IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 131385

DONTE LAMAR JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

On June 5, 2001, Donte Lamar Jones pled guilty to capital murder in the Circuit Court of York County and was sentenced to life imprisonment. (App. 47-48). No appeal was taken from this conviction.

On June 5, 2013, Jones filed a pro se motion to vacate his sentence in the Circuit Court of York County. (App. 55-63). On June 13, 2013, the

court denied that motion. (App. 65). Jones then filed a petition for a writ of habeas corpus seeking the same relief in the United States District Court for the Eastern District of Virginia on June 25, 2013. (Civil Action No. 1:13cv775). That proceeding was stayed pending exhaustion of state remedies on March 24, 2014.

This Court granted an appeal on April 17, 2014.

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.

STATEMENT OF FACTS

In the early hours of July 21, 2000, Jones, born on November 8, 1982, and Bryant Moore, armed and wearing masks, entered a 7-11 in York County. (App. 106, 109-10).[1] They demanded money and fired a shot. (App. 110). After Moore emptied the cash register into a bag and began to leave, Jones "raise[d] his weapon and fire[d] a single shot toward the floor" which killed one of the victims. (App. 10). Moore confessed to his

[1] Because Jones pled guilty and no appeal was taken, no transcript of the guilty plea and sentencing was prepared and the audio-tape was subsequently destroyed. The facts set forth are from the pre-sentence report based documents in the Commonwealth's Attorney's office.

involvement and to that of Jones. (App. 13, 110). The sheriff's report indicates there was a videotape of the offenses. (App. 5).

On September 19, 2000, Jones was indicted for capital murder and ten other offenses based on the robbery and shootings.[2] After motions to preclude the death penalty (App. 35-38) were denied (App. 39-43), Jones accepted a plea agreement. (App. 44-45). Upon entry of an *Alford* plea, the defendant was to be sentenced to life without the possibility of parole on the capital murder charge. (App. 45). On June 5, 2001, Jones pled guilty to all charges and was sentenced to life imprisonment for the capital murder. (App. 47-48).

On August 21, 2001, the court considered the presentence report and then sentenced Jones to life plus 68 years imprisonment for his other ten convictions: armed robbery, malicious wounding, two counts of abduction, five firearms offenses and wearing a mask in a prohibited place. (App. 52-53, 69).

On June 5, 2013, Jones, acting *pro* se, filed a "motion to vacate invalid sentence" in the York County Circuit Court. (App. 55-63). That motion was limited to the sentence in his capital murder conviction. (App. 56). The court

[2] Those other offenses are not involved in this appeal.

denied the motion on June 13, 2013, finding that "there is nothing new in mitigation of the offense." (App. 65).

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE MOTION TO VACATE THE SENTENCE.

The defendant, claiming his sentence was illegal, argues that the circuit court possessed the power to vacate the sentence. The defendant presents no basis on which the court had power to vacate the sentence, which was lawfully imposed in 2001. He says only that *Miller v. Alabama*, 132 S.Ct. 2455 (2012), should be applied to his case on collateral review. (Def. Br. 12). The sentence was clearly valid when imposed and remains so now.

Standard Of Review

This case presents only legal questions of the jurisdiction of Virginia courts and the application of federal constitutional doctrines to Virginia cases. Review *de novo* is appropriate. *Burrell v. Commonwealth*, 283 Va. 474, 478, 722 S.E.2d 272, 273 (2012); *Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011).

The Circuit Court Had No Power To Vacate This Conviction[3]

[3] A matter of subject-matter jurisdiction can be raised at any time. *Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753, 756 (1990).

Twenty-one days after the original sentencing the trial judge lost subject-matter jurisdiction over the original judgment. *See Kelley v. Stamos*, 285 Va. 68, 79, 737 S.E.2d 218, 224 (2013); *accord Virginia Dept. of Corrections v. Crowley*, 227 Va. 254, 260, 264, 316 S.E.2d 439, 442, 444 (1984). ["U]nless otherwise provided by statute . . . Rule 1:1 prohibits the modification of a final order more than 21 days after the date of entry." *Charles v. Commonwealth*, 270 Va. 14, 17 n.*, 613 S.E.2d 432, 433 n.* (2005). "The Rule is clear. After the expiration of 21 days from the entry of a judgment, the court rendering the judgment loses jurisdiction of the case, and, absent a perfected appeal, the judgment is final and conclusive." *Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987).

