No. 19-____

IN THE

Supreme Court of the United States

RAHEEM JOHNSON,

Petitioner,

v.

JEFFREY KISER, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

ELLIOTT SCHULDER
Counsel of Record
SHADMAN ZAMAN
MORGAN LEWIS
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
eschulder@cov.com

Counsel for Petitioner

January 13, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an indigent defendant who seeks the appointment of a mental conditions expert to assist in the sentencing phase of his trial is denied due process if the trial court first requires him to satisfy more than the three threshold criteria established by this Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and clarified in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

PARTIES TO THE PROCEEDING

Petitioner is Raheem Johnson. Respondent is Jeffrey Kiser, the Warden of Red Onion State Prison.

LIST OF RELATED PROCEEDINGS

Johnson v. Kiser, Record No. 181631 (Va. Aug. 16, 2019)

Johnson v. Kiser, Civil No. CL18000284-00 (Va. Cir. Ct. Sep. 17, 2018)

Johnson v. Commonwealth, 793 S.E.2d 326 (Va. 2016), *cert. denied sub nom. Johnson v. Virginia,* 138 S. Ct. 643 (2018)

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

Commonwealth v. Johnson, Case No. CR11022622-00–07 (Va. Cir. Ct. Feb. 5, 2012) (conviction)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

This case presents an important question concerning what showing courts can demand of indigent defendants seeking the assistance of mental conditions experts at trial and at sentencing. Raheem Johnson was sentenced to life in prison for a murder that was committed when he was a juvenile. Prior to his sentencing, Johnson, pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), requested the assistance of a neuropsychologist who could opine on his brain development because it was both relevant to the punishment he could receive and was seriously in question at the time of the offense. Despite meeting the requirements set forth in *Ake*, the trial court, and later the Virginia Supreme Court, concluded that because Johnson had not also demonstrated a "particularized need" for a mental conditions expert, his request must be denied.

The Virginia Supreme Court's decision directly conflicts with *Ake*. In *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) this Court held that under *Ake*, a defendant seeking a mental conditions expert need *only* show that (1) he is indigent; (2) that his mental condition is relevant to the punishment he may receive; and (3) that his mental condition during the commission of the offense was seriously in question. *Id*. at 1798. Neither *Ake* nor *McWilliams* requires an indigent defendant to demonstrate a particularized need for a mental conditions expert.

Because *McWilliams* was decided after Johnson had exhausted his direct appeal in state court, he sought relief in state court under *McWilliams* at his first available opportunity through his pro se state habeas petition. But both the trial-level habeas court and the Virginia Supreme Court refused to consider the constitutionality of requiring an indigent defendant

who meets *Ake*'s requirements to also demonstrate a particularized need for a mental conditions expert. Instead, the Virginia courts erroneously held that because Johnson did not raise his *McWilliams* claim at trial or on direct appeal and because its prior rulings were purportedly based on *Ake*, which *McWilliams* did not alter, he had defaulted his claim.

In filing this petition, Johnson asks this Court to clarify *Ake* by rejecting the particularized need inquiry as applied to indigent defendants seeking mental conditions experts to aid in their defense. In the alternative, the Court should vacate the ruling below and remand this case for further consideration in light of *McWilliams*, which stated that a defendant only must meet *Ake*'s three threshold criteria.

OPINIONS BELOW

The order of the Supreme Court of Virginia denying Johnson's appeal from the dismissal of his petition for a writ of habeas corpus, Pet. App. 1a, is unreported. The opinion of the Circuit Court for the City of Lynchburg dismissing Johnson's petition for a writ of habeas corpus, Pet. App. 2a, is also unreported. The opinion of the Supreme Court of Virginia denying Johnson's direct appeal, Pet. App. 68a, is reported at 793 S.E.2d 326 (Va. 2016).

JURISDICTION

The Supreme Court of Virginia entered judgment on August 16, 2019. On November 7, 2019, the Chief Justice extended the time for filing this petition to and including January 13, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On April 11, 2011, Timothy Irving was shot and killed in Lynchburg, Virginia. Pet. App. 69a. The Commonwealth of Virginia indicted Raheem Johnson on eight felony counts relating to Irving's death, including capital murder. Johnson was 17 years old at the time of Irving's murder. *Id*. After this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), the Commonwealth filed a superseding indictment, reducing the capital murder charge to first degree murder. *Id*. The jury ultimately convicted Johnson on all eight counts. *Id*.

Facing a potential life sentence, Johnson, who was indigent, sought the assistance of a mental conditions expert to help him prepare for his sentencing hearing. Relying on *Ake v. Oklahoma*, 470 U.S. 68 (1985), Johnson filed a motion requesting the appointment of Joseph Conley, Ph.D. ("Dr. Conley"), a neuropsychologist, to assist him. Pet. App. 114a. In his motion, Johnson explained that a "standard presentence report does not explore the development of an individual's brain or how mature the individual's brain is." *Id*. 115a. Johnson noted that scientific research had found that "an individual's brain does not fully mature until the mid-twenties . . . and demonstrates numerous cognitive deficits [that] go undetected . . . in the absence of a proper examination." *Id*. Accordingly, Johnson

sought Dr. Conley's assistance to fully advise the court on Johnson's brain functioning at the time of the offense, which Johnson argued would help the trial court render a sentence consistent with the Eighth Amendment. *Id*. 116a.

At the hearing on the motion, there was no discussion of the *Ake* factors. *Id*. 117a–123a. Specifically, there was no consideration of whether Johnson's mental condition was relevant to the punishment he might suffer, or whether his mental condition at the time of the offense was seriously in question, as *Ake* requires. 470 U.S. at 80. Rather, the focus was on whether Johnson had demonstrated a "particularized need" for the mental conditions expert he requested. Pet. App. 121a–123a.

The "particularized need" inquiry stems from the Virginia Supreme Court's holding in *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996). In *Husske*, the Court considered whether an indigent defendant seeking an independent DNA expert to defend against a charge of rape was entitled to appointment of such an expert to assist him at trial. *Id*. The Virginia Supreme Court considered this Court's decision in *Ake*, but recognized that it was limited to the case of an indigent defendant requesting a psychiatric expert. *Husske*, 476 S.E.2d at 924. Purporting instead to rely on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Virginia Supreme Court held that an indigent defendant is entitled to the appointment of a non-psychiatric expert at the state's expense only if he can demonstrate a particularized need. *Id*. at 925. In other words, it said the defendant must show "that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair

trial." *Id*. Under this standard, the state court denied Husske's motion.

Though *Husske* exclusively addressed the right to non-mental condition experts, the Commonwealth relied on *Husske* to contend that Johnson's request for a mental conditions expert should be denied. The Commonwealth principally argued that Johnson's "mere hope or suspicion that favorable evidence" may result from Dr. Conley's assistance was not enough to show he had a particularized need for a neuro-psychologist. Pet. App. 120a. The Commonwealth also asserted that Dr. Conley's proposed evaluation and testimony regarding Johnson's brain development was just a matter of common sense because it is obvious that young people are less mature than older ones; thus, it said such testimony would not have materially assisted in Johnson's defense. *Id*. The Commonwealth, however, never asserted that Johnson did not meet the requirements of *Ake* for the mental conditions expert assistance he sought.

The trial court concluded that Johnson did not show a "particularized need" for the neuropsychologist he requested: it said his school records did not indicate a need for a psychological evaluation, and the mere fact that he was a juvenile at the time of the offense did not suffice because, at age 18, "he's now an adult." Pet. App. 122a. The trial court further reasoned that *Miller v. Alabama*, 567 U.S. 460 (2012), does not require a mental health evaluation in every case where the accused was a juvenile at the time of the offense. *Id*. But, at no point did the trial court consider whether Johnson had met his burden under *Ake*.

At sentencing, the trial court considered the presentencing report, Johnson's school records, and four articles Johnson's lawyer submitted regarding

brain development and legal culpability generally. *Id*. 71a. After referring to the nature and circumstances of the offense, the trial court sentenced Johnson to life in prison for the first degree murder count plus an additional forty-two years for the other seven counts. *Id*.

Johnson moved for reconsideration of his life sentence, arguing that the sentence failed to consider "Johnson's individual characteristics as required by" *Miller* and *Graham v. Florida*, 560 U.S. 48 (2010). Pet. App. 132a–136a. Citing the "horrendous nature of the crime" and Johnson's "history of disrespect for authority and aggressive behavior," the trial court denied Johnson's motion for reconsideration, concluding that he is a "danger to himself and others should he be returned to society." *Id.* 113a.

Johnson appealed to the Virginia Court of Appeals, challenging both the trial court's denial of his request for appointment of a mental conditions expert and its imposition of a life sentence. *Id*. 72a. The Court of Appeals denied Johnson's petition for appeal as to the trial court's decision regarding Dr. Conley, but it considered and affirmed Johnson's life sentence. *Id*.

Johnson next appealed to the Virginia Supreme Court, raising both the trial court's denial of a mental conditions expert and its imposition of a life sentence. *Id*. The court affirmed the trial court on both issues. *Id*. 68a. As to the mental conditions expert, the court held that the "trial court did not abuse its discretion in denying Johnson's motion for the appointment of a neuropsychologist at the Commonwealth's expense and the Court of Appeals did not err in upholding this determination." *Id*. 76a. Like the trial court, the Virginia Supreme Court did not consider *Ake* in reaching its holding, and instead reasoned that "Johnson's

request for a neuropsychologist amounted to a mere hope that favorable evidence would be obtained. Thus, it cannot be said that Johnson demonstrated a particularized need for the assistance of a neuropsychologist." *Id.* 74a.

After the Virginia Supreme Court denied his appeal, Johnson filed a petition for certiorari in this Court, seeking guidance on (1) "whether *Miller v. Alabama* applies to a sentence of life in prison imposed on a juvenile whose only opportunity for release from prison is Virginia's geriatric-release program," and (2) "when a juvenile faces a sentence equal to or exceeding his natural life, must the sentencing court conduct an individualized inquiry, including receiving expert testimony, to determine whether the defendant is the rare juvenile offender who should be treated as permanently incorrigible?" *Id*. 138a. The latter question expressly relied on *Ake* and on *McWilliams*, which this Court had just decided. *Id*. 139a. This Court called for a response, and the Commonwealth focused on *Miller*. *Id*. 142a. Its brief in opposition mentioned *Ake* only once, in the statement of the case, and did not mention *McWilliams* at all. Pet. App. 143a–148a. The Court denied certiorari. *Johnson v. Virginia*, 138 S. Ct. 643 (2018).

Johnson then filed a pro se petition for a writ of habeas corpus in the Circuit Court for the City of Lynchburg. Pet. App. 9a. In Claim A of his petition, he alleged that the state court's denial of his motion for a neuropsychologist violated *Ake* in light of this Court's ruling in *McWilliams*. *Id*. 14a–19a. In Claim C, Johnson incorporated the factual allegations and legal arguments from Claim A, and asserted that "[i]f there was a procedural vehicle (other than habeas corpus) by which Petitioner could have brought a

timely action . . . [to] obtain the benefit of . . . *McWilliams*," defense counsel's failure to do so constituted ineffective assistance, both as a freestanding basis for collateral relief alternative to Claim A and as cause for any procedural default of Claim A.[1] *Id*. 26a.

The Circuit Court disagreed, holding that Johnson procedurally defaulted his claim, despite *McWilliams* having been decided after Johnson had exhausted his direct appeal in state court. The habeas court reasoned first that *McWilliams* created no change in the law; it was based on *Ake* and Johnson's arguments relying on *Ake* had been raised and rejected in his direct appeal and in his petition for certiorari to this Court. *Id*. 3a–4a. Next, the court held that to the extent Johnson made "new allegations" based on *McWilliams* "he could have raised it at trial and on appeal." *Id*. 4a. Johnson petitioned for leave to appeal to the Virginia Supreme Court, but that court summarily denied Johnson's petition, stating only that "there [was] no reversible error in the judgment complained of."[2] *Id*. 1a.

---

[1] Claim C also alleged ineffective assistance of trial counsel with respect to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady*-specific issues in Claim C are not presented in this petition for certiorari.

[2] In Section II of the petition, Petitioner explains why the state courts' dismissal does not rest on independent and adequate state law grounds.

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *AKE* AND *MCWILLIAMS*

A. *Ake* and *McWilliams* established the only requirements that an indigent defendant seeking a mental conditions expert to aid in his defense must satisfy

In *Ake*, this Court considered the due process rights of an indigent defendant seeking the assistance of a psychiatric expert in preparing and presenting his defense at trial and at sentencing. 470 U.S. at 68. To resolve this question, the Court weighed the defendant's interest in the "accuracy of a criminal proceeding," which the Court considered "almost uniquely compelling," against the burden imposed on a state to provide psychiatric experts in light of the "probable value of the psychiatric assistance sought, and the risk of error . . . if such assistance is not provided." *Id*. at 78–79.

Unpersuaded by the burden imposed on states to provide such assistance, especially where "the defendant's mental condition [is] relevant to his criminal culpability and to the punishment," and recognizing the utility of psychiatric experts in such circumstances, the Court held that an indigent defendant is entitled to psychiatric assistance either when: (a) he "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial;" or (b) when his "future dangerousness was a significant factor at his sentencing phase." *Id*. at 80–83, 86.

The overarching principle behind *Ake* is that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps

to assure that the defendant has a fair opportunity to present his defense." *Id*. at 76. The Court emphasized that the "[m]eaningful access to justice" the Fourteenth Amendment seeks to provide requires more than "access to the courthouse doors"—it requires identifying and providing the "basic tools of an adequate defense or appeal . . . to those defendants who cannot afford to pay for them." *Id*. at 77 (citation omitted).

This Court reaffirmed its commitment to these principles 32 years later in *McWilliams*, which clarified what *Ake* requires. In *McWilliams*, the Court was asked to resolve whether an indigent defendant, whose mental condition was relevant to his offense and the punishment he might suffer, had received sufficient assistance from a mental conditions expert to satisfy the demands of *Ake*. 137 S. Ct. at 1791–92. There, the defendant, who was indigent, sought the assistance of a neuropsychologist to aid him in presenting his defense at sentencing. *Id*. at 1791. Even though the defendant was granted the assistance of a neuropsychologist at the state's expense, this Court concluded that the defendant had not received all that he was entitled to under *Ake*. *Id*. at 1791–93.

The Court made clear that, to trigger the application of *Ake*, a defendant need *only* satisfy the three threshold criteria: the defendant is indigent, his mental condition is relevant to his potential punishment, and his mental condition at the time of the offense was seriously in question. *Id*. at 1798. The Court held that, when this showing is made, as it was in *McWilliams*, the state must provide the defense "with 'access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense.'" *Id*. at 1800 (quoting *Ake*, 470 U.S. at 83).

In *McWilliams*, the defendant only received an examination from a neuropsychologist, which the Court held fell short of what *Ake* demands. *Id.*

McWilliams does not merely restate *Ake*'s holdings. Rather, *McWilliams* unambiguously establishes first, that an indigent defendant seeking mental conditions expert assistance need only meet the threshold requirements articulated in *Ake*; there is no need for further inquiry. *Id*. at 1798. Second, if the defendant meets those requirements, he is entitled to assistance from mental conditions experts, including but not limited to, neuropsychologists. *Id*. at 1800. And third, such assistance must include more than an examination. *Id*.

