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Recommended Citation

Julie E. McConnell, *Capital Sentencing for Children in Virginia in the Wake of Miller v. Alabama and Montgomery v. Louisiana*, 21 Rich. Pub. Int. L. Rev. 47 (2017).

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CAPITAL SENTENCING FOR CHILDREN IN VIRGINIA IN THE
WAKE OF *MILLER V. ALABAMA* AND *MONTGOMERY V.*
LOUISIANA

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ABSTRACT

Recent United States Supreme Court decisions have declared it unconstitutional to sentence a juvenile to mandatory life in prison without an opportunity for parole. Virginia, a state that abolished parole in 1995, has yet to recognize the federally mandated prohibition against disproportionate punishment imposed on juveniles, particularly in cases where the mandatory minimum sentence is life without parole. This article proposes the General Assembly should amend current laws that reflect the unconstitutionality of these statutes as applied to juveniles.

INTRODUCTION

In the late 1980s and early 1990s, many states began aggressively trying more juveniles in the adult court system based on a now disproven theory that there would be a wave of juvenile “superpredators” that would wreak havoc on our communities.¹ In response to this faulty data, public policy began to deemphasize youth privacy, treatment, and rehabilitation in favor of laws designed to heighten public accountability.² The notion of “adult crime for adult time” influenced state legislatures and led to harsher sentences and more juveniles being tried as adults and sentenced to die in prison under mandatory life sentences.³ Today, there are approximately 2,500 people serving mandatory life sentences across the country.⁴ The philosophy behind this was a belief that individuals exhibiting violent behavior at such a young age were unredeemable and should be denied the protections of a juvenile justice system focused on rehabilitation.

¹ Howard N. Snyder & Melissa Sickmund, Nat'l Ctr. for Juv. Just., *Juvenile Offenders and Victims: 1999 National Report*, at 130 (1999) (describing "super-predator" myth to call public attention to a "new breed" of offenders). *See also* William J. Bennett, John J. Dillulio, JR. & John P. Walters, *Body Count: Moral Poverty—And How to Win America's War Against Crime and Drugs*, at 25–27 (1996) (citing Philadelphia District Attorney Lynne Abraham who talks about, “kids who have absolutely no respect for human life and no sense of the future,” and describing "super-predators" as "radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders.”).

² *See* Alexandra O. Cohen, et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 773 (2016) (claiming that politicians began to conflate juvenile and adult sentencing policies to comport with increased social pressures and media coverage of juvenile crimes).

³ Cal. S. Pub. Safety Comm., S.B. 9, 2011-2012 Reg. Sess., at 8 (2011).

⁴ Josh Rovner, *Policy Brief: Juvenile Life Without Parole: An Overview*, The Sentencing Project (Aug. 1, 2017), <http://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

However, through a series of cases decided by the U.S. Supreme Court, from *Roper v. Simmons* (2005) to *Montgomery v. Louisiana* (2016), the Court has consistently held that “children are constitutionally different from adults for the purposes of sentencing...” and that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders.”⁵ The Supreme Court, in furtherance of this philosophy, has held that it is unconstitutional to impose the death penalty on offenders who were under the age of 18 at the time that their crimes were committed, and that juveniles cannot be sentenced to life imprisonment without the possibility of parole without a prior individualized sentencing hearing that takes into consideration the age and attributes associated with such youthfulness.⁶

In the wake of *Miller*, many states modified their statutes that called for mandatory life sentences to make juvenile offenders eligible for parole after a certain term of years.⁷ Virginia, however, has yet to modify the capital murder statute, which allows for only one possible sentence for juveniles—mandatory life without parole—which is now unconstitutional for minors.⁸ This article argues that Virginia must change its unconstitutional juvenile sentencing laws, because (1) under *Miller* and *Montgomery* children and adults are not the same under the law, (2) other states and jurisdictions amended their laws to reflect the holding in *Miller* and *Montgomery*, and (3) the Virginia Supreme Court decision in *Jones v. Commonwealth* (2017) is inconsistent with the current precedent.

⁵ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (clarifying that *Miller v. Alabama* established a substantive rule of constitutional law that is retroactive); *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012); *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005) (outlining the “three general differences” between juveniles and adults that establish diminished capacity and make “the penological justifications for the death penalty apply to [juveniles] with lesser force”).

