No. 17-326

In The
Supreme Court of the United States

RAHEEM CHABEZZ JOHNSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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REVISED QUESTIONS PRESENTED

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that imposing a *mandatory* life-without-parole sentence on juvenile homicide offenders violates the Eighth Amendment's ban on "cruel and unusual punishments." In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court held that *Miller* announced a substantive rule of constitutional law that applied retroactively to cases on collateral review. Virginia's sentencing scheme does not mandate life sentences for juvenile homicide offenders convicted of first-degree murder, a Class 2 felony. Virginia provides for a presentence investigation and report, allows defendants to offer mitigating evidence before sentencing, and permits the sentencing judge to impose a discretionary sentence ranging from 20 years to life. Offenders convicted of first-degree murder also are eligible to apply for release at the age of 60, subject to consideration under the normal parole factors applied in Virginia.

The questions presented are:

1) Does *Miller*, standing alone, prohibit a trial court from imposing a discretionary life sentence on a juvenile homicide offender when the offender is eligible for release at age 60 based on normal parole considerations?

2) Does *Miller*, standing alone, require State courts to appoint an expert witness at the State's expense in every case where a juvenile offender could receive a lengthy sentence?

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STATEMENT OF THE CASE

1. Two months shy of his 18th birthday, Raheem Chabezz Johnson hatched a plan with his friend Dennis Watts to rob Timothy Irving. Va. App. 235;[1] *see also* Pet. App. 2. Because Watts had purchased marijuana from Irving on prior occasions, the two men agreed that, on April 11, 2011, Watts would knock on the door to gain entry to the home while Johnson hid out of sight. Va. App. 235. When Irving answered the door, Johnson made his presence known, brandished a handgun, and forced Irving into the house. *Id.*

Also home at the time were Irving's girlfriend and their two-year-old son. *Id.* They were in the bedroom when Johnson forced Irving into the room and ordered him to hand over his money and marijuana. *Id.* With Irving's girlfriend next to him on the floor and his toddler son on the bed, Johnson shot Irving in the back of the head. *Id.* Irving died. *See id.* "The victim's girlfriend and two-year-old son . . . thus, were forced to watch the murder" of their partner and father, respectively. Pet. App. 26.

Johnson was indicted by "a grand jury . . . on eight felony charges." *Id.* 27. Specifically, Johnson was indicted for capital murder, statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, two counts of attempted robbery, and four counts of use of a firearm in the commission of a felony. Va. App. 1-2. Prior to his trial in the Circuit

[1] "Va. App." refers to the appendix filed in the Supreme Court of Virginia.

Court of the City of Lynchburg, this Court decided *Miller v. Alabama*, which held that States must provide juvenile homicide offenders an opportunity to present mitigation evidence and argue for a sentence less than life without parole. 567 U.S. 460, 479 (2012). In response to this Court's decision, the Commonwealth amended the capital-murder charge to first-degree murder, which gave the trial court the option of imposing a sentence as short as 20 years if Johnson was convicted. *See* Va. App. 6-8; *see also* Va. Code Ann. § 18.2-10(b) (2014). A jury found Johnson guilty of all eight charges.

2. After Johnson was found guilty, the trial court ordered the preparation of a presentence report before "fixing punishment or imposing sentence." Pet. App. 41. Before the sentencing hearing was conducted, Johnson filed a motion asking the trial court to appoint a neuropsychologist to assist him with "preparation for the sentencing hearing." Va. App. 88-90. Johnson argued that, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), he was entitled to have an expert appointed because examination of Johnson by a neuropsychologist would "provide facts specific to [Johnson] so as 'to fully advise the court' of all matters specific to" him. Pet. App. 52.

After a hearing on the issue, the trial court denied Johnson's motion to appoint a neuropsychologist to assist during the sentencing phase. *Id.* 59. The court concluded that Johnson had not "shown a particularized need" and that *Miller* did not mandate this type of "evaluation in every case where the accused was a juvenile at the time . . . of the offense. He's been

convicted, he's now an adult," having turned 18 during the pendency of the case. *Id.*

In light of the trial court's ruling, Johnson submitted a letter to the court on September 4, 2012, bringing to the court's attention four articles that he said addressed "the growth and the physiological changes the adolescent brain experiences until fully developed." *Id.* 62. The articles were selected with the help of the expert Johnson had asked to have appointed. *Id.* Johnson's letter explained the science behind how the juvenile brain differs from an adult brain and how the juvenile brain continues to change with age. *See id.* 63-64. Johnson also linked the scientific evidence to his school records, which were before the court, to show how "family dysfunction, poverty, neglect, and" attention-deficit-hyper-activity disorder affected him and "adversely impacted the physiological development of his brain." *Id.* 64. Johnson asked the court to reconsider its decision on his motion to appoint an expert witness, but if the court refused, Johnson alternatively asked the court to accept the articles and consider them in imposing his sentence. *Id.* 65.

