NO. 17-326

In the
Supreme Court of the United States

RAHEEM JOHNSON,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

The Virginia Supreme Court held that Raheem Johnson's life sentence was not subject to the constitutional protections recognized in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *See* App. 10–12. It also upheld the trial court's sentencing procedures, even though that court did not appoint an expert or employ other procedures sufficient to properly consider Johnson's potential for rehabilitation. *See* App. 9–10. As a result, Johnson will likely die in prison with no reasonable opportunity to show that he was not the "rare child[] whose crimes reflect[ed] irreparable corruption." *Montgomery*, 136 S. Ct. at 734. In seeking review, Johnson requests that the Court vindicate its earlier holdings: sentencing a juvenile to die in prison, without providing him with any meaningful opportunity to show the diminished culpability common to most juvenile offenders, violates the Eighth Amendment.

The Commonwealth's opposition goes all-in on its assertion that Johnson waived any argument based on *Montgomery*, but that assertion was implicitly rejected by the Virginia Supreme Court, which declined to find waiver and addressed *Montgomery* in response to the arguments that Johnson raised. The Commonwealth also disclaims any relevant division in the lower courts, trying hard to distinguish the cases cited in the petition. But the distinctions it identifies do not hold water. The Commonwealth cannot escape the reality that the courts below are divided over (1) what types of life sentences trigger the scrutiny that *Miller* and *Montgomery* require,

and (2) what evidence should be considered at sentencing, including the role of expert testimony. Nor can it meaningfully defend the constitutionality of Johnson's sentence or the procedures used to reach it. Instead, the Commonwealth's response only confirms the need for this Court to address the important question it was unable to resolve in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017). The Court should grant review.

I. Johnson Has Not Waived His Arguments.

The centerpiece of the Commonwealth's opposition is its assertion that Johnson has waived any argument based on *Montgomery*. *See* Opp. 7–8, 9–12, 16–17. That position lacks merit.

The Commonwealth advanced the same waiver argument below, and it was baseless then too. *See* Appellee Br., *Johnson v. Commonwealth*, No. 141623, 2016 WL 9024628, at *15 n.11 (June 20, 2016). Before the Virginia Supreme Court, Johnson properly preserved his arguments that Virginia's geriatric-release program does not provide a constitutionally adequate opportunity to obtain early release, that he was entitled to an appointed expert, and that *Miller* principles apply to non-mandatory sentences. *See* Appellant Br., *Johnson v. Commonwealth*, No. 141623, 2016 WL 9024630, at *21–23 (May 25, 2016). It is hardly surprising that, in light of these arguments, the Virginia Supreme Court never accepted the Commonwealth's waiver contentions. In fact, nowhere does the lower court's decision even mention waiver. *See* App. 1–24.

Had Johnson waived any argument, the Virginia Supreme Court would "not [have] consider[ed] it on appeal." *Schmitt v. Commonwealth*, 547 S.E.2d 186, 194 (Va. 2001). Instead, the majority opinion and Justice Millette's concurrence both address *Montgomery* and its relevance to this case, confirming that the justices understood Johnson's position. App. 11 & 13–16. This Court is in any event entitled to review the lower court's "[f]inal judgment." 28 U.S.C. § 1257(a). Accordingly, even if the Virginia Supreme Court had addressed the argument *sua sponte*, the issue would be properly before the Court. *See, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 417–18 (1991) (granting certiorari on issue decided by Georgia Supreme Court "without briefing or arguments from the parties").

The Commonwealth ignores the state court's actual decision, quoting instead from its own brief below, *see* Opp. 10, and pointing to one justice's comment at oral argument, *see id.* at 11. But questions at argument are not holdings. *See Shareholder Rep. Servs. v. Airbus Ams., Inc.*, 791 S.E.2d 724, 728 (Va. 2016) ("a court speaks only through its written orders"). If anything, a question raised at argument but never addressed reinforces the conclusion that the lower court considered and rejected the Commonwealth's waiver argument. There is, in short, no impediment to this Court considering the questions presented.

