No. 14-1248

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 TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

In *Miller v. Alabama*, 132 S. Ct. 2455 (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." Virginia's sentencing scheme does not mandate life sentences for such offenders. Rather, Virginia: provides for a presentence investigation and report; allows defendants to offer mitigating evidence before sentencing; and permits the sentencing judge to suspend all or part of the sentence based on any mitigating circumstances. The questions presented are:

1) Whether *Miller* invalidates Virginia's discretionary sentencing scheme.

2) Whether *Miller* applies retroactively to cases that were final on direct review when *Miller* was decided.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

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, Petitioner Jones—born November 8, 1982—was four months shy of his 18th 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. 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 in the left

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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.

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]

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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.* 13.

2. Jones was charged as an adult with 11 felonies, including capital murder, armed robbery, 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 in prison. (The plea agreement referred to "LIFE without the possibility of parole,"[14] but parole had already been abolished in Virginia for crimes committed after January 1, 1995.[15]) Jones entered a straight-up guilty plea to the other ten charges, with sentencing on those charges to follow the completion of a presentence report.[16]

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

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

[12] *Id*. 37, 41.

[13] *Id.* 44.

[14] *Id.* 45.

[15] 1994 Va. Acts Sp. Sess. II chs. 1, 2 (codified at Va. Code Ann. § 53.1-165.1 (2013)).

[16] Va.-JA 44.

not be pronounced."[17] Neither Jones nor his lawyer argued:

- that Jones should be sentenced as a juvenile under Virginia Code § 16.1-272;
- that sentencing should be delayed pending the completion of the presentence report under Virginia Code § 19.2-299; or
- that mitigating evidence supported suspending any part of the sentence under Virginia Code § 19.2-303.[18]

The trial judge sentenced Jones to life in prison on the capital-murder charge.[19]

On August 21, 2001, the probation officer completed a presentence report for the remaining charges.[20] After again providing Jones and his counsel an opportunity to respond before sentence was imposed,[21] the trial judge sentenced Jones to life in prison on the armed-robbery charge, and to a total of 68 years on the remaining charges, to run consecutively.[22]

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[17] *Id.* 47.

[18] The relevant portions of these statutes, in the form they appeared in June 2001, are included in the appendix to this brief (at pages 22a-26a).

[19] Va.-JA 47.

[20] *Id.* 106-18.

[21] *Id.* 53.

[22] *Id.*

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."[23] By that time, the statute of limitations had run for Jones to bring a State habeas corpus challenge to his 2001 sentence.[24] His remaining State-law avenues of relief were limited. Virginia circuit courts: lose jurisdiction to alter or amend a judgment 21 days after entry of the final order;[25] and lose jurisdiction to suspend a sentence thereafter once the defendant is transferred to the custody of the Virginia Department of Corrections.[26] To successfully challenge his sentence, therefore, Jones had to demonstrate that it was void ab initio; a sentence is void ab initio when it is "imposed in violation of a prescribed statutory range of punishment . . . because 'the character of the judgment was not such as the [trial c]ourt had the power to render.' "[27]

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[23] 132 S. Ct. 2455, 2469 (2012).

[24] Virginia requires that a habeas corpus challenge to a sentence be brought no later than "two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later." Va. Code Ann. § 8.01-654(A)(2) (2007).

[25] Va. S. Ct. R. 1:1.

[26] Va. Code Ann. § 19.2-303 (2008).

[27] *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009) (quoting *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887)).

On June 5, 2013, relying on *Miller*, Jones filed a "Motion to Vacate Invalid Sentence" in the York County circuit court.[28] He argued that his life sentence was void ab initio because Virginia law mandated that "any juvenile convicted of Capital Murder must be sentenced to life imprisonment,"[29] making the statute "facially unconstitutional" under *Miller*.[30] In the alternative, Jones requested that the sentencing judge exercise his discretion under Virginia Code § 19.2-303 to "suspend the sentence in whole or part."[31] Jones expressly disclaimed any challenge to his life-plus-68-year sentence on the other ten convictions.[32]

On June 13, 2013, the trial court denied Jones's motion, finding "nothing new in mitigation of the offense."[33]

On June 25, 2013, Jones filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising the same *Miller* claim as in State court.[34] At Jones's request,

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[28] A copy is included in the appendix (at pages 1a-13a).

[29] *Id.* 6a.

[30] *Id.* 9a.