On October 5, 2012, the trial court held a sentencing hearing at which Irving's mother and his girlfriend testified. *See* Va. App. 193-200. Irving's girlfriend testified about how difficult it has been for her since the murder, and that Irving's son "remembers everything," "ask[s] about his father . . . [a]ll of the time," and that she does not "know how to explain [the murder] to him." *Id.* 199.

In its closing argument, the Commonwealth pointed out that Johnson would eligible for geriatric release in 41 years, so even if the court imposed a maximum sentence the parole board "will be able to make the determination whether it will be safe to ever release this defendant." *Id.* 203. And in asking the court to impose the maximum sentence, the Commonwealth noted that Johnson was a gang member, had a history of violent actions in school, and had "six years of criminal behavior listed on his criminal history." *Id.* 204-05. "Everything this defendant ha[d] ever done culminated" in the shooting of "an unarmed defenseless man at point blank range in the forehead in the man's own home in the middle of the night in front of his fiancé[e] and two year old child." *Id.* 205.

After hearing the testimony and argument, and after considering the presentence report as well as "the applicable discretionary sentencing guidelines and guidelines worksheets," Pet. App. 45, the trial court sentenced Johnson:

> [To] life on the charge of first degree murder, 20 years on the charge of statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, 2 years on each of the attempted robbery charges, 3 years on the charge of use of a firearm during the commission of a felony, and 5 years on each of the [remaining] use of a firearm during the commission of a felony charges. *Id.* 46.

In sum, "[t]he total sentence imposed [was] life plus 42 years." *Id.* Before imposing that sentence, the trial

court explained that "the shooting was unprovoked," the victim was "helpless," and that the murder was "as cruel and callous as anything I've seen since I've been sitting on the bench and that's been awhile." *Id.* 67.

On October 15, 2012, Johnson filed a motion asking the trial court to reconsider the life sentence Johnson received for murdering Irving. *See id.* 47. In rejecting Johnson's request, the trial court stated that "[t]he life sentence was imposed after careful consideration of [Johnson's] individual characteristics as reflected in the record, including without limitation the presentence report and school records." *Id.* 48. Additionally, the trial court stated that the four articles Johnson submitted to the court about adolescent brain development "were reviewed." *Id.* The trial court explained that it had imposed the maximum sentence in this case "due to the horrendous nature of the crime" as well as Johnson's "history of disrespect for authority and aggressive behavior, which coupled with the brutality of the offense [] make him, in my opinion, a danger to himself and others should he be returned to society." *Id.*

3. Johnson appealed his sentence and the trial court's decision denying him an expert witness to the Court of Appeals of Virginia. The Court of Appeals denied Johnson's appeal with respect to the expert witness, but granted him an appeal to decide whether his life sentence violated *Miller*. *See* Pet. App. 25-26 & n.1. In upholding the life sentence, the court explained that "the Supreme Court clearly did not hold in *Miller* that *all* life sentences for juvenile offenders violate the

Eighth Amendment." *Id.* 35. Here, "the trial court . . . indisputably had the discretion to sentence [Johnson] to a term that ranged from twenty years to life imprisonment for the first-degree murder that appellant committed about two months before his eighteenth birthday." *Id.* 36. According to the court, "[t]hat discretion alone places this case clearly outside of the category of cases" covered by *Miller*. *Id.* And, as the court explained, "the trial court here actually *did* render an 'individualized' sentencing decision in this case." *Id.* 36 n.7.

Again, Johnson appealed. The Supreme Court of Virginia awarded him an appeal with respect to two issues: (1) "the trial court's refusal to appoint a neuropsychologist at the Commonwealth's expense to assist in the preparation of his presentence report"; and (2) "the life sentence imposed by the trial court was in violation of the Eighth Amendment because the trial court failed to afford him the opportunity to present evidence about youth and its attendant characteristics." Pet. App. 2. With respect to the appointment of a neuropsychologist, the court held that Johnson had not shown "the requisite 'particularized need.'" *Id.* 6; *see also id.* 7 ("The indigent defendant who seeks the appointment of an expert must show a particularized need." (citation omitted)). The court based its decision on the fact that "Johnson sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way." *Id.* 8. The court declined to

address whether *Miller* itself provides "the requisite 'particularized need.'" *Id.* 10 n.2.

