No. 16-1337

In The
Supreme Court of the United States

DONTE LAMAR JONES,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

MARK R. HERRING
Attorney General
of Virginia

STUART A. RAPHAEL
Solicitor General

TREVOR S. COX
Deputy Solicitor General

MATTHEW R. MCGUIRE
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773
mmcguire@oag.state.va.us

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that imposing a *mandatory* life-without-parole sentence on juvenile homicide offenders violates the Eighth Amendment's ban on "cruel and unusual punishments." In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court held that *Miller* announced a substantive rule of constitutional law that applied retroactively to cases on collateral review. Virginia does not mandate life sentences for such offenders. Virginia provides for a presentence investigation and report, defendants may offer mitigating evidence before sentencing, and the sentencing judge may suspend all or part of a sentence based on such evidence. The questions presented are:

1) Whether this Court has jurisdiction to review a decision by a State's highest court about what types of claims can be presented in a judicially created collateral-review proceeding.

2) Whether a defendant's decision to plead guilty with a stipulated sentence waives any claim he may have had under *Miller*.

3) Whether, on collateral review, *Miller* must be interpreted according to its holding, or whether *Miller*'s new rule should be expanded in light of *Montgomery*.

4) Whether *Miller* requires that a defendant be resentenced for other nonhomicide crimes for which the defendant did not receive a life-without-parole sentence.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

1. This case arises from a robbery, abduction, and murder committed by petitioner Donte Lamar Jones, with two accomplices, on July 21, 2000, in York County, Virginia.[1] On the date of those crimes, Jones was four months shy of his eighteenth birthday.

Shortly before 4:00 a.m., Jones and Bryant Moore (age 22) were riding in a stolen car driven by Khalil Johnson (age 17) when they passed a 7-Eleven convenience store. Jones suggested that they "rob the place."[2] Johnson went inside to see who was there and reported seeing one female employee on duty. After leaving and returning to the store, Jones and Moore, each armed with a handgun, pulled masks over their heads and went in. They encountered not one but two attendants: Jennifer Tarasi and Jennifer Hogge. Tarasi managed to call 911 and to put the telephone receiver down on the counter before being ordered to the floor. Jones and Moore demanded money and both women complied.[3] Jones went to the back of the store to find and remove the surveillance videotape, but he returned empty-handed after hearing a gunshot; Moore had shot Hogge

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[1] The facts are found in the joint appendix filed in the Supreme Court of Virginia (hereinafter "Va.-JA"), which included the police reports (Va.-JA 1-13) and the presentence report (Va.-JA 106-18).

[2] Va.-JA 110.

[3] *Id.* 5-6, 8, 110.

in the left shoulder.[4] After stealing approximately $60,[5] Jones and Moore prepared to flee.

But before leaving, Jones took aim with his .38 caliber handgun and shot Tarasi in her lower back as she lay on the floor. The bullet penetrated her left iliac artery and vein and exited from her left groin. Jones later told Moore, "I think I paralyzed the bitch."[6] After the assailants left, the women were discovered and taken to the hospital; Hogge survived but Tarasi died from her gunshot wound.[7]

Based on the 911 recording, a tip from Moore's neighbor, and the store surveillance tape, the police discovered the trio's identities and interrogated Jones, who confessed.[8] He initially denied shooting Tarasi, but after the police told him that they had the store videotape, Jones admitted it. He claimed that he did not intend to kill Tarasi—only to shoot her in the leg to prevent her from getting up.[9] Jones also admitted purchasing the .38 caliber handgun, which police found under his mattress.[10]

2. Jones was charged as an adult with 11 felonies, including capital murder, armed robbery,

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[4] *Id.* 9-10.

[5] *Id.* 8.

[6] *Id.* 10.

[7] *Id.* 5.

[8] *Id.* 6, 13.

[9] *Id*. 13.

[10] *Id.*

abduction, and malicious wounding.[11] He moved to strike the death-penalty aspect of the capital-murder charge on the ground that he was a juvenile at the time of the offense, but the trial court denied that motion.[12]

On June 5, 2001, pursuant to a plea agreement, Jones pleaded guilty to all charges.[13] He entered an *Alford* plea to the capital-murder charge and agreed to a sentence of life without the possibility of parole.[14] Jones entered a guilty plea to the other ten charges, with sentencing on those charges to follow the completion of a presentence report.[15]

Later in the hearing, before pronouncing sentence on the capital-murder charge, the court "inquired if the defendant desired to make a statement and if [he] desired to advance any reason why judgment should not be pronounced."[16] Neither Jones nor his lawyer made a number of arguments available to them. For instance,

- they did not argue that Jones should be sentenced as a juvenile under Virginia Code § 16.1-272;
- they did not argue that sentencing should be delayed pending the completion of the

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[11] *Id.* 16-34, 44.

[12] *Id*. 37, 41.

[13] *Id.* 44.

[14] *Id.* 45.

[15] *Id.* 44.

[16] *Id.* 47.

presentence report under Virginia Code § 19.2-299; and

- they did not argue that mitigating evidence supported suspending any part of the sentence under Virginia Code § 19.2-303.[17]

The trial judge sentenced Jones to life in prison on the capital-murder charge.[18]

On August 16, 2001, the probation officer completed a presentence report for the remaining charges.[19] After again providing Jones and his counsel an opportunity to respond before sentence was imposed,[20] the trial judge sentenced Jones on August 21 to life in prison on the armed-robbery charge and to a total of 68 years on the remaining charges, to run consecutively.[21]

3. More than a decade later, on June 25, 2012, this Court held in *Miller v. Alabama* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[22]

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[17] The relevant portions of these statutes, in the form they appeared in June 2001, are included in the appendix to this brief. Resp't App. 22a-25a.

[18] Va.-JA 47.

[19] *Id.* 106-18.

[20] *Id.* 53.

[21] *Id.*

[22] 567 U.S. 460, 479 (2012).

On June 5, 2013, relying on *Miller*, Jones filed a "Motion to Vacate Invalid Sentence" in the York County circuit court.[23] A motion to vacate is a judicially created collateral-review proceeding for certain claims as determined by the Supreme Court of Virginia. Jones argued that a motion to vacate was a proper procedural vehicle because his life sentence was void ab initio since Virginia law mandated that "any juvenile offender convicted of Capital Murder must be sentenced to life imprisonment,"[24] making the statute "facially unconstitutional" under *Miller*.[25] In the alternative, recognizing that a sentencing judge has discretion under Virginia Code § 19.2-303 to suspend the imposition or length of a sentence, Jones asked the circuit court to "suspend [his] sentence in whole or part."[26] Jones expressly disclaimed any challenge to his life-plus-68-year sentence on the other ten convictions.[27]

On June 13, 2013, the trial court denied Jones's motion, finding "nothing new in mitigation of the offense."[28]

On June 25, 2013, Jones filed a petition for writ of habeas corpus in the United States District Court for

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[23] Resp't App. 1a-13a.

[24] *Id.* 6a.

[25] *Id.* 9a.

[26] *Id.* 10a-11a.

[27] *Id.* 2a ("[T]his motion only deals with the Capital Murder charge.").

[28] Va.-JA 65.

the Eastern District of Virginia, raising the same *Miller* claim as in State court.[29] At Jones's request, however, the district court stayed that petition pending exhaustion of the Virginia litigation.[30] That action remains stayed.[31]

4. Jones appealed the circuit court's denial of his motion to vacate to the Supreme Court of Virginia. His petition repeated his claim that "Virginia's sentencing scheme, which currently mandates that any juvenile offender convicted of Capital Murder must be sentenced to life imprisonment without the possibility of parole, is unconstitutional pursuant to *Miller*."[32] He represented, once again, that his appeal addressed "only . . . the Capital Murder charge," not the other ten convictions on which he is serving a life-plus-68-year sentence.[33]

Virginia's highest court granted review.[34] Jones argued in his opening brief that *Miller* applied retroactively to cases like his that were final at the time *Miller* was decided.[35] He continued to maintain that Virginia

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[29] Pet. for a Writ of Habeas Corpus, *Jones v. Vargo*, No. 1:13-cv-775 (E.D. Va. June 25, 2013), ECF No. 1.

[30] Order, *Jones v. Vargo*, No. 1:13-cv-775 (E.D. Va. Mar. 24, 2014), ECF No. 6.

[31] Order, *Jones v. Ray*, No. 1:13-cv-775 (E.D. Va. Mar. 29, 2017), ECF No. 14.

[32] Va.-JA 84.

[33] *Id.* 81.

[34] *Id.* 99.