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

[32] *Id.* 2a ("[T]his motion deals only with the capital murder charge.").

[33] Va.-JA 65.

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

however, the district court stayed that petition pending exhaustion of the Virginia litigation.[35] That action remains stayed.

4. In his petition for appeal to the Supreme Court of Virginia, Jones 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*."[36] 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.[37]

Virginia's high court granted the appeal.[38] Jones argued in his opening brief that *Miller* applied retroactively to cases, like his, that were final at the time *Miller* was decided.[39] He continued to maintain that Virginia law "*requires* that a juvenile be sentenced to life without the possibility of parole" for a capital-murder conviction.[40] He also argued for the first time that the court should vacate his life-plus-68-year

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

[36] Va.-JA 84.

[37] *Id.* 81.

[38] *Id.* 99.

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

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

sentence on the other ten felony convictions on the theory that his capital-murder sentence tainted the sentence on those charges.[41] As noted above, Jones had expressly waived that claim in both his motion in the trial court and his petition for appeal.[42]

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.[43] 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 sentences under Virginia Code § 19.2-303; and that

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[41] *Id.* at *27.

[42] Va. S. Ct. R. 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* at 19-24. Thus, Jones's belated attack on his life-plus-68-year sentence for his other convictions is without merit.

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

Jones had expressly waived any challenge to his sentence in his plea agreement.[44]

On October 31, 2014, the Supreme Court of Virginia dismissed the appeal, finding that the circuit court lacked jurisdiction because the sentence was not void ab initio.[45] 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."[46] The court held that it did not "because the trial judge had the authority under Code § 19.2-303 to suspend the sentence."[47] The court distinguished a conviction for capital murder from convictions under certain other statutes, where the legislature specifically "prescribed a mandatory minimum sentence."[48] 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."[49] 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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[44] *Id.* at *7-30.

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

[46] *Id.* at 824.

[47] *Id*.

[48] *Id.* at 825.

[49] *Id.*

> to Code § 19.2-303, as he asked the circuit court to so do in his motion to vacate.[50]

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."[51] The court therefore concluded that "*Miller* is not applicable even if it is to be applied retroactively."[52]

5. On December 1, 2014, Jones filed a petition for rehearing, briefing for the first time an argument that comes closer to the first question presented here. He urged that "[s]crutiny of Jones' sentence under *Miller* is not avoided . . . even if Virginia law does not mandate the imposition of life without parole," because *Miller* "does *more* than merely forbid a sentencing scheme that mandates life without parole for juveniles; it requires an individualized sentencing determination."[53] On January 15, 2015, the court denied Jones's rehearing petition without comment.[54]

Jones filed a timely petition for writ of certiorari, and the Court requested the Commonwealth's response.

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

[51] *Id.* at 826.

[52] *Id*.

[53] Pet. for Reh'g 4-5, *Jones v. Commonwealth*, No. 131385 (Va. Dec. 12, 2015) (emphasis added).

[54] Pet. App. 1a.

REASONS FOR DENYING THE WRIT

I. This case is a poor vehicle to address *Miller*'s scope.

A. Although State courts are beginning to divide over whether *Miller* does more than prohibit mandatory life sentences for juvenile homicide offenders, the case law is still developing.

This Court in *Miller* invalidated statutes in Arkansas and Alabama that denied "the sentencing authority . . . *any discretion* to impose a different punishment," thereby "mandat[ing] that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate."[55] The Arkansas statute at issue in *Miller* required that a defendant convicted of capital murder, even if a juvenile, "shall be sentenced to . . . life imprisonment without parole."[56] Although Arkansas argued for the first time on appeal that its statute allowed discretion and was not mandatory, the Court rejected that claim because it was not argued in lower courts; Arkansas all along had "treated

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[55] 132 S. Ct. at 2460 (first emphasis added); *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.").

[56] *Id.* at 2461 (quoting Ark. Code Ann. § 5-4-104(b) (1997)).

[the defendant's] sentence as mandatory."[57] And "like capital murder in Arkansas," the Alabama sentencing scheme also carried "a mandatory minimum punishment of life without parole."[58]

The majority in *Miller* explained that "the mandatory penalty schemes" in question "prevent[ed] the sentencer from taking account of" the defendant's youth.[59] The Court described several ways in which "children are constitutionally different from adults for purposes of sentencing."[60] Juvenile offenders have "diminished culpability and greater prospects for reform," are "more vulnerable . . . to negative influences and outside pressures," and their "character is not as 'well formed' as an adult's."[61] The Arkansas and Alabama sentencing schemes were invalid because "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[62]

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[57] *Id.* at 2462 n.2.

