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RETROACTIVITY, THE DUE PROCESS CLAUSE, AND THE FEDERAL QUESTION IN *MONTGOMERY V. LOUISIANA*

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INTRODUCTION

The Supreme Court recently granted certiorari in *Montgomery v. Louisiana*[1] to determine whether the Court's holding in *Miller v. Alabama*, that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,"[2] applies retroactively to cases on collateral review.[3] That question is important in its own right, as we have previously discussed.[4] But the Court also ordered argument on an additional, threshold question—one that, although perhaps less "sexy" than the merits question, may have profound implications for the scope of the Due Process Clause and retroactivity jurisprudence: Does the Supreme Court have jurisdiction over the case at all?[5] That is, does Montgomery's claim, which was nominally rejected on state law grounds by the Louisiana Supreme Court,[6] even raise a federal question?

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1. 135 S. Ct. 1546 (2015) (mem.) (granting petition for certiorari).

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

3. Petition for Writ of Certiorari at i, Montgomery v. Louisiana, No. 14-280 (U.S. Sept. 5, 2014), 2014 WL 4441518 [hereinafter Petition for Certiorari]; *Montgomery v. Louisiana*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/montgomery-v-louisiana (last visited Sept. 28, 2015).

4. *See* Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, 48 IND. L. REV. 931, 949-77 (2015) (arguing that *Miller* is "partially retroactive").

5. *Montgomery*, 135 S. Ct. at 1546. Because both parties in *Montgomery* agree that the Court has jurisdiction, the Court appointed an amicus to argue against jurisdiction. *See* Montgomery v. Louisiana, 135 S. Ct. 1729, 1729 (2015) (mem.) (inviting amicus curiae briefing); Brief of Court-Appointed Amicus Curiae Arguing Against Jurisdiction at 1, Montgomery v. Louisiana, No. 14-280 (U.S. June 16, 2015), 2015 WL 3799566 [hereinafter Amicus Brief].

6. *See* State v. Montgomery, 141 So. 3d 264, 265 (La. 2014); *infra* notes 24-26 and accompanying text.

Before turning to that question, some background is necessary. The Court's decision in *Teague v. Lane*[7] provides the modern framework governing retroactivity—that is, whether a decision announcing a "new" rule of constitutional law applies to defendants who were convicted before the rule's articulation. Under *Teague*, new rules apply on direct review, but not on collateral review; thus, a case announcing a new rule applies only to those defendants whose convictions were not final when the rule was announced.[8] This rule of nonretroactivity on collateral review has two exceptions. Under *Teague*'s first exception, new substantive rules of criminal law—decisions that "narrow the scope of a criminal statute by interpreting its terms" or "that place particular conduct or persons covered by the statute beyond the State's power to punish"—apply retroactively.[9] Importantly for our purposes, substantive rules include those that "plac[e] a certain class of individuals beyond the State's power to punish by death," because the Court has found such rules "analogous to . . . rule[s] placing certain conduct beyond the State's power to punish at all."[10] Under *Teague*'s second exception, "watershed" rules of criminal procedure apply retroactively.[11] *Montgomery* concerns *Teague*'s first exception.[12]

The next piece of the puzzle is the Court's 2008 decision in *Danforth v. Minnesota*, which held that *Teague*'s background rule of nonretroactivity is not binding on the states because *Teague* merely construed the federal habeas statute.[13] Thus under *Danforth*, state courts are free to determine retroactivity using more generous standards than *Teague*'s, although the *Danforth* Court was careful to leave open whether states are constitutionally required to apply *Teague*'s two exceptions.[14]

Finally, a word about the reviewability of state court decisions. The U.S. Supreme Court possesses jurisdiction to review only those state court decisions that present a dispositive federal question. Put slightly differently, the Court

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7. 489 U.S. 288 (1989).

8. *See id*. at 310 (plurality opinion) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

9. Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004) (citation omitted). The Court has explained that this is not really an exception at all; rather, substantive rules are "not subject to [*Teague*'s] bar." *Id*. at 352 n.4. Nonetheless, for ease of exposition we will refer to this as an "exception" here.

10. Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

11. *Teague*, 489 U.S. at 311 (plurality opinion).

12. *See* Petition for Certiorari, *supra* note 3, at i.

13. *See* Danforth v. Minnesota, 552 U.S. 264, 278-79 (2008).

14. *See id*. at 266 ("The question in this case is whether *Teague* constrains the authority of state courts to give *broader* effect to new rules of criminal procedure than is required by that opinion." (emphasis added)); *id*. at 269 n.4 ("[T]his case does not present the question[] whether States are required to apply 'watershed' rules in state post-conviction proceedings . . . ."); *id*. at 277 ("[T]he case before us now does not involve either of the '*Teague* exceptions' . . . .").

lacks jurisdiction to review state court decisions that rest on "adequate and independent state grounds."[15] Were the rule otherwise, the Court would issue an advisory opinion, because "the same judgment would be rendered by the state court after [the U.S. Supreme Court] corrected [the state court's] views of federal laws."[16] Not all state court decisions, though, are clear as to whether they are based on state or federal law. In those circumstances, the Court applies the *Michigan v. Long* presumption: if "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," the Court presumes that the state court decision is based on federal law.[17] This presumption is overcome only by an explicit statement to the contrary.[18]

I. THE JURISDICTIONAL ISSUE IN *MONTGOMERY* AND ITS DUE PROCESS IMPLICATIONS

This brings us to *Montgomery v. Louisiana*, which began when the petitioner, Henry Montgomery, filed a motion in Louisiana state court arguing that *Miller* was retroactive and thus entitled him to resentencing.[19] The state trial court denied his motion, and the Louisiana Supreme Court denied review, citing its decision in *State v. Tate*,[20] in which it held that *Miller* was not retroactive under *Teague*.[21] *Tate*, in turn, cited the Louisiana Supreme Court's seminal retroactivity decision, *State ex rel. Taylor v. Whitley*, which adopted the federal *Teague* standards for "all cases on collateral review in [Louisiana] state courts."[22] While "recogniz[ing] that [it was] not bound to adopt the *Teague* standards," the *Whitley* court determined that *Teague*'s approach was desirable because it promoted clarity and respect for finality in criminal proceedings.[23]

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15. Michigan v. Long, 463 U.S. 1032, 1038 & n.4 (1983).

16. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

17. *Long*, 463 U.S. at 1040-41. In *Long*, the Michigan Supreme Court ruled that a protective search for weapons pursuant to a *Terry* stop could not extend to an area beyond the person, relying on the Fourth Amendments of both the state and federal constitutions. People v. Long, 320 N.W.2d 866, 869-870, 869 n.4 (Mich. 1982), *rev'd*, 463 U.S. 1032 (1983); *see also Long*, 463 U.S. at 1037 ("The court below referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law."). The U.S. Supreme Court concluded that it had jurisdiction to review the case, *Long*, 463 U.S. at 1045, noting that "[a]part from its two citations to the State Constitution, the court below relied *exclusively* on its understanding of *Terry* and other federal cases," *id.* at 1043.

18. *See Long*, 463 U.S. at 1041.

19. Petition for Certiorari, *supra* note 3, at 2-3.

20. State v. Montgomery, 141 So. 3d 264, 264 (La. 2014) (citing State v. Tate, 130 So. 3d 829 (La. 2013)).

21. *Tate*, 130 So. 3d at 844 (holding that *Miller*'s new rule fell under neither of *Teague*'s two exceptions).

22. *Id.* at 834 (quoting State ex rel. Taylor v. Whitley, 606 So. 2d 1292, 1296 (La. 1992)).

23. *See Whitley*, 606 So. 2d at 1296-97.

