No. 16-

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court held that the Eighth Amendment "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016). And in *Montgomery*, the Court further held that *Miller* established a substantive constitutional right, that a "sentence imposed in violation" of such a right is "void," and that "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right." *Id.* at 731–32. The Virginia Supreme Court rejects those holdings in this case, ruling that *Miller* does not apply to juvenile offenders in Virginia like Mr. Jones who were sentenced to life without parole before *Miller* was decided.

The questions presented are:

1. Whether Virginia may refuse to give effect to *Miller* in state collateral review proceedings because, according to the Virginia Supreme Court, a sentence imposed in violation of the U.S. Constitution is not void but merely "voidable."

2. Whether the Virginia Supreme Court contradicted *Miller* and *Montgomery* by holding that, before imposing a sentence of life without parole, a sentencer need not *actually consider* a juvenile offender's youth and attendant characteristics so long as the sentencer had the *opportunity* to do so.

3. Whether Virginia may, consistent with the Eighth Amendment, limit the remedy for a sentence imposed in violation of *Miller*.

PARTIES TO THE PROCEEDING

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The decision of the York County-Poquoson Circuit Court is unreported. (Pet. App. 177a). The opinion of the Virginia Supreme Court in *Jones I* is reported at 288 Va. 475, 763 S.E.2d 823. (Pet. App. 148a). The opinion of the Virginia Supreme Court in *Jones II* is reported at 293 Va. 29, 795 S.E.2d 705. (Pet. App. 1a).

JURISDICTION

The Virginia Supreme Court issued its decision in *Jones I* on October 31, 2014. (Pet. App. 148a). On December 1, 2014, Petitioner filed a timely Petition for Rehearing, which the Virginia Supreme Court denied on January 15, 2015. (Pet. App. 147a). Jones filed a timely Petition for a Writ of Certiorari with this Court on April 15, 2015. On March 7, 2016, the Court granted Jones' Petition, vacated the judgment of the Virginia Supreme Court, and remanded this case for further consideration in light of *Montgomery v. Louisiana*. 136 S. Ct. 1358, 194 L. Ed. 2d 340 (2016). On February 2, 2017, the Virginia Supreme Court issued its decision on remand reinstating its holding in *Jones I*. (Pet. App. 1a). This Court has jurisdiction under 28 U.S. C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall

> be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS INVOLVED

Section 18.2-10 of the Virginia Code, Va. Code § 18.2-10 (2001), provides, in pertinent part:

> The authorized punishments for conviction of a felony are:
>
> (a) For Class 1 felonies, death, if the person so convicted was sixteen years of age or older at the time of the offense, or imprisonment for life . . . .

Section 19.2-303 of the Virginia Code, Va. Code § 19.2-303 (2011) provides, in pertinent part:

> After conviction, whether with or without a jury, the court may suspend imposition of sentence or suspend the sentence in whole or part. . . .

STATEMENT OF THE CASE

To avoid application of *Miller* and *Montgomery* in Virginia, a four-justice majority of the Virginia Supreme Court declares for the first time in this case: (1) that state collateral review proceedings previously used to bring federal constitutional claims heard by this Court, *see Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), are actually closed to federal constitutional claims; and (2) that—although this Court and many judges in Virginia understood a life without parole sentence was required for juveniles in Virginia such as Jones [1] and although no trial court in Virginia has ever done so[2]—trial courts in Virginia have (and always have had) the authority to suspend a statutory life without parole sentence.[3] The majority employs these new pronouncements of Virginia law to hold that it lacks jurisdiction to hear Jones' *Miller* claim and to hold that Virginia's capital sentencing scheme comports with *Miller* "because Virginia law [by virtue of its grant of suspension authority] does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else." (Pet App. 5a; *see id.* at 6a (asserting that "nothing in the statutory suspension power suggests that the offender's youth should be *legally irrelevant*") (emphasis added)).

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[1] *See Miller*, 132 S. Ct. 2455, 2471 n. 15 (including Virginia among the jurisdictions identified as mandating life without parole for children); *see also* Reply of Petitioner Donte Lamar Jones In Support of Petition for Certiorari, at 8, *Jones v. Virginia*, No. 14-1248 (July 28, 2015); Supreme Court of Virginia Audio Recordings of Oral Arguments September Session Schedule (Beginning 09/08/14) No. 131385, Virginia's Judicial System, http://www.courts.state.va.us/courts/scv/oral_arguments/2014/sep/home.html (Virginia's counsel acknowledging during oral argument in *Jones I* that "many judges" in Virginia "may think that [a life sentence is] mandatory").

[2] (Pet. App. 104a) (Virginia's counsel acknowledging during oral argument in *Jones II* that there are no "life sentences without [the] possibility of parole that have been suspended" in Virginia); *see also*

Justice Powell, the author of the Virginia Supreme Court's opinion in *Jones I*, declines to join in the majority's decision in *Jones II*, a decision that "reinstate[s] [the] holding in *Jones I*." (Pet. App. 43a). After consideration of the Court's decision in *Montgomery*, Justice Powell, joined by Justices Goodwyn and Mims, dissents in *Jones II*, reasoning:

> *Montgomery* explicitly requires that a *Miller* hearing be held before a life sentence without parole may be imposed upon a juvenile offender in order to comply with the strictures of the Eighth Amendment. In the absence of such a hearing, the sentence is in violation of the juvenile's substantive constitutional rights . . . [, the] court is without jurisdiction to impose [the] sentence . . . [and the] sentence is void ab initio."

(Pet. App. 44a (Powell, J., dissenting)).

As Justices Powell, Goodwyn and Mims note in dissent, the truncated analysis and selective quotations of the

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Supreme Court of Virginia Audio Recordings of Oral Arguments September Session Schedule (Beginning 09/12/16) No. 131385, Virginia's Judicial System, http://www.courts.state.va.us/courts/scv/oral_arguments/2016/sep/home.html.

[3] The majority suggests that the trial court's authority to suspend a life without parole sentence for a capital offense is meaningful by citing cases in which Virginia trial courts have suspended life sentences for non-homicide offenses. (Pet App. 13a.). The suspension of a life sentence for a non-homicide offense, a result Jones submits is required for juveniles by the Court's decision in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) does not support the majority's assertion that a trial court's authority to suspend a life without parole sentence for a capital offense is sufficient under Miller.

majority ignore the constitutional guarantee and rationale that underlie *Miller* and *Montgomery*. (*See* Pet App. 47a, 51a). These principles cannot be ignored: "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment," and "'children are constitutionally different from adults for purposes of sentencing.'" *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 132 S. Ct. at 2464). A sentencing scheme, such as the one here, that treats children the same as adults, that does not "require a sentencer to consider a juvenile's youth before imposing life without parole," and that includes no safeguards to ensure that life without parole is reserved for "'the rare juvenile offender whose crime reflects irreparable corruption'" does not provide the protection against disproportionate punishment that the Eighth Amendment guarantees for juvenile offenders. *Id.* at 734.

The discretion of a Virginia trial court to consider, if it so chooses, whether to suspend a life without parole sentence based on *anything* the court considers *legally relevant* does not ensure the proportionality in sentencing for juvenile offenders that *Miller* and *Montgomery* "require[]." *Id.* Nor may Virginia, consistent with the Supremacy Clause of the U.S. Constitution, refuse to hear *Miller* claims in state court collateral review proceedings by declaring that a prisoner may challenge his sentence through a motion to vacate in Virginia *only* if the sentence is "void ab initio" under *state law*. Finally, Virginia may not limit the remedy for a sentence imposed in violation of *Miller* in a manner that renders the relief provided illusory.

FACTUAL BACKGROUND

1. In the summer of 2000, Jones, a black, male juvenile, was involved in a convenience-store robbery with an adult accomplice. During the robbery, Jones fired a single shot at the leg of a white, female employee. The employee died from her wound. Two days later, Jones surrendered to authorities and was charged with capital murder and ten additional offenses. (Pet. App. 186a–195a).

2. Although Jones never intended to kill anyone, Jones agreed to enter an *Alford* plea on the capital charge in exchange for an agreement that he would not be sentenced to death, but would be sentenced to life without parole—the only sentence other than death authorized for Jones under Virginia's capital murder statute.[4] (Pet. App. 186a–189a, 195a).

3. After sentencing Jones to life without parole on the capital charge, the trial court sentenced Jones to an additional, consecutive term of life plus 68 years on the ten remaining non-homicide counts, the maximum sentence allowable under Virginia law for an adult. (Pet. App. 179a–185a).[5]

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[4] The Virginia statute pursuant to which Jones was sentenced, Virginia Code § 18.2-10(a), subsequently was amended to render juvenile offenders ineligible for the death penalty after this Court held in *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200, 161 L. Ed. 2d 1 (2005), that the Eighth and Fourteenth Amendments to the U.S. Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." See Va. Code § 18.2-10 (2008).

[5] The Virginia majority incorrectly asserts that Jones received a single life sentence plus a term of 68 years and that a presentence report was prepared before Jones was sentenced to life without parole. (Pet App. 2a). The Virginia trial court sentenced Jones to *two* life terms plus 68 years, with the sentences to run consecutively and did not have before it a

4. Jones has rehabilitated in prison. He continued his education while incarcerated, recently obtaining a paralegal certificate from Ashmore College. (Pet. App. 197a). His outstanding G.P.A. earned him a nomination to an honor society. (Pet. App. 198a). He works in the prison library, counsels other inmates on prison safety, and serves as a mentor to young inmates. (Pet. App. 196a). But because he is slated to die in prison, the Virginia Department of Corrections will not allow Jones to enroll in additional rehabilitation programs. (Pet. App. 200a–203a).

PROCEEDINGS BELOW

1. While serving his sentence, Jones learned of the Court's decision in *Miller* and filed a *pro se* Motion to Vacate Invalid Sentence. Eight days later, the trial court ***sua sponte*** denied the motion, finding—without a hearing and without affording Jones an opportunity to submit any evidence in support of his application—that "there is nothing new in mitigation of the offense." (Pet. App. 177a).

2. On appeal, the Virginia Supreme Court affirmed the denial of the motion to vacate, reasoning that the trial court had the authority to suspend all or part of Jones' sentence, and therefore, *Miller* does not apply, and "could never apply," in Virginia. (Pet. App. 155a & 155a n.5).

3. After this Court granted Jones' Petition for a Writ of Certiorari, vacated the judgment of the Virginia Supreme Court, and remanded the case for further consideration in light of *Montgomery*, the Virginia Supreme Court, in a four to three decision, reinstated its prior holding in *Jones I.* (Pet. App. 1a).

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presentence report when it sentenced Jones to life without parole on the capital count. (Pet. App. 179a-185a).

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW CONFLICTS WITH THE PRECEDENT OF THIS COURT.

A. The Opinion Below Precludes a *Miller* Challenge in State Court in violation of the Supremacy Clause and the Precedent of this Court.

It is a fundamental tenet of our republican form of government that the Constitution and laws of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2; *see also Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 367, 110 S. Ct. 2430, 2438, 110 L. Ed. 2d 332 (1990) (state courts must "enforce [federal] law according to their regular modes of procedure"). This means that a state court cannot "refuse to enforce [a] right arising from the law of the United States," when it otherwise has jurisdiction, because federal law "is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393, 67 S. Ct. 810, 814, 91 L. Ed. 967 (1947) (quoting *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 222, 36 S. Ct. 595, 598., 60 L. Ed. 961 (1917). *See also Howlett*, 496 U.S. at 380–81 (a state may not allow an action based on state law "but yet decline[] jursidiction over federal actions for constitutional violations"); *FERC v. Mississippi*, 456 U.S. 742, 761, 102 S. Ct. 2126, 2138, 72 L. Ed. 2d 532 (1982) (holding that Mississippi must make certain tribunals "available for the vindication of federal as well as state-created rights"). As the Court explained in *Montgomery*, "where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." 136 S. Ct. at 731–32, 193 L. Ed. 2d 599 (2016).

But that is what Virginia does here. In doing so, the majority acknowledges that Virginia law permits prisoners to challenge the lawfulness of their confinement through a motion to vacate their sentence under *state law*; it simply declares the state collateral review process closed to *federal constitutional claims*. (Pet App. 33a). The majority reasons that Virginia may chose not to hear federal constitutional claims in a motion to vacate for two reasons. First, the majority observes that Virginia law permits a prisoner to challenge his sentence in a motion to vacate filed after the trial court has lost active jurisdiction only if the sentence is "void ab initio," *i.e.*, the sentence is one the court lacked "the power to pronounce." (*Id.* at 27a–28a). The majority concludes that a *Miller* violation does not qualify for such review because, in the eyes of the majority, a "*Miller* violation, if proven, would render the sentence merely voidable." (*Id.* at 34a). Second, the majority observes that state habeas corpus proceedings are open to claims controlled by federal law, and thus, concludes that Virginia is not required to hear *Miller* claims in a motion to vacate.[6]

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[6] The Virginia majority also argues Jones' guilty plea precludes an assertion that his sentence violates the Eighth Amendment. (Pet. App. 18a–21a). It does not. Jones did not waive, and could not have waived, a Miller claim when he pled guilty to avoid the death penalty. *Miller* had not been decided when Jones was sentenced. Jones had no recognized right to argue that the Eighth Amendment precluded his life without parole sentence, and therefore, could not have waived that right. *Halbert v. Michigan*, 545 U.S. 605, 623, 125 S. Ct. 2582, 2594, 162 L. Ed. 2d 552 (2005) ("Michigan contends that, even if Halbert had a constitutionally guaranteed right to appointed counsel for first-level appellate review, he waived that right by entering a plea of nolo contendere. We disagree. At the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo."). Moreover, the waiver included in Jones' plea agreement was sharply limited in scope, waiving only "*rights of appeal* with regard to any substantive or procedural issue involved in this *prosecution*." (Pet App. 159a) (emphasis added). Such a waiver cannot be expanded now, by the Virginia Supreme Court, to include collateral review and

The flaws in the majority's reasoning are patent. "Substantive rules [such as the rule announced in *Miller*] set forth categorical constitutional guarantees that place certain criminal laws and 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*." *Montgomery*, 136 S. Ct. at 729–30, 193 L. Ed. 2d 599 (emphasis added); *see also Teague v. Lane*, 489 U.S. 288, 307, 109 S. Ct. 1060, 1073, 103 L. Ed. 2d 334 (1989) (substantive rules are those that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"); *Williams v. United States*, 401 U.S. 667, 692, 91 S. Ct. 1171, 1180, 28 L. Ed. 2d 404 (1971) (Harlan, J., concurring). A sentence imposed in violation of *Miller* "is not just erroneous but contrary to law and, as a result, *void*." *Montgomery*, 136 S. Ct. at 731 (emphasis added).

Because it is void, "a court has no authority to leave in place" a sentence imposed in violation of *Miller*. *Id.* Such a sentence is not "valid until annulled" as the Virginia majority argues; it is "of no legal effect." *Void, Voidable*, *Black's Law Dictionary* (7th ed. 1999) (defining "voidable" as "[v]alid until annulled" and defining "void" as "[o]f no legal effect").

Moreover, as the dissent explains, "Jones is simply using a motion to vacate to apply Virginia law in the manner th[e] [Virginia Supreme] Court announced close to a century

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sentencing issues. *See, e.g.*, *United States v. Linder*, 552 F.3d 391, 393 n.1. (4th Cir. 2009) ("In the plea agreement, Linder waived only his 'right to appeal,' not his right to seek collateral review . . . Of course, a collateral attack is distinct from a direct appeal.").

ago in *Thacker* [*v. Hubard & Appleby, Inc.*, 122 Va. 379, 386, 94 S.E. 929, 930 (Va. 1918)]: to bring a void ab initio order to the court's attention." (Pet. App. 62a (Powell, J., dissenting)). Prior to this case, there was no question that prisoners such as Jones were permitted to file a motion to vacate challenging their sentence as void under the U.S. Constitution. *See Loving v. Commonwealth*, 206 Va. 924, 925, 147 S.E.2d 78, 79 (Va. 1966) (motion to vacate challenging sentence as violative of the equal protection and due process clauses of the U.S. Constitution heard, and denied on the merits, by the Virginia Supreme Court) *reversed by Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967) (holding that Virginia's miscegenation statute violated the U.S. Constitution). *See also Hirschkop v. Commonwealth*, 209 Va. 678, 681, 166 S.E.2d 322, 324 (Va. 1969) (explaining that a motion to vacate was proper in *Loving* in part *because* it raised a federal constitutional challenge). It is altogether beyond the power of the Virginia Supreme Court to declare now that a federal constitutional violation renders a sentence merely voidable, and thus, not cognizable in state courts.

The fact that state habeas review may be available as a means to seek review of *other* claims is irrelevant. It is undisputed that Jones cannot raise his *Miller* claim in a state habeas petition. (Pet App. 62a–63a n.10 (Powell, J., dissenting)). Virginia law requires state habeas petitions to be filed within two years after the date of final judgment and provides no exception for newly recognized constitutional rights. Va. Code § 8.01-654. *Miller* was decided more than a decade after Jones was sentenced. As a result, a motion to vacate is the only state collateral review process through which a *Miller* claim could be presented by Jones and other similarly situated juvenile offenders.

Virginia cannot 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*. *Howlett*, 496 U.S. at 380–81.[7] The Virginia majority's assertion to the contrary presents a "question of great importance" that the Court should "grant[] certiorari" to hear. *Testa*, 330 U.S. at 388.

B. The Opinion Below Denies Juveniles in Virginia the Substantive Eighth Amendment Guarantees *Miller* and *Montgomery* Require.

"*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. 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. 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.*

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[7] If Jones had chosen to pursue federal habeas relief in the first instance, Virginia would have argued that he failed to exhaust available state remedies, as it has in response to other *Miller* claims. *See, e.g.*, *Ross v. Fleming*, No. 6:13-CV-34, 2016 WL 3365498, at *2 (W.D. Va. June 16, 2016) (noting that the Commonwealth "argues … that Petitioner has not exhausted his available state court remedies on his Miller claim").

The Virginia majority's opinion in *Jones II* dispenses with these constitutional guarantees. The Virginia majority asserts that, the above language notwithstanding, a sentencer need not actually consider how children are different and how those differences counsel against sentencing them to a lifetime in prison so long as the sentencer had the "opportunity" to do so. (Pet. App. 3a, 7a). The Virginia majority thus doubles down on the argument that the constitutional guarantee articulated in *Miller* is merely procedural, and is not substantive, an argument the Court expressly rejected in *Montgomery*. 136 S. Ct. at 732. In doing so, the majority also eviscerates the requirement of *Miller* and *Montgomery* that life without parole be reserved for the "'the rare juvenile offender whose crime reflects irreparable corruption.'" In the Virginia majority's view, the Eighth Amendment requires nothing more than affording the sentencer the opportunity to consider mitigating circumstances the sentencer deems legally relevant at the time of sentencing; if State law provides such an opportunity, it matters not, to the Virginia majority, that a juvenile offender such as Jones, whose crime reflects unfortunate yet transient immaturity, is sentenced to life without parole.

The Virginia majority's selective reading of *Miller* and *Montgomery* is required to avoid an application of *Miller* and *Montgomery* to Jones. Virginia's capital sentencing statute requires *every* juvenile offender to be sentenced to life without parole. Va. Code § 18.2-10 (providing that the only "authorized" punishments for a Class 1 felony are "death" or "imprisonment for life").[8] A juvenile offender in Virginia may receive a lesser sentence only if the trial court chooses to exercise its general discretion to suspend the

[8] Virginia has abolished parole for individuals convicted after January 1, 1995. *See* Va. Code § 53.1-165.1; *see also* Va. Code § 53.1-40.01 (providing that individuals convicted of capital murder, a Class 1 felony, are not eligible for geriatric release).

statutorily-prescribed sentence "in whole or part." Va. Code § 19.2-303. The result is predictable and tragic. Every juvenile offender sentenced under Virginia's capital murder statute (who was not sentenced to death) has been sentenced to life without parole; there are no exceptions.[9] Because Virginia law does not require them to do so, Virginia courts do not distinguish between the "child whose crime reflects 'unfortunate yet transient immaturity'" and "'the rare juvenile offender whose crime reflects irreparable corruption.'" The Virginia Supreme Court's insistence in *Jones II* that they need not do so once again stands the Court's decisions in *Miller* and *Montgomery* on their heads. *See* Petition for Writ of Certiorari, at 13, *Jones v. Virginia*, No. 14-1248, 2015 WL 1743946 (April 15, 2015). Summary reversal is warranted.

[9] Because life without parole is the *de jure* sentence for juveniles absent suspension and is the *de facto* sentence in practice, Jones' observed in his prior Petition for Writ of Certiorari that "the Virginia Supreme Court's characterization of that sentence as 'not mandatory' rings hollow." Petition for Writ of Certiorari, at *9 n.2, *Jones v. Virginia*, No. 14-1248, 2015 WL 1743946 (April 15, 2015). The Virginia majority takes issue with that statement, arguing that it has not "abruptly changed course in established legal doctrine governing the suspension power of a sentencing court." (Pet App. 6a). But as Jones stated before, for Eighth Amendment purposes, the question is not whether the court's interpretation of the suspension power is new, "the question is whether a trial court's discretion to suspend the sentence mandated by statute ensures that a juvenile receives a proportionate sentence." Pet. Cert., at *9 n.2. It clearly does not.

II. THE OPINION BELOW RAISES AN IMPORTANT FEDERAL QUESTION ON WHICH THERE IS SUBSTANTIAL CONFLICT.

A. Courts Disagree On The Reach of the Eighth Amendment Protections Articulated In *Miller* And *Montgomery*.

The Virginia Supreme Court's decision in *Jones II* stands in direct conflict with the decisions of the highest courts in at least thirteen states.[10] Most recently, a unanimous California Supreme Court held in *In re Kirchner*, 17 DAR 3901 (Cal. Apr. 24, 2017) that a California statute

[10] *State v. Long*, 2014-Ohio-849, ¶ 11, 138 Ohio St. 3d 478, 481, 8 N.E.3d 890, 894 (Ohio 2014) (requiring a trial court to "actually" consider the "defendant's youth and its attendant characteristics" in sentencing); *People v. Gutierrez*, 58 Cal. 4th 1354, 1360, 324 P.3d 245, 249 (Cal. 2014) (same); *Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013) (same); *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) (same); *Parker v. State*, 119 So. 3d 987, 99 (Miss. 2013) (same); *Bear Cloud v. State*, 2013 WY 18, ¶ 44, 294 P.3d 36, 47 (Wyo. 2013) (same); *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (S.C. 2014) ("*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."); *State v. Riley*, 315 Conn. 637, 653, 110 A.3d 1205, 1213 (Conn. 2015) ("[W]e hold that the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate."); *Landrum v. State*, 192 So. 3d 459, 460 (Fla. 2016) (same); *State v. Young*, 794 S.E.2d 274, 279 (N.C. 2016) (same); *Veal v. State*, 298 Ga. 691, 702, 784 S.E.2d 403, 412 (Ga. 2016) (requiring consideration of Miller factors and determination that defendant "is irreparably corrupt or permanently incorrigible"); *State v. Ramos*, 187 Wash. 2d 420, 434, 387 P.3d 650, 658 (Wash. 2017) ("every juvenile offender facing a literal or de facto life-without-parole sentence is automatically entitled to a *Miller* hearing."); *People v. Reyes*, 2016 IL 119271, ¶ 9, 63 N.E.3d 884, 888 (Ill. 2016) (same).

providing juvenile offenders serving life sentences with a statutory mechanism to seek resentencing failed to comply with *Miller* because resentencing under the statute "does not necessarily require consideration of all relevant evidence bearing on the *Miller* factors, through the lens prescribed by *Miller*, as part of the resentencing inquiry." Slip Op. at 15. For a life sentence imposed on a juvenile to pass constitutional muster, the unanimous California Supreme Court held that the sentencing court "*must* give proper consideration" to the distinctive attributes of youth that *Miller* identifies. Slip. Op. at 17 (emphasis in original). The possibility that a sentencing court "may consider" such factors is insufficient, the court explained, because "the possibility of consideration is not the same as the certainty that *Miller* and *Montgomery* demand." Slip. Op. at 17.

Courts in fourteen other states have found that a sentencer's obligation to choose between a range of sentencing options is sufficient to placate *Miller*, without a formal consideration of the defendant's age or mitigating factors of youth.[11] Still other courts have concluded, given

[11] *See, e.g.*, *State v. Williams*, 862 N.W.2d 701, 703–4 (Minn. 2015) (finding *Miller* inapplicable where sentencing was "not mandatory"); *Roheweder v. State*, No. 63596, 2014 WL 495465, at *1 (Nev. Jan. 15, 2014) (same); *State v. Redman*, No. 13-0225, 2014 WL 1272553, at *3 (W. Va. Mar. 28, 2014) (same); *State v. Williams*, 2014 WI App 16, ¶ 9, 842 N.W.2d 536 (Wis. 2014) (same); *State v. Gutierrez*, No. 33,354, 2013 WL 6230078, at *1 (N.M. Dec. 2, 2013) (same); *Delaware v. Roy*, 2017 WL 1040715, at *2 (Del. Super. Ct. Mar. 13, 2017) (same); *Phon v. Commonwealth*, No. 2014-CA-73-MR, 2016 WL 1178651, at *3 (Ky. Ct. App. Mar. 25, 2016) (same); *State v. Najar*, No. 1 CA-CR 13-686 PRPC, 2015 WL 3540196, at *2 (Ariz. Ct. App. June 2, 2015), *review denied* (Jan. 5, 2016), *cert. granted, judgment vacated*, 137 S. Ct. 369, 196 L. Ed. 2d 287 (2016) (same); *Arredondo v. State*, 406 S.W.3d 300, 307 (Tex. App. 2013) (same); *State v. James*, No. A-4153-08T2, 2012 WL 3870349, *13 (N.J. Super. App. Div. Sept. 7, 2012) (same); *Pennington v. Hobbs*, 2014 Ark. 356, 451 S.W.3d 199, 202, *on reconsideration*, 497 S.W.3d 186 (Ark. 2014) ("Miller is only applicable in Arkansas when a mandatory life sentence is imposed."); *Beach v. State*, 379 Mont. 74, 78,

the "unsettled nature of the law" with respect to *Miller* and its application, that it is "prudent to allow this process to continue," and further guidance to develop before reexamining the scope of *Miller*'s holding. *See Commonwealth v. Okoro*, 471 Mass. 51, 61, 26 N.E.3d 1092, 1101 (Mass. 2015). As evident from the divergent interpretations of *Miller* and *Montgomery*, further guidance from the Court is needed to resolve these conflicts.

B. Courts Disagree on the Remedy Required to Provide Relief for a *Miller* violation.

The Virginia Supreme Court's decision in *Jones II* also stands in conflict with decisions of the federal courts in Virginia on, among other issues, the remedy required to address a *Miller* violation. Jones argued to the Virginia Supreme Court that to remedy the Eighth Amendment violation that occurred when he was sentenced to life without parole vacatur of his entire sentence on all eleven counts was necessary. (Pet. App. 86a–87a; *id.* at 119a–121a). The Virginia Supreme Court rejected any reconsideration of Jones' sentence except on the capital count. (Pet, App. 11a n.5; *id.* at 44a n.1; *id.* at 86a–87a).

As Jones' advised the Virginia Supreme Court, this issue was squarely addressed in *Ross v. Fleming*, which held that a *Miller* violation requires vacatur of a petitioner's entire

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348 P.3d 629, 633 (Mont. 2015) (noting plaintiff conceded that Miller's holding did not apply "because [defendant's] sentence was not mandatory"); *State v. Conrad*, 280 Or. App. 325, 327, 381 P.3d 880, 888 (Or. Ct. App. 2016), *review denied*, 389 P.3d 1141 (Or. 2017) (finding that the Miller holding "hinged" in part on the "mandatory nature of the sentence"); *Conley v. State*, 972 N.E.2d 864, 876–79 (Ind. 2012) (noting that because "the Supreme Court mentioned Indiana as being one of fifteen jurisdictions where life without parole for juveniles was discretionary" it therefore could not violate the Eighth Amendment).

sentence and resentencing on all related counts, not just the life sentence imposed for capital murder. *Ross v. Fleming*, No. 6:13-cv-34, 2016 WL 3365498, at *1 (W.D. Va. June 16, 2016). Virginia petitioned in *Ross* to alter or amend the court's judgment to exclude petitioner's life sentence for robbery from resentencing. (Pet. App. 110a). The court declined to alter the scope of the vacatur, noting that *Miller*'s holding "applies depending on the nature of the sentence, not the nature of the underlying crime." (Pet. App. 114a).

Virginia "may provide relief beyond the demands of [the U.S. Constitution], but under no circumstances may it confine petitioners to a lesser remedy." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 102, 113 S. Ct. 2510, 2520, 125 L. Ed. 2d 74 (1993); *see also Danforth v. Minnesota*, 552 U.S. 264, 299, 128 S. Ct. 1029, 1052, 169 L. Ed. 2d 859 (2008) (Roberts, C.J. dissenting) ("[I]f the state court consider[s] the merits of the federal claim, it has a duty to grant the relief that *federal law* requires.") (internal quotations omitted) (emphasis in original). The Virginia Supreme Court would limit the remedy to which Jones is entitled under the Eighth Amendment to only the sentence imposed on the capital charge because Jones did not raise in his motion to vacate a separate constitutional challenge to his sentence on each of the remaining counts. (Pet. App. 11a n.5, 44a n.1).[12] Virginia's argument misapprehends the issue. Jones does not seek to raise a separate constitutional challenge to his sentence on the remaining counts. Jones submits that the Eighth Amendment requires relief that is effective and meaningful, relief that addresses the broad impact and deleterious effect of sentencing a juvenile offender to life without parole.

[12] The Virginia majority is incorrect in its assertion that Jones did not assert that "good cause" and the "ends of justice" warrant consideration of Jones' sentence on the remaining counts. Jones addressed this question at length in his opening brief on appeal . (Pet. App. 174a–175a).

As *Ross* recognized, to avoid rendering relief illusory, any remedy for a *Miller* violation must address the sentence imposed on all related counts. The Virginia Supreme Court has itself acknowledged, in other contexts, that an "ultra vires provision in the sentencing order results in the entire sentencing order being void ab initio." *Burrell v. Commonwealth*, 283 Va. 474, 480, 722 S.E. 2d 272, 275 (Va. 2012). Limiting the remedy for a *Miller* violation to the single count on which an illegal sentence was imposed, as Virginia would do here, ignores the very real and substantial impact that such a sentence has on the punishment fixed for the remaining counts. Accordingly, a grant of certiorari is necessary on this issue as well to ensure that the protections guaranteed by the Eighth Amendment, as articulated in *Miller* and *Montgomery*, are not rendered illusory by the lower courts.

CONCLUSION

The Virginia majority's decision in *Jones II* rejects the holdings of the Court in *Miller* and *Montgomery*. The majority's decision refuses to give effect to a substantive constitutional right in state court and recasts that right as a mere procedural guarantee. The Virginia court also makes clear that any relief it would allow for a violation of Jones' substantive constitutional right would be illusory. For these reasons, the Court should grant the 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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APPENDIX

SUPREME COURT OF VIRGINIA

Record No. 131385

DONTE LAMAR JONES,

v.

COMMONWEALTH OF VIRGINIA

February 2, 2017, Decided

OPINION BY JUSTICE D. ARTHUR KELSEY

Acting on a petition for certiorari, the United States Supreme Court in *Jones v. Virginia*, 136 S. Ct. 1358, 194 L. Ed. 2d 340 (2016), vacated and remanded *Jones v. Commonwealth* (*Jones I*), 288 Va. 475, 763 S.E.2d 823 (2014), for our reconsideration in light of *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Having done so, we now reinstate our holding in *Jones I*, subject to the qualifications made herein, and affirm the trial court's denial of the motion to vacate filed by Donte Lamar Jones.

I.

In 2000, Jones and an accomplice, both armed and wearing masks, robbed two night clerks at a convenience store. They ordered both clerks to lie down on the floor. After his accomplice took roughly $35 from the cash register and the two were fleeing the scene, Jones shot

one of the clerks in the back as she laid on the floor. The following day, Jones stated, "I think I paralyzed the bitch." J.A. at 9-10. In fact, however, Jones's gunshot wound had killed her. At the time of the offense, Jones was a few months away from his 18th birthday and was on supervised juvenile probation for a felony offense committed when he was 15 years old.

After his arrest, Jones entered an *Alford* guilty plea to capital murder and several related charges. He executed a plea agreement stipulating that he would receive a life sentence "without the possibility of parole" on the capital murder charge and a term of years to be determined by the court on the remaining charges. *Id.* at 45. The plea agreement also stipulated that Jones agreed "to waive any and all rights of appeal with regard to any substantive or procedural issue involved in this prosecution." *Id.* at 44.

The trial court held a sentencing hearing and received a presentence report from a probation officer. The court imposed the life sentence pursuant to the plea agreement, as well as a 68-year term of incarceration on the remaining 10 felony charges. The sentencing order concluded: "TOTAL SENTENCE IMPOSED: LIFE + 68 YEARS" followed by "TOTAL SENTENCE SUSPENDED: NONE." *Id.* at 53.

