IN THE

Supreme Court of Virginia

RECORD NO. 131385

DONTE LAMAR JONES,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

In his opening brief, Appellant Donte Lamar Jones established that the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), applies retroactively to render unconstitutional his sentence, as a juvenile, to life without the possibility of parole and that the Circuit Court thus erred in denying his motion to vacate. In opposition, the Commonwealth argues that: (1) the Circuit Court lacked the power to vacate Jones' sentence; (2) Jones waived his right to challenge his sentence; (3) *Miller* does not apply retroactively; and (4) Jones' sentence does not violate *Miller*. The Commonwealth's arguments are without merit.

The contention that the Circuit Court (and by extension this Court) lacks the power to vacate an unconstitutional sentence is simply wrong. Jones did not waive the right to challenge his sentence in his plea agreement. As the clear majority of states that have addressed the issue have held, *Miller* applies retroactively. App. Br. at 18. And, the Commonwealth's argument that Virginia Code Section 18.2-10(a) does not, on its

face, mandate life without the possibility of parole for juveniles, like Jones, who are convicted of Class 1 felonies is based on a hyper-technical reading of the statute that ignores the broader statutory scheme in Virginia and the irrefutable fact that sentencing courts in Virginia are not required to, and the court that sentenced Jones did not, as *Miller* requires, conduct an individualized consideration of the mitigating qualities of youth before imposing a sentencing of life without the possibility of parole. Because Jones was sentenced to life without the possibility of parole without the individualized consideration of the mitigating qualities of youth that the Eighth Amendment requires, he should be resentenced.

ARGUMENT

I. THE CIRCUIT COURT HAS THE POWER TO VACATE AN UNCONSTITUTIONAL SENTENCE.

The Commonwealth argues that Jones' sentence was valid at the time it was entered and therefore cannot now be challenged as void *ab initio* under *Rawls v. Commonwealth*, 278 Va. 213, 683 S.E.2d 544 (2009). Comm. Br. at 5-6. The Commonwealth's argument misapprehends the concept of void *ab initio*. Even if

authorized by a Virginia statute, a sentence that violates the U.S. Constitution is void *ab initio* because "the character of the judgment" is such that the Circuit Court did not have the power to render it. *Rawls*, 278 Va. at 221; *cf. Lee v. Harlow,* 75 Va. 22, 30 (1880) (finding that a statute, "being unconstitutional, is void *ab initio*, and no right could be conferred by it or taken away"); *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) (same); *Black's Law Dictionary* at 1568 (7th ed. 1999) ("A contract is void ab initio if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.").[1]

II. JONES DID NOT WAIVE HIS RIGHT TO CHALLENGE HIS SENTENCE IN HIS PLEA AGREEMENT.

The Commonwealth next argues that Jones' *Miller* claim is barred by his plea agreement. Comm. Br. at 7-8. But Jones did not waive in his plea agreement the right to bring a collateral

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[1] The Commonwealth's contention that this Court should not overturn the trial court's sentence because there is no evidence that the trial court abused its discretion, Comm. Br. at 5, is similarly ill-founded. There is no question that it is outside a trial court's discretion to impose a sentence that is unconstitutional. *Cf. Ohree v. Commonwealth*, 26 Va. App. 299, 311 (1998).

challenge to his sentence. Jones merely waived the right to appeal whether "the evidence against him is sufficient to prove beyond a reasonable doubt that he is guilty of [the] charge" and the right to appeal "any substantive or procedural issue involved in [his] prosecution." J.A. at 44-45. Neither waiver precludes a collateral challenge to Jones' sentence. The Commonwealth offers no argument to suggest that it does. Therefore, the Commonwealth's assertion that a defendant *may* waive the right to raise a *Miller* challenge to his sentence has no application to Jones.[2]

III. MILLER IS RETROACTIVE.

A. The U.S. Supreme Court Itself Applied *Miller* Retroactively.

The Commonwealth disputes that *Miller* applies retroactively, *i.e.*, to cases on collateral review, even though the Supreme Court itself applied *Miller* to vacate a life without parole sentence in *Jackson v. Hobbs*, a case on collateral review. The

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[2] Of course, any ambiguity in a plea agreement, and thus any argument that Jones' plea agreement *might* be construed to preclude a collateral challenge to his sentence, must be resolved in favor of the defendant. *See, e.g.*, *United States v. Harvey,* 791 F.2d 294, 300, 303 (4th Cir. 1986).

