No. 18-1259

IN THE

Supreme Court of the United States

BRETT JONES,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Mississippi Court of Appeals

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

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QUESTION PRESENTED

Does a life-without-parole sentence imposed under a discretionary sentencing scheme where the sentencer considers youth and its attendant characteristics violate the Eighth Amendment if the sentencer does not make an express, on-the-record finding that a juvenile is permanently incorrigible?

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INTEREST OF *AMICUS CURIAE*

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

Petitioner contends that the Cruel and Unusual Punishment Clause of the Eighth Amendment requires a specific finding of fact before a murderer who is one

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

or more days short of his 18th birthday may be sentenced to life without parole. The finding supposedly required is itself unusual, having no basis in our legal tradition, and it is likely unconstitutionally vague. Further, this requirement is deemed substantive and therefore would be retroactive to all cases, no matter how old.

The adoption of a novel, dubious, and unnecessary finding as a constitutional requirement would require reversal and resentencing of most, if not all, judgments sentencing under-18 murderers to life without parole. It would expose victims' families to reliving the trauma of a family member's murder as they must fight for justice once more at resentencing and possibly many times thereafter at parole hearings. Such a ruling would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The essential facts of this case are summarized in the oral ruling of the trial judge on resentencing, in the Joint Appendix (J. A.), and additional information is available in the opinions of the Mississippi courts. At the age of 15, petitioner Brett Jones left the home of his mother and stepfather in Florida and was taken in by his grandfather, Bert Jones, in Mississippi "to provide him with a home away from the circumstances in Florida." J. A. 151-152. The circumstances included behavior by the stepfather that was abusive but short of " 'beatings, per se' or any injuries that required medical attention." *Jones* v. *State*, 285 So. 3d 626, ¶ 7, 630 (Miss. Ct. App. 2017) (*Jones III*) (appeal from post-*Miller* hearing). Two months later, Jones stabbed his grandfather to death. *Ibid*., ¶ 8.

"A fair consideration of the evidence indicates that the killing of Mr. Bert Jones was particularly brutal." J. A. 150. Jones stabbed his grandfather eight times, using a second knife after the first broke. He attempted to conceal the act. *Ibid*. Postmortem examination found defensive wounds on the grandfather's hands. *Jones* v. *State*, 938 So. 2d 312, ¶ 10, 315 (Miss. Ct. App. 2006) (*Jones I*, initial appeal).

At trial, Jones claimed self-defense, and the jury was instructed on that defense and the lesser-included offense of manslaughter. The jury's verdict of guilty of deliberate-design murder constitutes a finding "beyond a reasonable doubt that the defendant did not act in self-defense," J. A. 150, rejecting Jones's version of the circumstances of the killing. There is "no evidence of mistreatment or threat by Bert Jones, except the self-defense claim asserted and rejected by the jury." J. A. 151.[2]

Jones was convicted of murder and sentenced to life imprisonment, and the judgment was affirmed on direct appeal. See 938 So. 2d, ¶ 11, at 315, ¶ 22, 317. The trial court subsequently denied post-conviction relief, and the Court of Appeals affirmed. *Jones* v. *State*, 122 So. 3d 725, ¶ 9, 729, ¶ 68, 742 (Miss. Ct. App. 2011), affirmed in part and reversed in part by *Jones* v. *State*, 122 So. 3d 698 (Miss. 2013) (*Jones II*).

This Court decided *Miller* v. *Alabama*, 567 U. S. 460 (2012) the following year. The Mississippi Supreme Court then granted certiorari limited to the *Miller* issue. *Jones II*, 122 So. 3d, ¶ 3, at 699. The Mississippi

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2. In this Court, petitioner's brief recites his own self-serving testimony as if it were the established facts of the case. See Brief for Petitioner 3-4. It is not. The jury did not believe him. The trial judge did not believe him. The only other witness is dead because Jones killed him.

Supreme Court held that *Miller* was retroactive on collateral review. See *id*., ¶¶ 11-12, at 702. It vacated the sentence and remanded to the trial court for resentencing. See *id*., ¶ 29, at 703.

On resentencing, the trial judge noted the defendant's age and his family situation. J. A. 151. The judge evidently did not find that situation to be as violent as petitioner would have this Court believe. Compare *ibid*., with Brief for Petitioner 7.

The judge stated expressly that he had "considered each of the *Miller* factors" and found that Jones was not entitled to have his sentence reduced "to make him eligible for parole consideration." J. A. 152. The Court of Appeals affirmed. See *Jones III*, 285 So. 3d, ¶ 1, at 627. The Mississippi Supreme Court, a nine-justice court with a "rule of four," granted certiorari, but then the court dismissed the writ after oral argument, four justices dissenting. See App. to Pet. for Cert. 1a-2a. This Court granted certiorari on March 9, 2020, after a similar case became moot. See *Mathena* v. *Malvo*, 140 S. Ct. 919, 206 L. Ed. 2d 250 (Feb. 26, 2020).