Put succinctly, *McWilliams* established the ceiling for what *Ake* requires indigent defendants to prove to receive mental conditions expert assistance and the floor for the assistance *Ake* requires states to provide. *Id*. at 1794 (""Unless a defendant is 'assure[d]' the assistance of someone who can effectively perform these functions, he has not received the 'minimum' to which *Ake* entitles him.") *McWilliams*, therefore, is directly relevant to Johnson's case because Johnson, like McWilliams, sought the assistance of a neuropsychologist to aid him at sentencing.

B. The Virginia Supreme Court improperly expanded the requirements for indigent defendants seeking the assistance of a mental conditions expert, in direct conflict with *Ake* and *McWilliams*

In denying Johnson's request for a neuropsychologist, the Virginia Supreme Court relied on *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996), a case that did not involve a request for a mental conditions expert. In *Husske*, an indigent defendant charged

with rape sought the assistance of an independent DNA expert at the state's expense to challenge the state's DNA evidence at trial. *Id*. at 920, 923. The trial court denied Husske's request, and that denial was ultimately affirmed by the Virginia Supreme Court, which held that the defendant did not demonstrate a "particularized need" for the DNA expert he requested. *Id*. at 926; *but see id.* at 930 (Poff, S.J., dissenting in part) (explaining that DNA evidence was crucial to state's case, and noting that defendant had presented evidence that "it is impossible for a lay person to successfully challenge the DNA testing and results without the aid of an expert").

The defendant in *Husske* argued that under *Ake* he was entitled to the assistance of a DNA expert. *Id*. at 924. The Virginia Supreme Court recognized, however, that the question before it—whether an indigent defendant is entitled to the assistance of a DNA expert (*i.e.*, a non-mental conditions expert) at trial—was not squarely addressed by this Court in *Ake*. To resolve the issue, the Virginia Supreme Court looked to *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In *Caldwell*, an indigent defendant sought the assistance of a criminal investigator, a fingerprint expert, and a ballistics expert, asserting only that such assistance "would be beneficial." *Caldwell*, 472 U.S. at 323 n.1. The trial court denied the requests and the Mississippi Supreme Court affirmed because "the requests were accompanied by no showing as to their reasonableness." *Id*. The defendant challenged this denial on due process grounds. *Id*.

Justice Marshall, writing for a unanimous Court, concluded that there was no deprivation of due process. *Id*. He reasoned that the defendant's request was inadequate because it fell short of the showing

this Court required of an indigent defendant requesting a mental conditions expert under *Ake*. *Id*. In light of this, Justice Marshall concluded that there was "no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought." *Id*.

Taking cues from how some other federal and state courts interpreted *Ake* and *Caldwell* in analyzing the question before it, the Virginia Supreme Court in *Husske* held that "*Ake* and *Caldwell*, when read together, require" the state to provide an indigent defendant with expert assistance only if they "show a particularized need [for the expert requested]: [m]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." *Husske*, 476 S.E.2d at 925 (citations omitted).

But *Husske*'s holding misrepresents *Caldwell*, and correspondingly *Ake*. *Caldwell* did not require "a particularized showing" of need, nor did it demand any other elevated threshold for an indigent defendant's request for any type of expert. As noted earlier, this Court *declined* to decide what was required of a defendant seeking non-psychiatric assistance, *Caldwell*, 472 U.S. at 323 n.1, and it has not revisited this issue since.[3] Thus, *Caldwell* has no bearing on *Ake*.

This is critical. By relying on an expansive reading of *Caldwell*, *Husske* imposes a burden on defendants seeking expert assistance greater than what *Ake* requires. Under *Ake*, so long as an indigent defendant's

---

[3] Justices Marshall and Brennan urged the Court to address this "unsettled issue of law" in their dissent from the denial of certiorari in *Johnson v. Oklahoma*, 484 U.S. 878 (1987), which concerned an indigent defendant's motion for appointment of an expert chemist.

mental condition is "*relevant* to the punishment he might suffer" and "seriously *in question*," the defendant is entitled to a mental conditions expert regardless of whether the expert's testimony will ultimately be helpful to the defendant. *McWilliams*, 137 S. Ct. at 1798 (emphasis added) (citing *Ake*, 470 U.S. at 70, 80). *Husske*, on the other hand, requires a defendant to demonstrate in advance "that the services of an expert *would materially assist him* in the preparation of his defense and that the denial of such services *would* result in a fundamentally unfair trial." 476 S.E.2d at 925 (emphasis added).

Hence, if *Husske* were applied to an indigent defendant seeking the assistance of a mental conditions expert, the defendant would not only have to show that his mental condition is relevant to the punishment and is seriously in question (i.e., all that *Ake* requires), but he would also have to show that the content of the requested expert's testimony will be material to his defense. *See generally Moore v. Kemp*, 809 F.2d 702, 742–43 (11th Cir. 1987) (en banc) (Johnson, J., joined in dissent on this issue by Kravitch, Hatchett, Godbold, Anderson, and Clark) (stating that a particularized showing is "too exacting because [it] require[s] the defendant to possess already the knowledge of the expert he seeks"); *see also, e.g., Dowdy v. Commonwealth*, 686 S.E.2d 710, 720–21 (Va. 2009) (affirming denial of an investigator sought to support alibi defense where defendant "did not allege that there were witnesses who could confirm his activities" or that of the victim); *Commonwealth v. Sanchez*, 597 S.E.2d 197, 200 (Va. 2004) (affirming denial of defense DNA expert where defendant did not attempt to explain what procedural defects in the state's DNA procedures his expert could testify to).

This is precisely what happened in Johnson's case. In affirming the trial court's denial of Johnson's request for a neuropsychologist, the Virginia Supreme Court reasoned that Johnson "sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way." Pet. App. 74a. Accordingly, the court shifted the inquiry from whether Johnson's mental condition was relevant to his punishment and whether it was seriously in question at the time of the offense as *Ake* requires, to whether Johnson had made a sufficient showing that there was particular, valuable testimony a neuropsychologist would provide as *Husske* demands.

Asking Johnson to articulate with specificity the evidentiary value of his mental conditions expert placed on him a burden not established in *Ake* or *McWilliams*. Nor did anything in *Caldwell* impose such a burden. The Virginia Supreme Court's decision in Johnson's case therefore deserves to be vacated and remanded, or subject to plenary review in this Court.

C. This case is the proper vehicle to resolve the issue

Until Johnson's case, Virginia principally applied the particularized need inquiry in cases involving requests for non-mental conditions experts. *Morva v. Commonwealth*, 683 S.E.2d 553, 561 (Va. 2009) ("Our Court, in *Husske* . . . applied the doctrine set forth in *Ake* to the appointment of non-mental conditions experts in certain circumstances."); *see, e.g.*, *Branche v. Commonwealth*, 2006 WL 1222400, at *3 (Va. Ct. App. May 9, 2006) (denying request for DNA expert); *Lenz v. Commonwealth*, 544 S.E.2d 299, 305 (Va. 2001) (same for "prison life" expert); *Barnabei v.*

Commonwealth, 477 S.E.2d 270, 276 (Va. 1996) (same for forensic pathologist).

Regardless of whether the particularized need inquiry as applied to non-mental conditions experts is proper, Virginia's imposition of this burden in a case involving a request for a mental conditions expert unequivocally raises a constitutional question in light of *McWilliams*. Johnson's case provides the ideal opportunity for this Court to address this question because Johnson's case is factually and legally similar to *McWilliams*.

Johnson, like the defendant in *McWilliams*, sought and was denied the assistance of a neuropsychologist, despite reasons to believe his mental condition (*i.e.*, his brain development) was relevant to the punishment he may suffer, and seriously in question in light of his age. *See, e.g.*, *Miller*, 567 U.S. at 476 ("'[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability.") (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)); *Graham*, 560 U.S. at 68 ("[J]uveniles have lessened culpability . . . [and] are less deserving of the most severe punishments . . . [because] compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'") (quoting *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005)).

Moreover, just as the Alabama courts gave McWilliams less protection than *Ake* required, the Virginia courts required Johnson to provide more justification than *Ake* required. In both cases the state courts cited *Ake*

as authority for their decisions, but they did not apply *Ake*'s explicit commands. Given the similarities between the cases, the Court can resolve the novel question raised in this petition without disturbing the precedents it established in *Ake*, *Caldwell*, or *McWilliams*.

Finally, in resolving the question here, the Court will provide essential guidance to states that require defendants to show a particularized need to receive the assistance of a mental conditions expert. *See e.g., Page v. Lee*, 337 F.3d 411, 415 (4th Cir. 2003) (recognizing that subsequent to *Ake*, North Carolina courts require indigent defendants to show a particularized need for a psychiatric expert); *State v. Sisson*, 567 N.W.2d 839, 842 (N.D. 1997); *State v. Moore*, 2016 WL 853277 at *22 (Ohio 2016); *Young v. State*, No. W2011-00982-CCA-R3PD, 2013 WL 3329051, at *34–35 (Tenn. Crim. App. June 27, 2013). Without this Court's guidance, these states will fail to provide the "basic tools of an adequate defense or appeal" that *Ake, McWilliams* and the Fourteenth Amendment promises "to those defendants who cannot afford to pay for them." *Ake*, 470 U.S. at 77.

II. JOHNSON'S HABEAS CLAIM IS NOT PROCEDURALLY DEFAULTED

The state habeas court dismissed Johnson's *McWilliams* claim on the sole ground that it was procedurally defaulted. Pet. App. 3a–4a. Because this Court must consider the state court's dismissal, and because that dismissal does not rest on independent and adequate state law grounds, it is addressed here preemptively.

Virginia courts recognize two circumstances when a nonjurisdictional habeas claim can be procedurally defaulted. Under *Henry v. Warden*, 576 S.E.2d 495

(Va. 2003), a habeas claim is defaulted if it already was "raised and decided either in the trial or on direct appeal." *Id*. at 496. Under *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), a habeas claim is defaulted if it was *not* raised at trial or appeal but could have been, and is then raised for the first time in state habeas proceedings, "absent a showing of ineffective assistance of counsel in failing to raise that question" at trial. *Id*. at 682.

Despite *McWilliams* being decided after the Virginia Supreme Court decided Johnson's direct appeal, but before Johnson's conviction had become final through resolution of certiorari proceedings in this Court, the trial-level habeas court held that Johnson's claim under *McWilliams* was defaulted under both *Henry* and *Parrigan*. Pet. App. 3a–4a. Signing an opinion drafted in whole by the Warden, the trial-level habeas court held: "[Johnson's] claim is defaulted under the rule in *Henry* to the extent it has been raised and rejected previously. To the extent Johnson makes new allegations, it is defaulted under the rule in [*Parrigan*] because he could have raised it at trial and on appeal." *Id*. 4a.

The Virginia Supreme Court did not disturb this conclusion in denying Johnson's habeas petition for appeal, concluding in a one-sentence ruling that it was "of the opinion there is no reversible error in the judgment complained of." *Id*. 1a. But Johnson's habeas claim is not procedurally barred, because the dismissal of his state habeas petition does not rest on adequate and independent state law grounds. This is so for at least three reasons.

A. *Henry* does not bar Johnson's habeas petition

Henry bars a Virginia habeas court from re-adjudicating an issue that was raised *and* determined at trial. The rule is fixed and narrow: it applies only when a state habeas petition presents "the very issue decided by . . . the trial court." 576 S.E.2d at 496. *See also, Muhammad v. Warden of Sussex I State Prison*, 646 S.E.2d 182, 192 (Va. 2007) (distinguishing habeas allegations that are raised and decided at trial, which are barred by *Henry*, from substantive habeas allegations that were not raised at trial, but could have been, which are not barred by *Henry*). Together, *Henry* and *Muhammad* establish that the rule in *Henry* was not adequate to bar Johnson's *McWilliams* claim because no such issue was ever raised in, or decided by, a state court during Johnson's trial or on direct appeal.

To the extent the trial-level state habeas opinion asserts that *Henry* justified the dismissal of Johnson's petition because "he had a full and fair opportunity to raise [the *McWilliams*] issue on direct appeal," Pet. App. 4a, that opinion is inadequate because it does not comply with clearly established Virginia law. *Henry* expressly bars habeas review only of issues that were actually raised and actually decided at trial, not issues that a petitioner hypothetically could have raised at trial, but did not. This misapplication of Virginia law must be construed against the Warden because his counsel drafted the state habeas opinion and asked the state habeas court to enter it verbatim.

B. If Johnson defaulted his claim, it is excusable under *Parrigan*

Before a Virginia court can dismiss a habeas claim on procedural grounds, the court must first consider

and resolve any allegation that the default is attributable to, and excused by, the ineffective assistance of trial counsel. *Parrigan*, 205 S.E.2d at 682 (habeas claim can be dismissed "absent a showing of ineffective assistance of counsel"). When Johnson presented the *McWilliams* claim in his state habeas petition, he alleged that if the *McWilliams* claim could have been raised at trial, his trial attorney rendered ineffective assistance in failing to do so. Pet. App. 26a. Johnson further alleged that trial counsel's deficient performance was both cause for any default of the *McWilliams* claim and also was a freestanding basis for habeas relief. *Id*.

The Virginia habeas court did not rule out trial counsel's deficient performance on this issue. In fact, it did not even consider that question. It simply ignored the presence of the ineffective-assistance allegation on the *McWilliams* issue in Johnson's habeas petition. Johnson repeated the allegations of ineffective assistance in his petition to appeal the denial of habeas. *Id*. 62a–63a. The Warden did not respond to the petition, and the request to appeal was denied.

Because the state habeas court never considered or made the threshold determination (as mandated by *Parrigan*) as to whether trial counsel's deficient performance was cause for the default, the state's procedural dismissal of the *McWilliams* claim does not rest on adequate and independent state law grounds. Moreover, because the state habeas opinion was drafted entirely by the Warden's counsel—and adopted by the state habeas court without alteration—any ambiguities or omissions in that opinion must be construed against the Warden.

C. This is an exceptional case

This Court ordinarily will not take up a federal question where "the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). But in *Lee v. Kemna*, 534 U.S. 362 (2002), this Court quoted the foregoing passage from *Coleman* and explained that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id*. at 376.

This case presents just such an exceptional circumstance. Under this Court's precedents, *McWilliams* applies to Johnson's trial and direct appeal because *McWilliams* was decided before the deadline for Johnson to file his petition for a writ of certiorari following direct appeal. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 295 (1989); *Griffith v. Kentucky*, 479 U.S. 314 (1987) (collecting cases). Virginia law, however, provided no mechanism for re-opening Johnson's trial or direct appeal proceedings in state court after this Court decided *McWilliams*. Therefore, Johnson's first opportunity to request review and relief in state court on this ground was in state habeas corpus proceedings.