⁶ See generally *Montgomery*, 136 S. Ct. 718 (holding that *Miller v. Alabama* established a substantive rule of constitutional law that is retroactive); *Miller*, 567 U.S. 460 (holding that mandatory life sentences without parole for juvenile offenders under 18 convicted of homicide violated the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that imposing a life sentence without possibility of parole for juvenile offenders under 18 who were not convicted of homicide violated the Eighth Amendment); *Roper*, 543 U.S. 551 (holding that imposing the death penalty on juvenile offenders under 18 violated the Eighth Amendment).

⁷ See Tafi Mukunyadzi, *Arkansas House Passes Juvenile Sentencing Bill*, U.S. NEWS AND WORLD REP., (Mar. 14, 2017, 8:50 PM), <https://www.usnews.com/news/best-states/arkansas/articles/2017-03-14/arkansas-house-passes-juvenile-sentencing-bill> (describing an amendment to the Arkansas Criminal Code to make juvenile offenders eligible for parole after 20 to 30 years of incarceration). See generally Jody Kent Lavy and Jessica Jackson Sloan, *A Life, Not A Life Sentence*, U.S. NEWS AND WORLD REP., (Mar. 30, 2017, 1:00 PM), <https://www.usnews.com/opinion/civil-wars/articles/2017-03-30/conservative-states-are-giving-juveniles-a-second-chance-after-prison> (listing Arkansas as the 18th state to revise its criminal statute).

⁸ VA. CODE ANN. § 19.2-231 (2017).

I. CHILDREN ARE DIFFERENT

In *Miller*, the Supreme Court recognized that juveniles are fundamentally different than adults in ways that matter for the criminal justice system.⁹ The Court requires trial courts, prior to sentencing a juvenile defendant to life imprisonment without the possibility of parole, to consider detailed factors that relate to the accountability that can be imposed on youth.¹⁰ The Court reiterated this sentiment in *Montgomery*, stating, “*Miller* did bar life without parole. . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.”¹¹ Thus, *Miller* and *Montgomery* hold that unless a juvenile offender is proven to be “permanently incorrigible,” that offender cannot be sentenced to life without parole. Such factors to be considered include the juvenile's

immaturity, impetuosity, and failure to appreciate risks and consequences[;] the family and home environment that surrounds him[;] the circumstances of the homicide offense including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[;]” the ability of the young defendant to participate in his defense or negotiate with prosecutors; and “the possibility of rehabilitation.”¹²

Additionally, *Miller* recognized five factors that make juveniles, even juveniles that commit serious offenses, less culpable than adults:

1. Adolescent brains are not fully mature in regions related to impulse control, planning ahead, and risk avoidance;
2. Adolescents cannot extricate themselves from negative family or social environments and are more vulnerable than adults to negative influences such as abuse and neglect;
3. Adolescent brains have an enhanced susceptibility to peer pressure;
4. Adolescents are less able than adults to assist in their defense and properly evaluate plea options; and
5. Because the adolescent brain is not fully formed, adolescents have a tremendous potential for rehabilitation.¹³

In *Roper*, *Graham*, *Miller*, and *Montgomery*, the Supreme Court reiterated the significant paradigm shift in the common understanding that juveniles must be treated differently under the law.¹⁴ Important research illus-

⁹ See generally *Miller*, 567 U.S. 460.

¹⁰ *Id.* at 489.

¹¹ *Montgomery*, 136 S. Ct. at 734.

¹² *Miller*, 567 U.S. at 477–78.

¹³ See *id.* at 471. See also Elizabeth Scott, Thomas Grisso & Laurence Steinberg, *Sentencing Reform in a Constitutional Framework*, 88 TEMP L. REV. 675, 696–702 (2016) (discussing application of the five *Miller* factors).

¹⁴ See *Montgomery*, 136 S. Ct. at 733; *Miller*, 567 U.S. at 471–72; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569–570.

trates the marked difference in maturity, and thus, the need to analyze to what extent to hold a juvenile responsible as compared to an adult during the sentencing process. As a result, constitutional law reinforced by recent Supreme Court decisions has affected a legal shift requiring the acknowledgement of these variations in culpability.

