NO. _____

In the
Supreme Court of the United States

RAHEEM JOHNSON,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Commonwealth of Virginia sentenced Raheem Johnson to life in prison for a crime he committed when he was seventeen. Because Virginia has abolished parole, Johnson's only opportunity to leave prison before he dies, aside from executive clemency, is through Virginia's "geriatric release" program, which allows inmates, on reaching sixty, to petition for conditional release. But as one Virginia Supreme Court Justice explained in this case, geriatric release, "as it currently exists in the Commonwealth, is fundamentally not a system that ensures review and release based on demonstrated maturity and rehabilitation." App. 21. The Virginia Supreme Court's opinion below did not disagree with that observation, but nonetheless ruled that because geriatric release "provides a meaningful opportunity for release that is akin to parole," this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), "has no application" either to Johnson's sentence or to the procedures relied on by the trial court to impose it. App. 11–13. The questions presented are:

1. Does *Miller* apply to a sentence of life in prison imposed on a juvenile whose only opportunity for release from prison is Virginia's geriatric-release program?

2. When a juvenile faces a sentence equal to or exceeding his natural life, must the sentencing court conduct an individualized inquiry, including receiving expert testimony, to determine whether the defendant is the rare juvenile offender who should be treated as permanently incorrigible?

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PETITION FOR WRIT OF CERTIORARI

This case, on direct appeal from the Virginia Supreme Court, presents an opportunity for this Court to address the merits of the important recurring question it could not reach in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam) — whether a geriatric-release program like Virginia's satisfies the requirements of the Eighth Amendment when applied to juveniles sentenced to life in prison. It also presents the Court with an ideal vehicle to clarify whether a sentencing court is required — before imposing a sentence equal to or exceeding a juvenile defendant's natural life — to make an individualized inquiry to determine whether the defendant falls within the small category of juveniles who are permanently incorrigible. Granting review would also allow the Court to reaffirm the principles set forth in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), and to clarify when an expert is needed to aid the sentencing court in distinguishing between a juvenile offender capable of rehabilitation and the rare juvenile offender who is irreparably corrupt.

This Court's decisions have directed the lower courts to take into account juvenile offenders' immaturity and potential for rehabilitation to ensure that their sentences are constitutionally appropriate. Nonetheless, the lower courts remain divided and confused over the proper scope and application of those decisions. That confusion is especially significant in cases, like this one, where a state purports to follow the narrow letter of the law, but does not appropriately comply with this Court's decisions or faithfully implement the important

constitutional requirements they recognize. The lower courts' erroneous rulings in this case warrant further review. Addressing the important issues raised here will provide much-needed guidance to the lower courts and reduce the need for this Court's intervention in future cases.

OPINIONS BELOW

The opinion of the Virginia Supreme Court, App. 1, is published at 292 Va. 772 (2016), rehearing denied, App. 47. The opinion of the Virginia Court of Appeals, App. 25, is published at 63 Va. App. 175 (2014). The trial court's judgment, App. 39, order denying Johnson's motion to appoint an expert, App. 42, sentencing order, App. 44, and letter opinion denying reconsideration, App. 47, are unpublished.

JURISDICTION

The Virginia Supreme Court entered its judgment on December 15, 2016. App. 1. Johnson filed a timely petition for rehearing, which the Virginia Supreme Court denied on March 24, 2017. On June 16, 2017, the Chief Justice extended the time to file this petition to and including August 21, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Constitution's Eighth Amendment provides:

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

U.S. CONST., AMDT. 8.

The Constitution's Fourteenth Amendment provides, in relevant part:

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., AMDT. 14.

STATEMENT OF THE CASE

Raheem Johnson was sentenced to life in prison after this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). Because Virginia has abolished parole, Johnson will die in prison unless he is granted executive clemency or geriatric release. The possibility of either is remote.

Johnson was seventeen when he shot and killed Timothy Irving. After his indictment for capital murder, this Court decided *Miller*. Johnson moved to quash the indictment and, in response, the Commonwealth moved to amend the charge of capital murder, punishable only by death or life in prison, to a charge of first-degree murder, which allows for a discretionary life sentence. VA. CODE ANN. § 18.2-10. A jury convicted Johnson of eight felonies, including first-degree murder.

Over a month before sentencing, because Johnson is indigent, Johnson's appointed counsel moved to appoint an expert, Joseph Conley, Ph.D. Citing *Miller* and *Ake v. Oklahoma*, 470 U.S. 68 (1985), Johnson's motion explained that Dr. Conley could provide information on brain maturation

"specific to" Johnson that was needed to ensure a constitutional sentence. At a hearing on the motion, Johnson's counsel argued that Dr. Conley's analysis would identify "relevant facts needed to individualize the punishment," including facts showing how Johnson's "mind has developed" and his potential "developmental delays." App. 56. Without testing and analysis by a qualified expert, Johnson emphasized, the court would lack information necessary to impose a punishment "tailored for the individual," as required by the Eighth Amendment. App. 59.

The Commonwealth argued that *Ake* did not apply because, in its view, Johnson had failed to prove a "particularized need" for an expert, and because the issue of youth developmental psychology differs from the "issue of insanity." App. 57. The Commonwealth characterized the recent psychological and neuroscience breakthroughs recognized by this Court in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller* as "just sort of common sense" that "as you get older, you get more mature." App. 58. The Commonwealth also argued that *Miller* did not apply because "at age sixty" Johnson would be eligible to seek geriatric release. App. 58; *see* VA. CODE ANN. § 53.1-40.01 (allowing prisoners serving sentences for felonies except capital murder to seek conditional geriatric release).

The trial court denied Johnson's motion to appoint an expert. Accepting the Commonwealth's arguments, the court ruled that Johnson had not proven a "particularized need" for an expert. App.

60. In response, Johnson submitted a letter emphasizing that "only an in-depth examination by an expert, such as Dr. Conley, w[ould] allow the court, at sentencing, to more fully appreciate the individual characteristics of Mr. Johnson as [it sought] to fashion a sentence specific to him." App. 65. Johnson also enclosed four articles on juvenile brain development and its implications for legal culpability.

After reviewing the articles, Johnson's school records, and his presentence report, the court sentenced Johnson to life in prison for the first-degree murder charge and an additional 42 years for the other offenses. App. 68–69; *see also* App. 46. The court identified the heinousness of the crime as the only ground for the life-long sentence. App. 68.

Johnson moved to reconsider, arguing that the court had failed to impose an appropriately individualized punishment. App. 70. He also argued that Virginia's "geriatric release" program is not a realistic opportunity to obtain early release. App. 72. The trial court denied the motion to reconsider, stating that it had imposed the life sentence "after careful consideration of [Johnson's] individual characteristics." App. 49. The court cited "the brutality of the offense" and Johnson's "history of disrespect for authority and aggressive behavior," which it had gleaned from "the record, including … the presentence report and school records." *Id.*

Johnson appealed. App. 25. The Court of Appeals of Virginia did not address the expert issue, but held that because Johnson was not facing a *mandatory* life sentence, *Miller* did not apply. *See*

App. 35–36. The Supreme Court of Virginia affirmed, holding that *Miller* did not apply and *Ake* did not require the appointment of an expert. App. 11–12. According to the Virginia Supreme Court, because Virginia's geriatric-release program is "akin to parole," *Miller* "ha[d] no application" to this case. App. 12–13. It also concluded that the sentencing court would not have benefited from expert testimony because there was no information regarding Johnson's physiology or psychology in his history. App. 8–9.

Writing separately, Justice Millette disagreed that the *Miller* line of cases have no relevance for juveniles sentenced to life in prison. App. 13 (Millette, J., concurring in the judgment). In his view, *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), should be applied to any life sentence, consistent with this Court's conclusion that "children are constitutionally different from adults for the purposes of sentencing." App. 14 (quoting *Miller*, 567 U.S. at 471). Justice Millette also concluded that Virginia's geriatric-release program did not provide a meaningful opportunity for release for juveniles sentenced to life in prison, particularly because the Parole Board is not required to consider the inmate's demonstrated maturity and rehabilitation before denying a petition for geriatric release. App. 21; *see also id.* at 23–24 (noting that "juveniles sentenced to life in Virginia are in fact facing 'the harshest possible penalty for juveniles,' … regardless of whether we choose to invoke the phrase 'life without parole") (citation omitted). He explained that when the Virginia Supreme Court previously determined that geriatric release was "akin to parole" in *Angel v.*

Commonwealth, 704 S.E.2d 386 (Va. 2011), it did not consider whether geriatric release provided a meaningful opportunity for release based on demonstrated maturity and rehabilitation. App. 20–21. Nonetheless, Justice Millette went on to concur in the judgment. In his view, the trial court's mere consideration of "peer-reviewed journals … concerning adolescent brain development and legal culpability" was alone enough to satisfy *Miller*. App. 24.

REASONS FOR GRANTING THE PETITION

State courts disagree over the scope of the constitutional rule announced in *Miller* that only permanently incorrigible juveniles may be sentenced to die in prison. This split reflects irreconcilable positions over, first, which sentences for juveniles trigger additional Eighth Amendment scrutiny and, second, what procedures are necessary to satisfy *Miller*'s requirement that juveniles be sentenced to die in prison only if they are permanently incorrigible. This case, which squarely presents both issues on direct appeal, is an ideal vehicle to resolve these conflicts.

I. State Courts Are Divided Over The Proper Application Of This Court's Decisions Addressing Juvenile Sentencing.

This Court's decisions in *Miller*, *Graham*, and *Roper* establish that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471; *Graham,* 560 U.S. at 68; *Roper*, 543 U.S. at 569–71. Developments in psychology and brain science confirm that juveniles

differ from adults in ways that affect their culpability for crimes: they lack maturity and a well-formed character, and they are more susceptible to outside influence. *Miller*, 567 U.S. at 470–73. These traits "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." *Id.* at 472. Moreover, and importantly, the traits are *not* "crime-specific" — they are relevant even when juveniles commit the most heinous crimes. *Id.* at 473.

Miller held that, for purposes of the Eighth Amendment, "life without parole" sentences for juveniles are equivalent to death sentences. *Id.* at 473–74. A life-without-parole sentence "deprives the convict of the most basic liberties without giving hope of restoration" and is especially harsh when imposed on a juvenile because it means he will serve "a greater percentage of his life in prison than an adult offender" receiving the same sentence. *Graham*, 560 U.S. at 69–70. Accordingly, a life-without-parole sentence "is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption'" and is therefore "an unconstitutional penalty … for juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479–80).

Miller announced a substantive constitutional rule, but its holding imposes a procedural requirement. *Id.* at 734–35. Before a court may sentence a juvenile to life without parole, it must give the defendant an individualized sentencing hearing at which "'youth and its attendant characteristics'" are considered as sentencing factors. *Id.* at 735

(quoting *Miller*, 567 U.S. at 465). This sentencing hearing must entail procedures sufficient to separate "children whose crimes reflect transient immaturity [from] those rare children whose crimes reflect irreparable corruption." *Id.* at 734; *see also Tatum v. Arizona*, 137 S. Ct. 11 (2016).

Although this Court's decisions have repeatedly held that "children are constitutionally different" for purposes of sentencing, the lower courts are deeply divided over the scope of their constitutional obligations when sentencing juveniles to life in prison. These divisions occur along two dimensions:

First, the lower courts disagree over what types of life sentences trigger the procedural scrutiny that *Miller* requires. Some courts, agreeing with the Court of Appeals below, have concluded that *Miller* applies only to *mandatory* sentencing schemes. *See Conley v. State*, 972 N.E.2d 864 (Ind. 2012); *Alexander v. Kelley*, 516 S.W.3d 258, 261 (Ark. 2017); *Jones v. Commonwealth*, 795 S.E.2d 705, 711 (Va. 2017) (*petition for cert. filed*, No. 16-1337). These courts have concluded that *Miller* and *Montgomery* addressed only "mandatory life sentences without possibility of parole" and the "expansion of these holdings to *non-mandatory* life sentences" would "require[] attenuated reasoning." *Jones*, 795 S.E.2d at 721. In contrast, several courts have read *Miller* to apply equally to both discretionary and mandatory sentencing schemes. *See State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014). These courts take the approach supported by Justice Millette below, who emphasized this Court's "clear indication" that *Roper*, *Graham*,

Miller, and *Montgomery* "must be read together to properly apply Eighth Amendment protections" and, as a result, *Miller* applies to discretionary sentences.