After serving 12 years of his sentence, Jones filed a motion to vacate his life sentence in the trial court, claiming that it violated the principles articulated in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which was issued by the United States

Supreme Court 11 years after his convictions. In *Miller*, two juvenile defendants received mandatory life sentences without the possibility of parole. Under applicable law, the state sentencing courts had no power to suspend in whole or in part either of the two mandatory life sentences. *See* Ala. Code § 15-22-50 ("The court shall have no power to suspend the execution of sentence imposed upon any [convicted] person . . . whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years.");[1] Ark. Code Ann. § 5-4-104(e)(1)(A)(i) ("The court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for . . . [c]apital murder.").[2]

Miller held that "a judge or jury must have the *opportunity* to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2475 (emphasis added). A "mandatory sentencing" scheme that eliminates this opportunity, *Miller* concluded, could be constitutional only if at some later date the prisoner is afforded the

1. *See also Belote v. State*, 185 So. 3d 1154, 1155 (Ala. Crim. App. 2015) (finding that "because the circuit court imposed a sentence of 16 years' imprisonment, pursuant to § 15-22-50, the circuit court was without authority to suspend the execution of [appellant's] sentence"); *Little v. State*, 129 So. 3d 312, 313 (Ala. Crim. App. 2012) (holding that, pursuant to Ala. Code § 15-22-50, the trial court was "without jurisdiction" to impose a completely suspended 20-year sentence).

2. *See also State v. Colvin*, 2013 Ark. 203, 427 S.W.3d 635, 638 (Ark. 2013) (noting that Ark. Code Ann. § 5-4-104 "prohibit[s] probation and the suspended imposition of sentence for the offense[] of capital murder").

"*possibility* of parole" — not the guarantee of it. *Id.* (emphasis added).

Miller was quite clear about what it meant by a mandatory sentence: "Such mandatory penalties, by their nature, *preclude* a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at ___, 132 S. Ct. at 2467 (emphasis added). *Miller* thus concluded that, "[b]y making youth (and all that accompanies it) irrelevant" to imprisonment for life without parole, mandatory, life-without-parole sentences for juveniles violate the Eighth Amendment. *Id.* at ___, 132 S. Ct. at 2469. Underlying this holding was the necessary premise that it could only apply to an actual, not a suspended, life-without-parole sentence imposed upon a juvenile offender because only the former, not the latter, would involve "condemning him or her to die in prison." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726 (summarizing *Miller*).

Relying on *Miller*, Jones's motion before the trial court expressly stated that it "only deal[t] with the Capital Murder charge." J.A. at 56. His motion also proposed an "alternative option" to his request for vacatur of the life sentence. *Id.* at 61. "Pursuant to Code § 19.2-303," Jones argued, the trial court "'may suspend imposition of sentence or suspend the sentence in whole or part' on the Capital Murder conviction." *Id.* (quoting Code § 19.2-303); *see also id.* at 55-56. The motion to vacate concluded with this prayer for relief: "Suspend the mandatory life sentence without parole or declare Mr. Jones's conviction for Capital Murder void in the absence of any legal

punishment the Court can lawfully impose." *Id.* at 62.

The motion to vacate, however, made no factual proffer and left the question whether to hold an evidentiary hearing entirely within the discretion of the trial court. The motion requested that the trial court "grant Mr. Jones an evidentiary hearing on the claims presented in this Motion" only "if the Court determine[d] there [was] a need for further factual development." *Id.* The trial court denied the motion "after review of the case file and the defendant's motion," observing that Jones presented "nothing new in mitigation of the offense." *Id.* at 65.

On appeal of the trial court's denial of the motion to vacate, we "h[e]ld that because the trial court ha[d] the ability under Code § 19.2-303 to suspend part or all of the life sentence . . . , the sentencing scheme applicable to Jones's conviction was not a mandatory life without the possibility of parole scheme." *Jones I*, 288 Va. at 477, 763 S.E.2d at 823. Thus, we reasoned, *Miller* was inapplicable to the Virginia sentencing law at issue "even if it is to be applied retroactively." *Id.* at 481, 763 S.E.2d at 826.

We came to this conclusion because Virginia law does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else. To be sure, sentencing statutes specifically authorize a trial court to do so, even to the point of suspending entirely a life sentence so that the offender never spends a day in prison. *See* Code § 19.2-303. Nor does Virginia law make "youth (and all that accompanies it) irrelevant" to the court's sentencing discretion.

Miller, 567 U.S. at ___, 132 S. Ct. at 2469. Nothing in the statutory suspension power suggests that the offender's youth should be legally irrelevant to the exercise of the sentencing court's discretion.

Dissatisfied with our reasoning, Jones filed a petition for certiorari to the United States Supreme Court arguing that he never truly had the mitigation opportunity. Despite the unqualified text of Code § 19.2-303 authorizing the power of suspension and our unanimous opinion applying it to his case, Jones argued that we were plainly wrong: "Because life without parole is the *only* sentence (other than death) authorized under Virginia's capital murder statute, the Virginia Supreme Court's characterization of that sentence as 'not mandatory' rings hollow." Pet. Cert. at 9 n.2 (emphasis in original).

Jones's petition for certiorari did not call attention to conflicting prior precedent or suggest that we had abruptly changed course in established legal doctrine governing the suspension power of a sentencing court. Neither did his petition put forward any legal analysis suggesting that our application of Code § 19.2-303 to life sentences rested upon a flawed statutory interpretation. Instead, he merely argued that the power to suspend a life sentence (even to the point of not serving a day in prison) was an insufficient "opportunity" for the sentencing court to take into account "mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2475; *see also* Pet. Cert. at 13-15.

Before ruling on the merits of Jones's petition, the United States Supreme Court issued *Montgomery v.*

Louisiana, which decided the "question whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive." 577 U.S. at ___, 136 S. Ct. at 732. *Montgomery* held that *Miller* was retroactive, and thus, juvenile defendants "must be given the *opportunity* [at the time of sentencing] to show their crime did not reflect irreparable corruption; and, *if it did not*, their *hope* for some years of life outside prison walls must be restored" by the possibility of future parole. *Id.* at ___, 136 S. Ct. at 736-37 (emphases added).[3] Like the sentencing statutes reviewed in *Miller*, the Louisiana law addressed in *Montgomery* forbade the sentencing court from suspending in whole or in part the life sentence without parole in capital cases. *See* La. Stat. Ann. § 14:30(C)(1) ("If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, *or suspension of sentence* . . . ." (emphasis added)).

The holding in *Montgomery* tracked that in *Miller*: State law cannot impose "mandatory" penalties that make "youth (and all that accompanies it) irrelevant" to the decision to imprison a juvenile for life without parole. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469). Mandatory sentencing statutes, "by their nature, *preclude* a sentencer

3. *Montgomery* acknowledged that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility" and "did not impose a formal factfinding requirement" on this mitigation issue. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735.

from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2467 (emphasis added). It was this legal preclusion that *Miller* and *Montgomery* deemed unconstitutional. If a mandatory sentencing statute has that effect, it can survive constitutional scrutiny only if the "possibility of parole," *id.* at ___, 132 S. Ct. at 2469, gives the prisoner a "hope" that he will not "die in prison," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-37.

Roughly 40 petitions for certiorari implicating *Miller* were before the United States Supreme Court at the same time as Jones's petition. The Court decided them all on the same day and issued a two-sentence order in each case, stating as applicable, "Petition for writ of certiorari granted. Judgment vacated, and case remanded . . . for further consideration in light of *Montgomery v. Louisiana*, 577 U. S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)." *Jones v. Virginia*, U.S. ___, ___, 136 S. Ct. 1358, 1358, 194 L. Ed. 2d 340 (2016) (per curiam).[4]

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4. *See also Baker v. Alabama*, 136 S. Ct. 1378, 194 L. Ed. 2d 355 (2016); *Black v. Alabama*, 136 S. Ct. 1367, 194 L. Ed. 2d 349 (2016); *Burgos v. Michigan*, 136 S. Ct. 1357, 194 L. Ed. 2d 342 (2016); *Carp v. Michigan*, 136 S. Ct. 1355, 194 L. Ed. 2d 339 (2016); *Click v. Alabama*, 136 S. Ct. 1363, 194 L. Ed. 2d 346 (2016); *Contreras v. Davis*, 136 S. Ct. 1363, 194 L. Ed. 2d 346 (2016); *Cook v. Michigan*, 136 S. Ct. 1358, 194 L. Ed. 2d 342 (2016); *Davis v. Michigan*, 136 S. Ct. 1356, 194 L. Ed. 2d 339 (2016); *Duke v. Alabama*, 136 S. Ct. 1378, 194 L. Ed. 2d 356 (2016); *Dunlap v. Alabama*, 136 S. Ct. 1367, 194 L. Ed. 2d 348 (2016); *Flynn v. Alabama*, 136 S. Ct. 1371, 194 L. Ed. 2d 352 (2016); *Forman v. Alabama*, 136 S. Ct. 1372, 194 L. Ed. 2d 353 (2016); *Foster v. Alabama*, 136 S. Ct. 1371, 194 L. Ed. 2d 352 (2016); *Gardner v. Alabama*, 136 S. Ct. 1369, 194 L. Ed. 2d 351 (2016); *Gibson v. Louisiana*, 136 S. Ct. 1360, 194 L. Ed. 2d 344 (2016); *Hogan v. Alabama*, 136 S. Ct. 1370, 194 L. Ed. 2d 351 (2016); *Iiams v. Alabama*,

In each of these orders, Justices Thomas and Alito filed a concurring statement explaining the Court's precise holding:

> The Court has held the petition in this and many other cases pending the decision in *Montgomery v. Louisiana*, 577 U. S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). In holding this petition and now vacating and remanding the judgment below, the Court has not assessed whether petitioner's asserted entitlement to retroactive relief "is properly presented in the case." *Id.*, at ___, 136 S. Ct. at 732, 193 L. Ed. 2d at 617.

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136 S. Ct. 1370, 194 L. Ed. 2d 351 (2016); *Ingram v. Alabama*, 136 S. Ct. 1372, 194 L. Ed. 2d 353 (2016); *Jacobs v. Louisiana*, 136 S. Ct. 1362, 194 L. Ed. 2d 345 (2016); *Lewis v. Michigan*, 136 S. Ct. 1357, 194 L. Ed. 2d 340 (2016); *Livas v. Louisiana*, 136 S. Ct. 1362, 194 L. Ed. 2d 345 (2016); *Martin v. Smith*, 136 S. Ct. 1365, 194 L. Ed. 2d 347 (2016); *Matthews v. Alabama*, 136 S. Ct. 1366, 194 L. Ed. 2d 348 (2016); *McWilliams v. Alabama*, 136 S. Ct. 1373, 194 L. Ed. 2d 354 (2016); *Pratt v. Alabama*, 136 S. Ct. 1368, 194 L. Ed. 2d 349 (2016); *Presley v. Alabama*, 136 S. Ct. 1399, 194 L. Ed. 2d 356 (2016); *Reeves v. Alabama*, 136 S. Ct. 1369, 194 L. Ed. 2d 350 (2016); *Riley v. Louisiana*, 136 S. Ct. 1359, 194 L. Ed. 2d 343 (2016); *Sanchez v. Pixley*, 136 S. Ct. 1361, 194 L. Ed. 2d 341 (2016); *Storey v. Alabama*, 136 S. Ct. 1373, 194 L. Ed. 2d 354 (2016); *Stubbs v. Alabama*, 136 S. Ct. 1368, 194 L. Ed. 2d 350 (2016); *Tapp v. Louisiana*, 136 S. Ct. 1355, 194 L. Ed. 2d 342 (2016); *Thompson v. Roy*, 136 S. Ct. 1375, 194 L. Ed. 2d 355 (2016); *Tolliver v. Louisiana*, 136 S. Ct. 1354, 194 L. Ed. 2d 341 (2016); *Tyler v. Louisiana*, 136 S. Ct. 1356, 194 L. Ed. 2d 339 (2016); *Williams v. Alabama*, 136 S. Ct. 1365, 194 L. Ed. 2d 347 (2016); *Williams v. Louisiana*, 136 S. Ct. 1360, 194 L. Ed. 2d 344 (2016); *Wilson v. Alabama*, 136 S. Ct. 1366, 194 L. Ed. 2d 348 (2016); *Young v. Louisiana*, 136 S. Ct. 1359, 194 L. Ed. 2d 343 (2016).

Jones v. Virginia, U.S. ___, ___, 136 S. Ct. 1358, 1358, 194 L. Ed. 2d 340 (2016) (Thomas, J., concurring). The concurrence clarified, without any suggestion to the contrary in the majority's form order, what the remand order did not do:

> On remand, courts should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief. The Court's disposition does not, for example, address whether an adequate and independent state ground bars relief, *whether petitioner forfeited or waived any entitlement to relief* (by, for example, entering into a plea agreement waiving any entitlement to relief), or *whether petitioner's sentence actually qualifies as a mandatory life without parole sentence.*

Id. (emphases added).

II.

On remand, Jones seeks a vacatur of his life sentence on several interdependent grounds. Under his view of *Miller* and *Montgomery*, Jones contends that we must order the trial court to resentence him to a specific term of years (not life) and to ensure that the term of incarceration is not long enough to be the "functional equivalent of a life sentence." Appellant's Remand Reply Br. at 9, 14. We find none of Jones's arguments persuasive.[5]

5. Jones's motion to vacate filed in the trial court expressly stated that the motion "only deal[t] with the Capital Murder charge."

A.

Jones first argues that we should hold — contrary to *Jones I* — that his life sentence was a mandatory life sentence in violation of *Miller*. We decline the invitation to do so.

1.

As *Jones I* observed, the General Assembly has carefully distinguished between "mandatory minimum sentence[s]" that cannot be suspended and non-mandatory minimum sentences that can be. *Jones I*, 288 Va. at 479-80, 763 S.E.2d at 825.[6] "Only where the General Assembly

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J.A. at 56. Consequently, Rule 5:25 precludes Jones from challenging on appeal any of the sentences imposed on his other convictions. *See Floyd v. Commonwealth*, 219 Va. 575, 584, 249 S.E.2d 171, 176 (1978) (holding that appellate courts will not consider an argument that differs from the specific argument presented to the trial court even if it relates to the same general issue). Jones does not assert any grounds for invoking the "good cause" or "ends of justice" exceptions under Rule 5:25, and we will not sua sponte raise them on his behalf. *See Toghill v. Commonwealth*, 289 Va. 220, 239-40, 768 S.E.2d 674, 684 (2015) (McClanahan, J., concurring); *see also Widdifield v. Commonwealth*, 43 Va. App. 559, 564, 600 S.E.2d 159, 162 (2004) (en banc); *Edwards v. Commonwealth*, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (en banc).

6. *See* Code § 18.2-61(B)(2) (rape by adult offender) for an example of a life sentence that cannot be suspended. For non-life sentences — of varying severity — that cannot be suspended see, for example, Code §§ 3.2-4212(D) (unlawful sale/transport of certain tobacco products), 16.1-253.2(A) (repeat violations of certain types of protective orders), 18.2-36.1(B) and -36.2(B) (aggravated involuntary manslaughter), 18.2-46.3:3 (gang-related activity in gang-free zones), 18.2-51.1 (malicious wounding of law enforcement

has prescribed a mandatory minimum sentence imposing an inflexible penalty has it 'divested trial judges of all discretion respecting punishment.'" *Id.* at 479, 763 S.E.2d at 825 (quoting *In re: Commonwealth*, 229 Va. 159, 163, 326 S.E.2d 695, 697 (1985)).[7] What is true for term-of-

officers or other first responders), 18.2-57 (certain types of assaults and batteries), 18.2-60.4(A) (repeat violations of certain protective orders), 18.2-61(B)(1) (rape when offender is more than three years the victim's senior), 18.2-67.1(B)(1) and -67.2(B)(1) (forcible sex acts when offender is more than three years the victim's senior), 18.2-121 (property damage motivated by a victim's "race, religious conviction, color or national origin"), 18.2-154 (shooting a firearm at certain types of vehicles), 18.2-186.4 (use of law enforcement officer's identity with intent to coerce), 18.2-248 (certain first or repeat drug manufacture, sale, transportation, or distribution offenses), 18.2-248.01 and -248.03 (same), 18.2-255 (distribution of marijuana to minors), 18.2-255.2 (repeat drug distribution on school campus), 18.2-270 (repeat DWI convictions), 18.2-308.1 (possession of explosive device on school campus), 18.2-308.2:2 (thwarting criminal background checks for firearms), 18.2-374.1 (production of child pornography), 18.2-374.1:1 (repeat reproduction or transmission of child pornography), 18.2-374.3 (certain electronic solicitation and other child pornography crimes), 46.2-341.28 (driving a commercial vehicle while intoxicated), 46.2-357(B) (habitual operation of a motor vehicle while license revoked), 46.2-391 (revocation of license for multiple DWI convictions), 46.2-865.1 (street racing resulting in death of another), 53.1-203 (escape by a felon from a correctional facility). Notwithstanding the girth of this list, when "[c]lassifying state guidelines systems along a continuum from most voluntary to most mandatory, Virginia ranks the most voluntary of [Minnesota, Michigan, and Virginia]." Va. Crim. Sent'g Comm'n, Annual Report 95 (2014), http://www.vcsc.virginia.gov/2014Annual Report.pdf.

7. The phrase "[m]andatory minimum" in the Virginia Code "means, for purposes of imposing punishment upon a person convicted of a crime, that the court shall impose the entire term of

years sentences is just as true for life sentences. Unless a statute precludes the exercise of such discretion, Virginia trial courts can — and do — suspend life sentences.[8] Jones has offered no persuasive reason to us, either before or after *Jones I*, in support of the thesis that life sentences are exempt from the judicial power of suspension. Consequently, we reaffirm *Jones I*'s holding that, under Virginia law, "the trial court ha[d] the ability under Code § 19.2-303 to suspend part or all of the life sentence," and thus, "the sentencing scheme applicable to Jones's conviction was not a mandatory life without the possibility of parole scheme." 288 Va. at 477, 763 S.E.2d at 823.

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confinement, the full amount of the fine and the complete requirement of community service prescribed by law." Code § 18.2-12.1. "The court *shall not suspend* in full or in part any punishment described as mandatory minimum punishment." *Id.* (emphasis added).

8. *See, e.g., Tyson v. Commonwealth*, Record No. 140917, 2015 Va. Unpub. LEXIS 6, at *1 (Aug. 24, 2015) (unpublished) (life sentence with "all but 13 years suspended"); *Hamilton v. Director of the Dep't of Corrs.*, Record No. 131738, 2014 Va. LEXIS 201, at *1 (June 6, 2014) (unpublished) (two life sentences plus 68-year term sentence "with all but twenty-two years suspended"); *Harris v. Commonwealth*, 279 Va. 123, 125 n.2, 128, 688 S.E.2d 279, 280 n.2, 282 (2010) (suspension of life and multiple term-of-years sentences to a total of "eight years of the life sentence for the abduction conviction"); *Moore v. Hinkle*, 259 Va. 479, 485, 527 S.E.2d 419, 422 (2000) (suspension of "all but ten years" of a life sentence); *Jefferson v. Commonwealth*, Record No. 2172-12-2, 2013 Va. App. LEXIS 311, at *2 (Oct. 29, 2013) (unpublished) (suspension of all but 20 years of life sentence); *White v. Commonwealth*, Record No. 1998-96-2, 1997 Va. App. LEXIS 613, at *4 (Sept. 23, 1997) (unpublished) (suspension of two life sentences and fifteen years of a thirty-year term to "twenty years of active time").

2.

Whether a state sentencing statute authorizes or precludes judicial discretion is a matter solely governed by state law. In the companion case addressed in the *Miller* opinion, the United States Supreme Court reaffirmed that whether a state sentencing statute is mandatory (that is, precludes the possibility of mitigation of the prescribed punishment) is a decision to be made by "state courts." *Miller*, 567 U.S. at n.2, 132 S. Ct. at 2462 n.2. When a state court treats a sentencing statute as "mandatory," the United States Supreme Court will "abide by that interpretation of state law." *Id.*[9]

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9. *See also Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law. . . . Accordingly, we accept as binding the Maine Supreme Judicial Court's construction of state homicide law."); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626, 22 L. Ed. 429 (1875) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."). *See generally Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948) (noting the United States Supreme Court's respect for and deference to a state court's interpretation of that state's own policy considerations underlying its laws); 18 Susan Bandes et al., Moore's Federal Practice § 133.14[1], at 133-17 (Matthew Bender 3d ed. 2016) ("A federal decision based on a federal judicial construction of state law may not preclude reconstruction of the law by that state's own courts. The highest court of each state is the principal expositor of that state's law, and therefore the state court may not be bound by a federal construction of that state's laws." (footnote omitted)); 22 Drew S. Days, III, *id.* § 406.20[3][b][ii], at 406-80 to -81 ("Matters of state law are not the [United States Supreme] Court's concern; rather, the state courts

It follows that where, as here, a State's highest court treats a sentencing statute as non-mandatory (that is, provides an opportunity to seek mitigation of the prescribed punishment), the United States Supreme Court would abide by that interpretation of state law. We thus infer no disapproval in either *Miller* or *Montgomery* of our interpretation of Virginia's sentencing statutes. Nor do we believe it proper to read into the remand order "any view" on the question of "whether petitioner's sentence actually qualified as a mandatory life without parole sentence." *Jones*, U.S. at ___, 136 S. Ct. at 1358 (Thomas, J., concurring).

B.

Jones frames his next argument in equally absolute, but flawed, terms. "*Montgomery* confirmed," Jones argues, "that *Miller* requires a hearing where youth and its attendant characteristics are considered as sentencing factors in order to separate those juveniles who may be sentenced to life without parole from those who may not. Virginia law does not provide for such hearing." Appellant's Remand Br. at 8. We disagree on several levels with this reasoning.

1.

As *Montgomery* explained, the mandatory, life-without-parole sentence under Louisiana law violated

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are the appropriate tribunals to decide questions arising under their local law." (footnote omitted)).

Miller because it gave the juvenile defendant "no *opportunity* to present mitigation evidence to justify a less severe sentence." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726 (emphasis added).[10] Like the sentencing statutes in *Miller*, the Louisiana statute imposing a sentence of life imprisonment on Montgomery was not subject to suspension in whole or in part by the sentencing court. *See* La. Stat. Ann. § 14:30(C)(1). Thus, as was the case in *Miller*, the state sentencing law at issue in *Montgomery* precluded the juvenile defendant from either seeking mitigation of his sentence or offering any evidence in support of such a request.

In Virginia, however, a criminal defendant has a statutorily provided opportunity to present mitigation

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10. In a post-argument submission to us, Jones contends that the United States Supreme Court has recently signaled a far broader interpretation of *Miller* and *Montgomery*. That signal, however, came from only one Justice in a concurrence to a summary opinion granting certiorari, vacating the lower court's decision, and remanding without any discussion of the merits of the petition. *See Tatum v. Arizona*, U.S. ___, ___, 137 S. Ct. 11, 13, 196 L. Ed. 2d 284 (2016) (Sotomayor, J., concurring) (expanding *Montgomery* to require "more than mere consideration of a juvenile offender's age" but to require a particular finding that the offender "is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption'" (citation omitted)). The majority did not mention this view, and two other Justices disclaimed it. *See* 137 S. Ct. 11, 196 L. Ed. 2d 284, [WL] at *5-6 (Alito, J., dissenting). Our colleagues in dissent find it relevant that the Court duplicated the *Tatum* summary opinion in *Arias v. Arizona*, U.S. ___, 137 S. Ct. 370, 196 L. Ed. 2d 287 (2016), another summary opinion issued the same day. We are unpersuaded that either *Tatum* or *Arias* has any controlling precedential impact.

evidence at his sentencing hearing.[11] If relevant and admissible, evidence in mitigation of punishment can be presented unless the punishment imposed is a mandatory, fixed sentence that cannot be varied in any degree.[12]

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11. *See* Code § 19.2-264.4(B) (stating that the sentencing court in a capital case may consider evidence of "history and background of the defendant, and any other facts in mitigation of the offense" including, inter alia, the "age of the defendant at the time of the commission of the capital offense" and the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law"); *Thomas v. Commonwealth*, 244 Va. 1, 7, 419 S.E.2d 606, 609, 8 Va. Law Rep. 3158 (1992) (acknowledging that Virginia's death penalty statute provides for "individualized consideration" of capital defendants because age is a "statutorily prescribed mitigating factor the jury may consider" in sentencing); John L. Costello, Virginia Criminal Law and Procedure § 63.5[1], at 1118 (4th ed. 2008) ("The Commonwealth may not attempt to preclude the defendant's offer of evidence in extenuation and mitigation by declining to put on evidence in aggravation."); *id.* § 63.7[3], at 1130-31 ("[T]he trial judge must instruct the jury concerning the duty to consider matters in mitigation to the extent they found them supported by evidence of record. . . . Under the statute, the defendant's age and grasp of moral considerations are relevant . . . ." (footnotes omitted)); *accord* Code § 19.2-295.1 (stating that defendant in non-capital case may present *any* "relevant, admissible evidence related to punishment"); Code § 19.2-299(A) (allowing a defendant to offer "any additional facts" bearing on sentencing in response to pre-sentence report offered in bench trials or non-capital jury trials); Rule 3A:17.1(e)(4) (allowing defendant convicted of non-capital felony offense to produce "relevant, admissible evidence related to punishment"); *Commonwealth v. Shifflett*, 257 Va. 34, 43-44, 510 S.E.2d 232, 236 (1999) (stating that the trial court "may be guided" by mitigating factors listed in the capital sentencing statute, Code § 19.2-264.4, when sentencing non-capital offenders).

12. "[U]nder the Virginia practice, the punishment as fixed by the jury is not final or absolute, since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in

This principle is no less true in Jones's case than in any other criminal case. Moreover, Virginia's sentencing laws — unlike the laws found unconstitutional in *Miller* — authorized the sentencing court to suspend Jones's life sentence in whole or in part. Nothing in Virginia law denied Jones the opportunity to request a suspension and to present evidence of his "youth and attendant characteristics," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734, in support of a suspended sentence. Jones was never denied this constitutionally required opportunity. For the certainty of a plea agreement, he simply chose not to exercise it.

2.

Jones's argument to the contrary seems oblivious to the fact that he entered into a plea agreement in which he *stipulated* to a life sentence "without the possibility of parole" on the capital murder charge. *See* J.A. at 45.[13] He also agreed "to waive any and all rights of appeal with regard to any substantive or procedural issue involved in this prosecution." *Id.* at 44. Consistent with the prevailing view, *see* 7 Wayne R. LaFave et al., Criminal Procedure

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part, on the basis of any mitigating facts that the convicted defendant can marshal." *Vines v. Muncy*, 553 F.2d 342, 349 (4th Cir. 1977). Furthermore, "[a] defendant convicted of a felony has an absolute right to have a presentence investigation and report prepared upon his request and submitted to the court prior to the pronouncement of sentence." *Duncan v. Commonwealth*, 2 Va. App. 342, 345-46, 343 S.E.2d 392, 394 (1986). "The presentence report generally provides the court with mitigating evidence." *Id.* at 345, 343 S.E.2d at 394.

13. At no point in the trial court or during this appeal has Jones asserted that he entered into his plea agreement involuntarily.

§ 27.5(c), at 86 (4th ed. 2015) (observing that "[m]ost courts, including all twelve federal courts of appeals with criminal jurisdiction, uphold appeal waivers"),[14] Virginia has long held that a criminal defendant can waive "his appeal of right" if the circumstances demonstrate "his decision to waive his appeal was made knowingly, voluntarily, and intelligently," *Davidson v. Commonwealth*, 244 Va. 129, 131, 419 S.E.2d 656, 658, 8 Va. Law Rep. 3306 (1992) (accepting waiver of right to appeal capital conviction but applying a specific statutory exception mandating limited appellate review of all death sentences).[15]

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14. As most courts have held, "because other important constitutional rights of the defendant may be waived by plea agreement, the right to appeal, which is not even guaranteed by the Constitution, but by statute, should also be subject to waiver." *Congdon v. Commonwealth*, 57 Va. App. 692, 696, 705 S.E.2d 526, 528 (2011) (quoting 7 Wayne R. LaFave, Criminal Procedure § 27.5(c), at 75-76 (3d ed. 2007)); *see also United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016); *United States v. Rodriguez*, 659 Fed. Appx. 671, 673 (2d Cir. 2016) (unpublished); *United States v. Haslam*, 833 F.3d 840, 844 (7th Cir. 2016); *United States v. Betancourt-Pérez*, 833 F.3d 18, 22 (1st Cir. 2016); *United States v. Fazio*, 795 F.3d 421, 425 (3d Cir. 2015); *United States v. Shemirani*, 802 F.3d 1, 2, 419 U.S. App. D.C. 359 (D.C. Cir. 2015); *United States v. Archie*, 771 F.3d 217, 221 (4th Cir. 2014), *cert. denied, Archie v. United States*, 135 S. Ct. 1579, 191 L. Ed. 2d 660 (2015), *sentence vacated*, 2016 U.S. Dist. LEXIS 81872, at *2 (E.D.N.C. June 23, 2016); *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1174, 191 L. Ed. 2d 132 (2015); *United States v. Gibney*, 519 F.3d 301, 305-06 (6th Cir. 2008); *United States v. Smith*, 500 F.3d 1206, 1210 (10th Cir. 2007); *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006); *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 2005); *United States v. Lemaster*, 403 F.3d 216, 219-20 (4th Cir. 2005); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003) (en banc).

15. *See also Hudson v. Commonwealth*, 267 Va. 29, 33, 590 S.E.2d 362, 364 (2004); *Emmett v. Commonwealth*, 264 Va. 364, 370,

In short, Jones was never denied the opportunity to offer mitigation evidence of his "youth and attendant characteristics," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734, in support of a suspended sentence. He affirmatively waived that right as part of a negotiated plea agreement. 24 Daniel R. Coquillette et al., Moore's Federal Practice § 611.08[4][a], at 611-84 (Matthew Bender 3d ed. 2016) ("There is a 'presumption that legal rights generally, and evidentiary rights specifically, are subject to waiver by voluntary agreement of the parties.' A plea of guilty entered on the competent advice of counsel will be held to waive all constitutional objections to the conviction . . . unless the jurisdiction in which the case arises specifically permits appeals on those issues, even after a plea of guilty." (footnote omitted) (quoting *United States v. Mezzanatto*, 513 U.S. 196, 203, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995))). He also expressly waived his right to challenge his sentence on direct appeal and, *a fortiori*, on collateral attack. His present argument thus amounts to a challenge that he was never afforded an opportunity to present evidence that he never offered and to request relief that he never sought.

Putting aside for the moment Jones's void-ab-initio contention, which we address in Part II(C) of this opinion, we fail to see how his *Miller-Montgomery* claim can be immunized from waiver principles that govern all other constitutional challenges. *See, e.g., McDonald v. Commonwealth*, 274 Va. 249, 255, 645 S.E.2d 918, 921

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569 S.E.2d 39, 43-44 (2002); *Patterson v. Commonwealth*, 262 Va. 301, 306, 551 S.E.2d 332, 335 (2001).

(2007) (holding that appellant had waived his facial constitutional challenge under Rule 5:25); *Powell v. Commonwealth*, 182 Va. 327, 336, 28 S.E.2d 687, 691 (1944) (affirming express waiver of various constitutional rights, including rights to counsel, to trial by jury, to sequester the jury, and to speedy trial); *Brown v. Epps*, 91 Va. 726, 737, 21 S.E. 119, 122 (1895) (observing, in a Sixth Amendment challenge, that it is "beyond a doubt" that "a prisoner may waive many of his constitutional rights").

Nothing in *Montgomery* undermines settled waiver principles. Nor does the remand order do so. As the concurring Justices pointed out, the remand order disclaims any position whatsoever on "whether an adequate and independent state ground bars relief" or "*whether petitioner forfeited or waived any entitlement to relief* (by, for example, entering into a plea agreement waiving any entitlement to relief)." *Jones*, U.S. at ___, 136 S. Ct. at 1358 (emphasis added). We are thus free to employ traditional waiver principles applicable to plea agreements. Those principles, in our opinion, are dispositive in this case.

C.

Jones next addresses the fact that, at his original sentencing, he never asked for a mitigation hearing, never proffered any mitigation evidence, expressly stipulated to his life sentence as a condition of his plea agreement, and affirmatively waived any appellate challenge to his conviction or sentence. That is of no concern, Jones claims, because his sentence was void ab initio — a doctrinal

"royal flush" that outranks any lesser hands of procedural default, estoppel, or even judicial stipulations.

This assertion, however, presupposes that the trial court violated the Eighth Amendment by accepting Jones's *Alford* guilty plea and by imposing the life sentence Jones agreed to in the plea agreement. As *Montgomery* explained, a mandatory, life-without-parole sentence violates *Miller* when it provides the juvenile defendant "no *opportunity* to present mitigation evidence to justify a less severe sentence." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726 (emphasis added). Under Virginia law, Jones had such an opportunity. *See supra* Part II.B. He simply failed to exercise it.

But even if, as Jones's logic implies, the trial court — over a decade ago — had a constitutional duty to force Jones to violate his plea agreement by requesting a partial or complete suspension of his stipulated sentence and then, whether requested or not, to order Jones to present mitigation evidence in support of an unrequested suspension, we would not hold that such a violation renders his sentence void ab initio. Nothing in Virginia or federal law compels us to do so, and we can think of no good reason why we should.

1.