[58] *Id.* at 2462 (citing Ala. Code §§ 13A-5-40(9), 13A-6-2(c) (1982)).

[59] *Id.* at 2466; *id.* at 2467 ("Such 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.").

[60] *Id.* at 2464.

[61] *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569, 570 (2004)).

[62] 132 S. Ct. at 2475.

The Court made clear that it was not categorically banning life-without-parole sentences for juvenile homicide offenses. The absence of a categorical ban made *Miller* different from *Graham v. Florida*, where the Court categorically barred life-without-parole sentences for juveniles convicted of *non-homicide* offenses.[63] The *Miller* Court explained that critical distinction this way: "*Graham* established one rule (a flat ban) for *nonhomicide* offenses, while we set out a different one (individualized sentencing) for *homicide* offenses."[64]

Following the 2012 decision in *Miller*, some State courts have held that *Miller* invalidates only those State-sentencing schemes that impose mandatory life-without-parole sentences for juvenile homicide offenders.[65] By contrast, other State courts have ruled

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[63] 560 U.S. 48, 82 (2010).

[64] 132 S. Ct. at 2466 n.6 (emphasis added).

[65] *See, e.g., Brown v. Hobbs*, 2014 Ark. 267, at *6 (2014) (holding that *Miller* did not apply because the sentence at issue was a "discretionary determination" and the judge could have sentenced the juvenile to a term of years); *Commonwealth v. Okoro*, 26 N.E.3d 1092, 1101 (Mass. 2015) (finding that *Miller* applied only to life-without-parole sentences and did not prohibit mandatory sentences of life *with* parole eligibility for juvenile offenders); *People v. Davis*, 6 N.E.3d 709, 723 (Ill.), *cert. denied sub nom. Illinois v. Davis*, 135 S. Ct. 710 (2014) (finding that a life-without-parole sentence does not violate the Eighth Amendment if it is "at the trial court's discretion rather than mandatory"); *People v. Tate*, 2015 Colo. LEXIS 466, at *51 (June 1, 2015) (finding life with the possibility of parole to be an appropriate remedy if the court on remand finds life without the possibility of parole to be inappropriate); *State v. Williams*, 862

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that *Miller* goes further, requiring that the sentencing authority actually consider specific factors relating to the defendant's youth and make specific findings on the record to show that it has done so.[66]

N.W.2d 701, 703 (Minn. 2015) (explaining that *Miller* does not apply to a "mandatory sentence of life imprisonment *with* the possibility of release after 30 years"); *State v. James*, No. A-4153-08T2, 2012 WL 3870349, at *13 (N.J. Super. Ct. App. Div. Sept. 7, 2012) (finding that "the distinction between the *Miller* mandatory sentences and defendant's discretionary one renders *Miller* inapposite"), *certif. denied*, 63 A.3d 229 (N.J. 2013); *Sexton v. Persson*, 341 P.3d 881, 887 n.8 (Or. Ct. App. 2014) (holding *Miller* inapplicable to sentencing scheme that did not mandate life-without-parole sentences); *Turner v. State*, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014) (per curiam) (finding that "juvenile offenders sentenced to life with the possibility of parole are not entitled to individualized sentencing"); *State v. Hampton*, 2014 Wis. App. LEXIS 949, at *4-5 (Wis. Ct. App. 2014) (explaining that *Miller* is concerned only with mandatory life-without-parole sentences).

[66] *See, e.g., Ex Parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013) (holding that "a sentencing hearing for a juvenile convicted of a capital offense must now include consideration of" 14 factors relevant to the juvenile's youth); *People v. Gutierrez*, 324 P.3d 245, 269 (Cal. 2014) (directing trial court to "consider all relevant evidence . . . discussed in *Miller*"); *State v. Riley*, 110 A.3d 1205, 1217 (Conn. 2015) (holding that *Miller* required the trial court to consider on the record circumstances attendant to defendant's youth), *petition for certiorari docketed*, No. 14-1472 (U.S. June 17, 2015); *State v. Seats*, No. 13-1960, 2015 Iowa Sup. LEXIS 76, at *23-28 (Iowa June 26, 2015) (specifying factors sentencing judge must take into account); *State v. Long*, 8 N.E.3d 890, 892 (Ohio 2014) (remanding because the trial court did not make clear whether it actually considered defendant's youth); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (finding that *Miller* "establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the

