No. 16-1337

IN THE
Supreme Court of the United States

DONTE LAMAR JONES,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari To the Virginia Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The questions presented in this petition ask whether the Virginia Supreme Court is required to give effect to the Eighth Amendment's prohibition against cruel and unusual punishment. Three justices of the Virginia Supreme Court concluded the precedent of this Court requires an examination of the constitutionality of Jones' sentence to life without parole. But a four-justice majority of the Virginia Supreme Court concluded that this Court's decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) do not require Virginia courts to re-examine life without parole sentences for juveniles or even require Virginia courts to hear a motion to vacate a sentence based on *Miller* and *Montgomery*.

In its brief in opposition, the Commonwealth argues this Court lacks jurisdiction to consider the Supremacy Clause question presented. The Commonwealth further argues the Court should decline review because Jones entered an *Alford* plea, because Jones was sentenced to an additional term of life plus 68 years, because Jones filed a federal habeas petition, and because the Virginia majority is "correct" that courts are not required to actually consider the mitigating qualities of youth before sentencing a juvenile to life without parole.

None of these arguments avoids the pressing need for the Court to address the questions presented. Indeed, a failure to grant review will encourage other states to hold that the precedent of this Court does not apply to them, that state courts are not required to hear federal constitutional claims in state collateral review proceedings, and that the

Eighth Amendment does not require consideration of the mitigating qualities of youth before sentencing juveniles to life without parole.

ARGUMENT

I. THE COURT HAS JURISDICTION TO ADDRESS THE SUPREMACY CLAUSE QUESTION PRESENTED.

In an effort to avoid review, the Commonwealth recasts the first question presented as whether this Court has jurisdiction to overrule the Virginia Supreme Court's determination of the types of claims that may be raised in state collateral review proceedings. (Opp. i, 13). But Jones does not ask this Court to address whether Virginia courts are required to hear a motion to vacate an invalid sentence, something Virginia courts regularly do. Jones asks the Court to address whether Virginia can "simultaneously hold its courts open to a motion to vacate a sentence as void under *state law* and deny Jones the right to pursue a motion to vacate his sentence as void under the *U.S. Constitution*." (Pet. 11–12). This is a "question of great importance" the Court should "grant[] certiorari" to hear. *Testa v. Katt*, 330 U.S. 386, 388 (1947).

A. Virginia Courts Have Jurisdiction to Hear a Motion to Vacate an Invalid Sentence.

The Virginia Supreme Court acknowledges Virginia courts have jurisdiction to hear, at any time, a motion to vacate a sentence that is "void ab initio," a sentence that "the trial court lacked 'the

power to render.'" (Pet. App. 27a). The court explained in *Rawls v. Commonwealth*, 278 Va. 213, 217–18 (2009), that "a motion to vacate is an appropriate procedural device to challenge a *void* conviction . . . . [and] [a] circuit court may correct a *void or unlawful* sentence at any time." *Id.* (emphasis added). The court held in *Rawls* that a motion to vacate was proper to challenge a sentence as "*void* because it exceeded the statutory range provided by law." *Id.* at 217 (emphasis added). The court further held "that a sentence imposed in violation of the prescribed statutory range . . . is void *ab initio* because 'the character of the judgment was not such as the [C]ourt had the power to render." *Id.* at 221.

Virginia has not—until now—suggested that a motion to vacate is limited to state law claims. On the contrary, the Virginia Supreme Court previously has considered federal constitutional claims presented in a motion to vacate. (Pet. App. 61a). Nearly five years after pleading guilty, the Lovings filed a motion to vacate their sentences under Virginia's miscegenation statute as violative of the U.S. Constitution. The Virginia Supreme Court affirmed the denial of the Loving's motion on the merits, *Loving v. Commonwealth*, 206 Va. 924 (1966), a decision this Court reversed in *Loving v. Virginia*, 388 U.S. 1 (1967).