Commonwealth argues, based on *Tyler v. Cain*, 533 U.S. 656 (2001), that *Miller* is not retroactive because the Supreme Court did not "hold" *Miller* was retroactive when it vacated the sentence in *Jackson*. The Commonwealth's argument is an exercise in sophistry. It is true that the Supreme Court did not invoke the phrase "*Miller* applies retroactively," but it certainly "held" that *Miller* applies retroactively, *i.e.*, to a case on collateral review, when it applied the *Miller* rule to "reverse the judgment[] of the Arkansas Supreme Court" in *Jackson*, a case on collateral review. 132 S. Ct. at 2474; s*ee also, Tyler v. Cain*, 533 U.S. at 668 (noting that the Supreme Court makes a new rule retroactive not only through express statements, but also through "holdings that logically dictate the retroactivity of the new rule") (O'Connor, J., concurring).[3] As numerous courts have recognized, the decision in *Jackson* logically dictates that the *Miller* rule applies retroactively, *i.e.*, to cases on collateral review. *See, e.g., State*

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[3] *Tyler* did not involve an application of the retroactivity principles articulated in *Teague v. Lane*, 489 U.S. 288 (1989). Therefore, contrary to the Commonwealth's assertion, the specific holding in *Tyler* does not apply here. Its reasoning, however, supports the conclusion that *Miller* is retroactive.

v. Ragland, 836 N.W.2d 107, 116 (Iowa 2013) (observing that "there would have been no reason" for the Supreme Court to apply the rule in Miller to the defendant in the *Jackson v. Hobbs* case "if it did not view the Miller rule as applying retroactively to cases on collateral review"); *Jones v. State*, 122 So. 3d 698, 703 n.5 (Miss. 2013); *People v. Williams*, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012).

The Commonwealth contends that the Supreme Court's determination in *Chaidez v. United States*, 133 S. Ct. 1103 (2013) that its prior opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) announced a new constitutional rule that does not apply retroactively counsels against a conclusion that *Miller* applies retroactively. Comm Br. at 18-19. It does not. The issue in *Chaidez* was whether *Padilla* had announced a new rule of constitutional law or merely applied the rule announced in *Strickland,* 466 U.S. 668 (1984), to new facts. 133 S. Ct. at 1108-13. Justice Kagan, writing for the majority in *Chaidez*, concluded that *Padilla* did more than merely apply *Strickland*; it announced a new rule that did not apply retroactively. *Id.* at

1113. Justice Kagan, writing for the majority in *Miller*, was equally clear that *Miller* announced a new rule–a new rule that the Court then proceeded to apply retroactively in the companion case of *Jackson*. A comparison of *Chaidez* and *Miller* thus reinforces, rather than undercuts, the conclusion that the Supreme Court "held" the *Miller* rule to apply retroactively when it applied the *Miller* rule in *Jackson*.

B. The Supreme Court Announced a Substantive Constitutional Rule in *Miller*.

The new rule announced in *Miller* applies retroactively, *i.e.*, to cases on collateral review, because it is a substantive constitutional rule. At the time of Jones' conviction, Virginia law mandated life without parole for juveniles convicted of Class 1 felonies and not sentenced to death. *Miller* invalidated mandatory life without parole sentences for juveniles, required that juveniles be eligible for lesser sentences, and required that the determination of appropriate sentences for juveniles convicted of homicide offenses be based on an individualized consideration of the mitigating qualities of youth. Contrary to the Commonwealth's claim, *Miller* is not "patently procedural," Comm.