The American Medical Association (AMA), in an amicus brief to the Supreme Court in *Miller*, summarized the adolescent brain as “a hyperactive reward-driven system (involving the nucleus accumbens and increased dopamine), a limited harm-avoidant system (involving the amygdala), and an immature cognitive control system (involving the prefrontal cortex and decreased serotonin.)”¹⁵ The AMA concluded that as a result, “adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment.”¹⁶ The American Psychological Association (APA) stated in its own *Miller* amicus brief, that juvenile crimes, even serious crimes such as homicide, are often spur-of-the-moment, impulsive reactions rather than premeditated actions, and are typically predicated on a social and/or emotional stimulus.¹⁷ As the APA stated in its *Miller* amicus brief, juveniles are “especially vulnerable to the negative influence of peer pressure. . . . The presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions.”¹⁸ Importantly, the impact of peers on the adolescent mind is not confined solely to situations where a peer is explicitly pressuring someone to do something. As the APA stated, “mere awareness that peers were watching encouraged risky behavior among juveniles, but not adults.”¹⁹

¹⁵ Brief for Am. Med. Ass’n & Am. Acad. of Child & Adolescent Psychiatry as Amici Curiae Supporting Neither Party at 35, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 LEXIS 128, at *35.

¹⁶ *Id.*

¹⁷ See Brief for Am. Psych. Ass’n & Am. Psychiatric Ass’n, & Nat’l. Ass’n of Soc. Workers as Amici Curiae Supporting Petitioners at 3, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 LEXIS 215, at *12; see also Scott, et al., *supra* note 14, at 683–684 (noting that “individuals do not evince adult levels of impulse control until their early or mid-twenties,” a process described as the “age-crime curve”).

¹⁸ Brief for Petitioners, *supra* note 18, at 16–17; see also Brief for Neither Party, *supra* note 16, at 9 (“[S]tudies have shown that adolescents are more likely to take risks when they are in the presence of peers.”).

¹⁹ Brief for Petitioners, *supra* note 18, at 17; Brief for Neither Party, *supra* note 16, at 12–13, (“Peer pressure. . . can arouse emotions of fear, rejection, or desire to impress friends that can undermine the reliability of adolescent behavioral control systems and result in actions taken without full consideration or appreciation of the consequences. . . . Researchers have also found that [an adolescent’s] limitations are especially pronounced when other factors – such as stress, emotions and peer pressure – enter the equation. These factors affect everyone’s cognitive functioning, but they operate on the adolescent mind differently and with special force.”); see also Scott, et al., *supra* note 14, at 699 (“[P]eer influence can play a more subtle role in adolescent behavior, as when teenagers engage in behavior that they think will

A juvenile offender's "cognitive and intellectual capacities, tendencies toward dependence and acquiescence, impulsiveness and shortsightedness in decision making, and general lack of knowledge about the legal process" all place the juvenile at a disadvantage compared with a similar adult offender.²⁰ As the APA stated in *Miller*, research "has shown that personality traits change significantly during the developmental transition from adolescence to adulthood, and the process of identity-formation typically remains incomplete until at least the early twenties."²¹ Thus, juveniles "are simply more likely than adults to change."²²

Finally, de facto life sentences are also not appropriate and are a violation of the spirit of *Graham*, *Miller*, and *Montgomery*. The Supreme Court jurisprudence in the realm of juvenile sentences was meant to institutionalize meaningful opportunities for release. De facto life sentences do not provide this opportunity. On remand from the Supreme Court, the Fourth Circuit Court of Appeals recently held that a 77-year sentence imposed upon a 15-year-old juvenile for first-degree murder was unconstitutional.²³ The court reasoned that because the earliest possible release was at the age of 60, the sentence was de facto life, and therefore, unconstitutional under the current regime.²⁴ The court reasoned that as there was no guarantee and only a slim chance that his petition for release would ever be granted under Virginia's geriatric parole system, it could not possibly be valid.²⁵ Additionally, the Seventh Circuit held that two consecutive 50-year prison terms for first-degree murder and the deadly use of a firearm constituted a de facto life sentence in violation of the Eighth Amendment.²⁶ The court argued that because the judge imposed a de facto life sentence without considering the age and mitigating juvenile attributes of the defendant, he violated the Court's mandate in *Miller*.²⁷

win approval").