The defendant says this principle does not apply to him because the sentence is invalid. He points to no relevant state authority for this proposition. He argues only that *Miller* is applicable to collateral proceedings. (Def. Br. 12). He concedes that his position "requires a determination that the *Miller* rule applies to cases on collateral review." (*Id.*).

> Under Virginia law, a sentencing order is void ab initio if "'the character of the judgment was not such as the [C]ourt had the power to render.'" *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009) (quoting *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887)) (alteration in original). In *Rawls*, the parties mistakenly believed that amendments to a

> criminal statute were in effect "and consequently the jury was incorrectly instructed that it could impose a specific term of imprisonment of not more than 40 years for the murder conviction." *Id.* at 215, 683 S.E.2d at 546. The statutory maximum actually was 20 years of incarceration. *Id.*

Burrell, 283 Va. at 480, 722 S.E.2d at 275.

Here, there can be no doubt that the circuit court had the authority to impose the penalty it did impose in 2001. Because it was authorized by the relevant statutes, it clearly was not void *ab initio*. There is no authority in Virginia authorizing the vacating of an initially valid judgment in an untimely collateral proceeding. Jones relies upon *Rawls*, but there the sentence was void *ab initio*. 278 Va, at 221, 683 S.E.2d at 549.

Even if the circuit court had jurisdiction to change Jones' sentence, he proffers no reason why it should have done so. In sentencing Jones on the associated offenses, the court considered the pre-sentence report and imposed additional imprisonment of life plus 68 years. The motion to vacate contains no factual allegations supporting modification of the sentence and the judge so ruled. (App. 65). "Sentencing determinations are within the discretion of the trial court, and will be reversed if the trial court abused its discretion." Howell v. Commonwealth, 274 Va. 737, 739, 652 S.E.2d 107, 108 (2007). Jones has shown no abuse of discretion.

Waiver By Guilty Plea[4]

Moreover, in his guilty plea agreement Jones waived his right to appeal. (App. 44). The Fourth Circuit has held that an appellate waiver precludes raising a *Miller* claim even on direct appeal. "Because [the defendant] knowingly and voluntarily waived his right to appeal and because the issues he seeks to raise on appeal fall squarely within the compass of his waiver of appellate rights, we dismiss the portion of [the defendant's] appeal that challenges his sentence." *United States v. Mason*, 495 Fed. Appx. 373, 375 (4th Cir. 2012) (citing *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 2005)).

> [H]olding a defendant to the plea bargain he struck is not "inequitable" because "unlike a defendant who is sentenced after trial, a defendant who enters a plea bargain has some control over the terms of his sentence," and if he "wants to ensure that he is sentenced in strict accordance with the guidelines, he can refuse to waive his right to appeal as a condition of the plea." *United States v. Brown*, 232 F.3d 399, 406 (4th Cir. 2000) (citation omitted). Recently, in *United States v. Lemaster*, 403 F.3d 216 (4th Cir. 2005), we ***extended our general rule concerning appeal waivers and held that a***

[4] Consideration of arguments not made in the court below is appropriate under the doctrine of the right result for the wrong reason where additional factual matters are not necessary to resolve a newly-advanced rationale. *Foltz v. Commonwealth*, 284 Va. 467, 472 n.*, 732 S.E.2d 4, 7 n.* (2012) (citing *Banks v. Commonwealth*, 280 Va. 612, 617, 701 S.E.2d 437, 440 (2010) (quoting *Perry v. Commonwealth*, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010))).

> ***defendant may waive in a plea agreement his right under 28 U.S.C. § 2255 to attack his conviction and sentence collaterally.***

Blick, 408 F.3d at 168 (emphasis added); *see also Savino v. Commonwealth*, 239 Va. 534, 538-39, 391 S.E.2d 276, 278 (1990) (guilty plea waives all non-jurisdictional defenses). Similarly here, Jones opted to accept a fixed penalty and surrendered any right to appeal that penalty, thus waiving any claim that he was denied individualized sentencing.

"[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 756 (1970); *Contreras v. Davis*, No. 1:13cv772, 2013 U.S. Dist. LEXIS 174256, *6-7. (E.D. Va. Dec. 11, 2013).

Life Without Parole Sentence Not Mandatory In Virginia

Additionally, even if *Miller* were applicable to this case, Jones' sentence was not unconstitutional. The fact is that he did not receive a mandatory term of life imprisonment without parole.