Yet, the Virginia courts denied Johnson's pro se habeas petition on procedural default grounds, ignoring the fact that the chronology of events left Johnson with no opportunity to timely raise a *McWilliams* claim at trial or on appeal after *McWilliams* was decided. This is precisely the exorbitant application of a generally sound rule that this Court disfavors. Accordingly, the Court can—and should—reach the merits of the question presented to afford Johnson the proper application of *McWilliams* to which he is

entitled, or in the alternative, it should summarily vacate and remand this case for further consideration in light of *McWilliams*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ELLIOTT SCHULDER
Counsel of Record
SHADMAN ZAMAN
MORGAN LEWIS
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
eschulder@cov.com

Counsel for Petitioner

January 13, 2020

APPENDIX

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of August, 2019.

———

Record No. 181631
Circuit Court No. CL18-284

———

RAHEEM CHABEZZ JOHNSON,

Appellant,

against

JEFFERY KISER, Warden,
Red Onion State Prison,

Appellee.

———

From the Circuit Court of the City of Lynchburg

———

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:

Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE CITY OF LYNCHBURG

Civil No. CL18000284-00

RAHEEM CHABEZZ JOHNSON,

Petitioner,

v.

JEFFREY KISER, Warden,
Red Onion State Prison

Respondent.

FINAL ORDER

Upon mature consideration of the petition for a writ of habeas corpus filed by Raheem Chabezz Johnson, the motion of the respondent and the authorities cited therein, and upon review of the entire record in this case, and upon review of the criminal case of *Commonwealth v Raheem Chabezz Johnson,* which is ordered made a part of the record in this case, the Court makes the following findings of fact and conclusions of law:

Johnson is currently confined under an order of this Court following a jury trial in which he was convicted of one count of first-degree murder, one count of statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, two counts of attempted robbery, and four counts of use of a firearm during the commission of a felony. The court sentenced him to serve an aggregate sentence of life plus

42 years. The order is dated October 5, 2012. (Case Nos. CR11022622-00 through -07). Johnson appealed his convictions to the Court of Appeals of Virginia which affirmed his convictions in a published opinion dated March 25, 2014. (Record No. 1941-12-3). Johnson then appealed to the Supreme Court of Virginia, which affirmed his convictions in a published opinion dated December 15, 2016. The court subsequently denied a petition for rehearing on March 24, 2017. (Record No. 141623). Johnson's petition for certiorari to the United States Supreme Court was refused on January 8, 2018. (Case No. 17-326).

Johnson now alleges that he is entitled to habeas corpus relief on substantially the following grounds:

(a) Johnson is entitled to a new sentencing proceeding including the appointment of assistance of a mental health expert because the Supreme Court of Virginia's opinion is inconsistent with the rule established in *McWilliams v. Dunn,* 137 S. Ct. 1790 (2017);

(b) The Commonwealth concealed favorable evidence from the petitioner in violation of his constitutional rights;

(c) Johnson's trial counsel was ineffective.

These claims are legally and factually without merit.

Claim A

Johnson first states that he is entitled to habeas corpus relief because the Supreme Court of Virginia's opinion in his direct appeal was inconsistent with the rule established in *McWilliams v. Dunn,* 137 S. Ct. 1790 (2017). Johnson's claim that he was entitled to the appointment of assistance of a mental health expert

has already been raised and rejected on direct appeal in the Supreme Court of Virginia and, to the extent he raised it in the United States Supreme Court, in that court as well. Accordingly, this claim is not cognizable in a habeas corpus action. *See Henry v. Warden,* 265 Va. 246, 576 S.E.2d 495 (2003).

To the extent that Johnson implies that the *Henry* rule should not apply to him in light of the *McWilliams* opinion, the Court rejects this claim. Contrary to Johnson's suggestion, he had a full and fair opportunity to raise these issues on direct appeal. Moreover, *McWilliams* did not in fact create any type of change in the law as Johnson suggests. Instead, the court clearly based its ruling on "what *Ake* requires." *McWilliams,* 137 S. Ct. at 1801. Johnson's *Ake* argument was raised and rejected on appeal. Moreover, as Johnson himself admits, the *McWilliams* opinion was issued on June 19, 2017, two months *before* he filed his petition for writ of certiorari in the U.S. Supreme Court, and approximately six months before the United States Supreme Court denied that petition. This claim is defaulted under the rule in *Henry* to the extent it has been raised and rejected previously. To the extent Johnson makes new allegations, it is defaulted under the rule in *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), because he could have raised it at trial and on appeal. For all of these reasons, the Court should reject this claim and find that it is procedurally defaulted in this habeas corpus action.

Claim B

Johnson next argues that the Commonwealth concealed favorable evidence from him in violation of his constitutional rights under *Brady v. Maryland,* 373 U.S. 83 (1963) and related cases. Johnson first claims that the Commonwealth violated his *Brady* rights

because it withheld an exculpatory search warrant affidavit from him until just days before his trial. This claim fails because it is the type of claim that the petitioner could have raised during his trial land on direct appeal. *See Parrigan*, 215 Va. at 29, 205 S.E.2d at 682.

Johnson also claims that the Commonwealth violated its *Brady* obligations by failing "to reveal that it engaged in bargaining with witnesses for testimony against [Johnson]." This is also the type of claim that Johnson could have raised at trial and on appeal, so it is defaulted under the rule in *Parrigan.* Moreover, it is without merit. His first part of the claim involves Wendell Franklin, but Franklin did not testify at trial, so Johnson has failed to establish materiality.

His second part of the claim involves "Khan." Johnson claims that Khan told Wendell Franklin that the prosecutor had "given him a deal if he would testify [against the petitioner]." This claim is also barred under the rule in *Parrigan*. Moreover, it is without merit. First, Johnson provides no affidavit from Khan; instead, he simply provides the hearsay-within-hearsay affidavit of Franklin attesting to what Khan supposedly told him. This affidavit is insufficient to prove this claim and is stricken as inadmissible hearsay. *See Burket v. Angelone*, 208 F.3d 172, 185-86 (4th Cir. 2000) (Supreme Court of Virginia struck similar "Brown" affidavit). Second, Court assumes that Johnson is referring to Abdul-Malik Khan, who did testify at trial. (7/17/12 Tr. 5-30). In light of both the extensive evidence the Commonwealth elicited at trial about Khan's "hope" that he would get "consideration" for his testimony, and defense counsel's thorough impeachment of Khan, Johnson has not established "materiality" from any undisclosed "promise" the Commonwealth may have made either.

(7/17/12 Tr. 5-8, 24-30). The Court dismisses Claim B as defaulted and without merit.

Claim C

Johnson next argues that his trial counsel was ineffective. To prevail on this claim he must establish that his trial counsel's performance was objectively unreasonable and that as a result he has been prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Johnson first argues that his trial counsel was ineffective for failing to move for a continuance in light of the late-disclosed exculpatory information in a search warrant. However, the decision whether to move for a continuance is committed solely to trial counsel's discretion. Johnson admits that prior to trial, the Court ordered the search warrant affidavit in his case to be unsealed. This affidavit was relatively short. Counsel was not objectively unreasonable for failing to move for a continuance. *See Stockton v. Commonwealth,* 227 Va. 124, 141, 314 S.E.2d 371, 382 (1984). In fact, the affidavit itself indicates that the petitioner, Raheem Johnson, had also stated to police that Quinton Johnson was inside the apartment at the time of the shooting, so the petitioner was aware of this information over a year before he was tried. (Petitioner's Ex. 1). Moreover, the petitioner has not shown prejudice. The respondent has pled that "[u]pon information and belief, Quinton Johnson, the individual whom the affidavit indicated told the police he was present in the apartment during the robbery and murder, is the petitioner's brother." In his reply pleading, the petitioner has not denied this fact. *See Huffington v. Nuth*, 140 F.3d 572, 581-82 (4th Cir. 1998) (stating that habeas court must evaluate information from defendant's family member as having "less value than that of objective witnesses" and in light of the potential bias inherent

in that information). The petitioner has not stated with particularity what evidence counsel could have developed had he obtained a continuance or why it would have made a difference in the outcome of his trial. For all these reasons, the Court rejects this claim under both prongs of *Strickland.*

To the extent that Johnson moves for a continuance due to the claims his lawyer was ineffective for failing to move for a continuance due to the existence of exculpatory information that the Commonwealth offered favorable treatment to certain individuals, Johnson contends in this Claim B that this information was never disclosed to the defense. Accordingly, trial counsel could not have been unreasonable for failing to move for a continuance on this basis. Even if counsel had this "exculpatory" information, Johnson has failed to establish that counsel was objectively unreasonable for failing to move for a continuance or that he was prejudiced by this failure. This claim also fails under both prongs of *Strickland.*

Johnson claims that he is entitled appointed counsel to assist him in his present habeas corpus proceedings. He does not have a right to such counsel. *See Howard v. Warden,* 232 Va. 16, 19, 348 S.E.2d 211, 213 (1986). Moreover, he has not shown good cause for the Court to grant him discovery. See Rule 4:1(b)(5) (leave of court is required for discovery in a habeas case and that the court "may deny or limit discovery" in such proceedings). Put another way, a habeas petitioner, unlike the usual civil litigant . . . is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

A determination regarding the petitioner's claims can be made without the need for an evidentiary hear-

ing. *See Friedline v. Commonwealth*, 265 Va. 273, 276-77, 576 S.E.2d 491, 493-94 (2003).

It is, therefore, ADJUDGED AND ORDERED that the petition for a writ of habeas corpus be dismissed and the rule discharged, to which action of this Court the petitioner's exceptions are noted. Pursuant to Rule 1:13, endorsement by the petitioner is dispensed with for good cause shown.

It is further hereby ORDERED the Clerk serve by mail certified copies of this Order on the petitioner and on Donald E. Jeffrey, Ill, Senior Assistant Attorney General, counsel for the respondent.

Entered this 17 day of September, 2018

R. Edwin Burnette Jr.
Judge

I ask for this:

/s/ Donald E. Jeffrey, III
Donald E. Jeffrey, III
Counsel for Respondent

APPENDIX C

IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

———

Case No. C.Ril-00.Q62-06
(related case Comm. v. Johnson,
CR11-022622-00)

———

RAHEEM CHABEZZ JOHNSON
(VDOC # 1462766),
Petitioner,

-vs-

JEFFREY KISER, Warden,
Red Onion State Prison,
Respondent.

———

Place of detention:
Red Onion State Prison,
Pound, Virginia

———

PETITION FOR WRIT OF HABEAS CORPUS

———

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:

Circuit Court for the City of Lynchburg, CR11022622-00-07, Lynchburg, Virginia

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

a. First-degree murder (518.2-32)

b. statutory burglary

c. two counts of attempted robbery

d. four counts of using a firearm during the commission of a felony

3. The date upon which sentence was imposed and the terms of the sentence:

10/05/2012 (Life in prison for first-degree murder and a total of 42 years for seven other felonies)

4. Check which plea you made and whether trial by jury:

Plea of not guilty: X;

Trial by jury: X

5. The name and address of each attorney, if any, who represented you at your criminal trial:

B. Leigh Drewry, Jr.
Cunningham and Drewry
Attorneys at Law
105 Archway Court
Lynchburg, Virginia 24502

6. Did you appeal the conviction?

Yes

7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari:

Johnson v. Commonwealth, 755 S.E.2d 468 (Va. Ct. App. Mar. 25, 2014) (judgment affirmed)

Johnson v. Commonwealth, 793 S.E.2d 326 (Va. Dec. 15, 2016) (judgment affirmed); (rehearing denied Mar. 24, 2017)

Johnson v. Virginia, U.S. S. Ct. No. 17-326 (petition for writ of certiorari denied Jan. 8, 2018)

8. List the name and address of each attorney, if any, who represented you on your appeal:

B. Leigh Drewry, Jr.
Cunningham and Drewry
Attorneys at Law
105 Archway Court
Lynchburg, Virginia 24502

Ashley C. Parrish
King & Spaulding LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

B. Habeas Corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court?

NO

10. If you answered "yes" to 9, list with respect to each petition: the name and location of the court in which each was filed:

NA

11. Did you appeal from the disposition of your petition for habeas corpus?

NA

12. If you answered "yes" to 11, state: the result and the date of each petition:

NA

C. Other Petitions, Motions or Applications

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you.

NA

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

a. Petitioner is entitled to a new sentencing proceeding, including the appointment and assistance of a mental health expert, because the decision of the Supreme Court of Virginia is inconsistent with the rule established in McWilliams v. Dunn, 137 S. Ct. 1790 (2017). The refusal to provide Petitioner access to the benefit established through McWilliams would violates Petitioner's constitutional rights to trial by jury,

due process, equal protection of law, and against imposition of cruel and unusual punishment, in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding sections of the Virginia Constitution. (see attached page for more).

b. The Commonwealth concealed favorable evidence from Petitioner at trial in violation of constitutional rights established by *Brady. v. Maryland*, and *Kyles v. Whitley*, and similar cases in state and federal courts. (see attached page for more).

c. Trial counsel failed to provide effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution, and similar provision of the Virginia Constitution, *see Strickland v. Washington*. (see attached page for more).

15. List each ground set forth in 14, which has been presented in any other proceeding: NA

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

a. Virginia procedure does not provide, opportunity for Petitioner to have applied a new rule of law established after 21 days after judgment is entered, even if the new rule is established before Petitioner judgment became final and, therefore, should apply to him

b. Brady–Alleged misconduct, including concealed evidence was not known to the Petitioner, and could not have been known through reasonable diligence

c. Strickland–Claim is not recognized until post-conviction proceedings. Petitioner was previously represented by counsel alleged to have performed deficiently, and who was therefore conflicted from raising this claim against himself.

D. Present Petition (supplemental pages)

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

a. Petitioner is entitled to a new sentencing proceeding, including the appointment and assistance of a mental health expert, because the decision of the Supreme Court of Virginia is inconsistent with the new rule established in McWilliams v. Dunn, 137 S. Ct. 1790 (2017). The refusal to provide Petitioner access to the benefit established in McWilliams would violates Petitioner's constitutional rights to trial by jury, due process, equal protection of law, and against imposition of cruel and unusual punishment, in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding sections of the Virginia Constitution. (see attached page for more).

On Dec. 15, 2016, the Supreme Court of Virginia applied its then-current interpretation of Ake v. Oklahoma, as articulated in *Husske v. Commonwealth*, to justify a finding that there was no error in the denial of Johnson's request for assistance of an expert neuropsychologist. *Johnson v. Commonwealth*, 793 S.E.2d 326 (Va.). The Court held that Petitioner failed to show a particularized need for the expert assistance requested. The Court subsequently denied rehearing on Mar. 24, 2017.

Petitioner sought certiorari review in the Supreme Court of the United States. On June 12, 2017, Petitioner sought an extension of time within which to present his petition, which the Court granted. On August 21, 2017, Petitioner filed a petition for writ of certiorari. On September 26, 2017, the Court requested a response from the Commonwealth. After the Com-

monwealth was granted an extension, a response was filed on. November 20, 2017. On January 8, 2018, the Court denied the petition.

