No. 18-217

In the Supreme Court of the United States

RANDALL MATHENA, WARDEN,

Petitioner,

v.

LEE BOYD MALVO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Our position is straightforward. This Court's decision in *Miller* v. *Alabama*, 567 U.S. 460 (2012), repeatedly stated its holding in terms of mandatory life without parole sentences. See Pet. 12–13 (quoting four such statements from *Miller*). Applying the framework set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989), this Court's decision in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), held that *Miller*'s "holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Id.* at 725; see also *id.* at 736. But *Montgomery* did not purport to extend or change the new constitutional rule announced in *Miller*, and any such step would have been inconsistent with *Teague*'s basic approach to retroactivity. Because *Montgomery*'s holding—like *Miller*'s—applies only to "mandatory life-without-parole sentences," *Miller*, 567 U.S. at 470, it too provides no basis for granting relief where, as here, state law requires no such sentence.

Respondent and the federal court of appeals whose territory includes Virginia disagree with that analysis. So do other circuits and state courts of last resort. But Virginia's highest court agrees with us, and that court, too, is not alone in its view. Because there is a deep and intractable split over this question—and because Virginia is currently facing the same "legal quagmire" that led this Court to grant review in *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1730 (2017)—the Court should grant certiorari and reverse the Fourth Circuit's decision.

I. There is a direct split

1. If nothing else, this case warrants certiorari because of the stark and irreconcilable conflict between two appellate courts encompassing the same territory: the United States Court of Appeals for the Fourth Circuit and the Commonwealth of Virginia's highest court. See Pet. 7–9.

In this case, the Fourth Circuit specifically "reject[ed] the Warden's argument that [respondent] 'has no entitlement to relief under *Miller*'" because "*Miller* applies only to mandatory life-without-parole sentences." Pet. App. 20a–21a. Instead, the Fourth Circuit concluded, respondent was entitled to relief because "*Miller*'s holding potentially applies to *any* case where a juvenile homicide offender *was sentenced to* life imprisonment without the possibility of parole." *Id.* at 21a (emphasis added).

Respondent does not deny that Virginia's highest court has reached precisely the opposite conclusion. The Supreme Court of Virginia has squarely held that, even after *Montgomery*, the Eighth Amendment prohibits only *mandatory* life-without-parole sentences for juvenile homicide offenders. See *Jones* v. *Commonwealth*, 795 S.E.2d 705, 721 (Va.) (*Jones II*) (stating that "[b]oth" *Miller* and *Montgomery* "addressed *mandatory* life sentences without the possibility of parole"), cert. denied, 138 S. Ct. 81 (2017); accord *id.* at 723 ("Having reconsidered *Jones I* in light of *Montgomery*, we reinstate our holding in *Jones I*. . . ."); see *Jones* v. *Commonwealth*, 763 S.E.2d 823, 826 (2014) (*Jones I*) ("We hold that because a [capital murder conviction]

does not impose a mandatory minimum sentence under Virginia law, *Miller* is not applicable even if it is to be applied retroactively.").

Respondent offers two takes on the Supreme Court of Virginia's decision in *Jones II*. First, respondent suggests that "the precedential value of [*Jones II*'s] discussion of" the relationship between *Miller* and *Montgomery* "is questionable" because (in respondent's view) that discussion "was not necessary to [the Supreme Court of Virginia's] disposition of the case." BIO 18–19.

But the Virginia Supreme Court's holding in *Jones II* was clear and explicit. In both the second line of that opinion and the very last one, the court stated that it was "reinstat[ing] our holding in *Jones I*," 795 S.E.2d at 707, 723, which was that "*Miller* was inapplicable to the Virginia sentencing law at issue 'even if it is to be applied retroactively.'" *Id.* at 708 (quoting *Jones I*, 763 S.E.2d at 826). Virginia's highest court would surely be surprised to hear a conclusion announced in *Jones II*'s opening and closing paragraphs and the subject of several pages of analysis, *id.* at 711–15—including a spirited back and forth with dissenting justices, *id.* at 720–23—dismissed as nothing more than "dicta." BIO 19 (citation omitted). We take the Supreme Court of Virginia at its word, as will the lower state courts that are bound to follow it.

Respondent's second response to *Jones II* is more straightforward: "That decision, simply put, is wrong." BIO 10. But the sharp disagreement between respondent and the Fourth Circuit, on one hand, and petitioner

and Virginia's highest court, on the other, provides a reason to *grant* certiorari, not deny it. Compare BIO 20–27; Pet. App. 17a–21a, with Pet. 11–18; *Jones II*, 795 S.E.2d at 711–13, 721–23. Indeed, denying certiorari here would, in effect, allow a federal court of appeals to overrule a decision by Virginia's highest court about the meaning of the Eighth Amendment. See *Davila* v. *Davis*, 137 S. Ct. 2058, 2070 (2017) (emphasizing that "[f]ederal habeas review of state convictions entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority") (citations and internal quotation marks omitted); see also *Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.").