The lower courts have also reached contradictory conclusions over whether sentences of long terms of years should be considered the functional equivalent of life-without-parole sentences for purposes of applying *Miller* and *Graham*. Courts in Virginia, as well as at least four other states, have concluded that *Miller* and *Graham* apply only when a juvenile is sentenced to life without any possibility of parole or parole-like release. *See* App. 11; *see also Ali*, 895 N.W.2d at 246. These courts have declined to apply *Graham* and *Miller*'s Eighth Amendment protections to terms of parole ineligibility far exceeding natural life expectancy. *See State v. Nathan*, — S.W.3d —, 2017 WL 2952773, at *6 (Mo. July 11, 2017); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (*petition for cert. filed*, No. 17-5578); *State v. Garza*, 888 N.W.2d 526, 535–36 (Neb. 2016) (*petition for cert. filed*, No. 16-9040); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 927–28 (Va. 2016); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013). In contrast, courts in at least nine states have found term-of-years sentences or minimum periods of parole ineligibility ranging from 45 to 112 years equivalent to "life without parole" for the purposes of *Miller* or *Graham*. *State v. Zuber*, 152 A.3d 197, 212–13 (N.J. 2017); *State v. Ramos*, 387 P.3d 650, 659–60 (Wash. 2017); *State v. Moore*, 76 N.E.3d 1127, 1137–38 (Ohio 2016); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1037–38 (Conn. 2015); *Henry v. State*, 175 So. 3d 675, 679–80 (Fla. 2015); *State v. Boston*, 363 P.3d 453, 457 (Nev. 2015); *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014);

State v. Null, 836 N.W.2d 41, 72 (Iowa 2013) (decided on state constitutional grounds); *People v. Caballero*, 282 P.3d 291, 294–95 (Cal. 2012). These courts take the position that a sentence's "label alone cannot control" and that "[d]efendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation." *Zuber*, 152 A.3d at 212.

Second, where *Miller* applies, the lower courts are confused over which factors and evidence they should consider at sentencing to satisfy the Eighth Amendment. This Court has held that *Miller* does not require a specific judicial finding of fact regarding a juvenile's "incorrigibility," but has also recognized that *Miller* requires the sentencing court to decide that a juvenile is permanently incorrigible before imposing a sentence of life in prison. *See Montgomery*, 136 S. Ct. at 735; *Tatum*, 137 S. Ct. at 13 (Sotomayor, J., concurring) ("*Montgomery* … requires that a sentencer decide whether the juvenile offender before it is [irreparably corrupt]."). The lower courts have struggled to interpret the scope of that obligation and to determine what evidence is needed to support the conclusion that a juvenile is permanently incorrigible. *See Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (remanding to the trial court to make "[some] sort of distinct determination on the record" regarding incorrigibility); *Luna v. State*, 387 P.3d 956, 962 (Okla. 2016) (emphasizing need for "evidence" to support conclusion of incorrigibility); *People v. Hyatt*, 891 N.W.2d 549, 579 (Mich. Ct. App. 2016) (remanding for court to "decide" incorrigibility and consider the directive

from *Miller* that incorrigibility is "rare"); *but see Garza*, 888 N.W.2d at 536–37 (suggesting that a specific finding of incorrigibility is required when the sentence is life without parole, but not when the sentencing court applies *Miller* factors to life sentences with the possibility of parole).

Identifying the evidentiary support necessary to support a conclusion of incorrigibility is especially difficult without expert testimony. Yet courts have expressed conflicting views over the role of expert testimony in meeting the demands of this Court's decisions. Some courts have concluded that the process for determining "which offenders are most culpable" is a resource-intensive one that requires "expert testimony" and should not be "left to the unguided discretion" of the sentencing court. *State v. Sweet*, 879 N.W.2d 811, 835 (Iowa 2016); *see also Hyatt*, 891 N.W.2d at 588 (Beckering, J., concurring). Others, like the courts below, have suggested that sentencing courts have wide discretion to deny access to expert assistance, and that expert testimony is irrelevant to the required culpability determination unless there is evidence already in the record demonstrating a history of physiological or psychological issues. App. 8–9; *see also Commonwealth v. Batts*, — A.3d —, 2017 WL 2735411, at *34 (Pa. June 26, 2017) (rejecting contention, despite its "undeniable appeal," that "expert testimony is necessary for a court to determine that a juvenile offender is permanently incorrigible"); *State v. Pascual*, — So.3d —, 2017 WL 2822503 (La. June 29, 2017) (Crichton, J., concurring).

The lower courts' divisions reflect fundamentally divergent understandings of what this Court's precedents require. Indeed, cases on all sides have been decided by closely divided courts and over dissenting opinions. Despite the concrete constitutional consequences for juveniles sentenced to life in prison, there are no signs this yawning split will resolve itself absent this Court's further intervention.

II. The Virginia Supreme Court Erred In Declining To Apply *Miller* And In Denying Johnson An Expert.

In addition to resolving this important split in authority, this Court should grant review for two other reasons. *First*, this case presents an opportunity to address the merits of the issue left unresolved in *LeBlanc* — contrary to the Virginia Supreme Court's conclusions, Virginia's geriatric-release program is not constitutionally adequate when applied to juveniles sentenced to life in prison. *Second*, the sentencing court failed to make an appropriately individualized examination of Johnson's youth and its attendant consequences, and failed to appoint an expert needed to aid the court in considering the relevant issues.

A. The Court Below Erred In Failing To Apply *Miller*.

The Virginia Supreme Court held that Johnson's reliance on *Miller* was "misplaced" because he might become eligible for geriatric release. App. 12. In the lower court's view, because the Commonwealth's geriatric-release program is "akin to parole," *Miller*

has no application to juveniles sentenced to life in prison. *See* App. 11. That conclusion is untenable.

No principled distinction exists between a sentence of life in prison in a state that has abolished parole and a sentence of life without parole. *Cf. Graham*, 560 U.S. at 69; *see also, e.g.*, *Zuber*, 152 A.3d at 212. Although the Commonwealth claims that its geriatric-release program is an adequate substitute for parole, the reality — as explained by Justice Millette and not refuted by the majority opinion below — is that geriatric release is rarely available in Virginia and does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation. *See* App. 21 (Millette, J., concurring).

Prisoners in Virginia become eligible for geriatric release only after reaching age sixty. That means a juvenile sentenced to life in Virginia would serve a term of at least 42 years before becoming eligible for release. But a recent study of adult and juvenile offenders sentenced to life in prison shows that those who began their sentence as adults have an average life expectancy of 58.1 years. *See* Michigan Life Expectancy Data For Youth Serving Natural Life Sentences, http://bit.ly/2wnWVze. On average, then, an adult sentenced to prison serves a sentence of less than 40 years. Virginia's geriatric-release program thus offers juveniles sentenced to life in prison the possibility of release only after they have served *longer* terms than the average adult sentenced for the same crimes.

Moreover, as Justice Millette has now clarified, the geriatric-release program in Virginia is

"fundamentally not a system that ensures review and release based on demonstrated maturity and rehabilitation." App. 21; *see Graham*, 560 U.S. at 75. Inmates who seek geriatric release must first submit an application stating "compelling reasons for conditional release." Virginia Parole Board, Administrative Procedures Manual, § 1.226, *available at* http://bit.ly/2vGTo11. The Parole Board conducts an "Initial Review" of this application based only on the applicant's written file. *Id.* At that initial-review stage, the Board may deny the application "for any reason" — in other words, without any consideration of factors tending to show an inmate's rehabilitation or maturity. *See id.*; *see also* App. 21. *Only if* an inmate's application passes "Initial Review" does the Board proceed to "Assessment Review." Although the Virginia Supreme Court has said that a geriatric-release applicant will be evaluated on criteria that substantially take into account his maturity and potential for rehabilitation during the Assessment Review, *see Angel*, 704 S.E.2d at 402, such an evaluation will never occur if the inmate's' application is denied "for any reason" at the "Initial Review" stage, *see* App. 21–22 (Millette, J., concurring in the judgment).

There is an exceedingly low statistical probability that Virginia's inmates will ever receive geriatric release. Only 18 percent of prisoners eligible for geriatric release in 2011 applied. And of that number, only 2.3 percent — three prisoners out of an eligible population of 719 — were granted release. In *Graham,* this Court found the option for executive clemency in Florida "too remote to mitigate

the harshness" of a life-without-parole sentence applied to a juvenile. Yet Florida commuted the sentences of five prisoners in 2010 alone. *See* Commutation of Sentence Cases Granted 1980 Through September 21, 2016, http://bit.ly/2vy0Njm. For the same reasons that executive clemency failed to provide juveniles sentenced to life without parole in Florida with a meaningful opportunity for release, geriatric release fails to provide an adequate opportunity for juveniles sentenced to life in Virginia.

In sum, Virginia's geriatric-release program creates a system where juveniles serve more time than adults convicted for the same crimes, permits requests for release to be denied without considering demonstrated maturation and rehabilitation, and is in practice exceedingly rare. When a life sentence is imposed on a juvenile absent an individualized finding of irreparable corruption, a program like Virginia's geriatric-release program does not let that sentence escape Eighth Amendment condemnation even though it makes release before death technically possible — indeed, *even if it had been called parole*.

B. The Procedures Afforded Johnson Were Constitutionally Insufficient.

The Virginia Supreme Court erred in failing to recognize that Johnson's sentencing hearing violated *Miller* because it resulted in a sentence that is in fact — if not in name — life without parole. In *Miller*, this Court left the states with the task of developing appropriate sentencing procedures. *Montgomery*, 136 S. Ct. at 734–35. But those procedures must at least ensure that juveniles whose crimes reflect transient immaturity are not

sentenced to the harshest sentences, and that only the "rarest of juvenile offenders … whose crimes reflect permanent incorrigibility" receive a sentence of life in prison. *Id*. at 734–35; *see Tatum*, 137 S. Ct. at 13 (Sotomayor, J., concurring).

The procedures afforded Johnson were insufficient to ensure that he was among those "rarest of juvenile offenders" whose incorrigibility justifies a life sentence. The trial court asserted that it imposed a life sentence only "after careful consideration of … individual characteristics." App. 49. But the record belies that conclusory statement. At sentencing the court relied on Johnson's school records, his presentence report, and several short articles on youth brain development. From this evidence, the court concluded that Johnson's "history of disrespect for authority and aggressive behavior" and "the brutality of the offense" made him a particular danger to others. App. 49.

But the paper record and a handful of articles were inadequate to support a conclusion that Johnson was irredeemable — indeed, that record is entirely consistent with "transient immaturity." *Montgomery*, 136 S. Ct. at 734. There is no evidence in the record sufficient to support a conclusion of *permanent* incorrigibility necessary to justify sentencing Johnson to die in prison. Instead, the court fell back on the heinousness of the crime, citing that as its exclusive ground for imposing the sentence during the hearing and reiterating that factor as the primary ground in its letter opinion. The court's focus on the nature of the crime ignored "*Miller*'s central intuition — that children who

commit even heinous crimes are capable of change." *Id.* at 736.

The mutability of juvenile character has led this Court to conclude that a juvenile's developmental characteristics have a profound effect on his culpability. As this Court has explained more than once, "[b]ecause juveniles have diminished culpability and greater prospects for reform … 'they are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). But assessing a juvenile offender's culpability is not a question fit for a lay judge without assistance; indeed, "it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. This fact as well as the risk that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course," *id.*, led the Court in *Roper* to categorically ban the imposition of the death penalty on any juvenile.

In the context of a life sentence without parole, the Court has not imposed a categorical ban, but it has required the sentencing court to consider whether the juvenile is permanently incorrigible. Reviewing articles and a defendant's paper record cannot suffice. Indeed, in most cases, it is difficult to see how a court could perform the required analysis *without* the assistance of a qualified expert. *See id.* at 573.

Assessing juvenile culpability is analogous to the inquiry required in the insanity context. At every sentencing hearing in which a juvenile offender faces a sentence that will mean he dies in prison, without a meaningful opportunity for an earlier release, the juvenile's "mental condition" is "relevant to … the punishment he might suffer" and "seriously in question." *McWilliams*, 137 S. Ct. at 1798 (quoting *Ake*, 470 U.S. at 70, 80). In *McWilliams*, this Court held that whenever the three threshold criteria articulated in *Ake* are met, the state must provide "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," including at the capital-sentencing phase. *Id.* at 1798–99. The three *Ake* criteria are: (1) an indigent defendant, (2) whose mental condition is "relevant to … the punishment he might suffer," (3) when that mental condition is "seriously in issue." 137 S. Ct. at 1798.

All three conditions are met here. As a result, even if *Miller* did not require appointing an expert in this case, *Ake* and *McWilliams* did. This Court should therefore take the opportunity this case presents to clarify the procedure required to constitutionally sentence a juvenile to life in prison.

III. This Case Presents An Ideal Vehicle For Addressing The Questions Presented.

The facts and procedural posture of this case, unlike many others where juveniles are sentenced to life imprisonment, would allow this Court to directly address *Miller*'s applicability to a discretionary

sentencing scheme that includes a program of "geriatric release."