²⁰ Scott, et al., *supra* note 14, at 699; *see also Miller*, 567 U.S. at 477.

²¹ Brief for Petitioners, *supra* note 18, at 20.

²² *Id.*; *see also* Brief of Former Juvenile Court Judges as Amici Curiae Supporting Petitioners at 13, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 LEXIS 204, at *17 ("Amici have been repeatedly impressed and surprised by the ability of juvenile offenders – including very serious offenders – to change and reform as they grow older and come to better appreciate the consequences of their actions."); Scott, et al., *supra* note 14, at 700 ("Research has demonstrated that the majority of youth involved in the juvenile justice system 'desist' from delinquency as they approach adulthood. . . . The research evidence indicates that the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure. Serious offending in adolescence occurs for many different reasons that may or may not reflect the character of the youth.").

²³ *See generally* *Contreras v. Davis*, 229 F. Supp. 3d 475 (E.D. Va. 2017).

²⁴ *Id.* at 482.

²⁵ *Id.*

²⁶ *See McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016).

²⁷ *Id.* at 911.

Yet, the issue is still very much in motion as some circuits have rejected the de facto life sentence argument. For example, the Fifth Circuit recently upheld the 40-year sentence for a 17-year-old juvenile convicted of conspiracy to use a firearm during a crime of violence.²⁸ The Fifth Circuit reasoned that because the judge had the capability of giving the juvenile life in prison, and he departed downward to 40 years, it was not unconstitutional. The Sixth Circuit also affirmed an 89-year sentence given to a 16-year-old for several non-homicide offenses.²⁹ The court reasoned that because *Graham* did not explicitly establish that consecutive, fixed-term sentences for several non-homicide offenses were unconstitutional, *Miller*, et al. did not apply.³⁰

Several states have also rejected lengthy juvenile sentences for homicide or non-homicide offenses. The Iowa Supreme Court held that the commutation of a sentence from mandatory life without parole to 60 years violated the Eighth Amendment.³¹ The Court reasoned that because the juvenile would not be considered for parole until the age of 78, there was no meaningful opportunity for release.³² Furthermore, the Florida Supreme Court held that a 70-year sentence for attempted first-degree murder violated the Eighth Amendment for similar reasons.³³ Additionally, the New Jersey Supreme Court held that a minimum 55-year sentence before parole eligibility was unconstitutional because the defendant would not be eligible for release until the age of 72 years old.³⁴ The Court reasoned that it was not the label of the sentence that mattered, but rather the practical effect of incarcerating a juvenile for life without a meaningful opportunity for release.³⁵

II. STATE RESPONSES TO *MILLER*

Since *Miller*, there has been an annual bill introduced in the Virginia Senate that would address this problem by modifying Virginia Code § 53.1-165.1. For example, in 2017, Senate Bill 1152 would have added a new subsection (B) to § 53.1-165.1 that would have reinstated parole eligibility for any person that “has active sentences that total more than 25 years for a single felony or multiple felonies committed while the person was a juve-

²⁸ *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013).

²⁹ *Bunch v. Smith*, 685 F.3d 546, 553 (6th Cir. 2012).

³⁰ *Id.*

³¹ *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013).

³² *Id.* at 119.

³³ *Gridine v. State*, 175 So. 3d 672, 674 (Fla. 2015).

³⁴ *State v. Zuber*, 152 A.3d 197, 213 (N.J. 2017).

³⁵ *Id.* at 201.

nile and who has served at least 25 years of such sentences.”³⁶ Yet every year, the Virginia House of Delegates fails to pass the Senate bill.³⁷ As a result of the General Assembly’s failure to modify the relevant Virginia criminal statutes, there is only one punishment available for a defendant convicted of capital murder who was a minor at the time of the offense – life without parole – and it is unconstitutional.