II. The State Courts Are Divided Over This Court's Juvenile-Sentencing Precedents.

The Commonwealth cannot deny that the lower courts are divided over the proper application of this Court's juvenile-sentencing precedents. Nor can it dispute that the lower courts disagree over the scope of their constitutional obligations when sentencing juveniles to life in prison (and the role that expert testimony should have in that process). Instead, the Commonwealth tries unconvincingly to distinguish the cases.

First, relying on its stillborn waiver theory, the Commonwealth urges the Court to ignore "cases that considered *Montgomery* in reaching their conclusion." Opp. 16. But it does not and cannot deny that the lower courts do not apply *Montgomery* consistently. The Commonwealth's efforts to cast aside these cases based on a waiver that never occurred is best seen as a tacit admission that it has no response to this division in authority.

Second, the Commonwealth urges the Court to ignore cases that considered the constitutionality of lengthy term-of-years sentences that were not called "life without parole" and did not involve juvenile homicide offenders, Opp. 14–16, arguing that non-homicide cases raise different considerations, *id.* at 16, and that Johnson never challenged the 42 years he received for his non-homicide offenses, *id.* at 14. But Johnson's total sentence of "life plus 42 years," App. 45–46, cannot and should not be split up and handled piecemeal. In any event, by exalting form over substance, the Commonwealth misses the point. As the petition explains, when a sentence is for a

term of years that is the functional equivalent of life without parole—whether the sentence is imposed in either a homicide or a non-homicide case—there is no principled reason to treat the sentence differently from a sentence that is called "life without parole." Pet. 10. The disagreement in the lower courts over that issue—whether constitutional principles require a functional analysis that takes into account the sentence's practical effect, or a formalistic one that turns on the labels the state itself has created—reflects the same problematic approach underlying the decision below.

Third, the Commonwealth tries to distinguish two cases on the view that one was decided on state constitutional grounds and the other involved a non-juvenile defendant. This effort also fails. The case decided on state-law grounds, *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016), did not reach its decision before first surveying the *federal baseline* established by this Court's precedents. The state court concluded that if this Court's jurisprudence "developed after *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] has any application to cases involving life in prison without parole, the process for making the determination of which offenders are most culpable would be resource intensive, *require expert testimony*, and would not be a matter left to the unguided discretion of the sentencer." 879 N.W.2d at 834–35 (emphasis added). Similarly, although the defendant in *Alexander v. Kelley* was over eighteen, the Arkansas Supreme Court emphasized, as an alternative ground for its decision, that "his sentence was not *mandatorily* imposed." 516 S.W.3d 258, 261 (Ark. 2017) (emphasis added); *see U.S. v. Title Ins. & Trust Co.*,

265 U.S. 472, 486 (1924) ("where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court") (quotation marks omitted).

Fourth, the Commonwealth complains that two of the many cases cited in the petition were not holdings of their respective states' highest courts. Opp. 17. True, but these cases illustrate the depth of the divisions in authority that plague the lower courts. Indeed, the split has only widened since Johnson filed his petition. *See People v. Holman*, — N.E.3d —, 2017 WL 4173340, at *9 (Ill. Sept. 21, 2017) (acknowledging the split and concluding that all "[l]ife sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the [E]ighth [A]mendment, unless the trial court considers youth and its attendant characteristics").

Finally, the Commonwealth argues that, although the lower courts disagree over whether *Miller* applies to both mandatory and discretionary sentences, the Virginia Supreme Court did not address that issue. Opp. 18–19. But *if,* as Johnson contends, the Virginia court's conclusion regarding the supposed equivalence of "geriatric release" and "parole" was wrong, to obtain relief Johnson must show that *Miller*'s rule applies to his discretionary sentence—a question on which the courts are divided. Unless the Commonwealth is willing to concede the point, the divisions in the lower courts remain relevant to this petition.

