IN THE

Supreme Court of Virginia

RECORD NO. 131385

DONTE LAMAR JONES,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

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

"finding that the existence of any aggravating factor is a decision of fact to be made by the jury." *Id.* at 41.

Subsequently, at the urging of his court-appointed counsel, Jones agreed to enter an *Alford* plea on the capital charge in exchange for an agreement that he would not be sentenced to death, but would be sentenced to life without the possibility of parole--as mandated by Virginia law for individuals convicted of capital murder and not sentenced to death.[1] *Id.* at 44. When it came time for the later sentencing of Jones on the ten lesser-included offenses, Jones' assigned probation and parole officer, while acknowledging that Jones had made a "positive adjustment" to life in prison and was not considered a "security risk," asserted that the victim, her family, and friends "deserve retribution" and urged the Circuit Court to "impose a sentence in excess of the high end of the Virginia Sentencing Guidelines." *Id.* at 106.

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[1] The Virginia statute pursuant to which Jones was sentenced, Virginia Code Section 18.2-10(a), subsequently was amended to render juveniles ineligible for the death penalty after the U.S. Supreme Court held in *Roper v. Simmons*, 543 U.S. 551, 578 (2005) that the Eighth and Fourteenth Amendments to the U.S. Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."

With the knowledge that Jones' earlier sentence on the capital count to life without the possibility of parole meant Jones would remain in prison for the rest of his days, the Circuit Court imposed an additional life sentence plus a term of 68 years on the ten lesser-included offenses. *Id.* at 52-53.

While Jones was serving his sentence, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), in which the Court held that the mandatory imposition of a life sentence without the possibility of parole for a juvenile violates the Eighth Amendment. Upon learning of the *Miller* decision, Jones filed a pro se Motion to Vacate Invalid Sentence on June 5, 2013. J.A. at 55. A week later, on June 13, 2013, the Circuit Court *sua sponte* denied the motion, finding--without a hearing and without affording Jones an opportunity to submit any evidence in support of his application--that "there is nothing new in mitigation of the offense." *Id.* at 65. Because Jones did not receive the Circuit Court's order until after the time period to appeal had expired, he sought and this Court granted him an extension of time to file his notice of appeal. *Id.* at 72, 88.

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

ASSIGNMENT OF ERROR

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

influences and outside pressures' . . . and lack the ability to extricate themselves from horrific, crime-producing settings.'" *Id.* Finally, the character of a child is less "'well-formed'" such that his actions are "less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Id.*

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

"[T]he distinctive attributes of youth" also lessen any penological justifications for imposing the harshest of sentences on juveniles. *Id.* "The heart of the retribution rationale is that a

criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Roper*, 543 U.S. at 571. "[T]he same characteristics that render juveniles less culpable than adults[--transient rashness, proclivity for risk, and inability to assess consequences--] suggest as well that juveniles will be less susceptible to deterrence." *Id.* Nor is incapacitation as a sentencing goal compelling for juveniles because it would require "the sentencer to make a judgment that the juvenile is incorrigible," and "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Graham*, 560 U.S. at 73 (quoting *Roper,* 543 U.S. at 572). Indeed, it is "juvenile offenders . . . who are most in need of and receptive to rehabilitation." *Id.* at 74.

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

offender." *Id.* at 2466. The Court further determined that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features, . . . the family and home environment, . . . the circumstances of the homicide offense, . . . the incompetencies [of] youth, . . . and disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 2468. Because "such a scheme poses too great a risk of disproportionate punishment," punishment that is excessive in light of the lessened moral culpability of a juvenile, the Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469.

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

The U.S. Supreme Court's determination in *Miller* that the Eighth Amendment prohibits the mandatory sentencing of juveniles to life without the possibility of parole is a "new" constitutional rule that was announced after Jones' conviction and

sentence became final.[2] Application of the *Miller* rule to Jones thus requires a determination that the *Miller* rule applies to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 299-300 (1989); *Mueller v. Murray*, 252 Va. at 361-62. As is evident from the Supreme Court's decision in *Miller* and analogous precedent, it clearly does.

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

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

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

sentence also clearly was final before the *Miller* decision issued because Jackson's case was before the U.S. Supreme Court on collateral review. *Id*.

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

Any suggestion that the Supreme Court's application of the *Miller* rule to Jackson is not indicative of a determination by the Supreme Court that *Miller* should apply on collateral review is

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

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

The reason *Miller* applies on collateral review is because the new rule announced in *Miller* is substantive in nature. "New substantive rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (emphasis omitted). New substantive rules generally apply retroactively (*i.e.*, to cases on collateral review) because they involve "substantive categorical guarantees," *Penry*, 492 U.S. at 329, such as those that seek to address a "significant risk that a defendant . . . faces a punishment that the law cannot impose upon him," *Schriro*, 542 U.S. at 352. New substantive rules thus include rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330, and rules "making a certain fact essential" prior to the imposition of a particular sentence, *Schriro*, 542 U.S. at 354 (stating that a rule "making a certain fact essential to the death penalty . . . would be substantive"). The new rule announced in *Miller* is substantive in both respects.