With respect to Johnson's challenge to his life sentence, the court held "that *Miller* is inapplicable" to this case. *Id.* 10. Unlike the Court of Appeals, the Supreme Court of Virginia concluded that Johnson's eligibility for geriatric release at age 60 qualified as a form of parole. *See id.* 10-11. Consequently, Johnson is not serving a life-without-parole sentence, and *Miller* does not apply. *See id.* 11. Johnson argued that geriatric release does not provide a meaningful opportunity for release because of the asserted "low statistical probability of release." *Id.* 12 n.4. The court rejected that argument as "speculative because the statistical data Johnson relies on does not include juvenile offenders." *Id.*

Johnson timely filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Johnson asks this Court to grant certiorari even though he waived one of the critical arguments necessary to resolve the questions presented. As the Commonwealth pointed out to the Supreme Court of Virginia, Johnson never argued that this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), had any effect on his *Miller*-sentencing claim. Johnson's express decision to waive any argument he may have had based on *Montgomery*—indeed, the Supreme Court of Virginia ordered briefing on this issue and

Johnson chose not to argue the point—makes this case a particularly poor vehicle for addressing (1) the scope of *Miller*'s new rule, or (2) whether every juvenile defendant is entitled to an expert witness at the State's expense at an individualized sentencing hearing—if *Miller* even requires such a hearing, as opposed to the *opportunity* for such a hearing.

Moreover, Johnson actually had an individualized sentencing hearing in this case where the trial court considered multiple scholarly articles about juvenile brain development. Johnson received a life sentence not because the trial court thought such a sentence was required or because the court was uninformed about how juveniles are different from adults. Johnson was sentenced to life because of the heinous nature of his offense, his pervasive criminal history, and his disciplinary issues while in school. Because he actually had an individualized hearing, every member of the Virginia Supreme Court agreed that his sentence was constitutional.

Even if this case were not a fatally flawed vehicle, this Court should still decline certiorari. Johnson's argument is largely premised on a nonbinding concurring opinion by a single, senior Justice from the Supreme Court of Virginia, who asserted that consideration for conditional release under Virginia Code § 53.1-40.01 (2013) is not subject to the same factors as an individual eligible for parole. *See* Pet. App. 13-24. But just as in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), this Court must accept as binding *Angel v. Commonwealth*'s holding that "the factors used in the

normal parole consideration process apply to conditional release decisions under this statute," 704 S.E.2d 386, 402 (Va. 2011). Senior Justice Millette's concurrence does not upset the *Angel* majority's holding.

Finally, contrary to Johnson's claim, there is no circuit split about whether eligibility for parole at age 60 cures a violation of *Miller*. The split of authority that exists with respect to sentences for juvenile nonhomicide offenders under *Graham v. Florida*, 560 U.S. 48 (2010), is irrelevant to the Court's analysis in this case. There is no logical reason why juveniles who commit brutal murders are entitled to the same constitutional maximum sentence—whatever that may be—as a juvenile who commits a robbery where no physical injury occurs.

I. This case is a poor vehicle for addressing the questions presented.

A. Johnson waived any argument based on *Montgomery v. Louisiana*.

In his petition, Johnson conflates this Court's juvenile sentencing precedent to argue that Virginia's discretionary sentencing scheme for juvenile homicide offenders charged with first-degree murder runs afoul of the Eighth Amendment. Although there are numerous reasons why certiorari should be denied, the most fundamental one is that Johnson has waived any challenge to his sentence based on this Court's decision in *Montgomery*. That waiver is critical because under *Miller*'s explicit holding—"We therefore hold that

mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,'" 567 U.S. at 465 (emphasis added)—Johnson has no entitlement to relief as his sentence was indisputably *discretionary*. Va. Code Ann. § 18.2-10(b) (providing a sentencing range of 20 years to life). Because Johnson affirmatively waived any argument that this Court's decision in *Montgomery* clarified or expanded *Miller*'s new rule, the question presented cannot be meaningfully addressed.

As the Commonwealth pointed out in its brief in the Supreme Court of Virginia, Johnson never cited *Montgomery* "much less developed any argument that it has any bearing on the outcome of this case." Br. for the Commonwealth at 15 n.11, *Johnson v. Virginia*, No. 141623 (Va. June 20, 2016). That omission was knowing and intentional; the Supreme Court of Virginia had issued an order on April 21, 2016 directing additional briefing in light of *Montgomery*. Order, *Johnson v. Virginia*, No. 141623 (Va. Apr. 21, 2016). Because Johnson chose not to make an argument based on *Montgomery* to the Supreme Court of Virginia, any such argument has been waived in this case. *See, e.g.*, *Jay v. Commonwealth*, 659 S.E.2d 311, 315-17 (Va. 2008) (collecting cases stating that arguments not developed on brief are waived); *P. Lorillard Co. v. Clay*, 104 S.E. 384, 388 (Va. 1920) (arguments may not be raised for the first time in a reply brief or at oral argument), *abrogated on other grounds by John Crane, Inc. v. Jones*, 650 S.E.2d 851 (Va. 2007); *see also Granite*

Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 306 (2010) (argument not raised in brief in opposition "is properly 'deemed waived' "); *Moore v. Illinois*, 408 U.S. 786, 799 (1972) (constitutional issue not "properly presented for review" since it was not raised in State court). And the Supreme Court of Virginia commented on Johnson's waiver at oral argument. Oral Arg. at 8:49 to 8:55, *Johnson v. Commonwealth*, No. 141623 (Va. Nov. 3, 2016), https://goo.gl/9sEsTA.