SUMMARY OF ARGUMENT

A requirement that the defendant be found "irreparably corrupt" or "permanently incorrigible" as an eligibility condition for life without parole would be exceptionally vague. If tested by the constitutional requirements for statutory eligibility requirements, it would be unconstitutionally vague. The Eighth Amendment cannot sensibly be interpreted to impose a requirement that the same amendment would forbid in a capital case or that the Due Process Clause would forbid in a noncapital case.

Montgomery v. *Louisiana* did not purport to reexamine whether the Eighth Amendment created a categorical exemption for a subset of juvenile murderers, but rather it claimed to merely say what *Miller* v. *Alabama* said. Given that *Miller* unambiguously stated that it did not create a categorical exemption, statements to the contrary in *Montgomery* should not be regarded as precedent.

This Court's Eighth Amendment cases have wandered far from the original understanding of that provision, even while the original understanding has been deemed controlling for other parts of the Bill of Rights. Fidelity to that understanding has been deemed important enough to overrule major, long-standing precedents despite massive reliance on them by the States. The Court should go no farther away from the original understanding but should bend the arc of its jurisprudence back toward it.

Miller is best understood as importing two rules from capital cases into juvenile life-without-parole: (1) the rule of *Woodson* v. *North Carolina* forbidding mandatory sentencing, thereby lowering the floor of available sentences to something less; and (2) the rule of *Eddings* v. *Oklahoma* to the extent it requires consideration of youth and related circumstances in mitigation when determining the sentence within the legal range. There is no need to import the full *Lockett* v. *Ohio* "anything goes" rule, which has had major detrimental effects in capital cases.

Disavowing *Montgomery*'s bogus categorical exemption does not require overruling the core holding of that case that *Miller* is retroactive on collateral review. The issue need not be addressed in this case, which is not a collateral review case. There are alternative arguments available to support *Montgomery*'s result, if the issue ever does arise again. The importation of the floor-

lowering *Woodson* rule may be considered a rule of substantive law. The issue may not need to be addressed again, however, as the life span of retroactivity issues is limited, and *Montgomery* will remain binding precedent in all other courts unless and until this Court overrules it.

ARGUMENT

I. As a sentence eligibility factor, "irreparable corruption" or "permanent incorrigibility" would be unconstitutionally vague.

A. Eligibility Factors and Vagueness.

In *Miller* v. *Alabama*, 567 U. S. 460, 474-477 (2012), this Court relied heavily on its capital cases, finding an analogy between capital punishment for an adult and life in prison without parole for a juvenile. See *id*., at 475 (quoting *Graham* v. *Florida*, 560 U. S. 48, 89 (2010) (Roberts, C.J., concurring in the judgment)). There is plenty of reason to doubt both the wisdom and the legitimacy of those capital cases. See *Lockett* v. *Ohio*, 438 U. S. 586, 623 (1978) (White, J., dissenting in part); *Graham* v. *Collins*, 506 U. S. 461, 478–500 (1993) (Thomas, J., concurring); *Tennard* v. *Dretke*, 542 U. S. 274, 293 (2004) (Scalia, J., dissenting) (*Lockett* line "has no basis in the Constitution"); see generally Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131 (2019). Even so, the body of capital case law does provide a useful structure for analyzing sentencing decision processes.

One insight that emerged in the capital cases and was developed further in the jury trial cases is the distinction between a sentence eligibility factor that determines the range of the sentencer's discretion and

the selection factors to be considered in choosing a sentence within that range. See *Zant* v. *Stephens*, 462 U. S. 862, 878-879 (1983); *United States* v. *Booker*, 543 U. S. 220, 233 (2005); *McKinney* v. *Arizona*, 589 U. S. __, 140 S. Ct. 702, 707-708, 206 L. Ed. 2d 69, 74-75 (2020) (slip op., at 4-5).

Statutory sentence eligibility factors are "the functional equivalent of an element of a greater offense ...." *Apprendi* v. *New Jersey*, 530 U. S. 466, 494, n. 19 (2000). They are therefore subject to a number of constitutional requirements that either apply differently or do not apply at all to selection factors. They must be found by a jury, not the trial judge. See *McKinney*, 140 S. Ct., at 707-708, 206 L. Ed. 2d, at 74-75 (slip op., at 4-5). They must be proved beyond a reasonable doubt. *Apprendi*, at 477. They are also subject to a more searching examination for vagueness.

Godfrey v. *Georgia*, 446 U. S. 420 (1980), considered a death-eligibility circumstance that a crime "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." A plurality of the Court held that this circumstance, as construed and applied by the Georgia Supreme Court, was invalid because it provided "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id*., at 433. "Especially heinous, atrocious, or cruel" also fails the test, see *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988), at least when that language is not narrowed by interpretation. Cf. *Proffitt* v. *Florida*, 428 U. S. 242, 255-256 (1976) (lead opinion).

Selection factors are different. *Tuilaepa* v. *California*, 512 U. S. 967, 969, n.* (1994), considered a statute that instructed jurors to consider "the circumstances of the crime." This consideration came in the selection

stage after the defendant had been made death-eligible by the finding of an eligibility factor. See *id*., at 970. If this circumstance had to meet the standard of *Godfrey* and *Maynard* it would fail miserably, but it was upheld. In the selection step it is not only appropriate but desirable that the jury consider wide-ranging factors. See *id*., at 977-978. It is enough that a selection factor "instructs the jury to consider a relevant subject matter and does so in understandable terms." *Id*., at 976.