This procedural background frames the jurisdictional issue. The Louisiana Supreme Court's rejection of Montgomery's postconviction motion rested on *Tate* and *Whitley*, two Louisiana state court decisions. Those decisions applied *Teague*, but the *Whitley* court explicitly stated that Louisiana was "not bound" by federal retroactivity standards,[24] raising the possibility that the Louisiana courts apply their own retroactivity law (which is permissible under *Danforth*) and look for federal law only for persuasive guidance.[25] If that is true, then arguably the Louisiana Supreme Court's rejection of Montgomery's motion does not present a federal question.[26]

This issue is closely intertwined with the issue left open in *Danforth*—whether *Teague*'s exceptions are binding on the states. As a matter of federal constitutional law, all courts are required to resolve the claims before them in accordance with the Due Process Clause.[27] Thus, if the Due Process Clause requires retroactivity for substantive rules, then the Louisiana Supreme Court's allegedly erroneous failure to apply *Miller* retroactively in *Montgomery* presents a federal question. If, however, the Due Process Clause does not require the retroactivity of substantive rules, then Louisiana's decision not to apply *Miller* retroactively was arguably a matter of state law and is thus unreviewable by the Supreme Court. While the Court could punt on the constitutional question and find jurisdiction under *Long*, the best course for the Court both doctrinally and jurisprudentially is to find federal jurisdiction on the grounds that *Teague*'s first exception is constitutionally required.

In our view, it is clear that the Due Process Clause requires the retroactivity of substantive rules on collateral review, and so *Montgomery* raises a federal question. As the Court noted in *Foucha v. Louisiana*, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[28] *Teague*'s first exception provides for retroactivity where certain conduct may no longer be punished or a certain sentence may no longer constitutionally be imposed on a given class of individuals.[29] Because the continued imprisonment of an individual who cannot constitutionally be imprisoned would violate the Due Process Clause's prohibition on arbitrary and unjustified governmental restraint, *Teague*'s substantive-rule exception must be constitutionally required. As the Seventh Circuit put it, "[i]f it would be unconstitutional to punish a person for an act that cannot be subject to criminal penalties it is no less unconstitutional to keep a person in prison for committing the same act."[30] Or, as Justice Brennan explained, "a decision holding certain conduct beyond the power of government to sanction or

24. *Id.* at 1296.
25. *See supra* note 14 and accompanying text.
26. *See* Amicus Brief, *supra* note 5, at 12-13 (making this argument).
27. Yates v. Aiken, 484 U.S. 211, 218 (1988).
28. 504 U.S. 71, 80 (1992).
29. *See supra* note 9 and accompanying text.
30. Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005).

prohibit must be applied to prevent the continuing imposition of sanctions for conduct engaged in before the date of that decision."[31] Indeed, Justice Harlan, the father of the modern retroactivity doctrine, could not have been clearer that the first *Teague* exception applies to "'substantive due process' rules."[32]

The Court's amicus offers two arguments against this inescapable conclusion. Both, however, fail to account for the requirements of the Due Process Clause.

The first argument is that, under *Danforth*, the *Teague* decision was an exercise in statutory construction, and so *Teague*'s exceptions must not be constitutionally mandated.[33] This grossly overstates *Danforth*'s reasoning. *Danforth* held that states were not bound by *Teague*'s *general rule* of non-retroactivity; the Court was careful not to conflate that *general rule* with *Teague*'s *exceptions*.[34] Nowhere did the *Danforth* majority suggest that *Teague*'s exceptions were statutorily grounded. In fact, the Court stated that "[f]ederal law simply 'sets certain *minimum requirements* that States must meet but may exceed in providing appropriate relief.'"[35] Thus, *Danforth* explicitly declined to resolve the question of whether states are bound by *Teague*'s exceptions and, if anything, suggested that the Constitution provides a "minimum" level of retroactive relief that is binding in all adjudications.

What is more, *Teague*'s first exception is different in kind from *Teague*'s background rule, given that substantive rules are not "exceptions" to *Teague* at all.[36] They "are simply 'not subject to the bar'—that is, they apply to all convictions, period, no matter when the conviction became final."[37] Even if *Danforth* had suggested that the *Teague* exceptions derive from the federal habeas statute, such a suggestion would still not support the amicus's argument.