Virginia v. LeBlanc, 137 S. Ct. 1726 (2017) (per curiam), recently presented this Court with the case of a juvenile in Virginia sentenced to life for a non-homicide crime. As in this case, geriatric release was the only mechanism by which the inmate could theoretically obtain release. LeBlanc filed a motion to vacate his life sentence but the state trial court, relying on Virginia Supreme Court precedent, ruled that Virginia's geriatric-release program satisfied *Graham*'s requirement of parole for juvenile offenders. The Fourth Circuit, on federal habeas review, held that the state trial court's decision was an "objectively unreasonable" application of *Graham*. *LeBlanc v. Mathena*, 841 F.3d 256, 260 (4th Cir. 2016), *as amended* (Nov. 10, 2016), *cert. granted*, *judgment rev'd sub nom. Virginia v. LeBlanc*, 137 S. Ct. 1726, (2017) (per curiam), *reh'g denied*, — S. Ct. —, 2017 WL 3342863 (Aug. 7, 2017) (mem.).

LeBlanc's case was a poor vehicle to address the application of the Eighth Amendment to juvenile sentencing because it came to this Court on collateral review. As a result, this Court could examine only whether the Virginia court's ruling was an "objectively unreasonable" application of precedent, not whether it was constitutionally accurate. *See LeBlanc*, 137 S. Ct. at 1728–29. Moreover, at the time this Court considered LeBlanc's petition, it arguably appeared that the Virginia Supreme Court in *Angel* had interpreted Virginia law to require that the Parole Board could not deny geriatric release without considering the normal parole factors,

including rehabilitation and maturity. *See id.* at 1730 (Ginsburg, J., concurring). Justice Millette's concurring opinion in this case, however, shows that *Angel* did not interpret the law in this fashion and that in fact Virginia law does not require the Parole Board to consider rehabilitation and maturity before denying release. *See* App. 18–21.

This case thus provides this Court with the opportunity to confront the underlying Eighth Amendment issue on direct review and to consider, with the benefit of full briefing, the constitutionality of Virginia's geriatric-release program. Because this case involves a juvenile convicted of first-degree murder, the Court can also consider the extent to which *Graham*, *Miller*, and *Montgomery* should be read together to inform juvenile sentencing in all contexts, including when a juvenile is convicted of the most serious crimes.

The Court could also take this opportunity to define the procedure required before imposing a life sentence — specifically, the degree of individualization required under *Miller* and whether *Ake* and *McWilliams* require the state to appoint a mental health expert. Clarifying that states can satisfy *Miller*'s substantive requirements by ensuring that their courts provide procedural safeguards to ensure that any juvenile receiving a sentence at the harshest end of the spectrum is in fact the "rare juvenile offender whose crime reflects irreparable corruption" would eliminate the need for this Court to chart a course through dozens of fact-bound sentencing decisions. It would also provide state courts and legislatures necessary guidance while leaving them

the flexibility needed to craft appropriate sentences without running afoul of the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A
Filed December 15, 2016

292 Va. 772

Raheem Chabezz JOHNSON

v.

COMMONWEALTH of Virginia

Record No. 141623

Supreme Court of Virginia.

December 15, 2016

Background: Defendant, who was 17 years old at the time of the alleged crime, was convicted in the Circuit Court, City of Lynchburg, Mosby G. Perrow, III, J., of first-degree murder and received a life sentence. Defendant appealed. The Court of Appeals, 63 Va.App. 175, 755 S.E.2d 468, affirmed. Defendant appealed.

Holdings: The Supreme Court, Powell, J., held that:

(1) defendant was not entitled to appointment of neuropsychologist to assist in sentencing, and

(2) defendant's sentence did not violate prohibition on cruel and unusual punishments

Affirmed.

Millette, Senior Justice, filed concurring opinion.

[HEADNOTES OMITTED]

FROM THE COURT OF APPEALS OF VIRGINIA

B. Leigh Drewry, Jr., Lynchburg, for appellant.

Donald E. Jeffrey, III, Senior Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

PRESENT: Lemons, C.J., Goodwyn, Mims, McClanahan, and Powell, JJ., and Russell and Millette, S.JJ.

OPINION BY JUSTICE CLEO E. POWELL

Raheem Chabezz Johnson ("Johnson") appeals the trial court's refusal to appoint a neuropsychologist at the Commonwealth's expense to assist in the preparation of his presentence report pursuant to Code § 19.2- 299(A). Johnson further takes issue with the Court of Appeals' affirmance of the trial court's decision to impose a life sentence. According to Johnson, the life sentence imposed by the trial court was in violation of the Eighth Amendment because the trial court failed to afford him the opportunity to present evidence about youth and its attendant characteristics.

I. BACKGROUND

On April 11, 2011, Johnson shot and killed Timothy Irving. At the time, Johnson was two months short of his eighteenth birthday. On June 1, 2011, Johnson was indicted on eight felonies, including capital murder. After his indictment but before trial, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012). As a result, the Commonwealth amended the

indictment to reduce the capital murder charge to first degree murder. A jury subsequently convicted Johnson of all eight felonies.

The trial court ordered a presentence re-port and continued the matter for sentencing. On August 3, 2012, Johnson moved to have Joseph Conley, Ph.D. ("Dr. Conley"), a neuropsychologist, appointed at the Commonwealth's expense, to serve as an expert to assist in the preparation for his sentencing hearing. In his motion, Johnson noted that Dr. Conley had "devoted his practice to the study of the maturation of the brain and its functioning." Johnson argued that Dr. Conley would "provide relevant facts specific to Raheem C. Johnson so as 'to fully advise the court' of all matters specific to Raheem C. Johnson and allow the fashioning of a sentence in compliance with the 8th Amendment to the United States Constitution."

At a hearing on the matter, Johnson argued that Dr. Conley's assistance was necessary because the probation officer charged with compiling the presentence report "does not have the ability to collect the necessary details about what is happening within [Johnson's] mind, how [Johnson's] mind has developed." Johnson asserted that Dr. Conley's "facts or unique abilities" would allow him to develop "other relevant facts needed to individualize the punishment that [the trial court] is going to have to mete out." In response, the Commonwealth stated that Johnson had not demonstrated the requisite particularized need to have Dr. Conley appointed at the Commonwealth's expense because it was "common sense" that a juvenile is less mature than an adult.

The Commonwealth also noted that Johnson was not facing life without parole because Johnson would be eligible for geriatric parole at age 60.

After considering the matter, the trial court denied Johnson's motion. The trial court noted that nothing in Johnson's record supported his position that such an evaluation was needed. It further stated that Johnson had not shown a particularized need because, in the trial court's opinion, *Miller* did not require such an evaluation in every case where the accused was a juvenile at the time of the offense.

Prior to sentencing, Johnson submitted four articles that discuss brain development and legal culpability. At the sentencing hearing, the trial court acknowledged that it had read the articles Johnson submitted and considered them along with the presentence report and Johnson's school records. After hearing argument from the parties, the trial court stated:

> Mr. Johnson, in this case we had a helpless victim, the shooting was unprovoked, and it was cruel and callous. It was just mean. It was, it's as cruel and callous as anything I've seen since I've been sitting here on the bench, and that's been awhile. Just totally unnecessary to put a bullet in this young man's head.

The trial court then proceeded to sentence Johnson to life in prison for the first degree murder charge plus an additional 42 years for the other seven charges.

Johnson filed a motion to reconsider, arguing that the trial court failed to properly consider the

articles he submitted and the Supreme Court's ruling in *Miller* before imposing Johnson's sentence. Johnson further asserted that, by imposing a life sentence, the trial court ignored the fact that, statistically, geriatric parole was not a realistic opportunity to obtain early release. The trial court denied the motion without a hearing.

In a letter opinion, the trial court explained that it imposed a life sentence "after careful consideration of [Johnson's] individual characteristics as reflected in the record, including without limitation the presentence report and school records." The trial court also reiterated that it had reviewed the articles Johnson submitted. The trial court noted the "horrendous nature of the crime" and determined that Johnson's "history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense, make [Johnson] … a danger to himself and others should he be returned to society."

Johnson appealed the trial court's refusal to appoint a neuropsychologist and its decision to impose a life sentence to the Court of Appeals. The Court of Appeals denied Johnson's petition for appeal with regard to the denial of his motion for a neuropsychologist, but granted his petition with regard to the sentence imposed. In a published opinion, the Court of Appeals subsequently determined that, because a sentence of life did not exceed the statutory maximum penalty for first-degree murder, the trial court had not erred. *Johnson v. Commonwealth*, 63 Va. App. 175, 182–85, 755 S.E.2d 468, 471–73 (2014). The Court of Appeals further held that, because

Johnson was not facing a mandatory life sentence, *Miller* did not apply. *Id.* at 183–84, 755 S.E.2d at 472.

Johnson appeals.

II. ANALYSIS

On appeal, Johnson argues that the Court of Appeals erred in refusing to consider his appeal related to the trial court's denial of the motion for the appointment of a neuropsychologist on his behalf at the Commonwealth's expense. Additionally, he asserts that, under *Miller*, the Court of Appeals erred in affirming the trial court's decision to impose a life sentence because he was not afforded the opportunity to present evidence regarding youth and its attendant consequences.

A. Motion for a Neuropsychologist

[1] Johnson contends that the trial court erred in denying his motion for the appointment of a neuropsychologist on his behalf at the Commonwealth's expense because he demonstrated a particularized need for the services of a neuropsychologist. Johnson asserts that he demonstrated the requisite "particularized need" established by this Court in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996). He also relies on the fact that Code § 19.2-299(A) requires that a presentence report include "other relevant facts." Johnson claims that evidence relating to his physiology or psychology were such "other relevant facts." Thus, according to Johnson, even in the absence of showing a particularized need, the services of a neuropsychologist were necessary to

provide a complete presentence report. He further asserts that such evidence was necessary to allow the trial court to "tailor" the punishment to him. We disagree.

[2–4] This Court has recognized that, upon request, the Commonwealth is required to "provide indigent defendants with 'the basic tools of an adequate defense.'" *Husske*, 252 Va. at 211, 476 S.E.2d at 925 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985)). However, "an indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense, is not absolute." *Id.* Rather,

> an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial. The indigent defendant who seeks the appointment of an expert must show a particularized need.

Id. at 211–12, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82–83, 105 S. Ct. 1087).

[5,6] Furthermore, "[w]hether a defendant has made the required showing of particularized need is a determination that lies within the sound discretion

of the trial court." *Commonwealth v. Sanchez*, 268 Va. 161, 165, 597 S.E.2d 197, 199 (2004) (citing *Husske*, 252 Va. at 212, 476 S.E.2d at 926, and other case authority). "A particularized need is more than a 'mere hope' that favorable evidence can be obtained through the services of an expert." *Green v. Commonwealth*, 266 Va. 81, 92, 580 S.E.2d 834, 841 (2003) (quoting *Husske*, 252 Va. at 212, 476 S.E.2d at 925–26). In the present case, Johnson admitted that he sought the services of a neuropsychologist because there was no other evidence regarding his physiology or psychology. In other words, Johnson sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way. At best, Johnson's request for a neuropsychologist amounted to a mere hope that favorable evidence would be obtained. Thus, it cannot be said that Johnson demonstrated a particularized need for the assistance of a neuropsychologist.

Johnson next argues that, under Code § 19.2-299(A), he was entitled to the appointment of a neuropsychologist independent of any showing of a particularized need. Code § 19.2-299(A) states that, upon a finding of guilt, a trial court may (or, under certain circumstances, shall) direct a probation officer to

> thoroughly investigate and report upon the history of the accused, including a report of the accused's criminal record as an adult and available juvenile court records, any information regarding the accused's participation or membership in a criminal street gang as defined in § 18.2-46.1,

> *and all other relevant facts*, to fully advise the court so the court may determine the appropriate sentence to be imposed.

Id. (emphasis added).

Nothing in the plain language of Code § 19.2-299(A) specifically requires a probation officer to investigate a defendant's current physiology or psychology.[1] Indeed, the statute expressly limits the subject of the probation officer's investigation and report to "the *history* of the accused." *Id.* (emphasis added). When read in context, it is clear that the phrase "all other relevant facts" is used to describe additional historical information that may be relevant to the probation officer's investigation and report.