In noncapital cases, a sentencing factor that changes the range of available punishments violates the Due Process Clause if it is excessively vague. See *Johnson* v. *United States*, 576 U. S. 591, 595-596 (2015).

B. Factors Mandated by Case Law.

All of the above cases deal with factors enacted in statutes. This case concerns a court-created rule, recently discovered lurking in the Eighth Amendment after having gone unnoticed there for over two centuries. See *Miller*, 567 U. S., at 502 (Roberts, C.J., dissenting) (no basis in text or precedent). Can this Court impose on the states through case law an eligibility standard so vague that a statute enacting the same rule would be unconstitutional?

There are now a large number of precedents in capital cases and juvenile life-without-parole (LWOP) cases where this Court has created eligibility factors or "ineligibility factors," *i.e.,* categorical exclusions. The factors to be found have, until now, been either straightforward, objective facts or mental state issues that are within the range of mental facts that juries have long found in other contexts.

The first of these cases was *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977), which precluded the death penalty for the rape of an adult woman where the

victim survives. There are no vague elements to this exclusion. *Enmund* v. *Florida*, 458 U. S. 782 (1982), created eligibility factors for capital cases where the murder conviction rested on the felony-murder rule. The defendant must have either killed, attempted to kill, or intended that life be taken. See *id*., at 797. These are all facts commonly found as elements in murder cases. *Tison* v. *Arizona*, 481 U. S. 137, 158 (1987), later expanded the eligible class to include major participants in the underlying felony who act with reckless indifference to human life. Although less objective than the *Enmund* factors, these are still well within the kinds of factual questions that juries routinely find as elements. See ALI, Model Penal Code § 2.02(2)(c) (1985) (recklessness mental state).

The pattern continues through the categorical exemption cases. The judicially declared eligibility and ineligibility factors are well within range of definiteness that would be required of elements of crimes. See *Roper* v. *Simmons*, 543 U. S. 551, 564 (2005) (age, capital punishment); *Graham* v. *Florida*, 560 U. S. 48, 82 (2010) (age, nonhomicide, life without parole); *Atkins* v. *Virginia*, 536 U. S. 304, 306-307 (2002) (intellectual disability, then called mental retardation, capital punishment). *Atkins* is the most difficult to determine of these exemptions, but it is a modernized and expanded version of the findings of "idiocy" that juries have made for centuries. See 4 W. Blackstone, Commentaries 24-25 (1st ed. 1769).

With *Montgomery*'s dubious interpretation of *Miller*, we have something completely different. Imagine if a state statute defined a base offense with certain elements and then a higher degree of offense with greater penalties if the jury finds in addition that the "crime reflects irreparable corruption." See *Montgomery* v. *Louisiana*, 577 U. S. __, 136 S. Ct. 718, 734, 193

L. Ed. 2d 599, 619 (2016) (internal quotation marks omitted). Can there be any doubt that this element would be struck down as void for vagueness under *Johnson* v. *United States* or, in a capital sentencing statute, as an Eighth Amendment violation under *Godfrey* v. *Georgia* and *Maynard* v. *Cartwright*?

The central question of this case is whether *Miller*, *Montgomery*, or the two combined make "irreparable corruption" an eligibility factor, or, equivalently, whether they make its opposite, "transient immaturity," an ineligibility factor. Those terms are considerably more vague than the ones struck down in *Godfrey*, *Maynard*, and *Johnson*, which at least referred to the circumstances of the crime being tried or of a prior offense.

Did this Court really interpret the Constitution to *require* an eligibility factor that would *violate* the Constitution if a legislature had written it into a statute? That just cannot be.

Any implication in *Montgomery* that the Constitution requires this hopelessly vague factor as a condition of eligibility for an LWOP sentence is clearly erroneous and should be disavowed.

II. *Montgomery* contradicts both *Miller* and itself, and it should be limited to its core holding.

A. Montgomery Contradicts Miller.

"Our decision does *not* categorically bar a penalty for a class of offenders or type of crime .... Instead, it mandates *only* that a sentencer follow a certain process —considering an offender's youth and attendant characteristics—before imposing a particular penalty."

Miller v. *Alabama*, 567 U. S. 460, 483 (2012) (emphasis added).

"*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole .... [I]t rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery* v. *Louisiana*, 577 U. S. __, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599, 619-620 (2016).

Those two passages alone are sufficient to establish that *Montgomery* is not a correct statement of the holding in *Miller*. *Montgomery* says that *Miller* holds something that *Miller* itself says with crystal clarity it does *not* hold. There are no two ways about it. The *Montgomery* passage is flatly contrary to the *Miller* passage. *Amicus* is aware of no other opinion in the entire history of this Court where a later opinion says that a precedent includes a holding that the precedent itself so unequivocally disclaims.