[35] Opening Br. of Appellant, *Jones v. Commonwealth*, No. 131385, 2014 WL 8187452, at *13 (Va. May 27, 2014).

law "*requires* that a juvenile be sentenced to life without the possibility of parole" for a capital-murder conviction.[36] He also argued for the first time that the court should vacate his life-plus-68-year sentence on the other ten felony convictions on the theory that his capital-murder sentence tainted the sentence on those charges.[37] As noted above, Jones had expressly waived that claim in both his motion in the trial court and his petition for appeal.[38]

In response, the Commonwealth argued that the trial court lacked jurisdiction because the sentence was not void ab initio, even assuming that *Miller* applied retroactively.[39] The Commonwealth further argued: that *Miller* was not retroactive; that Jones's interpretation of Virginia law was wrong because sentencing judges enjoy broad discretion to suspend

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[36] *Id.* at *16 (emphasis added).

[37] *Id.* at *27.

[38] R. Sup. Ct. Va. 5:25. Jones's claim that his capital-murder sentence tainted his sentence on the other convictions ignores that he pleaded *guilty* to the capital-murder charge; he has never challenged that guilty plea. The probation officer had recommended a sentence in excess of the sentencing guidelines on the other convictions, not because Jones had already received a life sentence for capital murder, but *in spite of that fact*. *See* Va.-JA 117 ("While it may seem that adding a second life term in prison is fruitless, a punishment must be imposed to address the ten heinous crimes before the Court today."). Of course, the sentencing judge had plenary discretion to depart from that recommendation based on any mitigating evidence Jones wished to offer. *See infra* Part IV.

[39] Br. for the Commonwealth, *Jones v. Commonwealth*, No. 131385, 2014 WL 8187451, at *5-6 (Va. June 23, 2014).

sentences under Virginia Code § 19.2-303; and that Jones had expressly waived any challenge to his sentence in his plea agreement.[40]

On October 31, 2014, in a unanimous decision, the Supreme Court of Virginia dismissed the appeal, finding that the circuit court lacked jurisdiction because the sentence was not void ab initio.[41] The court had to "first determine whether Virginia's sentencing scheme for capital murder imposed a mandatory minimum sentence of life without the possibility of parole."[42] The court held it did not "because the trial judge had the authority under Code § 19.2-303 to suspend the sentence."[43] The court distinguished a conviction for capital murder from convictions under certain other statutes, where the legislature specifically "prescribed a mandatory minimum sentence."[44] By contrast, the "absence of the phrase 'mandatory minimum' in Code § 18.2-10 underscores the flexibility afforded a trial court in sentencing pursuant to this statute."[45] Thus:

> when the trial court sentenced Jones, it had the authority to suspend part or all of Jones' life sentence. Indeed, Jones recognized that a circuit court continues to have the authority to suspend part or all of a sentence pursuant

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[40] *Id.* at *7-30.

[41] *Jones v. Commonwealth*, 763 S.E.2d 823, 826 (Va. 2014).

[42] *Id.* at 824.

[43] *Id*.

[44] *Id.* at 825.

[45] *Id.*

> to Code § 19.2-303, as he asked the circuit court to so do in his motion to vacate.[46]

Accordingly, the court ruled that Virginia law did not mandate a life sentence for juvenile offenders, "Jones' sentence was not void ab initio, and the trial court had no jurisdiction to grant the motion."[47] The court therefore concluded that "*Miller* is not applicable even if it is to be applied retroactively."[48]

5. Jones filed a timely petition for a writ of certiorari, which this Court held pending its decision in *Montgomery v. Louisiana*.[49] There were two questions presented in *Montgomery*: (1) "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison"; and (2) did this Court "have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to [this Court's] decision in *Miller*?"[50] This Court answered them both affirmatively and ordered Montgomery resentenced.

In light of *Montgomery*, this Court granted Jones's petition for a writ of certiorari, vacated the prior opinion, and remanded this case to the Supreme Court of Virginia. In the remand order, this Court took no

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[46] *Id.* (citation omitted).

[47] *Id.* at 826.

[48] *Id*.

[49] 136 S. Ct. 718 (2016).

[50] *Id.* at 727.

position on the merits. Justices Thomas and Alito concurred, noting that

> [i]n holding this petition and now vacating and remanding the judgment below, the Court has not assessed whether petitioner's asserted entitlement to retroactive relief 'is properly presented in the case.' On remand, courts should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief. The Court's disposition does not, for example, address whether an adequate and independent state ground bars relief, whether petitioner forfeited or waived any entitlement to relief (by, for example, entering into a plea agreement waiving any entitlement to relief), or whether petitioner's sentence actually qualifies as a mandatory life without parole sentence.[51]

6. On remand, the Supreme Court of Virginia reinstated its prior decision.[52] The court explained that in Virginia—unlike in Alabama and Louisiana, States whose procedures were found deficient in *Miller* and *Montgomery*, respectively—"a criminal defendant has a statutorily provided opportunity to present mitigation evidence at his sentencing hearing," including evidence related to "'youth and attendant characteristics.'"[53] The court held that this mitigating evidence

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[51] Order, *Jones v. Virginia*, No. 14-1248 (U.S. Mar. 7, 2016) (citation omitted).

[52] Pet. App. 1a.

[53] *Id.* 16a-18a.

can be presented in a capital-murder case because "the sentencing court [could] suspend Jones's life sentence in whole or in part."[54] The court further noted that "whether a state sentencing statute is mandatory (that is, precludes the possibility of mitigation of the prescribed punishment) is a decision to be made by 'state courts.'"[55] "[W]here, as here, a State's highest court treats a sentencing statute as non-mandatory (that is, provides an opportunity to seek mitigation of the prescribed punishment), the United States Supreme Court would abide by that interpretation of state law."[56]

Moreover, the court explained that Jones's claim failed for additional reasons. First, Jones waived any claim that he had under *Miller* by entering "into a plea agreement in which he *stipulated* to a life sentence 'without the possibility of parole' on the capital murder charge."[57] Because "[n]othing in *Montgomery* undermines settled waiver principles," the court concluded that Jones had waived his *Miller* claim.[58]

Second, the court concluded that Jones's claim was not properly filed as a motion to vacate as a matter of State law. The court explained that a motion to vacate is a limited collateral-review proceeding for raising

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[54] *Id.* 18a.

[55] *Id.* 14a (citing *Miller*, 567 U.S. at 467 n.2.).

[56] *Id.* 15a.

[57] *Id.* 18a.

[58] *Id.* 21a.

specific jurisdictional claims.[59] According to the court, "Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions."[60] "In Virginia, a *Miller* violation can be addressed on direct review or in a habeas proceeding. Because the violation, if proven, does not render the sentence void ab initio but merely voidable, it cannot be addressed by a motion to vacate. . . ."[61]

Jones filed a second petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Certiorari should be denied in this case because jurisdictional and vehicle issues will prevent this Court from reaching the merits of the questions presented. And even if those threshold problems were absent, there is no split of authority on most of the questions this Court would need to answer to grant Jones meaningful relief. All of those reasons weigh heavily against granting certiorari, but their weight is even greater here because Jones has a federal habeas petition pending in the United States District Court for the Eastern District of Virginia. Denying certiorari therefore will not preclude federal review of his case.

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[59] *See id.* 22a-23a.

[60] *Id.* 33a.

[61] *Id.* 35a.

Notwithstanding those obvious flaws, Jones asks this Court to summarily reverse the Supreme Court of Virginia.[62] That extraordinary request is wholly inappropriate in a case like this one;[63] as shown below, this case does not come close to "warrant[ing] the bitter medicine of summary reversal."[64]

I. This Court lacks jurisdiction to overrule the Supreme Court of Virginia's decision about what can be presented in a judicially created motion to vacate.

The Supreme Court of Virginia has recognized that two types of collateral challenges are permitted to be filed in Virginia courts: (1) general challenges, constitutional or otherwise, which are filed in a habeas petition consistent with Virginia's statutory scheme; and (2) challenges that the sentencing court lacked subject-matter jurisdiction, which are filed as a motion to vacate.[65] Unlike habeas petitions, motions to vacate were created by Virginia courts to address a rare circumstance: because Virginia courts have "no inherent judicial power to fix terms of imprisonment," they act beyond their jurisdiction (i.e., the court was without

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[62] Pet. 14.

[63] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (Stevens, J., dissenting); *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting) ("A summary reversal is an exceptional disposition.").

[64] *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

[65] *See* Pet. App. 33a, 35a.