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Several of those decisions were issued over strong dissents.[67] A number of State legislatures have also responded to *Miller* in various ways, enacting statutory changes ranging from the elimination of mandatory life sentences for juvenile homicide offenders, to specifying factors to be considered in imposing a life

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sentence rendered"), *cert. denied*, 135 S. Ct. 2379 (2015); *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013) (holding that "courts must consider the factors of youth and the nature of the homicide at an individualized sentencing hearing").

[67] *See Riley*, 110 A.3d at 1221 (Espinosa, J., dissenting) ("Because our sentencing scheme allows a defendant to present, and requires a sentencing court to consider, any mitigating evidence, *Miller* simply does not apply to Connecticut's sentencing scheme, which provides precisely what *Miller* requires, namely, individualized sentencing. . . ."); *Long*, 8 N.E.3d at 903 (O'Donnell, J., dissenting) ("Nor does *Miller* require the court to explicitly state that it has considered any particular mitigating factor. . . . 'While a sentencing court must consider all evidence of mitigation, it need not discuss each factor individually.' ") (citation omitted); *Aiken*, 765 S.E.2d at 579 (Toal, J., dissenting) ("South Carolina employs a discretionary sentencing scheme, in which sentencing courts consider all mitigating evidence presented by the criminal defendant. Thus, South Carolina courts already consider the hallmark features of youth. To the extent the majority wishes to provide courts with more explicit directions to consider the *Miller* factors in future sentencing hearings, I do not object; however, such future direction does not change the fact that petitioners' sentencing courts were given '*the opportunity* to consider mitigating circumstances.' ") (citation omitted); *id.* ("In my opinion, it is a leap of faith for the majority to extend *Miller*'s holding—*expressly applicable only to mandatory sentencing schemes*—to a discretionary sentencing scheme, and to require strict compliance with a rule that the Supreme Court has not yet set forth.").

sentence, to facilitating parole-eligibility review for juvenile offenders serving life sentences.[68]

There is surprisingly little authority yet from the federal circuits on this issue. To date, the United States Court of Appeals for the Ninth Circuit appears to be the only federal circuit to have addressed the issue. It ruled in *Bell v. Uribe* that a juvenile homicide offender's sentence of life without parole did not violate the Eighth Amendment because the sentencing judge exercised discretion afforded under California law.[69]

As this Court has said, it is for the States, "in the first instance, to explore the means and mechanisms for compliance,"[70] and that exploration is still in progress. The judicial and legislative response at the

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[68] *See, e.g.*, 2013 Cal. Stats. ch. 312 (codified at Cal. Penal Code §§ 3041, 3046, 3051, 4801); 2013 Del. Laws ch. 37 (codified at Del. Code Ann. tit. 11, §§ 4204A, 4209A); 2014 Fla. Laws ch. 220 (codified at Fla. Stat. §§ 921.1401, 921.1402); 2013 La. Acts 239 (codified at La. Code Crim. Proc. Ann. art. 878.1, La. Rev. Stat. Ann. § 15:574.4(E)); 2014 Mich. Pub. Acts 22 (codified at Mich. Comp. Laws § 769.25); 2013 Neb. Laws 44 (codified at Neb. Rev. Stat. § 28-105.02); 2015 Nev. Stat. 152; 2012 N.C. Sess. Laws 148 (codified at N.C. Gen. Stat. §§ 15A-1340.19A to 15A-1340.19D); 2012 Pa. Laws 204 (codified at 18 Pa. Cons. Stat. § 1102.1); 2013 Tex. Gen. Laws 2 (codified at Tex. Penal Code Ann. § 12.31); 2014 Wash. Sess. Laws 130 (codified at Wash. Rev. Code § 10.95.030); 2014 W. Va. Acts 37 (codified at W. Va. Code § 61-11-23); 2013 Wyo. Sess. Laws 18 (codified at Wyo. Stat. Ann. §§ 6-2-101(b), 6-10-301(c), 7-13-402(a)).

[69] 748 F.3d 857, 869-70 (9th Cir. 2014).

[70] *Graham*, 560 U.S. at 75.