A case is final when the judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time to petition for certiorari had elapsed. On June 19, 2017, while Petitioner's case was under certiorari review, and before his judgment had become final for purposes of the application of relevant decisions, the Supreme Court of the United States issued its decision in *McWilliams v. Dunn*, 137 S. Ct. 1790. One of the issues *McWilliams* addressed was when "the conditions that trigger application of *Ake* are present." 137 S. Ct. at 1798. In *McWilliams*, the Supreme Court established that whenever the three threshold criteria articulated in *Ake* are met, the state must provide "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," including at the capital-sentencing phase. *Id*. at 1798-99. The three *Ake* criteria are: (1) an indigent defendant, (2) whose mental condition is "relevant to the punishment he might suffer," (3) when that mental condition is "seriously in issue." 137 S. Ct. at 1798. *McWilliams* made clear that the right to a mental health expert cannot be conditioned on an additional criterion, such as a showing of "particularlized need" as that requirement has been imposed and defined in *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996). Because the Husske rule was applied and found to be determinative by the state courts in Petitioner's case, Petitioner is entitled to habeas relief, including a new sentencing proceeding at which he is provided all the assistance that *Ake* mandates.

In *McWilliams*, the jury gave an advisory opinion in favor of death, and a hearing was then set for judge sentencing. 137 S. Ct. at 1795. About five weeks before that sentencing, the trial court granted the defendant's motion for neurological and neuropsychological testing and appointed Dr. Goff to do the testing. Dr. Goff's report arrived two days before sentencing, and the next day counsel got a stack of mental health records he had subpoenaed from various institutions. The following morning-the day of sentencing-counsel told the court he needed a continuance and (among other things) an expert to go through the report and records because he (the lawyer) was not a psychologist. The court denied the motions but offered to give the lawyer until 2 p.m. that afternoon to review the previously unseen documents. The lawyer said that was impossible and moved to withdraw; the court denied the motion to withdraw. The lawyer renewed his motion for a continuance that the court denied. The judge sentenced *McWilliams* to death that same afternoon. 137 S. Ct. at 1795-98.

On direct appeal, Alabama held that *Ake*'s requirements "are met when the State provides the [defendant] with a competent psychiatrist," and that appointment of Dr. Goff satisfied that requirement. 137 S. Ct. 1797-98. The federal court reviewing the state judgment pursuant to 28 U.S.C. § 2254 deferred to the state court's decision under § 2254(d).

The Supreme Court of the United States reversed, finding that the assistance constitutionally-guaranteed under *Ake* must be provided where the defendant (1) is indigent, (2) his mental condition is "relevant to the punishment he might suffer," and (3) his mental condition is "seriously in issue." 137 S. Ct. at 1798. Where these conditions are met, the court is

constitutionally-required to provide "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." *Id*. (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)). *McWilliams* got the first component but not the other three, and thus the sentencing decision in his case was contrary to or involved an unreasonable application of Ake.

The requirements of *Husske* exceed those established in *McWilliams*. Most significantly, under *Husske*, the indigent defendant who seeks the appointment of an expert must also show a particularized need. *See Johnson*, 793 S.E.2d at 329-30. As that requirement is defined in Petitioner's case, it forecloses the appointment of an expert where *McWilliams* and *Ake* require the expert.

All three of the conditions established in *McWilliams* mandating the assistance required by *Ake* are met in Petitioner's case. Petitioner, however, has never received even the first component of the assistance guaranteed by *Ake*. Instead, the Supreme Court of Virginia held that, under *Husske*, *Johnson* was not entitled to any mental health expert assistance for purposes of sentencing. 793 S.E.2d at 30. Specifically, it said that Petitioner,

> sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way. At best, Johnson's request for a neuropsychologist amounted to a mere hope that favorable evidence would be obtained. Thus, it cannot be said that Johnson demonstrated a particularized need for the assistance of a neuropsychologist.

Id. The requirements of *Husske* as interpreted by the Court in Petitioner's case are flatly inconsistent with the first two of the four functions of *Ake*, as explained in *McWilliams*. As *McWilliams* explained, *Ake* "requires that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." The words "examination" and "evaluation" in the *McWilliams* opinion show the conflict with *Husske*. An appointed expert's initial tasks are to perform an examination and conduct an evaluation. It is premature, prior to any examination or evaluation, to prohibit assistance to indigent defendants who cannot—without the opportunity for expert assistance—prove that the requested examination and evaluation would produce "favorable evidence." This requirement in *Husske* puts "the cart before the horse" in a way that deprives the defendant to the rights guaranteed by the United States Constitution and the Virginia Constitution. It cannot stand in light of *Ake*, as clarified in *McWilliams*.

Although *Husske* purportedly is derived from *Ake*, *McWilliams* makes clear that there is no basis for refusing a defendant the assistance of a mental health expert because the defendant cannot first identify the evidence the expert will find and cannot make a particularized representation of how this evidence will help him. *McWilliams* makes clear that this interpretation of Ake is clear error.

The decision in *McWilliams* establishing the conditions requiring application of the constitutionally-guaranteed assistance provided under *Ake* was made before the state court criminal judgment against Johnson became final. *See Allen v. Hardy*, 478 U.S.

255, 258 n.1 (1986) ("By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before" the decision at issue was published, quoting *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965).

But Virginia procedure denied Petitioner the opportunity to have access to the Supreme Court's clearly applicable decision in McWilliams even though the judgment in his case still was pending on direct review. In *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), the Supreme Court of the United States held: "When a decision of the Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987)."

Because Petitioner's constitutional claim could not have been presented in previous proceedings to the state court for adjudication, this Court should recognize and address the merits of the claim in these proceedings. If, for any reason, the Court believes it is limited in its ability to address the merits of this claim, Petitioner maintains that the Court is authorized and obligated to address the merits of this claim in the interests of justice.

McWilliams established clear conditions that trigger application of Ake: the defendant is indigent, his mental condition is relevant to the punishment he might suffer, and is seriously in question. Petitioner satisfied all of those conditions. He was indigent, the extent of his brain development was relevant to his culpability and the punishment he might suffer, and the extent of that development was in question and could be meaningfully determined only by an expert.

b. The Commonwealth concealed favorable evidence from Petitioner at trial in violation of constitution rights established by *Brady v. Maryland*, and *Kyles v. Whitley*, and similar cases in state and federal courts. Because of these violations, his convictions must be vacated. The Commonwealth successfully, though improperly, enlisted the trial court's assistance in concealing exculpatory and material information from Petitioner. See *Gilchrist v. Comm.*, 317 S.E.2d 784 (Va. 1984). The information was contained in a search warrant affidavit the Commonwealth kept under seal until five days before the start of Petitioner's first-degree murder trial. The affidavit revealed the. admission that "Quinton Johnson made statements to investigators that he was present inside of the victim Timothy Irving's residence at the time of the shooting, but denied shooting Timothy Irving." Exhibit 1. The affidavit also referenced two cell phone records the Commonwealth claimed were crucial to the investigation of the crimes.

This concealed information is material under Brady because it undermines confidence in the account given by the Commonwealth's only witness who claimed to identify Petitioner at the crime scene. Prosecution witness Artenna Horsley-Robey identified Dennis Watts as one of the two masked intruders that entered her apartment on the night of the crime. Tr. at 127, lines 10-20. Ms. Robey later picked Petitioner out of a photographic lineup as the triggerman. She testified at trial that during the crimes a mask covered the triggerman's face, and the only visible portion of the triggerman's face was his eyes. Tr. 150, lines 1-17. Thus, the only basis for her identification of Petitioner as the triggerman was Ms. Robey's claim that Petitioner's eyes were similar to her recollection of the triggerman's eyes.

On cross-examination, Ms. Robey admitted that she previously told a police officer that she did not know who the gunman was. Tr. 161 line 20-25 and 162 line 1-10. She consistently maintained that she saw only two people in her apartment, and running from her apartment after the shooting, and, by the time of trial, she claimed these two were Dennis Watts and Petitioner. Tr. 130, lines 4-20.

The Commonwealth knew that Quinton Johnson's admission that he was present in the apartment at the time of the shooting directly contradicted Ms. Robey's account, and ultimately her testimony, and yet intentionally acted to keep the exculpatory contents of the affidavit concealed from Petitioner by filing it under seal. Quinton Johnson's admission undermines confidence in jurors' verdicts because the verdicts are based on Ms. Robey's purported identification of Petitioner as the triggerman. Recognizing as much, the Commonwealth admitted that the "search warrant affidavit contains information that can compromise the continuing investigation." Exhibit 3.

The Commonwealth moved to seal the search warrant affidavit and its exculpatory evidence on April 12, 2011. The Circuit Court granted Petitioner's motion for discovery, including disclosure of favorable information under Brady on August 3, 2011. Petitioner's trial was set to begin on July 16, 2012. The Court ordered the sealed search warrant affidavit to be unsealed on July 6, 2012, and it was delivered to Petitioner's counsel on July 10, 2014. No notation was made that these materials contained previously concealed, exculpatory Brady material. *But see Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to

accord defendants due process.") By the time the exculpatory information was made available to Petitioner, as the Commonwealth was well aware, Petitioner's court appointed counsel was deep in the throes of preparing for a first-degree murder trial, and unable to attend properly to delinquent deliveries. With regard to Brady materials, counsel also relied on the Commonwealth's previous misrepresentations that all such materials had been provided to counsel. *See Strickler v. Greene*, 527 U.S. 263, 285 (1999) (noting that the prosecution's release of some exculpatory information would make it "especially unlikely" that counsel would suspect other information was being withheld).

The Commonwealth's intentional manipulation of its obligations under *Brady* worked. After Petitioner's trial was completed, Petitioner's court-appointed counsel acknowledged in a letter dated Mar. 10, 2014, that he "did not know anything about your brother admitting to being at the scene of the homicide." Ex. 2.

The concealed evidence clearly was material under *Brady*. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (concluding withheld evidence describing potential alternative perpetrator was material, in part because it could have been used to cast doubt on the adequacy of government's consideration of alternative suspects.)

An accused has a constitutional right to call for evidence in his favor. U.S. Const. 5th, 6th, 14th Amends.; Va. Const. art. 1, §8. This includes the right to prepare for trial for trial by procuring both testimonial and documentary evidence. See *Cox v. Comm.*, 315 S.E.2d 228, 230 (Va. 1984). "In order to prepare for trial, an accused and his counsel must

have sufficient time to investigate the case and to evaluate the evidence that is procured." Gilchrist, 317 S.E.2d at 787; see also *Bobo v. Comm.*, 48 S.E.2d 213, 215 (Va. 1948) (defendant has the right "to call evidence in his favor," including the right to prepare for trial . . . and to ascertain the truth.")

The purported justification for concealing the information—that disclosure would "compromise" the investigation—meant only that Petitioner would have had a fair and meaningful opportunity to investigate the case himself. Moreover, providing the information without noting that it contained *Brady* material is further indication of subterfuge. As is the Commonwealth's failure to meet its ethical duties regarding disclosure. See Legal Ethics Opinion 1862 (prosecutor is ethically required-to-make "timely disclosure" of favorable evidence meaning disclosure "-as soon as practicable considering all the facts and circumstances of the case.")

The Commonwealth also, violated its *Brady* obligations by failing to reveal that it engaged in bargaining with witnesses for testimony against Petitioner. According to Wendell Franklin, an inmate at the Lynchburg Adult Detention Center, Deputy Commonwealth's Attorney Charles C. Felmlee visited him and represented that, in exchange for help from Franklin in the prosecution of Petitioner, Felmlee would assist Franklin and his wife, who Felmlee told Franklin was facing indictment for murder. Exhibit 4. According to Franklin, Franklin's lawyer contacted Felmlee about the proposal. Franklin claims that he agreed to help and "was instructed on what to say and to which questions and at what point." Ex. Q. Felmlee told Franklin that he had "to keep quiet about the deal." Ex. 4. According to Franklin, Felmlee changed

the deal, and Franklin did not agree to testify under the changed deal. Ex. k. According to Franklin, Felmlee "used a false statement," which Felmlee "knew to be false and fabricated" against Dennis Watts. Franklin states that Dennis Watts "never once told me anything about his case." Franklin also admitted that Petitioner "never told him anything but [Franklin] was doing it because of Mr. Felmlee's agreement." Ex. 4. Franklin added that another inmate at the Detention Center named "Khan" told him "Felmlee gave him a deal if he would testify on Mr. Johnson's case." Ex. _.

This evidence was concealed and exculpatory. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (evidence exculpatory and material that "would have raised opportunities to attack . . . the thoroughness and even good faith of the investigation.").

c. Trial counsel failed to provide effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution, and similar provision of the Virginia Constitution, *see Strickland v. Washington*.

All allegations of fact and legal arguments contained in section a and b, supra, are incorporated here by reference.

If, for any reason, the Commonwealth is absolved of its manipulation of its straightforward obligations under *Brady*, and its resultant successful concealment of exculpatory evidence from Petitioner, and, contrary to *Banks*, 540 U.S. at 696, Petitioner is found to have been required through trial counsel to have located the exculpatory evidence, then Petitioner alleges that trial counsel unreasonably failed to locate the concealed information and take appropriate action. As the Supreme Court has acknowledged, where defense

counsel becomes aware of previously concealed, exculpatory evidence late in proceedings, "granting a continuance" is always an available option to minimize prejudice. See *Gray v. Netherland*, 518 U.S. 152, 169 (1996) (quoting *Taylor v. Illinois*, 484 U.S. 400 (1988)). If trial counsel is found to be theoretically aware of, or responsible for knowing, the exculpatory information at issue, it was unreasonable for counsel not to obtain a continuance, as found in *Gray*, to provide Petitioner an opportunity to develop evidence based on the last-minute disclosure. "[a]lthough granting or denying a continuance is within the discretion of the trial court, it must exercise its discretion 'with due regard to the provisions of the Bill of Rights, which secure to one accused of crime a fair and impartial trial; and to end safe-guard his right to call for evidence in his favor." *Cremeans' Case*, 52 S.E. 362, 362 (1905); *see also Smith v. Comm.*, 156 S.E. 577, 579 (Va. 1931); *Gilchrist*, 317 S.E.2d at 787.

Under Virginia law, Petitioner is not provided counsel in post-conviction proceedings to assist in raising cognizable claims, including allegations of the denial of effective assistance of trial counsel guaranteed by the Sixth Amendment. Petitioner is indigent and unable to retain counsel on his own. He has been provided court-appointed counsel at every stage of the underlying criminal case where counsel is provided to indigent defendants. Petitioner requested appointment of counsel for these proceedings in order to have the opportunity to meet his obligations set out in Va. Code § 8.01-654, but was refused.

Under Strickland, in order to be entitled to relief, Petitioner must show that trial counsel's performance was deficient and, as a result, confidence is undermined in the jurors' verdicts. For the reasons, stated

above, including incorporation of sections a and b, Petitioner maintains that he has shown both elements of Strickland. If, for any reason, the Court finds Petitioner has not yet made the requisite showing, Petitioner maintains this is the result of the refusal to provide Petitioner the assistance of counsel at this stage of proceedings. Certainly, learned counsel would be far more qualified than indigent, unschooled Petitioner in identifying trial counsel's errors and omissions. Moreover, Petitioner's indigency and lack of resources, assistance, and mobility, make him entirely unable to investigate matters related to the showing of prejudice under *Strickland*.