"the power to render" a sentence) if the "court imposes a sentence outside the range set by the legislature."[66] In this case, Jones filed a motion to vacate that raised a general constitutional challenge to his sentence. Because his argument was not about the sentencing court's jurisdiction to impose a life-without-parole sentence, the Supreme Court of Virginia concluded that the motion was procedurally improper.[67]

The Supreme Court of Virginia's conclusion that Jones's federal constitutional claim must be presented in a habeas petition as opposed to a motion to vacate cannot be overturned by this Court.[68] States have broad discretion in deciding whether to provide appellate and collateral review of criminal convictions and sentences. In *McKane v. Durston*, the Court made clear that "review by an appellate court of the final judgment in a criminal case, however grave the offense of

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[66] *Id.* 26a-27a (citation omitted).

[67] *See, e.g.*, *Rawls v. Commonwealth*, 683 S.E.2d 544, 547 (Va. 2009) (explaining the judicial precedent sanctioning a motion to vacate as a limited method for attacking a criminal conviction on collateral review in state court); *see also* Pet. App. 27a-29a (similar).

[68] *See* 28 U.S.C. § 1257(a); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); *see also Foster v. Chatman*, 136 S. Ct. 1737, 1759 (2016) (Alito, J., concurring in judgment) ("To the extent that the decision of the Georgia Supreme Court was based on a state rule restricting the relitigation of previously rejected claims, the decision has a state-law component, and we have no jurisdiction to review a state court's decision on a question of state law.").

which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is *wholly within the discretion of the state* to allow or not to allow such a review."[69] The same is true of collateral review—States "have no obligation to provide" for any type of post-conviction relief.[70]

The fact that there is no constitutional requirement to provide Jones any form of collateral review in State court is fatal to his petition. In the absence of a federal constitutional mandate or federal statute authorizing Jones's motion, the Supreme Court of Virginia alone is entitled to decide the jurisdiction of Virginia courts. It is black-letter law that "the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them."[71] As this Court put it in *Anglo-American Provision Co. v. Davis Provision Co.*, "[i]f the plaintiff can find a court into which it *has a right* to come, then the effect of the judgment is fixed by the Constitution. . . . But the Constitution does not require

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[69] 153 U.S. 684, 687 (1894) (emphasis added); *see also Ross v. Moffitt*, 417 U.S. 600, 611 (1974).

[70] *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings. . . ."); *see also Foster*, 136 S. Ct. at 1759 (Alito, J., concurring in judgment) ("States are under no obligation to permit collateral attacks on convictions that have become final, and if they allow such attacks, they are free to limit the circumstances in which claims may be relitigated.").

[71] *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); *see also McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230, 233 (1934).

the State to provide such a court."[72] Because Jones's right to seek collateral review in Virginia courts rests entirely on State law and procedure, this Court lacks jurisdiction to review the Supreme Court of Virginia's decision about what types of claims can be heard in a motion-to-vacate proceeding.

Montgomery does not support a different conclusion. Although *Montgomery* addressed a related question—whether States must give retroactive effect in their collateral-review proceedings to substantive new rules of federal constitutional law—the Court did not answer the question presented in this case.[73] The premise of the Court's decision in *Montgomery* was that Louisiana's "*collateral review procedures are open to claims* that a decision of this Court has rendered certain sentences illegal, as a substantive matter, under the Eighth Amendment."[74] The difference here is that Virginia has two types of collateral-review proceedings, and only one—habeas review—is open to federal constitutional claims like those presented under

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[72] 191 U.S. 373, 374 (1903); *see also Missouri v. Lewis*, 101 U.S. 22, 30 (1879) ("It is the right of every State to establish [its] courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions. . . .").

[73] *See* 136 S. Ct. at 731-32.

[74] *Id.* at 732 (emphasis added); *see also id.* at 731 ("*If a state collateral proceeding is open* to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.' ") (citation omitted) (emphasis added).

Miller.[75] Nothing in *Montgomery* overruled this Court's precedent holding that the State alone has the authority to define the collateral-review processes available for reviewing criminal convictions and sentences in its courts.

Although Jones invokes *Howlett v. Rose*[76] to avoid the jurisdictional problem, *Howlett* is inapposite. In that case, this Court held that the Florida Supreme Court erred by extending sovereign immunity to municipalities for a claim arising under 42 U.S.C. § 1983 that had been filed in State court.[77] By its express terms, however, *Howlett* did "not present the question[] whether Congress *can require the States to create a forum* with the capacity to enforce federal statutory rights."[78] The Court recognized that that question poses a jurisdictional problem because States "have great latitude to establish the structure and jurisdiction of their own courts."[79] Given the States' sweeping authority, the Court stated that it "must act with utmost caution before deciding that [a State] is obligated to entertain the claim."[80] Thus, *Howlett* is entirely consistent with this Court's other precedent holding that jurisdiction turns on whether the State proceeding is open to a certain type of claim. That is a

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[75] *See* Pet. App. 33a ("[A] motion to vacate cannot be used as a substitute for a habeas corpus petition.").

[76] 496 U.S. 356 (1990).

[77] *See id.* at 377-78.

[78] *Id.* at 378 (emphasis added).

[79] *Id.* at 372.

[80] *Id.*

question of State law, and the Supreme Court of Virginia's answer is controlling.

Moreover, Jones misconstrues what the Supreme Court of Virginia held in this case. He claims in essence that Virginia is discriminating against federal constitutional claims in its collateral-review proceedings.[81] But the Supreme Court of Virginia's decision in this case is unremarkable. The court simply rejected Jones's attempt to expand Virginia's limited motion-to-vacate process to include challenges that ordinarily would be resolved as part of a timely filed habeas petition. As the court explained, permitting Jones to file claims like his *Miller* claim in a motion to vacate would "permanently sideline[ ]" "the multitude of substantive and procedural requirements in [Virginia's] habeas corpus law."[82] Given that a motion to vacate is a judicially created procedure for raising a very specific jurisdictional challenge, the court correctly declined to expand that process and render redundant the entire body of Virginia habeas law.

In sum, this Court has jurisdiction to resolve the questions presented in this case only if it concludes that Jones has a constitutional right to present his *Miller* claim on collateral review in State court—no matter what rules apply in State court—or if the Court overrules Virginia's highest court on the State-law question about what Virginia courts may consider in a

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[81] *See* Pet. 9.

[82] Pet. App. 32a.

judicially created motion to vacate. Jones has presented no good reason for this Court to take either of those drastic steps. That jurisdictional problem precludes this Court's review.

II. This case is a poor vehicle to address the scope of *Miller*'s new rule.

Even if there were not a jurisdictional defect, this case is replete with vehicle problems that will prevent the Court from addressing the questions presented.

A. Jones has not asked this Court to review the Supreme Court of Virginia's holding that his guilty plea waived any claim he had under *Miller*.

Rule 14.1(a) of this Court requires petitioners to set out the questions presented for review, and "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Jones's petition presents three questions presented, but he chooses not to ask this Court to review a separate merits holding of the Supreme Court of Virginia[83]—specifically, that Jones waived any *Miller* claim he had by pleading guilty under *Alford* to avoid the possible imposition of the death penalty.[84] That question is not "fairly included" in any of the questions presented by Jones, but it must be resolved before the Court can

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[83] *See* Pet. i.

[84] *See* Pet. App. 18a-21a.

reach the merits of either Jones's second or third questions.

Jones mentions the guilty-plea issue in a single footnote in his petition and cites a single case for why the Supreme Court of Virginia erred.[85] But that brief footnote falls short of adequately presenting a threshold question that this Court must answer before it can address the meaning of *Miller*. To be sure, this Court can rephrase or add a question presented if it were to grant certiorari, but doing so in this case would not be prudent. As discussed below, there is no split of authority on whether a guilty plea like Jones's waives a *Miller* claim.[86] And Jones does not argue that the issue is of such importance as to warrant consideration under Rule 10(c). Where the petitioner himself does not contend that a question should be answered in the absence of a circuit split, this Court should be particularly reticent to decide it.

In short, Jones's decision not to ask this Court to address a critical threshold issue—which two members of this Court identified as a likely issue and which the Supreme Court of Virginia expressly resolved against him—makes this case a poor vehicle for review.

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[85] Pet. 9 n.6.

[86] *See infra* Part III.A.

B. Jones has waived any challenge to his nonhomicide offenses as a matter of Virginia law, so any relief afforded in this case will be meaningless.

Even if this Court had jurisdiction to order Virginia courts to hear certain claims via a State-law motion to vacate, and even if it believed that the Supreme Court of Virginia erred in interpreting *Miller*, any relief awarded in this case would be meaningless. Independent of Jones's capital-murder conviction and his sentence (or resentencing) for that conviction, Jones is also serving a life-plus-68-year sentence for convictions on ten other crimes.[87] His failure to challenge those sentences makes any decision on the questions presented in this case an academic exercise.