Having waived any argument based on *Montgomery*, this case is a particularly poor vehicle for addressing either of the questions presented. Under *Miller*'s plain holding, Johnson is not entitled to relief from his discretionary sentence. 567 U.S. at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders.") (emphasis added). The only way Johnson can colorably assert that he is entitled to relief is to argue that *Montgomery* expanded the new rule announced in *Miller*, which is the argument he makes throughout his petition. *See, e.g.*, Pet. 8-9, 16-18; *see also id.* 21 ("[T]he Court can also consider the extent to which *Graham*, *Miller*, and *Montgomery* should be read together. . . ."). That argument may or may not be persuasive—*Montgomery* was decided under *Teague v. Lane*, 489 U.S. 288 (1989), to address the narrow question of whether *Miller*'s new rule applies retroactively on collateral review, and therefore it is far from clear that *Montgomery* has any application to a case like this one arising on direct review—but it is a threshold question that must be

resolved in Johnson's favor to award him relief on either question presented.

Because Johnson has waived the premise of the legal argument he advances to this Court, certiorari should be denied.

B. The trial court conducted an individualized sentencing hearing and considered Johnson's youth and immaturity before imposing a discretionary life sentence.

A second vehicle problem exists because Johnson plainly had an individualized sentencing proceeding before his discretionary life sentence was imposed. The trial court expressly stated in its two sentencing-related orders that: (1) the Court considered the presentence report as well as "the applicable discretionary sentencing guidelines," Pet. App. 45; and (2) "[t]he life sentence was imposed after careful consideration of [Johnson's] individual characteristics as reflected in the record, including without limitation the presentence report and school records. The [four articles of juvenile brain development] submitted with your letter dated September 4, 2012, were reviewed." *id.* 47-48. The trial court ultimately concluded that "Johnson has a history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense make him, in my opinion, a danger to himself and others should he be returned to society." *Id.* 48. Based on the record, the trial court plainly considered Johnson's

youth and individualized characteristics. The dispute arises here simply because Johnson disagrees with the court's evaluation. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 351 (10th ed. 2013) ("error correction . . . is outside the mainstream of the Court's functions and, generally speaking, not among the 'compelling reasons' (Rule 10) that govern the grant of certiorari").

Given the trial court's explicit consideration of Johnson's youth, the only way to award meaningful relief in this case would be to expand *Miller* to require State courts to appoint an expert witness in advance of every individualized sentencing hearing for a juvenile convicted of a homicide offense. But nothing in the Constitution or this Court's precedent requires the imposition of such a sweeping obligation on the part of the State. Moreover, Johnson offers no explanation for why an expert would be constitutionally required in his case, but not when a juvenile is facing a lengthy sentence for nonhomicide offenses. Thus, this Court would be left to develop on its own a limiting principle for when a juvenile is no longer categorically entitled to an expert witness under the Eighth Amendment.

II. This case does not implicate a split of authority warranting this Court's review.

Johnson argues that this case forms part of an open and intractable split of authority about whether eligibility for release based on normal parole consideration at age 60 satisfies *Miller* and whether a

sentencing court is required "to make an individualized inquiry" before sentencing any juvenile to a life sentence regardless of the availability of parole. Pet. 1. But Johnson is wrong; there is no split of authority warranting this Court's review on either question.

A. Most of the cases cited in the petition are irrelevant to the questions presented.

To begin, it is helpful to sort the wheat from the chaff regarding which cases cited by Johnson could arguably contribute to a circuit split. The vast majority of cases cited in his petition are either irrelevant to the questions presented—e.g., cases addressing lengthy term-of-years sentences, cases decided under *Graham*, cases decided based on *Montgomery*, and cases decided under State constitutional provisions—or do not meet the requirements of Rule 10—e.g., decisions by courts other than the federal courts of appeals or a State's highest court.