Three cases demonstrate that this is the only available result. First, in *United States v. Under Seal*, the U.S. Court of Appeals for the Fourth Circuit addressed a similar situation under a federal statute.³⁸ In *Under Seal*, the government filed a motion to transfer a juvenile for prosecution as an adult under an indictment for murder in the aid of racketeering.³⁹ The applicable federal statute imposed two possible punishments: either death or life imprisonment.⁴⁰ The district court denied the government’s motion, reasoning that after *Miller*, there was no constitutionally available punishment and thus, the indictment could not proceed.⁴¹ On appeal, the Fourth Circuit affirmed, reasoning that “once these unconstitutional punishments for murder in aid of racketeering are removed for purposes of prosecuting juveniles. . . no applicable penalty provision remains.”⁴² It concluded, “while excising the penalty provisions may cure the problem created by *Miller* and *Roper*, it simultaneously creates a vacuum that renders the statute unenforceable as pertaining to juveniles.”⁴³ The same rationale applies here. Because Virginia’s capital murder statute lacks any constitutional punishment for juveniles, the statute is “unenforceable as pertaining to juveniles.”

Second, in *Johnson v. Commonwealth*, the Commonwealth of Virginia charged a juvenile with capital murder before the *Miller* decision.⁴⁴ Then, as the Virginia Court of Appeals noted, “[i]n response to the decision in *Miller*, the Commonwealth moved to amend the capital murder indictment to change it to a charge of first-degree murder.”⁴⁵ Just like in *Under Seal*, had the Commonwealth not amended the indictment—which it did prior to the trial— it would have been attempting to convict someone for a crime for which no constitutional punishment existed.⁴⁶ Had the indictment not been

³⁶ See S.B. 1152, 2017 Gen. Assemb., 1st Sess., at 330–37 (Va. 2017) (proposed by Sen. Mardsen).

³⁷ See, e.g., *id.* (failing to pass in the House Courts of Justice Committee).

³⁸ See *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016).

³⁹ *Id.* at 717.

⁴⁰ 18 U.S.C. § 1959 (2017).

⁴¹ *Under Seal*, 819 F.3d at 717.

⁴² *Id.* at 723.

⁴³ *Id.*

⁴⁴ *Johnson v. Commonwealth*, 755 S.E.2d 468, 469 (Va. Ct. App. 2014).

⁴⁵ *Id.*

⁴⁶ *Id.*; Brief for Commonwealth at 4, *Johnson v. Commonwealth*, 292 Va. 772 (2015) (No. 141623),

2018]

CAPITAL SENTENCING FOR CHILDREN

55

amended, just like in *Under Seal*, the Court would have had to dismiss the case. Here, the only difference is that the Virginia Code only allows for indictments to be amended *before* a jury verdict.⁴⁷

Third, in *Ex Parte Evans*, a Texas inmate filed a state habeas petition, asserting that because Texas had failed to amend its capital murder statute after *Miller*, and because he was a juvenile offender, he had to be released because there was no constitutional punishment available.⁴⁸ Yet while the habeas petition was still in the Texas courts, the Texas legislature amended its statute to make juvenile offenders eligible for parole.⁴⁹ By doing so, the Texas legislature “removed Texas’s capital murder sentencing statutes from the express holdings of *Miller* and *Roper*. . . . [and] appellant’s argument. . . cannot now succeed.”⁵⁰ Here, Virginia’s General Assembly has failed to do what the Texas legislature did, *i.e.*, amend the capital murder sentencing statutes. As a result, there is no available punishment under the capital murder statute that is constitutional.

III. VIRGINIA’S RESPONSE

In *Jones v. Commonwealth*, twelve years after a juvenile offender pled guilty to capital murder and related charges and agreed to a life without parole sentence, he filed a motion to vacate his life sentence based on *Miller*.⁵¹ The Circuit Court of York County denied the motion and in 2016, the Virginia Supreme Court affirmed; however, the U.S. Supreme Court vacated and remanded the case for reconsideration in light of *Montgomery v. Louisiana*.⁵² On remand, a divided Virginia Supreme Court reaffirmed its 2016 ruling.⁵³ The Court upheld the statutorily required sentence of life imprisonment that had been imposed on Jones, despite the U.S. Supreme Court’s holding in *Miller*.⁵⁴ The Virginia Supreme Court suggested that the trial judges had the discretionary ability to countermand the statutorily required sentence of life imprisonment by suspending the sentence, and that the ability to simply suspend the sentence renders the sentencing scheme discre-

2015 WL 13345440, at *4.

⁴⁷ VA. CODE ANN. § 19.2-231 (2017) (“[T]he court may permit amendment of such indictment . . . at any time before the jury returns a verdict . . .”).