Miller expressly addressed the sentencing provisions in the Alabama and Arkansas statutes. In both states, the sentences imposed were "life without parole." See Ala. Code § 13A-6-2(c) (defendant convicted of aggravated murder shall "be sentenced to death or life imprisonment

without parole"); Ark. Code § 5-4-101(c)(1) ("Capital murder is punishable by death or life imprisonment without parole"). Moreover, as a matter of law in both states, a life without parole sentence ***cannot*** be suspended by the trial court. *See* Ala. Code § 15-22-50 ("The court shall have no power to suspend the execution of sentence imposed upon any person who has been found guilty and whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years."); Ark. Code § 5-4 104(e)(1)(A) (trial court cannot suspend imposition of capital murder sentence or place defendant on probation). *Miller* stressed that the new prohibition "forbids a sentencing scheme that ***mandates*** life in prison without possibility of parole for juveniles." 113 S.Ct. at 2469 (emphasis added). There is no such mandated punishment for capital murder under Virginia law; therefore, Virginia's sentencing statutes do not violate the *Miller* rule.

In Virginia, the sentence for a Class 1 Felony (capital murder) is "death or life, or, if the defendant was a juvenile at the time of the offense, "imprisonment for life." Va. Code § 18.2-10(a). Virginia does not impose a sentence of "life without parole" for capital murder. In addition, nothing in the sentencing statute prohibits a Virginia court from suspending execution of such a sentence or any part of such a sentence. Virginia's sentencing scheme is, therefore, significantly different from that of Alabama and

Arkansas. In fact, Virginia law already provides a procedure and mechanism for the sentencing judge to consider—***and act upon***—mitigating evidence, as *Miller* requires.

"[U]nder the Virginia practice, the punishment as fixed by the jury is not final or absolute, since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in part, on the basis of any *mitigating facts* that the convicted defendant can marshal." *Vines v. Muncy*, 553 F.2d 342, 349 (4th Cir. 1977) (emphasis added). "A defendant convicted of a felony has an absolute right to have a presentence investigation and report prepared upon his request and submitted to the court prior to the pronouncement of sentence." *Duncan v. Commonwealth*, 2 Va. App. 342, 345-46, 343 S.E.2d 392, 394 (1986). The purpose of the presentence report is "so the court may determine the appropriate sentence to be imposed" in light of all the evidence contained in the report. Va. Code § 19.2-299(A). "The presentence report generally provides the court with mitigating evidence." *Duncan*, 2 Va. App. at 345. 343 S.E.2d at 394. This report may include evidence that was not otherwise admissible at trial, or evidence the defendant may have had tactical reasons for not submitting to the jury to avoid "opening the door" to unfavorable evidence. *Id.*

"After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine." Va. Code § 19.2-303. The Virginia courts have long recognized the rehabilitative purposes of Virginia Code § 19.2-303, and therefore, construe it liberally, recognizing the "wide latitude" the trial courts have in suspending sentences. *See e.g., Dunham v. Commonwealth*, 59 Va. App. 634, 637-38, 721 S.E.2d 824, 826 (2012), *aff'd*, 284 Va. 511, 733 S.E.2d 660 (2012); *Stokes v. Commonwealth*, 61 Va. 388, 392-93, 736 S.E.2d 330, 333 (2013); *Richardson v. Commonwealth*, 131 Va. 802, 808-09, 109 S.E. 460, 462 (1921) (construing an earlier codification of the suspension statute and holding the statute "is highly remedial and should be liberally construed").[5]

"By vesting the trial court with discretionary authority to suspend or modify the sentence imposed by the jury, the legislature *intended* to leave the consideration of mitigating circumstances to the court." *Duncan*, 2 Va. App. at 345, 343 S.E.2d at 394 (emphasis added). Thus, the sentence of "imprisonment for life" for a Class 1 Felony in Virginia is not the functional equivalent of the sentences the Court struck down in *Miller* because the

[5] The defendant expressly acknowledged the circuit court had such power under §19.2-303 in his motion to vacate. (App. 61-62).

trial judge retains discretion to suspend all or part of that sentence in light of mitigating evidence, including the defendant's age.

Virginia does, in fact, have at least 29 statutes imposing "mandatory minimum" sentences for criminal conduct.[6] The term "mandatory minimum" is defined as a matter of Virginia statutory law.

> "Mandatory minimum" wherever it appears in this Code means, for purposes of imposing punishment upon a person convicted of a crime, that the court shall impose the entire term of confinement, the full amount of the fine and the complete requirement of community service prescribed by law. The court shall not suspend in full or in part any punishment described as mandatory minimum punishment.