As the Supreme Court of Virginia explained, Jones did not challenge his other sentences in his motion to vacate. That omission prevented the court from considering the issue on appeal as a matter of State procedure.[88] Every member of the Virginia Supreme Court agreed that its Rule 5:25 precluded the court from reviewing his other sentences.[89] That State procedural bar precludes this Court's review of Jones's other sentences.[90]

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[87] Va.-JA 53.

[88] Pet. App. 10a n.5; *see also* R. Sup. Ct. Va. 5:25.

[89] Pet. App. 10a n.5, 44a n.1.

[90] *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of

Jones attempts to overcome the procedural bar by arguing, without citation, "that the Eighth Amendment requires relief that is effective and meaningful."[91] But *Miller* is not a catch-all decision allowing defendants to challenge the individual sentences they received for nonhomicide crimes. Virginia does not impose aggregate sentences; each conviction receives a separate sentence.[92] In fact, Jones had an entirely separate sentencing hearing for his nonhomicide crimes.[93] Those sentences therefore cannot be lumped together with his capital-murder sentence. And in any event, those sentences, if they are constitutionally suspect at all, must be addressed under *Graham v. Florida*, not *Miller*.[94] In short, Jones's inability to obtain relief on his nonhomicide sentences makes this case a poor vehicle to address *Miller*'s scope.

C. Jones has a pending federal habeas petition that raises the same claims.

Regardless of the outcome here, Jones is not barred from pursuing his merits claims in federal court. He has a federal habeas petition pending in the United States District Court for the Eastern District of

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proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983)).

[91] Pet. 18.

[92] *See, e.g.*, *Woodard v. Commonwealth*, 754 S.E.2d 309, 312 (Va. 2014); *see also* Va.-JA 53.

[93] Va.-JA 52-53.

[94] *Graham v. Florida*, 560 U.S. 48 (2010).

Virginia, which has been held in abeyance pending the outcome of his motion to vacate in State court.[95] His ability to pursue his claims on federal habeas review is another reason to deny review. "'[T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims,' choosing instead to wait for 'federal habeas proceedings.'"[96] Given the jurisdictional and vehicle problems, this Court should follow its normal procedure and let this case proceed to federal habeas review.

III. There is no meaningful split of authority on most of the questions presented.

The jurisdictional and vehicle problems alone are a sufficient reason to deny certiorari in this case. But even if this case were a good vehicle for addressing *Miller*'s scope, there is not a split of authority on many of the issues that are dispositive here. Because the Supreme Court of Virginia issued alternative holdings in this case, Jones would need certiorari to be granted on each of the following issues and have those issues resolved in his favor in order to obtain meaningful relief: (1) whether pleading guilty with a stipulated sentence

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[95] *See* Order, *Jones v. Ray*, ECF No. 14 (granting Jones's motion to amend his habeas petition to add claims based on *Montgomery*, and ordering that the amended petition "is stayed and abeyed pending resolution of Petitioner's proceedings in the courts of Virginia").

[96] *Lawrence v. Florida*, 549 U.S. 327, 335 (2007) (citing *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring)).

waives a *Miller* claim; (2) whether a defendant is entitled to be resentenced on his separate nonhomicide offenses if he is awarded relief under *Miller*; and (3) whether *Miller* applies to non-mandatory, life-without-parole sentences.

If Jones is right about the answers to those questions, then a significant number of long-final criminal convictions and sentences likely will be called into question. As this Court has explained, "the principle of finality which is essential to the operation of our criminal justice system" is "seriously undermine[d]" when States must "*continually* . . . marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."[97] Given the critical interest in finality in the criminal context and the absence of an untenable circuit split on most of these questions, this Court should wait until lower courts more adequately address the merits on both sides before weighing in.[98]

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[97] *Teague v. Lane*, 489 U.S. 288, 309-10 (1989) (plurality op.).

[98] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (stating that in "many instances . . . when frontier legal problems are presented" "diverse opinions from state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court").

A. Courts are not divided on the question whether a defendant's decision to plead guilty with a stipulated sentence waives any claim he may have had under *Miller*.

The Supreme Court of Virginia held that Jones was not entitled to relief because he waived any *Miller* claim by entering into a plea agreement with a stipulated sentence. Jones hardly mentions this issue in his petition, and he does not allege that courts have reached different results on the question. But whether Jones waived his *Miller* claim is a threshold issue, so the Court would need to decide the question before it could award Jones relief.

In *Brady v. United States*, the Court upheld the guilty plea and sentence imposed on a defendant who alleged that he had pleaded guilty solely to avoid the threat of the death penalty.[99] The defendant argued that, because the Court had since held unconstitutional the death-penalty provision of the statute under which he pleaded guilty, his guilty plea was involuntary because it was coerced by the unconstitutional threat of the death penalty.[100] In rejecting the defendant's argument, the Court explained that:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor

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[99] 397 U.S. 742, 743-45 (1970).

[100] *See id.* at 745-47.

> entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.[101]

The Court was explicit that guilty pleas are "not subject to later attack because . . . later pronouncements of the courts . . . hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered."[102]

The most likely reason Jones has identified no circuit split on the waiver question is because *Brady* controls. Like the defendant in *Brady*, Jones pleaded guilty under *Alford* and entered into a plea agreement with a stipulated sentence to avoid the possibility of the death penalty.[103] To be sure, this Court's decision in 2005 in *Roper v. Simmons* eliminated the death penalty for juveniles.[104] But Jones received the benefit of the bargain in 2001 when he entered his guilty plea and agreed to the life sentence—the death penalty was no longer a possible outcome. And under ordinary waiver principles, the Supreme Court of Virginia is correct that Jones's voluntary decision to enter into the

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[101] *Id.* at 757.

[102] *Id.*

[103] *See* Va.-JA 44.

[104] 543 U.S. 551 (2005).

plea agreement waived any constitutional challenge he may have had to his stipulated sentence.[105]

The only case from this Court that Jones cites on this issue is *Halbert v. Michigan*,[106] but *Halbert* is inapposite. It focused on an indigent defendant's right to appointed counsel on direct appeal in a criminal case.[107] In *Halbert*, the defendant pleaded *nolo contendere* and did not waive his right to appeal.[108] The Court concluded that he had not knowingly waived his right to appointed appellate counsel in those circumstances where the trial court had not told him that "there would be no access to appointed counsel."[109] By contrast, Jones and the defendant in *Brady* explicitly waived any challenge to their sentences: they assumed the risk that sentencing law may change when they pleaded guilty to avoid the possibility of a death sentence. And Jones agreed to a stipulated sentence and expressly waived his right to appeal "any substantive or procedural issue involved in this prosecution."[110] *Halbert* thus has no bearing on whether Jones waived his right to seek relief under *Miller*.

In short, there is no split of authority over whether a defendant waives his rights under *Miller* by pleading guilty and agreeing to a stipulated sentence in order to

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[105] *See* Pet. App. 20a-21a.

[106] 545 U.S. 605 (2005); Pet. 9 n.6.

[107] *See* 545 U.S. at 616-23.

[108] *Id.* at 617.

[109] *Id.* at 623-24.

[110] Va.-JA 44-45.

avoid the possible imposition of the death penalty. Because the Supreme Court of Virginia's decision is consistent with *Brady*, certiorari is unwarranted.

B. Courts are not divided on the question whether a defendant is entitled to be resentenced on his nonhomicide offenses if he is awarded relief under *Miller*.

Jones also incorrectly sees a circuit split over whether a defendant with a meritorious *Miller* claim is entitled to be resentenced on his nonhomicide offenses. That split is mistakenly premised on the unpublished decision in *Ross v. Fleming*, issued by the United States District Court for the Western District of Virginia.[111] But there is no conflict between *Ross* and this case. And even if the decisions were inconsistent, it falls well short of meeting the requirements of Rule 10.

In *Ross*, the defendant "pled guilty to capital murder, robbery, and two counts of use of a firearm."[112] After *Miller* was decided, Ross filed a federal habeas petition challenging "his two life sentences."[113] The district court granted his petition and vacated his two life sentences.[114] The Commonwealth moved for reconsideration arguing in part that Ross had not challenged

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[111] No. 6:13-cv-00034, 2016 WL 3365498 (W.D. Va. June 16, 2016); *see also* Pet. 17-19.

[112] *Id.* at *1.