State level continues to develop rapidly, while no federal circuit has yet held that *Miller* does more than eliminate the mandatory aspect of life-without-parole sentencing for juvenile homicide offenders.

This Court should let the matter continue to percolate. That is especially true since, in this case, Virginia's sentencing scheme complies with *Miller* (even assuming it is retroactive), petitioner's procedural defaults make this petition a poor vehicle to explore *Miller*'s reach, and a decision invalidating petitioner's life sentence on his capital-murder conviction will not affect his life-plus-68-year sentence on his other ten convictions.

B. Jones's facial challenge to Virginia's sentencing scheme fails as a matter of law because Virginia employs individualized sentencing and does not mandate life sentences for juvenile homicide offenders.

Jones brought this case as a "facial challenge" to Virginia's sentencing scheme.[71] He had to. As noted above, the circuit court would not have had jurisdiction to vacate his sentence unless it was void ab initio—that is, beyond the power of the court to have imposed it. Only by arguing that he could not have received a life sentence under *Miller*—because the sentencing statute is facially unconstitutional—could

[71] Appendix at 9a.

Jones successfully argue that the trial court lacked the power to sentence him to life in prison.

Such facial challenges are "disfavored"[72] and are "the most difficult . . . to mount successfully."[73] Those attempting such a challenge "bear a heavy burden of persuasion."[74] And State laws like this one are entitled to "a strong presumption of validity."[75]

To show that Virginia's sentencing scheme is facially unconstitutional, Jones had to "establish 'that no set of circumstances exists under which [Virginia's sentencing scheme] would be valid,'"[76] or that "the statute lacks any 'plainly legitimate sweep.'"[77] The statute, in other words, must be "unconstitutional in all applications."[78]

Jones could not come close to winning that facial challenge because Virginia's criminal procedure rules

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[72] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

[73] *Los Angeles v. Patel*, No. 13-1175, 2015 U.S. LEXIS 4065, at *9, 2015 WL 2473445, at *5 (U.S. June 22, 2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

[74] *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008).

[75] *Heller v. Doe*, 509 U.S. 312, 319 (1993).

[76] *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *Salerno*, 481 U.S. at 745).

[77] *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgment)).

[78] *Patel*, 2015 U.S. LEXIS 4065, at *12, 2015 WL 2473445, at *6.

afford precisely the type of "individualized sentencing" discussed in *Miller*. It is true that at the time of his offense, Virginia Code § 18.2-10 provided that the punishment for capital murder, a Class 1 felony, was "death . . . or imprisonment for life. . . ."[79] But except for a few crimes where the legislature has specified a "mandatory minimum,"[80] 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.

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 defendant on probation under such conditions as the court shall determine. . . .[81]

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

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[79] Va. Code Ann. § 18.2-10 (Cum. Supp. 2000) (reprinted at 23a).

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

[81] Va. Code Ann. § 19.2-303 (2000 Repl. Vol.) (reprinted at 25a).

as a juvenile, including suspending the sentence or committing him to juvenile detention.[82]

Furthermore, Jones had the right to request that a presentence report be completed *before* he was sentenced on the capital murder charge.[83] At the time he 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*.[84]

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*."[85]

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[82] Va. Code Ann. § 16.1-272 (Cum. Supp. 2000) (reprinted at 22a). *See, e.g.*, Final Order at 4-5, *Pinckney v. Mathena*, No. CL13-7880 (Prince William Cnty. Cir. Ct. Mar. 26, 2014) (reprinted at 18a-20a), *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*, 244 Va. 1, 23, 419 S.E.2d 606, 618, *cert. denied*, 506 U.S. 958 (1992).

[83] *See* Va. Code Ann. § 19.2-299(A)(ii) (2000 Repl. Vol.) (reprinted at 23a-25a).

[84] *Id.* (emphasis added).

[85] *Id.* (emphasis added).

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.[86]

All of that would have been known to a competent Virginia criminal-defense lawyer in 2001, when Jones was sentenced. Indeed, even a cursory review of Virginia case law shows that the sentencing judge's power to suspend all or part of a sentence has been part of Virginia's sentencing scheme for nearly a century.

In 1921, the Supreme Court of Virginia held that the predecessor statute conferring sentence-suspending authority was "highly remedial and should be liberally construed . . . ."[87] In 1946, the court noted that the purpose of such statutes was "that of restoring to a useful place in society an offender who is a good

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[86] *Duncan v. Commonwealth*, 2 Va. App. 342, 345-46, 343 S.E.2d 392, 394 (1986) (citing Va. Code § 19.2-299 and *Smith v. Commonwealth*, 217 Va. 329, 330, 228 S.E.2d 557, 558 (1976) (per curiam)) (emphasis added).