If there was a procedural vehicle (other than habeas corpus) by which Petitioner could have brought a timely action in a Commonwealth court, in order to seek and obtain the benefit of the Supreme Court's decision in *McWilliams*, then Petitioner alleges that trial counsel unreasonably failed to identify and employ that vehicle.

With regard to each of the allegations described above, Petitioner asks the Court to appoint qualified counsel to represent him in these proceedings, and to appoint expert assistance as needed to develop factual support for his allegations, grant discovery to provide Petitioner the opportunity to identify, develop, and present facts in support of his allegations, and to grant an evidentiary hearing to resolve factual disputes and establish the credibility of evidence and testimony as needed.

_____

Signature of Petitioner

_____

_____

_____

Address of Petitioner

STATE OF VIRGINIA

CITY/COUNTY OF _____

The petitioner being first duly sworn, says:

1. He signed the foregoing petition;

2. The facts stated in the petition are true to the best of his information and belief.

_____

Signature of Petitioner

Subscribed and sworn to before me this _____ day of March, 2018.

_____

Notary Public

My commission expires: _____

[Stamp:]

_____

FILED IN THE CLERK'S OFFICE OF THE
CIRCUIT COURT OF THE CITY OF LYNCHBURG

MAR 23 2018 Time _____M. TESTE:
Eugene C. Wingfield, CLERK
By: _____ Dep. Clerk

APPENDIX D

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG VIRGINIA

Civil No. CL18000284-00

RAHEEM CHABEZZ JOHNSON,
Petitioner,

v.

JEFFREY KISER, Warden,
Red Onion State Prison,
Respondent.

MOTION TO DISMISS

Your respondent by counsel, moves this Court to deny and dismiss the petition for a writ of habeas corpus and in support of the motion states as follows:

1. Johnson is currently confined under an order of this Court following a jury trial in which he was convicted of one count of first-degree murder, one count of statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, two counts of attempted robbery, and four counts of use of a firearm during the commission of a felony. The court sentenced him to serve an aggregate sentence of life plus 42 years. The order is dated October 5, 2012. (Case Nos. CR11022622-00 through -07). Johnson appealed his convictions to the Court of Appeals of Virginia which affirmed his convictions in a published opinion dated March 25, 2014. (Record No. 1941-12-3). Johnson

then appealed to the Supreme Court of Virginia, which affirmed his convictions in a published opinion dated December 15, 2016. The court subsequently denied a petition for rehearing on March 24, 2017. (Record No. 141623). Johnson's petition for certiorari to the United States Supreme Court was refused on January 8, 2018. (Case No. 17-326).

2. Johnson now alleges that he is entitled to habeas corpus relief on substantially the following grounds:

(a) Johnson is entitled to a new sentencing proceeding including the appointment of assistance of a mental health expert because the Supreme Court of Virginia's opinion is inconsistent with the rule established in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017);

(b) The Commonwealth concealed favorable evidence from the petitioner in violation of his constitutional rights;

(c) Johnson's trial counsel was ineffective.

3. These claims are legally and factually without merit.

Claim A

4. Johnson first states that he is entitled to habeas corpus relief because the Supreme Court of Virginia's opinion in his direct appeal was inconsistent with the rule established in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017). Johnson's claim that he was entitled to the appointment of assistance of mental health expert has already been raised and rejected on direct appeal in the Supreme Court of Virginia and, to the extent he raised it in the United States Supreme Court, in that court as well. Accordingly, this claim is not cognizable in a habeas corpus action. *See Henry v. Warden*, 265 Va. 246, 576 S.E.2d 495 (2003).

5. To the extent that Johnson implies that the *Henry* rule should not apply to him in light of the *McWilliams* opinion, the Court should reject this claim. Contrary to Johnson's suggestion, he had a full and fair opportunity to raise these issues on direct appeal. Moreover, *McWilliams* did not in fact create any type of change in the law as Johnson suggests. Instead, the court clearly based its ruling on "what Ake requires." *McWilliams*, 137 S. Ct. at 1801. Johnson's *Ake* argument was raised and rejected both in the Supreme Court of Virginia and in the United States Supreme Court. Moreover, as Johnson himself admits, the *McWilliams* opinion was issued on June 19, 2017, two months before he filed his petition for writ of certiorari in that court, and approximately six months before the United States Supreme Court denied that petition. This claim is defaulted under the rule in *Henry* to the extent it has been raised and rejected previously. To the extent Johnson makes new allegations; it is defaulted under the rule in *Slavton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), because he could have raised it at trial and on appeal. For all of these reasons, the Court should reject this claim and find that it is procedurally defaulted in this habeas corpus action.

Claim B

6. Johnson next argues that the Commonwealth concealed favorable evidence from him in violation of his constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and related cases. Johnson first claims that the Commonwealth violated his *Brady* rights because it withheld an exculpatory search warrant from him until just days before his trial. This claim fails because it is the type of claim that the petitioner could have raised during his trial and on

direct appeal. *See Parrigan*, 215 Va. at 29, 205 S.E.2d at 682.

7. Johnson also claims that the Commonwealth violated its *Brady* obligations by failing "to reveal that it engaged in bargaining with witnesses for testimony against [Johnson]." This is also the type of claim that Johnson could have raised at trial and on appeal, so it is defaulted under the rule in *Parrigan*. Moreover, it is without merit. His first claim involves Wendell Franklin, but Franklin did not testify at trial, so Johnson has failed to establish materiality.

8. His second claim involves "Khan." Johnson claims that Khan told Wendell Franklin that the prosecutor had "given him a deaf if he would testify [against the petitioner]." This claim is also barred under the rule in *Parrigan*. Moreover, it is without merit. First, Johnson provides no affidavit from Khan; instead, he simply provides the hearsay-within-hearsay affidavit of Franklin attesting to what Khan supposedly told him. This affidavit is insufficient to prove this claim and should be stricken as inadmissible hearsay. *See Burket v. Angelone*, 208 F.3d 172, 185-86 (4th Cir. 2000) (Supreme Court of Virginia struck similar "Brown" affidavit). Second, the respondent is obliged to assume that Johnson is referring to Abdul-Malik Khan, who did testify at trial. (7/17/12 Tr. 5-30). In light of both the extensive evidence the Commonwealth elicited at trial about Khan's "hope" that he would get "consideration" for his testimony, and defense counsel's thorough impeachment of Khan, Johnson has not established "materiality" from any undisclosed "promise" the Commonwealth may have made either. (7/17/12 Tr. 5-8, 24-30). The Court should dismiss Claim B as defaulted and without merit.

Claim C

9. Johnson next argues that his trial counsel was ineffective. To prevail on this claim he must establish that his trial counsel's performance was objectively unreasonable and that as a result he has been prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Johnson first argues that his trial counsel was ineffective for failing to move for a continuance in light of the late-disclosed exculpatory information in a search warrant. However, the decision whether to move for a continuance is committed solely to trial counsel's discretion. Johnson admits that prior to trial, the Court ordered the search warrant affidavit in his case to be unsealed. This affidavit was relatively short. Counsel was not objectively unreasonable for failing to move for a continuance. See *Stockton v. Commonwealth*, 227 Va. 124, 141, 314 S.E.2d 371, 382 (1984). In fact, the affidavit itself indicates that the petitioner, Raheem Johnson, had also stated to police that Quinton Johnson was inside the apartment at the time of the shooting, so the petitioner was aware of this information over a year before he was tried. (Petitioner's Ex. 1). Moreover, the petitioner has not shown prejudice. Upon information and belief, Quinton Johnson, the individual whom the affidavit indicated told the police he was present in the apartment during the robbery and murder, is the petitioner's brother. See *Huffington v. Nuth*, 140 F.3d 572, 581-82 (4th Cir. 1998) (stating that habeas court must evaluate information from defendant's family member as having "less value than that of objective witnesses" and .in light of the potential bias inherent in that information). The petitioner has not stated with particularity what evidence counsel could have developed had he obtained a continuance or why it would have made a difference in the outcome of his trial. For all these

reasons, the Court should reject this claim under both prongs of *Strickland*.

10. To the extent that Johnson claims his lawyer was ineffective for failing to move for a continuance due to the existence of exculpatory information that the Commonwealth offered favorable treatment to certain individuals, Johnson contends in his Claim B that this information was never disclosed to the defense: Accordingly, trial counsel could not have been unreasonable for failing to move for a continuance on this basis. Even if counsel had this "exculpatory" information, Johnson has failed to establish that counsel was objectively unreasonable for failing to move for a continuance or that he was prejudiced by this failure. This claim also fails under both prongs of *Strickland*.

11. Johnson claims that he is entitled appointed counsel to assist him in his present habeas corpus proceedings. He does not have a right to such counsel. *See Haward v. Warden*, 232 Va. 16, 19, 348 S.E.2d 211, 213 (1986). Moreover, he has not shown good cause for the Court to grant him discovery. See Rule 4:1(b)(5) (leave of court is required for discovery in a habeas case and that the court "may deny or limit discovery" in such proceedings). Put another way, a habeas petitioner, unlike the usual civil litigant, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

12. The respondent denies any claims not admitted herein and states that no evidentiary hearing is necessary. *See Friedline v. Commonwealth*, 265 Va. 273, 277-79, 576 S.E.2d 491, 493-95 (2003) (citing Code § 8.01-654(8)(4)).

WHEREFORE, your respondent prays that the petition be denied and dismissed without an evidentiary hearing.

Respectfully submitted,

JEFFREY KISER, WARDEN,
Respondent herein

By:

Counsel

APPENDIX E

IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

Civil Case No. CL18000284-00
(related case Comm. v. Johnson, CR11-022622-00)

RAHEEM CHABEZZ JOHNSON
(VDOC # 1462766),
Petitioner,

-vs-

JEFFREY KISER, Warden,
Red Onion State Prison,

Respondent.

PETITIONER'S REPLY TO WARDEN'S
MOTION TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS

Petitioner Raheem Chabezz Johnson state the following in Reply to the Warden's Motion to Dismiss the Petition for Writ of Habeas Corpus and asks this Court to deny the motion to dismiss and grant appropriate relief, including ordering an evidentiary hearing with discovery to resolve Petitioner's dispute allegations.

Claim A

The Warden concedes that the June 19, 2017, decision of the Supreme Court of the United States in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), came after December 15, 2016, when Petitioner's direct

appeal was decided by the Supreme Court of Virginia. Therefore, it cannot be disputed that Petitioner did not raise a claim based on *McWilliams* in the Supreme Court of Virginia, and could not have done so. To the extent the Warden suggests Petition was required to raise a claim under *McWilliams* for the first time in a petition for writ of certiorari filed with the Supreme Court of the United States, MTD at 3 (noting *McWilliams* was decided before Petitioner filed for certiorari review), no such requirement exists. Johnson's direct appeal remedy was exhausted when the Supreme Court of Virginia issued its decision. *See, e.g., Lawrence v. Florida*, 549 U.S. 327, 333 (2007) (citing cases holding that petition for certiorari is not required, and stating that state remedies are exhausted at end of state-court review).

As alleged in his Petition, *McWilliams* established a new rule identifying three threshold criteria that, if established, require a court in a capital case to provide "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Petition at Section D, item 14 (supplemental pages)(quoting *McWilliams*, 137 S. Ct. at 1798-99). There is no corresponding language or requirement set forth in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and this requirement was not satisfied in Petitioner's case. The mandate of the Supreme Court of Virginia—that to obtain the assistance of the expert a defendant must make a showing of need that is different from, and more onerous than, the requirement in *McWilliams*—cannot stand.

The rule in *Henry v. Warden* does not bar Petitioner's habeas claim because there has been "a change in circumstances." 576 S.E.2d 495, 496 (Va. 2003).

Because the opinion in *McWilliams* was not issued until after Petitioner's direct appeal was decided by the Supreme Court of Virginia, and because *McWilliams* announced a new rule by changing the requirements for courts to provide expert assistance under *Ake*, the circumstances have changed, and this Court must consider the merits of Petitioner's claim under *McWilliams*.

Claim B

The Warden argues that Petitioner's *Brady* claims based on the prosecution's concealment of an exculpatory search warrant affidavit and its bargaining for witnesses for their testimony should be dismissed as a matter of law because they are "the type of claim[s]" that could be raised "at trial and on appeal." MTD at 3-4. This cannot provide a basis for dismissal as a matter of law. Any *Brady* claim includes a showing that the favorable evidence at issue was concealed. When considering a motion to dismiss, this Court must assume the nonmovant's allegations to be true.[1] In this instance, this Court must assume Petitioner's allegations of concealment to be true. Concealment as alleged in a *Brady* claim overcomes the default asserted by the Warden. *See, e.g., Strickler v. Green*, 527 U.S. 263

[1] "Where, as here, 'no evidence [has been] taken with regard to [a] motion to dismiss[,] we treat the factual allegations in the petition as we do on review of a demurrer.' *Virginia Marine Res. Comm'n v. Clark*, 709 S.E.2d 150, 154 (Va. 2011). We accept 'the truth of all material facts that are . . . expressly alleged, impliedly alleged, and those that may be fairly and justly inferred from the facts alleged.' *Harris v. Kreutzer*, 624 S.E.2d 24, 28 (Va. 2006). Our inquiry encompasses 'not only the substantive allegations of the pleading attacked but also any accompanying exhibit mentioned in the pleading.' *Flippo v. F & L Land Co*., 400 S.E.2d 156, 156 (Va. 1991).

(1999). This is indisputably true here where Petitioner's trial counsel admitted he did not know about the concealed evidence at a time where he could have raised the matter at trial or on appeal. See Exhibit 2.

The Warden also argues that Petitioner's claim should be dismissed as a matter of law because "it is without merit." MTD at 3. A motion to dismiss is not the proper vehicle to challenge the merits of a claim. The Court should only rule on the merits after Petitioner has had a fair and full opportunity to develop and present factual support for his claims. So far, Petitioner has had no opportunity whatsoever to develop factual support, and is incarcerated and without appointment of counsel. See n. 1, supra. Moreover, the only basis the Warden argues for dismissal of Petitioner's *Brady* claim is the fact that the claim "involves Wendell Franklin," and Franklin did not testify. This cannot provide a basis for dismissing a *Brady* claim. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (finding suppressed favorable statements of non-testifying witness material under *Brady*); cf. *Banks v. Dretke*, 540 U.S 668, 697–98 (2004) ("even though the informer in *Roviaro* [*v. United States*, 353 U.S. 53 (1957)] did not testify, we held that disclosure of his identity was necessary because he could have amplif[ied] or contradict[ed] the testimony of government witnesses." (internal quotation marks and citations omitted)); *see also Kyles*, 514 U.S. at 445–46 (undisclosed evidence would have "raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation" and would have enabled counsel to "attack[] the reliability of the investigation in failing to even consider [witness's] possible guilt").