In this case, as in most, whether an alleged error by a trial court renders its order void ab initio or merely voidable turns on the subtle, but crucial, distinction deeply embedded in Virginia law "between a court lacking

jurisdiction to act upon a matter and the court, while properly having jurisdiction, nonetheless erring in its judgment." *Kelley v. Stamos*, 285 Va. 68, 75, 737 S.E.2d 218, 221-22 (2013). "In this context, a matter is void either because it has been null from the beginning (void ab initio) or because it is declared null although seemingly valid until that point in time (voidable)." *Nelson v. Warden*, 262 Va. 276, 285, 552 S.E.2d 73, 77-78 (2001). Significantly, "very few judgments are totally void and subject to attack at any time." Costello, *supra* note 11, § 62.12, at 1087.

This distinction guards against the improper elevation of a court's failure "to comply with the requirements for exercising its authority to the same level of gravity as a lack of subject matter jurisdiction." *Nelson*, 262 Va. at 281, 552 S.E.2d at 75; *see also Burrell v. Commonwealth*, 283 Va. 474, 480, 722 S.E.2d 272, 275 (2012). In this sense, a trial court has "jurisdiction to err" just as an appellate court has jurisdiction to correct such errors. *Parrish v. Jessee*, 250 Va. 514, 521, 464 S.E.2d 141, 146 (1995) (citation omitted).

As subtle as this distinction may be, it has a sharp impact on criminal cases. If a criminal defendant fails to preserve an issue in the trial court, he can waive claimed violations of his constitutional right to be free of unreasonable searches and seizures under the Fourth Amendment,[16] of his *Miranda* rights under the Fifth

16. *See, e.g., McGhee v. Commonwealth*, 280 Va. 620, 625, 701 S.E.2d 58, 61 (2010) (refusing to consider appellant's Fourth Amendment argument based on developments in search-and-seizure law because appellant had not "object[ed] to the search incident to

Amendment,[17] of his confrontation and speedy trial rights under the Sixth Amendment,[18] and even of his right to a

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arrest below"); *Hudson v. Commonwealth*, 266 Va. 371, 375, 585 S.E.2d 583, 585 (2003) (finding appellant's Fourth Amendment argument "barred from consideration on appeal under Rule 5:25" because appellant "present[ed] this argument for the first time on appeal"); *see also* Code § 19.2-266.2(A)-(B) (providing that a defendant waives his right to challenge the admission of evidence allegedly obtained in violation of the Fourth Amendment if he does not file a "motion or objection in a proceeding in circuit court . . . in writing, before trial").

17. *See, e.g., Schmitt v. Commonwealth*, 262 Va. 127, 145-46, 547 S.E.2d 186, 199 (2001) (holding that appellant "ha[d] waived on appeal his argument regarding the admissibility of [a self-incriminating] tape recording" because he had not complied with statutory objection requirements at trial); *Jones v. Commonwealth*, 230 Va. 14, 18 n.1, 334 S.E.2d 536, 539 n.1 (1985) (holding appellant's Fifth Amendment self-incrimination argument waived under Rule 5:25 because "he did not raise these points in the trial court, and we will not consider them here"); *see also* Code § 19.2-266.2(A)-(B) (providing that a defendant waives his right to challenge the admission of evidence allegedly obtained in violation of the Fifth Amendment if he does not file a "motion or objection in a proceeding in circuit court . . . in writing, before trial").

18. *See, e.g., Schmitt*, 262 Va. at 145-46, 547 S.E.2d at 199 (holding that appellant had waived his Sixth Amendment right to confrontation by not complying with statutory objection requirements at trial); *Butts v. Commonwealth*, 145 Va. 800, 806, 133 S.E. 764, 766 (1926) (observing that the right to speedy trial "is not self-operative" but must "be claimed, or it may be waived"); *see also* Code § 19.2-266.2(A)-(B) (providing that a defendant waives his right to challenge the admission of evidence obtained in violation of the Sixth Amendment if he does not file a "motion or objection in a proceeding in circuit court . . . in writing, before trial").

jury trial under the Sixth Amendment.[19] None of these claims, even if conceded to be valid, renders the underlying judgment void ab initio. Procedural default principles, including Rules 5:25 and 5A:18, still apply, as do traditional finality principles protecting judgments no longer within the trial court's active jurisdiction. *See supra* notes 16-19 and accompanying text.[20]

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19. *See, e.g., Woodard v. Commonwealth*, 287 Va. 276, 278, 754 S.E.2d 309, 310 (2014) (noting the defendant's waiver of a jury trial in a felony proceeding); *Jackson v. Commonwealth*, 267 Va. 178, 189, 590 S.E.2d 520, 526 (2004) (acknowledging that the right to a jury trial may be waived in trial of a capital offense for which the death penalty may be imposed); *Fails v. Virginia State Bar*, 265 Va. 3, 8, 574 S.E.2d 530, 533 (2003) (observing that a criminal defendant "may waive, among other constitutional rights, the right to demand counsel or the right to demand trial by jury"); *accord Heinrich Schepers GmbH & Co. v. Whitaker*, 280 Va. 507, 516, 702 S.E.2d 573, 577 (2010) (affirming trial court's holding that appellant had waived its right to a jury for the liability but not damages phase of trial).

20. We have recognized very few exceptions to the finality principle of Rule 1:1. As our cases demonstrate, "we apply it rigorously," *Commonwealth v. Morris*, 281 Va. 70, 77, 705 S.E.2d 503, 506 (2011), in both criminal and civil cases. We recognize only those exceptions to finality clearly embedded in our common-law inheritance, when a statute does not provide an exception to finality. *See, e.g.*, Code §§ 19.2-303 (permitting modification of an unserved portion of a criminal sentence "at any time before the sentence has been completely served"), 8.01-428 (recognizing power to modify or vacate final orders under specified circumstances, including fraud on the court, "at any time on [the court's] own initiative or upon the motion of any party"), 8.01-654(A)(2) (authorizing petitions for habeas corpus, as applicable, "within one year after the cause of action accrues" or "within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has

Jones contends that unlawful sentencing orders are different. He is right but not in the way he supposes. The jurisdictional power of a Virginia trial court to issue a criminal sentence depends upon the applicable sentencing statutes. *See Kelley*, 285 Va. at 76, 737 S.E.2d at 222 (acknowledging that "the Constitution of Virginia authorized the General Assembly to confer power upon the circuit courts" and that "[t]he General Assembly prescribed the applicable punishments for criminal offenses").[21]

There is no inherent judicial power to fix terms of imprisonment. *See Hernandez v. Commonwealth*, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011) (explaining that a

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expired"), 8.01-677 (authorizing writs of error coram vobis "after reasonable notice" for "any clerical error or error in fact for which a judgment may be reversed or corrected"). In *Morris*, for example, we noted that "[s]ome jurisdictions have held that audita querela is available as a remedy to modify a criminal sentence." 281 Va. at 83, 705 S.E.2d at 509. "However, neither this Court nor any English court prior to the writ's adoption in this Commonwealth has ever applied the writ of audita querela in this manner. We will not do so now." *Id.*

21. *See also* Code § 19.2-295(A) ("Within the limits prescribed by law, the term of confinement . . . and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury, or by the court in cases tried without a jury."); *Smyth v. Holland*, 199 Va. 92, 98-99, 97 S.E.2d 745, 749-50 (1957) ("Provisions relating to the remission of fines and penalties, punishment and execution of sentences, the commencement of the confinement for crimes, credits and allowances to convicted persons, and probation and parole, are controlled and limited by our Constitution and statutes."); *Wilborn v. Saunders*, 170 Va. 153, 160-61, 195 S.E. 723, 726 (1938) (describing the legislative task of adopting "[p]enal laws" and the limited "judicial function" of "fix[ing] the amount of punishment within the limits prescribed by the legislature").

Virginia trial court "has no inherent authority to depart from the range of punishment legislatively prescribed"). Thus, when a trial court imposes a sentence outside the range set by the legislature, the court's sentencing order — at least to that extent — is void ab initio because the court has no jurisdiction to do so. *See, e.g., Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009); *Royster v. Smith*, 195 Va. 228, 235, 77 S.E.2d 855, 858 (1953) (noting that a sentence is "void" only if "the court rendering it" did not have "the power to pronounce" it).

We clarified these points in *Rawls*. "Prior to *Rawls*, our jurisprudence had not been uniform in determining whether a defendant who received an improper sentence was entitled to a new sentencing hearing." *Grafmuller v. Commonwealth*, 290 Va. 525, 529, 778 S.E.2d 114, 116 (2015). "Thus, in *Rawls* we adopted a bright-line rule that: 'a sentence imposed in violation of a prescribed statutory range of punishment is void ab initio because the character of the judgment was not such as the Court had the power to render.'" *Id.* (quoting *Rawls*, 278 Va. at 221, 683 S.E.2d at 549). In this context, a sentencing order is void ab initio only if the trial court lacked "the power to render" it. *Id.*; *accord Burrell*, 283 Va. at 480, 722 S.E.2d at 275 (recognizing an order as void ab initio when the trial court had no "power to render" it).[22]

22. *See, e.g., Frango v. Commonwealth*, 66 Va. App. 34, 48-49, 782 S.E.2d 175, 181-82 (2016) (holding that the trial court's sentence of two years of incarceration was void ab initio because, per sentencing statutes, the maximum sentence was 12 months, and thus, the trial court lacked "power to render" the excessive sentence (quoting *Rawls*, 278 Va. at 221, 683 S.E.2d at 549)); *Gordon v. Commonwealth*, 61 Va. App. 682, 685-86, 739 S.E.2d 276, 278

We respectfully disagree with the dissent's assertion that Virginia law supports Jones's use of a motion to vacate in this context. *See post* at 44-46. The dissent offers only one authority in support of that assertion: *Loving v. Commonwealth*, 206 Va. 924, 925, 147 S.E.2d 78, 79 (1966). That decision, however, was famously reversed by *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), and neither our opinion nor the United States Supreme Court opinion reversing it had a single line addressing the proper role of motions to vacate under Virginia law. Furthermore, the issue was not briefed, argued, or decided.

Under Virginia law, stare decisis does not "foreclose inquiry" into an issue not previously "raised, discussed, or decided." *Chesapeake Hosp. Auth. v. Commonwealth*, 262 Va. 551, 560, 554 S.E.2d 55, 59 (2001); *see also Selected Risks Ins. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581, 3 Va. Law Rep. 2345 (1987) (recognizing that precedent accorded stare decisis weight is contingent upon "full deliberation upon the issue by the court"); *Moses v. Commonwealth*, 45 Va. App. 357, 364 n.4, 611 S.E.2d 607, 610 n.4 (2005) (en banc). For stare decisis to apply, "the court must have decided the issue for which the precedent is claimed; it cannot merely have discussed it in dictum,

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(2013) (reversing appellant's conviction on the basis that it was void ab initio as to the portion of the sentence that exceeded applicable sentencing statutes and thus went beyond the trial court's power); *Zedan v. Westheim*, 60 Va. App. 556, 577, 729 S.E.2d 785, 795 (2012) (analyzing whether the disputed trial court ruling was void versus voidable based on whether "the character of the order was such that the court had no power to render it" (quoting *Singh v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001))).

ignored it, or assumed the point without ruling on it." Bryan A. Garner, et al., The Law of Judicial Precedent 6 (2016).

We made this very point about motions to vacate in *Hirschkop v. Commonwealth*, 209 Va. 678, 166 S.E.2d 322 (1969). Claiming *Loving* as supportive precedent, the criminal defendant in *Hirschkop* filed a motion to vacate his final conviction and sentencing order. *Id.* at 681-82, 166 S.E.2d at 324. We found several reasons why the motion to vacate was improper. One was that our *Loving* decision had no precedential value on the motion-to-vacate issue because "it does not appear from the opinion in *Loving* that the question of jurisdiction was raised or that any motion to dismiss was made by the Commonwealth. Certainly *Loving* does not stand for the proposition that any judgment which has become final can be vacated." *Id.* We continue to hold this view.[23]

2.

Jones claims that *Montgomery*'s retroactivity holding requires, as a matter of federal law, that we treat a *Miller* violation as rendering the sentence void ab initio. After all, Jones points out, *Montgomery* uses the term "void" in various places in the opinion to describe unconstitutional convictions and sentences. What Jones misses, however, is that neither *Montgomery* nor any decision upon which it relies holds that such violations render a criminal

23. We find unpersuasive the dissent's reliance on *Hodges v. Commonwealth*, 213 Va. 316, 191 S.E.2d 794 (1972). *See post* at 42 n.9, 47. We decided *Hodges* on direct appeal and said nothing about the availability of a collateral attack.

conviction or sentence void *ab initio*. Jones's argument fails to appreciate the crucial nature of this distinction.

"When a new substantive rule of constitutional law is established," the Supreme Court explained, "this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735. By using the term "void," *Montgomery* merely said what has been said for over a century. Certain types of constitutional errors render convictions "void," i.e., voidable until declared void, and thus subject to collateral attack in federal *habeas* proceedings — a precedential anchor securely set in *Ex parte Siebold*, 100 U.S. 371, 376-77, 25 L. Ed. 717 (1880).

This voidness principle was introduced by *Ex parte Siebold* "[i]n support of its holding that a conviction obtained under an unconstitutional law warrants *habeas relief*." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 731 (emphasis added) (quoting *Ex parte Siebold*, 100 U.S. at 376-77).[24] This conclusion, *Montgomery* held, also applies

24. *Ex parte Siebold* cannot be read to say that mere voidable errors can never be addressed by a habeas court and that a habeas court can only address void-ab-initio errors. If that were true, of course, there would be no reason for the habeas remedy. The all-purpose motion to vacate would render habeas irrelevant. But it has not been true for many decades. "Originally, criminal defendants whose convictions were final were entitled to federal habeas relief only if the court that rendered the judgment under which they were in custody lacked jurisdiction to do so." *Danforth v. Minnesota*, 552 U.S. 264, 271, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) (citing *Ex*

to state habeas review, but only to the extent that the state collateral-review proceeding "is open to a claim controlled by federal law"[25] and the "claim is properly presented in the case." *Id.* at ___, 136 S. Ct. at 731-32. Those last two caveats are important.

Parte Siebold). However, the Supreme Court "openly discarded the concept of jurisdiction — by then more [of] a fiction than anything else — as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of disregard of the constitutional rights of the accused." *Id.* at 272 n.7 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 79, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)) (citing *Waley v. Johnston*, 316 U.S. 101, 104-05, 62 S. Ct. 964, 86 L. Ed. 1302 (1942)). Habeas corpus is "not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it." *Waley*, 316 U.S. at 104-05.

25. *See* 28 U.S.C. § 2254(b)(1) (requiring generally the exhaustion of state remedies before initiating habeas action in federal court except when "there is an absence of available State corrective process"); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. *States have no obligation to provide this avenue of relief*, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." (emphasis added) (citations omitted)); *see also McKane v. Durston*, 153 U.S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.").

The law of habeas corpus in this Commonwealth "is open to a claim controlled by federal law." *Id.* at ___, 136 S. Ct. at 731; *see, e.g., Griffin v. Cunningham*, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964) (noting that "[i]t is well settled that the deprivation of a constitutional right of a prisoner may be raised by habeas corpus"); *Lacey v. Palmer*, 93 Va. 159, 172, 24 S.E. 930, 934 (1896) (evaluating statute under which habeas petitioner was convicted for validity under Commerce Clause of United States Constitution). We routinely adjudicate federal constitutional claims that are "properly presented," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 732, in our habeas proceedings.

The case before us now, however, is not a habeas corpus proceeding. Jones filed a motion to vacate in the sentencing court 12 years after his conviction, claiming that his sentence was cruel and unusual under the Eighth Amendment. There is no precedent under Virginia law for asserting such a claim in a motion to vacate. To be sure, we have never held, nor are we aware of any court that has held, that a motion to vacate (rather than a petition for habeas corpus) is a proper vehicle under Virginia law to challenge a conviction or sentence based solely on a federal constitutional challenge.

If a motion to vacate had the reach that Jones asserts, the multitude of substantive and procedural requirements in our habeas corpus law would be permanently sidelined. *See* Costello, *supra* note 11, § 68.2[2], at 1244 (describing Virginia habeas provisions as "impos[ing] strict limitations on the time within which petitions . . . may be filed" and highlighting other procedural requirements). Statutes of

limitation, as well as rules governing successive petitions, jurisdiction of courts to hear such claims, procedural defaults, service of process — none of these requirements would be relevant if a motion to vacate could be used in place of a petition for habeas corpus.

Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions. Just as habeas corpus cannot be used as a substitute for a direct appeal, 5 Ronald J. Bacigal, Virginia Practice Series: Criminal Procedure § 21:8, at 669 (2015-2016 ed.), a motion to vacate cannot be used as a substitute for a habeas corpus petition. Except for the narrow band of situations in which we have recognized the efficacy of motions to vacate to remedy orders that are void ab initio, constitutional challenges like the one Jones asserts must be properly presented in a timely petition for habeas corpus.

To put the point in the framework of *Montgomery*, a motion to vacate filed in a trial court that has long since lost active jurisdiction over the case, *see* Rule 1:1; Costello, *supra* note 11, § 62.12, at 1087, is not a state collateral-review proceeding "open to a claim controlled by federal law" and does not involve a claim that is "properly presented" by a motion to vacate, *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 731-32. Thus, even if the trial court (retroactively) violated *Miller* by imposing the stipulated life-without-parole sentence on Jones, the sentencing order would not be void ab initio and, thus, subject to annulment by a motion to vacate filed many years after the trial court lost active jurisdiction over the criminal

case. Instead, the putative *Miller* violation, if proven, would render the sentence merely voidable — that is, vulnerable to being judicially declared void — upon review either via direct appeal timely made or in a habeas corpus proceeding.

To be sure, *Montgomery* itself implicitly refutes Jones's assumption that a sentencing order in violation of *Miller* must be deemed void ab initio. *Montgomery* held that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 577 U. S. at ___, 136 S. Ct. at 736. How could that remedy be appropriate for a sentencing order deemed void ab initio, given that it is a "complete nullity" which, in the eyes of the law, does not exist at all? *Grafmuller*, 290 Va. at 528 n.1, 778 S.E.2d at 115 n.1 (citation omitted); *see also Griffith v. Frazier*, 12 U.S. 9, 28, 3 L. Ed. 471 (1814) (noting that an appointment that is "void ab initio" is "absolutely void" and thus renders all subsequent acts of the appointee voidable). A nonexistent nullity cannot be resurrected by some future, uncertain event. In this respect, the *Montgomery* remedy is irreconcilable with the dissent's claim that a violation of *Miller* ipso facto renders the sentence void ab initio.

While the dissent correctly points out that nowhere does *Montgomery* specifically state that habeas relief is the sole remedy available to address an unconstitutional sentence, that point is directed to the wrong question. The proper mode of collaterally attacking a criminal conviction and sentence in a state court depends on state law not federal law. *See Danforth v. Minnesota*, 552 U.S. 264, 288,

128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) ("[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." (citation omitted)); *Pace v. DiGuglielmo*, 544 U.S. 408, 414, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) (affirming procedural timelines for postconviction relief under state law and holding that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of [federal habeas review]" (citation omitted)); *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) (noting that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available"). We thus would not expect *Montgomery* to say anything about the exclusivity of state habeas relief in Virginia courts.

What *Montgomery* did say was that a life-without-parole sentence invalidated by *Miller* must be corrected in any state collateral-review proceeding that "is open to a claim controlled by federal law," assuming that the "claim is properly presented in the case." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 731-32. In Virginia, a *Miller* violation can be addressed on direct review or in a habeas proceeding. Because the violation, if proven, does not render the sentence void ab initio but merely voidable, it cannot be addressed by a motion to vacate filed years after the sentence became final. *See* Costello, *supra* note 11, § 62.12, at 1087 (noting that "a voidable judgment may be attacked only while the trial court that rendered it still has jurisdiction").

The dissent appears to believe that every substantive constitutional rule held to be retroactive, when violated,

renders the conviction or sentence void ab initio. *See post* at 41 (referring to this as the "general approach"). However, only one case cited by the dissent uses the "void ab initio" expression, *United States v. Johnson*, 457 U.S. 537, 550, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), and that case, like *Siebold*, addressed only a federal court's retroactive use of a new substantive rule in the context of federal habeas law.

Even in that context, *Johnson* synthesized earlier precedent that applied the "notion" of "void ab initio" judgments (an after-the-fact characterization, given that none of those cases used that term) only to situations in which a federal habeas court applies a constitutional guarantee that either "immunizes a defendant's conduct from punishment" or prevents a "trial from taking place at all." *Id.* at 550-51 (citing cases barring punishment of a defendant invoking the Fifth Amendment and cases barring prosecutions violative of the Double Jeopardy Clause); *see also Mackey v. United States*, 401 U.S. 667, 692-93, 91 S. Ct. 1160, 28 L. Ed. 2d 404 & nn.7-8 (1971) (Harlan, J., concurring) (observing that habeas review historically applied only to cases in which the challenged conviction involved "conduct beyond the power of the criminal law-making authority to proscribe" in a way that "punish[ed] for conduct that is constitutionally protected").

Nothing in the void-ab-initio "notion" in *Johnson* sought to dictate how state law governs the scope and availability of collateral remedies or to mandate that violations of retroactive substantive rules be treated as defects in subject-matter jurisdiction for purposes of motions to vacate filed in state courts. The "general approach" referred to by the dissent, *post* at 41, is nothing more than the unremarkable fact that habeas courts

applying substantive rules retroactively have authority to declare violative convictions or sentences to be void and to order appropriate relief. None of these cases hold that state courts must permit such challenges to go forward outside the parameters of a properly filed habeas petition.

D.

Finally, our colleagues in dissent raise several points about the interplay between *Miller* and *Montgomery* that go considerably beyond Jones's position in this appeal. We respect these views and offer a brief explanation as to why we cannot agree with them.

1.

First, the dissent adopts an "expanded" analysis of *Montgomery*, *post* at 33, contending that *Montgomery* "require[s] a *Miller* hearing before a juvenile offender can be sentenced to life without parole, *regardless of whether the sentence is mandatory or discretionary*," *post* at 36 (emphasis added). This fulsome expansion, however, does not come from *Montgomery*'s expansive interpretation of *Miller*. It comes from the dissent's expansive interpretation of *Montgomery*. As the dissent candidly acknowledges: "Even if *Miller* and *Montgomery* did not expressly require the facts surrounding Jones's sentencing be reconsidered, I would hold that juveniles in Virginia facing a sentence of life without parole should be afforded a *Miller* hearing, for the reasons stated in *Montgomery*." *Post* at 47 n.11.

We view the debate through a different prism. "We are duty bound," of course, "to enforce the Eighth Amendment

consistent with the holdings of the highest court in the land." *Vasquez v. Commonwealth*, 291 Va. 232, 242, 781 S.E.2d 920, 926 (2016). However, our "duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding." *Id.* We believe "the very concept of binding precedent presupposes that courts are 'bound by holdings, not language.'" *Id.* at 242-43, 781 S.E.2d at 926 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 282, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)). This limiting principle exists because "words [in judicial] opinions are to be read in the light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S. Ct. 165, 89 L. Ed. 118 (1944); *see also Ameur v. Gates*, 759 F.3d 317, 324 (4th Cir. 2014).

As we recently stated, *Miller* "held that 'mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Vasquez*, 291 Va. at 240-41, 781 S.E.2d at 925 (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2464). The main "question" for decision in *Montgomery* was equally clear: "whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders" should be applied retroactively. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 732. Both cases addressed *mandatory* life sentences without possibility of parole. The dissent's proposed expansion of these holdings to *non-mandatory* life sentences — based entirely on dicta in *Montgomery* — requires attenuated reasoning uninfluenced by stare decisis.[26]

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26. In his *Montgomery* dissent, Justice Scalia asserted that the majority opinion employed dicta not for the purpose of "applying *Miller*, but rewriting it." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at

We acknowledge that, perhaps, some post-*Montgomery* opinion from the United States Supreme Court might expand the Eighth Amendment to "mandatory or discretionary" juvenile life sentences generally, as the dissent proposes, with the evident purpose of moving the bar so high that all life sentences for convicted juvenile murderers and rapists, or juveniles convicted of other similarly serious crimes, eventually will be judicially deemed cruel and unusual punishment as a matter of law. The question before us, however, "is what the law is now, not what it may be in the future. We are not in the speculative business of plotting the future course of federal precedents." *Clark v. Virginia Dep't of State Police*, 292 Va. 725, 735, 793 S.E.2d 1, 7 (2016); *cf. Garcia v. Texas*, 564 U.S. 940, 941, 131 S. Ct. 2866, 180 L. Ed. 2d 872 (2011) ("Our task is to rule on what the law is, not what it might eventually be.").

2.

Second, the dissent sees our analysis as a logical conundrum. *Miller* cannot be understood, the dissent suggests, to apply only to a mandatory sentence of life without possibility of parole. This "interpretation of *Miller* and *Montgomery*," the dissent states, "renders

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743 (Scalia, J., dissenting). Our colleagues in dissent apparently endorse this view. *Post* at 33 n.2 (noting that the "resultant expansion of *Miller* did not go unnoticed by the dissenters" in *Montgomery*). On this point, we concur with Justice Ginsburg, who aptly observed that "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." *Lee v. Kemna*, 534 U.S. 362, 386, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002) (citation omitted). That observation is particularly poignant when the predictions are based upon nonbinding dicta.

the requirement that a sentencing court hold a hearing and 'consider a juvenile offender's youth and attendant characteristics' contingent upon whether the sentence to be imposed is mandatory rather than discretionary." *Post* at 35. Continuing this syllogism, the dissent adds, "[b]y that same logic, the majority concludes that a sentencing court may, but is not constitutionally required to, consider those factors if the sentence is discretionary." *Post* at 35-36.

We do not endorse this logic or attempt to defend it. Our understanding of *Miller* is different — and far clearer — than the thesis criticized by the dissent. Under our view, the whole point of *Miller* was to preclude a sentencing scheme from imposing a mandatory life-without-parole sentence because doing so would eliminate the sentencing court's discretion to impose anything less than that. Only in those nondiscretionary sentencing schemes are the offender's "youth and attendant characteristics," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734, truly irrelevant.

The *Miller* remedy was to require mandatory life sentences to be accompanied by the possibility of release on parole at some future date. *See Miller*, 567 U.S. at ___, ___, 132 S. Ct. at 2469, 2474-75. If that possibility exists, the *Miller* decision held, there could be no Eighth Amendment violation. *Montgomery* added another remedy in cases in which no parole possibility exists: an opportunity upon resentencing to conduct an evidentiary hearing on the offender's youth and attendant characteristics. *See Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-37.

Those are the only two scenarios: (i) mandatory life-without-parole sentences that can be remedied by the availability of parole and (ii) those for which parole is unavailable and which therefore require remand for discretionary resentencing. Both the *Miller* and *Montgomery* remedies presuppose that the original life sentence was mandatory such that no mitigating evidence presented at the original sentencing hearing could have precluded the entry of a mandatory sentencing order "condemning him or her to die in prison." *Id.* at ___, 136 S. Ct. at 726 (summarizing *Miller*). Without this predicate, neither remedy makes sense.

Our dissenting colleagues think that we leave out a third scenario, one in which a purely discretionary sentencing scheme does not require consideration of a juvenile offender's youth and attendant characteristics. Under our approach, the dissent warns, a sentencing court could choose to ignore these factors if the sentence is discretionary.

We respond by pointing out the unrealistic nature of that scenario. We are aware of no statute in the nation that authorizes a sentencing court to use its discretion to impose a life-without-parole punishment on a juvenile but forbids the court from considering the juvenile's "youth and attendant characteristics." *Id.* at ___, 136 S. Ct. at 734. Nor are we aware of any case — and this is certainly not one — in which a sentencing statute gave the juvenile offender the opportunity to present mitigating evidence but the sentencing court arbitrarily refused to consider it. If there were such a case, we would not need the Eighth Amendment to remedy the obvious error. We would simply hold that the trial court cannot arbitrarily refuse

to consider relevant evidence that a statute requires the court to consider. *See supra* notes 11-12 and accompanying text.

If *Montgomery* actually held what the dissent supposes, *Montgomery* would, ironically, not amplify *Miller* but reverse it. A mere future, potential opportunity to present mitigating evidence at a parole hearing (the remedy authorized by *Miller*) would never be enough to satisfy the Eighth Amendment under the dissent's view of *Montgomery*. That is because, under the dissent's "expanded" analysis of *Montgomery, post* at 33, only the consideration of mitigation evidence at the time of sentencing or resentencing would suffice — rendering the dissent's reasoning in conflict with basic voidness doctrine. A judicial order that is void ab initio, in the eyes of the law, never existed. It might be possible to resurrect a legally dead ruling (one later declared void) but not one that never existed in the first place (one void ab initio). So, too, if a sentencing order were truly void ab initio, it could not be cured by the hope that, sometime in the distant future, a parole board may release the prisoner from the void-ab-initio sentence.

III.

Having reconsidered *Jones I* in light of *Montgomery*, we reinstate our holding in *Jones I*, subject to the qualifications made herein, and affirm the trial court's denial of Jones's motion to vacate.[27]

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27. Our rulings substantially track the successful reasoning of the original appellate brief filed by the Attorney General as it related to the issues addressed in *Jones I*. After the *Montgomery* remand, however, the Attorney General has taken a different view and now

Affirmed.

JUSTICE POWELL, with whom JUSTICE GOODWYN and JUSTICE MIMS join, dissenting.

When this Court first analyzed Jones's claim, we held as the majority states: that Jones's sentence was not a mandatory life sentence. *Jones v. Commonwealth* (*Jones I*), 288 Va. 475, 481, 763 S.E.2d 823, 826 (2014). I continue to agree with this part of the holding. However, in light of the Supreme Court's recent decision in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), I can no longer agree with that portion of *Jones I* where we held that, because Jones's sentence was not a mandatory life sentence, the holding of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), does not apply.

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suggests that we should remand the case to the trial court for an additional evidentiary hearing to consider youth-based mitigation evidence — evidence Jones failed to present at his original sentencing hearing due to the stipulated sentence in his plea agreement. The Attorney General interprets *Montgomery* to require this result. Every aspect of the Attorney General's change of position, however, involves purely legal issues on which we must give our de novo judgment. *See generally Gibson v. United States*, 329 U.S. 338, 344 n.9, 67 S. Ct. 301, 91 L. Ed. 331 (1946) ("A confession of error . . . does not relieve this Court of the performance of the judicial function" because "our judicial obligations compel us to examine independently the errors confessed." (citation omitted)); *Young v. United States*, 315 U.S. 257, 259, 62 S. Ct. 510, 86 L. Ed. 832 (1942) ("[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties."); *CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 117 n.5, 766 S.E.2d 912, 919 n.5 (2015) ("[A] party cannot concede the law.").

In *Montgomery*, the Supreme Court purposefully clarified and, in my opinion, expanded the holding in *Miller*, thereby revealing why this Court's previous interpretation of *Miller* in *Jones I* was misguided. The Supreme Court's analysis in *Montgomery* transparently explains why *Miller* is not limited to juvenile offenders facing or serving mandatory life sentences without parole. *Montgomery* explicitly requires that a *Miller* hearing be held before a life sentence without parole may be imposed upon a juvenile offender in order to comply with the strictures of the Eighth Amendment. In the absence of such a hearing, the sentence is in violation of the juvenile's substantive constitutional rights and a court is without jurisdiction to impose a life sentence without parole on a juvenile offender. Therefore, such a sentence is void ab initio. Accordingly, I must respectfully dissent.[1]

I. Mandatory Life Sentences

It is important to first address the basis of my opinion that, contrary to the majority opinion, *Miller* is not limited to mandatory life sentences. As *Montgomery* makes explicitly clear, *Miller* "rendered life without parole *an unconstitutional penalty* for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 577 U.S. at ___, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469) (emphasis added). *See also id.* ("*Miller* . . . bar[red] life without parole . . . for all but the rarest of

1. With regard to the collateral review of Jones's other sentences, I agree with the majority that Rule 5:25 bars our consideration of those sentences.

juvenile offenders, those whose crimes reflect permanent incorrigibility.").[2] Thus, *Montgomery* made it clear that the focus of *Miller* was not that only mandatory life sentences are unconstitutional; rather, it is that the Eighth Amendment requires individualized consideration before a juvenile can be sentenced to life in prison without the possibility of parole.

To ensure such individualized consideration, the Supreme Court expressly mandated that a sentencing court is required to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before imposing a life sentence upon a juvenile. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469. As the Supreme Court explained in *Montgomery*, such a hearing is vitally important, as the hearing "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." 577 U.S. ___, 136 S. Ct. at 735. This is because "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2460).

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2. Although the majority in this Court fails to recognize the significance of *Montgomery*, its resultant expansion of *Miller* did not go unnoticed by the dissenters in the Supreme Court. As Justice Scalia colloquially put it, "[i]t is plain as day that the majority is not applying *Miller*, but rewriting it." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 743 (Scalia J. dissenting).

Thus, when viewed through the lens of *Montgomery*, it is clear that *Miller*'s discussion of mandatory life sentences was not meant to limit application of the opinion to that instance, but rather to demonstrate how mandatory sentencing schemes foreclose the necessary individualized consideration.

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 567 U.S. at ___, 132 S. Ct. at 2468 (citations omitted).