[87] *Richardson v. Commonwealth*, 131 Va. 802, 811, 109 S.E. 460, 462 (1921).

social risk."[88] And in 1982, it reiterated that such "statutes are highly remedial and should be liberally construed to provide trial courts a valuable tool for rehabilitation of criminals."[89]

In 1990, the Virginia Court of Appeals made clear that it is reversible error for a sentencing judge to refuse to consider mitigating evidence offered to suspend a sentence under Code § 19.2-303.[90] The court described how the sentencing judge in Virginia's criminal-justice system serves as an essential, independent check in determining the appropriate punishment:

> [T]he punishment as fixed by the jury is not final or absolute, since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in part, on the basis of *any mitigating facts* that the convicted defendant can marshal. The verdict of the jury is the fixing of maximum punishment which may be served. Under such practice, the convicted criminal defendant is entitled to "two decisions" on the sentence, one by the jury and the other by the trial

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[88] *Slayton v. Commonwealth*, 185 Va. 357, 366, 38 S.E.2d 479, 483 (1946).

[89] *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982).

[90] *Bruce v. Commonwealth*, 9 Va. App. 298, 302, 387 S.E.2d 279, 280-81 (1990); *see also Clem v. Fleming*, No. 7:13cv319, 2014 U.S. Dist. LEXIS 46404, at *9, 2014 WL 1329444, at *3 (W.D. Va. Apr. 2, 2014) (same).

> judge in the exercise of his statutory right to suspend; his "ultimate sentence . . . does not [therefore] rest with the jury" alone but is always subject to the control of the trial judge. This procedure makes the jury's finding little more than an advisory opinion or first-step decision.[91]

In 1999—two years before Jones was sentenced—the Virginia Court of Appeals made clear in *Esparza v. Commonwealth* that the trial judge has the power under Code § 19.2-303 to suspend a sentence even when the sentence is specified in the plea agreement itself,[92] as it was in Jones's plea agreement on the capital murder charge. Again, a competent criminal-defense attorney in 2001 would have been aware of *Esparza*. Commendably, Jones's petition cites *Esparza* (at page 8), conceding that the sentencing judge's power to suspend is both "discretionary" and "unfettered" under Virginia law.

Cases like *Esparza* are fatal to Jones's claim that Virginia law mandated his life sentence. Indeed, Jones himself understood that his life sentence was not mandatory because he asked the trial court, in the alternative, to use its discretion under § 19.2-303 to suspend all or part of his sentence.[93] The Supreme Court of Virginia pointed out that contradiction in

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[91] *Bruce*, 387 S.E.2d at 281 (quoting *Duncan*, 2 Va. App. at 345, 343 S.E.2d at 394 (emphasis added)).

[92] 29 Va. App. 600, 605-07, 513 S.E.2d 885, 887-89 (1999).

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

Jones's position: he could not simultaneously claim that his life sentence was mandatory and then argue that the sentencing judge had plenary discretion to suspend it.[94]

Jones is wrong that Virginia trial judges somehow do not apply that discretion when determining whether to sentence juvenile homicide offenders to life in prison. For example, in *Pinckney v. Mathena*, the trial judge rejected the defendant's claim that he was sentenced to life in prison without individualized consideration of his youth or other mitigating factors.[95] The court said that "it imposed a sentence which took account of Pinckney's age, the circumstances of the crime, his criminal history, and his mitigating evidence."[96] Likewise, the U.S. District Court for the Eastern District of Virginia, in *Clem v. Fleming*, rejected the juvenile offender's *Miller* claim "because the Virginia Code did not require the circuit judge to impose life imprisonment without parole, and because in any event, the judge *actually made an*

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[94] *See id.* ("Jones recognized that a circuit court continues to have the authority to suspend part or all of a sentence pursuant to Code § 19.2-303, as he asked the circuit court to so do in his motion to vacate.").

[95] *Pinckney*, *supra* note 82, is reprinted in the Appendix at 14a-21a.

[96] *Id.* 20a.

individualized determination after considering mitigating and aggravating factors. . . .”[97]

Jones argues (at page 13) that the record does not reflect “a single case in the history of Virginia in which a Virginia trial court has suspended a life without parole sentence.” But neither party developed those facts below and the record does not speak to that question one way or the other.