First, Johnson argues in his petition that lower courts have "reached contradictory conclusions over whether sentences of long terms of years should be considered the functional equivalent of life-without-parole sentences for purposes of applying *Miller* and *Graham*." Pet. 10. That argument fails because the question about the constitutionality of lengthy term-of-years sentences is not presented in this case; Johnson has never sought to overturn the cumulative 42-year sentence he received for his nonhomicide offenses. Pet. App. 25 n.1. Because the Supreme Court of Virginia

said nothing about aggregate term-of-years sentences, the following cases cited by Johnson, which were decided under *Miller*, are irrelevant here: *State v. Ali*, 895 N.W.2d 237, 239 (Minn. 2017) (declining to apply *Miller* and *Montgomery* because this Court "has not squarely addressed the issue of whether consecutive sentences should be viewed separately when conducting a proportionality analysis under the Eighth Amendment"), *pet. for certiorari filed* (No. 17-5578); *State v. Nathan*, 522 S.W.3d 881, 882-83 (Mo. 2017) (*en banc*) (rejecting a challenge under *Miller* to "imposed consecutive sentences" for numerous offenses); *State v. Zuber*, 152 A.3d 197, 201 (N.J. 2017) (applying *Miller* to aggregate sentences of 75 years and 110 years); *State v. Ramos*, 387 P.3d 650, 656 (Wash. 2017) (applying *Miller* to an 80-year aggregate sentence), *pet. for certiorari filed* (No. 16-9363); *State v. Garza*, 888 N.W.2d 526, 528 (Neb. 2016) (discussing *Miller*'s application to a sentence of 90 years), *pet. for cert. denied*, No. 16-9040 (Oct. 2, 2017); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1033 (Conn. 2015) (concluding that *Miller* applies to a 50-year sentence); *State v. Riley*, 110 A.3d 1205, 1206 (Conn. 2015) (applying *Miller* to a 100-year aggregate sentence); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) ("We hold that the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing . . . when, as here, the aggregate sentences result in the functional equivalent of life without parole."); *State v. Null*, 836 N.W.2d 41, 45 (Iowa 2013) (applying *Miller* to an aggregate sentence of 75 years).

Second, Johnson has offered no justification for why juvenile homicide offenders and juvenile nonhomicide offenders would be entitled to the same constitutional rule under the Eighth Amendment. In fact, this Court has recognized that the type of crime bears on the permissible punishment: *Graham* categorically prohibits life-without-parole sentences for juveniles for nonhomicide offenses, 560 U.S. at 74; *Miller* permits that harsh sentence as long as a homicide offender had the opportunity to argue for a lesser sentence, 567 U.S. at 489. Because juvenile homicide offenders and nonhomicide offenders are not similarly situated for purposes of the Eighth Amendment, cases decided under *Graham* are irrelevant and do not count for determining if there is a circuit split under Rule 10. *Graham*, 560 U.S. at 69 ("There is a line 'between homicide and other serious violent offenses against the individual.' ") (citation omitted). As a result, this Court should disregard the following cases cited by Johnson in his petition that involved juvenile nonhomicide offenders: *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015), *modified*, Jan. 6, 2016; *State v. Brown*, 118 So. 3d 332 (La. 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012).

Third, as noted above, Johnson waived the opportunity to argue that this Court's decision in *Montgomery* has any bearing on his entitlement to relief. *See supra* Part I.A. Because Johnson chose not to rely on *Montgomery*, cases that considered *Montgomery* in reaching their conclusion are irrelevant here. Those

cases include: *Ali*, 895 N.W.2d at 239 (applying *Montgomery*, but denying offender resentencing); *Commonwealth v. Batts*, 163 A.3d 410, 415 (Pa. 2017) (applying *Montgomery* to conclude that juvenile offender was entitled to resentencing); *Ramos*, 387 P.3d at 655 (same); *Veal v. State*, 784 S.E.2d 403, 405 (Ga. 2016) (same); *Luna v. State*, 387 P.3d 956, 961-62 (Okla. 2016) (same).

Fourth, Johnson relies on two cases that are entirely inapposite. *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016), was decided on State constitutional grounds. *Id.* at 839 (holding that life-without-parole sentences for juveniles are unconstitutional under the Iowa Constitution). Because States are permitted to be more protective of defendants' rights under their State constitutions, *Arizona v. Evans*, 514 U.S. 1, 8 (1995), *Sweet* does not contribute to a circuit split about the protections afforded by the Eighth Amendment. And *Alexander v. Kelley*, 516 S.W.3d 258 (Ark. 2017), involved a defendant who was over the age of 18 at the time of the crime. *Id.* at 261. *Alexander* thus is irrelevant; there is no claim in this case related to whether *Miller* applies to a person who has reached adulthood.

Finally, Johnson cites two cases that were not decided by a majority of the State's highest court. *State v. Pascual*, 222 So. 3d 35 (La. 2017) (Crichton, J., concurring); *People v. Hyatt*, 891 N.W.2d 549 (Mich. Ct. App. 2016). A decision by Michigan's intermediate appellate court and a concurrence by a single Justice on the Louisiana Supreme Court do not count towards any split of authority under Rule 10.