The majority, however, contends that *Montgomery*'s express language barring life without parole for all but the rarest of juvenile offenders is not binding upon it because the question before the Court in *Montgomery* was limited to "'whether *Miller* 's prohibition on mandatory life without parole for juvenile offenders' should be applied retroactively." (Quoting *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 732.) Thus, the majority insists that the precedential holding in *Montgomery* amounts simply to: *Miller* is retroactive.

By truncating its analysis, the majority ignores the rationale underlying the Supreme Court's decision. As the Supreme Court explains, the reason *Miller* is retroactive is because it announced a substantive rule of constitutional law that "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S., at ___, 132 S. Ct. at 2469).

Further, the majority's interpretation of *Miller* and *Montgomery* renders the requirement that a sentencing court hold a hearing and "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence" contingent upon whether the sentence to be imposed is mandatory rather than discretionary. Under the majority's interpretation, the factors that serve as the very basis of the substantive holding of *Miller* are only constitutionally required to be considered when a sentence

is mandatory. By that same logic, the majority concludes that a sentencing court may, but is not constitutionally required to, consider those factors if the sentence is discretionary.[3] I find it highly unlikely that the Supreme Court would tolerate any life sentence without parole to be imposed upon a juvenile without consideration of the relevant factors, especially considering that "the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2465).[4] Yet the majority concludes

3. That is not to say that a sentencing court would be forbidden from considering these factors or that it could arbitrarily ignore them if presented with mitigating evidence related to these factors. Rather, I am simply pointing out that, under the majority's view, a court imposing a discretionary life sentence without parole would not be required to hold a hearing and specifically consider all of the same factors to the same degree as a court imposing a mandatory life sentence without parole because *Miller* does not apply.

4. As further support for the proposition that the hearing requirement of *Miller* applies to all situations where a juvenile homicide offender is facing a sentence of life without parole, the Court need look no further than the Supreme Court's recent summary opinion in *Arias v. Arizona*, U.S. ___, 137 S. Ct. 370, 196 L. Ed. 2d 287 (2016). In *Arias*, the defendant sought review of his life sentence without parole under *Miller*. *State v. Arias*, 2015 Ariz. App. Unpub. LEXIS 658 (Ariz. Ct. App. 2015). The Court of Appeals of Arizona denied relief on the sole basis that *Miller* did not apply because the defendant's life sentence was not mandatory. *Id.* at *3. Given that the Supreme Court summarily vacated and remanded the judgment in *Arias*, the only logical interpretation for this action is that a majority of the Supreme Court interprets *Montgomery* as expanding *Miller* to apply to all cases where a juvenile is sentenced to life without parole, not just those cases where

that this substantive constitutional right does not extend to juveniles facing discretionary life sentences without the possibility of parole. The more logical approach, and the approach I believe is required by *Montgomery*, would be to require a *Miller* hearing before a juvenile offender can be sentenced to life without parole, regardless of whether the sentence is mandatory or discretionary, thus affording the same constitutional protections to all juvenile offenders.[5]

II. *Miller* Hearing

Next, the majority takes the position that *Miller* and *Montgomery* require only that a defendant have the opportunity to offer mitigation evidence of his youth and attendant circumstances. Notably, the majority reaches this conclusion by relying on language taken from the recitation of the facts in *Montgomery*.[6] On the other hand, the language used throughout the remainder of the opinion makes it clear that the Supreme Court interpreted

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the sentence is mandatory.

5. For those juvenile offenders who were already sentenced to life without parole and did not receive the benefit of a *Miller* hearing, I agree with the majority's characterization that this would require a resentencing either to impose a sentence where parole is available or to provide for a *Miller* hearing.

6. Specifically, the majority relies upon language describing the fact that Montgomery's "sentence was automatic upon the jury's verdict, so Montgomery had *no opportunity to present mitigation evidence to justify a less severe sentence*." *Montgomery*, 577 U.S. ___, 136 S. Ct. at 725 (emphasis added). Such language is clearly not part of the Supreme Court's holding in *Montgomery*.

Miller as requiring more than just the opportunity to present mitigation evidence. "*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*, 577 U.S. ___, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. ___, 132 S. Ct. at 2475) (emphasis added). Therefore, "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors *is necessary* to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735 (quoting *Miller*, 567 U.S. ___, 132 S. Ct. at 2460) (emphasis added). Disappointingly, the majority pays no heed to the Supreme Court's clear statement regarding the need for such a hearing.

If, as the majority states, a *Miller* violation only occurs when a juvenile offender is denied the opportunity to present mitigation evidence, then the entire purpose of a *Miller* hearing is undermined. The majority's analysis ignores the Supreme Court's admonition that "*Miller* requires *a sentencer* to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence" regardless of whether the defense presents any mitigating evidence. *Id.* at ___, 136 S. Ct. at 734 (emphasis added). The majority's emphasis on the opportunity to present evidence, rather than on the need for the trial court's individualized consideration of such factors, is misplaced. Even if a juvenile offender foregoes the opportunity to present mitigating evidence, a court does not have the option of

sentencing that juvenile to life without the possibility of parole absent consideration of the juvenile's youth and attendant circumstances.

The majority's approach places the burden on the juvenile offender to prove that he or she was not the rare exception to the rule. Notably, however, nothing in *Miller* requires a juvenile offender to present any evidence. As previously noted, because *Montgomery* interprets *Miller* as barring life without parole as a punishment for the vast majority of juvenile offenders, any burden of proof would seem to rest on the prosecution to prove that the juvenile offender was the rare exception to the rule.

III. Waiver

The majority further claims that, by entering into a plea agreement and stipulating to a life sentence, Jones waived the requirement that a *Miller* hearing be conducted. The majority goes on to make the broad assertion that *all* constitutional challenges are governed by waiver principles. Although I fully agree with the majority that many constitutional challenges may be waived, I cannot agree with the notion that a plea agreement can act as a waiver to all constitutional challenges. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (holding that "the two-part *Strickland v. Washington* test applies to challenges to *guilty pleas* based on ineffective assistance of counsel.") (emphasis added). Moreover, the majority fails to offer any controlling authority that supports its underlying proposition that a defendant can waive all constitutional

challenges; it does not cite to any case indicating that a defendant can waive a challenge based on a continuing violation of a substantive rule of constitutional law.[7]

Nor could it. The very nature of a substantive rule of constitutional law precludes such waiver. Such a violation occurs where "the conduct being penalized is constitutionally immune from punishment." *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971). *See also Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (applying the same logic to punishments that "the Constitution itself deprives the State of the power to impose"). Such a violation "affects the foundation of the whole proceedings." *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1880). Therefore, "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 731.

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7. Instead of offering any controlling precedent indicating that a defendant can waive a substantive rule of constitutional law, the majority relies on language taken from the concurrence to the summary opinion issued by the Supreme Court. *See Jones v. Virginia*, ___ U.S. ___, ___, 136 S. Ct. 1358, 1358, 194 L. Ed. 2d 340 (2016) (Thomas, J., concurring). Based on this language, the majority asserts that "[w]e are thus free to employ traditional principles governing waiver and forfeiture principle applicable to plea agreements." Given the fact that the concurrence was written by Justice Thomas and joined only by Justice Alito, both of whom dissented in both *Miller* and *Montgomery*, I am unpersuaded that this concurrence has any controlling precedential value.

> "An unconstitutional law is void, and is as no law." A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.

Id. (quoting *Siebold*, 100 U.S. at 376).

Additionally, the notion that such a requirement can be waived violates our long standing principle that parties cannot confer power upon the court which it does not rightfully possess. *Cf. Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753, 755, 6 Va. Law Rep. 1125 (1990) ("Subject matter jurisdiction alone cannot be waived or conferred on the court by agreement of the parties."). As the Supreme Court established in *Montgomery*, a trial court lacks the power to impose a sentence of life without parole upon a juvenile offender without first conducting a *Miller* hearing. 577 U.S. ___, 136 S. Ct. at 734-35 (describing a *Miller* hearing as the "procedural requirement necessary to implement a substantive guarantee"). Therefore, the fact that Jones entered into a plea agreement and stipulated to a life sentence without parole is irrelevant, as neither action is sufficient to confer upon a trial court the power to render a sentence which it constitutionally has no authority to impose. I do not believe that our Commonwealth can continue to enforce a punishment that the Supreme Court has determined to be prohibited by the Constitution.

IV. Void ab Initio

The majority takes the position that not all constitutional violations render a conviction/sentence void ab initio, rather "[c]ertain types of constitutional errors render convictions 'void,' i.e., voidable, and thus subject to collateral attack in federal *habeas* proceedings." While it is true that certain types of constitutional errors only render a sentence or conviction voidable, it is equally true that other types of constitutional errors render a conviction or sentence void ab initio. Under this Court's precedent, as well as the plain language of *Montgomery*, the constitutional error at issue in the present case (i.e., a violation of a substantive rule of constitutional law) clearly falls into the latter category of error, not the former.

> The distinction between an action of the court that is void ab initio rather than merely voidable is that the former involves the underlying authority of a court to act on a matter whereas the latter involves actions taken by a court which are in error. 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 had no power to render it*, or if the mode of procedure used by the court was one that the court could "not lawfully adopt."

Singh v. Mooney, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001) (quoting *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998)) (footnote omitted) (emphasis added).

As previously explained, "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 731. Here, it is unequivocal that "*Miller* announced a substantive rule of constitutional law." *Montgomery*, 577 U.S. ___, 136 S. Ct. at 734. It is equally clear that the substantive rule announced in *Miller* must be given "retroactive effect regardless of when a conviction became final" because "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments *altogether beyond the State's power to impose*." *Id.* at 729 (emphasis added). Indeed, as the Supreme Court has explained, when applying substantive rules of constitutional law retroactively, the general approach is that "prior inconsistent judgments or sentences [are] void ab initio." *United States v. Johnson*, 457 U.S. 537, 550, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982) (citing *Moore v. Illinois*, 408 U.S. 786, 800, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972) and *Ashe v. Swenson*, 397 U.S. 436, 437, n. 1, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). *Montgomery* established that, in the absence of a *Miller* hearing, a trial court lacks the power to sentence a juvenile to life without parole. Therefore, in my opinion, any sentence imposed in a manner inconsistent with the substantive constitutional rule announced in *Miller* is void ab initio.[8] *See id.*

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8. In my opinion, the majority reads too much into the alternative remedy offered by the Supreme Court in *Montgomery*, i.e., that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 577 U.S. ___, 136 S. Ct. at 736. The fact that

Rather than address the constitutional infirmity of Jones's sentence, the majority focuses on the trial court's power to impose the sentence under Virginia law. According to the majority, a sentence is *only* void ab initio if it is imposed in violation of the range of punishment prescribed by Virginia law. While it is well established that "a sentence imposed in violation of a prescribed statutory range of punishment is void ab initio," *Grafmuller v. Commonwealth*, 290 Va. 525, 529, 778 S.E.2d 114, 116

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the Supreme Court suggested a remedy that some states "may" be able to take advantage of is not irreconcilable with my contention that a sentence of life without parole imposed on a juvenile offender is void ab initio in the absence of a *Miller* hearing. For example, other states may have mechanisms in place that automatically reduce a sentence deemed unconstitutional. Regardless, the Supreme Court's language is merely a suggestion; it is not binding on the states. Indeed, as the Supreme Court explained:

> When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue.

Id. at ___, 136 S. Ct. at 735 (citation omitted).

Furthermore, it is worth noting that the suggestion offered by the Supreme Court was a means by which a state could avoid resentencing. However, assuming parole eligibility was or could be extended to a juvenile offender convicted of a Class 1 felony (such an eventuality is highly unlikely, given that parole is abolished in this state), such a sentence modification would, ultimately, equate to a resentencing.

(2015) (quoting *Rawls*, 278 Va. at 221, 683 S.E.2d at 549), nothing in our jurisprudence supports the majority's contention that a statutory violation is the *only* basis for rendering a sentence void ab initio.[9]

V. Motion to Vacate

According to the majority, a motion to vacate is not the proper vehicle for Jones's claim because there is no precedent under Virginia law for using a motion to vacate to collaterally attack a conviction or sentence based solely on federal constitutional grounds. In the absence of such precedent, the majority asserts that a motion to vacate "is not a state collateral review proceeding 'open to a claim controlled by federal law.'" (Quoting *Montgomery*, 577 U.S. ___, 136 S. Ct. at 740.) In taking this position, however, the majority ignores a fundamental tenet of our jurisprudence: a void ab initio order may be attacked in any manner at any time. *Singh*, 261 Va. at 52, 541 S.E.2d at 551.

9. It is worth noting that, on at least one occasion, this Court has, acting *sua sponte*, set aside a sentence that had been rendered unconstitutional by the Supreme Court in an unrelated case. In *Hodges v. Commonwealth*, 213 Va. 316, 317, 191 S.E.2d 794, 795 (1972), the appellant appealed his death sentence to this Court. After the appellant's writs of error had been granted, none of which attacked the constitutionality of the sentence, the Supreme Court decided *Furman*. *Id.* at 320, 191 S.E.2d at 797. Recognizing that the appellant's death sentence was "nullified" by the Supreme Court's decision, this Court remanded the matter "for a new trial on the issue of punishment." *Id.* at 321, 191 S.E.2d at 798.

> The lack of jurisdiction to enter an order . . . renders the order a complete nullity and it may be "impeached directly or collaterally by all persons, anywhere, at any time, or in any manner."

Id. (quoting *Barnes v. American Fertilizer Co.*, 144 Va. 692, 705, 130 S.E. 902, 906 (1925)). *See also Thacker v. Hubard & Appleby, Inc.*, 122 Va. 379, 386, 94 S.E. 929, 930 (1918) ("Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or in any way by which the subject may be brought to the attention of the court.").

Indeed, contrary to the majority's assertion, the Supreme Court's holding in *Montgomery* is not limited to only those collateral proceedings that are "open to a claim controlled by federal law." Rather, the Supreme Court explained that an unconstitutional sentence may be attacked in *any* type of postconviction proceeding where an unlawful sentence may be challenged.

> A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees. Writing for the Court in *United States Coin & Currency*, Justice Harlan made this point when he declared that "[n]o circumstances call

more for the invocation of a rule of complete retroactivity" than when "the conduct being penalized is constitutionally immune from punishment." 401 U.S. at 724. *United States Coin & Currency* involved a case on direct review; yet, for the reasons explained in this opinion, the same principle should govern the application of substantive rules on collateral review. As Justice Harlan explained, where a State lacked the power to proscribe the habeas petitioner's conduct, "it could not constitutionally insist that he remain in jail." *Desist v. United States*, 394 U.S. 244, 261, n. 2, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J. dissenting). If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. 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. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Yates v. Aiken*, 484 U.S. 211, 218, 108 S. Ct. 534, 98 L. Ed. 2d 546 (1987). *Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.*

Montgomery, 577 U.S. at ___, 136 S. Ct. at 731-32 (emphasis added).

This Court has recognized that prisoners may challenge the lawfulness of their confinement using a motion to vacate. *See Rawls*, 278 Va. at 218, 683 S.E.2d at 547 (holding that a motion to vacate is the appropriate procedural device to challenge a conviction or sentence that is void ab initio and that such a conviction or sentence may be corrected at any time). While it is true that *Rawls* and its progeny all involved sentences in excess of a statutory limitation, the underlying rationale must also apply to sentences in violation of a substantive rule of constitutional law because in both situations, a court is imposing a sentence it is without power to impose, thereby rendering the sentence void ab initio. *Compare Rawls*, 278 Va. at 221, 683 S.E.2d at 549 (explaining that the reason such sentences are void ab initio is because "the character of the judgment was not such as the [C]ourt had the power to render") *with Montgomery*, 577 U.S. ___, 136 S. Ct. at 739 (holding that sentences imposed in violation of a substantive rule of constitutional law are "altogether beyond the State's power to impose"). Indeed, "[a] nullity is a nullity, and out of nothing[,] nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions." *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283, 285 (N.C. 1934). Accordingly, the underlying rationale of why a sentence is void ab initio cannot and does not dictate the manner in which such a sentence may be attacked. If a prisoner may use a motion to vacate to challenge a void ab initio sentence because it was imposed in violation of a statute, logic dictates that the same procedural device

can be used to challenge a void ab initio sentence imposed in violation of the Constitution.

Furthermore, contrary to the majority's statement, there is precedent under Virginia law for using a motion to vacate to collaterally attack a conviction or sentence based on federal constitutional grounds. In *Loving v. Commonwealth*, 206 Va. 924, 925, 147 S.E.2d 78, 79 (1966), just under five years after they had pled guilty, Richard and Mildred Loving used a motion to vacate to challenge the constitutionality of Virginia's miscegenation statute.

The majority dismisses the precedential value of *Loving* by noting that the propriety of using a motion to vacate to collaterally attack a conviction or sentence based solely on federal constitutional grounds was not litigated. In other words, the majority intimates that the Lovings' claim should have been procedurally defaulted and dismissed by Virginia's courts before the matter reached the Supreme Court, because, in Virginia, a motion to vacate cannot be used to collaterally attack a constitutionally invalid conviction.

Our ruling in *Hirschkop v. Commonwealth*, 209 Va. 678, 166 S.E.2d 322 (1969), clearly indicates otherwise. As the majority notes, in *Hirschkop* this Court addressed the use of a motion to vacate in *Loving*. *Id.* at 681, 166 S.E.2d at 324. However, the majority overlooks the fact that, in concluding that the use of a motion to vacate was inappropriate in *Hirschkop*, the Court expressly distinguished *Loving* on several bases. *See id.* ("[*Loving*] is not apposite to [Hirschkop's] case."). The most important difference noted by this Court was that "in *Loving*, the

statute under which the conviction was had was attacked as violative of the Constitutions of Virginia and of the United States, and the sentences imposed were attacked as invalid." *Id.* This basis for differentiating *Loving* is very similar to the argument raised by Jones in the present case.

The majority's concerns that "the multitude of substantive and procedural requirements in habeas corpus law would be permanently sidelined" are unfounded. Jones is not seeking to subvert our habeas corpus law. Nor is he seeking to use a motion to vacate "as an all-purpose pleading for collateral review of criminal convictions." Rather, Jones is simply using a motion to vacate to apply Virginia law in the manner this Court announced close to a century ago in *Thacker*: to bring a void ab initio order to the court's attention. 122 Va. 379, 386, 94 S.E. 929, 930 (1918) ("Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or *in any way by which the subject may be brought to the attention of the court*.") (emphasis added). *See also Rawls*, 278 Va. at 218, 683 S.E.2d at 547 (recognizing that a motion to vacate is the proper vehicle to challenge a void ab initio sentencing order); *Singh*, 261 Va. at 52, 541 S.E.2d at 551 ("The lack of jurisdiction to enter an order . . . renders the order a complete nullity [that] may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.").

The majority's analysis concludes that individuals such as the Lovings and Jones have no avenue for relief in Virginia courts, more than two years after their convictions become final, even if they can clearly prove

that their sentences were imposed in violation of a recently determined substantive constitutional right. I disagree with this previously unexpressed restriction on the ability of Virginia state courts to address the retroactive application of new substantive constitutional rulings, because it is clearly inconsistent with our prior cases.[10] *See, e.g.*, *Loving*, 206 Va. at 926, 147 S.E.2d at 80; *Hirschkop*, 209 Va. at 681, 166 S.E.2d at 324; *Hodges v. Commonwealth*, 213 Va. 316, 317, 191 S.E.2d 794, 795 (1972).

VI. Conclusion

Although I believe that the law in this case is clear, the facts are another matter.[11] Both parties agree that the record in the present case is incomplete and,

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10. The majority asserts that individuals such as the Lovings and Jones may only challenge their convictions "either via direct appeal timely made or in a habeas corpus proceeding," even if the Supreme Court retroactively determines their substantive constitutional rights were violated. Unstated by the majority is that a direct appeal must be noticed within 30 days of a final judgment and any habeas action is barred if not pursued within two years of a final judgment. Thus, according to the majority, any substantive constitutional rights determined to exist more than two years after conviction may not be successfully vindicated in a Virginia court. Individuals such as Jones, even if they prove that they were sentenced in violation of their substantive constitutional rights, can only apply for relief from a federal court.

11. Even if *Miller* and *Montgomery* did not expressly require the facts surrounding Jones's sentencing be reconsidered, I would hold that juveniles in Virginia facing a sentence of life without parole should be afforded a *Miller* hearing, for the reasons stated in *Montgomery*.

therefore, it is unclear whether Jones received a *Miller* hearing before he was sentenced. As such, both parties request that the matter be remanded to the circuit court for further development of the facts surrounding the imposition of Jones's sentence of life without parole to determine whether he received the requisite hearing. In my opinion, this is the best course of action to ensure the constitutionality of the sentence imposed. If the circuit court determines that Jones did, in fact, receive a *Miller* hearing, then his motion to vacate would be properly denied. On the other hand, if it is determined that Jones did not receive a *Miller* hearing, his sentence of life in prison without parole would be void ab initio and he would be entitled to a new sentencing hearing that complies with *Miller* and *Montgomery*. Accordingly, I would vacate the circuit court's decision to deny Jones's motion to vacate and remand the matter for further proceedings to determine whether Jones was properly sentenced on his capital murder charge.

MORGAN LEWIS

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November 7, 2016

Patricia L. Harrington
Clerk of the Court
Supreme Court of Virginia
100 N 9th Street, 5th Floor
Richmond, VA 23219

Re: Notice of Supplemental Authority in *Jones v. Commonwealth*, No. 131385

Dear Madame Clerk:

Pursuant to Rule 5:6A, Donte Lamar Jones respectfully provides notice of the U.S. Supreme Court's decision in *Tatum v. Arizona*, No. 15-8850, 580 U.S. ___ (2016), which supports Jones' petition for vacatur of his sentence under *Miller v. Alabama,* 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016). *Tatum* involved consolidated petitions for certiorari challenging decisions by the Arizona Court of Appeals to uphold life without parole sentences for crimes committed by juveniles. The Supreme Court granted the petitions in *Tatum,* vacated the judgments below, and remanded for further consideration.

Justice Sotomayor's concurrence in *Tatum* illustrates how the decision is relevant to Jones' petition. Justice Sotomayor explains, in response to Justice Alito's dissent, that the vacatur and remand for further consideration in light of *Montgomery* is not limited to the narrow retroactivity holding of *Montgomery.* Rather, vacatur and remand was warranted for the Arizona court to determine whether the petitioner was sentenced in accordance with the "substantive rule governing the imposition of a sentence of life without parole on a juvenile offender." That substantive rule "require[s] a sentencer to ask ... whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 580 U.S.___ (slip op. at 2). As Justice Sotomayor noted, *Miller* and *Montgomery* require such a determination, and there was no evidence in the record that such a determination was made by the Arizona courts.

Jones asserted in his briefs and at oral argument that, like the petitioners before the Supreme Court in *Tatum,* there is no evidence in the record that the Circuit Court made such a finding. Opening Br. 11; Reply Br. 1. Therefore, this Court should vacate Jones' sentence and remand to the Circuit Court so that it may undertake the "meaningful task" of determining whether Jones' crimes reflected permanent incorrigibility or were merely the result of his "transient immaturity." 580 U.S.___ (slip op. at 3-4).

Accordingly, Jones respectfully directs the Court's attention to this recent decision, which is attached to this letter.

Sincerely,

/s/

Douglas Andrew Hastings

SUPREME COURT OF THE UNITED STATES

No. 15-8850

BOBBY JERRY TATUM,

Petitioner,

v.

ARIZONA

October 31, 2016, Decided

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF ARIZONA,
DIVISION TWO

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Arizona, Division Two for further consideration in light of *Montgomery* v. *Louisiana,* 577 U. S. _ (2016).

JUSTICE SOTOMAYOR, concurring in the decision to grant, vacate, and remand.*

* This opinion also applies to No. 15-8842, *Purcell* v. *Arizona*; No. 15-8878, *Najar* v. *Arizona*; No. 15-9044, *Arias* v. *Arizona*; and No. 15-9057, *DeShaw* v. *Arizona*.

This Court explained in *Miller* v. *Alabama*, 567 U. S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), that a sentencer is "require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*, at ___, 132 S. Ct. 2455, 183 L. Ed. 2d at 424. Children are "constitutionally different from adults for purposes of sentencing" in light of their lack of maturity and under-developed sense of responsibility, their susceptibility to negative influences and outside pressure, and their less well-formed character traits. *Id.*, at ___, 132 S. Ct. 2455, 183 L. Ed. 2d at 418. Failing to consider these constitutionally significant differences, we explained, "poses too great a risk of disproportionate punishment." *Id.*, at ___, 132 S. Ct. 2455, 183 L. Ed. 2d at 424. In the context of life without parole, we stated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ibid.*

Montgomery v. *Louisiana*, 577 U. S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), held that *Miller* "announced a substantive rule of constitutional law." 577 U. S., at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 622. That rule draws "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" and allows for the possibility "that life without parole could be a proportionate sentence [only] for the latter kind of juvenile offender." *Id.*, at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 620.

The petitioners in these cases were sentenced to life without the possibility of parole for crimes they committed

before they turned 18. A grant, vacate, and remand of these cases in light of *Montgomery* permits the lower courts to consider whether these petitioners' sentences comply with the substantive rule governing the imposition of a sentence of life without parole on a juvenile offender.

JUSTICE ALITO questions this course, noting that the judges in these cases considered petitioners' youth during sentencing. As *Montgomery* made clear, however, "[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.*, at ___-___, 136 S. Ct. 718, 193 L. Ed. 2d at 619 (internal quotation marks omitted).

On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 577 U. S., at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 620.

Take *Najar* v. *Arizona*, No. 15-8878. There, the sentencing judge identified as mitigating factors that the defendant was "16 years of age" and "emotionally and physically immature." App. to Pet. for Cert. in No. 15-8878, p. A-51. He said no more on this front. He then discounted the petitioner's efforts to rehabilitate himself as "nothing significant," despite commending him for those efforts and expressing hope that they would continue. *Id.*, at A-52. The sentencing judge did not evaluate whether Najar

represented the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 577 U. S., at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 619.

Purcell v. *Arizona*, No. 15-8842, is no different. The sentencing judge found that Purcell's age at the time of his offense — 16 years old—qualified as a statutory mitigating factor. App. to Pet. for Cert. in No. 15-8842, p. A-80. He then minimized the relevance of Purcell's troubled childhood, concluding that "this case sums up the result of defendant's family environment: he became a double-murderer at age 16. Nothing more need be said." *Id.*, at A-83. So here too, the sentencing judge did not undertake the evaluation that *Montgomery* requires. He imposed a sentence of life without parole despite finding that Purcell was "likely to do well in the structured environment of a prison and that he possesses the capacity to be meaningfully rehabilitated." App. to Pet. for Cert. in No. 15-8842, at A-83.

The other petitions are similar. In *Tatum* v. *Arizona*, No. 15-8850, and *DeShaw* v. *Arizona*, No. 15-9057, the sentencing judge merely noted age as a mitigating circumstance without further discussion. In *Arias* v. *Arizona*, No. 15-9044, the record before us does not contain a sentencing transcript or order reflecting the factors the sentencing judge considered.

It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a

sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate. 577 U. S., at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 621. There is thus a very meaningful task for the lower courts to carry out on remand.

ALITO, J., dissenting

JUSTICE ALITO, with whom Justice Thomas joins, dissenting from the decision to grant, vacate, and remand.*

The Court grants review and vacates and remands in this and four other cases in which defendants convicted of committing murders while under the age of 18 were sentenced to life without parole. The Court grants this relief so that the Arizona courts can reconsider their decisions in light of *Montgomery* v. *Louisiana*, 577 U. S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), which we decided last Term. I expect that the Arizona courts will be as puzzled by this directive as I am.

In *Montgomery*, the Court held that *Miller* v. *Alabama*, 567 U. S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), is retroactive. 577 U. S., at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 620. That holding has no bearing whatsoever on the decisions that the Court now vacates. The Arizona cases at issue here were decided after *Miller*, and in each case the court expressly assumed that *Miller* was applicable to the sentence that had been imposed. Therefore, if the Court is taken at its word — that is, it simply wants the Arizona courts to take *Montgomery* into account — there is nothing for those courts to do.

It is possible that what the majority wants is for the lower courts to reconsider *the application of Miller* to the

* This opinion also applies to four other petitions: No. 15-8842, *Purcell* v. *Arizona*; No. 15-8878, *Najar* v. *Arizona*; No. 15-9044, *Arias* v. *Arizona*; and No. 15-9057, *DeShaw* v. *Arizona*.

cases at issue,† but if that is the Court's aim, it is misusing the GVR vehicle. We do not GVR so that a lower court can reconsider the application of a precedent that it has already considered.

In any event, the Arizona decisions at issue are fully consistent with *Miller*'s central holding, namely, that mandatory life without parole for juvenile offenders is unconstitutional. 567 U. S., at ___, 132 S. Ct. 2455, 183 L. Ed. 2d at 414-415. A sentence of life without parole was imposed in each of these cases, not because Arizona law dictated such a sentence, but because a court, after taking the defendant's youth into account, found that life without parole was appropriate in light of the nature of the offense and the offender.

It is true that the *Miller* Court also opined that "life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,'" *Montgomery*, *supra*, at ___, 136 S. Ct. 718, 193 L. Ed. 2d at 619 (quoting *Miller*, *supra*, at ___, 132 S. Ct. 2455, 183 L. Ed. 2d at 424 (internal quotation marks omitted)), but the record in the cases at issue provides ample support for the conclusion that these "children" fall into that category.

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† This is certainly Justice Sotomayor's explanation of the GVR. She faults the lower courts for failing to heed the statement *in Miller* that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." 567 U. S., at ___, 132 S. Ct. 2455, 183 L. Ed. 2d at 437. If the others in the majority have a similar view, the Court should grant review and decide the cases on the merits.

For example, in *Purcell* v. *Arizona*, No. 15-8842, a 16-year-old gang member fired a sawed-off shotgun into a group of teenagers, killing two of them, under the belief that they had flashed a rival gang's sign at him. He was ultimately convicted of two counts of first-degree murder, nine counts of attempted first-degree murder, and one count each of aggravated assault and misconduct involving weapons. The trial court considered his youth, identified his age as a mitigating factor, and still sentenced him to life without parole. The remaining cases are in the same vein. See *Tatum* v. *Arizona*, No. 15-8850 (17-year-old defendant convicted of first-degree murder, conspiracy to commit armed robbery, attempted armed robbery, and aggravated assault); *Najar* v. *Arizona*, No. 15-8878 (juvenile convicted of first-degree murder and theft); *Arias* v. *Arizona*, No. 15-9044 (16-year-old defendant pleaded guilty to two counts of first-degree murder, two counts of second-degree murder, two counts of kidnapping, four counts of armed robbery, and one count each of first-degree burglary, conspiracy to commit first-degree murder, and conspiracy to commit armed robbery); *DeShaw* v. *Arizona*, No. 15-9057 (17-year-old defendant convicted of first-degree murder, armed robbery, and kidnapping).

In short, the Arizona courts have already evaluated these sentences under *Miller*, and their conclusions are eminently reasonable. It is not clear why this Court is insisting on a do-over, or why it expects the results to be any different the second time around. I respectfully dissent.

SUPREME COURT OF VIRGINIA

Record No. 131385

DONTE LAMAR JONES,

Petitioner,

COMMONWEALTH OF VIRGINIA,

Respondent.

September 15, 2016

10:43 a.m.

REPORTED BY: Lori McCoin Jones, RPR, CCR

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[3](The court reporter is sworn.)

CHIEF JUSTICE: You may proceed.

MR. HASTINGS: May it please the Court. My name is Doug Hastings, and I represent Donte Lamar Jones in Jones v. Commonwealth.

Oral argument will be given by my cocounsel, Duke McCall, who is admitted pro hoc vice in this case.

CHIEF JUSTICE: Welcome, Mr. McCall.

MR. MCCALL: Thank you, Your Honor.

May it please the Court.

This case comes before the court today on remand from the U.S. Supreme Court. In October 2014, the court ruled that the U.S. Supreme Court's decision in Miller v. Alabama does not apply in Virginia, and that Donte Lamar Jones was not entitled to vacatur of his sentence. The court reached its conclusion based on its observation that Virginia law authorized the trial court to suspend all or part of Jones' sentence at the time of sentencing.

The U.S. Supreme Court vacated that decision in March of this year --

JUSTICE KELSEY: Yeah. I'm sorry to interrupt, but did you say we held anything retroactivity in our earlier decision?

[4]MR. MCCALL: No, Your Honor, the court did not address retroactivity.

JUSTICE KELSEY: Okay. All right.

MR. MCCALL: The U.S. Supreme Court vacated the October 2014 decision in March of this year and remanded

the case to this court for further consideration. The sole issue before the court today, as presented in the parties' briefs, is what this court should vacate before sending the case back to the circuit court.

The parties have identified three options. The first is the court may merely vacate -- excuse me -- reverse and vacate the decision of the circuit court denying Jones' motion to vacate. The second is that the court may reverse the decision of the circuit court denying the motion and vacate both the judgment denying the motion and a portion -- the portion of Jones' sentence that pertains to his Class 1 felony conviction. The third option is that the court may reverse the decision of the circuit court and vacate both the judgment denying Jones' motion and the entirety of Jones' sentence on all counts.

JUSTICE KELSEY: But you missed an option.

MR. MCCALL: I'm sorry, Your Honor?