III. The Procedures Used In Johnson's Sentencing Violate The Eighth Amendment.

The Commonwealth contends that Johnson's sentence complies with all constitutional requirements, but its arguments only confirm the need for this Court to address the important question left unanswered in *LeBlanc*—namely, whether *Miller* applies to a life-in-prison sentence imposed on a juvenile whose only opportunity for release is Virginia's geriatric-release program. Answering that question is an opportunity to provide clarity on the principles that govern when juveniles are sentenced to life in prison, the factors courts must consider when imposing those sentences, and what baseline safeguards the courts must apply to ensure the sentences' constitutionality.

A. Johnson's Sentence Is Equivalent To Life Without Parole, And Thus Triggers *Miller* Protections.

As Johnson's petition explains, the Virginia Supreme Court wrongly held that *Miller* was inapplicable because Johnson may seek geriatric release at age 60. App. 12. Even if geriatric release *were* a parole-like substitute (it is not), Johnson still faces 42 years in prison without parole, which other courts have correctly concluded is the functional equivalent of a life sentence without parole. *See Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (concluding that sentence of 45 years is equivalent to life without parole). By contrast, the average adult offender sentenced to life without parole—whose presumed maturity justifies a harsher sentence—serves a sentence shorter than 40 years. Pet. 14.

The Commonwealth contends that the possibility of geriatric release is just as good as parole, claiming that the "same factors that apply in parole also apply to conditional release." Opp. 22. That is wrong. As the documents cited by the Commonwealth make clear, and as Justice Millette exposed in his concurring opinion, *see* App. 20–21, geriatric release in Virginia may be denied at the "Initial Review" stage "by majority vote of the Parole Board" for any reason, before beginning the "Assessment Review"—the stage at which normal parole considerations are reviewed. *See* Va. Dep't of Corr., Op. Proc. 820.1, at 2 (2011), *available at* http://bit.ly/2i7Uqv3 (citing procedure § 1.226); Va. Parole Bd., Admin. Procedures Manual, § 1.226, *available at* http://bit.ly/2vGTo11.

Nor is there anything to the Commonwealth's form-over-substance argument that the "parole manual defines conditional [geriatric] release as a form of parole." Opp. 22–23. Virginia might just as easily call prison recreation or meal times "parole." Pet. 16. Unless the juvenile is given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," the sentence violates the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

The Commonwealth next contends that the Virginia Supreme Court's blessing of geriatric release as constitutionally sufficient should be decisive. Opp. 23 (citing *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011)). But whether parole and geriatric release are equivalent for purposes of the Eighth Amendment is a question of *federal*, not state law.

Nor is Johnson "essentially … asking this Court to overrule … *LeBlanc*"—a case decided on collateral review and thus subject to AEDPA's heightened deference requirements. Opp. 24. In *LeBlanc*, this Court recognized that arguments that "a geriatric release program does not satisfy the Eighth Amendment" are "arguments [that] cannot be resolved on federal habeas review." 137 S. Ct. at 1729. Those arguments must instead be resolved on *direct review* of a sentencing decision—in other words, in the posture of this case.

The Commonwealth even goes so far as to suggest that this Court should ignore that prison inmates on average do not live as long as the general population, and that it should substitute instead the Virginia legislature's codified life-expectancy table that applies in the context of civil remedies and procedures. Opp. 21–22 & n.4 (citing Va. Code Ann. § 8.01-419). But, again, this is a question of constitutional requirements, not state law. The average juvenile sentenced to life in prison will die before he is old enough, at age 60, to apply for geriatric release. Pet. 14–15.