[113] *Id.*

[114] *Id.* at *2.

his robbery conviction in his habeas petition.[115] But the court disagreed, pointing out that Ross challenged both life sentences in his petition and that, as a result, the court was not "persuade[d] . . . that the capital murder sentence is the only one being challenged."[116] Unlike Ross, Jones challenged only his life-without-parole sentence for capital murder.[117]

Moreover, Ross had a single sentencing hearing at which he was sentenced for all of his crimes.[118] By contrast, Jones had two sentencing events: one hearing at which his capital-murder sentence was imposed, and a second hearing two months later at which he was sentenced for the remaining ten felonies.[119] Because Jones challenged only the capital-murder conviction in his motion to vacate, the only sentencing event that is implicated here is the first hearing. *Ross* provides no support for the proposition that a *Miller* challenge to one sentence imposed at a stand-alone sentencing hearing also sweeps in sentences imposed at a separate hearing.

So even if an unpublished district court decision counted under Rule 10 for purposes of showing a circuit split, such a scenario is not present here. *Ross* and *Jones* are not in conflict.

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[115] Pet. App. 112a.

[116] *Id.*

[117] *See supra* Part II.B.

[118] Pet. for Writ of Habeas Corpus at 2, *Ross v. Fleming*, No. 6:13-cv-00034 (June 24, 2013), ECF No. 1.

[119] *Compare* Va.-JA 44, 47 (sentencing on capital-murder conviction), *with* Va.-JA 53 (sentencing on ten remaining convictions).

C. Although courts are divided over whether *Miller* does more than prohibit mandatory sentencing schemes, the issue would benefit from further percolation.

The Commonwealth does not dispute that a split of authority continues to develop over whether *Miller*'s new rule applies to more than *mandatory* sentencing schemes. The Virginia Supreme Court's decision is in the majority of State courts of last resort and federal courts of appeals to have decided that question.[120] But it is worth noting that several of the decisions supporting Jones's argument in this case—that *Miller* applies to non-mandatory sentencing schemes—appear to be based on the assumption that *Montgomery* and this Court's other juvenile sentencing precedent require *Miller*'s new rule to be expanded beyond its clear holding.[121] Courts that have expanded *Miller* beyond the mandatory sentencing schemes at issue in that case and in *Montgomery*, however, have not explained how that approach is consistent with the general prohibition against retroactive application of new rules.

In *Teague v. Lane*, this Court expressly "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review."[122] Justice Harlan was quite clear that "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a

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[120] *See generally* Pet. 15-16.

[121] *See, e.g.*, *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016); *Landrum v. State*, 192 So. 3d 459, 460, 463 (Fla. 2016); *State v. Young*, 794 S.E.2d 274, 277-79 (N.C. 2016).

[122] 489 U.S. at 310.

judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation. . . ."[123] Indeed, the "very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first."[124]

Given this Court's explicit recognition that "application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions,"[125] the better reading is that *Montgomery* held only that *Miller*'s new rule applies retroactively and that *Miller*'s new rule should be limited to its holding. That position accords with *Teague* and "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered."[126] The contrary conclusion—that *Montgomery* expanded *Miller* or that *Miller* must be broadly construed in light of this Court's other juvenile sentencing precedent—would allow criminal sentencing law to develop piecemeal while being applied retroactively. Doing so would continuously upset long-final State criminal convictions and sentences in a way that "intrudes on state sovereignty to a degree

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[123] *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

[124] *Id.*

[125] *Teague*, 489 U.S. at 310.

[126] *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

matched by few exercises of federal judicial authority."[127]

Regardless of the Court's assessment of the strength of the Commonwealth's interests in finality, the Court would benefit from having the issue addressed further by the lower courts. There is still room for productive debate about whether *Miller*'s new substantive rule should be broadly construed to apply to cases outside the scope of its holding. Many federal circuit courts of appeals and State courts of last resort have not yet addressed these issues at all.[128] And many of the federal courts of appeals that have held that *Miller* applies only to *mandatory* sentencing schemes considered the issue before *Montgomery* was decided.[129] Those courts should be permitted to revisit the issue in light of the intervening decision. Given the importance of the question, this Court should let the issue percolate and mature.[130]

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[127] *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation omitted).

[128] *See* Pet. 15-17 (identifying 29 state courts that Jones claims have addressed *Miller*'s scope but no federal courts of appeals).

[129] *See, e.g.*, *Davis v. McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015); *Evans-García v. United States*, 744 F.3d 235, 240 (1st Cir. 2014); *Bell v. Uribe*, 748 F.3d 857, 869 (9th Cir. 2014); *see also United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (argued before *Montgomery*, but the opinion was issued after *Montgomery* without discussion of this issue).

[130] *See Evans*, 514 U.S. at 23 n.1 (Ginsburg, J., dissenting).

IV. The Supreme Court of Virginia's decision is correct because *Miller* applies only to mandatory sentencing schemes and Virginia does not mandate life sentences for juvenile homicide offenders.

The fact that the Supreme Court of Virginia is right in this case is another factor weighing against certiorari. The Supreme Court of Virginia has now held on two occasions that Virginia's criminal procedure rules afford precisely the type of "individualized sentencing" discussed in *Miller*. It is true that at the time of Jones's offense, Virginia Code § 18.2-10 provided that the punishment for capital murder, a Class 1 felony, was "death . . . or imprisonment for life."[131] But except for a few crimes where the legislature has specified a "mandatory minimum,"[132] Virginia law grants trial judges discretion to suspend all or part of the sentence, including when defendants are convicted of capital murder under § 18.2-10.[133] And as this Court indicated in *Miller*, it is a question of State law whether a sentencing scheme imposes mandatory sentences.[134]

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[131] Resp't App. 23a (Va. Code Ann. § 18.2-10 (Cum. Supp. 2000)).

[132] *See Jones*, 763 S.E.2d at 825.

[133] Pet. App. 13a.

[134] *See Miller*, 567 U.S. at 467 n.2 ("abid[ing] by" the State's interpretation of "Jackson's sentence as mandatory") (citing *Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975)); *see also* Pet. App. 15a ("It follows that where, as here, a State's highest court treats a sentencing statute as non-mandatory (that is, provides an opportunity to seek mitigation of the prescribed punishment), the

At the time of Jones's conviction, Virginia Code § 19.2-303 provided:

> 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 accused on probation under such conditions as the court shall determine. . . .[135]

In addition to being eligible for a suspended sentence under § 19.2-303, the statute allowing Jones to be tried as an adult—Virginia Code § 16.1-272—made clear that the trial judge could sentence him *as a juvenile*, including suspending the sentence or committing him to juvenile detention.[136]

Furthermore, Jones had the right to request that a presentence report be completed *before* he was sentenced on the capital-murder charge.[137] At the time he

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United States Supreme Court would abide by that interpretation of state law.").

[135] Resp't App. 25a (Va. Code Ann. § 19.2-303 (2000 Repl. Vol.)).

[136] *Id.* 22a (Va. Code Ann. § 16.1-272 (Cum. Supp. 2000)); *see also id.* 18a-20a (Final Order at 4-5, *Pinckney v. Mathena*, No. CL13-7880 (Prince William Cty. Cir. Ct. Mar. 26, 2014), *pet. for appeal denied*, No. 140995 (Va. Mar. 24, 2015)). That juvenile-sentencing option under § 16.1-272 would not have applied had a jury convicted Jones of capital murder. *See Thomas v. Commonwealth*, 419 S.E.2d 606, 618 (Va. 1992).

[137] *See* Resp't App. 23a-25a (Va. Code Ann. § 19.2-299(A)(ii) (2000 Repl. Vol.)).

was sentenced, Virginia Code § 19.2-299 directed the probation officer:

> to thoroughly investigate and report upon the history of the accused, including a report of the accused's criminal record as an adult and available juvenile court records, and *all other relevant facts, to fully advise the court so the court may determine the appropriate sentence to be imposed*.[138]

Jones also had "the right to cross-examine the investigating officer as to any matter contained therein and *to present any additional facts bearing upon the matter*."[139]

As the Virginia Court of Appeals explained in 1986, 15 years before Jones was sentenced:

> The presentence report generally provides the court with mitigating evidence. 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.[140]

All of that was apparent in 2001, when Jones was sentenced. Indeed, even a cursory review of Virginia caselaw shows that the sentencing judge's power to suspend all or part of a sentence has been part of

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[138] *Id.* at 23a (emphasis added).

[139] *Id.* at 24a (emphasis added).

[140] *Duncan v. Commonwealth*, 343 S.E.2d 392, 394 (Va. Ct. App. 1986) (emphasis added).