Va. Code § 18.2-12.1. The life sentence imposed for capital murder, however, does not denominate the sentence as a "mandatory minimum"; therefore, it does not preclude suspension. Va. Code § 18.2-10(a).

In addition, three Virginia statutes do impose mandatory life without parole sentences. Va. Code §§ 18.2-61(B)(2), 18.2-67.1(B)(2), 18.2-67.2(B)(3). By their express terms, however, these statutes do not apply to juvenile offenders. All three statutes contain the same operative language; Virginia Code § 18.2-61, addressing rape, provides:

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[6] *See, e.g.,* Va. Code. §§ 18.2-36.1, 18.2-36.2, 18.2-46.3:3, 18.2-51.1, 18.2-53.1, 18.2-57, 18.2-57.1, 18.2-60.4, 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-121, 18.2-154, 18.2-186.4, 18.2-248, 18.2-248.01, 18.2-248.03, 18.2-248.1, 18.2-248.5, 18.2-255, 18.2-255.2, 18.2-270, 18.2-308.1, 18.2-308.2, 18.2-308.2:2, 18.2-308.4, 18.2-374.1, 18.2-374.1:1, 18.2-374.3.

A. If any person has sexual intercourse with a complaining witness, whether or not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is . . . (iii) with a child under age 13 as the victim, he or she shall be guilty of rape.

B. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years; and in addition:

* * *

2. For a violation of clause (iii) of subsection A where it is alleged in the indictment that the offender was 18 years of age or older at the time of the offense, the punishment shall include a ***mandatory minimum term of confinement for life.***

(Emphasis added). These statutes make plain that when the Virginia legislature intends for a life sentence to be mandatory, it expressly states that intent. Again, Virginia Code § 18.2-10(a) contains no similar language denominating the sentence as a "mandatory" or "mandatory minimum" sentence. Thus, the general provision permitting the trial court to suspend a sentence controls. Under these circumstances, Jones contention that he received a "mandatory life sentence without parole" is incorrect as a matter of Virginia law.

The court in *Clem v. Fleming*, 2014 U.S. Dist. LEXIS 46404 (decided 4/2/2014, W.D. Va), accepted this view of Virginia law.

> The Supreme Court of Virginia has consistently held that, "under Virginia's statutory scheme, the sentence ascertained by the jury is not final or absolute." *Allard v. Com.*, 24 Va. App. 57, 480 S.E.2d 139, 144 (Va. 1997). Rather, Va. Code § 19.2-303 grants the circuit judge statutory authority to suspend a sentence, "in whole or in part, on the basis of any mitigating facts that the convicted defendant can marshal." *Vines v. Muncy*, 553 F.2d 342, 349 (4th Cir. 1977). And Va. Code § 18.2-12.1 expressly carves out exceptions to that authority when the relevant code provision uses the language "mandatory minimum," language the General Assembly did not use in the applicable statutes here. Consequently, unlike the statutes at issue in *Miller*, the Virginia Code did not limit the circuit judge's authority to consider all the facts and circumstances, including evidence in mitigation in imposing sentence. . . .

Id. at *8-9.

Jones could have asked for individualized sentencing but chose to agree to a life sentence without parole to avoid the death penalty. A sentence of life without parole does not violate *Miller* if individualized consideration of other sentences is available. 132 S.Ct. at 2475.

Miller Is Not Applicable To This Case

There are 16 cases pending in federal courts in Virginia involving application of *Miller* to cases similar to this. Five decisions have been rendered, holding *Miller* not to be retroactive. *Johnson v. Ponton*, No. 3:13cv404, 2013 U.S. Dist. LEXIS 149021, *15-18 (E.D. Va. Oct. 15, 2013); *Contreras* at *8-9; *Stewart v. Clarke*, No. 2:13cv388, 2014 U.S. Dist. LEXIS 59384 (E.D. Va. Mar. 13, 2014) (adopting Report and Recommendation);

Sanchez v. Vargo, No. 3:13cv400, 2014 U.S. Dist. LEXIS 37818, at *14-18 (E.D. Va. Mar. 21, 2014); *Landry v. Baskerville*, No. 3:13cv367, 2014 U.S. Dist. LEXIS 44760, at *23-27 (E.D. Va. March 31, 2014).[7]

Application In *Jackson v. Hobbs* Is Not Determinative

"[A] new rule is not 'made retroactive' unless the Supreme Court *holds* it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (emphasis added); *see also United States v. Mathur*, 685 F.3d 396, 401 (4th Cir. 2012) ("The only way to make a new rule retroactive 'is through a holding,' not through dictum." (quoting *Tyler*, 533 U.S. at 663-64)). *Miller* does not hold that it is retroactive.