⁴⁸ *Ex parte Evans*, 410 S.W.3d 481, 482, 484 (Tex. Ct. App. 2013).

⁴⁹ *Id.*; S.B. 2B, 83rd Leg., 2nd Sess. (Tex. 2013).

⁵⁰ *Evans*, 410 S.W.3d at 484.

⁵¹ *Jones v. Commonwealth*, 795 S.E.2d 705, 707 (Va. 2017); Brief for Appellant at 3, *Jones v. Commonwealth*, 763 S.E.2d 823 (2014) (No. 131385), 2014 WL 8187452, at *3.

⁵² *Jones*, 795 S.E.2d at 707.

⁵³ *Id.*

⁵⁴ *Id.* at 708.

tionary.⁵⁵ As a result, the Court held that the state sentencing system was outside the scope of *Miller* and the Eighth Amendment protections associated with that decision, as the decision only impacted mandatory sentencing schemes.⁵⁶

Yet, this decision ignores the fact that Virginia's sentencing scheme is in fact mandatory. The Virginia Supreme Court has repeatedly held that "the question of the penalty to be imposed is entirely within the province of the General Assembly, and [a sentencing] court has no inherent authority to depart from the range of punishment legislatively prescribed."⁵⁷ Thus, Virginia Circuit Courts are unable to issue a sentence that is outside the range of punishment prescribed by statute. Pursuant to the direct language of Va. Code § 18.2-10, the option for a juvenile convicted of a Class 1 felony "shall be imprisonment for life."⁵⁸ The statute clearly and unambiguously forecloses the opportunity for a jury or a judge to impose anything but life imprisonment on a juvenile convicted of a Class 1 felony, thereby demonstrating the scheme's mandatory nature.

It is important to read the statute in conjunction with Va. Code § 19.2-264.4, which prescribes the sentencing proceeding and states that:

[u]pon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which *shall be limited to* a determination as to whether the defendant *shall be sentenced to death or life imprisonment*. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant *shall not be eligible for parole if sentenced to imprisonment for life*. In the case of trial by jury, where a sentence of death is not recommended, the *defendant shall be sentenced to imprisonment for life*.⁵⁹

As indicated by the compulsory language utilized in both statutes, the opportunity for a trial court to utilize any discretion in the case of a Class 1 felony is precluded.

The majority opinion in *Jones* has three holdings. First, Virginia law does not deny a juvenile offender an opportunity to present mitigating evidence when that offender enters into a guilty plea and waives his/her right to present such evidence.⁶⁰ Second, whereas the Alabama statute at issue in *Miller* expressly prohibited a court from suspending any portion of a capital

⁵⁵ *Id.* at 711–12.

⁵⁶ *Id.* at 721.

⁵⁷ *Starrs v. Commonwealth*, 752 S.E.2d 812, 817 (Va. 2014); *see also Woodard v. Commonwealth*, 754 S.E.2d 309, 311 (Va. 2014) (quoting *Rawls v. Commonwealth*, 634 S.E.2d 697, 706 (Va. 2006)) ("A court's assessment of punishment, when the sentence 'does not exceed the maximum sentence allowed by statute,' is reviewed for an abuse of discretion.")

⁵⁸ VA. CODE ANN. § 18.2-10 (2017).

⁵⁹ VA. CODE ANN. § 19.2-264.4(A) (2017) (emphasis added).

⁶⁰ *Jones*, 795 S.E.2d at 713.

murder sentence, the Virginia capital murder statute contains no express prohibition; therefore, Virginia's capital murder statute is not mandatory and does not violate *Miller*.⁶¹ Finally, a motion to vacate cannot be used in place of a habeas petition to make a collateral attack on a conviction or sentence based on a federal constitutional claim.⁶²

The discretion that the Virginia Supreme Court points to is nonexistent and has never been utilized in the case of juveniles. The court states that "Virginia trial courts can – and do – suspend life sentences" yet the cases they cite to do not involve juveniles nor do they involve offenders who were convicted of capital murder.⁶³ As a result of the inability of the Virginia Supreme Court to exhibit the purported discretion in conjunction with the clearly mandatory nature of the statutes, it is clear that the Virginia sentencing scheme is in fact mandatory, and in violation of the Eighth Amendment as well as the precedent established by the United States Supreme Court.