Similarly, the Warden seeks dismissal as a matter of law based on a merits determination of Petitioner's allegations that the prosecution gave prosecution witness Abdul-Malik Khan a deal for testifying against Petitioner at trial. MTD at 4. The Warden argues only that the evidence offered in support of the claim "is insufficient to prove" the claim. MTD at 4. But Petitioner need not provide evidence sufficient to "prove" his claim in order to survive a motion to dismiss. See n. 1., supra. The Warden's argument that cross-examination of Khan conducted at trial shows that Petitioner "has not established 'materiality,'" MTD at 4, again misses the mark by arguing that Petitioner must "establish materiality" in order to avoid dismissal of his claim as a matter of law. *See, e.g., Juniper v. Zook*, 876 F.3d 551, 567 (4th Cir. 2017). Also, the Warden has it backwards when he argues that this cross-examination is evidence against a showing of materiality. The Court's assessment of materiality must be cumulative. *See e.g., Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1995)). Therefore, when assessing materiality, the Court must add the impact of the concealed evidence to that of any evidence that was presented or examination that took place at trial.

Claim C

The Warden argues that Petitioner's allegations that he did not receive effective assistance of counsel must be dismissed as a matter of law because a decision whether to move for a continuance "is committed solely to trial counsel's discretion." MTD at 4-5. This simply is not true, and the Warden's counsel admits as much. See MTD at 5 (acknowledging that counsel's actions are assessed for their reasonableness). Moreover, review of counsel's actions must con-

sider what counsel would have reasonably done had counsel known about the powerful evidence at issue here where counsel had no idea about the exculpatory evidence. See Exhibit 2. Also, the Warden is wrong to suggest that Petitioner knew about the full content of the exculpatory information in Quinton Johnson's affidavit that was concealed from Petitioner. The Warden cannot support a motion to dismiss by raising disputes of fact, and this Court cannot rely on such disputes as bases for dismissing Petitioner's allegation as a matter of law. See n. 1., supra.

The Warden improperly argues that Petitioner's claim should be dismissed as a matter of law based on purported facts proffered by the Warden, the party moving for dismissal, and supported only by the representation of the Warden "[u]pon information and belief." This cannot provide a proper basis for a motion to dismiss allegations as a matter of law. See n. 1., supra.

CONCLUSION

For the reasons stated above and in Petitioner's Petition for Writ of Habeas Corpus filed in this matter, incorporated in full by reference herein, this Court must deny the Warden's Motion to Dismiss Petitioner's claims as a matter of law.

PRAYER FOR RELIEF

For the reasons stated above and in Petitioner's Petition for Writ of Habeas Corpus filed in this matter, incorporated in full by reference herein, Petitioner asks this Court to grant the following relief:

1. Vacate Petitioner's convictions and order Respondent to release him from custody;

2. Vacate Petitioner's sentences as appropriate;

3. Deny the Warden's motion to dismiss Petitioner's claims as a matter of law;
4. Order an evidentiary hearing, and appropriate discovery and expert assistance to allow Petitioner a full and fair opportunity to develop and present evidence in support of his claims, and to resolve any disputed claims;
5. Appoint qualified counsel to represent Petitioner in these proceedings, and provide counsel sufficient time to investigate, develop, and present allegations regarding his convictions and sentences, including the ability to amend existing claims and supplement his Petition with new claims developed by appointed counsel that Petition could not develop due to his indigence and his inability to obtain the assistance of counsel; and
6. Grant all of other appropriate relief.

Respectfully Submitted,

Raheem Chabezz Johnson

Signature of Petitioner
Red Onion State Prison
10800 H. Jack Rose Highway
P.O. Box 90
Pound, Virginia 24279
(276) 796-7510

CERTIFICATE OF SERVICE

On August 13, 2018, Raheem Chabezz Johnson, submitted the above Reply to the Warden's Motion to Dismiss for delivery to counsel for the Warden,

Donald E. Jeffrey, III,
Senior Assistant Attorney General,
Office of the Attorney General,
202 North Ninth Street,
Richmond, Virginia, 23219,
(804) 786-2071,
oagcriminallitigation@oag.state.va.us.

_____

APPENDIX F

IN THE SUPREME COURT OF VIRGINIA

RAHEEM CHABEZZ JOHNSON, prose,
Petitioner,

v.

JEFFERY KISER, Warden,
Red Onion State Penitentiary,
Respondent.

From the Circuit Court for the City of Lynchburg
(Johnson v. Kiser, Warden, No. CL 18-284)

PETITION FOR APPEAL

Raheem Chabezz Johnson,
pro se (DOC# 1462766)
Red Onion State Prison
10800 H. Jack Rose Highway
P.O. Box 90
Pound, Virginia 24279
(276) 796-7510

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

ASSIGNMENTS OF ERROR

1. The circuit court erred in holding that Johnson's habeas claim under *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), is procedurally defaulted under *Henry v. Warden*, 576 S.E.2d 495 (Va. 2003), and/or *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). Order at 2-3. To the extent the circuit court addressed the merits of Johnson's claim, it erred in denying him a new sentencing proceeding with the assistance of appropriate mental health experts to examine and present mitigating evidence.

This issue was presented to the circuit court in the petition for writ of habeas corpus Sections D.14.a, D.16.a, D.17.a (misnumbered as D.14.a) and in Petitioner's Reply Brief at 12. The circuit court's consideration is at Order at 2-3.

2. The circuit court erred in refusing to grant relief and dismissing as a matter of law Johnson's habeas allegations that the Commonwealth concealed exculpatory or impeaching evidence, in violation of constitutional rights established by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles* v. Whitley, 514 U.S. 419 (1995), without allowing discovery or an evidentiary hearing. Order at 3-4.

This issue was presented to the circuit court in the petition for writ of habeas corpus Sections D.14.b, D.16.b, D.17.b (misnumbered as D.14.b), and in Petitioner's Reply Brief at 3-5. The circuit court's consideration is at Order at 3-4.

3. The circuit court erred in refusing to grant relief and dismissing as a matter of law Johnson's habeas allegations trial counsel failed to provide constitutionally effective assistance, *see Strickland v. Washington*,

466 U.S. 664 (1984), without allowing discovery or an evidentiary hearing. Order at 4-6.

This issue was presented to the circuit court in the petition for writ of habeas corpus Sections D.14.c, D.16.c, D.17.c (misnumbered as D.14.c), and in Petitioner's Reply Brief at 6. The circuit court's consideration is at Order at 4-6.

THE NATURE OF THE CASE AND PROCEEDINGS BELOW

This is an appeal from the dismissal of a petition for writ of habeas corpus. Petitioner Raheem Chabezz Johnson is an inmate sentenced to life imprisonment for crimes committed when he was a juvenile. The habeas petition alleged that his conviction and sentence were obtained in violation of the constitutions of the United States and Virginia.

A Lynchburg jury convicted Petitioner of first-degree murder for the 2011 shooting death of Timothy Irving, and sentenced him to life imprisonment. Petitioner also was convicted of statutory burglary, two counts of attempted robbery, and four counts of using a firearm during the commission of a felony, and sentenced to a total of 42 years in prison.

The Court of Appeals affirmed the convictions and sentences. *Johnson v. Commonwealth*, 755 S.E.2d 468 (Va. Ct. App. 2014). This Court partially granted a petition for appeal, limited to the constitutionality of petitioner's life sentence in light of *Miller v. Alabama*, 567 U.S. 460 (2012). but did not grant relief. Petitioner asked for rehearing. In light of the U.S. Supreme Court's new decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court amended the grant of appeal, and agreed to consider the trial court's denial of funds for a neuropsychologist. The Court ultimately

denied relief on all the grounds it considered. *Johnson v. Commonwealth*, 793 S.E.2d 326 (Va. 2016).

Petitioner asked the U.S. Supreme Court for a writ of certiorari. He argued that because of his age at the time of the crime, Virginia unconstitutionally (i) sentenced him to life imprisonment without parole, and (ii) denied him the assistance of a neuropsychologist to examine and present individualized evidence in mitigation. On the second issue, petitioner relied in part on *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), which the Supreme Court had decided several months after the conclusion of all direct appeal proceedings in state court. The Commonwealth waived its right to respond, but the Supreme Court took the uncommon step of requesting a response. That Court subsequently denied the petition. *Johnson v. Virginia*, 138 S. Ct. 643 (2018).

Acting pro se, and without the benefit of investigative assistance, Petitioner submitted a petition for habeas corpus in the Lynchburg circuit court. *Johnson v. Kiser, Warden*, Civil No. CL18-284. He alleged that the trial court's denial of his request for the assistance of a mental health expert was unconstitutional under *McWilliams* and *Ake v. Oklahoma*, 470 U.S. 68 (1985) (Claim A); that the Commonwealth violated rights established by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995) (Claim B); and that, due to particular errors or omissions, he was denied effective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668 (1984) (Claim C). He supported his allegations with the evidence available to him, including proffered statements and documentary evidence, and he asked for appointment of counsel and the opportunity to obtain discovery and an evidentiary hearing.

The Warden moved to dismiss these allegations as a matter of law, and opposed appointment of counsel, discovery, and an evidentiary hearing. On September 17, 2018, the circuit court adopted verbatim an order drafted by the Warden's lawyer, which summarily dismissed the habeas petition. The court also denied Petitioner's request for appointment of counsel, and any opportunity for discovery or an evidentiary hearing.

STATEMENT OF FACTS

On April 11, 2011, two intruders entered Timothy Irving's residence to rob him. Irving's girlfriend, Artenna Horsley-Robey, was in the residence and has consistently said she saw only two intruders, both wore masks, and only their eyes were visible. Trial transcript (Tr.) 150. She told police that Dennis Watts was one of the intruders, but that she did not know the identity of the other intruder who actually shot Irving. She later identified Petitioner as the second intruder.

The Commonwealth possessed evidence that the second intruder was petitioner's brother, Quinton Johnson. A sealed affidavit, appended to the government's application for a search warrant, revealed that, "Quinton Johnson made statements to investigators that he was present inside of the victim Timothy Irving's residence at the time of the shooting, but denied shooting Timothy Irving." Petition for Writ of Habeas Corpus, Ex. 1. At the Commonwealth's request, the circuit court found that the affidavit "contains information that can compromise the continuing investigation." Ex. 3. Although the Commonwealth represented that it had timely disclosed all *Brady* materials, it intentionally did not move to unseal the affidavit and provide it to the defense until a few days before trial began, at a time when defense counsel was in the

throes of preparing for the imminent trial. Even then, the Commonwealth failed to alert defense counsel that this last-minute disclosure included additional *Brady* material. Petitioner's court-appointed defense counsel acknowledged to petitioner in a letter dated March 10, 2014, that he "did not know anything about your brother admitting to being at the scene of the homicide." Ex. 2.[1]

The Commonwealth also failed to reveal that it engaged in bargaining with witnesses for testimony against Petitioner. According to Wendell Franklin, an inmate at the Lynchburg Adult Detention Center, Deputy Commonwealth's Attorney Charles C. Felmlee told him that, in exchange for help from Franklin in the prosecution of Petitioner, Felmlee would assist Franklin and his wife, who Felmlee told Franklin was facing indictment for murder. Petition for writ of Habeas Corpus, Ex. 4. According to Franklin, Franklin's lawyer contacted Felmlee about the proposal. Franklin claims that he agreed to help and "was instructed on what to say and to which questions and at what point." Ex. 4. Felmlee told Franklin that he had "to keep quiet about the deal." Id., Ex. 4. According to Franklin, Felmlee changed the deal, and Franklin did not agree to testify under the changed deal. Id. Ex. 4. According to Franklin, Felmlee "used a false statement," which Felmlee "knew to be false and fabricated" against Dennis Watts. Franklin states that Dennis Watts "never once told me anything about his case." Franklin also admitted that Petitioner "never told him anything but [Franklin] was doing it because of Mr. Felmlee's agreement." 19, Ex. 4. Franklin added that another inmate at the Detention Center named "Khan" told

[1] After providing the letter, but before certiorari litigation was resolved, Petitioner's trial counsel passed away unexpectedly.

him "Felmlee gave him a deal if he would testify on Mr. Johnson's case." Id., Ex. 4.

On April 11, 2011, when Timothy Irving was shot and killed, petitioner was 17 years old. He was indicted for capital murder (which carried a mandatory sentence of life without parole) and several lesser offenses. After the U.S. Supreme Court outlawed mandatory life without parole sentences for juveniles, *see Miller v. Alabama*, 567 U.S. 460 (2012), the Commonwealth reduced the capital charge to first-degree murder, for which a sentence of life without parole was permitted but was not mandatory.

A Lynchburg jury found Petitioner guilty of first-degree murder, statutory burglary, two counts of attempted robbery, and four counts of using a firearm during the commission of a felony. *Commonwealth v. Johnson*, Lynchburg Circuit Court, CR11022622-00-07. In preparation for sentencing, Petitioner asked the court to appoint a neuropsychologist under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to develop and present, as a mitigating factor in favor of a sentence less than life, individualized evidence that Petitioner's physiological and emotional development were immature at the time of the crime. The trial court denied the motion, and, in the absence of this mitigating evidence, Petitioner was sentenced to life imprisonment, plus 42 additional years in prison. Under Virginia law, Petitioner is not eligible for parole, except to seek a "geriatric 11 parole after reaching 60 years of age.

AUTHORITIES AND ARGUMENT

1. The circuit court erred in holding that Johnson's habeas claim under *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), is procedurally defaulted under *Henry v. Warden*, 576 S.E.2d 495 (Va. 2003), and/or *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). Assignment of Error 1 (Claim A)

This Court should grant an appeal on Claim A because the circuit court erred in holding that Petitioner's claim, based on *McWilliams*, is procedurally defaulted. The claim cannot be defaulted under *Henry v. Warden*, 576 S.E.2d 495 (Va. 2003), because Henry only applies to claims that were "raised and decided either in the trial or on direct appeal." Id. at 496 (emphasis added). No state court "decided" the *McWilliams* claim in the trial or on direct appeal because all state court proceedings ended months before the U.S. Supreme Court issued its opinion in *McWilliams* in the first place. The U.S. Supreme Court also did not "decide" petitioner's *McWilliams* claim; it only denied certiorari. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case in *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (Roberts, C.J., concurring in denial of certiorari) (quoting *United States_v. Carver*, 260 U.S. 482, 490 (1923)).

Petitioner's *McWilliams* claim also cannot be defaulted under *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). Slayton, similar to Henry, applies only to claims that could have been raised at trial and on direct appeal, but were not. Petitioner could not have raised a *McWilliams* claim at trial and on appeal because *McWilliams* was not decided until two years after the trial and six months after this Court's decision on appeal.

The habeas court ignored the substance of petitioner's *McWilliams* claim and did not decide the merits. The closest it came to the merits was to include a brief sentence, in the middle of its procedural default discussion, saying that "*McWilliams* did not in fact create any type of change in the law as Johnson suggests." Order at 3. To the extent this Court reads the habeas court's decision as adjudicating the merits of the *McWilliams* issue, its decision was erroneous.