Jones nevertheless insists that because the Supreme Court decided the companion case of *Jackson v. Hobbs* simultaneously with *Miller*, the Court already has decided that the new rule will apply retroactively. Jones's argument ignores the Supreme Court's clear direction "that 'made' means 'held' and, thus, the requirement is satisfied *only* if this Court has held that the new rule is retroactively applicable to cases on collateral review." *Tyler*, 533 U.S. at 662 (quoting 28 U.S.C. § 2244(b)(2)) (emphasis added).

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[7] In three cases the magistrates have recommended a holding of non-retroactivity, while in one case the magistrate had recommended a contrary position. Those recommendations have not yet been adopted by the judges.

In *Tyler*, the Court addressed whether the jury-instruction rule announced in *Cage v. Louisiana*, 498 U.S. 39 (1990), applied retroactively. Tyler argued it must be retroactive because the Court subsequently held that a *Cage*-error was structural. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993). The Supreme Court rejected that argument, explaining that "*Cage* itself does not hold that it is retroactive. The only holding in *Cage* is that the particular jury instruction violated the Due Process Clause." *Tyler*, 533 U.S. at 664-65.

Even in light of the subsequent determination that such a violation amounted to structural error, "[t]he most [Tyler] can claim is that, based on the principles outlined in *Teague* [*v. Lane*, 489 U.S. 288 (1989)], this Court should make *Cage* retroactive to cases on collateral review. What is clear, however, is that we have not 'made' *Cage* retroactive to cases on collateral review." *Id.* at 666. The Court then declined to make *Cage* retroactive in Tyler's case because under the successive writ bar, "the District Court was required to dismiss it unless Tyler showed that this Court already had made *Cage* retroactive. § 2244(b)(4)." *Id.* at 667.

The same is true here. To use *Tyler*'s words, *Miller* "itself does not hold that it is retroactive." 533 U.S. at 664. The only holding in *Miller* was "that the Eighth Amendment forbids a sentencing scheme that mandates

life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469. Therefore, *Miller* has not been "made" retroactive to cases on collateral review. As in *Tyler*, the best Jones can say is that the Supreme Court *should* make *Miller* retroactive. "What is clear, however," is that the Supreme Court has not done so. *Tyler*, 533 U.S. at 666. *See also In re Morgan*, 713 F.3d 1365, 1367, *reh'g en banc denied*, 717 F.3d 1186 (11th Cir. 2013) (citing *Tyler* and noting "the Supreme Court has not held that *Miller* is retroactively applicable to cases on collateral review."); *cf. United States v. Stewart*, 2013 U.S. App. LEXIS 19810 at *2 n.* (4th Cir. 2013) ("We note that *Alleyne* [*v. United States*, 133 S. Ct. 2151 (2013)] has not been made retroactively applicable to cases on collateral review.").

Morgan and *Craig v. Cain*, 2013 U.S. App. LEXIS 431 (5th Cir. 2013), rely upon the significant federalism concerns underpinning *Teague*. *Jackson* was decided on certiorari from state court rather than in a federal habeas corpus proceeding. While states are free to also adopt the principles of *Teague*, the rule "was intended to limit the authority of federal courts to overturn state convictions — not to limit a state court's authority to grant relief

for violations of new rules of constitutional law when reviewing its own State's convictions." *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008).[8]

"The relevant frame of reference, . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." *Teague*, 489 U.S. at 306. That purpose, within our federal system of government, includes "comity and respect for the finality of state convictions." *Danforth*, 552 U.S. at 279. The United States Supreme Court does not look to the purpose of the new rule; only to the purpose of the federal writ of habeas corpus. *Teague*, 489 U.S. at 306.

The Supreme Court's decision in *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013), guides the analysis here. In *Chaidez*, the petitioner had an active federal collateral proceeding pending when the Supreme Court decided *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). 133 S. Ct. at 1106. The Court recognized that its holding in *Padilla* "vindicated Chaidez's view of the Sixth Amendment: We held that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas." *Id.* But the Court held nonetheless that Chaidez was *not* entitled to

[8] Furthermore, *Teague* is a prudential, rather than a jurisdictional rule and may be waived if the state fails to raise it. *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994). It does not appear Arkansas raised the argument that relief could not be granted to Jackson in a *state* collateral proceeding.

retroactive benefit because the "Court announced a new rule in *Padilla*. Under *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Id.* at 1113.