Montgomery's basis for its statement of what *Miller* holds comes from a passage that is quite obviously *obiter dicta*. The paragraph of *Miller* in question begins with a clear statement of the holding. "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U. S., at 479. Clear enough. Two sentences later, the opinion says "that holding is sufficient to decide these cases" and declines to go any further. See *ibid*. Then the opinion goes on to express some thoughts about how often an LWOP sentence will be found appropriate. See *ibid*. This is textbook dicta.

Chief Justice Marshall noted the limitations of *obiter dicta* in *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264,

399-400 (1821), when confronted with his own *dictum* from 18 years earlier:[3]

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The Questions Presented in *Miller*, as drafted by counsel for Miller, included one categorical exclusion question that the Court expressly declined to answer. Compare 567 U. S., at 479, with Questions Presented in *Miller* v. *Alabama*, No. 10-9646, https://www.supremecourt.gov/qp/10-09646qp.pdf. The second question was:

> "Does imposition of mandatory sentence of life imprisonment without parole on a fourteen-year-old child [sic][4] convicted of homicide — a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances —

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3. See *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 174 (1803).

4. Miller was not "a child" in the sense that term is primarily used in America today, *i.e.*, a person before the age of puberty. The use of the word "child" by anti-punishment advocates is Orwellian abuse of language for the purpose of misleading the public regarding the age range of the murderers at issue in these cases.

violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments?"

The question presented in the joined case that the Court chose to answer was nearly identical. See Questions Presented in *Jackson* v. *Hobbs*, No. 10-9647, Question 3, https://www.supremecourt.gov/qp/10-09647qp.pdf.

The questions that *Miller* answered dealt with the permissibility of mandatory sentencing laws and consideration of youth and other mitigating circumstances as selection factors. The questions that Miller chose not to answer dealt with objective eligibility factors including youth alone, in both cases, and degree of participation and *mens rea* in Jackson's case. The invention of a novel eligibility or exclusion factor never before imposed in any kind of case involving any kind of defendant was not in the questions presented. There is no indication that, in the words of *Cohens*, such a question was "investigated with care, and considered in its full extent." The statement is dicta.

By no stretch of the imagination can dicta musing about the frequency of future sentencing outcomes override an opinion's clear statement of what it does and does not hold. "It is to the holdings of our cases, rather than their dicta, that we must attend ...." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994). Yet *Montgomery* did just the opposite. See 136 S. Ct., at 733-734, 193 L. Ed. 2d, 619-620. The oddness of this jurisprudential prestidigitation did not go unnoticed at the time. See *id*., 136 S. Ct., at 743, 193 L. Ed. 2d, 630-631 (Scalia, J., dissenting).

The law generally prefers original sources to secondary ones. Original writings are preferred over copies. See Fed. Rule Evid. 1002. Testimony of percipient witnesses is preferred over hearsay. See Fed. Rule Evid.

802. The best authority on what *Miller* holds is the *Miller* opinion, not what *Montgomery* said about *Miller*. *Montgomery* did not purport to reexamine the meaning of the Eighth Amendment and modify the *Miller* rule as a result of that reexamination. It only purported to say what *Miller* held. To the extent that rendition contradicts *Miller* itself, it should not be regarded as precedent.

B. Montgomery Contradicts Montgomery.

The *Montgomery* opinion acknowledges that "*Miller* did not require trial courts to make a finding of fact regarding a [juvenile's] incorrigibility."[5] Yet the opinion insists that States cannot "sentence a [juvenile] whose crime reflects transient immaturity [the opposite of incorrigibility] to life without parole." 136 S. Ct., at 735, 193 L. Ed. 2d, at 621. That makes no sense.

Montgomery itself involved a mandatory sentencing statute, so once the retroactivity hurdle was cleared, this Court could reverse the decision of the Supreme Court of Louisiana under *Miller*. But in a case like the present one, involving a discretionary statute and a sentencer who considered the mitigating impact of youth, by what authority could this Court reverse a state court decision imposing an LWOP sentence on an adolescent murderer if there is no factfinding requirement?

For a judgment to be reversed, there must have been an error. If a court renders a judgment after following correct procedure and finding all the facts that the law requires to be found to support the judgment, there has

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5. The juveniles involved in these cases are all adolescents, not children. See note 4, *supra*. It was disappointing, to put it mildly, to see this disingenuous usage adopted by this Court in *Miller* and *Montgomery*.

been no error. The only possible error here is that the trial court entered the judgment without finding "irreparable corruption" or "incorrigibility" or "not transient immaturity." Yet that is a fact-finding requirement, which *Montgomery* concedes *Miller* did not impose.

In the end, *Montgomery* does implicitly impose a factfinding requirement. "[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption ...." 136 S. Ct., at 736, 193 L. Ed. 2d, at 623. The right to an opportunity to make a showing necessarily implies a right to a fact-finder who will consider the showing and decide if the point has been made. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 115, n. 11 (1982).

Miller actually says that it imposes *only* a requirement that "a sentencer follow a certain process —considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U. S., at 483. In the end, *Montgomery* says that the juvenile murderer is entitled to a hearing on a designated fact (although an exceptionally vague one), which necessarily involves a finding on that fact, thus contradicting both *Miller* and itself.