The amicus's second argument is that the availability of federal habeas relief eliminates any constitutional problem with a state's failure to allow the retroactive application of substantive rules. Because federal courts can grant ret-

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31. United States v. U.S. Coin & Currency, 401 U.S. 715, 726-27 (1971) (Brennan, J., concurring). Justice Brennan here, and the Seventh Circuit in *Muth*, were referring to "primary conduct" rules, under which the state may not constitutionally punish certain conduct at all. However, the Court has explained that rules forbidding the government from subjecting a given class of defendants to a certain type of punishment are equivalent to primary conduct rules for purposes of constitutional retroactivity analysis. *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

32. Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

33. Amicus Brief, *supra* note 5, at 23-25.

34. *See supra* note 14 and accompanying text (noting that *Danforth* left open the status of the *Teague* exceptions).

35. Danforth v. Minnesota, 552 U.S. 264, 288 (2008) (emphasis added) (quoting Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 178-79 (1990) (plurality opinion)).

36. *See supra* note 9.

37. Zarrow & Milliken, *supra* note 4, at 983 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 n.4 (2004)).

roactive relief, the argument goes, state courts are not required to do so.[38] But this argument confuses the availability of a forum for a claim with the substance of the claim itself. In constitutional terms, it addresses an argument under the Suspension Clause, rather than one under the Due Process Clause.

It is likely true that the Suspension Clause would still be satisfied if a state court refused to apply substantive rules retroactively. Under *Boumediene v. Bush*, the Suspension Clause does not insist on any particular vehicle for relief so long as "an adequate substitute for the writ of habeas corpus" exists.[39] Federal courts are surely adequate substitutes. Indeed, as the amicus observes, "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings."[40]

But unlike the Suspension Clause, which apparently requires only *a* forum, the Due Process Clause applies in *all* fora, whether on direct review or collateral, in state court or federal. If it violates the Due Process Clause to continue to imprison an individual who has a valid claim under a retroactive rule, state courts are obligated to grant release.[41] States simply have no authority not to issue the relief required by the Due Process Clause, regardless of the availability of another forum. For this reason, the amicus's greater-includes-the-lesser argument (because state habeas relief is not generally required, it need not be required for a particular type of claim) is a nonstarter. This is not how the Due Process Clause—or federal law more generally—works. A state is not required to hear habeas cases—but if it does, the Due Process Clause applies:

> Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause. Likewise, even if a State has no duty to authorize parole or probation, if it does exercise its discretion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process. *Similarly, if a State establishes postconviction proceedings, these proceedings must comport with due process*.[42]

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38. *See* Amicus Brief, *supra* note 5, at 36.

39. *See* 553 U.S. 723, 792 (2008).

40. Amicus Brief, *supra* note 5, at 28 (quoting Murray v. Giarratano, 492 U.S. 1, 10 (1989)).

41. *See, e.g.*, Yates v. Aiken, 484 U.S. 211, 218 (1988) (noting that, if a state court decides to hear constitutional issues in habeas proceedings, "it has a duty to grant the relief that federal law requires").

42. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 292-93 (1998) (Stevens, J., concurring in part and dissenting in part) (emphasis added) (citation omitted); *cf. Yates*, 484 U.S. at 218 ("Since [the South Carolina Supreme Court] has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.").

II. *MICHIGAN V. LONG*: A FLAWED WAY TO AVOID THE DUE PROCESS CLAUSE ISSUE

Michigan v. Long[43] provides an alternate route to the merits that avoids these constitutional questions. Louisiana has chosen to apply *Teague*, even though, under *Danforth*, it is not required to do so. The Louisiana Supreme Court's determination that *Miller* is not retroactive thus rests exclusively on its interpretation of federal law. To the extent that the *Long* presumption is even needed, it compels a finding of jurisdiction because there is *no* indication in the decisions below, much less the required plain statement, that they rested on state law.[44]