2. Our petition made clear that the main reason we are seeking review is because "[t]he Fourth Circuit's decision has created a direct split with Virginia's highest court on the same important matter." Pet. 7 (emphasis removed); see also *id.* at 7–9. At the same time, however, we also noted that "[t]he nationwide split of authority about how to interpret *Miller* and *Montgomery* also weighs in favor of granting review." Pet. 9 (emphasis removed).

Respondent, however, turns a single paragraph from our petition into the focal point of his response, delving at length into the facts of those cases and

claiming that we are wrong about whether there is a broader split of authority. See BIO 11–17.

But even accepting respondent's interpretation of those cases, there is *still* a broad split. Respondent does not deny that other courts of appeals and state courts of last resort have agreed with the Fourth Circuit's view and disagreed with the Supreme Court of Virginia's. To the contrary, respondent argues that "[t]he courts of at least eleven states" have agreed with the Fourth Circuit's view that, at least after *Montgomery*, there is "no distinction between 'mandatory' and 'discretionary' sentencing schemes." BIO 16. So even if respondent were right about all of the non-Virginia cases, there *still* would be a split between Virginia and those States.[1]

In any event, respondent is also mistaken that no other state court of last resort has aligned itself with Virginia. BIO 13–16. Take *State* v. *Charles*, 892 N.W.2d 915 (S.D. 2017), for example. A juvenile offender who had been "resentenced . . . to 92 years in prison" appealed, arguing that "[t]he constitution categorically prohibits sentencing a 14-year-old child to die in prison." *Id.* at 917, 919. The Supreme Court of South

[1] It is not uncommon for this Court to grant certiorari even when the split of authority is weighted to one side or the other. See, *e.g.*, *Buckhannon Bd. & Care Home* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 601–02 & n.3 (2001) (noting split of authority with nine circuits on one side and one circuit on the other); see also *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1193 (2018) (noting six-to-one split); *JP Morgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (three-to-one split).

Dakota rejected the defendant's argument—but not for the reasons given by respondent. See BIO 14–15. Instead, the court *assumed* that the defendant's 92-year sentence was "*equivalent to* a sentence of life without parole," but emphasized that "that alone *does not mean* his sentence is unconstitutional under Eighth Amendment precedent." *Charles*, 892 N.W.2d at 920 (emphasis added). Instead, the South Dakota Supreme Court read this Court's precedents as "bar[ring] *mandatory* life sentences without parole against juvenile homicide offenders, not *discretionary* sentences of life without parole." 892 N.W.2d at 920.

Nor does *Charles* stand alone. In *United States* v. *Jefferson*, 816 F.3d 1016 (8th Cir. 2016), for example, the Eighth Circuit declined to decide whether "*Miller*'s categorical ban applies to" "de facto life sentence[s]," holding instead that the defendant's sentence did not fit "within *Miller*'s categorical ban on *mandatory* life-without-parole sentences" because his sentence was "discretionary." *Id.* at 1019. There are also all of the other decisions whose language respondent strains to dismiss as "stray observations" and "dicta." BIO 13; see also Pet. 9-10. In short, respondent is simply wrong in claiming that the Supreme Court of Virginia stands alone in understanding *Miller* and *Montgomery* as prohibiting only mandatory life-without-parole sentences.

II. The decision below is wrong

Nothing in respondent's brief in opposition impacts our argument on the merits. To the contrary, we are (still) unaware of any post-*Teague* cases where a decision about the retroactivity of an earlier decision was understood as substantially expanding the very constitutional rule whose retroactivity was in debate. Pet. 16–17.

Respondent offers two general answers. First, respondent challenges our argument about what *Miller* actually held. See BIO 20–27. Second, respondent argues that a 1989 decision that declined to adopt a new constitutional rule somehow shows that the Fourth Circuit's approach was not so novel after all. See BIO 29–31. The first argument weighs in favor of granting certiorari, and the second point is incorrect.

1. Respondent's merits argument largely mirrors the approach taken by the Fourth Circuit. See Pet. App. 17a–21a. We think the Fourth Circuit and respondent are wrong, see Pet. 11–18, but we will not belabor those points here.