At oral argument in *Mathena* v. *Malvo*, No. 18-217, Justice Kagan said at page 10 of the transcript, "all of Miller ... can be summarized in two words, which is that youth matters and that you have to consider youth in making these sorts of sentencing determinations." That is correct, as we will explain further in Part IV-A, *infra*. No findings of fact as to vague abstractions are required or even desirable. To the extent *Montgomery* says otherwise, it should be overruled. *Montgomery*'s core holding of retroactivity can be supported on other grounds, if necessary, as explained in Part IV-C, *infra*.

III. The arc of Eighth Amendment jurisprudence should bend back toward the original understanding, not further away from it.

For the last two decades, much of the constitutional criminal law and procedure jurisprudence of this Court has tended back toward the original understanding of the Bill of Rights and away from the result-oriented approach of the middle twentieth century. For the same reason that those cases were valid, the course of Eighth Amendment law should also bend back toward the original understanding. At the very least, it should not stray any farther afield than it already has.

Apprendi v. *New Jersey*, 530 U. S. 466, 478 (2000), extended the right of jury trial under the Sixth Amendment to many findings designated as "sentencing factors," looking for guidance to the right to jury trial "as it existed during the years surrounding our Nation's founding." It was not long before this renewed fidelity to original understanding collided with precedent. In *Ring* v. *Arizona*, 536 U. S. 584 (2002), and *Hurst* v. *Florida*, 577 U. S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), this Court overruled *Hildwin* v. *Florida*, 490 U. S. 638 (1989), and *Walton* v. *Arizona*, 497 U. S. 639 (1990), on the very arguments considered and rejected in those cases. Despite the massive reliance on these decisions in multiple states and despite the aggravation of the problem of lengthy delay in carrying out capital sentences caused by resentencings following changes in rules, see Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131, 164 (2019), fidelity to the Constitution as the people adopted it was more important. In more recent *Apprendi* cases, the debate is over what the original understanding was, not whether it should be the benchmark. Compare *Alleyne* v. *United*

States, 570 U. S. 99, 108-110 (2013) (plurality opinion) (historical basis), with *id*., at 128-129 (Roberts, C.J., dissenting) (disputing historical basis).

Crawford v. *Washington*, 541 U. S. 36 (2004), and its progeny are similar. The basis of the rule was the understanding of the right of confrontation when the Bill of Rights was ratified in 1791. See *id*., at 53-56. With that decision, a quarter century of Confrontation Clause law was tossed, "cast[ing] a mantle of uncertainty over future criminal trials in both state and federal courts." *Id*., at 69 (Rehnquist, C.J., concurring in the judgment). In *Giles* v. *California*, 554 U. S. 353 (2008), as in *Alleyne*, the dispute was over the content of the historical record, not its importance. Compare *id*., at 359-369, with *id*., at 381-383 (Breyer, J., dissenting).

Even when dealing with technology that was beyond imagination in the late 18th century, this Court has looked to "Founding-era understandings" in applying the substantive Fourth Amendment. See *Carpenter* v. *United States*, 585 U. S. __, 138 S. Ct. 2206, 2214, 201 L. Ed. 2d 507, 518 (2018) (slip op., at 6-7). *Carpenter* addressed cell-tower data and noted cases on thermal imaging and cell phone contents.

If fidelity to the real Constitution is a fundamental principle and not a device to be employed or ignored at will, then it should apply across the board. However, there are three major areas of constitutional criminal law that remain resistant to the principle that " 'the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.' " *Haywood* v. *Drown*, 556 U. S. 729, 764 (2009) (quoting *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 491-492 (1939) (Frankfurter, J., concurring)).

First in order of appearance, there is the Fourth Amendment exclusionary rule. This is a purely judge-made remedy, with no trace of support in the text of the Constitution or historical practice at the time of adoption of the Fourth or Fourteenth Amendments. See Brief for Criminal Justice Legal Foundation in *Utah* v. *Strieff*, No. 14-1373, pp. 5-22.

Second, there is "the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence." *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting); see generally Scheidegger, *supra*.

The third major area where this Court's cases seem oblivious to the original understanding is the one at issue in the present case, the sentencing of people who commit major violent crimes before their 18th birthday. Unlike the first two areas, this one has developed concurrently with the Court's recognition of the importance of fidelity to the original understanding when interpreting other provisions of the Constitution, making the development all the more curious.

Indeed, *Miller* v. *Alabama*, 567 U. S. 460 (2012), seems almost disdainful of history. *Miller* says that the concept of proportionality is viewed "less through a historical prism than according to '"the evolving standards of decency that mark the progress of a maturing society."'" *Id*., at 469 (quoting *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976), in turn quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). Yet if we trace that "evolving standards" quote back to its source, we find that even in the Warren Court history was not irrelevant. Chief Justice Warren's plurality opinion took care to note that its standard could not have any effect on the constitutionality of capital punishment because "the death penalty has been employed throughout our history, and, in a day

when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." *Trop* v. *Dulles*, 356 U. S. 86, 99 (1958); see also Scheidegger, 17 Ohio St. J. Crim. L., at 142.

Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739 (2008) sheds important light on the original understanding of the Cruel and Unusual Punishments Clause. After an extensive examination of the history, Stinneford concludes that "unusual" meant "contrary to long usage." See *id*., at 1767. The clause is a guarantee *against* cruel innovation by the legislative branch. It cannot legitimately be used as a tool for *imposing* innovation by the judiciary. See *id*., at 1817.

That is enough to decide this case. There is no historical practice of *any* standing, much less long, universal standing, requiring that a court make a finding of "irreparable corruption" before sentencing an under-18 murderer to the sentence that adults routinely receive for the same crime. Blackstone noted a number of cases discussing whether 8- to 13-year-olds could be hanged for murder. Many were, after individual determinations "of the delinquent's understanding and judgment." See 4 W. Blackstone, Commentaries 23-24 (1st ed. 1769). Generally, "above the age of fourteen [the perpetrator of a crime of violence] is equally liable to suffer, as a person of the full age of twenty-one." *Id*., at 22-23. States today vary in their approaches to sentencing of juveniles who commit murder in their mid to late teens, but petitioner does not cite a single state statute requiring a "corruption" or "incorrigibility" finding, much less a sufficient number to demonstrate that the contrary practice has disappeared from our law. Cf. Stinneford, 102 Nw. U. L. Rev., at 1813-1815. No such showing could be made.

Amicus acknowledges that the Court may not be ready to fully embrace the original understanding as the benchmark for interpreting the Cruel and Unusual Punishments Clause. There are a great many precedents that would be called into question by such a step. Even so, the Court should venture no farther into the illegitimate exercise of making its own decisions on what is good sentencing policy and imposing them on the country on the pretense of interpreting the Constitution. See *Roper* v. *Simmons*, 543 U. S. 551, 609 (2005) (Scalia, J., dissenting). There is no need to do so in this case. Petitioner received all the consideration of his youth that *Miller*, fairly interpreted, requires. He received far more than the real Eighth Amendment requires.

IV. *Miller* is best understood as importing the *Woodson* rule from capital cases plus the *Eddings* rule as applied to youth-related mitigation, and nothing more.

A. Miller and the Capital Cases.

The essence of *Miller* v. *Alabama*, 567 U. S. 460 (2012), is its use of *Graham* v. *Florida*, 560 U. S. 48 (2010), to import, as relevant to the mitigating impact of youth, two rules from this Court's capital punishment cases, making them applicable to juvenile LWOP cases. *Graham* effectively imported the rules of *Coker* v. *Georgia*, 433 U. S. 584 (1977), and *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008), from capital punishment to juvenile LWOP, categorically barring the punishment in question for nonhomicide crimes. See *Graham*, *supra*, at 69 (quoting *Kennedy*, in turn quoting *Coker*). *Miller* extends *Graham*'s analogy:

> "*Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking

> a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. See *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion); *Lockett* v. *Ohio*, 438 U. S. 586 (1978). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller*, 567 U. S., at 470.

Woodson and *Lockett* might be considered to be in the same line in a broad sense, but the two cases establish different rules. *Woodson* banned mandatory sentencing, see *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), while *Lockett* established a breathtakingly broad rule as to what mitigating evidence must be considered. See *Lockett*, 438 U. S., at 590 (plurality opinion). *Lockett* was followed by *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), which the *Miller* Court regards as "especially on point." 567 U. S., at 476. The death sentence was vacated because the trial judge did not consider Eddings's "neglectful and violent background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance." *Ibid*.

Considering *Graham* and *Eddings*, *Miller* identifies the vice of mandatory LWOP statutes for juvenile murderers to be that they "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Ibid*. This theme is repeated throughout the opinion. "Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id*., at 473. "By removing youth from the *balance* ... these laws

prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id*., at 474 (emphasis added).

If there were any lingering doubt, it is eliminated by *Miller*'s own recap of its own holding:

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Id*., at 477.

This is fully consistent with the *Eddings* rule as applied to youth-related mitigation. It requires the sentencer to consider mitigation in the selection step of the process. It does not create a new and unprecedented requirement for a finding of fact as a gateway to eligibility for the sentence to be considered. As the quote from page 474 above implies, it is a requirement for youth to be considered in the *balance*. The scales of justice are more than a symbol. The truth is that all sentencers with discretion weigh aggravating against mitigating circumstances, whether the statute expressly directs weighing or not. See *Brown* v. *Sanders*, 546 U. S. 212, 216-217 (2006) (noting that the *Lockett*/*Eddings* line effectively requires weighing in all capital cases); *id*., at 219-220 (abandoning prior classification of capital sentencing statutes as "weighing" or "non-weighing").

Miller can be understood as adopting two rules regarding life-without-parole sentences for murderers who are one or more days short of their 18th birthday on the date of the crime. Importing *Woodson*, a mandatory sentence is prohibited. Importing *Eddings* in pertinent part, the sentencer must "consider[] [the defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[, along with] the family and home environment that surrounds him ...." 567 U. S., at 477.