JUSTICE KELSEY: You missed an option. You [5]missed the option that our earlier holding is still the law of Virginia in a 7-0 opinion saying that that particular sentence was not subject to Miller; because it was not a mandatory life sentence, it could not be suspended.

MR. MCCALL: Your Honor, that position has not being argued by the Commonwealth. I was identifying the options identified in --

JUSTICE KELSEY: I understand that --

MR. MCCALL: -- our briefs.

JUSTICE KELSEY: -- but that's the predicate issue. We -- this is on remand in a case where we've already issued a unanimous opinion on the principal threshold issue. And as I understand your argument, Montgomery changes that; is that right?

MR. MCCALL: Yes, Justice Kelsey, I do agree that Montgomery does change that.

JUSTICE KELSEY: All right. Let me ask you this: Montgomery starts off and says that Miller, and I'm now reading from Montgomery: Miller held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment. Mandatory life -- sorry, without parole violates the Eighth Amendment.

We have just held that this is not mandatory [6]life without the ability of a suspension which would be completely discretionary on the trial judge's part.

Then the analysis section of Montgomery says, and this is the holding of Montgomery, retroactivity, quote, This leads to the question whether Miller's prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive role, and that under the Constitution must be retroactive.

And they held, well, it should be. Okay, it is.

But that doesn't change the first predicate. We've already held this was not a mandatory minimum life sentence on a juvenile, so the first predicate must be addressed.

MR. MCCALL: Yes, Your Honor. We submit that that holding is in error. The language the court used in Montgomery also was automatic, any sentence that is automatic is subject to the dictates of Miller and Montgomery. And here the trial court, unlike in the cases before the court --

JUSTICE KELSEY: But we held this sentence was not automatic, that the trial judge is not bound by any inhibition, statutory or otherwise, to suspend [7]any or all of the sentence. It is a purely discretionary call by a trial judge, made, not inconsiderably, every day in our courts.

MR. MCCALL: Justice Kelsey, I guess I would respond in two -- two ways. First of all, this sentence was -- was automatic in the sense that the trial court was not forced to choose between a range of sentencing opinions. The statutory prescribed sentence, the only statutory prescribed sentence left for the court to impose was life without parole.

And we do not agree, our position is the discretion of the trial court to suspend the sentence does not satisfy Miller and Montgomery, and the reason is, the -- as the court stated in Montgomery, the life without parole

sentence may only be imposed in accordance with the Eighth Amendment if it's done so after a hearing at which youth and its attendant characteristics are considered before the sentence is imposed, and that there is a determination that the individual before the court, the juvenile offender, is the rarest of juvenile offenders and demonstrates permanent incorrigibility. And I --

JUSTICE KELSEY: So you -- you interpret a mandatory life sentence essentially to be something other than a mandatory minimum life sentence?

[8]MR. MCCALL: Your Honor, I would submit that it's mandatory. It is automatic. It is the only statutory option available to the trial court at the time is a life sentence. If the court is not forced to consider or choose among a range of sentencing options, it is a mandatory sentence. If the court –

JUSTICE KELSEY: So a trial judge would violate the Constitution by issuing a life sentence, suspend every day of it, but not violate the Constitution, under this interpretation, by having a life sentence with some statute out there that says in 50 years he can be reviewed for parole?

MR. MCCALL: No, Your Honor. I would not agree with that. If the -- if the court imposes a life sentence and suspends in its entirety, the individual is not subject to life in prison without the possibility of parole. In fact, the sentence is suspended. Therefore, if the court had left the sentence in place and not suspended it, that would be an unconstitutional violation of the Eighth Amendment.

JUSTICE KELSEY: All right. But Miller was a mandatory life. This is the -- it's the first fork in the road for you. And if we want to change the word mandatory, that's fine, but mandatory means you [9]don't have the discretion, you cannot effectively, directly or indirectly, reduce a sentence. And that's the holding of our 7-0 opinion.

MR. MCCALL: Your Honor, I understand, and my position is that unless the trial court is forced to choose among a range of sentencing options and exercises, actually exercises that discretion and conducts a hearing and considers youth and its attending characteristics and makes a determination that there is a permanent incorrigibility, then it is a violation of the Eighth Amendment.

JUSTICE MCCULLOUGH: A trial judge does that in every sentencing. No trial judge in this state would say, Because I cannot suspend any time, I'm not going to consider suspending any time.

MR. MCCALL: Your Honor, there is no evidence in the record that that occurred here.

JUSTICE KELSEY: Well, we've held already that that's not what the problem was.

MR. MCCALL: And, Your Honor, I respectfully submit that the court's interpretation of a mandatory sentence does not comport with the U.S. Supreme Court's decisions in Miller or Montgomery.

JUSTICE KELSEY: In Miller did the trial judge have the ability to suspend the life sentence for the [10]juvenile?

MR. MCCALL: The Arkansas court in the companion case, the trial court did have the ability to suspend. The court not did address the issue because it was not properly presented on appeal.

JUSTICE KELSEY: Okay. So the -- the issue is not before Miller. The issue was not before Montgomery. We have a 7-0 opinion directly on the issue, and you want us to read tea leaves for the next supreme court round of cases on this and change our own law?

MR. MCCALL: Your Honor, I'm submitting it to the court today that the court's decision is inconsistent with the opinion articulated by the court in Montgomery. I think Montgomery did clarify Miller. I think it was -- it -- it used the phrase automatic as opposed to mandatory in some places, and I do believe the sentence is automatic under Virginia law. Only after the sentence is imposed, a life-without sentence is imposed may the trial court decide whether to suspend all or part of the sentence. The sentence provided for by statute is automatic. It is mandatory in the sense that it is the statute, the statutorily prescribed and required sentence.

[11]JUSTICE KELSEY: Okay.

MR. MCCALL: On the issue of what should be vacated, the Commonwealth's request for a limited vacatur is based on its mistaken assertion that the circuit court

concluded that Miller was not retroactive, and thus, did not provide a basis for Jones to challenge his sentence. In essence, the court did not address the merits of Jones' motion. The Commonwealth's reasons based on this mistaken assertion said the court should be afforded an opportunity in the first instance to address the merits of Jones' motion to vacate the sentence.

The Commonwealth's argument fails for two reasons. First, the Commonwealth -- excuse me, the circuit court did reach the merits of Jones' motion concluding that it should be denied because there is, quote, nothing new in mitigation of the offense.

Second, there are no factual findings the court perceives as necessary or appropriate to determine the legal question presented, which is whether Jones' sentence was imposed in violation of the Eighth Amendment of the U. S. Constitution. If it was, it was void ab initio and must be vacated.

As Miller and Montgomery make clear, the questions to be asked in determining whether Jones' [12]sentence was imposed in violation of the Eighth Amendment are twofold. First, did the circuit court conduct a hearing at the time of Jones' sentencing at which youth and its attending characteristics were considered as sentencing factors before Jones was sentenced. It is undisputed that did not occur.

JUSTICE MCCULLOUGH: And just to make sure I'm following your argument, are you addressing – your

preferred option in this instance -- which is the entirety of the sentence should be vacated?

MR. MCCALL: Yes, that's correct.

JUSTICE MCCULLOUGH: Okay. Looking at what was filed below, the only request that was made below was the mandatory or life sentence. I mean, it strikes me as it would be highly unusual -- and that's what went up -- for the court to reach out beyond what was specifically asked for and pled in a specific case, which is the -- the death count, and then sweep in this other -- other things that were not asked for below, and for the first time on appeal, reach into that and put it in play. How do we get that?

MR. MCCALL: The basis for the legal challenge presented was that the sentence of life without the possibility of parole on the Class 1 felony conviction violated the Eighth Amendment. The relief [13]requested in Jones' original motion to vacate was relief from his unconstitutional sentence and was not limited to the sentence on the Class 1 felony count.

JUSTICE MCCULLOUGH: But clearly the target was that one crime.

MR. MCCALL: Your Honor, the distinction we're drawing is the basis of the claim and the relief sought. The basis of the claim was imposition of the life without parole sentence in violation of the Eighth Amendment. The relief sought is a vacatur of his entire sentence and a resentencing on all counts.

JUSTICE MCCULLOUGH: Is there -- is there anything that would -- I mean, this is just technical -- but that would prevent him from filing a second motion to vacate at any time? That is what -- these other sentences are equally problematic for related but different reasons.

MR. MCCALL: If he had a separate basis, separate constitutional basis to challenge his sentence, he certainly could file a separate motion asserting an independent constitutional challenge to the sentence.

That is not what Jones did. He argued that his sentence should be vacated because of the violation of Miller v. Alabama, and we're seeking a vacatur of [14]the -- and the relief we're seeking is a vacatur of his entire sentence.

I would bring the court's attention, there was a decision issued two weeks ago by the U.S. District Court for the Western District of Virginia. It was a case in which Mr. Murphy was counsel, Ross v. Fleming. The court there held that Miller and Montgomery require the vacatur of both a life without parole sentence and --

JUSTICE MCCULLOUGH: But were -- was all that brought up? In other words, here we have kind of a siloed case and now we're asked to reach into something else.

MR. MCCALL: It was the exact same argument and issue presented. The court ruled in that case that both the life without parole sentence on Ross' Class 1 felony conviction should be vacated, as well as his life sentence

on a related robbery conviction. The court there concluded that, yes, you do have to vacate both sentences because the constitutional error of defect that infects the sentence in the Class 1 felony conviction carries over to the other counts on which the counsel [sic] was convicted.

JUSTICE KELSEY: May I interrupt you with this question? The remand order has a concurrence, and [15] the concurrence unqualifiedly says that the disposition does not address, and it lists a bunch of things, including the last sentence, the last phrase, Or whether the sentence actually qualifies as a mandatory life without parole sentence.

Well, we've already held 7-0 it doesn't qualify as that.

This order, as you know, was issued in several dozen cases. It's a form order -- well, not a form order. It's an order that was issued across the board in all of these Miller cases. So it is clear that no one is directing us specifically to rethink our earlier opinion on mandatory and the definition of mandatory.

So what is it about this remand order that in your mind changes that? Nothing in the majority portion of the order says, Oh, we don't agree with this concurrence.

If they intended to do what you say, which is Montgomery, through indirection, expanded Miller far beyond the actual holding of Miller, and if that's what they intended to do, and they wanted to do it indirectly, and they wanted us to reverse our 7-0 opinion based upon

that -- that hint, you would think that when this -- this concurrence came out on the [16]remand order, someone in the majority would say, You know what, I think we should say we're not talking one way or the other about the subject, or actually, Read Montgomery, it does, in fact, change the definition of Miller. But none of that is in any one of these orders, and I looked at all of them that I could find on the -- on the Web. Did you find anything differently?

MR. MCCALL: Justice Kelsey, you are correct. Well, our position is that Montgomery didn't expand Miller, it clarified Miller, that the principles at issue, the position we're arguing is embedded within Miller itself. The requirements of Miller are that there be a hearing and this finding of permanent incorrigibility, and unless the sentencing process in place provides for that, the life without parole sentence violates the Eighth Amendment.

JUSTICE KELSEY: Well, when you read Miller, it doesn't say that to me. It says you can't have a mandatory life sentence without the possibility of parole. We have a presumptive life sentence with the possibility of a hundred percent of it being suspended by a trial judge with a PSR and every possible information to -- to make the discretionary judgment call. That just doesn't make sense to me, [17]how that could be unconstitutional and a life sentence where he is going to spend the next 40 years in a prison and some possibility maybe of a parole determination later is compliant with the Constitution.

MR. MCCALL: Justice Kelsey, I guess in response, I would make just one last point, and that is it is clear from Miller and Montgomery that the imposition of life without parole should be reserved for the rarest of juvenile offenders who is found to be permanently incorrigible, and to my knowledge -- Mr. Murphy can speak to this as well -- the power to suspend under Virginia law has never been exercised to suspend a life without parole sentence for a Class 1 felony conviction.

CHIEF JUSTICE: Let me ask you a question before you sit down, a procedural question. There was a single assignment of error before the court when it was here the last time. The U.S. Supreme Court remanded for further consideration in light of Montgomery v. Louisiana.

You've changed the assignment of error, which is not permitted by our rules, but what I want to get at is: Is it your contention that there is any difference between the assignment of error that was [18]before us when it was here before and how you have stated the assignment of error today?

MR. MCCALL: No, Your Honor. And I – our intent was not to change the assignment of error. I think it was just phrasing, different phrasing of the assignment. The assignment on which this court granted review is controlling, and that is that the trial court erred in denying the motion to vacate an invalid sentence.

CHIEF JUSTICE: All right. Thank you.

MR. MCCALL: Thank you.

MR. MURPHY: Good morning, Your Honor. May it please the Court.

Let me explain first that our office did consider this case carefully. We came to the conclusion that Montgomery was, in fact, a substantial expansion of Miller. That, in fact, by declaring the principle in Miller a substantive rule and then setting it forth, page 734 of the Supreme Court opinion where it said that there was a particular class of offenders who cannot be sentenced to life without parole without addressing mandatory or discretionary and that class is the juvenile offenders whose crimes reflect the transient immaturity of youth, that they have created a rule [19]that says that you cannot sentence that -- anybody in that group to life without parole.

The decision doesn't change Virginia law. There is no mandatory life without parole in Virginia, and this court ruled that way. The question before us was does Montgomery, which says there is a rule that you cannot sentence any of these people to life without parole, foreclose our argument that, well, ours isn't mandatory, therefore, we can sentence somebody under these circumstances to life without parole because we can suspend it. And we don't think we --

JUSTICE KELSEY: The difficulty, though, is the rule that you're talking about is not the rule of Montgomery. Montgomery is a Teague case. The rule that's being analyzed as substantive, new or old or watershed breakthrough in procedural law for purposes

of retroactivity, the rule is Miller, and Miller is clearly a mandatory sentence.

MR. MURPHY: There's no question about that, Your Honor.

JUSTICE KELSEY: And we held that Miller – the mandatory sentence in Miller is inapplicable here because there is absolute discretion, unreviewable discretion of a trial judge in this situation.

[20]MR. MURPHY: Yes, Your Honor.

JUSTICE MCCULLOUGH: So all you're really saying to me, as I understand it, is dicta in Montgomery should be shoehorned as the predicate rule for Teague analysis out of Miller. That is just very indirect and circular to me.

MR. MURPHY: Well, Your Honor, absent that, we did, in fact, look at the -- the reasoning supporting it, and it looked to us very much like a substantive change in the law which, in fact, was limited not to those who were imposed -- sentenced to mandatory life without parole, but to anybody, any juvenile who was sentenced to life without parole had available to him a challenge unless the requirements of Montgomery or consideration of factors of youth and a finding of irretrievable depravity, was present.

JUSTICE MIMS: Counsel, you mentioned that the -- that in Virginia there isn't -- there aren't sentences without parole. I presume you mean the geriatric release as parole.

MR. MURPHY: Well, there are some sentences, I believe, without parole for particular offenses.

JUSTICE MIMS: Which would include capital murder.

MR. MURPHY: But the language in those statutes [21]is not present in the death penalty -- in the capital murder.

JUSTICE MIMS: So -- so separating the capital murder charge under which Mr. Jones was -- was sentenced to life plus, I believe, 68 years, from all of the others charges in this case, under the capital murder charge, he would not be eligible for geriatric release, and therefore, Angel would not apply?

MR. MURPHY: That's correct, Your Honor. And I think, you know, that's the one difference is that capital life does not -- that's the one exception in the geriatric rule statute.

JUSTICE POWELL: Mr. Murphy, so let me understand the Attorney General's position because I was not exactly clear from page 6 what the position is that we should do. I understand your argument or your position, I think, to be that Montgomery expanded Miller in the sense that Miller addressed mandatory sentencing. Montgomery, in the language, seemed to say perhaps that, whether it's mandatory or not, if it's life, they have to be given a particularized sentence.

MR. MURPHY: That's correct.

JUSTICE POWELL: At one point you say vacate, at another point, it seems, on page 6 -- and I'm on [22]page 6 -- the record doesn't provide any means for this court to make a determination. So what actually is the Attorney General's position, vacate the sentence, send it back for a particularized hearing?

MR. MURPHY: No, Your Honor. Our suggestion is that you vacate judgment denying the motion to vacate.

JUSTICE POWELL: Okay.

MR. MURPHY: Return it to the circuit court for the circuit court to determine whether there is any evidence available. You know, it may be very difficult to produce that evidence, but we're suggesting that that court should have an opportunity to determine whether the Montgomery factors were present. We don't have a transcript --

CHIEF JUSTICE: And if they weren't? JUSTICE MIMS: And if they weren't?

MR. MURPHY: Then vacate the sentence.

JUSTICE MCCULLOUGH: And impose a new sentence but specifically on the Class 1 felony?

MR. MURPHY: Just on the capital murder. Just on the Class 1, yeah. And, of course, the only sentences available at that point would be a life sentence with a --

suspended with a certain number of years to be served because – [23]JUSTICE MIMS: But after vacating the first sentence, the court presumably would hold what I'll call a Miller/Montgomery hearing --

MR. MURPHY: Yes, Your Honor.

JUSTICE MIMS: -- on those two factors?

MR. MURPHY: Well, no. It would vacate – it would have before it a motion to vacate. It could then look to the factors and see was the original sentence appropriate under Miller/Montgomery.

JUSTICE MIMS: And if it determines that the two -- I'm not going to use the right talisman, but that the incorrigibility factors --

MR. MURPHY: Yes, Your Honor.

JUSTICE MIMS: -- were not considered --

MR. MURPHY: Yes, Your Honor.

JUSTICE MIMS: -- then would the office of the Attorney General urge the court to hold a hearing on those factors?

MR. MURPHY: That would be up to the court to determine whether or not there is to be evidence -- the Commonwealth Attorney could present that kind of evidence. If it's available, then there should be a hearing

on whether or not Montgomery was complied with. If -- you know, they may decide we -– because it's so old, we don't have a transcript, we can't [24]come up with that kind of evidence, but would be up to the court to determine, and the Commonwealth Attorney, what to do at that point if they said no, we can't prove these factors.

JUSTICE MCCULLOUGH: Well, I mean, you could present evidence that over all these years, he was unrepentant --

MR. MURPHY: Yeah, sure.

JUSTICE MCCULLOUGH: -- he had all these infractions and violence in the correctional center, I mean, that kind of thing might carry you across the threshold.

JUSTICE MIMS: But you do presume that evidence of that nature could, in fact, now be brought forward --

MR. MURPHY: I'm not sure.

JUSTICE MIMS: -- if it wasn't brought forward before?

MR. MURPHY: Your Honor, I'm not sure that can -- I mean, the question is at the time that he was sentenced, was -- did the court make a finding of incorrigibility and if the court considered the factors of youth.

JUSTICE MIMS: But my question specifically presumes a scenario where that was not determined

[25]then, and I'm trying to tease out what -- what could a circuit court do now if that wasn't done. Could a circuit court have a Miller -- what I would call a Miller/Montgomery hearing?

MR. MURPHY: No, Your Honor. I think what -- what the court would have to do is reconstruct what happened at that time.

JUSTICE MIMS: Okay.

MR. MURPHY: That may be impossible, but I think that, you know, that -- it is a factual element here that -- what happened at the time of the hearing. And perhaps it should go back to the trial court to make that determination rather than saying we're granting the motion to vacate here, sending it back for resentencing without any opportunity to do that.

JUSTICE GOODWYN: Well, you said motion to vacate, there are two different motions to vacate. So you might want to be clear because there is --

MR. MURPHY: Well, the motion to vacate is the one that the court initially ruled on. That decision could be vacated -- could itself be vacated, and then the court directed to determine whether or not, you know, just to proceed again with the motion before you, which is a motion to vacate, because of lack of [26]compliance with Miller and Montgomery.

JUSTICE KELSEY: But ordinarily appellants have to show that the trial court erred, not appellees and not the decision maker, the court. The appellant has to show that. So this whole thing is actually quite simple. Basically what you're saying, as I understand it, is we should presume that a trial judge in a circuit court of Virginia with a juvenile certified as an adult in the circuit court issuing a capital offense life imprisonment did not consider the fact that the person was a juvenile and he may have had circumstances unique to his age that affected him. How could I possibly presume that? I would expect every judge to take that into consideration.

MR. MURPHY: Yes, Your Honor, but -- but I think the court has -- in Montgomery has indicated there has to be a hearing on those issues, there has to be, you know, a consideration of the -- first of all, the factors that might influence a young person to commit an act that he might not commit 10 years later. And then you have -- have on the -- be able to argue that there is an implicit finding of incorrigibility. We're not going to find, very often, anything explicit because the court didn't [27]rule on those. It didn't have to.

JUSTICE KELSEY: So now we have two rules. We have the Montgomery rule that Miller doesn't apply merely to mandatory sentences, but to all life sentences, even when there is the discretion to reduce it to zero. And, secondly, there is a new constitutional rule under the Eighth Amendment that says you have to make written findings of fact on the talismanic language of dicta in Montgomery. We're a long way from anything, in my

opinion, close to a holding that binds us by operation of precedent.

MR. MURPHY: Yes, Your Honor. I mean, there is no question that the court in Miller -- I mean in Montgomery said that you just cannot impose this kind of sentence on this class of juveniles, those who commit the crime only because of the immaturity of -- their own immaturity. And in order to do that, you have to have -- demonstrate that these things were present. It's very difficult, of course, to do that at this time.

CHIEF JUSTICE: The logic of what you're saying is that a life sentence entirely suspended would, nonetheless, violate Montgomery without a hearing.

MR. MURPHY: Oh, no. No. If it were entirely suspended, no, it would not. I mean, the thing is, [28]if -- if you are serving life without parole, it doesn't make a difference whether it's mandatory. If you are serving less than that, it doesn't apply.

JUSTICE KELSEY: Well, you just -- you just collapsed your argument because that was the holding of our Jones' opinion that because life without parole can be suspended to zero if the trial -- or to a half a life or whatever, then it's not subject to Miller.

Similarly, if a trial judge, as the Chief just asked you -- if a trial judge said, I'm issuing a life sentence, but I'm going to suspend a hundred percent of it.

And can I put on evidence about incorrigibility and the fact that the child is 17 when he committed the capital offense?

No, I don't want to hear that. I've just done a life without -- a life with a hundred percent suspension, so I don't want to hear it.

So an obvious violation of the dicta of Montgomery or recalibrating Miller. Logically the appellants would say that is a violative act, and it would have to be because it could come back on a revocation and he might get life the next go-around.

MR. MURPHY: Your Honor, I -- I think that what [29]we're talking about is what is available. If you sentence somebody to life without parole, you satisfy these conditions, and I think that's what Montgomery says is forbidden. It doesn't say you cannot impose a life sentence and suspend it. It says that you cannot impose life without parole where there is no possibility of parole, where you will not get out, where you have no geriatric parole available.

JUSTICE GOODWYN: Now, it seems like to me you're just saying -- looking at the reality of this situation, it was not suspended. This person was sentenced to life without possibility of parole. So we have to send it back to the trial court to see if they held a hearing, which the trial court has to determine factually whether it complied with Miller and Montgomery.

MR. MURPHY: Yes, Your Honor.

JUSTICE POWELL: So you're saying send it back to the trial court to see if they held a hearing before they sentenced Mr. Jones to life without parole?

MR. MURPHY: Yes, Your Honor. Well --

JUSTICE POWELL: We know that they didn't --

JUSTICE KELSEY: It's called sentencing --

JUSTICE GOODWYN: I want to keep saying [30] parole--

JUSTICE POWELL: I'm having --

JUSTICE GOODWYN: I'm sorry. Go ahead.

JUSTICE POWELL: No. I'm just not understanding what it is.

MR. MURPHY: All right. Whether or not a hearing was held at which the factors mentioned in Montgomery about the youth of the offender –

JUSTICE POWELL: Right. But don't we know that they didn't? Don't we know that he pled guilty and they sentenced him --

MR. MURPHY: That's very likely, Your Honor, but we --

JUSTICE POWELL: -- without even a presentence report?

MR. MURPHY: -- don't know. We don't have a transcript of it. The tape was destroyed after so many years. We don't have a transcript. We don't know what happened. I mean, the parties might very well decide they cannot reconstruct what happened.

JUSTICE KELSEY: Well, doesn't -- doesn't the criminal defendant need to prove that he didn't waive the issue below, that he asked for the court to take into account that he was a juvenile and juveniles are generally susceptible to juvenile influences? So, I [31]mean, we don't even -- everything you've just told me is that we don't know the trial court didn't consider these things, and we don't even know that the defendant himself, Mr. Jones, asked for it to be considered, and we don't even know, if we remand it back to the circuit court at this late date, whether any of it can be reconstructed. And if the logic of what I'm hearing from both sides in this case is we've got to do something completely different than issue the sentence that the trial judge who presided over the case did.

MR. MURPHY: Yes, Your Honor. I mean, that's the problem we have is that we don't know what happened, and the question is do we just presume from the record that it didn't happen and vacate the sentence or do we send it back to the trial court for another sentencing --

JUSTICE MCCULLOUGH: So it's a two-step process. The first thing is it goes back and we look at was

a hearing held that comported with these Montgomery factors.

MR. MURPHY: Yes, Your Honor.

JUSTICE MCCULLOUGH: Assuming the answer to that is no, you then go into a new sentencing hearing on the Class 1 felony?

[32]MR. MURPHY: Yes. If I might -- Judge, I know we're at the end -- near the end. I just want to make -- point out that in the motion -- in the original motion to vacate, not only did Jones not mention the other sentences, but, in fact, on page 61 and 62, he said that if they adopt -- he wanted -- he asked the court to with -- to suspend the capital murder sentence. And he said if you did that, it would still leave Jones with a life sentence on at least one other of the remaining convictions, and he said Jones would consent to that alternative. So in the motion to vacate, not only did he not ask anything about the other sentences, he, in fact, accepted the other sentences and asked only that the capital murder conviction be considered.

CHIEF JUSTICE: Mr. Murphy, before you sit down.

MR. MURPHY: Yes, Your Honor.

CHIEF JUSTICE: If you have a sentence that's denominated life without parole and it's suspended entirely, what is it?

MR. MURPHY: It is a suspended sentence.

CHIEF JUSTICE: Well, but, I mean, parole isn't an issue if a person is released.

MR. MURPHY: Well, Your Honor, I mean, unless [33]he is sentenced -- if -- unless he's in prison without the possibility of parole for life, you know, the life without parole sentence. So...

JUSTICE KELSEY: I mean, a revocation hearing can undo the whole thing under that analysis. One revocation, one condition one, and you impose the whole less -- the whole remainder of the life sentence.

MR. MURPHY: That may be a very different issue. I mean, at that point if he, in fact, demonstrated a failure to comply with the conditions of probation, at that point I think it'd be in a different issue.

JUSTICE POWELL: Would he then be entitled to a Miller/Montgomery hearing because he is now subject to --

MR. MURPHY: I think you might well have to prove that, in fact, you have considered the factors in that, through his violation of parole, he may have demonstrated his incorrigibility.

CHIEF JUSTICE: Even 50 years later?

MR. MURPHY: Well, I guess at that point the question is is the -- if you are imposing that life sentence at that time, if -- and if you have a suspended sentence, if, in fact, you are going to [34]revoke it and at that particular

point impose the -- require service of the entire sentence, then, yes, you have the hearing at that time as to what the conditions are now.

JUSTICE GOODWYN: But in actuality wouldn't the reality be, first of all, we don't have any mandatory minimum, we don't have any life sentences without possibility of parole that have been suspended. Are there any of those cases out there in Virginia that we have to worry about?

MR. MURPHY: No, Your Honor.

JUSTICE GOODWYN: Okay. So all we're looking at is prospectively. And my understanding of your position or the position of other counsel is that going forward, a court, before it pronounced a sentence of life imprisonment without the possibility of parole, needs to have a hearing that complies with Montgomery.

MR. MURPHY: Yes, Your Honor.

JUSTICE GOODWYN: So if they have that hearing, no matter what the sentence is, no matter what the suspension is, they've satisfied the Constitution of the United States?

MR. MURPHY: Yes, Your Honor.

JUSTICE KELSEY: Chief, can I ask one last [35] question?

CHIEF JUSTICE: Well, yeah. I've got one last question, too.

JUSTICE KELSEY: Is there anything in this record where this defendant, not Montgomery, not Miller, not somebody up in D.C., this defendant asked for that hearing?

MR. MURPHY: No, Your Honor.

JUSTICE KELSEY: Well, then why isn't it waived?

MR. MURPHY: I -- I think it's not waived because the sentence imposed, under our view, is a void --

JUSTICE KELSEY: The remedy for the violation is a hearing where you stand up and you present evidence, oh, he was 17 when it happened, or whatever, and he was subject to these juvenile influences. He never asked for that.

MR. MURPHY: No, Your Honor.

JUSTICE KELSEY: All right. Then why should we order a trial judge to do something that has been waived?

MR. MURPHY: Because his waiver is ineffective because he --

JUSTICE KELSEY: You can't waive a [36]constitutional right?

MR. MURPHY: -- the sentence imposed was void.

JUSTICE KELSEY: You can't waive a constitutional -- it's not void, it's -- it's unconstitutional.

MR. MURPHY: Well, I think, in fact, Your Honor, it would be void. It's a sentence in excess of what can be honored.

JUSTICE KELSEY: Well, Eighth Amendment violations are not void, they are unconstitutional.

MR. MURPHY: Your Honor, we -- I mean, it's clearly unconstitutional, and what, in fact, we have is a sentence that is, in our opinion, void.

JUSTICE KELSEY: So you don't think 525 or 518 apply to any Miller? So now we have a third level of new law which is procedural default law is inapplicable because this is the super-super-duper right?

JUSTICE GOODWYN: But isn't the question whether or not one can basically concede to an unconstitutional sentence?

MR. MURPHY: Yes, Your Honor. Absolutely. That's the question.

JUSTICE MCCULLOUGH: That's the law in Virginia now, that a sentence in excess of the minimum [37] statutory, presumably constitutional, is void.

JUSTICE GOODWYN: Right.

MR. MURPHY: Yes, Your Honor.

JUSTICE KELSEY: But we're talking about the Eighth Amendment, not the power of the court by statute. If you don't raise an Eighth Amendment cruel and unusual complaint in state court, trial court, you cannot raise it for the first time on appeal. It is subject to 525, just like Crawford is subject to 525, just like the due process clause is subject to 525, just like the First Amendment is subject to 525.

MR. MURPHY: I -- I think, as Justice McCullough has pointed out, we have cases in Virginia where you have an excessive sentence.

JUSTICE KELSEY: When courts act outside their subject matter jurisdiction and issue a sentence beyond the power of the court and given to them by the General Assembly --

MR. MURPHY: Well, I think that's exactly what they said in Montgomery, that it faces a punishment that the law cannot impose upon you.

JUSTICE KELSEY: Well, generally you can impose a law -- a punishment in violation of law, but the matter can still be waived.

[38]MR. MURPHY: Your Honor, I say -- I mean, we've adopted a different position that, in fact, if it's a void sentence, it can be raised at any time. Thank you.

CHIEF JUSTICE: Mr. Murphy, I find it curious --

MR. MURPHY: Excuse me, Your Honor.

CHIEF JUSTICE: -- that Mr. McCall says that there was no expansion of Miller in Montgomery, that there was simply a clarification, and you say Montgomery was a substantial expansion of Miller; and then I listen to both of your arguments and I can't tell a difference. What difference does it make? Why is he expressing it this way and you are expressing it a different way and you both sound alike?

MR. MURPHY: Well, all I can say is that we think that because it has included nonmandatory life without parole, as in Virginia, that is a substantial expansion of the holding in Miller.

CHIEF JUSTICE: But that's the part that you think has been expanded?

MR. MURPHY: Yes, Your Honor.

THE CHIEF: But the actual requirement of Montgomery, before there is a life sentence of any [39] sort, that that is just a clarification; do you agree with me on that?

MR. MURPHY: Yes, Your Honor.

CHIEF JUSTICE: All right. Well, at least I understand why you're using the language you use.

MR. MURPHY: The language with respect to what has to be done at the hearing, I think, is directly from Miller, but the expansion to every life sentence without parole, I think, is important and significant.

JUSTICE POWELL: And it is the expansion beyond the mandatory that you're saying is the expansion; that's not the clarification?

MR. MURPHY: Yes, Your Honor.

JUSTICE MIMS: I think that all depends upon your starting point. My guess is that Mr. McCall had a very expansive view of Miller when it first came down and that Mr. Murphy had a less expansive view of Miller when it first came down and now they've come to the same point based upon Montgomery.

MR. MURPHY: Thank you, Your Honor. Unless there are any further questions.

(The argument concluded at 10:57 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL NO. 6:13–cv–00034

RANDY DWAYNE ROSS,

Petitioner,

v.

LESLIE FLEMING,

Respondent.

JUDGE NORMAN K. MOON

ORDER

This case is before the Court on Respondent's motion under Federal Rule of Civil Procedure 59(e) to amend or correct this Court's June 16, 2016 Final Order granting Petitioner's writ of habeas corpus. Respondent argues that the Order incorrectly vacated Petitioner's life sentence for robbery. Respondent, however, does not meet the standard for Rule 59(e) relief because she presents arguments that have already been raised previously or that should have been brought up at an earlier opportunity. Further, Respondent's claims are substantively without merit. For the foregoing reasons, Respondent's motion is denied.