In *McWilliams*, the Supreme Court said that whenever the three threshold criteria articulated in Ake are met-(1) an indigent defendant, (2) whose mental condition is "relevant to . . . the punishment he might suffer," and (3) when that mental condition is "seriously in issue" the state must provide "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," including at the sentencing phase. 137 S. Ct. at 1798-99. All three criteria were present in petitioner's case.

In *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996), this Court announced how Ake would apply in Virginia. The defendant in *Husske* had requested the assistance of a DNA expert in order to challenge the Commonwealth's forensic DNA evidence, which the trial court denied. This Court upheld the decision, stating that before a defendant is entitled to expert assistance under *Ake*, he must make a "particularized showing of need." In *Husske* and subsequent cases, Virginia courts have used this more demanding "particularized showing of need," rather than the threshold *Ake* criteria. *McWilliams* established that at least with respect to the assistance of appropriate mental health experts, *Husske* is incompatible with *Ake*.

Petitioner satisfied the threshold criteria identified in *McWilliams*. He was indigent. His mental condition, meaning the extent to which his brain was underdeveloped because of his youth and particularized history, was relevant to mitigation and the appropriate sentence. *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("psychology and brain science continue to show fundamental differences between juvenile and adult minds"; "parts of the brain involved in behavior control continue to mature through late adolescence"; actions of juveniles "are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults" (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). And his mental condition was "seriously in issue." In fact, it is impossible to see how a juvenile defendant, facing a potential life sentence for a murder, could not have the strong need for an expert who would conduct an appropriate examination, determine the individualized developmental status of the juvenile's brain, help defense counsel prepare the facts and theory for presentation to the jury, identify and prepare points to rebut any contrary presentation by the prosecution regarding the defendant's brain development, and testify as a mitigation witness in support of a reduced sentence. In short, the Court announced in *McWilliams* "what Ake requires," 137 S. Ct. at 1801, and it is not what petitioner got under Husske. This Court should grant the appeal, apply the rule in *McWilliams*, and remand the case for resentencing.

2. The circuit court erred in refusing to grant relief and dismissing as a matter of law Johnson's habeas allegations that the Commonwealth concealed exculpatory or impeaching evidence, in violation of constitutional rights established by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995), without allowing discovery or an evidentiary hearing. Assignment of Error 2 (Claim B)

This Court should grant an appeal on Claim B because the habeas court erred by dismissing Petitioner's allegations that the Commonwealth concealed exculpatory and impeaching evidence in violation of rights established by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995). The habeas court further erred by doing so as a matter of law without allowing discovery or an evidentiary hearing. The Commonwealth possessed and concealed evidence that the second intruder-the one who prosecutors argued shot Irving-was petitioner's brother, Quinton Johnson. A sealed affidavit, appended to the government's application for a search warrant, revealed "Quinton Johnson made statements to investigators that he was present inside of the victim Timothy Irving's residence at the time of the shooting, but denied shooting Timothy Irving." Petition for Writ of Habeas Corpus, Ex. 1. The trial court found that the sealed affidavit, Ex. 1, contains information that can compromise the continuing investigation/ Ex. 3. As such, it was favorable to Petitioner. Nonetheless, while still holding back the exculpatory affidavit, the Commonwealth represented to the defense that it had timely disclosed *Brady* material. In fact, it did not move to unseal the affidavit and provide it to the defense until a few days before trial began, at a time when the Commonwealth was well aware defense

counsel was in the throes of preparing for the imminent trial. Even then, the Commonwealth engaged in subterfuge by failing to alert defense counsel that this last-minute disclosure included additional *Brady* material.

The withheld information was material because it identified a credible, alternate triggerman. Although Robey testified at trial that Petitioner was the shooter, she acknowledged that a mask covered the triggerman's face, and she could only see his eyes. Tr. at 150, lines 1-17. The fact that Quinton admitted his presence, and that Robey's identification was based solely on her view of the intruder's eyes, would further cast doubt that she could identify the triggerman with sufficient certainty to support a finding of guilt beyond a reasonable doubt, and on the adequacy of the government's consideration of alternative suspects. *See Kyles*, 514 U.S. at 445.

The habeas court rejected this claim because it is "the type of claim that the petitioner could have raised during his trial and on direct appeal." Order at 3. But that is true of any *Brady* claim. By definition, *Brady* requires a showing that the prosecution concealed evidence that the defense could have raised "at trial and on direct appeal."[2] Because the Commonwealth's con-

---

[2] Because the habeas court acted on the Warden's motion to dismiss, and because no evidence was taken. the habeas court was required to "treat the factual allegations in the petition as we do on review of a demurrer." *Virginia Marin Res. Comm'n v. Clark*, 709 S.E.2d 150, 154 (Va. 2011). It had to accept "the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. . . . [AJ court may examine not only the substantive allegations of the pleading attacked but

cealment was deliberate and knowing, it cannot be excused under the untenable rule that "prosecutor may hide, defendant must seek." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). In a habeas affidavit, petitioner's trial counsel admitted he did not know about the concealed evidence at a time when he could have raised it at trial or on appeal. Petition for Writ of Habeas Corpus, Ex. 2.

The government further violated *Brady* by failing to disclose its offers of assistance to witness Wendell Franklin, and his wife (who faced indictment for murder) if they assisted the government in prosecuting petitioner. Petitioner presented Franklin's sworn statement, which described how the prosecutor approached Franklin to make a deal. Petition for Writ of Habeas Corpus, Ex. 4. After talking to his lawyer, Franklin agreed to help and was instructed by the prosecutor on what to say. But the prosecutor changed the terms of the deal and Franklin declined to testify under the change. The fact that the prosecution felt it had to offer a deal in order to obtain evidence against petitioner is material because it further shows the weakness of the government's case. And, contrary to the circuit court's reasoning, the fact that Franklin did not testify at petitioner's trial is not a basis to dismiss the *Brady* claim. *See Kyle*, §514 U.S. at 445 (suppressed favorable statement of nontestifying witness was material under *Brady*).

The habeas court again dismissed this allegation because it is "the type of claim" that could have been raised at trial and on appeal. Order at. 3. That remains true of all *Brady* claims and is not a basis for summary

---

also any accompanying exhibit mentioned in the pleading". *Flippo v. F & L Land Co.*, 400 S.E.2d 156, 156 (Va. 1991).

dismissal. For the reasons already described, the habeas court erred in failing to treat petitioner's factual allegations as true, and in failing to give him a full and fair opportunity to develop and present factual support.

Franklin's affidavit additionally said that the prosecution gave another inmate, Abdul-Malik Khan, a deal for testifying against petitioner. The habeas court responded by striking the affidavit, saying it contained inadmissible hearsay and therefore was insufficient to prove Petitioner's claim. But this Court instructed in *Kearns v. Hall*, 91 S.E.2d 648, 652-53 (Va. 1956), that hearsay statements in an affidavit, even though inadmissible in their own right, can be "sufficient to require the court to hold a hearing" so it can determine whether the hearsay allegations are accurate. At such a hearing, witnesses would have to appear and testify under oath, and the affidavit would be inadmissible. !d. After making an assessment of accuracy, the court would address the merits of the request for legal relief-here, the application for habeas corpus based on a violation of *Brady*-and determine whether to grant or deny that relief. Petitioner specifically requested an evidentiary hearing, and the habeas court erred in denying it.

The fact that Khan testified at trial that he merely "hope[d]" to get "consideration" for his testimony does not preclude a finding that the alleged *Brady* violation was immaterial. As Justice Blackmun explained in *United States v. Bagley*, if consideration for Brown's testimony was not guaranteed, that fact would serve to strengthen his incentive to testify falsely in order to help the Commonwealth secure petitioner's conviction. 473 U.S. 667, 683 (1985) (opinion of Blackmun, J.). Moreover, a court's assessment of materiality must

be cumulative. *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016). The habeas court erred in failing to perform such an assessment.

This Court should grant the appeal, and remand the case for review of the merits of his allegations of violations of *Brady* and *Kyles*, including discovery and an evidentiary hearing.

3. The circuit court erred in refusing to grant relief and dismissing as a matter of law Johnson's habeas allegations that trial counsel failed to provide constitutionally effective assistance, see *Strickland v. Washington*, 466 U.S. 664 (1984), without allowing discovery or an evidentiary hearing. Assignment of Error 3 (Claim C)

This Court should grant an appeal because the habeas court erred in dismissing as a matter of law Petitioner's well-supported allegations that trial counsel failed to provide effective assistance, as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. Petitioner incorporates all facts and legal arguments he has made above.

Regarding Claim A, the habeas court held that petitioner should have raised the *McWilliams* claim at trial and on direct appeal, even though *McWilliams* was not decided until four years after the trial court's judgment. Order at 2-3. Petitioner alleged in the alternative to his substantive claim, that, if the *McWilliams* claim should have been raised at trial and on appeal, it was unreasonable for defense counsel not to do so. Counsel knew that it was critically important to Petitioner's sentencing case to have the assistance of an expert who could examine the state of Petitioner's brain, and could help counsel prepare and present the case for reduced punishment. Counsel also knew that

the need for such assistance was critical in circumstances where the defendant committed the crime when he was a juvenile, the government was seeking a life sentence without available parole, the defense goal was a sentence less than life imprisonment, juveniles' brains are influenced by childhood environments and experiences and develop at different rates, and a neuropsychologist was needed to develop and present individualized mitigation evidence to support a shorter sentence. In light of *McWilliams*, the trial court's denial of the defense motion, upheld on appeal, must be taken to mean that defense counsel fell short in some significant way. Petitioner adequately alleged that, had jurors considered the individualized evidence the neuropsychologist would have provided, there is a reasonable probability at least one juror would not have voted for a death sentence.

Regarding Claim B, petitioner alleged that the Commonwealth failed to disclose several pieces of exculpatory or impeachment information in violation of *Brady*. The habeas court held that petitioner defaulted these *Brady* allegations because each is "the type of claim" he could have raised at trial and on direct appeal. To the extent the *Brady* allegations were properly found to be defaulted, Petitioner alleged that trial counsel rendered ineffective assistance in failing to raise the claims at trial and on appeal.

First, the Warden admits the Commonwealth kept the affidavit regarding Quinton Johnson under seal, and produced it to the defense just days before trial.[3]

---

[3] Trial counsel later admitted that he was unaware of the contents of the affidavit. Petition for Writ of Habeas Corpus, Ex. 2. If counsel received the late *Brady* disclosure but failed to review, this was undoubtedly ineffective assistance.

A reasonable attorney who represented a defendant charged with first-degree murder, and who received an exculpatory affidavit so belatedly in the case, would move for a continuance in order to investigate and modify his trial strategy. Competent counsel would recognize that the information in the affidavit, coupled with Robey's admission that the triggerman's face was masked so that her identification was based solely on seeing his eyes, gave defense counsel a powerful basis to develop and present a defense of reasonable doubt regarding the triggerman's identity. The circuit court sought to justify trial counsel's omission because Petitioner also claimed-though without supporting evidence-that Quinton was in the victim's apartment, Order at 5, but this only increases the reasonable need to request a continuance to investigate the previously concealed evidence. Without any evidence about the reason (if there was one) for counsel's failure to request such a continuance, the habeas court concluded that the failure was not objectively unreasonable. Without addressing the exculpatory value of the late-disclosed information, the habeas court also held that petitioner failed to show he was prejudiced by counsel's deficient performance. Order at 5-6. These decisions were erroneous.

Second, the prosecutor offered to assist detainees Wendell Franklin and his wife in exchange for their testimony against petitioner. The prosecutor instructed the Franklins "to keep quiet about the deal," and told them "what to say and to which questions and at what point." Petition for Writ of habeas Corpus, Exhibit (statement of Wendell Franklin). He also reportedly used a statement in his prosecution of Watts that Franklin knew was false. That the Commonwealth broke his deal with Franklin, with the result that Franklin did not testify at petitioner's trial, does not

erase the fact that the prosecutor solicited testimony that would be tainted. The habeas court held that because the prosecutor's deal with the Franklins was not consummated, counsel could not have been unreasonable in failing to move for a continuance or otherwise challenge the deal. Order at 6. This is circular logic because the premise depends on proof of the conclusion. The prosecutor's intent to solicit untrustworthy testimony from Franklin was impeaching, regardless whether he actually elicited that testimony at trial. *See*, *e.g.*, *Kyles*, 514 U.S. at 445 (finding suppressed statements of nontestifying witness material under Bragy); id. at 445-46 (explaining that undisclosed evidence would have given defense opportunities to attack physical evidence and to challenge good faith of government's investigation). Petitioner was prejudiced because trial counsel could have challenged the good faith of the government's investigation and the trial tactics it formulated.

Third, the habeas court wrote cryptically that because the Commonwealth's deal with Abdul-Malik Khan "was never disclosed to the defense, . . . trial counsel could not have been unreasonable for failing to move for a continuance on this basis." Order at 6. This is more circular logic. The government cannot hide evidence of its own *Brady* misconduct, and then argue that its failure to disclose that evidence excuses trial counsel's failure to discover it. *Kyles*, supra.

This Court should grant the appeal, and remand the case for review of the merits of his allegations of violations of Strickland and the Sixth Amendment, including discovery and an evidentiary hearing.

Discovery, Hearing, and Counsel

Petitioner requested counsel to assist him in habeas proceedings. The habeas court denied this request on the sole ground that he had no right to counsel. But petitioner clearly asked for a discretionary appointment, which the habeas court did not address. The Court should take the denial of counsel into consideration in considering this petition for appeal, especially with regard to Petitioner's failure to investigate and develop factual support for allegations. Petitioner also asked for discovery and an evidentiary hearing. Without addressing any of the disputed questions of fact in the parties' pleadings, the habeas court announced that a determination of petitioner's claims could be made without the need for a hearing. In assessing the evidence, this Court should take into consideration petitioner's inability to elicit and present facts supporting his claims, especially with regard to Claims B and C.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated above, Petitioner respectfully asks the Court to grant his Petition for Appeal, appoint counsel to represent Petitioner who is indigent, find that the habeas court's analyses and conclusions were legally erroneous or factually unsupported, and either grant habeas relief or remand for further proceedings.

Respectfully submitted,

Raheem Chaffezz Johnson,
pro se (VDOC# 1462766)
Red Onion State Prison
10800 H. Jack Rose Highway
P.O. Box 90
Pound, Virginia 24279
(276) 796-7510

CERTIFICATE

On this 13 of December, 2018, pursuant to Rule 5:17(i), Petitioner states the following:

(1) Appellant/Petitioner: Raheem Chabezz Johnson (VDOC# 1462766)1 Red Onion State Prison, 10800 H. Jack Rose Highway. P.O. Box 90, Pound, Virginia 24279, (276) 796-7510. Appellant/Petitioner is incarcerated and does not have access to a facsimile machine or email. Appellant/Petitioner is not represented by counsel.

Appellee/Respondent Warden Jeffrey Kiser is represented by Senior Assistant Attorney General Donald E. Jeffrey, Ill. Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, (804) 786-2071 (telephone), (804) 786-1991 (fax).