We note, however, that despite his lengthy discussion of *Miller*, respondent only once quotes (one of) *Miller*'s (numerous) clear statements of its actual holding—and even then only in the Statement section of the brief in opposition. See BIO 5 (quoting *Miller*'s statement that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"). In contrast, we quoted four such statements in the petition for a writ of certiorari, *all* of which are expressly

limited to *mandatory* life-without-parole sentences. See, *e.g.*, *Miller*, 567 U.S. at 465 ("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.'") (emphasis added); accord Pet. 12–13.

Respondent also appears to endorse a proposition that this Court disclaimed in *Montgomery*. In *Montgomery*, the Court stated that "[g]iving *Miller* retroactive effect . . . [will] not require States to relitigate sentences, let alone convictions, in *every* case where a juvenile offender received mandatory life without parole." 136 S. Ct. at 736 (emphasis added). Yet respondent appears to view those decisions as granting a right to resentencing to *every* juvenile offender serving a life-without-parole sentence that was imposed before *Miller*. BIO 2.

2. Respondent's reliance on *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), is inapt and provides no basis for denying certiorari. For one thing, as respondent acknowledges, *Penry* did not adopt a new rule of constitutional law while simultaneously concluding that it applies retroactively on collateral review. BIO 30. To the contrary, the *Penry* Court *declined* to hold that the Eighth Amendment "preclude[d] the execution of any mentally [incapacitated] person of Penry's ability" in the first place. 492 U.S. at 340. It is hard to see how *Penry* supports the view that a court may "refine an existing rule and apply it retroactively," BIO 31, when *Penry* itself did neither of those things.

In any event, nothing in *Penry* conflicts with our argument here. Our view is not that this Court *could never* announce a new substantive rule of constitutional law while simultaneously deciding that that rule applies retroactively to cases on federal habeas review. Instead, our argument rests on something much simpler: The *Montgomery* Court *did not purport to and did not announce* any new rule of constitutional law. See Pet. 15 (describing the question presented in *Montgomery* and this Court's express holding). That fact alone distinguishes *Penry*, where the question presented was about the substantive requirements of the Eighth Amendment. Pet. Br. at i, *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (No. 87–6177) ("Is it cruel and unusual punishment to execute an individual with the reasoning capacity of a seven year old?"), available at 1988 WL 1022992.

It also would be inconsistent with *Teague*'s entire approach to construe a decision where this Court granted certiorari for the express purpose of deciding whether an earlier decision is retroactive as having silently expanded the categories of punishment prohibited by the Eighth Amendment. See Pet. 16–17. After all, the basic insight underlying the *Teague* framework is that the decision whether a new rule should be adopted is analytically distinct from whether that new rule should be allowed to affect cases that have already become final because of the conclusion of review. It thus makes little "sense" to allow new rules to themselves be "refine[d]" as part of a stand-alone retroactivity determination. BIO 30–31.

III. The question presented is of considerable importance

We agree, and respondent does not dispute, that the broader *Teague* question presented here does not yet appear to have arisen in "any other context." BIO 29. Respondent is wrong, however, that that fact weighs against certiorari. The question of whether decisions about the retroactivity of previously adopted new rules of constitutional law can properly be understood as themselves expanding the substantive constitutional rule is of considerable real-world importance. The Fourth Circuit's published decision here and those like it provide an easy road map for future litigants to argue that any decisions about retroactivity have, themselves, substantially expanded the underlying rule of constitutional law. Such an outcome would risk exponentially increasing litigation on collateral review every time this Court announces a new rule of constitutional law by expanding the arguments available to litigants.

* * *

We reiterate that, contrary to respondent's suggestion, BIO 23–27, we are not seeking to relitigate *Montgomery*. This Court's decision in *Miller* established a new rule of constitutional law, and *Montgomery* holds that that new rule must be given retroactive effect to cases pending on collateral review. As a result of those decisions, judges and juries may not be compelled to sentence juvenile homicide offenders to die in prison without being able to consider the offender's individual

circumstances and prisoners who were previously sentenced under such constraints are entitled to relief.

Whether the Eighth Amendment categorically bars a trial court from exercising its discretion to impose a life-without-parole sentence unless certain findings are made (presumably on the record) is a different inquiry. As we pointed out in our petition, *Montgomery* makes a powerful case for why juveniles should, or even must, be treated differently under the Eighth Amendment even with respect to discretionary sentences. Pet. 17–18. But unless the Court intends to jettison the *Teague* framework for retroactivity, the proper approach here is to grant certiorari and make clear that *Montgomery* stands for exactly what it holds: that the specific constitutional rule announced in *Miller* (no mandatory life without parole for juvenile homicide offenders) is retroactive to cases on collateral review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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