Significantly, *Padilla* was decided in the same procedural posture as *Jackson*: on certiorari from a denial of state habeas corpus review. *Chaidez* held, however, that *Padilla* was not retroactive. 133 S. Ct. at 1113.

Miller* Is Not Retroactive Under *Teague

"Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310; *Mueller v. Murray,* 252 Va. 356, 361-62, 478 S.E.2d 542, 545 (1996); see *also Chaidez*, 133 S. Ct. at 1107 ("When we announce a 'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding."); *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (new rules apply retroactively "only in limited circumstances.").

The Supreme Court has explained the important federalism considerations underpinning the nonretroactivity doctrine. The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of

this application." *Teague*, 489 U.S. at 310 (quotiing *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring)). In other words, "the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings." *Danforth*, 552 U.S. at 280. Notwithstanding the importance of the right vindicated by the new rule

> it does *not* follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart.

Summerlin, 542 U.S. at 358 (emphasis added).

Thus, to invoke the benefit of a new rule on collateral review, a petitioner must show that the rule "falls within one of the two narrow exceptions to the *Teague* doctrine." *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997); *Beard v. Banks*, 542 U.S. 406, 416 (2004). These narrow exceptions are: (1) the rule is substantive or (2) the rule is a "watershed" rule of criminal procedure. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

Jones contends both exceptions apply to make *Miller* retroactive, but his arguments are unsound and the weight of authority is against him. *See, e.g.*, *Morgan*, 717 F.3d at 1189 (holding *Miller* announced a procedural rule that is not retroactive); *Craig*, 2013 U.S. App. LEXIS 431, *4-6 (not

retroactive); *Martin v. Symmes*, 2013 U.S. Dist. LEXIS 147965, *58 (D. Minn. 2013) (not retroactive); *Ware v. King*, 2013 U.S. Dist. LEXIS 126782, *9, *approved by*, 2013 U.S. Dist. LEXIS 126781 (S.D. Miss. 2013) (not retroactive); *Kha v. Gipson*, 2013 U.S. Dist. LEXIS 95943, *2 (C.D. Cal. 2013) (not retroactive); *cf. Bell v. Uribe*, 729 F.3d 1052, 1064 (9th Cir. 2013) (noting "[i]t is not clear whether Miller may be applied retroactively on collateral review"). *Accord Commonwealth v. Cunningham,* 81 A.3d 1, 6-11 (Pa. 2013), *cert. denied*, 2014 U.S. LEXIS 4082 (June 9, 2014); *Chambers v. State*, 831 N.W.2d 311, 331 (Minn. 2013) (not retroactive); *State v. Tate*, 130 So.3d 829, 844 (La. 2013) (not retroactive); *People v. Carp*, 828 N.W.2d 685, 723 (Mich. App. 2012) (not retroactive); *Geter v. State*, 2012 Fla. App. LEXIS 16051, *27-28 (Fla. App. 2012) (not retroactive).[9]

"At bottom, . . . the *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *O'Dell*, 521 U.S. at 156 (internal quotations and citation omitted). "*Teague* asks state-court judges to judge reasonably, not presciently." *Id.* at 166.

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[9] The federal criminal cases in which the Department of Justice "conceded" as a matter of policy that *Miller* is retroactive do not bind this Court. *See generally Morgan*, 717 F.3d at 1193. Virginia was not a party to those proceedings, and in any event, they do not implicate the comity concerns underpinning *Teague*. 489 U.S. at 310.

***Miller* Is Not A Substantive Change**

"A new rule is substantive when that rule places an entire class beyond the power of the government to impose a certain punishment regardless of the procedure followed, not when the rule expands the range of possible sentences." *Morgan*, 713 F.3d at 1368. Conversely, "rules that regulate only the *manner* of determining the defendant's culpability are procedural." *Summerlin*, 542 U.S. at 353 (emphasis added; internal citations omitted); *Morgan*, 717 F.3d at 1191 (rejecting "the misconception that, if a rule might have affected the sentence imposed upon a defendant, that rule must be substantive.").