B. The remaining cases do not establish that there is a circuit split over whether eligibility for a form of parole at age 60 cures any violation of *Miller*.

Eliminating the cases cited by Johnson that have no application here leaves only two decisions that warrant discussion. Neither case is in conflict with the Supreme Court of Virginia's decision.

Johnson relies on *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014), for the proposition that *Miller* applies to non-mandatory life sentences. Pet. 9. But *Aiken* did not hold that *Miller*'s new rule applies to discretionary sentences like the one Johnson received in this case. The controlling opinion in *Aiken* is Justice Pleicones's concurrence, in which he states that he "agree[s] with the dissent that *Miller* does not require that we grant relief to juveniles who received *discretionary* life without the possibility of parole . . . sentences." 765 S.E.2d at 578 (Pleicones, J., concurring in the result) (emphasis added). He cast the deciding vote in favor of ordering the defendants resentenced based on Article I, § 15 of the South Carolina Constitution, not the Eighth Amendment. *Id.*

Moreover, even if *Aiken* did support Johnson's claim, that issue is irrelevant here. The Supreme Court of Virginia did not decide this case by concluding that *Miller* was inapplicable to Johnson's discretionary sentence. The court's holding plainly was that eligibility for release at age 60 based on the consideration of normal parole factors cures any violation of *Miller*. Pet.

App. 11-12. Put simply, this case does not implicate whether *Miller* applies to discretionary sentencing schemes and *Aiken* says nothing about parole eligibility. For the same reason, the other case that is arguably relevant here, *Conley v. State*, 972 N.E.2d 864 (Ind. 2012), does not support Johnson's *Miller* argument. *See id.* at 879 (finding that *Miller* does not apply to a discretionary life-without-parole sentence).

In sum, this case does not present the question whether *Miller* applies to more than mandatory sentencing schemes. *Aiken* and *Conley* therefore are not part of a split of authority that this Court could address if it granted the petition in this case. Johnson has failed to identify a single case that conflicts with the Supreme Court of Virginia's decision with respect to parole eligibility and *Miller*.

C. There is no circuit split about whether *Miller* requires the appointment of a neuropsychologist.

Similarly, Johnson has not demonstrated that there is a split of authority with respect to the appointment of expert witnesses when sentencing a juvenile offender. *See* Pet. 11-12. Indeed, he has not identified any court that has held that *Miller* always requires the appointment of an expert at sentencing to satisfy the Eighth Amendment.

To begin, a couple of the cases cited by Johnson, such as *Veal*, are about whether a trial court has to make an express incorrigibility finding before

imposing a life-without-parole sentence. 784 S.E.2d at 412; *see also Luna*, 387 P.3d at 962. Those cases hardly even mention expert witnesses, much less hold that they are categorically required in every juvenile sentencing case. Moreover, contrary to Johnson's claim, Pet. 12, the Iowa Supreme Court did not address the need for expert-witness testimony in *Sweet*. Because the court imposed a flat ban on life-without-parole sentences under the Iowa Constitution, whether expert-witness testimony is required before such a sentence could be imposed makes no difference in Iowa. *Sweet*, 879 N.W.2d at 839.

The final case worth mentioning is the Pennsylvania Supreme Court's decision in *Batts*. While *Batts* does address the expert-witness issue under the Eighth Amendment, the court reached the same conclusion as the Supreme Court of Virginia: whether an expert witness is required is "determined on a case-by-case basis by the sentencing court." *Batts*, 163 A.3d at 456; *see also* Pet. App. 7-8. Simply put, there is no conflict warranting this Court's review about the need for expert-witness testimony when sentencing a juvenile offender.

III. Virginia courts correctly concluded that Johnson's discretionary sentence satisfies the Eighth Amendment.

The fact that the Virginia courts faithfully applied this Court's decision in *Miller* furthers weighs against granting the petition for a writ of certiorari. First,

the Supreme Court of Virginia correctly concluded that eligibility for release at age 60 renders *Miller* inapplicable; Johnson is not serving a life-without-parole sentence. Second, even if that were not true, *Miller* applies exclusively to *mandatory* sentencing schemes, and as the Virginia Court of Appeals held, Johnson's sentence was entirely discretionary.

A. Eligibility for release at age 60 based on consideration of normal parole factors renders *Miller* inapplicable.

The life-expectancy table provided in the Virginia Code—for use "[w]henever . . . it is necessary to establish the expectancy of continued life of any person from any period of such person's life"—shows that the average 17-year-old can be expected to live another 61.2 years, or until age 78. Va. Code Ann. § 8.01-419 (2015). That mortality table is similar to tables published by the U.S. Census Bureau.[2] At age 60, then, another 18 years remain in one's average life expectancy. Thus, it is impossible to say that Johnson is serving a life sentence without the possibility of parole since he is eligible for release at age 60.[3]

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[2] *See* U.S. Census Bureau, Statistical Abstract of the United States (2012), Table 105—Life Expectancy by Sex, Age, and Race: 2008 (showing that an average 15-year-old has a remaining life expectancy of 63.8 years), *available at* https://www.census.gov/prod/2011pubs/12statab/vitstat.pdf.