B. Virginia's Attempt to Limit Collateral Review to State Law Claims Violates the Supremacy Clause.

The Virginia majority seizes on the use of the phrase "void *ab initio*" in *Rawls* to assert that a motion to vacate is a procedural device that may be used to raise only claims that assert a sentence is "void *ab initio*." The Virginia majority observes this Court in *Montgomery* used the word "void," instead of the phrase "void *ab initio*" to describe the effect of a sentence imposed in violation of *Miller*. The Virginia majority concludes the use of the word "void" in *Montgomery* means a sentence imposed in violation of *Miller* is "merely voidable." (Pet App. 34a). Because a sentence imposed in violation of *Miller* is (in the eyes of the Virginia majority) merely "voidable", it holds that Jones' motion to vacate his sentence was improper.

The Virginia majority's reasoning not only strains common English usage, interpreting "void" to mean "voidable,"[1] it also turns on a question of *federal law*. This Court decides the effect of a sentence imposed in violation of *Miller* and did so in *Montgomery*, holding:

> Substantive rules [such as that announced in *Miller*], then, set forth categorical constitutional guarantees that place certain criminal laws and

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[1] *See, e.g., Void, Voidable, Black's Law Dictionary* (7th ed. 1999) (defining "void" as "[o]f no legal effect" and defining "voidable" as "[v]alid until annulled").

> punishments *altogether beyond the State's power to impose.* It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, *by definition, unlawful.*

136 S. Ct. at 729–30 (emphasis added). "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. . . . [A] court has no authority to leave in place a conviction or sentence that violates a substantive rule." *Id.* at 731. In short, *Montgomery* makes plain that a sentence imposed in violation of *Miller* is not, as the Virginia majority argues, valid until annulled; it is of no legal effect. To use the Latin, it is "void *ab initio*." *See Singh v. Mooney*, 261 Va. 48, 51–52 (2001).

Recognizing the flaws in the Virginia majority's reasoning, the Commonwealth offers an alternative construction of when a motion to vacate is proper. The Commonwealth argues that a motion to vacate is a collateral review process limited to "challenges that the sentencing court lacked subject-matter jurisdiction." (Opp. 13). The Commonwealth contends that such challenges are limited to circumstances where, for example, the "court imposes a sentence outside the range set by the legislature." (*Id.* at 14). The Commonwealth concludes that "[b]ecause [Jones'] argument was not about the sentencing court's jurisdiction to impose a life-without-parole sentence, the Supreme Court of Virginia concluded that [his] motion was procedurally improper." (*Id.*).

The Commonwealth's argument not only appears to conflict with the precedent of the Virginia Supreme Court, *see* (Pet. App. 33a) ("we . . . recognize[] the efficacy of motions to vacate to remedy orders that are void ab initio"); *Singh*, 261 Va. at 51–52 ("an order is void ab initio if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court has no power to render it, or if the mode of procedure used by the court was one the court could 'not lawfully adopt'"), it misapprehends both the nature of Jones' claim and the jurisdiction of Virginia courts. Jones' argument *is* about the sentencing court's jurisdiction to impose his sentence. Jones asserts the Virginia trial court lacked jurisdiction to sentence him to life without parole without affording him an individualized consideration of the mitigating qualities of his youth—that "'the character of the judgment was not such as the Court had the power to render.'" (Pet. App. 134a) (quoting *Burrell v. Commonwealth*, 283 Va. 474, 480 (2012)). This is so because Virginia courts not only lack the power to render, "a sentence outside the range set by the legislature," Virginia courts also lack the power to impose a sentence that violates a substantive constitutional guarantee. *Id.* at 730–731. In each instance, the court acts without jurisdiction and the sentence imposed is void; it is of no legal effect.