The Supreme Court could not have made clearer the procedural nature of the rule it announced in *Miller*. "Our decision ***does not categorically bar a penalty for a class of offenders or type of crime***—as, for example, we did in *Roper* [*v. Simmons, 543 U.S. 551 (2005)*] or *Graham* [*v. Florida*, 560 U.S. 48 (2010)]. Instead, ***it mandates only that a sentencer follow a certain process***—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, 132 S. Ct. at 2471 (emphasis added).[10] The *Miller* rule is not substantive

[10] The Virginia federal decisions emphasize this language in finding *Miller* not to be retroactive. *Johnson,* supra, at *16; *Contreras*, *supra*, at *8-9; *Sanchez*, *supra,* at 16-17; *Landry, supra*, at 24-25.

because it "neither decriminalize[s] a class of conduct nor prohibit[s] the imposition of [the challenged] punishment on a particular class of persons." *Graham v. Collins*, 506 U.S. 461, 477 (1993). "*Miller* does not implicate a substantive categorical guarantee because a juvenile offender may still be sentenced to life imprisonment without the possibility of parole after *Miller*." *Morgan*, 717 F.3d at 1191. It merely mandates "***a certain process***" to be used in imposing the sentence that may include life imprisonment without parole, a rule patently procedural. "Since, by its own terms, the *Miller* holding "does not categorically bar a penalty for a class of offenders," *Miller,* U.S. at _, 132 S. Ct. at 2471, (and because it does not place any conduct beyond the State's power to punish at all, *see supra* note 6), it is procedural and not substantive purposes of *Teague*." *Cunningham*, 81 A.3d at 10.

The amicus misreads *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper* and *Graham v. Florida*, to wrongly conclude that *Miller* announced a substantive rule. Those cases, which did announce substantive rules, actually underscore the *procedural* nature of the rule in *Miller*. *Miller* itself expressly distinguished *Roper* and *Graham*, noting that the rules in those cases applied categorically while the newly announced rule did not. 132 S. Ct. at 2471.

Atkins categorically banned capital punishment of the mentally retarded. 536 U.S. at 321 ("the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender") (citation and internal quotation omitted). *Roper* categorically banned capital punishment of juvenile offenders. 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). And *Graham* categorically banned imposing life without parole on juveniles who committed solely non-homicide offenses. 560 U.S. at 82 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").[11]

The categorical nature of the rulings makes them substantive. There is no procedure Virginia could adopt that would permit death sentences for juveniles or the mentally retarded. Likewise, there is no procedure Virginia could fashion that would permit it to sentence a juvenile to life without parole solely for a non-homicide offense. Because the bars apply "regardless of the procedures followed," the rules in those cases are plainly substantive. *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989).

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[11] The *Miller* Court made clear that *Graham*'s "categorical bar relates only to nonhomicide offenses." 132 S.Ct. at 2466.

In contrast, *Miller* announced a rule that regulates the *manner* in which Virginia may sentence a juvenile to life without parole. The Court held simply that "the Eighth Amendment forbids a sentencing scheme that ***mandates*** life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469 (emphasis added). The sentence itself was left intact. What the Court invalidated was "the mandatory sentencing schemes" codified in the Alabama and Arkansas statutes. *Id.* It did "not categorically bar" the penalty. *Id.* at 2471. As such, *Miller* announced a procedural rule, not a substantive one.

The assertion of the amicus to the contrary notwithstanding, *Alleyne* affords no support to Jones' effort to raise the procedural rule to substantive status. In *Alleyne*, the Court held "the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." 133 S. Ct. at 2162. The opinion did not hold it was retroactive.

What is more, all the circuits that have considered the question, including the Fourth Circuit, have held that *Alleyne* does not apply retroactively to cases on collateral review. *See, e.g.*, *Stewart*, 2013 U.S.

App. LEXIS 19810, at *2; *United States v. Redd*, 735 F.3d 88, 91 (2d Cir. 2013); *In re Payne*, 733 F.3d 1027, 1029 (10th Cir. 2013); *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013). Thus, like the *Miller* rule, the *Alleyne* rule plainly is procedural.

Summerlin is instructive on this point. In *Summerlin*, the Court addressed the nonretroactivity of the new rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002). *Summerlin*, 542 U.S. at 354-57. *Ring* had held the Sixth Amendment required that the jury decide whether an aggravating factor was present that was necessary to impose the death penalty. 536 U.S. at 603-09. Summerlin argued that *Ring* was substantive and, therefore, retroactive to his case. 542 U.S. at 354. Applying *Teague*, the Supreme Court called *Ring* a procedural rule because it "did not alter the range of conduct Arizona law subjected to the death penalty." *Summerlin*, 542 U.S. at 354. "Instead, *Ring* altered the range of permissible *methods* for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id.* (emphasis added).[12]

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[12] The amicus relies upon *Summerlin* because there the Court ruled that a rule requiring the factfinder to find a particular fact before it could impose the death penalty was substantive. Jones claims his case is similar. *Miller*, however, requires only that the factfinder consider certain factors. 132 S. Ct. at 2469.