Br. at 23, because it did not merely "alter[] the range of permissible methods" by which an existing range of punishments may be administered, *Schiro v. Summerlin*, 542 U.S. 348 (2004). *Miller* altered the existing range of sentencing options for juveniles.

Miller "prohibits 'a certain category of punishment [LWOP] for a class of defendants [juvenile offenders convicted of homicide] because of their status [chronological age and its hallmark features].'" 168 Cal. Rptr. 3d 719 (Cal. Ct. App. 2014) (alteration in original) (citing *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). *See also People v. Davis*, 6 N.E.2d 709 (Ill. 2014) ("*Miller* places a particular class of persons covered by the statute – juveniles – constitutionally beyond the State's power to punish with a particular category of punishment – mandatory sentences of natural life without parole."); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) (holding *Miller* is substantive because it categorically banned imposition of "a mandatory life sentence").

Miller differs from certain other rules commonly identified as "substantive" because, through its prohibition on the mandatory

imposition of life without parole, it requires an *expansion* of the range of available punishments, rather than banning a particular punishment altogether, a distinction *Miller* acknowledges. *See* 132 S. Ct. at 2471. The Supreme Court, however, has not limited the class of "substantive" rules to categorical prohibitions on a specific punishment. *See Summerlin*, 542 U.S. at 351 ("New substantive rules . . . *include*[] . . . constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish) (emphasis added) (citations omitted). Indeed, similar constitutional rules that require a consideration of mitigating factors before imposing a particular punishment have been held to be retroactive. *See, e.g., Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (holding that Supreme Court decisions requiring an individualized consideration of mitigating factors before the imposition of the death penalty apply retroactively)*; see also Ragland*, 836 N.W.2d at 115 (holding that *Miller* is substantive because it requires additional fact-finding before sentencing juveniles to life without parole).

C. Alternatively, the Rule Announced in *Miller* Is a Watershed Procedural Rule.

The Commonwealth argues that the rule announced in *Miller* is not a watershed rule of criminal procedure because it neither decreases the likelihood of an inaccurate result, nor "alter[s] our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. Comm. Br. at 30. But the rule in *Miller* does decrease the likelihood of an inaccurate result and does alter our understanding of bedrock procedural requirements. Sentencing is a critical component of the trial process and directly affects the accuracy of criminal trials. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate") (alteration in original) (internal citation omitted). Mandatory life without parole sentences cause an "impermissibly large risk" of inaccurately imposing the harshest sentence available for juveniles. *Whorton v. Bockting*, 548 U.S. 406, 418 (2007). Miller decreases this likelihood of inaccurate results by requiring an individualized

consideration of the unique characteristics that make juveniles "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464.

Miller also so altered our notions of fundamental fairness in criminal proceedings that it invalidated existing sentencing schemes in 29 U.S. jurisdictions. *See* 132 S. Ct. at 2466. *Miller* thus announced a new bedrock principal, requiring that when imposing the most severe of penalties on juvenile offenders, courts "cannot proceed as though [the offenders] were not children." *See id*.

IV. JONES IS ENTITLED TO RELIEF UNDER MILLER.

The Commonwealth asserts that, even if *Miller* applies to this case, Jones' sentence is constitutional because he did not receive a mandatory sentence of life without the possibility of parole. The Commonwealth reasons that: (1) the relevant Virginia statute does not use the words "without parole"; and (2) a trial court has the discretion to suspend all or part of the sentence for a Class 1 felony under Virginia law. Comm. Br. at 8-14. While it is true that the Virginia statute specifying the punishment for Class 1 felonies, Section 18.2-10(a), does not use the words

"without parole," it is indisputable that persons convicted of Class 1 felonies are not eligible for parole under Virginia law. *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). Therefore, as a matter of Virginia law, Jones was sentenced to life "without parole."[4]

The Commonwealth's argument that a trial court has *discretion* to suspend a life without parole sentence imposed under Section 18.2-10(a) does not somehow render constitutional the sentence of life without parole that Jones received for three reasons.[5] First, the ability of the court to suspend all or a portion of the statutorily prescribed sentence of life without parole did not

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[4] Indeed, the Commonwealth concedes as much in its brief. Comm. Br. at 8, 14.