Precisely because the nature of the claim is the same—the sentence is void because the court lacked the power to impose it—Virginia cannot restrict motions to vacate to those that present state law claims. States are not required to open their courts to any claims, but where state courts have

"jurisdiction adequate and appropriate" to adjudicate a claim under state law, "the State courts are not free to refuse" to adjudicate an analogous claim under federal law. *Testa v. Katt*, 330 U.S. 386, 394 (1947). Nor may a state, as Virginia seeks to do here, avoid hearing federal constitutional claims by asserting that federal claims are relegated to an alternative, more limited, collateral review process that does not allow such claims to be heard. "Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." *Montgomery*, 136 S.Ct. at 731.

II. NONE OF THE PURPORTED "DEFECTS" THE COMMONWEALTH IDENTIFIES PRECLUDE REVIEW.

The Commonwealth raises a number of purported "defects" it contends counsel against review. None do.

A. Jones' *Alford* Plea.

The Commonwealth first argues the Court should not grant Jones' petition because he did not include a separate question presented addressing the Virginia majority's alternative holding that Jones waived his *Miller* claim, a holding the Virginia majority devoted a mere 3 pages to in its 42-page opinion. (Opp. 19–20); *see* (Pet. App. 18a–21a). Jones' conclusion that this alternative holding was not worthy of a separate question presented does not counsel against review. Jones explains in his petition why the Virginia majority's alternative

holding is legally and factually wrong. (Pet. at 9–10 n. 6). The issue is "fairly included" in Jones' petition, *see* Rule 14.1(a), and the Court may, of course, grant consideration of the issue as an additional question presented, if necessary.

Remarkably, after critiquing Jones' decision to omit a separate question presented on the issue of whether Jones waived his *Miller* claim, the Commonwealth argues there is no split of authority on this issue warranting review, *i.e.*, there is no split of authority warranting review of a question Jones has not asked the Court to review. (Opp. at 27–28). The Commonwealth's argument confirms Jones' view the issue does not warrant consideration as a separate question presented.

The Commonwealth nonetheless proceeds to argue that the Virginia majority's holding that Jones waived his *Miller* claim is "consistent" with *Brady v. United States*, 397 U.S. 742 (1970). (Opp. 28). But *Brady* is inapposite. Jones is not seeking to withdraw his plea—the issue addressed in *Brady*. 397 U.S. at 757. Jones argues: (i) that his sentence is void; and (ii) that he did not and could not have waived his *Miller* claim. (Pet. 9 n.6); (Pet. App. 52a) ("The very nature of a substantive rule of constitutional law precludes waiver.")

B. Jones' Sentence to an Additional Term of Life plus 68 years.

The second "defect" the Commonwealth identifies as counseling against review is its assertion that any relief the Court might grant would be "meaningless." (Opp. 21). The

Commonwealth's contention fails for a very obvious reason. The relief Jones seeks is a vacatur of his entire sentence on all counts. (Pet. i, 17–19). Such relief certainly would not be "meaningless."[2]

Addressing the merits, the Commonwealth argues the sole claim raised in Jones' motion to vacate was a claim his sentence to life without parole as a juvenile violated *Miller*. The Commonwealth contends that, as a result, Jones has waived any challenge to his additional life sentence plus 68 years. (*Id.*). But Jones' does not seek to assert a separate legal challenge to the remainder of his sentence; he argues the *relief* that *federal law* requires for a *Miller* violation extends beyond his life without parole sentence. Because he was sentenced to an additional term of life plus 68 years by the same judge for offenses arising out of the same course of conduct (a convenience-store robbery) after being sentenced to life without parole in violation of *Miller*, Jones contends the Eighth Amendment requires relief that remedies the broad impact and deleterious effect of his sentence to life without parole in violation of *Miller*. Such relief *must* address his entire sentence on all counts. The Virginia Supreme Court's contrary decision presents

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[2] Even if the Court limited relief to the homicide count, such relief would not be "meaningless" because it would provides Jones the opportunity to secure a sentence the Virginia Supreme Court asserts provides a "'meaningful opportunity' for release." *Angel v. Commonwealth*, 281 Va. 248, 275 (2011).

an important federal question "that has not been, but should be, settled by this Court." Rule 10(c).