[7] Thus, it is clear that Code § 19.2- 299(A) does not envision the appointment of a neuropsychologist to augment the presentence report. That said, however, if information regarding a defendant's physiology or psychology exists in a defendant's history, that information might well be included as "other relevant facts" in the presentence report. Moreover, such information could be used as part of the showing necessary to demonstrate a "particularized need" under *Husske* or presented as "additional facts bear-

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[1] Notably, Code § 19.2-299(A) only describes the investigation that must be conducted by the probation officer and the contents of that probation officer's report. Although the statute provides a defendant with an opportunity to "present any additional facts bearing upon the matter," such an opportunity only arises *after* the probation officer has completed his investigation and submitted his report. Similarly, the statute is silent on the manner in which such facts may be developed.

ing upon the matter" in response to the presentence report. *See* Code § 19.2-299(A). Accordingly, the trial court did not abuse its discretion in denying Johnson's motion for the appointment of a neuropsychologist at the Commonwealth's expense and the Court of Appeals did not err in upholding this determination.[2]

B. Life Sentence

[8] Johnson next argues that the trial court erred in sentencing him to life in prison. Relying on the Supreme Court's decision in *Miller v. Alabama*, Johnson claims that, because he was still a juvenile on the date that he committed the crimes, the trial court was required to consider the psychological differences between adults and juveniles before imposing a life sentence. Johnson further contends that, in the absence of such consideration, the sentence imposed by the trial court was not individualized and, therefore, violated the Eighth Amendment. However, we conclude that *Miller* is inapplicable to the present case. Therefore, the trial court did not err.

In *Miller*, the Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. However, by its plain language, *Miller* only applies where a ju-

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[2] Johnson also asserts that the Supreme Court's decision in *Miller* further demonstrates the requisite "particularized need." However, as discussed below, Johnson's reliance on *Miller* is misplaced and, therefore, we need not address whether the applicability of *Miller* to a specific case can provide a "particularized need" under the proper circumstances.

venile offender is sentenced to a term of life *without parole*. Notably, the Supreme Court's analysis in *Miller* is founded, in part, on the notion that sentencing a juvenile to life in prison is a disproportionate sentence because a juvenile sentenced to life without parole is analogous to capital punishment. *Id.* at 2466. In contrast, "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery v. Louisiana*, — U.S. —, 136 S. Ct. 718, 736, 193 L.Ed.2d 599 (2016). Indeed, it is particularly telling that the remedy for a *Miller* violation is to "permit juvenile homicide offenders to be considered for parole." *Id.* Thus it is clear that *Miller* does not apply when a juvenile offender has the opportunity to be considered for parole.

In *Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386, 402 (2011), we held that the possibility of geriatric release under Code § 53.1-40.01[3] provides a meaningful opportunity for release that is akin to parole. As Johnson was convicted of a Class 2 felony, he will be eligible for geriatric release

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[3] Code § 53.1-40.01 states:

> 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. The Parole Board shall promulgate regulations to implement the pro-visions of this section.

under Code § 53.1-40.01 when he turns 60 in 2053, in which case the possibility exists that Johnson's sentence of life imprisonment will convert into a sentence of approximately forty years.[4] Thus, it is readily apparent that, under this Court's jurisprudence, Johnson was only sentenced to life in prison; he was not sentenced to life without parole. Accordingly, Johnson's reliance on *Miller* is misplaced.

III. CONCLUSION

Having failed to demonstrate the requisite particularized need for the appointment of a neuropsychologist at the Commonwealth's expense, Johnson has failed to show any abuse of discretion in the decision of the trial court that mandated review by the Court of Appeals. Additionally, as Code § 53.1-40.01 provides Johnson with a meaningful opportunity for parole when he turns 60, *Miller* has no application to

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[4] While Johnson makes much about the low statistical probability of release under Code § 53.1-40.01, we find his argument to be, at present, speculative because the statistical data Johnson relies on does not include juvenile offenders. Indeed, as has been recently noted,

> The geriatric release program was not implemented until 1994. See 1994 Acts (Sp. Sess. II) 1, 2 (enacting Code § 53.1-40.01). A hypothetical 17-year old sentenced to a life sentence or a de facto life sentence in 1995 will not be eligible for geriatric release until 2038. Moreover, inmates who committed their crimes before January 1, 1995 are still eligible for traditional parole. See Code §§ 53.1-151, 53.1-165.1. Accordingly, a number of inmates, who would be eligible for geriatric release, obtain release through traditional parole instead.

Vasquez v. Commonwealth, 291 Va. 232, 258 n. 4, 781 S.E.2d 920, 935 n.4 (2016) (Mims, J., concurring).

the present case. Accordingly, we find no reversible error in the judgment of the Court of Appeals and we will affirm the decisions of the trial court.

Affirmed.

SENIOR JUSTICE MILLETTE, concurring.

I agree with the majority's analysis concluding that Johnson is not entitled to a neuropsychologist under *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996). I write separately because I disagree with the majority's conclusion that "*Miller* [*v. Alabama*, 567 U.S. ——, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012)] is inapplicable to the present case" because geriatric release "provides a meaningful opportunity for release akin to parole." While the majority applies existing Virginia precedent, I believe *Miller* and *Montgomery v. Louisiana,* 577 U.S. —, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), do not suggest but rather require that this Court reexamine our position. However, because I conclude that Johnson's sentencing ultimately comported with *Miller* and *Montgomery,* and the trial court met its burden under the Eighth Amendment, I concur in the result.

I.

As an initial matter, *Miller* and *Montgomery* are not limited in scope to mandatory life sentences. Rather, *Miller*, as explicated in *Montgomery*, is the touchstone for constitutional sentencing of children potentially facing a sentence of life imprisonment without parole.

In examining the scope of *Miller* and *Montgomery*, it is necessary to take two short steps back in the

jurisprudence of the Supreme Court of the United States. In *Roper v. Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005), the Supreme Court found the death sentence to be a disproportionate punishment, and therefore cruel and unusual for juveniles for Eighth Amendment purposes. In *Graham v. Florida*, 560 U.S. 48, 74, 75, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), the Supreme Court issued a blanket ban on the imposition of a sentence of life without parole for juvenile nonhomicide offenders, in part because the penalty of life without parole "forswears altogether the rehabilitative ideal." These two cases would ultimately form the bedrock of the holdings reached in *Miller* and *Montgomery*.

Two years later, *Miller* arose in the context of a challenge to mandatory life without parole for a juvenile homicide offender. In *Miller*, the Supreme Court did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S. at ——, 132 S. Ct. at 2471. Such a process is required, in short, because "children are constitutionally different from adults for the purposes of sentencing." 567 U.S. at —, 132 S. Ct. at 2464 (citing *Roper*, 543 U.S. at 569–70, 125 S. Ct. 1183 and *Graham*, 560 U.S. at 68, 130 S. Ct. 2011). The Court held not that a life sentence without parole was *never* appropriate for a juvenile, but rather that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at —, 132 S. Ct. at

2475. Accordingly, *Miller* held mandatory life sentences for juvenile offenders to be unconstitutional, and mandated that a process be followed considering the "offender's youth and attendant characteristics" before sentencing juveniles to life with-out parole. *Id.* at —, 132 S. Ct. at 2471.

Courts initially struggled with the interaction of *Miller's* substantive and procedural components, resulting in the subsequent opinion of *Montgomery*, which plainly states *Miller's* key substantive and procedural holdings. *Montgomery* clarified that *Miller* set forth the following substantive rule of law:

> Even 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." 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," it 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 (citations and internal quotation marks omitted). *Montgomery* also emphasized *Miller*'s parallel, prospective procedural holding: "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.*

While *Miller* rendered mandatory sentences of life without parole facially unconstitutional, its impact was not limited to mandatory sentences. *Miller's* facial holding that mandatory life sentences without parole were unconstitutional was required by the dual central holdings clarified in *Montgomery*: that life without parole is a violation of the Eighth Amendment for "juvenile offenders whose crimes reflect the transient immaturity of youth," and, that "*Miller* requires a sentencer to consider a juvenile offender's youth and its attendant characteristics" before rendering a sentence of life without parole. *Montgomery*, 577 U.S. at —, 136 S. Ct. at 734. Because mandatory sentences do not allow for such consideration, they "necessarily carr[y] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose on him": that "a child whose crime reflects unfortunate yet transient immaturity" might receive life without parole. *Id.* (citations and internal quotation marks omitted).

Yet a non-mandatory sentence of life without parole can still be unconstitutional as applied to a given defendant, if such a juvenile is sentenced to life without parole with- out consideration of "youth and its attendant characteristics." *Id.*; *United States v. Johnson*, No. 3:08–cr–0010, 2016 WL 3653753, at *5, 2016 U.S. Dist. LEXIS 83459, at *5–6 (W.D.Va. June 28, 2016) ("[A]bsolutist statutes like those in *Miller* and *Montgomery* are facially unconstitutional. But a particular life sentence (even one stemming from a sentencing regime that permits a non-life sentence) would be unconstitutional as-applied if the sentence did not abide by the commands of *Miller* and

Montgomery."). *Montgomery* is clear that, prospectively, "[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. The hearing … gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[1] *Montgomery*, 577 U.S. at —, 136 S. Ct. at 735 (emphasis added) (citation and internal quotation marks omitted).

The Supreme Court in *Miller* could have simply struck down mandatory life without parole as unconstitutional. Instead, it devoted the majority of its opinion and holding to the importance of this procedural consideration of youth. This procedural requirement is ineffectual if limited to only "mandatory" sentencing schemes. *Montgomery* clarifies that the substantive rule of law set forth in *Miller* is that life without parole—not mandatory life without parole, but "life without parole"—is "an unconstitutional penalty for … juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at —, 136 S. Ct. at 734.[2] Accordingly, *Montgomery* also makes clear that a *Miller* hearing procedurally requires not just discretion to enter a lesser sentence,

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[1] Retroactively, *Montgomery* allows for reviews after a term of years to satisfy this requirement without disturbing finality. 577 U.S. at —, 136 S. Ct. at 736.

[2] The Supreme Court's recent action bolsters this view. *Arias v. Arizona*, — U.S. —, 137 S. Ct. 370, 196 L.Ed.2d 287 (2016) (vacating and remanding a judgment predicated upon the refusal of the Court of Appeals of Arizona to grant *Miller* relief to a juvenile who did not receive a mandatory life sentence).

but *actual* consideration of youth by the sentencer, *id.*, or the entire portion of the opinion and holding in *Miller* addressing procedure would be rendered superfluous.

II.

Of course, none of the foregoing observations are consequential if Johnson received a sentence that provides, through parole or a similar system, a meaningful opportunity for release based on maturation and rehabilitation. The majority, observing that *Miller* and *Montgomery* do not apply in instances of parole, relies on our previous decision in *Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386, 402 (2011), for the proposition that geriatric release is "akin to parole."

The Commonwealth abolished parole two decades ago. Code § 53.1-165.1. Non-capital juvenile homicide offenders in Virginia remain eligible to apply for geriatric release at the age of 60. Code § 53.1-40.01. Five years ago, in light of *Graham*, this Court was first tasked with examining whether those juvenile nonhomicide offenders eligible for geriatric release fell under *Graham's* prohibition against life imprisonment without parole, or rather had a "meaningful opportunity" for release. *Graham*, 560 U.S. at 75, 130 S. Ct. 2011.

At the time, I joined this Court's opinion in *Angel*, 281 Va. at 275, 704 S.E.2d at 402, concluding that nonhomicide offenders in Virginia were not subject to life without parole under *Graham* because geriatric release offered a "meaningful opportunity" for release, thereby preventing those life sentences

from implicating the Eighth Amendment concerns raised by *Graham*.

Our mandate in light of *Graham* alone was substantially narrower than the vision of the Eighth Amendment set forth by the Supreme Court today. *Graham* noted, for example, that:

> It bears emphasis … that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

560 U.S. at 75, 130 S. Ct. 2011. Additionally, the caveat that meaningful opportunity for release be "based on demonstrated maturity and rehabilitation," while present in *Graham*, *id.,* was not emphasized as central to the holding in the case. The opinion went on to refer to "meaningful opportunity to obtain release" without caveat, *id.* at 79, 130 S. Ct. 2011, and, notably, the conclusion in *Graham* synthesized the holding as simply: "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with *some realistic opportunity to obtain release*

before the end of that term." *Id.* at 82, 130 S. Ct. 2011 (emphasis added).

Accordingly, in *Angel* this Court considered whether the Virginia geriatric release system was sufficiently distinguishable from life without parole as described in *Graham*, and concluded that it was; we found it offered a meaningful opportunity for release. 281 Va. at 275, 704 S.E.2d at 402. While we also noted that normally applicable consideration procedures of the Parole Board would provide for meaningful release based on demonstrated maturity and rehabilitation, we devoted only two sentences to consideration of that issue. *Id.* *Roper*, a death penalty case, was unrelated to our analysis. I believe we made an informed decision based on the guidance provided to us from the Supreme Court at the time.