FEDERAL RULE OF CIVIL PROCEDURE 59(E) STANDARD

Federal Rule of Civil Procedure 59(e) allows a District Court to alter or amend a judgment within 28 days after the entry of a judgment. Although the rule itself does not specify a standard, Rule 59(e) motions may be granted only upon three grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993); see also *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007).

The standard for a successful Rule 59(e) motion is a high one, and granting such a motion is an "extraordinary remedy that should be applied sparingly." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012). Additionally, "Rule 59(e) motions may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

DISCUSSION OF RESPONDENT'S ARGUMENTS

Respondent has failed to acknowledge or argue any of the grounds for a successful Rule 59(e) motion. Instead, Respondent uses her motion to re-litigate issues that this Court has previously ruled on or to raise new arguments which should have been raised prior to the issuance of the judgment.

Respondent previously argued that Petitioner failed to include the robbery sentence as part of his habeas petition. (Dkt. 30 at ¶. 1). Having considered this argument prior to issuing my June 16 Final Order, I nevertheless ordered that both life sentences be vacated. Respondent presents no change in law, new evidence, or clear error of law that would give reason for this Court to amend its judgment on this issue. Additionally, the argument would be unpersuasive even if it properly invoked Rule 59(e). The first sentence of the habeas petition makes clear that Petitioner is challenging "two terms of life without parole", and nothing in the record persuades the Court that the capital murder sentence is the only one being challenged. (Dkt. 1 at 6).

Respondent also re-litigates the argument (see dkt. 10 at ¶ 5) that Petitioner's claim is time barred or waived, relying on *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) and *Savino v. Commonwealth,* 239 Va. 534, 538-39, 291 S.E.2d 276, 278 (1990), respectively. The Court has already decided that Petitioner's claims are not otherwise barred,[1] and Respondent does not now offer any new reason to reconsider the issue. Respondent's bare reassertion that these claims are time barred or waived, citing cases already argued before the Court, is insufficient.

In addition, the cases cited by Respondent do not bear on facts of this case. The court in *Slayton* held

1. Although I did not expressly address these arguments in the June 16 Final Order, I considered them and rejected them in deciding to grant Petitioner's habeas petition.

that "[a] petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error" in rejecting a defendant's attempt to raise a defense upon collateral review that was available to the defendant at trial. *Slayton*, 205 S.E.2d at 682. *Slayton* is not applicable to the present case, where Petitioner's *Miller* defense was not available to him at trial because *Miller* was decided well after his sentencing. *Savino* is similarly inapposite. *Savino* held that a defendant's entry of a guilty plea waives non-jurisdictional defenses upon direct appeal. *Savino*, 291 S.E.2d at 278. This holding is inapplicable to the present case, where Petitioner is seeking collateral review of a judgment upon a defense not available to him at the time of his plea.

Respondent's final argument, that *Miller v. Alabama* 132 S. Ct. 2455 (2012) is not the correct governing precedent for a life sentence without parole for robbery, is one that Respondent failed to raise in prior proceedings despite having every opportunity to do so. In response to this Court's Order that parties should address "why this Court, following *Montgomery*, should not vacate the Petitioner's sentence and order a new sentencing proceeding in Virginia state court" (Dkt. 29), Respondent did not raise any of her arguments against the applicability of *Miller*. Respondent cannot now argue for the first time in a Rule 59(e) motion that *Graham v. Florida* 560 U.S. 48, 82 (2010) is the correct applicable precedent or that the chance of geriatric release negates *Miller's* applicability.

Further, these arguments would fail on the merits. *Miller's* holding that the "Eighth Amendment forbids a

sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" applies depending on the nature of the sentence, not the nature of the underlying crime. *Miller*, 132 S. Ct. at 2469. Here, it is undisputed that the record fails to show that Petitioner's sentencing procedure comported with *Miller*. (See dkt. 30 at 8.) Neither the ruling in *Graham* nor the possibility of geriatric release negate Petitioner's valid claim under *Miller*. See *LeBlanc v. Mathena*, No. 2:12-cv-340, 2015 WL 4042175 (E.D. Va. July 1, 2015) (holding that Virginia's geriatric release program did not make a juvenile life sentence constitutional under *Graham*).

For the reasons discussed above, Respondent's is **DENIED**.

It is so **ORDERED**.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and accompanying Order to all counsel of record.

ENTERED: This 30th day of August, 2016.

/s/
Norman K. Moon
United States District Judge

IN THE SUPREME COURT OF VIRGINIA

Record No. 131385

DONTE LAMAR JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT ON REMAND FROM THE UNITED STATES SUPREME COURT

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[TABLES INTENTIONALLY OMITTED]

ARGUMENT

I. The Court Should Vacate Jones' Sentence on the Class One Felony.

A. Jones' Sentence on the Class One Felony is Void Ab Initio.

"*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718, 734 (2016) (emphasis added). "A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735 (emphasis added). Moreover, "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734.

It is undisputed that Jones' life sentence on the Class One Felony was imposed without a hearing where youth and its attendant characteristics were considered and without a finding that Jones was permanently incorrigible. As a result, Jones' sentence on the Class One Felony violates the Eighth Amendment. The imposition of Jones' sentence in violation of the Eighth Amendment renders his sentence void ab initio. *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009) (sentence imposed in violation of statutory range is void ab initio); *Burrell v. Commonwealth*, 283 Va. 474, 722 S.E.2d 272, 275 (2012)

("ultra vires provision in the sentencing order results in the entire sentencing order being void ab initio").

B. The Constitutionality of Jones' Sentence Is the Issue Presented on Appeal and Remand Would Serve No Purpose.

Whether Jones' sentence is unconstitutional and should have been vacated pursuant to *Miller* is the issue presented in Jones' appeal from the Circuit Court. *See, e.g.*, J.A. 105. This Court denied Jones' appeal, reasoning that the ability of the Circuit Court to suspend the statutorily-required sentence of life without parole satisfied *Miller*. After reaffirming in *Montgomery* that *Miller* requires more, the U.S. Supreme Court vacated the judgment of this Court and remanded this case to "the Supreme Court of Virginia for further consideration." *Jones v. Virginia*, 136 S. Ct. 1358 (2016). The Commonwealth argues the Court should instead remand the case "to the Circuit Court of York County to conduct any other proceedings that may be required." Comm. Br. 6.

The Commonwealth's argument for remand to the Circuit Court without vacating Jones' sentence is premised on the Commonwealth's assertion that "[t]he circuit court denied Jones' motion to vacate his sentence on the ground that *Miller's* new rule was not substantive and therefore did not apply retroactively under *Teague v. Lane,* 489 U.S. 288 (1989) (plurality op.)." Comm. Br. 5. The Circuit Court did not—as the Commonwealth now claims—decline to address the substance of Jones' motion to vacate on the ground that *Miller* does not apply

retroactively. The Circuit Court denied Jones' motion on the merits (without a hearing and opportunity to submit mitigating evidence), finding "there is nothing new in mitigation of the offense." J.A. 65.

The Commonwealth claims "a Virginia Court must now decide whether Jones' life sentence for murder committed while he was a juvenile complies with *Miller*. . . ." Comm. Br. 5. But both the Circuit Court and this Court already have done so. Moreover, the Commonwealth concedes, "the record does not provide any means for this Court to make th[e] determination [whether Jones' life sentence for murder committed while he was a juvenile complies with *Miller*]." *Id.* Yet, the Commonwealth suggests that the Court should not declare Jones' sentence void ab initio and remand the matter for resentencing, but should instead remand the case to the Circuit Court to permit the Circuit Court to "analyze the record"—a record the Commonwealth concedes "does not provide any means" to make a determination that Jones' life sentence comports with *Miller*. *Id.* at 6. The Commonwealth's suggestion makes no sense and would serve no purpose.

The Commonwealth has identified no issue to be addressed on remand other than the purely legal question presented in Jones' appeal. The Commonwealth offers no argument as to why Jones' sentence is not void ab initio. Accordingly, the Court should declare, consistent with its decisions in *Rawls* and *Burrell*, that Jones' sentence on the Class One Felony is void ab initio and remand for resentencing in accordance with *Miller*.

II. The Court Should Also Vacate Jones' Sentence on the Related Offenses.

The Commonwealth contends this Court lacks authority to vacate the portion of Jones' sentence related to any offense other than the Class One Felony because the additional related offenses are not listed in the granted assignment of error. Comm. Br. 7-8. The Commonwealth's reading is too narrow. The assignment of error granted by this Court was:

> The trial court erred in denying Appellant's motion to vacate invalid sentence, pursuant to *Miller v. Alabama*, on the ground that Appellant did not present any new evidence in mitigation.

J.A. 105. Nothing in this language precludes consideration of the portion of Jones' sentence related to offenses other than the Class One Felony. Indeed, the Commonwealth argues later in its brief that the term "sentence" should be understood as inclusive of "multiple sentences . . . to be treated as one." Comm. Br. 14 n.5. The Commonwealth's argument demonstrates why Jones' entire sentence on the Class One Felony and each of the related offenses properly is before this Court. Jones' sentence on each of these offenses, all of which stemmed from the same convenience store robbery, properly is considered "as one."

Indeed, it is the inherently interrelated nature of the sentence on multiple, related offenses that forms the basis for Jones' argument that the Court should vacate

Jones' sentence on the additional convenience store robbery offenses. Jones does not assert an independent constitutional challenge to his sentence on the related convenience store robbery offenses. Rather, Jones argues that the appropriate remedy for the Circuit Court's failure to sentence Jones in accordance with the Eighth Amendment's prohibition on cruel and unusual punishment is to vacate Jones' sentence on all of the interrelated convenience store robbery offenses, including—but not limited to—the Class One Felony. *See* Opening Br. 26-28; Opening Br. on Remand 11-14.

Jones' argues that vacatur of his entire sentence is necessary because the life sentence imposed on the Class One Felony necessarily tainted the sentencing of Jones on the remaining related offenses. As Jones noted in both his initial Opening Brief and his Opening Brief on Remand, Jones' life sentence on the Class One Felony was afforded significant weight in determining his sentence on the remaining related offenses. *See* Opening Br. 27-28; Opening Br. on Remand 12-13. Moreover, the presentence report prepared for those offenses reveals that, rather than considering the mitigating qualities of Jones' youth at the time the offenses were committed, the sentencer emphasized that Jones was adjudicated as an adult and had reached the age of majority at the time of sentencing. Opening Br. 27-28; Opening Br. on Remand 13. In short, Jones argues that the violation of his constitutional rights may remedied only by vacating his entire sentence; that any other remedy would inadequate. *See Burrell*, 722 S.E.2d at 275 (vacating entire sentence that contained ultra vires provision and remanding for resentencing).

Jones was not afforded the opportunity, with the assistance of counsel, to develop and present to the Circuit Court the full scope of relief he contends should be granted. But "good cause" and "the ends of justice" and the precedent of this Court warrant the entry of complete relief for the violation of Jones' fundamental constitutional right to be free from cruel and unusual punishment. *See* Rule 5:25; *c.f. Allen v. Com.*, 36 Va. App. 334, 338, 549 S.E.2d 652, 654 (2001) (considering issue not raised before the trial court under the "ends of justice" exception because "[t]he denial of due process involves the denial of a fundamental constitutional right"); *Cooper v. Com.*, 205 Va. 883, 892, 140 S.E.2d 688, 694 (1965) (considering the deprivation of the petitioner's constitutional right to counsel though it was not raised below).

III. Any New Sentence on Remand Must Comport with the Eighth Amendment.

Jones also contends that any new sentence the Circuit Court imposes on remand must comport with the Eighth Amendment—a contention that Jones thought was beyond dispute. The Commonwealth, however, seeks to re-characterize Jones' argument as: (i) "attack[ing]" his existing sentence on the related convenience store robbery offenses as "void under *Graham*;" and (ii) asking this Court to "overrule" *Angel v. Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (2011) and *Vasquez v. Commonwealth*, 291 Va. 232, 781 S.E.2d 920 (2016). Comm. Br. 6-10. Jones is not seeking to raise now a new constitutional challenge to his sentence on the related offenses, and Jones is not asking this Court to overrule *Angel* and *Vasquez*. Rather, Jones

contends that, on remand after vacatur of his existing sentence: (1) a sentencing hearing should be held at which Jones is permitted to present evidence of the mitigating qualities of his youth and demonstrated rehabilitation; (2) the Circuit Court should exercise its authority under Section 18.2-10(a) to suspend any statutorily-required sentence that would violate the Eighth Amendment; and (3) any new sentence imposed should be for a term of years that, in the aggregate, is not the functional equivalent of a life sentence.

A. *Graham* Counsels against a Life Sentence for Non-Homicide Offenses.

The Commonwealth devotes much of the argument in its Response to the proposition that, in Virginia, a sentence of life in prison for a non-homicide offense committed as a juvenile does not run afoul of the U.S. Supreme Court's decision in *Graham* because of the possibility of geriatric parole. The Commonwealth's position bears a striking resemblance to its argument that, in Virginia, a sentence of life in prison for a homicide offense committed as a juvenile does not run afoul of the U.S. Supreme Court's decision in *Miller* because of the possibility of suspension. Jones submits that the Commonwealth's argument for non-homicide offenses fails to pass muster for the same reason its argument for homicide offenses did. In practice, the statutory availability of geriatric parole in Virginia, like the statutory authority for suspension of a life sentence, represents little more than a hope for an ad hoc exercise of leniency, and thus, is inadequate to ensure that the punishment of juvenile comports with the Eighth

Amendment. *See Solem v. Helm*, 463 U.S. 277, 303, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (holding "[t]he possibility of commutation is nothing more than a hope of 'an *ad hoc* exercise of clemency'" and fails to ensure that punishment is proportionate to the offender and offense as required by the Eighth Amendment); *Graham*, 560 U.S. at 70 (the "remote possibility of [executive clemency] does not mitigate the harshness of the sentence").

Graham requires a "*realistic* opportunity to obtain release." 560 U.S. at 82 (emphasis added). The opportunity for release must be "meaningful" and "based on demonstrated maturity and rehabilitation." *Id.* at 75. The Commonwealth argues the statutory availability of geriatric parole in Virginia satisfies *Graham*. Comm. Br. at 11. Virginia Parole Board statistics suggest otherwise. *See* Opening Br. on Remand at 22. (noting that geriatric parole was granted in only 28 of 774 cases (3.6%) in which it was sought between January 2013 and March 2016). The denial of geriatric parole to greater than 96% of all applicants does not ensure that life in prison in Virginia is reserved for the rarest of juvenile offenders whose crime reflects permanent incorrigibility. *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (the mere "prospect of geriatric release" is insufficient under *Graham*); *LeBlanc v. Mathena*, No. 2:12CV340, 2015 WL 4042175, at *18 (E.D. Va. July 1, 2015) ("The distant and minute chance at geriatric release at a time when the offender has no realistic opportunity to truly reenter society . . . falls far short of the hallmarks of compassion, mercy and fairness rooted in this nation's commitment to justice."); *see also Vasquez,* 781 S.E.2d at 934-35 (Mims & Goodwyn, Js., concurring) (stating that

"[s]tatistics describing the frequency with which geriatric release has been granted post-*Angel* are troubling" and that "whether the geriatric release statute *as applied* will continue to provide the 'meaningful opportunity for release' required by *Graham* is subject to debate").

To avoid running afoul of *Graham*, any sentence imposed on remand for Jones' non-homicide offenses should be for a term of years. Virginia law might authorize more, but Jones contends it would be prudent, in light of the very real debate as to whether geriatric parole in Virginia provides a "meaningful opportunity for release," to limit the sentence to a term of years. Doing so would promote judicial efficiency by avoiding future challenges to a life sentence for a non-homicide offense.

B. *Graham* Counsels Against a Sentence for a Term of Years that is the Functional Equivalent of a Life Sentence.

The Commonwealth also argues that "'[t]he Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole.'" Comm. Br. 15 (quoting *United States v. Cobler*, 748 F.3d 570, 580 n.4 (4th Cir.), *cert. denied*, 135 S. Ct. 229 (2014)). Jones does not argue otherwise. Rather, Jones submits, as Justices of this Court have recognized and the highest courts in six states have held, the focus of *Graham*, *Miller*, and *Montgomery* is not on the label applied to a sentence, but the meaningful opportunity for a juvenile offender to secure release. *See, e.g., Vasquez*,

781 S.E. 2d at 931 (Mims & Goodwyn, Js., concurring) ("*Graham's* prohibition on sentences of life without parole for juveniles who commit non-homicide offenses does apply to a term-of-years sentence that constitutes a de facto life sentence imposed in a single sentencing event"); *Casiano v. Commissioner of Correction*, 115 A.3d 1031, 1044 (Conn. 2015) ("We agree, however, with those courts that have concluded that the Supreme Court's focus in *Graham* and *Miller* 'was not on the label of a 'life sentence'" but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life." (citation omitted)). A sentence for a term of years that is the functional equivalent of a life sentence and fails to provide a meaningful opportunity for release does not comport with the Eighth Amendment guarantee against cruel and unusual punishment for juveniles as articulated by the U.S. Supreme Court in *Graham*, *Miller*, and *Montgomery*. *See, e.g., Null*, 836 N.W.2d at 71 ("[W]e do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*."). Accordingly, Jones submits that any sentence imposed on remand for his non-homicide offenses should be for a term of years that, in the aggregate, is not the functional equivalent of a life sentence.[1]

1. The Commonwealth represents that, notwithstanding the aggregate number of years to which Jones is sentenced, he will be eligible for geriatric parole at age sixty. Even if the Commonwealth is correct on this point, Jones submits that eligibility for geriatric parole does not satisfy the Eighth Amendment because it does not provide a meaningful opportunity for release in Virginia for juvenile offenders.

CONCLUSION

Jones requests that the Court vacate his sentence for all of the offenses related to the convenience store robbery committed when Jones was a juvenile. Jones further requests that the Court instruct the Circuit Court on remand that any new sentences imposed must comport with the Eighth Amendment protections against cruel and unusual punishment for a juvenile as articulated by the U.S. Supreme Court in *Graham*, *Miller*, and *Montgomery*.

Dated: July 1, 2016 Respectfully submitted,

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IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 131385

DONTE LAMAR JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT ON REMAND FROM THE UNITED STATES SUPREME COURT

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[TABLES INTENTIONALLY OMITTED]

STATEMENT OF THE CASE

In the summer of 2000, while a juvenile, Donte Lamar Jones ("Jones") was involved in a convenience store robbery with two other individuals—an adult and another juvenile—that resulted in the death of a store clerk. J.A. at 12-13. Despite his young age, voluntary surrender to authorities, the minimal amount of force involved, and lack of intent to kill anyone, Jones was charged with capital murder and ten other offenses. *Id.* at 13-34. Jones' court-appointed counsel moved to dismiss the capital aspect of the indictment against him on the ground that, as applied to Jones, a juvenile, the punishment sought violated the Eighth Amendment. *Id.* at 37. The York County-Poquoson Circuit Court overruled the motion. *Id.* at 39. Jones' court-appointed counsel also moved to prohibit the imposition of the death penalty against Jones on the ground that the evidence was insufficient as a matter of law to establish a statutory aggravating factor. *Id.* at 35. The Circuit Court overruled this motion as well, "finding that the existence of any aggravating factor is a decision of fact to be made by the jury." *Id.* at 41.

Subsequently, at the urging of his court-appointed counsel, Jones agreed to enter an *Alford* plea on the capital charge in exchange for an agreement that he would not be sentenced to death, but would be sentenced to life without the possibility of parole—as mandated by Virginia law for all persons convicted of capital murder and not sentenced to death.[1] *Id.* at 44. When it came time

1. The Virginia statute pursuant to which Jones was sentenced, Virginia Code Section 18.2-10(a), subsequently was amended to

for the later sentencing of Jones on the ten remaining offenses, Jones' assigned probation and parole officer, while acknowledging that Jones had made a "positive adjustment" to life in prison and was not considered a "security risk," asserted that the victim, her family, and friends "deserve retribution" and urged the Circuit Court to "impose a sentence in excess of the high end of the Virginia Sentencing Guidelines." *Id.* at 106. With the knowledge that Jones' earlier sentence on the capital count to life without the possibility of parole meant Jones would spend the rest of his life in prison, the Circuit Court imposed an additional life sentence plus a term of 68 years on the ten remaining offenses. *Id.* at 52-53.

While Jones was serving his sentence, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), in which the Court held that the mandatory imposition of a life sentence without the possibility of parole for a juvenile violates the Eighth Amendment. Upon learning of the *Miller* decision, Jones filed a pro se Motion to Vacate Invalid Sentence on June 5, 2013. J.A. at 55. A week later, on June 13, 2013, the Circuit Court *sua sponte* denied the motion, finding—without a hearing and without affording Jones an opportunity to submit any evidence in support of his application—that "there is nothing new in mitigation of the offense." *Id.* at 65. Because Jones did not receive the Circuit Court's

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render juveniles ineligible for the death penalty after the U.S. Supreme Court held in *Roper v. Simmons*, 543 U.S. 551, 578 (2005) that the Eighth and Fourteenth Amendments to the U.S. Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."

order until after the time period to appeal had expired, he sought and this Court granted him an extension of time to file his notice of appeal. *Id.* at 72, 88.

Jones filed his pro se petition for leave to appeal in this Court on September 4, 2013. *Id.* at 76. This Court granted Jones' petition, but ultimately denied his appeal, concluding that Miller does not apply in Virginia because Virginia trial courts have the authority to suspend a life sentence. Jones petitioned for rehearing, arguing that *Miller* does more than "forbid a sentencing scheme that mandates life without parole for juveniles; it requires an individualized sentencing determination." Petition for Rehearing at 5. The Court denied Jones' petition for rehearing.

On April 15, 2015, Jones petitioned the U.S. Supreme Court for a writ of certiorari. While Jones' petition was pending, the U.S. Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), in which it held that its previous decision in *Miller* announced a substantive rule of law that: (1) requires "the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison;" and (2) prohibits life without parole for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 733-34. Shortly thereafter, on March 7, 2016, the U.S. Supreme Court granted Jones' petition for a writ of certiorari, vacated this Court's judgment denying Jones' appeal, and remanded Jones' case to this Court for further consideration in light of *Montgomery*.

ASSIGNMENT OF ERROR

The Circuit Court erred in failing to vacate, as violative of the Eighth Amendment's prohibition on cruel and unusual punishment, Jones' sentence for offenses committed as a juvenile. J.A. 55-65, 76-87.

STANDARD OF REVIEW

This appeal presents questions of law which the Court reviews *de novo*. *See Burrell v. Commonwealth*, 283 Va. 474, 478, 722 S.E.2d 272 (2012) (reviewing denial of motion to vacate sentence *de novo*); *see also Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011) (applying *de novo* standard of review to appeal from grant of motions to modify sentences); *Gallagher v. Commonwealth* 284 Va. 444, 449, 732 S.E.2d 22, 24 (2012) (stating that *de novo* standard of review applies to questions involving constitutional and statutory interpretation); *Johnson v. Commonwealth*, 63 Va. App. 175, 182, 755 S.E.2d 468, 471 (Ct. App. 2014) (applying *de novo* standard of review to argument under *Miller v. Alabama*).

ARGUMENT

I. *MONTGOMERY v. LOUISIANA* REQUIRES THAT JONES' SENTENCE BE VACATED.

A. The Eighth Amendment Protections Articulated in *Montgomery* Apply in Virginia.

The U.S. Supreme Court's decision to grant Jones' petition for certiorari, to vacate this Court's decision,

and to remand this case for further proceedings in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) requires the Court to reconsider its ruling that the Eighth Amendment protections articulated in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) do not apply in Virginia. Jones respectfully submits that the conclusion the Eighth Amendment protections articulated in *Miller* do not apply in Virginia cannot be reconciled with the U.S. Supreme Court's decision in *Montgomery* for two reasons.

First, *Montgomery* confirmed that *Miller* requires "a hearing where 'youth and its attendant characteristics' are considered as sentencing factors" in order to "separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735. Virginia law does not provide for such a hearing. The Court held in this case that a trial court has the authority, under Virginia Code Section 19.2-303, to suspend the life sentence required for juveniles convicted of a Class 1 felony, but the mere authority to suspend such a sentence does not avoid an application of *Miller* because it does not ensure that juveniles are afforded the proportionality protections required by the Eighth Amendment. As *Montgomery* explains, the Eighth Amendment requires a sentencing hearing, comparable to that required before the imposition of the death penalty, at which evidence concerning the mitigating qualities of youth is considered. 236 S. Ct. at 735; *see also Miller*, 132 S. Ct. at 2467 (requiring "individualized sentencing" because life sentences for juveniles are "analogous to capital punishment"); *cf. Sumner v. Shuman*, 483 U.S. 66, 74, 107 S. Ct. 2716, 2721, 97 L. Ed. 2d 56 (1987) (requiring an opportunity

for "presentation of mitigating circumstances for the consideration of the sentencing authority" before imposing the death penalty).

Second, *Montgomery* reaffirmed that a life sentence is unconstitutional "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734. Thus, any life sentence for a juvenile offender "whose crimes reflect the transient immaturity of youth" is unconstitutional, "even if a court considers a child's age before sentencing him or her to a lifetime in prison." *Id.* Virginia law does not require the trial court to determine that a juvenile is "permanently incorrigible" before imposing a life sentence, does not require the trial court to make such a determination in deciding whether to suspend a life sentence, and does not even mandate that the trial court consider suspension. The authority of Virginia trial courts to suspend a life sentence does not suffice. The Eighth Amendment requires a determination whether the juvenile offender's crime reflects the transient immaturity of youth or permanent incorrigibility. And only the "rarest of juvenile offenders" found to be permanently incorrigible may, consistent with the proportionality requirements of the Eighth Amendment, be sentenced to a life in prison.

B. The Eighth Amendment Protections Articulated in Montgomery Require Vacatur of Jones' Sentence.

1. Jones' Class One Felony Sentence Must Be Vacated.

The trial court did not, before sentencing Jones to life in prison without the possibility of parole, conduct a hearing at which the mitigating qualities of Jones' youth were considered. The trial court also did not, after a consideration such factors, determine that Jones' was "the rarest of juvenile offenders" whose crime "reflect[s] permanent incorrigibility." As a result, Jones' sentence to life in prison on the Class 1 felony is unconstitutional and must be vacated. *Burrell v. Commonwealth*, 283 Va. 474, 480, 722 S.E.2d 272, 275 (2012) ("A sentencing order is void ab initio if 'the character of the judgment was not such as the Court had the power to render.'")

2. Jones' Sentence on the Remaining Charges Also Must be Vacated.

In addition to the life sentence for the Class 1 felony, Jones was sentenced to an additional life term for armed robbery, plus 68 years on ten other offenses, all of which stemmed from the same convenience store robbery. Jones was sentenced on these offenses *after* he was sentenced to life without parole on the Class 1 felony and *before* the U.S. Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551, 578 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller*, 132 S. Ct. 2455,

and *Montgomery*, 136 S. Ct. 718. "Good cause," the "ends of justice," and the proportionality requirements of the Eighth Amendment, as recognized by the U.S. Supreme in *Roper*, *Graham*, *Miller*, and *Montgomery* require that Jones' sentence on these offenses be vacated as well. *See* Rule 5:25.

It is evident from the Presentence Investigation Report prepared for purposes of sentencing Jones on the remaining offenses and the Circuit Court's Sentencing Order that the sentencing of Jones on the remaining offenses was tainted by the imposition of the statutorily-required life sentence on the Class 1 felony stemming from the same convenience store robbery. Jones' Class 1 felony was considered a prior conviction and "scored as such on the Virginia Sentencing Guidelines," J.A. at 112, and although she recognized that the imposition of a second life sentence would be "fruitless," the probation and parole officer who prepared the Presentence Investigation Report nevertheless argued for "a sentence [for Jones] in excess of the high end of the Virginia Sentencing Guidelines" in order to provide "retribution" for those affected, J.A. at 117, an argument that runs contrary to the teaching of *Graham* that "'the case for retribution is not as strong with a minor as with an adult,'" 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). The Presentence Report plainly did not comport with *Montgomery* and *Miller* because, rather than giving weight to the mitigating qualities of youth, the probation and parole officer did the opposite by characterizing Jones as an "eighteen year old man [at the time of sentencing]" and noting that he "was adjudicated as an adult." J.A. at 117.

Moreover, the probation and parole officer ignored factors in the record that the U.S. Supreme Court subsequently recognized are critical in assessing the sentence appropriate for a juvenile, including Jones' difficult family and home environment, his "positive adjustment" in prison, and the fact that Jones was not considered a "security risk" by prison officials. *See id.* at 113-17. The probation and parole officer and the Circuit Court failed to recognize that the Eighth Amendment requires minors to be treated differently from adults in sentencing decisions and failed to account for the mitigating qualities of Jones' youth. *See* J.A. at 52–54, 113-17. Jones' sentence to life plus 68 years on the remaining offenses thus runs afoul of the U.S. Supreme Court's holding in *Graham* that juveniles may not be condemned to a life in prison for non-homicide offenses. 560 U.S. at 75. Jones sentence to life plus 68 years on the remaining offenses also runs afoul of the U.S. Supreme Court's admonition in *Miller* and *Montgomery* that such a sentence should be reserved for the "rare" juvenile offender whose crime reflects "permanent incorrigibility." *Montgomery*, 236 S. Ct. at 734.

II. ANY RESENTENCING OF JONES MUST COMPORT WITH THE EIGHTH AMENDMENT.

Jones has served more than fifteen years in prison and has proven to be the archetypal juvenile offender the U.S. Supreme Court sought to protect from the imposition of cruel and unusual punishment in *Roper*, *Graham*, *Miller*, and *Montgomery*. He has demonstrated that his crimes were the product of "transient immaturity of youth," not "permanent incorrigibility." It would be

appropriate, therefore, for the Commonwealth not to pursue resentencing of Jones in light of the time he has served in prison and his demonstrated rehabilitation. In the event the Commonwealth pursues resentencing, any such resentencing must comport with the Eighth Amendment protections set forth in *Graham*, *Miller*, and *Montgomery*.

A. Jones Is Entitled to a New Sentencing Hearing at Which He is Permitted to Present Evidence of the Mitigating Characteristics of His Youth and Demonstrated Rehabilitation.

In order to ensure that any resentencing comports with the Eighth Amendment requirements identified in *Graham, Miller,* and *Montgomery*, this Court should, if the Commonwealth pursues resentencing, instruct the trial court on remand to conduct a new sentencing hearing that takes into account (1) Jones' "youth and its attendant characteristics" at the time the offenses were committed and (2) Jones' rehabilitation in prison. *Montgomery*, 136 S. Ct. at 734–36. The specific factors the trial court should be directed to consider include, but are not limited to, those identified in *Miller*: "his chronological age and its hallmark features, . . . the family and home environment, . . . the circumstances of the homicide offense, . . . the incompetencies [of] youth, . . . and . . . the possibility of rehabilitation." *Miller,* 132 S. Ct. at 2468.

B. The Trial Court Should Suspend Any Statutorily-Required Sentence that Would Violate the Eighth Amendment.

The Court also should instruct the trial court to exercise its suspension authority to avoid the imposition of an unconstitutional sentence. By way of example, Virginia Code Section 18.2-10(a) requires that Jones be sentenced to life in prison on his Class 1 felony conviction. But as this Court recognized, the trial court has the authority under Section 19.2–303 "to suspend part or all of the life sentence imposed for [Jones'] Class 1 felony conviction." *Jones v. Commonwealth*, 763 S.E.2d 823, 823 (Va. 2014), *vacated* 136 S. Ct. 1358 (2016); *cf. Commonwealth v. Costa*, 33 N.E.3d 412, 415 (Mass. 2015) (holding that trial judge "may amend . . . the original sentence that imposed consecutive life sentences to impose instead concurrent life sentences"); *State v. Zarate*, 2016 WL 1079462, at *5 (N.J. App. Div. Mar. 21, 2016) (affirming trial court's elimination of consecutive nature of sentences to comply with *Montgomery*, *Miller*, and *Graham*). In addition, the trial court "may place the defendant on probation under such conditions as the court shall determine." Va. Code § 19.2–303. "These [suspension] statutes obviously confer upon trial courts 'wide latitude' and much 'discretion in matters of suspension and probation . . . to provide a remedial tool . . . in the rehabilitation of criminals' and, to that end, 'should be liberally construed.'" *See Wright v. Commonwealth*, 526 S.E.2d 784, 786 (Va. Ct. App. 2000) (quoting *Deal v. Commonwealth*, 421 S.E.2d 897, 899 (Va. Ct. App. 1992)). Section 19.2-303 provides that the trial court may exercise this authority to "fix the

period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the defendant might have been sentenced." Va. Code § 19.2-303.1. Accordingly, the Court should instruct the trial court on remand to exercise its suspension authority to avoid the imposition of a sentence otherwise required by statute that would violate the Eighth Amendment, including in particular the life sentence otherwise required for Jones' Class 1 felony conviction.[2]

C. Any New Sentence Imposed on the Non-Homicide Offenses Should Be for a Term of Years That Is Not the Functional Equivalent of a Life Sentence.