What is clear is that Virginia Code §§ 16.1-272 and 19.2-303, combined with the right to a presentence report and to present mitigating evidence under § 19.2-299, have plainly allowed for individualized sentencing of juvenile offenders convicted of capital murder, *both before and after* 2001, when Jones pleaded guilty.

Jones’s counsel may have been ineffective because he failed to take advantage of Jones’s ample procedural rights, but that does not show that Jones was denied the opportunity to present mitigating circumstances based on youth, let alone that Virginia’s sentencing scheme is facially unconstitutional under *Miller*.

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[97] 2014 U.S. Dist. LEXIS 46404, at *11, 2014 WL 1329444, at *4 (emphasis added).

C. Jones also failed to preserve his challenge because he litigated this case on the false premise that Virginia law mandated his life sentence.

In his petition for writ of certiorari, Jones argues that *Miller* requires the sentencing authority to actually consider the defendant's youth and to show on the record that it has done so. But that is a very different argument from the one he raised below.

Jones's motion to vacate his sentence in the trial court argued only that Virginia's sentencing scheme violated *Miller* because "[u]nder current Virginia law, any juvenile convicted of Capital Murder *must* be sentenced to life imprisonment."[98] That was likewise the premise of his petition for appeal to the Supreme Court of Virginia,[99] a theory he repeated in his opening brief on the merits.[100]

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[98] Appendix at 1a (emphasis added).

[99] Va.-JA 84 ("In Virginia, a judge must sentence any juvenile offender convicted of Capital Murder as an adult to life imprisonment without the possibility of parole.").

[100] Opening Br. of Appellant, *Jones v. Commonwealth*, No. 131385, 2014 WL 8187452, at *16 (Va. May 27, 2014) ("Under Virginia law, a capital offense is punishable as a Class 1 felony, which requires that a juvenile be sentenced to life without the possibility of parole."); *see also* Reply Br. of Appellant, *Jones v. Commonwealth*, No. 131385, 2014 WL 8187453, at *7 (Va. July 7, 2014) ("At the time of Jones' conviction, Virginia law mandated life without parole for juveniles convicted of Class 1 felonies and not sentenced to death.").

Yet the Supreme Court of Virginia squarely rejected that characterization of Virginia's sentencing scheme, concluding that "a Class 1 felony does not impose a mandatory minimum sentence under Virginia law."[101] Thus, it found that "*Miller* is not applicable even if it is to be applied retroactively."[102] Virginia's highest court, of course, is the "final arbiter" on the interpretation of the Virginia statutes at issue.[103]

Jones filed a petition for rehearing, continuing to insist that Virginia's sentencing scheme "requires all juveniles in Virginia convicted of a Class 1 felony to be sentenced to life without parole."[104] But then he added the new argument that he now presses here:

> Scrutiny of Jones' sentence under *Miller* is not avoided, however, *even if* Virginia law does not mandate the imposition of life without parole for every juvenile convicted of a Class 1 felony . . . . [T]he Eighth Amendment's prohibition on cruel and unusual punishment does *more than* merely forbid a sentencing scheme that mandates life without

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[101] 763 S.E.2d at 826.

[102] *Id.*

[103] *Montana v. Wyoming*, 131 S. Ct. 1765, 1773 n.5 (2011) (quoting *West v. AT&T Co.*, 311 U.S. 223, 236 (1940)); *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983) ("We are bound to accept the Missouri court's construction of that State's [criminal] statutes.").

[104] Pet. for Reh'g 1, *Jones v. Commonwealth*, No. 131385 (Va. Dec. 12, 2015).

> parole for juveniles; it requires an individualized sentencing determination.[105]

The Virginia Supreme Court "denied the petition for rehearing without comment, consistent with" the practice of many State courts of "refusing to consider issues not pressed at each stage of the litigation."[106]

Under these circumstances, Jones failed to preserve his first question presented. In Virginia, an argument is waived if it is not raised in the trial court,[107] is not raised in the petition for appeal,[108] or is not included in the appellant's opening brief.[109] Jones committed all three of those defaults here. And this Court, to boot, has "generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question."[110]

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[105] *Id.* 4-5 (emphasis added).