I do not believe we sit in the same position today. We now must consider the issue in light of *Roper*, *Graham*, *Miller*, and *Montgomery*, and the clear indication by the Supreme Court of the United States that these cases are to be read together. *Montgomery*, 577 U.S. at —, 136 S. Ct. at 734; *Miller*, 567 U.S. at —, 132 S. Ct. at 2461–69. As stated in *Montgomery*, *Graham* was the "foundation stone" for *Miller*, and "*Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'" 577 U.S. at —, 136 S. Ct. at 732–33. We must consider these holdings not as substantive rules unto themselves but parts of the larger, functioning understanding of the Eighth Amendment; as such, they cannot be understood in a vacuum, but must be

read together to properly apply Eighth Amendment protections.

Miller and *Montgomery* provide a more robust analytical framework for considering the issue of geriatric release. *Graham's* requirement of "meaningful opportunity for release *based on demonstrated maturity and rehabilitation*," 560 U.S. at 75, 130 S. Ct. 2011 (emphasis added), contains new meaning and import in light of the emphasis in *Miller* and *Montgomery* on the distinction between transient behavior and incorrigibility. Through the lens of *Miller* and *Montgomery*, it appears that the "meaningful" or "realistic" opportunity to obtain release referred to in *Graham* always contemplated meaningful release based on demonstrated maturity and rehabilitation.

Geriatric release, as it currently exists in the Commonwealth, is fundamentally not a system that ensures review and release based on demonstrated maturity and rehabilitation. Virginia's traditional parole system[3] requires consideration of enumerated factors by the Parole Board. Code § 53.1-155; Virginia Parole Board, Policy Manual, Section I (2006), available at https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf (last visited Dec. 1, 2016). While maturity and rehabilitation are not factors which are enumerated verbatim, they are substantially present. *See id.* However, geriatric release applicants are required to cite compelling reasons for their release, and the Parole Board can deny the application for any reason upon Initial

[3] Traditional parole, while still operational, applies to sentences rendered in prosecutions for crimes that were committed prior to January 1, 1995. Code § 53.1-165.1.

Review.[4] Virginia Parole Board Admin. Proc. 1.226.[5] No consideration of particular factors is required. *Id.* If geriatric release as implemented in Virginia carries no mandate to ensure a process for consideration of maturation or rehabilitation, it would appear to fail the test set forth in *Graham* that release be "based on demonstrated maturity and rehabilitation." 560 U.S. at 75, 130 S. Ct. 2011. *See also LeBlanc v. Mathena,* 841 F.3d 256 (4th Cir. 2016) (holding Virginia's geriatric release statute failed to provide a meaningful opportunity for release based on maturity and rehabilitation under *Graham* in accordance with the Eighth Amendment). In this regard, it is also manifest that geriatric release is not a meaningful opportunity for release that is "akin to parole."

Additionally, following *Miller* and *Montgomery*, the issue of rarity is no longer a mere empirical observation; it is instead linked to a substantive element: "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." *Montgomery*, 577 U.S. at —, 136 S. Ct. at 726 (citation and internal quotation marks omitted). Yet if geriatric release does not require consideration of ir-

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[4] Applications that proceed past the Initial Review stage to the Assessment Review stage receive consideration under the same factors as those eligible for traditional parole. Virginia Parole Board Admin. Proc. 1.226.

[5] As of December 1, 2016, the Virginia Parole Board Administrative Procedure Manual was available at https:// vpb. virginia. gov/files/1108/ vpb-procedure-manual.pdf.

reparable corruption versus demonstrated maturity, or ensure that denial of release, and therefore life without parole, is indeed rare, then we cannot claim geriatric release serves as a basis for the validation of life without parole sentences without complying with the framework of *Montgomery*.

In requiring that "sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him to die in prison," *Graham*, *Miller,* and *Montgomery* now reflect an evident clarification of doctrine on the part of the Supreme Court of the United States to avoid condemning juveniles to life in prison without hope of parole due to the "transient immaturity of youth." *Montgomery*, 577 U.S. at —, —, 136 S. Ct. at 726, 734. As *Miller* emphasizes, "removing youth from the balance … contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 567 U.S. at ——, 132 S. Ct. at 2466. Yet geriatric release treats juveniles no differently than adults, and is if anything harsher due to the longer period of punishment the juvenile must serve before reaching the age of eligibility.

In light of recent Supreme Court precedent, I believe that the juveniles sentenced to life in Virginia are no different than the juveniles sentenced to "life imprisonment without parole" described in *Graham*, *Miller,* and *Montgomery*, and that geriatric parole does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 130 S. Ct.

2011. As a result, juveniles sentenced to life in Virginia are in fact facing "the harshest possible penalty for juveniles," *Miller*, 567 U.S. at ——, 132 S. Ct. at 2475, regardless of whether we choose to invoke the phrase "life without parole." Accordingly, they should be protected by the substantive and, at least prospectively, procedural rules of law clarified in *Montgomery*.

III.

In the case at bar, the record reflects that the trial court considered peer-reviewed journals presented by the defendant concerning adolescent brain development and legal culpability, thereby considering "youth and its attendant characteristics" before rendering its sentence. *Montgomery*, 577 U.S. at ——, 136 S. Ct. at 735. Because I believe the trial court satisfied the constitutional requirements articulated in *Miller* and *Montgomery*, I concur in the majority's opinion affirming Johnson's sentence.

Appendix B
Filed March 25, 2014

Present: Judges Humphreys, Beales and Huff
Argued at Salem, Virginia

RAHEEM CHABEZZ JOHNSON

v. Record No. 1941-12-3

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RANDOLPH A. BEALES
MARCH 25, 2014

FROM THE CIRCUIT COURT OF THE
CITY OF LYNCHBURG
Mosby G. Perrow, III, Judge

B. Leigh Drewry, Jr. (Cunningham and Drewry, on brief), for appellant.

Donald E. Jeffrey, III, Senior Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Raheem Chabezz Johnson (appellant) appeals the trial court's decision to impose a life sentence for appellant's first-degree murder conviction under Code § 18.2-32.[1] In his assignment of error that is

[1] In addition to the life sentence, appellant was also sentenced to a total of forty-two years for several other offenses — i.e., statutory burglary, two counts of attempted robbery, and four

before this Court, appellant alleges that the trial court "ignored his individuality and the holding of Miller v. Alabama, 132 S. Ct. 2455 (2012)." For the following reasons, we affirm appellant's life sentence for first-degree murder.

I. BACKGROUND

Under settled principles of appellate review, we view "the evidence in the light most favorable to the Commonwealth, as we must since it was the prevailing party" in the trial court. Riner v. Commonwealth, 268 Va. 296, 330, 601 S.E.2d 555, 574 (2004). On April 11, 2011, about two months before appellant's eighteenth birthday, appellant and a co-defendant planned to rob the victim. After appellant and the co-defendant entered the victim's residence, appellant produced a handgun and ordered the victim to a bedroom. While the victim was on his knees looking in his bedroom closet for money, appellant shot the victim in the head. The victim's girlfriend and two-year-old son were in the bedroom and, thus, were forced to watch the murder of the victim.

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counts of using a firearm during the commission of a felony. Appellant has not challenged the sentences for those convictions on appeal. Furthermore, an appeal was not granted on assignments of error alleging that the trial court erred by denying appellant's motion to strike the statutory burglary and attempted robbery charges, erred by improperly instructing the jury on the issue of eyewitness identification, erred by denying appellant's request for the appointment of a neuropsychologist, and erred with respect to the preparation of the trial transcripts.

On June 1, 2011, a grand jury indicted appellant on eight felony charges, including capital murder. Code § 18.2-31 classifies capital murder as a Class 1 felony. For defendants, such as appellant, who were under eighteen years of age at the time of the offense, Code § 18.2-10(a) states that the punishment for a Class 1 offense is life imprisonment. Furthermore, inmates who have been convicted of Class 1 felonies are not eligible to apply for conditional release under the geriatric parole statute, Code § 53.1-40.01.[2]

On June 25, 2012, prior to appellant's trial, the United States Supreme Court held in Miller, 132 S. Ct. at 2469, that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In response to the decision in Miller, the Commonwealth moved to amend the capital murder indictment to change it to a charge of first-degree murder. Code § 18.2-32 classifies first-degree murder as a Class 2 felony, and Code § 18.2-10(b) states that Class 2 felonies are punishable by a range of twenty years to life imprisonment. Furthermore, inmates who have been convicted of Class 2 felonies are eligible to apply for conditional release under the

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[2] Code § 53.1-40-01 states,

> 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. The Parole Board shall promulgate regulations to implement the provisions of this section.

geriatric parole statute. See Code § 53.1-40.01. The trial court granted the Commonwealth's motion to amend the indictment against appellant to a charge of first-degree murder, and appellant has not challenged that decision on appeal.

Following the jury's verdict convicting appellant of first-degree murder, among other offenses, the trial court sentenced appellant as a juvenile offender pursuant to Code § 16.1-272(A). In anticipation of sentencing, appellant's counsel submitted to the trial court a series of articles that addressed adolescent brain development. According to appellant's counsel, these articles supported a finding that the brain of a person who is appellant's age at the time that these offenses occurred has not completely grown and developed. Based on these articles, appellant's counsel contended that the trial court should not consider appellant as culpable as a fully mature adult would be. The Commonwealth, in turn, submitted documents from the City of Lynchburg Public Schools that detailed, *inter alia,* the many suspensions that appellant had received — including several that involved acts of violence.[3]

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[3] Included in these documents was a report from appellant's principal explaining why appellant was suspended from school for ten days in January 2009. The principal wrote:

> On January 21,2009 at approximately 9:05 a.m. Raheem was involved in a fight with another student in front of the school building. Raheem initiated the confrontation by punching and then slamming the other individual to the ground. This referral is Raheem's 12th referral for the 2008–09 school year. He has previously been suspended from school for 22 days. Raheem is a habitual offender. . . . This is to notify you that I am suspending

In addition, the probation officer prepared a presentence report that was presented to the trial court and to the parties prior to sentencing. The presentence report indicated that many prior juvenile petitions had been filed against appellant, with several of those petitions resulting in probation or adjudications of guilt.[4] The presentence report also stated that appellant had been a member of the Bloods gang since he was about thirteen years old and that appellant admitted to a juvenile and domestic relations district court officer in August 2008 that he had risen to "the rank of 2-Star General" in that gang.

At the sentencing hearing, the Commonwealth argued that a life sentence for appellant's first-degree murder conviction was appropriate. In support of this argument, the prosecutor contended that appellant's prior record was "atrocious," that appellant's murder of the victim was "brutal,"

> Raheem for 10 school days and that I will forward a recommendation to the superintendent that the school board consider a long-term suspension/alternative educational placement.

In addition, it appears that appellant was suspended at least twice during the 2009–10 school year after hitting other students.

[4] For example, in November 2005, Johnson was charged with assault and battery. After being placed on probation, appellant was found guilty of a probation violation in February 2006. Appellant was also found guilty of disorderly conduct in April 2006. Johnson was then charged with assault and battery and brandishing a firearm in April 2008, and he was found guilty of that assault and battery offense in June 2008. Appellant remained on supervised probation until March 2010.

"heartless," and "sick,"[5] and that a life sentence would "guarantee the next two to three generations of Lynchburg residents that this defendant will no longer harm anyone on our streets." The prosecutor noted that appellant would be eligible to apply for geriatric parole at age sixty and asserted that it should be the role of "the geriatric parole board to make the determination whether it's ever safe for him to be released again." In response, appellant's counsel relied on the United States Supreme Court's decision in Miller for the view that "juveniles are different." Appellant's counsel asserted, "Whether you are an adult at eighteen by the law does not negate the psychological and scientific evidence that you remain a juvenile with regard to the development of the brain until your mid-twenties." Appellant's counsel requested that the trial court impose a total sentence that was within the recommended sentencing guidelines range of twenty-eight years, two months and forty-seven years of imprisonment.

The trial court decided to impose a life sentence for the first-degree murder conviction, explaining from the bench at the sentencing hearing:

> [I]n this case we had a helpless victim, the shooting was unprovoked, and it was cruel and

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[5] The victim's mother and the victim's girlfriend both testified at the sentencing hearing. The victim's girlfriend, who had dated the victim for eight years and is the mother of the victim's son, testified at sentencing that her then-three-and-a-half-year-old son "knows who his father is." She testified that the victim's death has been especially difficult for their son (who witnessed his father's murder), adding, "He remembers everything."

> callous. It was just mean. It was, it's as cruel and callous as anything I've seen since I've been sitting here on the bench and that's been awhile. Just totally unnecessary to put a bullet in this young man's head.

Appellant's counsel filed a motion for reconsideration. Summarizing the ways in which he alleged that the trial court had erred at sentencing, appellant's counsel argued in the motion for reconsideration, "Nothing announced in the court's imposition of sentence demonstrates an individualized sentencing taking into consideration the various characteristics of Raheem Chabezz Johnson detailed in the presentence report, the trial of the case, or the scientific studies of the brain received by the Court."