[3] The defendant in *Graham* conceded that eligibility for parole after 40 years "'probably' would be constitutional." *Graham*, 560 U.S. at 124 (Alito, J., dissenting) (citation omitted). And this

Johnson protests that inescapable conclusion in several ways, including arguing that geriatric release does not incorporate the normal parole considerations, Pet. 14-15, and that "[t]here is an exceedingly low statistical probability that Virginia's inmates will ever receive geriatric release," *id.* at 15.[4] None of those arguments has merit.

First, Johnson mischaracterizes Virginia's geriatric-release statute by claiming that it is more limited than parole because it supposedly permits the parole board to deny an application for release "without any consideration of factors tending to show an inmate's rehabilitation or maturity." Pet. 15. That claim is untrue. The parole board's regulations make clear that the *same* factors that apply in parole also apply to conditional release, and the parole manual defines

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Court recognized in *Graham* that homicide offenders are not entitled to the same Eighth Amendment protections as nonhomicide offenders. 560 U.S. at 69 ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."). Put differently, the type of parole eligibility required to satisfy *Graham* would necessarily be more protective than what would be required to satisfy *Miller*.

[4] Johnson also relies on a study by the ACLU of Michigan Juvenile Life Without Parole Initiative, which purports to show that prison inmates in Michigan have a life expectancy of 58.1 years. Pet. 14. That report was never introduced below and is inconsistent with Virginia law, which governs with respect to life expectancy when no other evidence is introduced to the contrary. Va. Code Ann. § 8.01-419. Johnson cannot dispute the factual issue about his life expectancy at this late date.

conditional release as a form of parole.[5] The written parole factors include numerous considerations, for instance, that account for the offender's age at the time of the offense and his maturity and rehabilitation while incarcerated. *See* Va. Parole Bd., Policy Manual at 2-5.

In any case, this is not the place to debate that State-law question. The "State's highest court is unquestionably 'the ultimate exposito[r] of state law,'" *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)); *Mullaney*, 421 U.S. at 691 ("[W]e accept as binding the Maine Supreme Judicial Court's construction of state homicide law."), and the Supreme Court of Virginia squarely held in *Angel* that the geriatric-release statute makes juvenile nonhomicide offenders eligible for release at age 60 based on "the factors used in the normal parole consideration process." 704 S.E.2d at 402. The concurrence by Justices Mims and Goodwyn in *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016), reiterated that conclusion:

> The statute provides an age-based review according to normal parole considerations including the individual's personal, social and criminal history, his conduct in prison including engagement in rehabilitative and vocational programs, the sentence and type of

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[5] *See* Va. Dep't of Corr., Op. Proc. 820.1 at 2 (2011), https://vadoc.virginia.gov/about/procedures/documents/800/820-1.pdf; Va. Parole Bd., Policy Manual at 6-8 (2006), https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf.

> offense, changes in motivation, and results of psychological testing. *These considerations certainly allow the Board to consider age, maturity and rehabilitation as Graham instructs*.

Id. at 934-35 (Mims, J., concurring) (citation omitted) (emphasis added).

Johnson essentially is asking this Court to overrule its conclusion last term in *LeBlanc* that *Angel* is the binding interpretation of Virginia law and that "the geriatric release program employ[s] normal parole factors." 137 S. Ct. at 1729. He makes that request based on a single Justice's concurrence. *See* Pet. 14-16, 21. But "Justice Millette's concurring opinion in this case" did not show that *Angel* was an incorrect interpretation of Virginia law. *Id.* 21. In fact, the majority in this case reaffirmed *Angel*. *See* Pet. App. 11. It makes little sense to argue that a single Justice's concurring opinion trumps both the majority opinion in this case as well as a preexisting precedential opinion on the relevant legal issue. In short, the Supreme Court of Virginia, not Justice Millette, is the final authority on the scope and application of Virginia's parole laws.