Finally, Jones submits that any new sentenced imposed on the non-homicide offenses on remand must be for a term of years that is not the functional equivalent of a life sentence. As stated in *Montgomery,* "certain punishments [are] disproportionate when applied to juveniles," including "life without parole for juvenile nonhomicide offenders." 136 S. Ct. at 732 (citing *Graham*, 560 U.S. at 59). This is so because, "the penological justifications for

2. Alternatively, the Commonwealth could pursue resentencing of Jones under another provision of the Virginia Code, such as Section 18.2-32, which provides for confinement for not less than 5 nor more than 40 years. Va. Code § 18.2-32. *Cf. Johnson v. Commonwealth*, 63 Va. App. 175, 178, 755 S.E.2d 468, 469 (Va. Ct. App. 2014) (amending capital murder indictment to change the charge to first degree murder, a Class 2 felony "punishable by a range of twenty years to life imprisonment").

life without parole [for juveniles] collapse in light of 'the distinctive attributes of youth." *Montgomery*, 136 S. Ct. at 734. For non-homicide offenses committed by juveniles, *Graham* and its progeny thus require that a "realistic opportunity" for release be built into a sentence that is both "meaningful" and "based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 50, 82. This is necessary as "children are constitutionally different from adults for purposes of sentencing." *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 132 S. Ct. 2455, 2464).

This Court held in *Angel v. Commonwealth*, 281 Va. 248, 275 (2011) that Virginia's geriatric parole statute provides the required "meaningful opportunity to obtain release based on the demonstrated maturity and rehabilitation required by the Eighth Amendment." The Court further held in *Vasquez v. Commonwealth*, 781 S.E. 2d 920, 925 (Va. 2016) that *Graham* should not apply to a "term-of-years sentences imposed on multiple crimes that, by virtue of the accumulation, exceeded the criminal defendant's life expectancy." Jones respectfully submits that, in practice, Virginia's geriatric parole statute fails to provide the "meaningful opportunity for release" required by *Graham* and the Eighth Amendment. Jones further submits that the decision in *Vasquez*, which relies on cases decided before *Montgomery,* cannot be reconciled with the U.S. Supreme Court's decision in *Montgomery*.

As an initial matter, it is unclear if Virginia's geriatric parole statute provides an opportunity for release for juvenile offenders, such as Jones, who are serving multiple sentences designated to run consecutively. The geriatric parole statute provides that:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.

Va. Code § 53.1-40.01. This statute is susceptible of being read as requiring a person to have reached the age of 65 or 60 and have served at least 5 or 10 years of the sentence imposed on each felony offense for which they received a separate sentence. Indeed, it appears that this is how geriatric parole eligibility is determined in practice because the form developed by the Virginia Parole Board to petition for geriatric parole requires that a person separately list each offense and the date on which the offense was committed. Ex. 1 (Petition For Geriatric Conditional Release application form (PB27); *see also Vasquez v. Com.*, 781 S.E. 2d 920 (Va. 2016) (emphasizing that separate crimes inure to separate sentences). If a juvenile offender, such as Jones, who is serving multiple, consecutive sentences on non-homicide offenses, including a life sentence, is required to serve at least 5 to 10 years on each offense, then it is quite likely the juvenile offender would never be found eligible for geriatric parole.

Because geriatric parole is rarely granted, Jones also submits that it does not, in practice, provide the "meaningful opportunity for release" that Graham

requires.[3] *See Vasquez*, 781 S.E. 2d at 935 (Mims & Goodwyn, Js., concurring) (noting that "whether the geriatric release statute *as applied* will continue to provide the 'meaningful opportunity for release' required by *Graham* is subject to debate"). According to the Richmond Times Dispatch, between 1994 and in 2010, "only 15 such [geriatric] paroles ever have been granted," despite an estimated 1,000 Virginia inmates becoming eligible in 2010 alone. Green, Frank, *Va. Rarely Grants Geriatric Parole*, RICHMOND TIMES DISPATCH (Mar. 1, 2010). Between January 2013 and March of 2016, geriatric parole has been granted for only 28 inmates; during that same time period the Virginia Parole Board denied geriatric parole on approximately 774 occasions, rendering the percentage of granted applications a mere 3.8%.[4] Justices of this Court have noted this disturbing trend. *Vasquez*, 781 S.E.2d at 934 (Mims & Goodwyn, Js., concurring) ("Statistics describing the frequency with which geriatric release has been granted post-*Angel* are troubling."). Thus, in practice, geriatric parole is akin to the remote possibility of executive clemency and does not provide the meaningful opportunity for release required by the Eighth Amendment and *Graham*. *Graham*, 560 U.S. at 70 (stating that the "remote possibility of [executive clemency] does not mitigate the harshness of

3. Perhaps this is the reason that the U.S. Supreme Court identified Virginia in *Graham* as one of the jurisdictions that impermissibly allows juveniles to be sentenced to life without parole for non-homicide offenses. *Graham*, 560 U.S. at 64.

4. Virginia Parole Board, Parole Decisions, *available at* http://vpb.virginia.gov/parole-decisions/ (Differentiating geriatric release from other releases beginning in January 2013).

the sentence"); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (concluding that the possibility of executive clemency does not cure a constitutionally defective sentence).

As Justice Mims, joined by Justice Goodwyn, noted in his concurrence in *Vasquez*, "*Graham's* prohibition on sentences of life without parole for juveniles who commit non-homicide offenses does apply to a term-of-years sentence that constitutes a de facto life sentence imposed in a single sentencing event." *Vasquez*, 781 S.E. 2d 920 (Va. 2016) (Mims & Goodwyn, Js., concurring). In reaching a contrary conclusion in *Vasquez,* the Court relied in part on pre-*Montgomery* decisions from the Fifth and Sixth Circuits, and disagreed with a decision from the Ninth Circuit. *Id.* at 926–27 (citing *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013), *United States v. Walton*, 537 Fed. App'x 430 (5th Cir. 2013) (per curium) and *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012)). The Court also declined to follow at least six other state courts, which have held that a term of years sentence that is the functional equivalent of life without parole violates the Eighth Amendment. *See People v. Caballero*, 282 P.3d 291, 265 (Cal. 2012) (Applying *Graham* to 110-year-to-life sentence imposed on a juvenile); *Casiano v. Commissioner of Correction*, 115 A.3d 1031, 1044 (Conn. 2015) ("We agree, however, with those courts that have concluded that the Supreme Court's focus in *Graham* and *Miller* 'was not on the label of a 'life sentence'" but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life." (citation omitted)); *Henry v. State*, 175 So.3d 675, 679–89 (Fla. 2015) (Applying *Graham* to 90 year aggregate

sentence); *Brown v. State*, 10 N.E.3d 1, 7–8 (Ind. 2014) (applying *Graham* to sentences aggregating to 150-years); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("[W]e do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*."); *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014) ("[W]e will 'focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." (citation omitted)). *But see Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) ("Clearly, "[n]othing in the Court's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole." (citing *Graham*, 560 U.S. at 124 (Alito, J. dissenting))); *State v. Brown*, 118 So.3d 332, 332–33 (La. 2013) (*Graham* is inapplicable to four 10-year sentences for four armed robberies).

Jones respectfully submits that the holding in *Vasquez* cannot be reconciled with the U.S. Supreme Court's decision in *Montgomery*. The Court in *Montgomery* explained that "States [are not] free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Montgomery*, 136 S. Ct. at 735; *see also id.* at 736 ("*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.").

Justice Mims noted in his concurrence that "[a]s parole has been abolished in Virginia, any sentence that is clearly in excess of a juvenile's life expectancy will result in that juvenile having to serve the remainder of his or her life in prison without the possibility of parole." *Vasquez*, 781 S.E.2d at 931 n.1 (Mims & Goodwyn, Js., concurring); *see also People v. Caballero*, 282 P.3d 291, 265 (Cal. 2012) ("Consistent with the high court's holding in *Graham*, we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment."). To allow a trial court to impose a sentence on non-homicide offenses that will prevent a juvenile offender from ever having a meaningful opportunity for release cannot be reconciled with the Eighth Amendment's protection against cruel and unusual punishment as elucidated by the U.S. Supreme Court in *Graham*, *Miller, and Montgomery.* Accordingly, the trial court should be instructed that any new sentence that might be imposed for the non-homicide offenses should be for a term of years that, considered in the aggregate, is not the functional equivalent of a life sentence.

CONCLUSION

A life sentence for a juvenile offender violates the Eighth Amendment's prohibition of cruel and unusual punishment unless consideration of that juvenile's crimes and mitigating characteristics has demonstrated he is permanently incorrigible. As the U.S. Supreme Court's

decisions make clear, this rule applies to Jones and requires that he be sentenced in a manner that takes into account an individualized consideration of the distinct, mitigating qualities of his youth under a scheme that allows for a range of punishment other than life in prison or its functional equivalent. Thus, Jones' class one felony sentence, as well as his additional sentence of life plus 68 years on other offenses, must be vacated and remanded to the Circuit Court for resentencing.

Dated: May 23, 2016 Respectfully submitted,

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of January, 2015.

DONTE LAMAR JONES,

Appellant,

against

COMMONWEALTH OF VIRGINIA,

Appellee.

Record No. 131385
Circuit Court No. CR00-548-01

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 31st day of October, 2014 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
By: Patricia L. Harrington, Clerk
/s/_____
Deputy Clerk

PRESENT: All the Justices

Record No. 131385

DONTE LAMAR JONES

v.

COMMONWEALTH OF VIRGINIA

OPINION BY
JUSTICE CLEO E. POWELL
October 31, 2014

FROM THE CIRCUIT COURT OF YORK COUNTY
Richard Y. Atlee, Jr., Judge

This appeal arises from a motion to vacate his sentence filed by Donte Lamar Jones ("Jones") twelve years after he pled guilty to capital murder in exchange for a sentence of life without the possibility of parole. Jones argues that the Supreme Court of the United States' decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), applies retroactively to his case. *Miller* held that the Eighth Amendment forbids a sentencing scheme that mandates life imprisonment without the possibility of parole for juvenile offenders without affording the decision maker the opportunity to consider mitigating circumstances. *Id.* at 2460. Therefore, Jones contends that he is entitled to a new sentencing proceeding because he was seventeen years old when he committed the murder.

We hold that because the trial court has the ability under Code § 19.2-303 to suspend part or all of the life sentence imposed for a Class 1 felony conviction, the sentencing scheme applicable to Jones' conviction was not a mandatory life without the possibility of parole scheme. Therefore, even if *Miller* applied retroactively, it would not apply to the Virginia sentencing statutes relevant here. Thus, the circuit court lacked jurisdiction to grant Jones' motion.

I. FACTS AND PROCEEDINGS

In 2000, Jones was charged with capital murder, five counts of use of a firearm in the commission of a felony, two counts of abduction, armed robbery, malicious wounding, and wearing a mask in a prohibited place for his role in an armed robbery at a convenience store in which a store clerk was murdered. He was seventeen years old at the time. On June 5, 2001, Jones agreed to plead guilty to all charges in exchange for being sentenced to life without the possibility of parole on the capital murder charge. In so doing, he also "waive[d] any and all rights of appeal with regard to any substantive or procedural issue involved in this prosecution." He was immediately sentenced to life for the capital murder conviction. Because there was no agreement as to the sentence for the remaining charges, a presentence report was prepared for the other charges, and a sentencing hearing was set for a later date. Jones was ultimately sentenced to life plus 68 years on the remaining charges.

On June 5, 2013, Jones, proceeding pro se, filed a motion to vacate his sentence relying upon the Supreme

Court's decision in *Miller*. He argued that Virginia's mandatory sentencing scheme for capital murder, as applied to juveniles, is unconstitutional because it does not consider mitigating factors. Jones also argued that Code §§ 18.2-31 and -10 are unconstitutional because they do not allow for any other sentence for a juvenile charged with capital murder other than mandatory life without the possibility of parole. Finally, he argued that *Rawls v. Commonwealth*, 278 Va. 213, 683 S.E.2d 544 (2009), allows a circuit court to set aside a void or unlawful sentence at any time and that his sentence is void ab initio because it is in excess of what is legal and should be vacated. Alternatively, Jones asserted that pursuant to Code § 19.2-303, a circuit court may suspend all or part of a sentence at any time. Jones asked the circuit court to so do.

On June 13, 2013, the circuit court denied Jones' motion without a hearing because "there [was] nothing new in mitigation of the offense." This appeal follows.

II. ANALYSIS

In its 2012 decision in *Miller*, the Supreme Court held that sentencing schemes that "mandate life without parole for those under the age of 18 at the time of their crimes" such as Alabama's Code § 15-22-50[1] and Arkansas' Code § 5-4-104 (e) (1) (A) at issue in that case, "violate[] the Eighth Amendment's prohibition on 'cruel and

1. The Supreme Court in *Miller* referred to the murder and capital murder provisions of the Alabama Code that provided for "punishment of life without parole, "Ala. Code §§ 13A-5-40(9), 13A-6-2(c), which are cross-referenced in Ala. Code § 15-22-50, discussed in the present opinion.

unusual punishments.'" 132 S.Ct. at 2460. Jones argues that *Miller* applies retroactively to his case because he received a mandatory minimum sentence of life without the possibility of parole and, therefore, under *Miller*, he is entitled to a new sentencing proceeding in which individualized sentencing factors are considered. We disagree.

Jones was sentenced in 2001 and, therefore, the circuit court would only have jurisdiction to grant his motion to vacate his sentence if his original sentencing order was void ab initio. *Amin v. County of Henrico*, 286 Va. 231, 235, 749 S.E.2d 169, 171 (2013) (holding that "Rule 1:1, which limits the jurisdiction of a court to twenty-one days after entry of the final order, does not apply to an order which is void ab initio.").

At the time that Jones murdered a convenience store clerk during a robbery, a person who was over the age of sixteen and convicted of capital murder, a Class 1 felony, could be punished by death or "imprisonment for life." Code § 18.2-10 (Cum. Supp. 2000). He now argues that his sentence is invalid because Virginia's sentencing scheme is mandatory and therefore is unconstitutional.

To decide whether Jones' sentence is void, we must first determine whether Virginia's sentencing scheme for capital murder imposed a mandatory minimum sentence of life without the possibility of parole. We conclude that it did not because the trial judge had the authority under Code § 19.2-303 to suspend the sentence. In 2000, the relevant portion of Code § 19.2-303 provided, as it does

now, that "[a]fter conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part." Nothing restricted its application to a certain type of sentence. Unlike the statutes in Alabama and Arkansas found unconstitutional in *Miller*, there was no language limiting the power of the court to suspend a portion of the sentence.

Only where the General Assembly has prescribed a mandatory minimum sentence imposing an inflexible penalty has it "divested trial judges of all discretion respecting punishment." *In re: Commonwealth*, 229 Va. 159, 163, 326 S.E.2d 695, 697 (1985).[2] The absence

2. *See* Code §§ 18.2-36.1(B) (Cum. Supp. 2000) (imposing a one year mandatory minimum sentence for a person convicted of aggravated involuntary manslaughter); 18.2-51.1 (Cum. Supp. 2000) (establishing mandatory minimum penalties for maliciously wounding a law enforcement officer or firefighter); 18.2-57 (Cum. Supp. 2000) (setting mandatory minimum sentences for certain types of assaults and batteries); 18.2-121 (Cum. Supp. 2 00 0) (imposing a mandatory minimum sentence of one year for a person convicted of entering another's property with the intent to cause damage because of the owner's or occupant's "race, religious conviction, color or national origin"); 18.2-154 (1996 Repl. Vol.) (requiring a mandatory minimum sentence for shooting a firearm at certain types of vehicles); 18.2-248 (Cum. Supp. 2000) (mandating mandatory minimum sentences for certain repeated drug distribution offenses); 18.2-270 (Cum. Supp. 2000) (levying mandatory minimum sentences for repeated driving while intoxicated convictions); 18.2-308.2:2 (Cum. Supp. 2000) (enacting mandatory minimum sentences for those who thwart the criminal background check for firearms in order to provide the firearms to those who may not legally possess firearms); and 46.2-341.28 (1998 Repl. Vol.) (setting a mandatory minimum sentence for a conviction for driving a commercial motor vehicle while intoxicated) .

of the phrase "mandatory minimum" in Code § 18.2-10 underscores the flexibility afforded a trial court in sentencing pursuant to this statute.

Indeed, in 2004, the General Assembly codified this principle in Code § 18.2-12.1, which states that "'[m]andatory minimum' wherever it appears in this Code means, for purposes of imposing punishment upon a person convicted of a crime, that the court shall impose the entire term of confinement, the full amount of the fine and the complete requirement of community service prescribed by law. The court shall not suspend in full or in part any punishment described as mandatory minimum punishment." *See* 2004 Acts ch. 461. This action codified the settled interpretation of the phrase "mandatory minimum."

Nothing about the punishment for a Class 1 felony requires a mandatory minimum sentence under Virginia law. Cf., Ala. Code § 15-22-50 ("The court shall have no power to suspend the execution of sentence imposed upon any person who has been found guilty and whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years."); Ark. Code Ann. § 5-4-104(e) (1) (A) ("The court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for [capital murder]."). [3] Code §

3. It is telling that the General Assembly has subsequently amended certain statutes to include a mandatory minimum sentence of life for certain crimes. *See* Code § 18.2-61(B)(2) (2012) (prescribing a mandatory minimum sentence of life imprisonment for certain types of rape). The General Assembly could have

19.2-303 applies to Virginia's capital sentencing scheme, granting judges the authority to suspend part or all of the offender's sentence at the trial court's discretion.

Thus, when the trial court sentenced Jones, it had the authority to suspend part or all of Jones' life sentence. Code § 19.2-303 (2000 Repl. Vol.). Indeed, Jones recognized that a circuit court continues to have the authority to suspend part or all of a sentence pursuant to Code § 19.2-303, as he asked the circuit court to so do in his motion to vacate.[4] Moreover, his conviction and sentencing order acknowledged the authority of the trial court to suspend a portion of his sentence for capital murder, as it specifically stated that he was sentenced to life and no portion of that sentence was suspended.

Because a Class 1 felony does not impose a mandatory minimum sentence under Virginia law, the circuit court had, at the time it sentenced Jones, the authority to suspend part or all of his life sentence. Therefore, *Miller*

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amended Code § 18.2-10 in a similar fashion. The fact that it did not underscores the point that Code § 18.2-10 does not impose a mandatory minimum sentence.

4. Jones' request, however, was not timely as Jones had already been transferred to the Department of Corrections at the time of his request. Code § 19.2-303 (stating "If a person has been sentenced for a felony to the Department of Corrections but has not actually been transferred to a receiving unit of the Department, the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, suspend or otherwise modify the unserved portion of such a sentence.").

is not applicable to the statute at issue here because one convicted of capital murder does not receive a mandatory sentence of life without the possibility of parole.[5]

III. CONCLUSION

We hold that because a Class 1 felony does not impose a mandatory minimum sentence under Virginia law, *Miller* is not applicable even if it is to be applied retroactively. Thus, Jones' sentence was not void ab initio, and the trial court had no jurisdiction to grant the motion. Therefore, we find no reversible error in the trial court's denial of Jones' motion to vacate his sentence and will affirm the trial court's judgment denying the motion.

Affirmed.

5. Because Virginia's capital punishment sentencing scheme does not include a mandatory minimum sentence, *Miller* could never apply in Virginia and, therefore, we need not address Jones' other arguments as to the retroactivity of *Miller*.

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 131385

DONTE LAMAR JONES,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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[TABLES INTENTIONALLY OMITTED]

STATEMENT OF THE CASE

In the summer of 2000, while a juvenile, Donte Lamar Jones ("Jones") was involved in a convenience store robbery with two other individuals--an adult and another juvenile--that resulted in the death of a store clerk. J.A. at 12-13. Despite his young age, voluntary surrender to authorities, the minimal amount of force involved, and lack of intent to kill anyone, Jones was charged with capital murder and ten lesser-included offenses. *Id.* at 13-34. Jones' court-appointed counsel moved to dismiss the capital aspect of the indictment against him on the ground that, as applied to Jones, a juvenile, the punishment sought violated the Eighth Amendment. *Id.* at 37. The York County-Poquoson Circuit Court overruled the motion. *Id.* at 39. Jones' court-appointed counsel also moved to prohibit the imposition of the death penalty against Jones on the ground that the evidence was insufficient as a matter of law to establish a statutory aggravating factor. *Id.* at 35. The Circuit Court overruled this motion as well, "finding that the existence of any aggravating factor is a decision of fact to be made by the jury." *Id.* at 41.

Subsequently, at the urging of his court-appointed counsel, Jones agreed to enter an *Alford* plea on the capital charge in exchange for an agreement that he would not be sentenced to death, but would be sentenced to life without the possibility of parole--as mandated by Virginia law for individuals convicted of capital murder and not sentenced to death.[1] *Id.* at 44. When it came time

1. The Virginia statute pursuant to which Jones was sentenced, Virginia Code Section 18.2-10(a), subsequently was

for the later sentencing of Jones on the ten lesser-included offenses, Jones' assigned probation and parole officer, while acknowledging that Jones had made a "positive adjustment" to life in prison and was not considered a "security risk," asserted that the victim, her family, and friends "deserve retribution" and urged the Circuit Court to "impose a sentence in excess of the high end of the Virginia Sentencing Guidelines." *Id.* at 106. With the knowledge that Jones' earlier sentence on the capital count to life without the possibility of parole meant Jones would remain in prison for the rest of his days, the Circuit Court imposed an additional life sentence plus a term of 68 years on the ten lesser-included offenses. *Id.* at 52-53.

While Jones was serving his sentence, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), in which the Court held that the mandatory imposition of a life sentence without the possibility of parole for a juvenile violates the Eighth Amendment. Upon learning of the *Miller* decision, Jones filed a pro se Motion to Vacate Invalid Sentence on June 5, 2013. J.A. at 55. A week later, on June 13, 2013, the Circuit Court *sua sponte* denied the motion, finding--without a hearing and without affording Jones an opportunity to submit any evidence in support of his application--that "there is nothing new in mitigation of the offense." *Id.*

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amended to render juveniles ineligible for the death penalty after the U.S. Supreme Court held in *Roper v. Simmons*, 543 U.S. 551, 578 (2005) that the Eighth and Fourteenth Amendments to the U.S. Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."

at 65. Because Jones did not receive the Circuit Court's order until after the time period to appeal had expired, he sought and this Court granted him an extension of time to file his notice of appeal. *Id.* at 72, 88.

Jones filed his pro se Petition for Appeal in this Court on September 4, 2013. *Id.* at 76. Jones subsequently retained the undersigned counsel to represent him on appeal. *Id.* at 89. And the Court granted Jones' Petition for Appeal on April 17, 2014. *Id.* at 99.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN DENYING JONES' PRO SE MOTION TO VACATE HIS MANDATORY SENTENCE AS JUVENILE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE. J.A. at 55-65.

STANDARD OF REVIEW

This appeal presents questions of law which the Court reviews *de novo*. *See Burrell v. Commonwealth*, 283 Va. 474, 478 (2012) (reviewing denial of motion to vacate sentence *de novo*); *see also Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011) (applying *de novo* standard of review to appeal from grant of motions to modify sentences); *Gallagher v. Commonwealth* 284 Va. 444, 449, 732 S.E.2d 22, 24 (2012) (stating that *de novo* standard of review applies to questions involving constitutional and statutory interpretation); *Johnson v. Commonwealth*, 63 Va. App. 175, 182, 755 S.E.2d 468, 471 (Ct. App. 2014) (applying *de novo* standard of review to argument under *Miller v. Alabama*).

ARGUMENT

I. A MANDATORY SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR A JUVENILE OFFENDER VIOLATES THE EIGHTH AMENDMENT.

"'Our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (citing examples from property, tort, contract, and criminal law)). This long-standing legal awareness in our country that minors are different from adults is buttressed by "developments in psychology and brain science [that] show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 560 U.S. 48, 68 (2010). In the criminal context, these differences are exhibited in at least three different and significant ways. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). Juveniles "'lack maturity and [have] an underdeveloped sense of responsibility,'" which leads to "recklessness, impulsivity, and heedless risk-taking." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quoting *Roper*, 543 U.S. at 569). Juveniles also "'are more vulnerable . . . to negative influences and outside pressures' . . . and lack the ability to extricate themselves from horrific, crime-producing settings.'" *Id.* Finally, the character of a child is less "'well-formed'" such that his actions are "less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Id.*

Because of these differences, the law has long recognized that the transgression of a juvenile "is not as morally reprehensible as that of an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988); *see also Graham*, 560 U.S. at 68 ("because juveniles have lessened culpability they are less deserving of the most severe punishments"). The characteristics of "transient rashness, proclivity for risk, and inability to assess consequences" both lessen a juvenile's "'moral cupability' and enhance[] the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 132 S. Ct. at 2465.

"[T]he distinctive attributes of youth" also lessen any penological justifications for imposing the harshest of sentences on juveniles. *Id.* "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Roper*, 543 U.S. at 571. "[T]he same characteristics that render juveniles less culpable than adults[--transient rashness, proclivity for risk, and inability to assess consequences--] suggest as well that juveniles will be less susceptible to deterrence." *Id.* Nor is incapacitation as a sentencing goal compelling for juveniles because it would require "the sentencer to make a judgment that the juvenile is incorrigible," and "'[i]t 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.'" *Graham*, 560 U.S. at 73 (quoting *Roper*, 543 U.S. at 572). Indeed, it is "juvenile offenders . . . who are most in need of and receptive to rehabilitation." *Id.* at 74.

Because it is founded on "'the basic precept of justice that punishment for crime should be graduated and proportioned' to both *the offender* and the offense," the Eighth Amendment's prohibition of cruel and unusual punishment requires that the indisputable differences between juveniles and adults be taken into account. *Miller*, 132 S. Ct. at 2463 (emphasis added). In *Miller*, the U.S. Supreme Court observed that the requirement of proportionality both precludes "mismatches between the culpability of a class of offenders and the severity of a penalty" and prohibits "the mandatory imposition" of the harshest sentences, "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense." *Id.* at 2463-64. Applying these principles to penalty schemes that provided for the mandatory imposition of life without the possibility of parole for juvenile offenders, the Supreme Court determined that such laws have a disproportionately severe impact on juveniles, who as a class of offenders are less culpable than adults, because a juvenile "will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 2466. The Court further determined that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features, . . . the family and home environment, . . . the circumstances of

the homicide offense, . . . the incompetencies [of] youth, . . . and disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 2468. Because "such a scheme poses too great a risk of disproportionate punishment," punishment that is excessive in light of the lessened moral culpability of a juvenile, the Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469.

II. THE RULE ANNOUNCED IN *MILLER* APPLIES TO JONES.

The U.S. Supreme Court's determination in *Miller* that the Eighth Amendment prohibits the mandatory sentencing of juveniles to life without the possibility of parole is a "new" constitutional rule that was announced after Jones' conviction and sentence became final.[2] Application of the *Miller* rule to Jones thus requires a determination that the *Miller* rule applies to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 299-300 (1989); *Mueller v. Murray*, 252 Va. at 361-62. As is evident from the Supreme Court's decision in *Miller* and analogous precedent, it clearly does.

2. The result in *Miller* was not dictated by precedent existing at the time Jones' conviction and sentence became final in 2001. *Miller* is based is on the 2005 decision of the U.S. Supreme Court in *Roper* and the 2010 decision of the U.S. Supreme Court in *Graham*, and neither of those decisions dictated the result in *Miller*. *See Mueller v. Murray*, 252 Va. 356, 361-62, 478 S.E.2d 542 (1996).

A. The U.S. Supreme Court in *Miller* applied the *Miller* rule to a case on collateral review.

The matters before the Supreme Court in *Miller* involved two consolidated petitions--*Miller v. Alabama,* a petition on direct appeal from the Alabama Supreme Court, and *Jackson v. Hobbs*, a petition on collateral review from the Arkansas Supreme Court. 132 S. Ct. at 2461-2463. Like Jones, the petitioner in *Jackson v. Hobbs*, Kuntrell Jackson, was convicted and sentenced to mandatory life without the possibility of parole after a clerk was killed during a store robbery. *Id.* at 2461. Like Jones, Jackson's sentence also clearly was final before the *Miller* decision issued because Jackson's case was before the U.S. Supreme Court on collateral review. *Id.*

In announcing its decision in *Miller*, however, the U.S. Supreme Court did not limit the application of its ruling to Evan Miller, whose case was before the Court on direct appeal, it also reversed the Arkansas Supreme Court's denial of state habeas relief to Jackson. *Id.* at 2475. In short, the U.S. Supreme Court itself applied the rule announced in *Miller* to a petitioner, such as Jones, whose sentence was final and was being challenged on collateral review. As the Supreme Court explained in *Teague*, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice *requires* that it be applied retroactively to all who are similarly situated." *Id. a*t 300 (emphasis added). Accordingly, evenhanded justice requires that the *Miller* rule apply to Jones.

Any suggestion that the Supreme Court's application of the *Miller* rule to Jackson is not indicative of a determination by the Supreme Court that *Miller* should apply on collateral review is belied by the Supreme Court's analysis in *Teague* and its progeny. The Supreme Court stated in *Teague*, and has often repeated since, that the issue of whether a new rule of constitutional law should apply on collateral review is a "threshold question." 489 U.S. at 300; *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989) *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997). Where a new rule "[sh]ould not be applied retroactively to cases on collateral review," the Court has declined, as it did in *Teague*, to "address the petitioner's claim." 489 U.S. at 316; *Lambrix*, 520 U.S. at 539-40. Conversely, the Court has proceeded to "address the merits" of a case on collateral review only after concluding that the new rule at issue "would be applicable to defendants on collateral review." *Penry* 492 U.S. at 329-30. The Court in *Miller* not only proceeded to address the merits of Jackson's claim on collateral review, it reversed the denial of habeas relief to Jackson based on the new rule announced in *Miller*. *Miller*, 132 S. Ct. at 2475.

B. *Miller* applies to sentences on collateral review because *Miller* announced a new substantive rule of constitutional law.

The reason *Miller* applies on collateral review is because the new rule announced in *Miller* is substantive in nature. "New substantive rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348,

351 (2004) (emphasis omitted). New substantive rules generally apply retroactively (i.e., to cases on collateral review) because they involve "substantive categorical guarantees," *Penry*, 492 U.S. at 329, such as those that seek to address a "significant risk that a defendant . . . faces a punishment that the law cannot impose upon him," *Schriro.* at 352. New substantive rules thus include rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330, and rules "making a certain fact essential" prior to the imposition of a particular sentence, *Schriro*, 542 U.S. at 354 (stating that a rule "making a certain fact essential to the death penalty . . . would be substantive"). The new rule announced in *Miller* is substantive in both respects.

First, *Miller* prohibits a certain category of punishment, *i.e.*, *mandatory* life without parole, for a class of defendants because of their status, *i.e.*, for juveniles because of their age. *See Miller* at 2469. That *Miller* properly is viewed as prohibiting a "category" of punishment (mandatory life without parole), even though it does not bar a life sentence without the possibility of parole for juveniles under all circumstances, is evident from Virginia's sentencing statutes. Under Virginia law, a capital offense is punishable as a Class 1 felony, which requires that a juvenile be sentenced to life without the possibility of parole. Va. Code §§ 18.2-10(a), 18.2-31. *Miller* prohibits juveniles from receiving a mandatory sentence of life without the possibility of parole. As the Virginia Senate has recognized, *Miller* thus requires that juveniles in Virginia receive an alternative category

of punishment, and the Senate has proposed that they receive the sentence authorized for Class 2 felonies. *See* Senate Bill No. 809 (proposing to amend Section 18.2-10(a) to provide that a defendant who is convicted of a Class 1 felony but was "under 18 years of age at the time of the offense . . . shall be [sentenced for] a Class 2 felony").

Second, *Miller* additionally requires that the sentencer make a "certain fact essential" before sentencing a juvenile to life without the possibility of parole--that the juvenile to be sentenced is "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. As the Court explained, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* *Miller* is analogous in this respect to those cases in which the U.S. Supreme Court has held that a mandatory death penalty statute violates the Eighth Amendment because it "preclude[s] consideration of relevant mitigating factors." *E.g., Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The rule announced in these death penalty cases, like the rule announced in Miller, has been held to apply retroactively to claims on collateral review. S*ee e.g., Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985 (en banc) (per curiam) (stating "[t]here is no doubt . . . *Lockett* is retroactive").

For these reasons, both the U.S. Department of Justice and the majority of states to address the issue

have concluded that the rule announced in *Miller* is a substantive rule that applies to cases on collateral review. *See* Br. of Juvenile Law Center *et al.* as Amicus Curiae in Supp. of Appellant Donte Lamar Jones at p. 15 n.2; *Illinois v. Davis*, Case No. 115595, 2014 WL 1097181 (Ill. Mar. 20, 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa Aug. 16, 2013); *Diatchenko v. District Atty. For Suffolk Dist.*, 1 N.E.3d 270 (Dec. 24, 2013); *Jones v. State*, 122 So.2d 698 (Miss. Sept. 26, 2013); *Nebraska v. Mantich*, 842 N.W.2d 716 (Feb. 7, 2014); *Ex Parte Maxwell*, Case No. AP-76964, 2014 WL 941675 (Tex. Crim. App. Mar. 12, 2014).