The *Summerlin* analysis applies with equal force here. *Miller* stated expressly that it did "not foreclose a sentencer's ability to" impose life without parole sentences on juveniles in homicide cases. 132 S. Ct. at 2469. It merely required the sentencer "to take into account *how* children are different, and *how* those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469 (emphasis added). Thus, as the Fifth Circuit has held, "*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme." *Craig*, 2013 U.S. App. LEXIS 431, at *4-5.

The Eleventh Circuit reached the same conclusion, noting "*Miller* did not prohibit the imposition of a sentence of life imprisonment without the possibility of parole on minors." *Morgan*, 713 F.3d at 1367-68; *see also United States v. Maldonado*, 2012 U.S. Dist. LEXIS 166589, *26 (S.D.N.Y. 2012) (noting a juvenile offender "may still be given a sentence of life imprisonment provided that such a sentence is imposed" consistent with *Miller*) (quoting *Miller*, 132 S. Ct. at 2468). *Accord Tate*, 130 So.3d at 831 ("*Miller* does not apply retroactively in cases on collateral review as it merely sets forth a new rule of criminal constitutional procedure, which is

neither substantive nor implicative of the fundamental fairness and accuracy of criminal proceedings."); *Chambers*, 831 N.W.2d at 328 ("the rule announced in *Miller* does not eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release upon a juvenile offender who has committed a homicide offense.").

In sum, Jones is serving a sentence ("imprisonment for life") that the law *may* impose, consistent with the Eighth Amendment. Because *Miller* expressly did not bar the sentence that Jones now challenges, it did not announce a substantive rule. *Penry*, 492 U.S. at 329.

Rule In *Miller* Is Not A "Watershed Rule"

"The second, even more circumscribed, exception [to the *Teague* rule] permits retroactive application of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell*, 521 U.S. at 157 (citation omitted); *Beard*, 542 U.S. at 417. *Miller* did not announce such a rule.

"Since *Teague*, the Supreme Court has reviewed numerous claims that new rights fall within [the watershed rule] exception, and it has rejected every single one of them." *Mathur*, 685 F.3d at 399 (citing *Whorton*, 549 U.S. at 417-18 (collecting cases)). "That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one

without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge." *Summerlin*, 542 U.S. at 352 (alterations in original; internal citations and quotations omitted).

To qualify as "watershed," "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding. In applying this requirement, we again have looked to the example of *Gideon*,[13] and 'we have not hesitated to hold that less sweeping and fundamental rules' do not qualify." *Whorton*, 549 U.S. at 421 (quoting *Beard*, 542 U.S. at 418). A watershed rule "cannot just be an important or even a fundamental right; it must be an important right in the specific service of enhancing the accuracy of the factfinding process." *Mathur*, 685 F.3d at 400 (citation and internal quotations omitted).

"The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a 'watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Craig*, 2013 U.S. App. LEXIS 431, *5-6 (quoting *Beard*, 542 U.S. at 417). *See also Howard v. United States*, 374 F.3d

[13] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

1068, 1080 (11th Cir. 2004) (noting "the second *Teague* exception is so tight that very few new rules will ever squeeze through it.").

Given that *Miller* in no way addresses the accuracy of the underlying conviction, it does not satisfy the first test for a watershed rule. In addition, *Miller* does not alter our understanding of bedrock procedural elements. Rather, it simply mandates a procedure for one particular type of sentence. As such, *Miller* is significantly less sweeping than many other new rules the Supreme Court has held do not satisfy *Teague*'s second exception. *See Whorton*, 549 U.S. at 417-18 (collecting cases); *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (refusing to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States).

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of York County, denying the defendant's motion to vacate his sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On June 23, 2014, the required copies of this brief were hand delivered to the Clerk's Office of this Court for filing and three copies were mailed to Duke K. McCall, III, Esquire, BINGHAM McCUTCHEON LLP, 2020 K Street, N.W., Washington, D.C. 20006 and to Marsha Levick, Esquire, 1315 Walnut Street, 4th Floor, Philadelphia, PA 19107.

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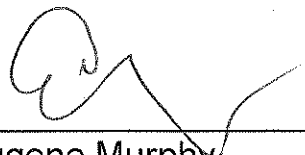

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