The trial court: denied the motion for reconsideration in a written order that also incorporated a letter opinion, in which the trial court found:

> The life sentence was imposed after careful consideration of your client's individual characteristics as reflected in the record, including without limitation, the presentence report and school records. The materials submitted with your letter dated September 4, 2012 were reviewed. The sentencing guidelines were also considered and felt to be inappropriate due to the horrendous nature of the crime. Raheem Chabezz Johnson has a history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense, make him, in my

> opinion, a danger to himself and others should he be returned to society.

II. ANALYSIS

A. SENTENCING IN VIRGINIA

Virginia's law pertaining to appellant's appeal of his sentence is well established.

> We review the trial court's sentence for abuse of discretion. Valentine v. Commonwealth, 18 Va. App. 334, 339, 443 S.E.2d 445, 448 (1994). Given this deferential standard of review, we will not interfere with the sentence so long as it "'was within the range set by the legislature'" for the particular crime of which the defendant was convicted. Jett v. Commonwealth, 34 Va. App. 252, 256, 540 S.E.2d 511, 513 (2001) (quoting Hudson v. Commonwealth, 10 Va. App. 158, 160–61, 390 S.E.2d 509, 510 (1990)).

Scott v. Commonwealth, 58 Va. App. 35, 46–47, 707 S.E.2d 17,23 (2011); see Abdo v. Commonwealth, 218 Va. 473, 479, 237 S.E.2d 900, 903 (1977) ("We have held in numerous cases that when a statute prescribes a maximum imprisonment penalty and the sentence does not exceed that maximum, the sentence will not be overturned as being an abuse of discretion."); see also Rawls v. Commonwealth, 272 Va. 334, 351, 634 S.E.2d 697, 706 (2006); Williams v. Commonwealth, 270 Va. 580, 584, 621 S.E.2d 98, 100 (2005); cf. Code § 19.2-298.01(F) (stating that a trial court's decision not to follow the discretionary sentencing guidelines range "shall not be reviewable

on appeal or the basis of any other post-conviction relief").

In this case, appellant was convicted of first-degree murder. That offense is a Class 2 felony, which is punishable by a statutory sentencing range of twenty years to life imprisonment. See Code § 18.2-32; see also Code § 18.2-10(b). The trial court sentenced appellant to life imprisonment for the first-degree murder conviction. That sentence did not exceed the statutory maximum penalty for first-degree murder. Accordingly, "the sentence will not be overturned as being an abuse of discretion" under Virginia law. Abdo, 218 Va. at 479, 237 S.E.2d at 903.

Nevertheless, appellant argues that the United States Supreme Court's recent decision in Miller requires this Court to reverse his life sentence for first-degree murder as a matter of federal constitutional law. Neither this Court nor the Supreme Court of Virginia previously has addressed Miller in a published opinion. To the extent that appellant's argument under Miller raises a question of constitutional interpretation, that issue is reviewed *de novo*. Lawlor v. Commonwealth, 285 Va. 187, 240, 738 S.E.2d 847, 877 (2013).

B. THE DECISION IN MILLER V. ALABAMA

The United States Supreme Court limited its review in Miller to the constitutionality of *mandatory sentencing statutes* that provide sentencing courts *no discretion* to sentence juvenile offenders to anything other than life sentences *without the possibility of parole*. Indeed, the first paragraph of the majority

opinion in Miller summarizes the issue before the Supreme Court and states the scope of its holding as a matter of constitutional law:

> The two 14-year-old offenders in this case were convicted of murder and sentenced to life imprisonment *without the possibility of parole.* In neither case did the sentencing authority have *any discretion* to impose a different punishment. State law *mandated* that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," Graham v. Florida, 560 U. S. __, __ (2010) (slip op., at 17, 23), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. *We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."*

Miller, 132 S. Ct. at 2460 (emphasis added); see also id. at 2461, 2463 (explaining that both juvenile defendants who petitioned the Supreme Court in Miller were sentenced under state statutes that mandated life without the possibility of parole for their offenses). The Supreme Court then repeated its

central holding in Miller - i.e., that a mandatory life sentence without the possibility of parole for juvenile offenders violates the Eighth Amendment's prohibition against cruel arid unusual punishments - at least two more times later in the majority opinion. See id. at 2468, 2475.

Thus, the Supreme Court clearly did not hold in Miller that *all* life sentences for juvenile offenders violate the Eighth Amendment. The Supreme Court in that case addressed a specific type of life sentence — a *mandatory* life sentence *without the possibility of parole*.[6] The Supreme Court expressly *declined* to consider in Miller whether "the Eighth Amendment requires a categorical bar" on all life sentences without the possibility of parole for juvenile offenders. See id. at 2469 ("[W]e do not consider [the petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger."). The Supreme Court's actual holding in Miller states that "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." Id. (emphasis added).

C. APPELLANT'S SENTENCE WAS WITHIN THE TRIAL COURT'S DISCRETION

It is plainly evident that the life sentence imposed by the trial court here passes the United

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[6] The majority opinion in Miller simply cannot be read outside of the context of a life sentence without the possibility of parole. Indeed, the phrases "without parole," "without the possibility of parole," and "life-without-parole" appear approximately seventy times in the majority opinion in Miller.

States Supreme Court's test for constitutionality that it expressed in Miller. An Eighth Amendment violation occurred in Miller, in the view of the Supreme Court, because the fourteen-year-old defendants were automatically sentenced to mandatory terms of life imprisonment without the possibility of parole for their offenses. By contrast, as discussed *supra,* the trial court here indisputably had the discretion to sentence appellant to a term that ranged from twenty years to life imprisonment for the first-degree murder that appellant committed about two months before his eighteenth birthday. That discretion alone places this case clearly outside of the category of cases that the Supreme Court addressed in Miller.[7]

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[7] Furthermore, contrary to appellant's argument on appeal, the trial court here actually *did* render an "individualized" sentencing decision in this case. See Miller, 132 S. Ct. at 2475 (noting that the Supreme Court's recent "individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles" (citing Graham v. Florida, 560 U.S. 48 (2010), and Roper v. Simmons, 543 U.S. 551 (2005)). In its letter opinion denying appellant's motion to reconsider - which the trial court incorporated in its final order - the trial court expressly stated that appellant's "life sentence was imposed after careful consideration of [appellant's] *individual* characteristics as reflected in the record" before the trial court at the time of sentencing. (Emphasis added). The trial court's statements indicating that it sentenced appellant on an individualized basis speak for themselves, and this Court will not second-guess them. See McBride v. Commonwealth, 24 Va. App. 30, 35,480 S.E.2d 126, 128 (1997) ("A court speaks through its orders and those orders are presumed to accurately reflect what transpired.").

Ultimately, the trial court found that a life sentence for appellant's first-degree murder of the victim was appropriate because appellant's prior record, "coupled with the brutality of the offense," made appellant "a danger to himself and others should he be returned to society." To hold that the trial court somehow lacked the discretion to impose a life sentence under the circumstances of this case would require us to step far outside the United States Supreme Court's holding in Miller — which addresses statutes *mandating* life sentences without the possibility of parole for juvenile offenders. In addition, the Supreme Court of Virginia has already held that geriatric parole under Code § 53.1-40.01 (for which appellant will be eligible to apply at age sixty) represents a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for purposes of the Eighth Amendment. Angel v. Commonwealth, 281 Va. 248, 275, 704 S.E.2d 386,402 (2011). Accordingly, it is clear that appellant's life sentence for the horrific

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As the trial court explained in its letter opinion, it considered the contents of the presentence report and appellant's school records. The trial court also explained that it reviewed the articles on adolescent brain development submitted by appellant's trial counsel. The trial court's decision not to accord those articles significant weight certainly will not be disturbed on appeal-given that the trial court exercised its discretion in selecting an appropriate sentence for appellant within the statutory sentencing range. See Williams, 270 Va. at 584, 621 S.E.2d at 101. The trial court also considered, but rejected, the range of recommended sentences under the sentencing guidelines, and that decision is not reviewable on appeal. See Code § 19.2-298.01(F).

first-degree murder of the victim in this case must be affirmed.

III. CONCLUSION

The trial court, in its discretion, sentenced appellant to life imprisonment for first-degree murder. This sentence was proper under Virginia law, given that life imprisonment is within the sentencing range for first-degree murder. Furthermore, the United States Supreme Court's decision in Miller simply does not apply here because Miller concerns the mandatory imposition of life imprisonment without the possibility of parole for juvenile offenders. Accordingly, for the foregoing reasons, we affirm appellant's life sentence for his first-degree murder conviction.

Affirmed.

Appendix C
Filed July 17, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

Present, the Honorable Mosby G. Perrow, III, Judge

July 17,2012

COMMONWEALTH OF VIRGINIA

v.

ORDER

Felony No. CR11022622-00-07 — First Degree Murder; Statutory Burglary with Intent to Commit Murder, Rape, or Robbery While Armed with a Deadly Weapon; Attempted Robbery, 2 Counts; Use of a Firearm During the Commission of a Felony, 4 Counts

Raheem Chabezz Johnson, DOB [REDACTED]

Defendant.

This day came the Commonwealth, represented by Charles Felmlee and Bethany Harrison, and Raheem Chabezz Johnson, who stands indicted for felonies, to-wit: first degree murder, statutory burglary with intent to commit murder, rape, or robbery while armed with a deadly weapon, attempted robbery, 2 counts, and use of a firearm during the commission of a felony, 4 counts, appeared in proper person, in custody, and came Leigh Drewry, defense counsel previously appointed, and came also the jury, previously sworn according to their adjournment.

The evidence was presented by the Commonwealth, and at the conclusion thereof, the defendant, by counsel, made a motion to strike the Commonwealth's evidence as to the charges of statutory burglary with intent to commit murder, rape, or robbery while armed with a deadly weapon, and attempted robbery, 2 counts, for the reasons stated to the record, which motion the Court overruled, and exception was noted.

Thereupon the defendant presented his evidence and renewed his motion to strike the Commonwealth's evidence, which motion the Court overruled, and exception was noted.

After hearing all the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words, to-wit: "We, the jury, find the defendant guilty of first degree murder, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of statutory burglary with the intent to commit murder of robbery while armed with a deadly weapon, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of the attempted robbery of Timothy Irving, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of the attempted robbery of Artenna Horsley-Robey, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm during the commission of murder, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a

firearm during the commission of burglary, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm during the commission of the attempted robbery of Timothy Irving, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm during the commission of the attempted robbery of Artenna Horsley-Robey, as charged in the indictment. Steven Powers, Foreman."

The Court enters judgment on the verdict as to guilt and the jury was discharged.

Thereupon, the defendant, by counsel, renewed his motion to strike the Commonwealth's evidence, and made a motion to set aside the verdict, for reasons stated on the record, to which motions the Court doth deny.

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, and sentencing is set for September 14, 2012 at 2:00 o'clock p.m., to which time this case is continued. The Court doth order that the defendant submit to a substance abuse screening and follow-up pursuant to Section 18.2-251.01 as deemed appropriate by the Probation Officer.

The Court certifies that at all times during the trial of this case the defendant was personally present and defense counsel was likewise personally present and capably represented the defendant.

And the defendant is remanded to jail.

Appendix D
Filed August 15, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

Present, the Honorable Mosby G. Perrow, III, Judge

August 15, 2012

COMMONWEALTH OF VIRGINIA

v.

ORDER

Felony No. CR11022622-00-07 — First Degree Murder; Statutory Burglary with Intent to Commit Murder, Rape, or Robbery While Armed with a Deadly Weapon; Attempted Robbery, 2 Counts; Use of a Firearm During the Commission of a Felony, 4 Counts

Raheem Chabezz Johnson, DOB [REDACTED]

Defendant.

This day came the Commonwealth's Attorney, represented by Charles Felmlee, and the defendant, Raheem Chabezz Johnson, in proper person, and came also Leigh Drewry, defense counsel previously appointed.

Thereupon, the defendant, by counsel, made a motion to appoint a neuropsychologist, for reasons stated on the record, to which the Commonwealth was opposed, and the Court, having heard evidence and argument of counsel, doth deny said motion, and exception was noted.

And this case is continued to September 14, 2012 at 2:00 o'clock p.m. for sentencing.

And the defendant is remanded to jail.

Appendix E
Filed October 5, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

FIPS CODE 680

Hearing Date: October 5, 2012

Judge: Mosby G. Perrow, III

COMMONWEALTH OF VIRGINIA

v.

ORDER

Felony No. CR11022622-00-07 — First Degree Murder; Statutory Burglary with Intent to Commit Murder, Rape, or Robbery While Armed with a Deadly Weapon; Attempted Robbery, 2 Counts; Use of a Firearm During the Commission of a Felony, 4 Counts

Raheem Chabezz Johnson, Defendant.