Virginia's sentencing scheme for nearly a century.[141] Jones himself understood that his life sentence was not mandatory because he asked the trial court in his motion to vacate to use its discretion under § 19.2-303 to suspend all or part of his sentence.[142] Thus, Jones is wrong to claim that Virginia courts did not know they could suspend a life sentence.[143]

Jones largely ignores that it is up to the Supreme Court of Virginia to determine whether Virginia imposes mandatory sentences, and that the court's determination that Virginia does *not* impose such sentences is well-supported. Rather, he frames this case as whether States are constitutionally required to do more than comply with *Miller*'s plain holding: "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[144] By limiting *Miller* to its holding, Jones claims that Virginia "doubles down on the argument that the constitutional guarantee articulated in *Miller* is merely procedural, and is not substantive."[145] That simply is not the case.

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[141] *Slayton v. Commonwealth*, 38 S.E.2d 479, 483 (Va. 1946); *Richardson v. Commonwealth*, 109 S.E. 460, 462 (Va. 1921); *Esparza v. Commonwealth*, 513 S.E.2d 885, 887-89 (Va. Ct. App. 1999); *Bruce v. Commonwealth*, 387 S.E.2d 279, 280-81 (Va. Ct. App. 1990).

[142] *See Jones*, 763 S.E.2d at 825.

[143] *See, e.g.*, Pet. App. 13a & n.8.

[144] *Miller*, 567 U.S. at 465.

[145] Pet. 13.

Miller's explicit constitutional guarantee is that no juvenile homicide offender will be sentenced to die in prison by legislative fiat; every juvenile offender must have had the opportunity to argue for a lesser sentence. The Supreme Court of Virginia has determined, as a matter of Virginia law, that Virginia—unlike the States whose procedures were found deficient in *Miller* and *Montgomery*—has always provided that substantive protection. Whether or not a particular juvenile offender took advantage of it, the individual had the opportunity to present mitigating evidence related to youth and immaturity and to argue for a suspended sentence as a matter of Virginia law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia

STUART A. RAPHAEL
Solicitor General

TREVOR S. COX
Deputy Solicitor General

MATTHEW R. MCGUIRE
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773
mmcguire@oag.state.va.us

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APPENDIX

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

DONTE LAMAR. JONES, #1165814, Movant,

v. **Criminal Case Nos.: CR00-548-01 (Capital Murder)**

COMMONWEALTH OF VIRGINIA, Respondent.

MOTION TO VACATE INVALID SENTENCE

The Movant, Donte Lamar Jones ("Mr. Jones"), Pro-Se, moves this Honorable Court to Vacate the mandatory life sentence for Capital Murder, pursuant to *Miller v. Alabama,* 132 S.Ct. 2455 (2012) and *Rawls v. Commonwealth,* 278 Va. 213, 683 S.E.2d 544 (2009). In support thereof, Mr. Jones states as follows:

I. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 132 S.Ct. 2455 (2012) the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. Under current Virginia law, any juvenile convicted of Capital Murder must be sentenced to life imprisonment. This statutory scheme is now unconstitutional. Mr. Jones's sentence must be vacated and a new sentence imposed. *Rawls*

v. Commonwealth, 278 Va. 213, 683 S.E.2d 544 (2009).

This Court must look to existing statutes to determine what constitutional sentence may be imposed on juveniles convicted of Capital Murder. In Virginia, however, there is no constitutional statutory sentence available for said crime other than life imprisonment. Therefore, in the absence of a valid sentence this Court should hold that the appropriate remedy for juveniles convicted of Capital Murder is to either suspend the sentence or set aside the conviction of Capital Murder.

II. PROCEDURAL HISTORY

In 2000, Donte Lamar Jones was found guilty, pursuant to an *Alford* plea to Capital Murder. Mr. Jones was also charged with additional crimes for which he went to trial and was found guilty. However, this motion only deals with the Capital Murder charge. In 2001, he was sentenced to active prison terms for all offenses, including a mandatory sentence of life imprisonment without parole for the Capital Murder.

On June 25, 2012, the United States Supreme Court held in *Miller v. Alabama,* 132 S.Ct. 2455 (2012), that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without parole for juvenile offenders." *Id.* 2469.

III. ARGUMENT

In *Miller v. Alabama,* 132 S.Ct. 2455 (2012), the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." Acknowledging the unique status of juveniles and reaffirming its recent holdings in *Roper v. Simmons,* 125 S.Ct. 1183 (2005), *Graham v. Florida.* 130 S. Ct. 2011 (2010), and *J.D.B. v. North Carolina,* 131 S. Ct. 2394 (2011), the Court in *Miller* held that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464, and therefore the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466. In addition, due process has been violated by imposition of a sentence resulting from the instant unconstitutional sentencing *scheme.* U.S. CONST. AMEND. VI, XIV; *Gardner v. Florida,* 97 S. Ct. 1197 1205 (1977); *Morrissey v. Brewer,* 92 S. Ct. 2593, 2600 (1972).

a. In Holding Mandatory Juvenile Life Sentences Without Parole Unconstitutional, *Miller* Reaffirms The Court's Recognition That Children Are Fundamentally Different Than Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments.

Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of

life "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham v. Florida,* 130 S. Ct. 2011, 2026-27, 2029-30 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller* at 2460. The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, that shows fundamental differences between juveniles and adults.[1] The Court reiterated its holdings in *Roper* and *Graham* that these research findings established that "children are constitutionally different from adults for purposes of sentencing." *Id.* The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham,* 130 S.Ct. at 2027, *Roper,* 125 S. Ct. at 1195)). Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."

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[1] In *Graham,* the Court recognized that "youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness[,] and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient." *Miller,* at 2467 (internal citations and quotation marks omitted).

Id. at 2465. Accordingly, the Court emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentence on juvenile offenders, even when they commit terrible crimes. *Id.*

Miller held that mandatory life sentencing schemes imposed on juvenile offenders convicted of murder are unconstitutional. *See id.* at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). The Court found that "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. The Court wrote:

> Under these schemes, every juvenile will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses – but really, as *Graham* noted, a *greater* sentence than those adults will serve.

Id. at 2467-68. Relying on *Graham, Roper,* and the Court's individualized sentencing decisions, the Court found "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child

as an adult." *Id.* at 2468. Mandatory life sentences are unconstitutional as applied to juveniles because "[b]y making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. *Id.* 2469.

b. Virginia's Mandatory Life Imprisonment Without Parole Sentencing Scheme For Juvenile Offenders Convicted of Capital Murder Is Unconstitutional to *Miller*.

Virginia's sentencing scheme, which currently mandates that any juvenile offender convicted of Capital Murder must he sentenced to life imprisonment without parole, is unconstitutional pursuant to *Miller.* In Virginia, a judge must sentence any juvenile offender convicted of Capital Murder as an adult to life imprisonment. Capital Murder is punishable as a Class 1 felony. Va. Code § 18.2-31. Pursuant to Va. Code § 18.2-10, the punishment for conviction of a Class I felony is death, or life imprisonment. Because Mr. Jones accepted the Commonwealth's offer to try him without a jury in exchange for taking the death penalty off the table in the event he was found guilty, he was sentenced to a mandatory sentence of life imprisonment without parole for Capital Murder. Virginia's sentencing scheme required that Mr. Jones be sentenced to a mandatory sentence of life imprisonment for Capital Murder.

When a juvenile offender in Virginia is convicted of Capital Murder, the sentencer is denied any opportunity to consider factors related to the juvenile's overall level of culpability, as mandated by *Miller*. *Miller* sets forth specific factors that the sentencer, at a minimum, should consider: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 2468. Accordingly, Virginia's mandatory sentencing scheme for Capital Murder, as applied to juvenile offenders, is unconstitutional and sentences imposed pursuant to this scheme must be vacated.

c. *Rawls v. Commonwealth* Allows A Circuit Court to Set Aside An Unconstitutional Sentence At Any Time

Mr. Jones has demonstrated that his mandatory sentence of life imprisonment without parole for Capital Murder is unconstitutional under the ruling in *Miller*. The Supreme Court of Virginia in *Rawls v. Commonwealth,* 278 Va. 213, 683 S.E.2d 544 (2009), held that a circuit court may correct a void or unlawful sentence at any time (citing *Powell v. Commonwealth,* 182 Va. 327, 340, 28 S.E.2d 687, 692 (1944)).

Further, the Supreme Court of Virginia has previously held that "[a] sentence in excess of that prescribed by law is not void ab initio because of the excess, but is good in so far as the power of the court extends, and is invalid only as to the excess." *Royster v. Smith,* 195 Va. 228, 236, 77 S.E.2d 855, 859 (1953); accord *Charles v. Commonwealth*, 270 Va. 14, 20, 613 S.E.2d 432, 435 (2005); *Crutchfield v. Commonwealth,* 187 Va. 291, 297-98, 46 S.E.2d 340, 343 (1948). Additionally, stated in *Powell*, 182 Va. at 340, 28 S.E.2d at 692: "The authorities are unanimous in the view that a court may impose a valid sentence in substitution for one that is void, even though the execution of the void sentence has commenced. . . . The invalidity of the judgment does not affect the validity of the verdict."