As in *Eddings*, these factors are properly considered by weighing them in the balance against the aggravating factors. As is generally true in capital cases, the primary aggravating factors are (1) those that make the crime more heinous than the typical crime in the category, and (2) the length and severity of the defendant's criminal record. Youth and its attendant circumstances properly belong in the selection stage, not the eligibility stage, of the sentencing decision.

Nothing more is required. Anything more would take this Court even farther afield from the true meaning of the Eighth Amendment. That amendment does not empower this Court to become a National Sentencing Commission with the power to dictate sentencing practices that it believes to be good policy, regardless of what the people think. See *Miller*, 567 U. S., at 500 (Roberts, C.J., dissenting) ("displacement of the legislative role"). The Court has gone too far down that road already. It has usurped to itself decisions of policy that the Constitution leaves with the people and their elected representatives. It has endangered its own legitimacy with the brazenness of result-oriented decisions with no basis in the text or history of the Constitution. The Court should not take another step in that direction.

B. The Excessive Breadth of Lockett.

Although *Miller* relied to a substantial extent on the *Lockett*/*Eddings* line, it did not take the extreme step of incorporating the *Lockett* rule in its full sweep, federalizing and constitutionalizing a right to introduce virtually anything the defendant wants in mitigation. That was a grave error in *Lockett*, and it should not be extended to new territory.

In one of the bitterest ironies of constitutional law, Chief Justice Burger authored the *Lockett* plurality opinion believing that he was giving "[t]he States ... the clearest guidance that the Court can provide." *Lockett* v. *Ohio*, 438 U. S. 586, 602 (1978). The effort was a colossal failure. Nearly three decades later, *Lockett* and its numerous progeny were aptly described as "a dog's breakfast of divided, conflicting, and ever-changing analyses." *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 267 (2007) (Roberts, C.J., dissenting).

The people of the several States, through the democratic process, generally have the authority to decide what circumstances will and will not be considered in excuse or mitigation of otherwise criminal conduct. That is true for voluntary intoxication. See *Montana* v. *Egelhoff*, 518 U. S. 37, 58-59 (1996) (Ginsburg, J., concurring in the judgment). It is true for insanity. See *Kahler* v. *Kansas*, 589 U. S. __, 140 S. Ct. 1021, 1037, 206 L. Ed. 2d 312, 332 (2020) (slip op., at 24) ("a project for state governance, not constitutional law").

Yet *Lockett* stripped the people of their authority to decide what factors will and will not be considered mitigating for the purpose of sentencing convicted murderers. It created a constitutional right to introduce and have considered everything including the kitchen sink. It did so without a shred of basis in the text or history of the Eighth Amendment and by misrepresent-

ing what the Court had said about mitigation in a set of landmark cases only two years earlier. See Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131, 151-155 (2019). While the early cases involve circumstances that nearly everyone would consider mitigating, such as minor role in the crime, lack of intent to kill, and youth, the rule also permits defendants to complain that they did not receive full consideration of factors that most people of sense would consider aggravating. "It may be evidence of voluntary intoxication or of drug use. Or even — astonishingly — evidence that the defendant suffers from chronic 'antisocial personality disorder' — that is, that he is a sociopath." *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring).

Lockett did not only produce decades of confusion on the law and a large increase in the time and money needed to investigate and try capital cases. That would be bad enough. But the most pernicious effect of *Lockett* was to declare a perpetual open season on the prior lawyers in every capital case. See Scheidegger, 17 Ohio St. J. Crim. L., at 160-161. "Lawyers are accused of ineffective assistance for their failure to 'scour the globe' only because the Supreme Court has forced the states to allow in mitigation every speck of evidence that globe-scouring might turn up." *Id*., at 161 (quoting *Rompilla* v. *Beard*, 545 U. S. 374, 383 (2005) (Kennedy, J., dissenting)).

Whether the "dog's breakfast" of *Lockett* should be cleaned up in capital cases is a matter to be decided in those cases, taking into account the weighty considerations of *stare decisis*. Those considerations are absent when the question is whether to extend an erroneous precedent to new territory. This Court should clarify that *Miller* extended to juvenile LWOP only the re-

quirement of *Eddings* to consider the offender's age and related circumstances. See *Miller*, 567 U. S., at 476. The question of what other mitigation to consider should remain "a project for state governance, not constitutional law." See *supra*, at 24.

C. Preserving Montgomery's Core Holding, If Necessary.

The core holding of *Montgomery* v. *Louisiana* is simply that *Miller* v. *Alabama* applies retroactively to cases on collateral review. See *Montgomery*, 136 S. Ct., at 732, 193 L. Ed. 2d, at 618. That issue is not presented in the present case. It comes to this Court on direct appeal, where all new constitutional rules are retroactive. See *Griffith* v. *Kentucky*, 479 U. S. 314, 322-323 (1987).