First, *Miller* prohibits a certain category of punishment, *i.e.*, *mandatory* life without parole, for a class of defendants because of their status, *i.e.*, for juveniles because of their age. *See Miller* at 2469. That *Miller* properly is viewed as prohibiting a "category" of punishment (mandatory life without parole), even though it does not bar a life sentence without the possibility of parole for juveniles under all circumstances, is evident from Virginia's sentencing statutes. Under Virginia law, a capital offense is punishable as a Class 1 felony, which requires that a juvenile be sentenced to life without the possibility of parole. Va. Code §§ 18.2-10(a), 18.2-31. *Miller* prohibits juveniles from receiving a mandatory sentence of life without the possibility of parole. As the Virginia Senate has recognized, *Miller* thus requires that juveniles in Virginia receive an alternative category of punishment, and the Senate has proposed that they receive the sentence authorized for Class 2 felonies. *See* Senate Bill No. 809 (proposing to amend Section 18.2-10(a) to provide that a defendant who is convicted of a Class 1 felony but was "under 18

years of age at the time of the offense . . . shall be [sentenced for] a Class 2 felony").

Second, *Miller* additionally requires that the sentencer make a "certain fact essential" before sentencing a juvenile to life without the possibility of parole--that the juvenile to be sentenced is "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. As the Court explained, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* *Miller* is analogous in this respect to those cases in which the U.S. Supreme Court has held that a mandatory death penalty statute violates the Eighth Amendment because it "preclude[s] consideration of relevant mitigating factors." *E.g., Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The rule announced in these death penalty cases, like the rule announced in Miller, has been

held to apply retroactively to claims on collateral review. *See e.g., Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985 (en banc) (per curiam) (stating "[t]here is no doubt . . . *Lockett* is retroactive").

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

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

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

involving juveniles. *Whorton v. Bockting,* 549 U.S. 406, 408 (2007). Therefore, if not deemed a new substantive rule of constitutional law, the new rule announced in *Miller* properly is viewed as a watershed rule of criminal procedure that applies retroactively to Jones because it implicates the fundamental fairness and accuracy of criminal proceedings involving juveniles.

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

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

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

potential for rehabilitation that *Miller* tells us juveniles are most receptive to. *Id.* at 111-114.

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

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

Both the Commonwealth and the Virginia Senate have recognized as a result that a sentence of "imprisonment for life" under Section 18.2-10(a) violates *Miller*. In a case prosecuted shortly after *Miller* was decided, the Commonwealth moved--"[i]n response to the decision in *Miller*"--to amend the capital murder indictment of a juvenile to change it to a charge of first degree murder, a Class 2 felony "punishable by a range of twenty years

to life imprisonment" and for which a prisoner is eligible for conditional release under the geriatric parole statute. *Johnson v. Commonwealth*, 63 Va. App. 175, 178, 755 S.E.2d 468, 469 (Ct. App. 2014). The Virginia Senate also passed a bill last year seeking to amend Section 18.2-10(a) to provide that a defendant who is convicted of a Class 1 felony but was "under 18 years of age at the time of the offense . . . shall be [sentenced for] a Class 2 felony," i.e. "imprisonment for life or for any term not less than 20 years" under § 18.2-10(b). The Senate explained that "[t]his bill is in response to Miller v. Alabama (567 U.S.___, 2012) where the United States Supreme Court held that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders." SB 809, Va. Gen. Assembly Legislative Info. Sys., http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB809 (last visited May 26, 2014).

Jones also was not afforded an individualized consideration of the mitigating qualities of youth that *Miller* requires. The Circuit Court did not consider, before imposing on Jones a

sentence of "imprisonment for life," the hallmark features of Jones' chronological age (immaturity, impetuosity, and failure to appreciate risks and consequences), Jones' home and family environment, the circumstances of the offense, Jones' inability to deal with police officers or prosecutors or assist in his own defense, or his potential for rehabilitation.

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

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

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

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

By its terms, *Miller* requires that Jones be re-sentenced on his conviction for capital murder in a manner that: (1) provides

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

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

Section 53.1-40.01, which provides "the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment"). Accordingly, Jones should be re-sentenced under Code Section 18.2-10(b), which provides a sentencing range of twenty years to life, and be declared eligible for geriatric parole pursuant to Code Section 53.1-40.01.

In determining the appropriate sentence on remand, the Court also should direct the Circuit Court to consider the "mitigating qualities of youth" as *Miller* requires, including: (1) Jones' chronological age at the time of his offense "and its hallmark features--among them immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) Jones' family and home environment; (3) the circumstances of his homicide offense; (4) his ability at the time to deal with police officers or prosecutors and capacity to assist in his own defense; and (5) his potential for rehabilitation. *Miller*, 132 S. Ct. at 2468.

Because Jones was sentenced on the lesser included offenses *after* he was sentenced to life without the possibility of

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

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

CONCLUSION

A mandatory sentence of life without the possibility of parole for a juvenile offender violates the Eighth Amendment's prohibition against cruel and unusual punishment. As the U.S. Supreme Court's decisions make clear, this rule applies to Jones and requires that he be re-sentenced in a manner that takes into account an individualized consideration of the distinct, mitigating qualities of his youth under a scheme that allows for a range of punishment other than mandatory life without the possibility of parole. Good cause and the ends of justice also call for a re-sentencing of Jones on the related, lesser included offenses to correct for the inappropriate influence of his prior unconstitutional sentence of mandatory life without the possibility of parole and to permit the same mitigating factors required to be considered on the homicide offense to inform the sentencing decisions on the related, lesser included offenses.

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