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, Leigh Drewry. The Commonwealth was represented by Charles Felmlee.

On July 17, 2012, the defendant was found guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION & INDICATOR FELONY/MISDEMEANOR (F/M)	OFFENSE DATE	CODE SECTION
CR11022622-00	First Degree Murder (F) MUR0925F2	4/11/2011	18.2-32
CR11022622-01	Statutory Burglary with Intent to Commit Murder Or Robbery While Armed with a Deadly Weapon (F) BUR2212F2	4/11/2011	18.2-90
CR11022622-02	Attempted Robbery (F) ROB1214A9	4/11/2011	18.2-58 & 18.2-26
CR11022622-03	Attempted Robbery (F) ROB1214A9	4/11/2011	18.2-58 & 18.2-26
CR11022622-04	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/2011	18.2-53.1
CR11022622-05	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/2011	18.2-53.1
CR11022622-06	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/2011	18.2-53.1
CR11022622-07	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/20011	18.2-53.1

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

Pursuant to the provisions of Code Section 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.

The Court SENTENCES the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: life on the charge of first degree murder, 20 years on the charge of statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, 2 years on each of the attempted robbery charges, 3 years on the charge of use of a firearm during the commission of a felony (CR11022622-04), and 5 years on each of the use of a firearm during the commission of a felony charges (CR11022622-05-07). The total sentence imposed is life plus 42 years.

These sentences shall run consecutively with any other sentences imposed.

Costs. The defendant shall pay the costs of this prosecution in accordance with a schedule prepared by the Clerk.

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

And the defendant is remanded to jail.

DEFENDANT IDENTIFICATION:

Alias:
SSN: [REDACTED] DOB: [REDACTED]
Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Life, plus 42 years

TOTAL SENTENCE SUSPENDED: none

TOTAL SENTENCE TO SERVE: Life, plus 42 years

Appendix F
Filed March 24, 2017

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 24th of March, 2017.

Raheem Chabezz Johnson, Appellant,

against Record No. 141623
Court of Appeals No. 1941-12-3

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 15th day of December, 2016 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Kelsey and Justice McCullough took no part in the consideration of this case.

A Copy,

Test:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

Appendix G
Filed October 23, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

ORDER CR11022622

The Motion to reconsider life sentence filed by Raheem Chabezz Johnson, by counsel, in the Clerk's Office of the Circuit Court for the City of Lynchburg on October 15, 2012, is denied. The Court's letter to B. Leigh Drewry, Jr., counsel for the defendant, dated October 23, 2012, is incorporated herein by reference.

Endorsement by counsel is dispensed with and the objection of the defendant to the Court's action is noted. The Clerk is directed to forward a certified copy of this order to B. Leigh Drewry, Jr., counsel for the defendant, and to the Charles Felmlee, Deputy Commonwealth's Attorney for the City of Lynchburg.

Entered this 23 day of October, 2012

Judge

[LETTERHEAD OMITTED]

October 23, 2012

B. Leigh Drewry, Jr., Esq.
Cunningham & Drewry
105 Archway Court
Lynchburg/ VA 24502

Re: Commonwealth of Virginia v.
Raheem Chabezz Johnson

Dear Mr. Drewry:

I have reviewed the defendant's motion to reconsider the life sentence imposed by the Court upon his conviction by a jury of first degree murder. The motion will be denied without a hearing.

The life sentence was imposed after careful consideration of your client's individual characteristics as reflected in the record, including without limitation the presentence report and school records. The materials submitted with your letter dated September 4, 2012, were reviewed. The sentencing guidelines were also considered and felt to be inappropriate due to the horrendous nature of the crime. Raheem Chabezz Johnson has a history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense l make him, in my opinion, a danger to himself and others should he be returned to society.

Very truly yours,

Mosby G. Perrow, III, Judge

MGP, III/vkh
cc: Charles Felmlee, Esq.
Eugene Wingfield, Clerk

Appendix H
Filed August 1, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

File No. CR11-022622-00

COMMONWEALTH OF VIRGINIA

Plaintiff,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

MOTION

COMES NOW Raheem Chabezz Johnson, by counsel, and respectfully moves this Honorable Court for an Order appointing Joseph Conley, Ph.D., to serve as an expert in preparation for the sentencing hearing currently scheduled for Friday, September 14, 2012 at 2:00 p.m. In support of this motion, Raheem Chabezz Johnson says as follows:

1. *Ake v. Oklahoma,* 470 U.S. 68 (1985) and *Husske. v. Commonwealth,* 252 Va. 203, 476 S.E.2d 920 (1996) hold that upon a showing of a specific need due process requires an indigent defendant be afforded the same resources as a defendant capable of employing his own experts.

2. Raheem C. Johnson is indigent and currently represented by appointed counsel.

3. Raheem C. Johnson was convicted by a jury on Tuesday, July 16, 2012 on the charges of first degree

murder, statutory burglary with the intent to commit murder or robbery while armed with a deadly weapon, two (2) counts of attempted robbery, and four (4) counts of use of a firearm in the commission of a felony.

4. Sentencing is currently scheduled for Friday, September 14, 2012 at 2:00 p.m.

5. A presentence investigation report has been directed to be prepared by the Court pursuant to **VA CODE ANN § 19.2-299**.

6. **VA CODE ANN § 19.2-299** says the probation officer shall "thoroughly investigate and report upon the history of the accused, ... and **all other relevant facts to fully advise** the Court so the Court may determine the appropriate sentence to be imposed." (Emphasis added.)

7. *Miller v. Alabama*, __ U.S. __ (June 25, 2012, slip op. at 6) has found "[t]he concept of proportionality is central to the Eighth Amendment." (Internal citations omitted.)

8. The standard presentence report does not explore the development of an individual's brain or how mature the individual's brain is.

9. Peer reviewed literature in the field of psychology reveals an individual's brain does not fully mature until the mid-twenties, with males maturing later than females.

10. This same literature demonstrates numerous cognitive deficits go undetected by the layman and in the absence of a proper examination.

11. Joseph Conley, Ph.D., is a licensed clinical neuropsycologist [sic] who has devoted his practice to the study of the maturation of the brain and its functioning.

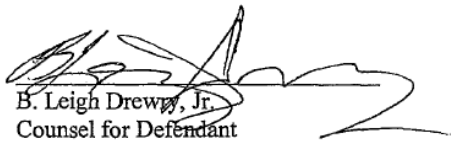
12. Raheem C. Johnson is currently 19 years of age.

13. An examination of Raheem C. Johnson by Joseph Conley, Ph.D., will provide relevant facts specific to Raheem C. Johnson so as "to fully advise the court" of all matters specific to Raheem C. Johnson and allow the fashioning of a sentence in compliance with the 8th Amendment to the United States Constitution.

14. It is expected Dr. Conley's services will cost $2,000.

Wherefore, Raheem Chabezz Johnson respectfully requests this Honorable Court enter an Order appointing Joseph Conley, Ph.D., to assist counsel for Raheem Chabezz Johnson in the development of additional facts specific to Defendant in the preparation of his sentencing hearing scheduled for September 14, 2012.

Respectfully Submitted,



B. Leigh Drewry, Jr.
Counsel for Defendant

[CERTIFICATE OF SERVICE OMITTED]

Appendix I
Filed August 15, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA

Plaintiff,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE MOSBY G. PERROW, III, PRESIDING

AUGUST 15, 2012

Lynchburg, Virginia

FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF LYNCHBURG
DATE 14/4/12 TIME 1030 AM
TESTE: EUGENE C. WINGFIELD, CLERK
BY: _____ Dep. Clerk

Vicki K. Hunt
P. O. Box 11292
Lynchburg, VA 24506
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[Pgs. 1–2 Omitted]

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THE CLERK: Commonwealth versus Raheem Johnson

THE COURT: Alright. Counsel are we ready?

MR. FELMLEE: We are, Your Honor

MR. DREWRY: Yes, Sir.

THE COURT: And we're here on your motion, Mr. Drewry, for appointment. My docket says of a neuropsychologist.

MR. DREWRY: Yes, Sir, Judge.

THE COURT: To assist with the sentencing?

MR. DREWRY: Yes, Sir.

THE COURT: Alright.

MR. DREWRY: Judge . The , uh, the last - - I think the motion is the last four pages in that file that you have.

We're making this motion on several grounds. One., Ake v. Oklahoma, and Husske v. Commonwealth 1996 version of Ake, asking for a. specific situation. And we would submit that the subsequent reasons are the specific reasons outlined. 19.2-299 is the presentence investigation report statute which this Court is ordered

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to be direct, or has directed to be prepared. Within that Code section, it directs the probation officer to thoroughly investigate and report from the history of

the accused, and emphasis towards the end, all other relevant facts to fully advise the Court so as the Court may determine the appropriate sentence to impose.

And then I cite the Court to my new favorite case Miller v. Alabama, which is a capital case, that emphasizes proportionality as central to the Eighth Amendment. We would submit, Judge, that the probation officer does not have the ability to collect the necessary details about what is happening within my client's mind, how my client's mind has developed. And he's still only nineteen. And research within the field of psychology indicates that the human brain does not fully mature until the mid-twenties and later for males than for females. There's also some indication in talking to Dr. Conley that there may be additional developmental delays in my particular client that can only be confirmed with regard to testing.

So we would submit that Dr. Conley's facts or unique abilities allow us to develop' the other relevant facts needed to individualize the punishment that this Court is going to have to mete out when we return in

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September. And ask the Court to enter the order.

THE COURT: Mr. Felmlee.

MR. FELMLEE: Your Honor, the Commonwealth is opposed to this order. We do not believe the defense has shown a particularized need for this particular expert. Reading from the Husske case that Mr. Drewry cited in his motion, it states that the

Commonwealth of Virginia upon request must provide indigent defendants with the basic tools of an adequate defense. This defendant is indigent, Mr. Drewry has been appointed in this case. The case goes on to state this requirement, however, does not confer a right upon an indigent defendant to receive at the Commonwealth's expense all assistance that a non-indigent defendant may purchase. The indigent defendant who seeks appointment of an expert must show a particularized need. Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided. The determination whether the defendant has made an adequate showing of particularized necessity lies within the discretion of the trial judge and will not be overturned unless plainly wrong.

Your Honor, in this case, I believe, you know, this is not an issue of competency to stand trial. This is not an issue of insanity. I think the Commonwealth

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has provided the basic tools of an adequate defense for this defendant already. I think Your Honor in this case appointed a private investigator at the Commonwealth's expense to assist the defense in their preparation. There was also an ex parte judge, Judge Yeatts was appointed as an *ex parte* judge. And I believe the Commonwealth was put on notice that Dr. Michael Light, a renowned professor from New York University was gonna be traveling down at the Commonwealth's expense to potentially testify at the trial stage. The defense elected not to call him as a witness. But we had two outside people that were

provided funds. The private investigator, potentially this professor from the State of New York.

Your Honor, in the defense's motion bullet point eight states that the standard presentence report does not explore the development of an individual's brain or how mature the individual/s brain is. Bullet point nine goes on to state that the brain is not fully mature until the mid-twenties. I think it's just sort of common sense, you know, as you get older, you get more mature. We're not dealing with a jury sentencing. We/re dealing with Your Honor. Your Honor is gonna be sentencing this-defendant. This is not a capital case. He's not looking at the death penalty. He's not looking at life in prison without parole. No matter what sentence this Court fashions on

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the defendant at age sixty this defendant will be eligible for geriatric parole if he petitions the parole board.

So what we've seen in this motion, I — we do not believe the defense has shown a particularized need. This is sort of just common sense that you're not, you're — you're more mature when you're twenty-five than you are when you are, when you're seventeen. This defendant was seventeen years old and approximately ten months when he committed this homicide. And now all of a sudden he's the older he gets the more mature he will be getting.

So for these reasons, Your Honor, it would be at a cost of two thousand dollars to the Commonwealth. We do not believe the defense has shown a particularized need. We believe we've provided, the Com-

monwealth has provided the defense with the adequate tools of defense. We do not believe this is — this is needed for this case.

THE COURT: Mr. —

MR. DREWRY: Judge

THE COURT: Mr. Drewry.

MR. DREWRY: If we're gonna get into a dollar and cents calculation, which I submit that we shouldn't.

THE COURT: I think the case law says fundamental fairness over weighs cost to the Commonwealth, Mr. Drewry.

[Pgs. 8–9 Omitted]

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MR. DREWRY: The reality is that we're stuck with the problems that I don't have all of the tools. And I understand that indigent doesn't equal. And that's part of the problem. Indigent doesn't equal retained client or a retained attorney. That creates a dual system in violation of equal protection. But more importantly in this case, Miller v. Alabama looks at the Eighth Amendment and says that proportionality has to be involved and Miller also goes on as do other cases, in traditional cases not capital cases, say that punishment has to be tailored for the individual. This helps the Court in the words of presentence find the relevant factors for that tailoring.