Therefore, this Court has the authority to set aside Mr. Jones's illegal sentence, hold a sentencing hearing that takes into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison, *Miller* at 2469, and impose a valid sentence. However, to the extent that Code §§ 18.2-31 and 18.2-10 prohibits the Court from imposing any sentence other than life, Mr. Jones contends that these code sections are unconstitutional.

d. <u>Code §§ 18.2-31 and 18.2-10 Are Facially Unconstitutional Because They Do Not Prescribe a Punishment Other Than Mandatory Life Imprisonment for Juvenile Offenders</u>

Mr. Jones stands convicted of Capital Murder, a Class 1 felony, in violation of Code § 18.2-31, and sentenced to a mandatory sentence of life imprisonment, pursuant to Code § 18.10. Accordingly, he challenges these code sections as facially unconstitutional under the United States and Virginia Constitutions under *Miller v. Alabama,* 132 S.Ct. 2455 (2012), because they do not prescribe a punishment other than a mandatory sentence of life imprisonment without parole for juvenile offenders convicted under them.

The Supreme Court of Virginia has stated, "[w]e will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions." *Marshall v. Northern Virginia Transportation Authority,* 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (citing *In re Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council of Emporia v. Newsome,* 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)). Moreover, "[t]he party challenging an enactment has the burden of proving that the statute is unconstitutional." *Id.* at 428, 657 S.E.2d at 75 (citing *Hess v. Snyder Hunt Corp.,* 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990); *Blue Cross of Virginia v. Commonwealth,* 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980)).

Mr. Jones has met his burden in proving that Code §§ 18.2-31 and 18.2-10 violates the United States and Virginia Constitutions in that the only punishment it prescribes for a juvenile offender so convicted is a mandatory sentence of life imprisonment without parole. As previously noted, the Supreme Court has held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without parole for juvenile offenders." *Miller,* at 2469. Conversely, the sentence is forbidden under Article I, Section 9 of the Virginia Constitution, which mirrors the Eighth Amendment to the U.S. Constitution.[2]

Therefore, Code §§ 18.2-31 and 18.2-10 must be declared unconstitutional because they are plainly repugnant to the Virginia and United States Constitutions, pursuant *Miller.*

e. <u>Alternative Option</u>

Mr. Jones notes an alternative option for the Court. Pursuant to Code § 19.2-303, the Court "may suspend imposition of sentence or suspend the sentence in whole or part" on the Capital Murder conviction.

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[2] Article I, Section 9 to the Virginia Constitution states in relevant part: "That excessive bail ought not to be required, nor excessive fines imposed, ***nor cruel and unusual punishments inflicted***." (Emphasis added) The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, ***nor cruel and unusual punishments inflicted***." (Emphasis added)

This will still leave Mr. Jones with a life sentence on at least one of the remaining non-homicide convictions while alleviating him from the unconstitutional mandatory life without parole sentence for Capital Murder. Mr. Jones consents to this alternative option with the exception that he be allowed the right to appeal the legal question of whether a suspended mandatory life sentence without parole on a juvenile offender is constitutional under *Miller*.

PRAYER FOR RELIEF

For all the above stated reasons, and any other such reasons as may be made upon amendment of this Motion, Donte Lamar Jones respectfully asks this Honorable Court to grant him the following relief:

(A) Issue an Order granting him relief from his unconstitutional sentence;

(B) Declare Code §§ 18.2-31 and 18.2-10 unconstitutional under *Miller v. Alabama,* 132 S.Ct. 2455 (2012);

(C) Suspend the mandatory life sentence without parole or declare Mr. Jones' conviction for Capital Murder void in the absence of any legal punishment the Court can lawfully impose;

(D) If the Court determines there is a need for further factual development, grant Mr. Jones an evidentiary hearing on the claims presented in this Motion;

(E) Appoint Mr. Jones an attorney and permit an opportunity to brief and argue the issues presented in this Motion;

(F) Afford Mr. Jones an opportunity to reply to any responsive pleadings filed by Respondent; and

(G) Grant such further and other relief as may be appropriate.

Respectfully submitted,

["Without Prejudice"]

/s/ Donte L. Jones
Movant, Pro-Se

Donte Lamar Jones, #1165814
SUSSEX II STATE PRISON
24427 Musselwhite Drive
Waverly, Virginia 23891-2222

CERTIFICATE OF SERVICE

I, Donte Lamar Jones, hereby certify that on May 31, 2013, a copy of the foregoing was served by first-class mail on Mr. Benjamin M. Hahn, York County Commonwealth's Attorney, P.O. Box 40, Yorktown, Virginia 23690-0040.

["Without Prejudice"]

/s/ Donte L. Jones
Donte Lamar Jones
Movant, Pro-Se

[1] **VIRGINIA:**

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

XAVIER JAMAL PINCKNEY, #1421296, Petitioner,

v.

RANDALL MATHENA, WARDEN, RED ONION STATE PRISON, Respondent.

Docket No. CL13-7880

FINAL ORDER

Upon mature consideration of the petition of Xavier Jamal Pinckney for a writ of habeas corpus, the respondent's motion to dismiss the petition, and the petitioner's opposition to the motion to dismiss the petition, and the authorities cited therein, a review of the record in the criminal cases in the Court of *Commonwealth v. Xavier Jamal Pinckney,* Case Nos. CR05073822-00 through CR05073825-00, CR05073827-00, CR05073828-00, CR05073877-00, and CR05073878-00, and a review of the orders entered by the Court of Appeals of Virginia in Record No. 0902-10-4 and by the Supreme Court of Virginia in Record No. 120490, all of which are hereby made a part of the record in this matter, the Court makes the following findings of fact and conclusions of law:

The Court finds Pinckney's petition challenges his custody by the Virginia Department of Corrections,

pursuant to the Court's orders. *See* Va. Code Ann. §§ 53.1-20 and 19.2-310. The Warden thus is the proper party-respondent. *See* Va. Code Ann. § 8.01-657. Accordingly, it is ORDERED that Randall Mathena, as Warden of Red Onion State Prison, be, and hereby is, [2] substituted as the sole proper party-respondent and that the Commonwealth of Virginia be, and hereby is, struck as a party-respondent.

The Court has considered the particular allegations and the claim contained in Pinckney's petition and makes the following further findings of fact and conclusions of law, pursuant to Virginia Code § 8.01-654(B)(5):

Pinckney is confined pursuant to a final judgment of the Court entered on March 9, 2010. Following a bench trial, the Court found Pinckney guilty of four counts of capital murder in violation of Virginia Code § 18.2-31 and sentenced him to imprisonment for life for each conviction. (Case Nos. CR05073822-00, CR05073823-00, CR05073877-00, and CR05073878-00). The Court also found Pinckney guilty of robbery in violation of Virginia Code § 18.2-58 (Case Nos. CR05073824-00) and three counts of use of a firearm in the commission of murder in violation of Virginia Code § 18.2-53.1 (Case Nos. CR05073825-00, CR05073827-00, and CR05073828-00) and sentenced Pinckney to an additional 18 years' imprisonment for those convictions.

By order dated January 26, 2011, the Court of Appeals granted Pinckney's petition for appeal with

respect to his assignments of error that his statements to police and certain physical evidence should have been suppressed. (Record No. 0902-10-4). It denied Pinckney's petition for appeal challenging the sufficiency of the evidence. *Id.* The Court of Appeals ultimately affirmed Pinckney's convictions by an unpublished opinion rendered on February 28, 2012. The Supreme Court of Virginia refused his petition for appeal on June 21, 2012, and it denied his petition for rehearing on September 25, 2012. (Record No. 120490).

On September 24, 2013, Pinckney timely filed the instant petition for a writ of habeas corpus. Pinckney's petition presents a single claim: that because *Miller v. Alabama,* 132 S. Ct. [3] 2455 (2012), held that "mandatory life without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,'" he is entitled to a resentencing hearing on his capital murder convictions.

The Court finds *Miller* announced a new rule governing sentencing of juveniles convicted of capital murder. "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane,* 489 U.S. 288, 301 (1989). "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." *Chaidez v. United States,* 133 S. Ct. 1103, 1107 (2013). Pinckney's conviction was not "final" for *Teague* purposes on the

date *Miller* was decided. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994); *see also Mueller v. Director,* 252 Va. 356, 362, 478 S.E.2d 542, 546 (1996). Pinckney's conviction was not final until the Supreme Court of Virginia refused his petition for rehearing on September 25, 2012. *Miller* was decided on June 25, 2012. Pinckney's petition therefore presents no *Teague* retroactivity issue.