Additionally, beginning in the mid-1990s, Virginia implemented the use of a set of discretionary sentencing guidelines for use during the sentencing process for felonies. The guidelines are updated annually, and yet since their creation and throughout their entire utilization, there have never been any guidelines that address any sort of spectrum of sentences for capital murder, as there were only two options available: death or life imprisonment.⁶⁴ The fact that each year capital murder is noticeably and specifically left out of the guidelines explicitly indicates that the scheme is mandatory.

As indicated by the Supreme Court in *Miller*, the issue was that "[i]n neither case did the sentencing authority have any discretion to impose a different punishment."⁶⁵ Similarly, in Virginia, when trial courts are tasked with sentencing a juvenile who has been convicted of a Class 1 felony, the trial courts are bound to impose the sentence of life imprisonment.⁶⁶ The statutes governing the punishment for felonies clearly indicate that the Gen-

⁶¹ *Id.* at 712–13.

⁶² *Id.* at 719.

⁶³ *Id.* at 711. *See, e.g.*, *Tyson v. Commonwealth*, No. 140917, 2015 Va. Unpub. Lexis 6, at *1 (Aug. 24, 2015) (convicting a 33-year-old male of rape); *Hamilton v. Director of the Dep't of Corrs.*, No. 131738, 2014 Va. Lexis 201, at *1 (June 6, 2014) (convicting a 30-year-old male of robbery, abduction, felony eluding, and use of a firearm in the commission of a felony); *Harris v. Commonwealth*, 688 S.E.2d 279, 280 (Va. 2010) (convicting a 29-year-old male of forcible sodomy, abduction, and taking indecent liberties); *Moore v. Hinkle*, 527 S.E.2d 419, 420, 422 (Va. 2000) (convicting a 34-year-old male of abduction with intent to defile); *Jefferson v. Commonwealth*, No. 2172-12-2, 2013 Va. App. LEXIS 311, at *2 (Oct. 29, 2013) (convicting a 38-year-old male of possession with intent to distribute); *White v. Commonwealth*, No. 1998-96-2, 1997 Va. App. LEXIS 613, at *1 (Sept. 23, 1997) (convicting an adult male of cocaine distribution).

⁶⁴ VA. CODE ANN. § 18.2-10, 31 (1950).

⁶⁵ *Miller*, 567 U.S. at 465.

⁶⁶ *See* VA. CODE ANN. § 18.2-10(a) (2017); VA. CODE ANN. § 19.2-264.4(A) (2017).

eral Assembly meant for there to only be one option based on the significant and isolated use of “shall.”⁶⁷ When considered against the backdrop of accompanying statutes and guidelines which further explicitly declare that life imprisonment is the only option for juveniles convicted of capital murder, it becomes unambiguously clear that the Virginia scheme is mandatory and violates the Eighth Amendment’s ban on cruel and unusual punishment.⁶⁸

CONCLUSION

Despite the Virginia Supreme Court’s attempt to reconcile the current sentencing scheme with the constitutional requirements in *Jones v. Commonwealth*, the mere suspension of a life sentence does not eliminate the disproportionately harsh hand of the criminal justice system that the U.S. Supreme Court intended to protect against. The “risk of disproportionate punishment” which the *Miller* and *Montgomery* Court prohibited is still occurring through the decisions of the Virginia Supreme Court.⁶⁹ It is still a violation of the Eighth Amendment.

In order to embrace the true meaning of *Miller v. Alabama* and *Montgomery v. Louisiana*, Virginia must amend the capital murder statute to allow for a sentencing option less than life without parole for minors. But more importantly, it is time for Virginia to recognize that children truly are different from adults and should be given a meaningful sentencing hearing in which all the attributes of youth, including adolescent brain development, are fully considered in the determination of a final sentence.

⁶⁷ See VA. CODE ANN. § 18.2-10(a) (2017).

⁶⁸ *Miller*, 567 U.S. at 489.

⁶⁹ See *Jones*, 763 S.E.2d at 823.