14-280 at i (asking "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review"); *see e.g., Snyder v. Phelps*, 562 U.S. 443, 449 n.1 (2011) (declining to reach issue not asserted in petition, even though issue was discussed in lower courts). Whether *Miller* is a watershed procedural rule is distinct from whether it is a substantive *Teague* rule. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535-37 (1992) (generally considering issues "fairly included" within question presented, but not "related" or "complementary" issues); Sup. Ct. R. 14.1(a).

If the Court decides to reach this issue, Louisiana agrees with the United States that *Miller* did not announce a watershed rule. *See* US Br. 19 n.8. To satisfy the watershed exception the rule must both relate to the accuracy of the conviction and "alter our understanding of the 'bedrock procedural elements' essential to the fundamental fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citing *Teague,* 489 U.S. at 311). This Court has never found a rule retroactive under the watershed exception and has identified only *Gideon v. Wainright*, 372 U.S. 335 (1963), as an example of such a rule. As the Court has explained, the paucity of watershed rules should be "no surprise" given that the exception applies "only to a

small core" of procedures "implicit in the concept of ordered liberty." *Beard*, 542 U.S. at 417 (internal citations and quotations omitted). It is therefore "unlikely that many such components of basic due process have yet to emerge." *Id.*

Even assuming the watershed exception could ever apply to a rule that concerns only a sentencing procedure, the rule announced in *Miller* does not qualify as a watershed rule. As the United States observes, *Miller* does not work the "profound and sweeping change" on our justice system that *Gideon* produced and does not "fundamentally 'alter our understanding of the bedrock' procedures necessary for a fair trial." US Br. 19, n.8 (quoting *Whorton v. Bockting*, 549 U.S. 406, 418 (2007)); *see also* LaFave § 28.6(e) (observing that rules which are less sweeping than *Gideon* are not watershed rules even if they relate to the accuracy and fairness of the proceeding).

CONCLUSION

The judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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