C. Jones' Federal Habeas Petition.

The third "defect" the Commonwealth identifies as counseling against review is the federal habeas petition Jones filed as a protective measure while pursuing relief in the Virginia courts. *See* 28 U.S.C. § 2244(d)(1)(C), § 2254 (b)(1)(A). Quoting a statement by Justice Stevens prior to the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Commonwealth argues the Court should not grant review of the decision of the Virginia Supreme Court, but should "let the case proceed to federal habeas review." (Opp. 23).

The Commonwealth offers no argument as to why the Court should do so in this case, and doing so would actually conflict with this Court's practice in cases addressing the constitutionality of juvenile sentencing. S*ee, e.g.*, *Montgomery*, 136 S.Ct. at 736 (petition from the Louisiana Supreme Court). Doing so also would prejudice Jones, delaying resolution of his claims and requiring an application of a heightened standard of review under AEDPA. S*ee* 28 U.S.C. § 2254(d)(1). Finally, doing so would prevent the Court from addressing the important Supremacy Clause question presented in Jones' petition.

III. VIRGINIA'S CONCLUSION THAT THE EIGHTH AMENDMENT IS LIMITED TO HOLLOW PROCEDURAL GUARANTEES CONFLICTS WITH THE PRECEDENT OF THIS COURT.

The final argument the Commonwealth offers as a reason to deny review is that the Virginia Supreme Court is "correct" in its resolution of the issue left open in *Miller*, *i.e.*, whether the *discretion* of a trial court to suspend a life without parole sentence mandated by statute for juvenile offenders ensures the proportionality in sentencing that the Eighth Amendment "requires." (Opp. 33–37); *Miller*, 567 U.S. at 467 n.2 (declining to address whether a trial court's suspension authority renders a life without parole sentence "non-mandatory" because the issue was not raised below). The Commonwealth contends the Virginia Supreme Court is "correct" in its conclusion that the Eighth Amendment is satisfied so long as "Virginia law does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else." (Pet. App. 5a).

The Virginia Supreme Court's "resolution" of the question left open in *Miller* weighs *in favor* of review. The Virginia Supreme Court's resolution of that question—on remand from this Court—in a manner that conflicts with the precedent of this Court presents a compelling case for review (and summary reversal).

"*Miller requires* that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and

how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Montgomery*, 136 S. Ct. at 733 (emphasis added). But *Miller* "did more than *require* a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* at 734 (emphasis added). As a result, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* This is so because "*Miller* determined that sentencing a child to life without parole is excessive for all but '"the rare juvenile offender whose crime reflects irreparable corruption."'" *Id.* This substantive constitutional guarantee applies retroactively to prisoners, such as Jones, who were sentenced to life without parole before *Miller* was decided.

Yet, the Virginia Supreme Court concludes that Jones' life without parole sentence does not violate the Eighth Amendment because, at the time he was sentenced—more than a decade before *Miller* was decided—Virginia law did not "preclude" consideration of the mitigating qualities of Jones' youth. Virginia law would have allowed Jones—had he been prescient enough to anticipate advancements in brain science and the evolution of this Court's Eighth Amendment jurisprudence—to present evidence of the mitigating qualities of his youth and such evidence could have been considered by the trial court in deciding whether to suspend Jones' life without parole sentence, assuming the

trial court was aware it could suspend Jones' sentence. (*See* Pet. 3). But that did not happen, and the procedural "safeguards" the Commonwealth identifies do not operate to ensure that life without parole in Virginia is reserved for "the rare juvenile offender whose crime reflects irreparable corruption." On the contrary, it is undisputed that *every* juvenile offender in Virginia sentenced for a Class 1 felony has been sentenced to life without parole.

CONCLUSION

The Court should grant Jones' petition for a writ of certiorari and summarily reverse the decision of the Virginia Supreme Court or set the case for plenary review.

Respectfully submitted,

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