Miller "mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty," life without parole. *Miller,* 132 S. Ct. at 2471. "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.* at 2469. *Miller* expressly addressed the sentencing provisions in the Alabama and Arkansas statutes. As a matter of law in both states, a life without parole sentence could not be [4] 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 its new prohibition "forbids a sentencing scheme that mandates life in prison without possibility of parole for juveniles." 113 S.Ct. at 2469.

Virginia law is clear that when legislature intends to bar a court from suspending execution of a sentence, it fixes a "mandatory minimum" sentence in the statute. *See* Va. Code Ann. § 18.2-12.1. The statutory sentence for a Class 1 Felony (capital murder) is "death" or "imprisonment for life," or, if the defendant was a juvenile at the time of the offense, "imprisonment for life." Va. Code Ann. § 18.2-10(a). The life sentence imposed for capital murder does not denominate the sentence as a "mandatory minimum;" therefore, it does not preclude suspension of all or part of the life sentences in the exercise of the Court's discretion.

Under Virginia Code § 16.1-272, a circuit court sentencing a juvenile indicted as an adult has wide discretion to impose a range of sentencing alternatives. In addition, the Court had discretion to suspend any, or all, of the life sentence provided for in Virginia Code § 18.2-10(a), following preparation of a presentence investigation and report "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 v. Commonwealth,* 2 Va. App. 342, 345, 343 S.E.2d 392, 394

(1986); Va. Code Ann. § 19.2-299(A). The Court also had authority to "suspend imposition of sentence or suspend the sentence in whole or part and in addition [to] may place the defendant on probation under such [5] conditions as the court shall determine." Va. Code Ann. § 19.2-303. Thus, the Court had the statutory authority to suspend all or part of Pinckney's life sentence in light of mitigating evidence, including the defendant's age. A juvenile defendant in Virginia is not subject to a sentence of "mandatory life without parole" as was the case in *Miller*.

Pinckney was indicted on March 2, 2009, for the December 19, 2008, murders of Jean and James Smith. Pinckney was a juvenile at the time of the murders and at the time of the indictment. The Court found Pinckney guilty at the conclusion of a one-day bench trial on September 28, 2009, and scheduled sentencing for February 5, 2010. On January 29, 2010, the Court took up Pinckney's motion to continue the sentencing for the express purpose of developing additional mitigating evidence from his mental health expert, Dr. Mills. Pinckney specifically moved the Court "to fix a sentence short of life in prison" and expressly relied on the Court's authority to sentence juvenile defendants, pursuant to Virginia Code § 16.1-272. Based on that authority, Pinckney argued the mitigation evidence he wished to develop was relevant to the Court's determination of an appropriate sentence. On February 19, 2010, the Court received a written report from Dr. Mills, as well as a pre-sentence report prepared pursuant to Virginia

Code § 19.2-299, and heard testimony from two family members of the victims.

The Court concluded, consistent with Pinckney's argument, that it had the authority "to fix a sentence short of life in prison." After reviewing the presentence report and taking account of all the mitigating evidence Pinckney had marshaled, the Court carefully explained its sentencing decision, holding it appropriate to impose life sentences for each capital murder conviction without suspended any portion of the sentences. The Court did exactly what *Miller* requires: it imposed a sentence which took account of Pinckney's age, the circumstances of the crime, his criminal history, and his mitigating evidence. Having taken all those mitigating [6] factors into account, the Court simply declined to exercise its discretion to commute or suspend the sentence in light of all the evidence in Pinckney's case. Under these circumstances, Pinckney's *Miller* claim must fail.

For all the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed. It is, therefore, ADJUDGED, ORDERED, and DECREED that the Commonwealth's Motion to Dismiss is GRANTED and that the Petition for Habeas Corpus is DISMISSED.

The Clerk is directed to forward a certified copy of this Order to counsel for the parties.

Enter this 26 day of March, 2014

/s/ Mary Grace O'Brien
JUDGE

I ASK FOR THIS:

/s/ Matthew P. Dullaghan

Matthew P. Dullaghan
Senior Assistant
Attorney General
Virginia State Bar
No. 22164
Counsel for Respondent
Office of the
Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 786-0142
(Facsimile)
mdullaghan@
oag.state.va.us.

SEEN AND
OBJECTED TO:

Jennifer T. Stanton,
Esquire
Virginia State Bar
No. 32448
Counsel for Petitioner
J.T. STANTON, P.C.
555 East Main Street,
Suite 801
Norfolk Virginia 23510
(757) 622-3628
(Telephone)
(757)-622-3630
(Facsimile)
stantonlaw500@gmail.com

Text of Relevant Virginia Code
Provision in Effect in June 2001

§ 16.1-272. Power of circuit court over juvenile offender. –

A. In any case in which a juvenile is indicted, the offense for which he is indicted and all ancillary charges shall be tried in the same manner as provided for in the trial of adults, except as otherwise provided with regard to sentencing. Upon a finding of guilty of any charge other than capital murder, the court shall fix the sentence without the intervention of a jury.

1. If a juvenile is convicted of a violent juvenile felony, the sentence for that offense and for all ancillary crimes shall be fixed by the court in the same manner as provided for adults, but the sentence may be suspended conditioned upon successful completion of such terms and conditions as may be imposed in a juvenile court upon disposition of a delinquency case including, but not limited to, commitment under subdivision 14 of § 16.1-278.8 or § 16.1-285.1.

. . . .

B. If the circuit court decides to deal with the juvenile in the same manner as a case in the juvenile court and places the juvenile on probation, the juvenile may be supervised by a juvenile probation officer.

. . . .

§ 18.2-10. Punishment for conviction of felony. – The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, if the person so convicted was sixteen years of age or older at the time of the offense, or imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000. If the person was under sixteen years of age at the time of the offense, the punishment shall be imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000.

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§ 19.2-299. Investigations and reports by probation officers in certain cases.

A. When a person is tried in a circuit court . . . (ii) upon a felony charge, the court may when there is a plea agreement between the defendant and the Commonwealth and shall when the defendant pleads guilty without a plea agreement or is found guilty by the court after a plea of not guilty, direct a probation officer of such court to thoroughly investigate and report upon the history of the accused, including a report of the accused's criminal record as an adult and available juvenile court records, and all other relevant facts, to fully advise the court so the court may determine the appropriate sentence to be imposed. The probation officer, after having furnished

a copy of this report at least five days prior to sentencing to counsel for the accused and the attorney for the Commonwealth for their permanent use, shall submit his report in advance of the sentencing hearing to the judge in chambers, who shall keep such report confidential. The probation officer shall be available to testify from this report in open court in the presence of the accused, who shall have been advised of its contents and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter. The report of the investigating officer shall at all times be kept confidential by each recipient, and shall be filed as a part of the record in the case. Any report so filed shall be sealed upon the entry of the sentencing order by the court and made available only by court order, except that such reports or copies thereof shall be available at any time to any criminal justice agency, as defined in § 9-169, of this or any other state or of the United States; to any agency where the accused is referred for treatment by the court or by probation and parole services; and to counsel for any person who has been indicted jointly for the same felony as the person subject to the report. Any report prepared pursuant to the provisions hereof shall without court order be made available to counsel for the person who is the subject of the report if that person is charged with a felony subsequent to the time of the preparation of the report. The presentence report shall be in a form prescribed by the Department of Corrections. In all cases where such report is not ordered, a simplified

report shall be prepared on a form prescribed by the Department of Corrections.

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§ 19.2-303. Suspension or modification of sentence; probation; taking of fingerprints as condition of probation. – 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 accused on probation under such conditions as the court shall determine or may, as a condition of a suspended sentence, require the accused to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted, or to perform community service, or both, under terms and conditions which shall be entered in writing by the court. The judge, after convicting the accused of a felony, shall determine whether a copy of the accused's fingerprints are on file at the Central Criminal Records Exchange. In any case where fingerprints are not on file, the judge shall require that fingerprints be taken as a condition of probation. Such fingerprints shall be submitted to the Central Criminal Records Exchange under the provisions of subsection D of § 19.2-390.

If a person is sentenced to jail upon conviction of a misdemeanor or a felony, the court may, at any time before the sentence has been completely served, suspend the unserved portion of any such sentence,

place the person on probation for such time as the court shall determine, or otherwise modify the sentence imposed.

If a person has been sentenced for a felony to the Department of Corrections but has not actually been transferred to a receiving unit of the Department, the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, suspend or otherwise modify the unserved portion of such a sentence. The court may place the person on probation for such time as the court shall determine.