Second, Johnson's statistical argument is misplaced. He asserts that, because "only 2.3 percent [of inmates] were granted release" under the geriatric-release program in 2011, the program is not similar to parole. Pet. 15. It is noteworthy that Johnson cites no source for that particular statistic, but the Commonwealth assumes he is generally relying on statistical data from 2010-2012 reflecting that, on average, 5.6%

of the eligible offenders who applied for geriatric release actually received it.[6] Even if that 5.6% figure were accurate—it is not, for the reasons given below—it would reflect a meaningful opportunity for release, i.e., a form of parole. During oral argument in *Graham*, Graham's counsel conceded at oral argument that a parole system that "grants parole to 1 out of 20 applicants"—5%—would satisfy the "meaningful opportunity" requirement. Tr. of Oral Arg. at 7:4-14, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412). Data showing an average 5.6% release rate under Virginia's geriatric-release program is slightly better than that. And one could fairly expect that the release-rate for homicide offenders would be lower than nonhomicide offenders.

More to the point, the statistical data relied on by Johnson seriously understates his true opportunity for release when he turns 60. Persons who offended before 1995 are currently eligible for traditional parole and geriatric release (but not both), while those who offended in 1995 or later, like Johnson, are eligible *only* for geriatric release. *See* Va. Code Ann. §§ 53.1-151, 53.1-165.1 (2013). So as Justice Mims pointed out in *Vasquez*, the current data underestimates a juvenile offender's actual release opportunity by failing to account for those offenders who "obtain release through traditional parole instead." 781 S.E.2d at 935 n.4 (Mims, J., concurring). In other words, as the current prison population ages, more and more who offended

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[6] *See* Pet. App. L at 2-3, *Vasquez v. Commonwealth*, 137 S. Ct. 568 (2016) (No. 16-5579).

in 1995 or later will be eligible *only* for geriatric release, thereby driving up those release statistics.

The data relied on by Johnson is also not representative of his situation. Again, as Justice Mims explained in *Vasquez*, "[a] hypothetical 17-year[-]old sentenced to a life sentence or a de facto life sentence in 1995 will not be eligible for geriatric release until 2038." *Id.* Indeed, the former head of the parole board explained that the geriatric-release program was created, at the same time that parole was abolished in 1994, to provide a release opportunity to persons "who were going to get very long sentences at a young age so they would have some opportunity to be released."[7] Because the current geriatric-release statistics do not yet include such prisoners, Johnson's data simply does not account for offenders like himself. In short, Johnson's challenge based on the *current* frequency of geriatric release is unripe; he has not been denied geriatric release and his eligibility is decades away. *See Vasquez*, 781 S.E.2d at 935; *see also Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' ") (citation omitted).

Because Johnson is eligible for release at age 60 based on consideration of normal parole factors, *Miller*

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[7] Frank Green, Richmond Times-Dispatch (Mar. 1, 2010), *available at* http://www.richmond.com/news/article_4969b0fe-bdca-5361-984a-7aeb0da2f87e.html.

does not apply. He is not serving a life-without-parole sentence.

B. *Miller* does not apply to discretionary sentencing schemes for homicide offenses.

Although the Supreme Court of Virginia did not reach the issue, the Virginia Court of Appeals denied Johnson's request for resentencing for a second reason: *Miller* does not apply to his discretionary sentence. Pet. App. 36. That conclusion is unremarkable given *Miller*'s express 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 (emphasis added). Because Virginia's sentencing scheme does not "mak[e] youth (and all that accompanies it) irrelevant" in determining Johnson's sentence, he has no claim for relief under *Miller*. *Id.*

Even if Johnson had not waived any argument based on *Montgomery*, he still would be wrong that *Miller* applies to discretionary sentences. There were two questions presented in *Montgomery*: (1) "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison"; and (2) did this Court "have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to [this Court's] decision in *Miller*?" *Montgomery*, 136 S. Ct. at 727; *see also id.* at 725 ("[c]ertiorari

was granted in this case to" answer "whether [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided"). This Court answered them both affirmatively and ordered the defendant resentenced. The holding in *Montgomery* simply was that the prohibition against mandatory life-without-parole sentences announced in *Miller* applies retroactively on collateral review. *Id.* at 736.

To put a fine point on it, *Miller*'s explicit constitutional guarantee is that no juvenile homicide offender will be sentenced to die in prison by legislative fiat; every juvenile offender must have had the opportunity to argue for a lesser sentence. And as discussed throughout, the trial court in this case had the option of sentencing Johnson to anywhere between 20 years and life for first-degree murder. Johnson argued then, and continues to argue now, that he should have received less than a life sentence based on his youth and immaturity. But after considering the evidence offered by Johnson and the Commonwealth, the trial court reached the opposite conclusion and exercised its discretion to impose a life sentence. The fact that Johnson was barely under the age of majority at the time of the offense was insufficient in the trial court's eyes to warrant a sentence less than life, given Johnson's significant criminal history and the heinousness of the crime: intentionally murdering a helpless father for money and drugs in front of his two-year-old child. A

discretionary life sentence for that crime does not violate *Miller* or the Eighth Amendment.

CONCLUSION

The petition for writ of certiorari should be denied.

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