The Court's amicus again contends otherwise. The amicus argues that the Louisiana Supreme Court's decision was not interwoven with federal law because the court "appl[ied] state law to retroactivity and us[ed] non-binding federal cases as persuasive authority."[45] This argument rests on a false premise. Louisiana did *not* choose to apply its own state-law retroactivity standards and use federal cases as mere "persuasive authority." Rather, it adopted the federal standard and applied that federal standard as a matter of state law.[46] Since the Louisiana Supreme Court made that choice, it must apply *Teague* correctly—just as the Michigan court in *Long* was required to apply federal precedents correctly, given its choice to rest its decision on federal, rather than state, search and seizure law.[47]

While this may be the easiest way to dispose of the jurisdictional question in *Montgomery*, it is not the best. Presumably, the Court granted certiorari to resolve a deep split among lower courts about *Miller*'s retroactivity. However, a holding that the Court has jurisdiction under *Long* would do little to resolve that split since, as the law currently stands (recall that it is uncertain whether *Teague*'s first exception binds the states), any state court that had misconstrued *Miller*'s retroactivity under *Teague* would not be bound by the Court's decision. Indeed, any holding on the *Miller* question would not even be binding in Montgomery's case, since the Louisiana Supreme Court could articulate a different retroactivity rule on remand. Furthermore, a holding predicated on juris-

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43. 463 U.S. 1032 (1983).

44. *Cf.* Florida v. Powell, 559 U.S. 50, 57 (2010) (finding jurisdiction over a state court decision that applied *Miranda v. Arizona* and related state law because the court "treated state and federal law as interchangeable and interwoven . . . [and] at no point expressly asserted that state-law sources gave [the defendant] rights distinct from, or broader than, those delineated in *Miranda*").

45. Amicus Brief, *supra* note 5, at 14-15.

46. *See supra* notes 20-23 and accompanying text.

47. *See supra* note 17. The amicus argues that finding jurisdiction on this ground would "invite a host of other petitions in civil and criminal cases where state law has been voluntarily modeled on federal law." Amicus Brief, *supra* note 5, at 15. Hardly. There is a qualitative difference between a state using analogous federal law to inform its interpretation of, say, its own rules of evidence, *see id.* at 15-16, and a state making an explicit choice to apply a federal standard instead of fashioning its own standard.

diction under *Long* would provide no guidance to states that simply choose not to apply the *Teague* framework.[48]

The Court's amicus recognizes that a finding of jurisdiction under *Long* would not be binding on state courts, but mistakenly argues that this result means that any interpretation of *Teague* issued by the Court in *Montgomery* amounts to an advisory opinion.[49] Not so. An opinion vacating a decision below is not an advisory opinion just because the lower court eventually reaches the same result on alternative grounds.[50] If the Supreme Court were to hold that Montgomery was entitled to relief under *Teague*'s first exception, a state court decision denying relief under a different retroactivity standard would be entirely consistent with the Court's ruling unless and until the Court holds that the first exception is binding on the states.

Thus, although *Michigan v. Long* leads to the right result, it would be along the wrong path.

CONCLUSION

The Court clearly has jurisdiction in *Montgomery*. What is less clear, however, is the path the Court will take to reach the merits. It has two options: a broad holding resting (perhaps implicitly) on the Due Process Clause, or a narrow holding resting on Louisiana's voluntary decision to apply *Teague*. The Court should choose the former and definitively resolve the split of authority on *Miller*'s retroactivity while also eliminating any misconceptions about the applicability of substantive rules to cases on collateral review in the state courts.

48. *See, e.g.*, Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015) ("We would reach the same conclusion if we were to apply the test for retroactivity set forth in *Teague*.").

49. Amicus Brief, *supra* note 5, at 18-19.

50. *See, e.g.*, Tennant v. Jefferson Cty. Comm'n, 133 S. Ct. 3, 8 (2012) (per curiam) ("Because the District Court did not reach plaintiffs' claims under the West Virginia Constitution and the issue has not been briefed by the parties, we leave it to the District Court to address the remaining claims in the first instance.").