The Commonwealth also argues for a narrow reading of *Miller*, limiting its application only to mandatory sentences. Opp. 27–28. Johnson has never disputed that *Miller* was decided in the context of a mandatory life-without-parole sentence. Nor has he hidden the fact that his life sentence for first-degree murder is a non-mandatory one. Instead, Johnson asked the Virginia Supreme Court to recognize that *Miller* applies to non-mandatory life sentences, because there is no principled or practical

distinction between mandatory and discretionary life sentences. In one instance, the constitutional violation occurs by mandate of the state legislature; in the other, it is imposed by the state trial court. But in both instances, the constitutional concerns are the same. The unconstitutional invasion of a right does not become constitutional merely because it is executed by a different branch of government. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection*, 560 U.S. 702, 714 (2010) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.").

In Virginia, juveniles sentenced to life in prison serve more time than adults convicted of the same crimes and are exceedingly unlikely ever to leave prison once they enter. That is because Virginia's geriatric-release program is not equivalent to parole, including because it permits requests for release to be denied without considering maturation or rehabilitation. To meet the Eighth Amendment's requirements, Virginia may not impose a sentence of life without parole or its functional equivalent unless an individualized inquiry shows that the juvenile offender is irreparably corrupt. *See Montgomery*, 136 S. Ct. at 734.

B. The Trial Court's Sentencing Inquiry Violated The Eighth Amendment.

This Court has held that individualized sentencing procedures must be sufficient to separate "children whose crimes reflect transient immaturity [from] those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at

734; *see also Tatum v. Arizona*, 137 S. Ct. 11 (2016). Nonetheless, the Commonwealth claims it was enough that the trial court in this case reviewed general articles about juvenile brain development and "individualized" the sentence by looking backward at Johnson's school records and the facts of his crime. Opp. 12–13.

The evidence reviewed by the trial court was not sufficient to assess whether *this particular juvenile offender* should die in prison. The Commonwealth cites nothing in the trial court's order establishing that it had the information or performed the inquiry necessary to reach a particularized conclusion about Johnson's maturity and capacity for rehabilitation. Opp. 12–13. Instead, the trial court focused entirely on backward-looking factors (Johnson's "history of disrespect for authority and aggressive behavior … coupled with the brutality of the offense") that demonstrate no consideration of whether Johnson is permanently incorrigible. The Commonwealth's foregrounding of the undisputed heinousness of Johnson's crime, Opp. 1–2, betrays the same backward-looking bias. If a juvenile can be deemed incorrigible merely because he committed crimes as a youth, then *Miller* and *Montgomery* are meaningless. All juveniles facing a possible life sentence have, by definition, committed serious, often heinous crimes.

Contrary to the Commonwealth's position, Opp. 12–13, *Miller* and *Montgomery* require a different type of inquiry: before imposing the harshest sentences, a court must consider a juvenile offender's capability for rehabilitation and maturation. And its analysis must be forward-looking and predictive—the

court must assess whether the defendant is "the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479–80). Nor is this a hypothetical concern, as illustrated by the histories of juveniles who have committed serious crimes but nevertheless matured into responsible, prominent, and inspiring citizens. *See* Br. of Former Juvenile Offenders, *Graham v. Florida*, No. 08-7412, 2009 WL 2219302 (July 23, 2009).

The Commonwealth nowhere disagrees that an expert is needed to perform that analysis. *See* Opp. 19–20. The Commonwealth does not even dispute that Johnson satisfies the three factors governing appointment of a state-appointed expert. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017); *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). This Court has recognized that predicting a young person's capacity for change is challenging *even with* an expert. *See Roper v. Simmons*, 543 U.S. 551, 573 (2005) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."). That inherent difficulty reinforces the need for professional assistance, not the speculation that drove the trial court's sentencing decision.

* * * *

This case, on direct appeal, presents an ideal vehicle for this Court to consider the important constitutional questions raised in Johnson's petition. *See* Pet. 19–22. The two issues presented are

recurring questions of law and provide an opportunity for this Court to resolve significant disagreement and confusion in the lower courts. Speaking clearly on these questions will help ensure that the sentences imposed on juvenile offenders meet basic constitutional requirements.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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