C. Alternatively, *Miller* announced a watershed rule of criminal procedure that applies to claims on collateral review.

A new constitutional rule also applies to claims on collateral review if it is a "watershed rule of criminal procedure." *Saffle v. Parks,* 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L.Ed.2d 415 (1990). A watershed rule of criminal procedure is a rule that implicates "the fundamental fairness and accuracy of the criminal proceeding." *Id.* The Court's confirmation in *Miller* that juveniles are "different" for purposes of sentencing teaches that a mandatory sentence of life without the possibility of parole is neither a fair nor accurate punishment for most juvenile offenders. It is not fair because juveniles as a class exhibit lessened moral culpability. It is not accurate because the mandatory imposition of a life-without-parole sentence for juveniles guarantees that many juveniles inappropriately are sentenced to life without the possibility of parole. By requiring that certain factors be considered before

sentencing a juvenile to life without parole, the *Miller* decision also "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding" involving juveniles. *Whorton v. Bockting,* 549 U.S. 406, 408 (2007). Therefore, if not deemed a new substantive rule of constitutional law, the new rule announced in *Miller* properly is viewed as a watershed rule of criminal procedure that applies retroactively to Jones because it implicates the fundamental fairness and accuracy of criminal proceedings involving juveniles.

III. JONES IS ENTITLED TO RELIEF UNDER *MILLER*.

A. Jones falls within the class of persons *Miller* is intended to protect.

It cannot be disputed that Jones falls within the class of persons *Miller* is intended to protect. He was a juvenile in the summer of 2000 when he participated in a crime that was, by all accounts, marked by impulsivity. J.A. at 13. It also was a crime that involved two other individuals, one of whom was an adult, raising the specter of negative influences and pressures. *Id.* at 12. Appellant's actions during the robbery exhibited a lack of intent to kill. *Id.* at 13. And despite a troubled childhood, Appellant had no meaningful criminal history and subsequently exhibited the potential for rehabilitation that *Miller* tells us juveniles are most receptive to. *Id.* at 111-114.

B. Jones received a mandatory life sentence without the possibility of parole.

It also cannot be disputed that Jones was sentenced in violation of the rule announced in *Miller*. The statute pursuant to which Jones was sentenced, Virginia Code Section 18.2-10(a), "authorized" only two possible sentences: "death" or "imprisonment for life." The life sentence "authorized" by Section 18.2-10(a) is without the possibility of parole. *See* Va. Code §§ 53.1-165.1 (abolishing parole for individuals convicted after January 1, 1995), 53.1-40.01 (providing that individuals convicted of Class 1 felonies are not eligible for geriatric parole).

Both the Commonwealth and the Virginia Senate have recognized as a result that a sentence of "imprisonment for life" under Section 18.2-10(a) violates *Miller*. In a case prosecuted shortly after *Miller* was decided, the Commonwealth moved--"[i]n response to the decision in *Miller*"--to amend the capital murder indictment of a juvenile to change it to a charge of first degree murder, a Class 2 felony "punishable by a range of twenty years to life imprisonment" and for which a prisoner is eligible for conditional release under the geriatric parole statute. *Johnson v. Commonwealth*, 63 Va. App. 175, 178, 755 S.E.2d 468, 469 (Ct. App. 2014). The Virginia Senate also passed a bill last year seeking to amend Section 18.2-10(a) to provide that a defendant who is convicted of a Class 1 felony but was "under 18 years of age at the time of the offense . . . shall be [sentenced for] a Class 2 felony," i.e. "imprisonment for life or for any term not less than 20 years" under § 18.2-10(b). The Senate explained that

"[t]his bill is in response to Miller v. Alabama (567 U.S.___, 2012) where the United States Supreme Court held that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders." SB 809, Va. Gen. Assembly Legislative Info. Sys., http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB809 (last visited May 26, 2014).

Jones also was not afforded an individualized consideration of the mitigating qualities of youth that *Miller* requires. The Circuit Court did not consider, before imposing on Jones a sentence of "imprisonment for life," the hallmark features of Jones' chronological age (immaturity, impetuosity, and failure to appreciate risks and consequences), Jones' home and family environment, the circumstances of the offense, Jones' inability to deal with police officers or prosecutors or assist in his own defense, or his potential for rehabilitation.

C. Jones raised a proper and timely request for relief under *Miller*.

On June 5, 2013, Jones filed his pro se Motion to Vacate Invalid Sentence in the Circuit Court pursuant to *Rawls v. Commonwealth*, in which this Court confirmed that "[a] circuit court may correct a void or unlawful sentence *at any time*." 278 Va. 213, 218 (2009) (emphasis added). After the Circuit Court *sua sponte* denied his motion, Jones filed a Notice of Appeal pursuant to Rule 5:9, which this Court deemed timely. Because the relief Jones seeks is a declaration that the Circuit Court lacked authority to impose a mandatory sentence of life without

the possibility of parole and because Jones filed his motion after his conviction and sentence were final, the motion and appeal are civil in nature (analogous to a petition for habeas corpus and an appeal from an order denying habeas corpus) and the denial of the motion properly is appealable to this Court. *See Commonwealth v. Southerly*, 262 Va. 294, 297-99, 551 S.E.2d 650, 652-53 (2001) (holding that appeal from denial of motion to vacate conviction was civil in nature and should have been filed in the Supreme Court); *see also* Va. Code §8.01-670(A) (providing "any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved . . . [b]y a final judgment in any . . . civil case); Va Code § 17.1-406 (noting that "appeals lie directly to the Supreme Court . . . from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus").[3] Consequently, this matter properly is before this Court.

D. Nature and scope of relief to which Jones is entitled.

By its terms, *Miller* requires that Jones be re-sentenced on his conviction for capital murder in a manner that: (1) provides for sentencing options other than life without the possibility of parole; and (2) takes into account the "'mitigating qualities of youth.'" *Miller*,

3. Alternatively, Jones' pro se Motion to Vacate Invalid Sentence should be construed as a petition for habeas corpus pursuant to Virginia Code Section § 8.01-654 and deemed timely filed, less than a year after the *Miller* decision, under the Suspension Clause of the Virginia Constitution. Va. Const., Art. I. § 9."

132 S. Ct. at 2467 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993). As suggested by the Virginia Senate and the Commonwealth, Virginia Code Section 18.2-10(b) would provide an appropriate statutory framework for re-sentencing that includes options other than life without the possibility of parole. *See* Senate Bill No. 809 (proposing to amend Code Section 18.2-10(a) to provide that a person convicted of a Class 1 felony who was "under 18 years of age at the time of the offense . . . shall be [sentenced for] a Class 2 felony," under Section 18.2-10(b); *Johnson v. Commonwealth*, 63 Va. App. 175, 178, 755 S.E.2d 468, 469 (Ct. App. 2014) (amending capital murder indictment to change the charge to first degree murder, a Class 2 felony "punishable by a range of twenty years to life imprisonment"); *see also Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386, 402 (2011) (concluding that sentence of life imprisonment under Section 18.2-10(b) does not violate *Miller* because the defendant is eligible for geriatric parole under Code Section 53.1-40.01, which provides "the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment"). Accordingly, Jones should be re-sentenced under Code Section18.2-10(b), which provides a sentencing range of twenty years to life, and be declared eligible for geriatric parole pursuant to Code Section 53.1-40.01.

In determining the appropriate sentence on remand, the Court also should direct the Circuit Court to consider the "mitigating qualities of youth" as *Miller* requires, including: (1) Jones' chronological age at the time of his offense "and its hallmark features--among

them immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) Jones' family and home environment; (3) the circumstances of his homicide offense; (4) his ability at the time to deal with police officers or prosecutors and capacity to assist in his own defense; and (5) his potential for rehabilitation. *Miller*, 132 S. Ct. at 2468.

Because Jones was sentenced on the lesser included offenses *after* he was sentenced to life without the possibility of parole, "good cause" and the "ends of justice" also warrant that he be re-sentenced on each of the lesser included offenses. *See* Rule 5:25. Not only was Jones' capital murder conviction and life sentence considered a prior conviction and "scored as such on the Virginia Sentencing Guidelines," J.A. at 112, it is evident from the Presentence Investigation Report prepared for purposes of sentencing Jones on the lesser included offenses that the sentencing of Jones on these offenses was tainted by the imposition of the prior sentence of life without the possibility of parole. Recognizing that the imposition of a second life sentence would be "fruitless," the probation and parole officer who prepared the Presentence Investigation Report nevertheless argued for "a sentence in excess of the high end of the Virginia Sentencing Guidelines" in order to provide "retribution" for those affected, J.A. at 117, an argument that runs contrary to the teaching of *Graham* that "'the case for retribution is not as strong with a minor as with an adult,'" 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). Rather than giving weight to the mitigating qualities of youth, the probation and parole officer also noted that Appellant was

an "eighteen year old man [at the time of sentencing]. . . and was adjudicated as an adult." J.A. at 117. Moreover, the probation and parole officer ignored factors in the record that would have warranted a lesser sentence, including a difficult family and home environment, a "positive adjustment" in prison, and the fact that Jones was not considered a "security risk" by prison officials. *See id.* at 113-117. The probation and parole officer and the Circuit Court arguably cannot be faulted for failing to consider, or develop further, these factors and other mitigating qualities of youth because *Roper, Graham*, and *Miller*, in which the U.S. Supreme Court held that the Eighth Amendment requires minors to be treated differently from adults in sentencing, had not been decided at the time Appellant was sentenced. For all of these reasons, the Court should direct the Circuit Court on remand to re-sentence Appellant on each of the lesser included offenses, in addition to the homicide offense, taking into account the mitigating qualities of youth identified in *Graham* and *Miller*.

CONCLUSION

A mandatory sentence of life without the possibility of parole for a juvenile offender violates the Eighth Amendment's prohibition against cruel and unusual punishment. As the U.S. Supreme Court's decisions make clear, this rule applies to Jones and requires that he be re-sentenced in a manner that takes into account an individualized consideration of the distinct, mitigating qualities of his youth under a scheme that allows for a range of punishment other than mandatory life without

the possibility of parole. Good cause and the ends of justice also call for a re-sentencing of Jones on the related, lesser included offenses to correct for the inappropriate influence of his prior unconstitutional sentence of mandatory life without the possibility of parole and to permit the same mitigating factors required to be considered on the homicide offense to inform the sentencing decisions on the related, lesser included offenses.

Dated: May 27, 2014 Respectfully submitted,

/s/ *Douglas A. Hastings*
Duke K. McCall, III, Esq.
(Admitted Pro Hac Vice)
Douglas A. Hastings, Esq.
(Va. Bar No. 85524)
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
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Fax: (202) 373-6001
E-mail: duke.mccall@
bingham.com
E-mail: douglas.hastings@
bingham.com

Counsel for Appellant

VIRGINIA: IN THE YORK COUNTY
—POQUOSON CIRCUIT COURT

CASE NO.: CR00-548-01

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 199

COMMONWEALTH OF VIRGINIA

v.

DONTE LAMAR JONES,

Defendant.

FINAL ORDER

This day the Court considered the defendant's Motion to Vacate Invalid Sentence in the above styled case.

Upon consideration whereof, and after review of the case file and the defendant's motion, this Court finds that there is nothing new in mitigation of the offense. The defendant's Motion to Vacate Invalid Sentence is accordingly DENIED.

This is a final order and the case is removed from the docket of this Court.

The Clerk is directed to mail a copy of this Order to the defendant and to the Commonwealth's Attorney.

June 13, 2013 ENTER: /s/
DATE JUDGE

DEFENDANT IDENTIFICATION:
SSN: 230-13-3882 DOB: 11/08/1982 Sex: M

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF YORK

Hearing Date: August 21, 2001
Judge: Honorable Prentis Smiley, Jr.

COMMONWEALTH OF VIRGINIA

v.

DONTE LAMAR JONES, DEFENDANT

This case came before the Court for sentencing of the defendant, who appeared in person with counsel, Colleen Killilea and Timothy G. Clancy. The Commonwealth was represented by Eileen M. Addison and Benjamin M. Hahn.

On June 5, 2001, the defendant was found guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR00-548-02	Use/Display Firearm While Committing Murder (F)	07/21/00	18.2-53.1
CR00-548-03	Abduction (F)	07/21/00	18.2-47

CR00-548-04	Use/Display Firearm While Committing Abduction (F)	07/21/00	18.2-53.1
CR00-548-05	Armed Robbery (F)	07/21/00	18.2-47
CR00-548-06	Use/Display Firearm While Committing Abduction (F)	07/21/00	18.2-53.1
CR00-548-07	Abduction (F)	07/21/00	18.2-47
CR00-548-08	Use/Display Firearm While Committing Abduction (F)	07/21/00	18.2-53.1
CR00-548-09	Malicious Wounding (F)	07/21/00	18.2-51
CR00-548-10	Use/Display Firearm While Committing Malicious Wounding (F)	07/21/00	18.2-53.1
CR00-548-11	Wear Mask in a Prohibited Place (F)	07/21/00	18.2-422

Note: The defendant was convicted and sentenced on indictment no. 1 for Capital Murder While Committing Robbery on June 5, 2001.

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Virginia Code § 19.2-299.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced, and the defendant gave no reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the Virginia Department of Corrections for the term of: **3 YEARS** for Use/Display Firearm While Committing Murder, No. 2; **10 YEARS** for Abduction, No. 3; **5 YEARS** for Use/Display Firearm While Committing Abduction, No. 4; **LIFE** for Armed Robbery, No. 5; **5 YEARS** for Use/Display Firearm While Committing Robbery, No. 6; **10 YEARS** for Abduction, No. 7; **5 YEARS** for Use/Display Firearm While Committing Abduction, No. 8; **20 YEARS** for Malicious Wounding, No. 9; **5 YEARS** for Use/Display Firearm While Committing Malicious Wounding, No. 10; **5 YEARS** for Wear Mask in a Prohibited Place, No. 11. The total sentence imposed is **LIFE plus 68 YEARS**.

Any sentence herein shall run consecutively with any other sentences imposed.

Costs. The defendant shall pay costs of this Court.

CCRE. The Defendant shall forthwith allow fingerprints to be taken by the Sheriff of this County pursuant to § 19.2-303, unless such fingerprints are already on file in the Central Criminal Records Exchange.

DNA. The Defendant shall allow a sample of blood to be taken for analysis pursuant to § 19.2-310.3 and be responsible for all fees and costs related thereto.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

And the Defendant is remanded to jail.

8/22/01 ENTER: /s/
DATE JUDGE

DEFENDANT IDENTIFICATION:
SSN: 220-13-3882 DOB: 11/08/1982 SEX: M

SENTENCING SUMMARY:
TOTAL SENTENCE IMPOSED: **LIFE + 68 YEARS**
TOTAL SENTENCE SUSPENDED: **NONE**

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA

v.

DONTE LAMAR JONES,

Defendant.

Judge: **Honorable Prentis Smiley, Jr.**

Hearing Date: **June 5, 2001**

ORDER OF CONVICTION AND SENTENCING

This day came the defendant, who appeared in person with counsel, Colleen Killilea and Timothy G. Clancy. The Commonwealth was represented by Eileen M. Addison. Whereupon, the defendant was arraigned and after being advised by counsel, pleaded an ALFORD PLEA OF GUILTY to indictment no. 1, which plea was tendered by the defendant in person, and the Court having made inquiry and being of the opinion that the Defendant fully understood the nature and effect of the plea and of the penalties that may be imposed upon conviction and of the waiver of trial by jury and of appeal.

The Court having been advised by the defendant, defense counsel and the attorney for the Commonwealth that there has been a plea agreement in this case, and

such agreement in writing having been presented to the Court, and now filed herein, and counsel having stipulated to the evidence, the Court accepts said agreement and the plea of guilty of the defendant, and finds the defendant GUILTY of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR00-548-01	**Capital Murder While Committing Robbery (F)**	**07/21/00**	**18.2-31(4)**

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced, and the defendant gave no reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: LIFE. The total sentence imposed is **LIFE**.

Any sentence herein shall run consecutively with any other sentences imposed.

Costs. The defendant shall pay costs of this Court.

CCRE. The Defendant shall forthwith allow fingerprints to be taken by the Sheriff of this County pursuant to § 19.2-303, unless such fingerprints are already on file in the Central Criminal Records Exchange.

DNA. The Defendant shall allow a sample of blood to be taken for analysis pursuant to § 19.2-310.3 and be responsible for all fees and costs related thereto.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

And the Defendant is remanded to jail.

6/8/01 ENTER: _____
DATE JUDGE

DEFENDANT IDENTIFICATION:
SSN: 220-13-3882 DOB: 11/08/1982 SEX: M

SENTENCING SUMMARY:
TOTAL SENTENCE IMPOSED: **LIFE**
TOTAL SENTENCE SUSPENDED: **NONE**

VIRGINIA: IN THE CIRCUIT COURT
FOR THE COUNTY OF YORK AND
THE CITY OF POQUOSON

DOCKET NO. 548

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

DONTE LAMAR JONES,
DOB: 11-08-82
SS#: 220-13-3882

Defendant.

MEMORANDUM OF PLEA AGREEMENT

This Memorandum is presented to the Circuit Court for the County of York in compliance with Rule 3A:8(c)(2) of the Rules of the Supreme Court of Virginia.

PART I

The defendant currently stands charged with CAPITAL MURDER WHILE IN THE COMMISSION OF ROBBERY (Indictment No. 1), five (5) counts of USE OF A FIREARM IN THE COMMISSION OF A FELONY (Indictment Nos. 2, 4, 6, 8 and 10); two (2) counts of ABDUCTION (Indictment Nos. 3 and 7);

ARMED ROBBERY (Indictment No. 5); MALICIOUS WOUNDING (Indictment No. 9); and WEARING A MASK IN A PROHIBITED PLACE (Indictment No. 11).

PART II

The defendant hereby agrees to enter a plea of guilty, pursuant to the procedure approved in *North Carolina v. Alford,*·400 U.S. 25 (1972), to the charge of Capital Murder (Indictment No. 1), and further to stipulate that his interests require entry of such a guilty plea and waiver of all defenses other than those jurisdictional. The defendant further agrees to stipulate that this Court has jurisdiction of the case and that the Commonwealth's evidence is strong evidence of his actual guilt. By entering this plea, the defendant hereby agrees that he is freely and intelligently waiving his right to appeal issue of whether the evidence against him is sufficient to prove beyond a reasonable doubt that he is guilty of that charge.

The defendant hereby agrees to enter pleas of guilty to each of the remaining charges (Indictment Nos. 2 through 11), and to stipulate that this Court has jurisdiction in these cases and that the Commonwealth's evidence, if presented, would be sufficient to establish his guilt beyond a reasonable doubt.

The defendant further agrees to waive any and all rights of appeal with regard to any substantive or procedural issue involved in this prosecution.

PART III

In accordance with the provisions of subparagraph (c)(1)(C) of said Rule 3A:8, the parties have agreed that the following is an appropriate disposition for the felony offense of Indictment No. 1 (Capital Murder): **That the defendant be sentenced to LIFE without the possibility of parole**.

Further in accordance with the provisions of subparagraph (e)(1)(C) of said Rule 3A:8, the parties have agreed to jointly move the Court to order the preparation of a presentence report by the Probation and Parole Officer of this Court, and each reserves the right to argue the appropriate disposition of the remaining charges (Indictment Nos. 2 through 11) at the sentencing hearing.

All parties hereto understand and agree that the Court is not bound by and need not impose a sentence on Indictment Nos. 2 through 11 within the sentencing guidelines range, but may impose any sentence allowed by law. The Defendant understands that any estimate of the probable sentencing range under the sentencing guidelines that the Defendant may have received from the Defendant's counsel, the Commonwealth's Attorney, or any other source is, at most, a prediction and not a promise and is not binding on the Court. **The Commonwealth's Attorney has not and does not make any promise or representation regarding what sentence the Defendant will receive on Indictment Nos. 2 through 11, and the Defendant agrees and understands that he cannot withdraw his guilty pleas based upon the actual sentence received.**

I HAVE READ AND REVIEWED THE TERMS OF THE FOREGOING AGREEMENT AND AGREE TO ABIDE BY ITS TERMS. I UNDERSTAND THE CONSEQUENCES OF MY FAILURE TO DO SO AND AM DOING SO FREELY AND VOLUNTARILY.

Agreed to this 5 day of June, 2001

/s/_____
Donte Lamar Jones,
Defendant

/s/_____
Timothy G. Clancy, Esq.
Counsel for the Defendant

/s/_____
Colleen K. Killilea, Esq.
Counsel for the Defendant

YORK COUNTY SHERIFF'S OFFICE
Officer/Follow-up

DR# 2007211
IN# 202230

Report Date: 08-10-00 Report ID: 202230.C07

Subject: HOMICIDE-CAPITOL
Division Reporting: INVESTIGATIONS
Disposition: Arrest
Date and Time Occ: 07-21-00 03:50
Loc. of Occurrence: 7-11 2721 RT 17
Case Clear./Disp.: 2 Arrest

OFFICER INVOLVEMENT

Officer's Name	P#	Assmt.
LYONS, FREDERIC T.	1207	INVESTIGATOR

ADDITIONAL PEOPLE INVOLVED

CODES: S=SUSPECT, V=VICTIM, W=WITNESS,
C=COMPLAINANT, F= FATHER, M=MOTHER

A1	Name: JONES, DONTE LAMAR Addr: 79A W COUNTY ST CSZ: HAMPTON, VA 23669 AKA:	DOB: 11-08-82 SEX: M HP: 722-6710 MO: Suspect Armed Suspect Wore Glo	Age: 17 Race: B Eth: N WP:

A2	Name: MOORE, BRYANT LEVON Addr: 212 A SEGAR ST CSZ: HAMPTON, VA 23669 AKA:	DOB: 05-15-78 Sex: M HP: MO: Suspect Armed, Suspect Wore Glo	Age: 22 Race: B Eth. N WP:
A3	Name: AMIN, JOHNSON KHALIL Addr: 114 S CURRY ST CSZ: HAMPTON, VA 23663 AKA: CLEO	DOB: 10-09-82 Sex: M HP: 727-9433 MO: Lookout, Suspect posed as needi	Age: 17 Race: B Eth. N WP:
V1	Name: TARASI, JENNIFER LOUISE Addr: 333 CHESAPEAKE AVE CSZ: NEWPORT NEWS, VA 23607 AKA:	DOB: 07-13-64 Sex: F HP: Testify: No	Age: 36 Race: W Eth: N WP:
V2	Name: HOGGE, JENNIFER K Addr: 2440 MAUNDYS CREEK RD CSZ: HAYES, VA 23072 AKA:	DOB: 12-11-81 Sex: F HP: 867-5299 Testify: Yes	Age: 18 Race: W Eth. N WP:
V3	Name: [B] 7-11 Addr: RICH ROAD CSZ: YORKTOWN, VA 23692 AKA:	DOB: Sex: HP: Testify:	Age: Race: Eth. WP:

The Details are as follows:

CONTINUATION OF NARRATIVE OF 202230.B07.
ITEM #46. BLACK BEE BRAND "DOO" RAG.
FOUND IN DONTE'S BEDROOM.

ITEM #47. BLACK T-SHIRT FOUND IN DONTE'S BEDROOM.

ITEM #48, 49, 50. BLACK DENIM JEANS FOUND IN DONTE'S BEDROOM.

I SPOKE AGAIN WITH DONTE'S MOTHER AND SHE IDENTIFIED THE ROOM WHERE THE ITEMS ABOVE WERE FOUND AS DONTE'S ROOM. MRS. JONES FURTHER ADVISED THAT THE BED CONTAINING THE MATTRESS WHERE THE GUN WAS FOUND UNDER WAS DONTE'S BED.

ON 7-23-00 AT APPROXIMATELY 11:45 PM I WAS NOTIFIED BY HAMPTON POLICE THAT DONTE JONES' MOTHER HAD BROUGHT HIM TO POLICE STATION AND HE WAS THERE WAITING FOR ME TO ARRIVE.

ONCE I ARRIVED AT THE PD I WAS ADVISED THAT DONTE WAS IN THE INTERVIEW ROOM AND HAD NOT BEEN ADVISED OF HIS MIRANDA RIGHTS OR QUESTIONED AT ALL ABOUT THIS OFFENSE. I WAS ADVISED THAT DONTE'S MOTHER WAS IN THE WAITING ROOM. I ADVISED DONTE JONES OF HIS MIRANDA RIGHTS AT

APPROXIMATELY 12:32 AM. HE STATED THAT HE UNDERSTOOD HIS RIGHTS AND WOULD TALK TO ME. HE ADVISED THAT HE UNDERSTOOD HE COULD HAVE ONE OR BOTH PARENTS PRESENT AND DID NOT REQUEST THEY BE PRESENT. DONTE INITIALLY ASKED WHAT WE DOING UP IN HIS MOTHERS HOUSE SEARCHING IT. I ADVISED DONTE THAT HE WAS BEING CHARGED WITH MURDER, ROBBERY, ABDUCTION, USE OF A FIREARM, MAIMING IN REFERENCE TO THE 7-11 ROBBERY HOMICIDE. I ADVISED HIM THAT WE FOUND A .380 SEMI AUTOMATIC HANDGUN UNDER HIS MATTRESS IN HIS BEDROOM THAT I BELIEVED WAS USED IN THE MURDER. DONTE THEN ADVISED THAT HE PURCHASED THE GUN FRIDAY NIGHT FROM SOME GUY ON THE STREET FOR $40.00. I THEN ADVISED DONTE THAT WE HAD ALREADY OBTAINED STATEMENTS FROM KHALIL JOHNSON AND BRYANT MOORE IN REFERENCE TO THIS CASE AND THAT HE WAS FACING A DEATH PENALTY IF CONVICTED. I ADVISED DONTE THAT HE NEEDED TO DO EVERYTHING THAT HE COULD TO KEEP THAT FROM HAPPENING. I ADVISED HIM THAT HE NEEDED TO BE HONEST ABOUT WHAT HAPPENED BECAUSE THAT WAS PROBABLY HIS ONLY HOPE TO AVOID A DEATH SENTENCE AND EVEN THAT WAS NOT A GUARANTEE. DONTE ADVISED THAT HE GOT THE GUN THURSDAY NIGHT BEFORE THE ROBBERY. HE ADVISED THAT KHALIL WAS DRIVING AND HE AND BRYANT MOORE WERE RIDING. HE ADVISED THAT KHALIL STOPPED

AND GOT GAS AT THE 7-11. HE ADVISED THAT WHEN KHALIL CAME OUT HE SAID THERE WAS ONLY ONE LADY WORKING IN THERE AND SHE SHOULD HAVE SOME MONEY. DONTE ADVISED THAT THEY DROVE DOWN THE STREET TURNED AROUND AND CAME BACK TO THE 7-11 TO GET SOME MONEY. DONTE ADVISED THAT THEY PULLED UP NEXT TO THE STORE AND HE AND BRYANT WENT IN. DONTE SAID HE WENT IN THE STORE FIRST AND BRYANT WAS BEHIND HIM. DONTE ADVISED THAT HE WENT TO THE BACK OF THE STORE AND THOUGHT HE WAS GOING INTO THE OFFICE BUT ENDED UP IN A BROOM CLOSET. DONTE ADVISED THAT HE HEARD BRYANT SHOOT THE CLERK BEHIND THE COUNTER THEN DEMAND THE MONEY AND FOR HER TO OPEN THE SAFE. DONTE ADVISED THAT HE CAME TO THE FRONT OF THE STORE AND ORDERED THE CLERK OUT OF THE OFFICE ONTO THE GROUND AND KEPT LOOKING OUT THE WINDOW. DONTE ADVISED THAT THE LADY WAS LAYING ON THE GROUND SLIDING UP THE FLOOR AND HE TOLD HER. "DON'T JUMP." MEANING DON'T GET UP. DONTE ADVISED THAT HE WAS NOT TRYING TO SHOOT THE LADY. DONTE ADVISED THAT THE GUN JUST WENT OFF WHEN HE TURNED TO LEAVE. I ADVISED DONTE THAT THE VIDEO CLEARLY SHOWED HIM RAISING THE GUN AND FIRING BEFORE HE TURNED TO LEAVE. DONTE THEN ADVISED THAT HE JUST FIRED TRYING TO SCARE THE LADY SO SHE WOULD NOT GET UP. I THEN ASKED

HIM WHY THEN DID HE AIM THE GUN AT HER. DONTE REPLIED THAT HE WAS JUST TRYING TO SHOOT HER IN THE LEG TO KEEP HER FROM GETTING UP. DONTE THEN ADVISED THAT HE WAS NOT TRYING TO KILL NO BODY. DONTE ADVISED THAT HE DID NOT KNOW UNTIL THE NEXT DAY THAT THE LADY HAD DIED.

I TRANSPORTED DONTE JONES TO MERRIMAC CENTER WHERE HE WAS HELD WITHOUT BAIL.

ON 7-24-00 I SPOKE WITH SHARON GRAHAM ONE OF THE MANAGERS FROM 7-11 RICH RD. MS. GRAHAM SHOWED ME HOW THE COINS IN THE SAFE ARE WRAPPED FROM THE BANK. THE NICKELSAND DIMES ARE WRAPPED IN CLEAR PLASTIC WRAPPERS AND THAT IS HOW THEY ARE PUT INTO THE DROP SAFE IN THE STORES.

BETWEEN 7-21-00 AND 7-24-00 I VIEWED THE VIDEO TAPES FROM ALL 7-11'S ON RT. 17 BETWEEN OLD OYSTER POINT RD AND THE COLEMAN BRIDGE. THE THREE ARRESTED IN THIS CASE WERE NOT SEEN IN ANY OTHER 7-11'S FROM THE TAPES VIEWED.

FOLDOUT

CERTIFICATE *of* ACHIEVEMENT

THIS ACKNOWLEDGES THAT

Donte L. Jones

HAS SUCCESSFULLY COMPLETED THE

VADOC PEER EDUCATOR PROGRAM

FEBRUARY 27
2017

x Officer S. Lewis

Officer S. Lewis, PREA Peer Education Liaison

DEPARTMENT OF CORRECTIONS
Virginia
PUBLIC SAFETY FIRST

FOLDOUT

Ashworth College

In recognition of the completion of the prescribed program of study

Undergraduate Certificate in
Paralegal Studies
Summa Cum Laude

This Certificate is hereby awarded to

Donte Jones

In testimony whereof, this Certificate has been conferred in Atlanta, Georgia.
Whereupon the undersigned have affixed their names on this
Fifteenth day of June, Two Thousand Sixteen.

Rob Klapper
President

ASHWORTH COLLEGE
DITO CUM SCIENTIA

William Kakish, J.D., Ph.D
Chief Academic Officer

ASHWORTH COLLEGE

Donte Jones 1165814
Sussex 2# State Prison
2447 Mussel White Dr
Waverly, VA 23891

Dear Donte,

Congratulations! Based on your outstanding G.P.A. and your exceptional academic achievement as a distance learner, you have been nominated to become a member in the Georgia Alpha Chapter of the Delta Epsilon Tau National Honor Society.

Membership in Delta Epsilon Tau brings honor and earned recognition to individuals, like you, who have worked diligently to acquire new knowledge and skills from an accredited distance learning institution. Membership sets you apart from other students and clearly demonstrates your commitment to distance education and self-study.

All Honors students receive a Personalized Membership Certificate, Honor Society Gold Key, Congratulatory Letter and Honor Society Narrative Overview. The emblem that appears on the gold key may be worn with pride by those who have been elected to membership. It bears the Greek Letters ET, the Flaming Torch and two of the finest words in any language: Integrity and Excellence.

By words and example, the Members of the Delta Epsilon Tau National Honor Society reflect the concern, modesty, friendly spirit and good nature that characterize the qualities found in true leaders. Your official application is on the other side of this letter. Please complete this application, sign the honor code, and return with your membership fee to:

Christopher Davis, President
Delta Epsilon Tau Honor Society
31257 Bird Haven Street
Ocean View, DE 19970
302.541.0450

You are to be commended; and hopefully, this accomplishment will inspire you to reach new levels of achievement in your life, both personally and professionally.

Sincerely,

/s/

Rob Klapper
President, Ashworth College

COMMONWEALTH OF VIRGINIA

Department of Corrections

June 20, 2014

Donte Jones, #1165814
Sussex II State Prison

Re: Program Participation

Dear Mr. Jones:

Your letter to Chief of Corrections Operations A. David Robinson requesting Therapeutic Community has been forwarded to me for response.

Presently, offenders whose combined length of sentence and age total more than 80 years receive the Thinking for a Change program to promote a positive and useful adjustment to prison life. There are also ongoing programs that are related to their ability to function and be healthy in prison. Please consult with your institutional counselor if you have any questions concerning program eligibility criteria.

I trust this information is beneficial to you.

Sincerely,

/s/

James E. Parks, Director

Offender Management Services

March 20, 2014

Mr. A. David Robinson
P.O. Box 26963
Richmond, VA 23261

Mr. Donte L. Jones #1165814
Sussex II State Prison
24428 Musselwhite Dr.
Waverly, VA 23891

Dear Mr. Robinson:

The intent of this missive is humbly request that an exception be made for my admittance into the New Hope Therapeutic Community at [illegible]. There is a small segment of "offenders" within the [illegible]. who were certified and tried as adults for crimes committed while still juvenile and sentenced to life without parole. Recently (June 2012) the U.S. Supreme Court ruled that it is a violation of the 8th Amendment to sentence a juvenile to life without parole. Presumably/hopefully there will come a time when these "offenders" may be eligible for some sort of parole. As one of those "offenders" in that predicament I am striving to make a genuine effort to demonstrate that rehabilitation is possible when there is a specific incentive to do it or not.

I am aware that matters of classification are handled on a case by case basis. I have written to the program director however as it stands now I would need special approval to participate in the program at the time.

Your assistance with this matter would be greatly appreciated.

Sincerely,

Donte Jones