THE COURT: Well, you're telling me there's nothing in the school records that would support your position that this evaluation is needed? Other than.

MR. DREWRY: No, Sir.

THE COURT: Okay. Well, Mr. Drewry, I don't think you've shown a particularized need. I don't think Miller requires this evaluation in every case where the accused was a juvenile at the time he — of the offense. He's been convicted, he's now an adult. You know, this — and I don't think there's anything in the case law that requires us to have every individual who has been convicted of an offense committed when he was a

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juvenile to have this type of evaluation.

I'm gonna deny your motion and your exception is noted.

I'd be willing to review the school records but you obviously have and there's nothing in them that would support your position.

MR. DREWRY: Judge, the Court. is making a ruling based upon the fact that you believe that I'm gonna be asking for this or that other lawyers are gonna be asking for this —

THE COURT: No.

MR. DREWRY: in every juvenile situation. That's not the case. I'm asking for it in this case. In this case only.

THE COURT: I'm saying you haven't shown a particularized need, Mr. Drewry.

MR. DREWRY: Judge, it's not sole — this motion is not based solely upon a particularized need. It's based upon 19.2-299 and the presentence investigation. And you're not gonna be able to get the relevant

facts that are available in this case by this examination.

THE COURT: Alright. Well, you have my ruling. Your exceptions noted.

(Whereupon the proceeding was concluded)

Appendix J
Filed September 4, 2012

[Letterhead Omitted]

The Honorable Mosby O. Perrow, III. Judge
Lynchburg Circuit Court
P.O. Box 4
Lynchburg, VA 24505

Re: Commonwealth v. Raheem Chabezz Johnson

Dear Judge Perrow:

On Wednesday, August 15,2012, you heard a defense motion seeking the appointment of Joseph Conley, Ph.D., a licensed clinical neuropsychologist, to serve as a defense expert in preparation for sentencing in this case currently set for Friday, 'September 14, 2012.

The Commonwealth argued the defense had failed to show a specific reason for the need to appoint an expert in this matter. The chief thrust of the prosecution's argument was that it is common sense an individual of Mr. Johnson's age was not as mature as an individual of thirty (30) years of age. While not agreeing in *toto*, the defense agreed there was maturing still occurring as an individual aged.

My argument went on to say there were additional changes to the brain as one aged.

Unfortunately, it appears the prosecution and the defense were using the same word to describe two distinct concepts. I am also afraid I failed to properly identify the reasons why I believe Dr. Conley, as a

licensed, clinical neuropsychologist, should be appointed.

A quick reference to Webster's New Collegiate Dictionary (1976) and to the online version of the free Miriam-Webster Dictionary highlights the difference in concepts represented by the single word, "mature". Both dictionaries identify "mature" as an adjective. The first definition of "mature" as an adjective defines it as "slow, careful consideration".

The second definition for the adjective "mature" says it is "having completed natural growth and development."

The 1976 version of Webster's goes on to identify "mature" as a verb meaning to become fully developed or ripe.

It appears the prosecution was using the word "mature" to mean that as one ages the individual acquires the ability to give their action mature consideration.

On the other hand, I was referring to the growth and the physiological changes the adolescent brain experiences until fully developed.

Since our August 15, 2012 hearing, I have been able, with the help of Dr. Conley, to identify four (4) articles which illustrate my definition of "mature". Two (2) of these articles are "Adolescence, Brain Development, and Legal Culpability", Journal of the American Bar Association, January, 2004 and Section 3, "Adolescent Brain" from Wisconsin Council on Children & Families, Rethinking the Juvenile in Ju-

venile Justice (2006). I have enclosed a copy of both of these articles for your review.

These articles identify four (4) physiological changes occurring in the adolescent brain as it progresses towards its completed development.

The first is an explosion of a gray matter which is that portion of the brain involved in thinking. This explosion of gray matter, results in the development of additional synapses. Following the explosion of gray matter the brain engages in a process these articles refer to as "pruning". The pruning is in fact myelination, which is the installation of insulation and the creation of the white matter portion of the brain. This myelination creates a more precise and efficient brain and allows thought processes to clarify.

The articles also confirm the prefrontal cortex continues to grow in size serving as a check on the amygdala.

It is important to remember as individuals enter adolescence the amygdala, which controls emotion, is the predominant structure within the brain. It is only after the prefrontal cortex has completed its development is it able to overcome the emotion generated by the amygdala. Please keep in mind included in emotion is the body's natural response known as "fight or flight".

As individuals enter adolescence their body is awash in new hormones, particularly, testosterone. Testosterone only serves to aggravate the emotional response of the amygdala. At the same time the adolescent brain is experiencing this infusion of

testosterone, it is dealing with an inadequate supply of the neurotransmitter dopamine. This depressed level of dopamine does not allow for the efficient operation of the prefrontal cortex and an overriding of the emotion of the amygdala. Therefore, adolescents tend to engage in higher risk behaviors than adults in their effort to receive the same emotional satisfaction all human beings seek.

In addition to these four (4) physiological components there are a variety of traumatic experiences which have an impact upon the physiological development of the brain. These experiences include, but are not limited to, family dysfunction, poverty, neglect, and a mental health diagnosis such as Attention Deficit Hyperactivity Disorder (ADHD). A review of school records along with the records of the Lynchburg Department of Social Services reveals Mr. Johnson experienced all of these and most likely additional events which adversely impacted the physiological development of his brain. Only an in-depth examination by an expert, such as Dr. Conley, will allow the court, at sentencing, to more fully appreciate the individual characteristics of Mr. Johnson as you seek to fashion a sentence specific to him.

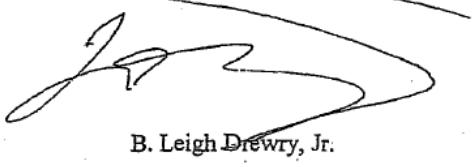
I submit this letter along with the articles I have enclosed provide the court with the specificity case law requires to appoint Dr. Conley as an expert to assist the defense in the sentencing of this matter.

Should the court agree and elect to appoint Dr. Conley, please accept this letter as my additional request for a continuance of the sentencing currently set for Friday, September 14, 2012.

Should the court reject the request to appoint an expert and to continue this matter, I ask the court to accept these two (2) articles and the additional two (2) articles you will find enclosed as the "common sense" exhibits referenced by the prosecution.

Thank: you very much for your attention to this matter.

Sincerely,



B. Leigh Drewry, Jr.

BLD/lag
Enclosures:
cc: Chuck Felmlee
Raheem Johnson
Eugene Wingfield, Clerk

Appendix K
Filed October 5, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA

Plaintiff,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE MOSBY G. PERROW, III, PRESIDING

OCTOBER 5, 2012

Lynchburg, Virginia

FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF LYNCHBURG
DATE 12/4/12 TIME 1030 AM
TESTE: EUGENE C. WINGFIELD, CLERK
BY: _____ Dep. Clerk

Vicki K. Hunt
P. O. Box 11292
Lynchburg, VA 24506
(434) 851-8991

[Pgs. 1–22 Omitted]

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Is there anything you want to say before the Court sentences you?

THE DEFENDANT: No, Sir.

THE COURT: Alright. Well, Mr. Johnson, in this case we had a helpless victim, the shooting was unprovoked, and it was cruel and callous. It was just mean. It was, it's as cruel and callous as anything I've seen since I've been sitting here on the bench and that's been awhile. Just totally unnecessary to put a bullet in this young man's head.

Upon your conviction of use of a firearm in the commission of murder, I'm gonna sentence you to the mandatory three years confinement in the penitentiary.

Upon your conviction of use of a firearm in the commission of statutory burglary — not statutory burglary, uh, yeah, statutory burglary, I'm gonna sentence you to five years confinement in the penitentiary.

Mandatory use of firearm in the commission of attempted robbery, two counts, five years on each count.

Upon your conviction of attempted robbery, two counts, I'm gonna sentence you to two years confinement in the penitentiary on each count.

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Upon your conviction of burglary with the intent to commit robbery, I'm gonna sentence you to twenty years confinement in the penitentiary.

And upon your conviction of first degree murder, I'm gonna sentence you to life in prison.

Mr. Drewry, you can advise him with regard to his appeal.

MR. DREWRY: I've already done it and I'll take care of it.

THE COURT: Alright. Alright. Anything further?

MR. FELMLEE: No, Your Honor.

THE COURT: Alright.

(Whereupon the proceeding was concluded)

Appendix L
Filed October 15, 2012

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

File No. CR11-022622-00

COMMONWEALTH OF VIRGINIA

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

MOTION

COMES NOW Raheem Chabezz Johnson, by counsel, and respectfully moves this Honorable Court to reconsider its sentence of life in the penitentiary upon the charge of First Degree Murder entered on Friday, October 5, 2006. In support of this Motion, Raheem Chabezz Johnson says as follows:

1. He was initially indicted by the Lynchburg Circuit Court Grand Jury on the charge of capital murder in violation of VA CODE ANN §§ 18.2-30 and 31.

2. At the time of the alleged offense, Raheem Chabezz Johnson was 17 years of age.

3. Under VA CODE ANN §§ 18.2-10 and 31 and case law, Raheem Chabezz Johnson faced only one possible sentence if convicted of this offense, life without the possibility of parole.

4. On June 25, 2012 the United States Supreme Court issued its opinion in Miller v. Alabama, __ U.S.

__ (June 25, 2012) which held such sentences were unconstitutional.

5. The United States Supreme Court said, "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." Miller v. Alabama, supra. (slip op. at p. 17.)

6. The Court acknowledged "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" Miller v. Alabama, supra (slip op. at p. 8.)

7. The Court went on to say. "And in Graham, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds' - for example, in 'parts of the brain involved in behavior control.' ... We reasoned that those findings - of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed'". Miller v. Alabama, supra. (slip op. at p 9.)

8. The Court enunciated a variety of other reasons for its holding which Raheem Chabezz Johnson adopts in support of this Motion.

9. In a letter dated September 4, 2012 to this Court, counsel for Raheem Chabezz Johnson provided several articles detailing some of what the United States

Supreme Court referenced in its Miller v. Alabama opinion.

10. At sentencing, the trial court acknowledged receiving this letter and these articles and made them a part of the record.

11. The sentencing court, however, did not rely on Miller v. Alabama nor on these articles to mitigate the life sentence nor to individualize the punishment it imposed upon Raheem Chabezz Johnson.

12. Instead, the Court accepted the recommendation of the prosecutor in the instant case and imposed life in the penitentiary without consideration of Raheem Chabezz Johnson's individual characteristics as required by Miller v. Alabama, supra and Graham v. Florida, 560 U.S. __ ,130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010).

13. This action ignores only 18% of the prisoners eligible for geriatric parole in 2011 applied and of this number only 2.3% were given geriatric release. In other words, only three (3) of 719 inmates eligible for early release received it, 0.4%. "Geriatric offenders within the SR Popluation" [sic] Virginia Department of Corrections, Research and Forecast Unit, August 2012.

14. Such statistics fail to establish a "realistic opportunity to obtain" an early release from a life term as required by Graham v. Florida, supra, 560 U.S. at __, 130 S. Ct. at 2034 and Miller v. Alabama, supra.

15. The Court announced from the bench this was the most cruel and calloused homicide it had witnessed during its tenure.

16. Such comments ignore the reality the same trial judge presided in the case of Commonwealth v. Winston which saw the initial imposition of the death penalty for the killing of a pregnant woman in the presence of her two (2) minor children and Commonwealth v. Kenneth J. Davis which resulted in an active prison term of 35 years for the beating death of an eighty-five (85) years old gentleman walking on the streets of the City of Lynchburg. The latter defendant was a juvenile at the time the offense was committed.

17. The instant case involved in the killing of a young man involved in the drug trade before his girlfriend and two year old child.

18. Nothing announced in the Court's imposition of sentence demonstrates an individualized sentencing taking into consideration the various characteristics of Raheem Chahezz Johnson detailed in the presentence report, the trial of the case, or the scientific studies of the brain received by the Court.

WHEREFORE, Raheem Chabezz Johnson respectfully requests this Honorable Court modify its sentence of life in the penitentiary and impose a sentence in keeping with Raheem Chabezz Johnson's youth, his ability to mature and develop mentally and psychologically, and the sentencing guidelines detailed in the presentence report as required by *Miller v. Alabama, supra.*

Respectfully Submitted,

RAHEEM CHABEZZ JOHNSON

By: Of Counsel

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[CERTIFICATE OF SERVICE OMITTED]