[5] The Commonwealth also is incorrect in its claim that Virginia's statutory scheme differs in this respect from those at issue in *Miller*. As the Supreme Court explained in *Miller*, Arkansas also argued that the trial court was authorized to suspend Jackson's life without parole sentence rendering it not "mandatory" under Arkansas law. 132 S. Ct. at 2462 n.2. Noting the Arkansas courts treated Jackson's sentence as mandatory, the Supreme Court declined to accept Arkansas' argument that a trial court's ability to suspend a sentence renders it not "mandatory." *Id.*

allow the court to impose a lesser sentence. Granting the trial court authority to suspend all or a portion of a sentence is not the same as granting the court authority to impose a lesser sentence, which Section 18.2-10(a) does not allow. Second, *discretion* to suspend all or a portion of a life without parole sentence based on the "wide latitude" afforded trial courts does not satisfy *Miller.* *Miller* "*require[s]* [the sentencing court] to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469 (emphasis added). The *possibility* that a court *could have* considered such factors in deciding whether to suspend the statutorily proscribed sentenced does not suffice. Third, it is undisputed that Jones did not receive the individualized consideration of the mitigating qualities of youth that *Miller* requires before he was sentenced to life without the possibility of parole.[6] Assessing the constitutionality of analogous death

[6] This case is distinguishable in this regard from *Clem v. Fleming*, 7:13cv319, 2014 WL 1329444 at *2 (W.D. Va. Apr. 2, 2014), in which the trial court "made an individualized assessment of all the mitigating and aggravating factors presented at trial" before

penalty sentencing schemes, the U.S. Supreme Court has held that "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a *constitutionally indispensable* part of the process." *Johnson v. Texas*, 509 U.S. 350, 360 (1993) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)) (emphasis added). Thus, in *Eddings v. Oklahoma*, the U.S. Supreme Court vacated the death sentence imposed on a defendant who was 16 years old, finding the trial judge failed to consider mitigating evidence such as the defendants' background, family history, and the mitigating qualities of youth. 455 U.S. 104, 112-13, 115-16 (1982). Remanding the case, the Supreme Court held that "just as the chronological age of a minor itself is a relevant mitigating factor that must be given great weight, so must the background and mental and emotional development of a youthful defendant be considered in sentencing." *Id*. at 116. Because the Circuit Court did not to take into account the mitigating qualities of youth–and was not required to do so under Virginia law–before sentencing

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determining "that life imprisonment without parole was appropriate."

Jones to life without the possibility of parole, Jones' sentence is unconstitutional, and he should be resentenced.

CONCLUSION

The Supreme Court's decision in *Miller* applies retroactively and renders unconstitutional Jones' sentence as a juvenile to life without parole. Accordingly, this Court should reverse the Circuit Court's denial of Jones' motion to vacate and order that Jones be re-sentenced in a manner consistent with *Miller* and the Eighth Amendment.

Dated: July 7, 2014 Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on July 7, 2014, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed by CD in PDF format, and the correct number of copies along with the electronic copy by CD in PDF format were served upon counsel for the appellee by first class mail: Eugene Murphy, Senior Assistant Attorney General, 900 East Main Street, Richmond, VA 23219, oagcriminallitigation@oag.state.va.us and to counsel for the Juvenile Law Center, Marsha Levick, 1315 Walnut Street, 4th Floor, Philadelphia, PA 19107.

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