To reach its result, *Montgomery* said (1) that *Miller* "indeed did announce a new substantive rule," 136 S. Ct., at 732, 193 L. Ed. 2d, at 618, and (2) that the rule was a categorical exemption from LWOP for "juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct., at 734, 193 L. Ed. 2d, at 620. Part (2) of that chain of logic is unsupportable, as demonstrated above. First, *Miller* expressly says it does not hold that. See Part II-A, *supra*, at 10-14. Second, an eligibility factor that vague would be unconstitutional. See Part I, *supra*, at 6-10.

If the retroactivity of *Miller* arose again, it would become necessary to address whether *Miller* announced a rule of substantive law other than the unsupportable one advanced in *Montgomery*. The question might not arise again because retroactivity, like radioactivity, decays with time. This one has already decayed for multiple half-lives. *Miller* was decided eight years ago. The retroactivity of *Miller* was established four years ago. Every juvenile murderer sentenced under a mandatory law before *Miller* became able to challenge that

sentence. *Miller* petitions already in progress will generally be resolved within a few years. Any pre-*Miller* claim that has not been filed yet is likely already barred on delay, default, or successive petition grounds. See, *e.g.*, 28 U. S. C. §§ 2244(b)(2)(A), (d)(1)(C) (successive petition allowed for new rule that is retroactive on collateral review, but must be filed within one year).

The Court in this case could hold that *Miller* means what *Miller* says—that there is no categorical exemption—and not what *Montgomery* says. See Part II, *supra*, at 10-15. It could stop there, not overruling *Montgomery*'s core holding and not addressing whether its core holding might be supported on other grounds. Lower courts would remain bound by *Montgomery* as a precedent of this Court not yet overruled, even if apparently undermined. See *Tenet* v. *Doe*, 544 U. S. 1, 10-11 (2005). The retroactivity issue will die out.

If an alternative theory for *Montgomery*'s "substantive rule" holding is thought necessary, one suggests itself. *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), originally applied only to factors that increased the maximum sentence, but *Alleyne* v. *United States*, 570 U. S. 99 (2013), held that factors that increased the minimum sentence were not distinguishable. "[B]ecause the legally prescribed range *is* the penalty affixed to the crime ... it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id*., at 112.

The legally prescribed range of punishments for a crime is a rule of substantive law. Normally, it is found in the code along with the definition of the crime, while the procedure for selecting a punishment within the range is set forth elsewhere. See, *e.g.*, 18 U. S. C. § 1111 (defining murder and its degrees and setting the penalty for first-degree murder in federal jurisdiction at death or life in prison); 18 U. S. C. § 3591 *et seq*. (estab-

lishing procedure for choosing among alternatives for murder and other federal capital offenses).

The legally prescribed range may be altered by constitutional rules, however. Categorical exclusions lower the ceiling for a defined group of offenses or offenders. See *supra*, at 8. A rule of constitutional law that prohibits a given mandatory minimum and requires a different minimum lowers the floor. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Sumner* v. *Shuman*, 483 U. S. 66, 77-78 (1987), lowered the floor from death to life in prison for murderers.[6]

As explained *supra*, at 21, *Miller*'s primary holding is an importation of *Woodson* to juvenile LWOP, though this is supplemented by a partial incorporation of *Eddings* as well. The *Woodson* component is substantive in the sense that it lowers the floor of the range of punishment below the floor established by the statute. Understanding *Miller* to be a floor-lowering rule like *Woodson*, rather than a ceiling-lowering rule like *Penry*, does not necessarily preclude characterizing the rule as substantive. The Mississippi Supreme Court's pre-*Montgomery* retroactivity decision in the present case followed a similar rationale. See *Jones II*, 122 So. 3d, ¶ 11, at 702.

This argument is not airtight, to be sure. If one returns to first principles and examines the reasons that Justice Harlan included the "first exception" in his proposal that eventually became the *Teague* rule, see *Mackey* v. *United States*, 401 U. S. 667, 692-693 (1971) (concurring and dissenting opinion), rather than focusing on the "substantive" and "procedural" labels, there is considerable room to argue that *Miller* does not

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6. Both of these cases predated *Teague* v. *Lane*, 489 U. S. 288 (1989), so this Court never needed to address their retroactivity under *Teague*.

fit. But that argument is for another day, a day that may never come. For now, it is sufficient to note that disavowing *Montgomery*'s erroneous statement about *Miller*'s supposed creation of a categorical exclusion does not necessarily require reversing *Montgomery*'s core holding.

Amicus CJLF acknowledges that this mode of proceeding is untidy. But it's a messy problem. *Montgomery* contains an obvious and embarrassing error, and it must be dealt with. "Of course it is embarrassing to confess a blunder; it may prove more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

The Eighth Amendment does not require a categorical exclusion for a subset of adolescent murderers facing life without parole.[7] Instead, as interpreted by *Miller*, it requires (1) that the sentencer have discretion to choose life with the possibility of parole or some lesser sentence allowed by state law; and (2) that the sentencer consider youth and its attendant circumstances in exercising that discretion. As both requirements were met in this case, there is no basis for reversal.

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7. Whether there is a categorical exclusion for children is a question that can await a case in which a state has actually sentenced a child to life in prison. That day, also, may never come.

CONCLUSION

The decision of the Mississippi Supreme Court should be affirmed.

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Respectfully submitted,

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