[106] *Prudential Fed. Sav. & Loan Ass'n v. Flanigan*, 478 U.S. 1311, 1311 (1986) (Rehnquist, J., in chambers).

[107] Va. S. Ct. R. 5:25 ("No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.").

[108] Va. S. Ct. R. 5:17(c)(1)(i) ("Only assignments of error assigned in the petition for appeal will be noticed by this Court.").

[109] *See John Crane, Inc. v. Hardick*, 283 Va. 358, 376, 722 S.E.2d 610, 620 (2012) (holding that argument is waived when raised for the first time in appellant's reply brief), *cert. denied*, 133 S. Ct. 1263 (2013).

[110] *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997).

"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 proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'"[111] As this Court explained in *Adams v. Robertson*, that well-established procedural-default rule serves multiple salutary purposes:

> The rule serves an important interest of comity . . . . Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record . . . . And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.[112]

Jones did not argue to the trial court, let alone in his petition for appeal or opening brief to the Virginia Supreme Court, that his sentence was invalid *even if Miller* does more than eliminate the mandatory aspect of a life sentence for juvenile homicide offenders. Accordingly, that argument has been waived.

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[111] *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983)).

[112] *Adams*, 520 U.S. at 90-91.

II. This Court has granted review in *Montgomery* to determine whether *Miller* is retroactive, but certiorari here should be denied because, even if *Miller is* retroactive, it does not apply to Virginia's sentencing scheme.

Jones's second question presented is the one this Court is considering in *Montgomery v. Louisiana*, No. 14-280: whether *Miller* created a new substantive rule that applies retroactively to cases that were final on direct review when *Miller* was decided. While Jones and the Commonwealth briefed that question below,[113] the Supreme Court of Virginia did not reach it. That court held "that because a Class 1 felony does not impose a mandatory minimum sentence under Virginia law, *Miller* is not applicable *even if it is to be applied retroactively*."[114]

Because the retroactivity issue will likely be decided in *Montgomery*, there is little point in repeating here Virginia's argument against *Miller*'s retroactivity, except to note that the Fourth Circuit recently validated the Commonwealth's position in *Johnson v. Ponton*.[115] The petition for certiorari in that case has

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[113] *See* Opening Br. of Appellant, *Jones v. Commonwealth*, No. 131385, 2014 WL 8187452, at *15-19 (Va. May 27, 2014); Br. for the Commonwealth, *Jones v. Commonwealth*, No. 131385, 2014 WL 8187451, at *14-29 (Va. June 23, 2014).

[114] 763 S.E.2d at 826 (emphasis added).

[115] 780 F.3d 219, 223-26 (4th Cir. 2015) (explaining that *Miller* is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), because: this Court did not hold the rule to be retroactive

(Continued on following page)

been docketed as *Johnson v. Manis* (No. 15-1). If, for some reason, this Court does not answer the retroactivity question in *Montgomery*,[116] then *Johnson*, or one of the other pending cases raising the same issue,[117] would present a better vehicle to answer it than this case, particularly when the Supreme Court of Virginia did not address the retroactivity question below. As this Court observed in *Adams*, it is generally "'unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider."[118]

The more salient question is whether this Court should hold Jones's petition until it decides *Montgomery*. It plainly should not, in light of the Virginia Supreme Court's explicit holding that Jones cannot prevail even if *Miller* is retroactive.[119] To successfully

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in *Miller*; it did not establish a new "substantive" rule—only a procedural one; and *Miller* did not establish a "watershed" procedural rule), *petition for cert. filed sub nom. Johnson v. Manis*, No. 15-1.

[116] The Court granted certiorari on the retroactivity question in *Toca v. Louisiana*, No. 14-6381, but the case was dismissed under Rule 46.

[117] *See, e.g.*, *New Hampshire v. Soto*, 14-639; *Carp v. Michigan*, No. 14-824; *Tyler v. Louisiana*, No. 14-1068; *Lewis v. Michigan*, No. 14-1196; *Tolliver v. Louisiana*, No. 14-6673; *Davis v. Michigan*, No. 14-8106.

[118] 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)).

[119] 763 S.E.2d at 826.

challenge his sentence, then, Jones must prevail on his first question. But that question was not preserved below, his facial challenge to Virginia's sentencing scheme fails as a matter of law, and the case law should be allowed to develop further before this Court wades into the area.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

July 10, 2015

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

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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.

Docket No. CL13-7880

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

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

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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.

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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.

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§ 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.