Appellant/Petitioner does not have an email address for Respondent or Respondent's counsel.

(2) A copy of the foregoing Petition for Appeal has been served on counsel for Appellee/Respondent by hand-delivery.

(3) The foregoing Petition for Appeal complies with the Court's length requirements under Rule 5:17(f).

(4) Appellant/Petitioner is not represented by counsel.

(5) Appellant/Petitioner is an inmate proceeding prose; pursuant to Rule 5:170)(3), the Court can consider his petition without oral argument. If permitted and appropriate, and Petitioner is served in a timely manner, Petitioner would provide a reply brief.

Raheem Chabezz Johnson, pro se
(VDOC# 1462766)

APPENDIX G

SUPREME COURT OF VIRGINIA

Record No. 141623
292 Va. 772

RAHEEM CHABEZZ JOHNSON

v.

COMMONWEALTH OF VIRGINIA

Filed December 15, 2016

Background: Defendant, who was 17 years old at the time of the alleged crime, was convicted in the Circuit Court, City of Lynchburg, Mosby G. Perrow, III, J., of first-degree murder and received a life sentence. Defendant appealed. The Court of Appeals, 63 Va.App. 175, 755 S.E.2d 468, affirmed. Defendant appealed.

Holdings: The Supreme Court, Powell, J., held that:

(1) defendant was not entitled to appointment of neuropsychologist to assist in sentencing, and

(2) defendant's sentence did not violate prohibition on cruel and unusual punishments

Affirmed.

Millette, Senior Justice, filed concurring opinion.

[HEADNOTES OMITTED]

FROM THE COURT OF APPEALS OF VIRGINIA

B. Leigh Drewry, Jr., Lynchburg, for appellant.

Donald E. Jeffrey, III, Senior Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

PRESENT: Lemons, C.J., Goodwyn, Mims, McClanahan, and Powell, JJ., and Russell and Millette, S.JJ.

OPINION BY JUSTICE CLEO E. POWELL

Raheem Chabezz Johnson ("Johnson") appeals the trial court's refusal to appoint a neuropsychologist at the Commonwealth's expense to assist in the preparation of his presentence report pursuant to Code § 19.2-299(A). Johnson further takes issue with the Court of Appeals' affirmance of the trial court's decision to impose a life sentence. According to Johnson, the life sentence imposed by the trial court was in violation of the Eighth Amendment because the trial court failed to afford him the opportunity to present evidence about youth and its attendant characteristics.

I. BACKGROUND

On April 11, 2011, Johnson shot and killed Timothy Irving. At the time, Johnson was two months short of his eighteenth birthday. On June 1, 2011, Johnson was indicted on eight felonies, including capital murder. After his indictment but before trial, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012). As a result, the Commonwealth amended the indictment to reduce the capital murder charge to first degree murder. A jury subsequently convicted Johnson of all eight felonies.

The trial court ordered a presentence re-port and continued the matter for sentencing. On August 3, 2012, Johnson moved to have Joseph Conley, Ph.D. ("Dr. Conley"), a neuropsychologist, appointed at the Commonwealth's expense, to serve as an expert to assist in the preparation for his sentencing hearing. In his motion, Johnson noted that Dr. Conley had "devoted his practice to the study of the maturation of the brain and its functioning." Johnson argued that Dr. Conley would "provide relevant facts specific to Raheem C. Johnson so as 'to fully advise the court' of all matters specific to Raheem C. Johnson and allow the fashioning of a sentence in compliance with the 8th Amendment to the United States Constitution."

At a hearing on the matter, Johnson argued that Dr. Conley's assistance was necessary because the probation officer charged with compiling the pre-sentence report "does not have the ability to collect the necessary details about what is happening within [Johnson's] mind, how [Johnson's] mind has developed." Johnson asserted that Dr. Conley's "facts or unique abilities" would allow him to develop "other relevant facts needed to individualize the punishment that [the trial court] is going to have to mete out." In response, the Commonwealth stated that Johnson had not demonstrated the requisite particularized need to have Dr. Conley appointed at the Commonwealth's expense because it was "common sense" that a juvenile is less mature than an adult. The Commonwealth also noted that Johnson was not facing life without parole because Johnson would be eligible for geriatric parole at age 60.

After considering the matter, the trial court denied Johnson's motion. The trial court noted that nothing in Johnson's record supported his position that such

an evaluation was needed. It further stated that Johnson had not shown a particularized need because, in the trial court's opinion, *Miller* did not require such an evaluation in every case where the accused was a juvenile at the time of the offense.

Prior to sentencing, Johnson submitted four articles that discuss brain development and legal culpability. At the sentencing hearing, the trial court acknowledged that it had read the articles Johnson submitted and considered them along with the presentence report and Johnson's school records. After hearing argument from the parties, the trial court stated:

> Mr. Johnson, in this case we had a helpless victim, the shooting was unprovoked, and it was cruel and callous. It was just mean. It was, it's as cruel and callous as anything I've seen since I've been sitting here on the bench, and that's been awhile. Just totally unnecessary to put a bullet in this young man's head.

The trial court then proceeded to sentence Johnson to life in prison for the first degree murder charge plus an additional 42 years for the other seven charges.

Johnson filed a motion to reconsider, arguing that the trial court failed to properly consider the articles he submitted and the Supreme Court's ruling in *Miller* before imposing Johnson's sentence. Johnson further asserted that, by imposing a life sentence, the trial court ignored the fact that, statistically, geriatric parole was not a realistic opportunity to obtain early release. The trial court denied the motion without a hearing.

In a letter opinion, the trial court explained that it imposed a life sentence "after careful consideration of [Johnson's] individual characteristics as reflected in

the record, including without limitation the presentence report and school records." The trial court also reiterated that it had reviewed the articles Johnson submitted. The trial court noted the "horrendous nature of the crime" and determined that Johnson's "history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense, make [Johnson] … a danger to himself and others should he be returned to society."

Johnson appealed the trial court's refusal to appoint a neuropsychologist and its decision to impose a life sentence to the Court of Appeals. The Court of Appeals denied Johnson's petition for appeal with regard to the denial of his motion for a neuropsychologist, but granted his petition with regard to the sentence imposed. In a published opinion, the Court of Appeals subsequently determined that, because a sentence of life did not exceed the statutory maximum penalty for first-degree murder, the trial court had not erred. *Johnson v. Commonwealth*, 63 Va. App. 175, 182–85, 755 S.E.2d 468, 471–73 (2014). The Court of Appeals further held that, because Johnson was not facing a mandatory life sentence, *Miller* did not apply. *Id.* at 183–84, 755 S.E.2d at 472.

Johnson appeals.

II. ANALYSIS

On appeal, Johnson argues that the Court of Appeals erred in refusing to consider his appeal related to the trial court's denial of the motion for the appointment of a neuropsychologist on his behalf at the Commonwealth's expense. Additionally, he asserts that, under *Miller*, the Court of Appeals erred in affirming the trial court's decision to impose a life sentence because he was not afforded the opportunity to present

evidence regarding youth and its attendant consequences.

A. Motion for a Neuropsychologist

[1] Johnson contends that the trial court erred in denying his motion for the appointment of a neuropsychologist on his behalf at the Commonwealth's expense because he demonstrated a particularized need for the services of a neuropsychologist. Johnson asserts that he demonstrated the requisite "particularized need" established by this Court in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996). He also relies on the fact that Code § 19.2-299(A) requires that a presentence report include "other relevant facts." Johnson claims that evidence relating to his physiology or psychology were such "other relevant facts." Thus, according to Johnson, even in the absence of showing a particularized need, the services of a neuropsychologist were necessary to provide a complete presentence report. He further asserts that such evidence was necessary to allow the trial court to "tailor" the punishment to him. We disagree.

[2–4] This Court has recognized that, upon request, the Commonwealth is required to "provide indigent defendants with 'the basic tools of an adequate defense.'" *Husske*, 252 Va. at 211, 476 S.E.2d at 925 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985)). However, "an indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense, is not absolute." *Id.* Rather,

> an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor

> in his defense," and that he will be prejudiced by the lack of expert assistance. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial. The indigent defendant who seeks the appointment of an expert must show a particularized need.

Id. at 211–12, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82–83, 105 S. Ct. 1087).

[5,6] Furthermore, "[w]hether a defendant has made the required showing of particularized need is a determination that lies within the sound discretion of the trial court." *Commonwealth v. Sanchez*, 268 Va. 161, 165, 597 S.E.2d 197, 199 (2004) (citing *Husske*, 252 Va. at 212, 476 S.E.2d at 926, and other case authority). "A particularized need is more than a 'mere hope' that favorable evidence can be obtained through the services of an expert." *Green v. Commonwealth*, 266 Va. 81, 92, 580 S.E.2d 834, 841 (2003) (quoting *Husske*, 252 Va. at 212, 476 S.E.2d at 925–26). In the present case, Johnson admitted that he sought the services of a neuropsychologist because there was no other evidence regarding his physiology or psychology. In other words, Johnson sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way. At best, Johnson's request for a neuropsychologist amounted to a mere hope that favorable evidence would be obtained. Thus, it cannot be said that Johnson demonstrated a particularized need for the assistance of a neuropsychologist.

Johnson next argues that, under Code § 19.2-299(A), he was entitled to the appointment of a neuropsychologist independent of any showing of a particularized need. Code § 19.2-299(A) states that, upon a finding of guilt, a trial court may (or, under certain circumstances, shall) direct a 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, any information regarding the accused's participation or membership in a criminal street gang as defined in § 18.2-46.1, *and all other relevant facts*, to fully advise the court so the court may determine the appropriate sentence to be imposed.

Id. (emphasis added).

Nothing in the plain language of Code § 19.2-299(A) specifically requires a probation officer to investigate a defendant's current physiology or psychology.[1] Indeed, the statute expressly limits the subject of the probation officer's investigation and report to "the *history* of the accused." *Id.* (emphasis added). When read in context, it is clear that the phrase "all other relevant facts" is used to describe additional historical information that may be relevant to the probation officer's investigation and report.

---

[1] Notably, Code § 19.2-299(A) only describes the investigation that must be conducted by the probation officer and the contents of that probation officer's report. Although the statute provides a defendant with an opportunity to "present any additional facts bearing upon the matter," such an opportunity only arises *after* the probation officer has completed his investigation and submitted his report. Similarly, the statute is silent on the manner in which such facts may be developed.

[7] Thus, it is clear that Code § 19.2- 299(A) does not envision the appointment of a neuropsychologist to augment the presentence report. That said, however, if information regarding a defendant's physiology or psychology exists in a defendant's history, that information might well be included as "other relevant facts" in the presentence report. Moreover, such information could be used as part of the showing necessary to demonstrate a "particularized need" under *Husske* or presented as "additional facts bearing upon the matter" in response to the presentence report. *See* Code § 19.2-299(A). Accordingly, the trial court did not abuse its discretion in denying Johnson's motion for the appointment of a neuropsychologist at the Commonwealth's expense and the Court of Appeals did not err in upholding this determination.[2]

B. Life Sentence

[8] Johnson next argues that the trial court erred in sentencing him to life in prison. Relying on the Supreme Court's decision in *Miller v. Alabama*, Johnson claims that, because he was still a juvenile on the date that he committed the crimes, the trial court was required to consider the psychological differences between adults and juveniles before imposing a life sentence. Johnson further contends that, in the absence of such consideration, the sentence imposed by the trial court was not individualized and, therefore, violated the Eighth Amendment. However, we conclude that *Miller*

---

[2] Johnson also asserts that the Supreme Court's decision in *Miller* further demonstrates the requisite "particularized need." However, as discussed below, Johnson's reliance on *Miller* is misplaced and, therefore, we need not address whether the applicability of *Miller* to a specific case can provide a "particularized need" under the proper circumstances.

is inapplicable to the present case. Therefore, the trial court did not err.

In *Miller*, the Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. However, by its plain language, *Miller* only applies where a juvenile offender is sentenced to a term of life *without parole*. Notably, the Supreme Court's analysis in *Miller* is founded, in part, on the notion that sentencing a juvenile to life in prison is a disproportionate sentence because a juvenile sentenced to life without parole is analogous to capital punishment. *Id.* at 2466. In contrast, "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery v. Louisiana*, — U.S. —, 136 S. Ct. 718, 736, 193 L.Ed.2d 599 (2016). Indeed, it is particularly telling that the remedy for a *Miller* violation is to "permit juvenile homicide offenders to be considered for parole." *Id.* Thus it is clear that *Miller* does not apply when a juvenile offender has the opportunity to be considered for parole.

In *Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386, 402 (2011), we held that the possibility of geriatric release under Code § 53.1-40.01[3] provides a

---

[3] Code § 53.1-40.01 states:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who

meaningful opportunity for release that is akin to parole. As Johnson was convicted of a Class 2 felony, he will be eligible for geriatric release under Code § 53.1-40.01 when he turns 60 in 2053, in which case the possibility exists that Johnson's sentence of life imprisonment will convert into a sentence of approximately forty years.[4] Thus, it is readily apparent that, under this Court's jurisprudence, Johnson was only sentenced to life in prison; he was not sentenced to life without parole. Accordingly, Johnson's reliance on *Miller* is misplaced.

III. CONCLUSION

Having failed to demonstrate the requisite particularized need for the appointment of a neuropsychologist at the Commonwealth's expense, Johnson has

---

> has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the pro-visions of this section.

[4] While Johnson makes much about the low statistical probability of release under Code § 53.1-40.01, we find his argument to be, at present, speculative because the statistical data Johnson relies on does not include juvenile offenders. Indeed, as has been recently noted,

> The geriatric release program was not implemented until 1994. See 1994 Acts (Sp. Sess. II) 1, 2 (enacting Code § 53.1-40.01). A hypothetical 17-year old sentenced to a life sentence or a de facto life sentence in 1995 will not be eligible for geriatric release until 2038. Moreover, inmates who committed their crimes before January 1, 1995 are still eligible for traditional parole. See Code §§ 53.1-151, 53.1-165.1. Accordingly, a number of inmates, who would be eligible for geriatric release, obtain release through traditional parole instead.

Vasquez v. Commonwealth, 291 Va. 232, 258 n. 4, 781 S.E.2d 920, 935 n.4 (2016) (Mims, J., concurring).

failed to show any abuse of discretion in the decision of the trial court that mandated review by the Court of Appeals. Additionally, as Code § 53.1-40.01 provides Johnson with a meaningful opportunity for parole when he turns 60, *Miller* has no application to the present case. Accordingly, we find no reversible error in the judgment of the Court of Appeals and we will affirm the decisions of the trial court.

Affirmed.

SENIOR JUSTICE MILLETTE, concurring.

I agree with the majority's analysis concluding that Johnson is not entitled to a neuropsychologist under *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996). I write separately because I disagree with the majority's conclusion that "*Miller* [*v. Alabama*, 567 U.S. —, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012)] is inapplicable to the present case" because geriatric release "provides a meaningful opportunity for release akin to parole." While the majority applies existing Virginia precedent, I believe *Miller* and *Montgomery v. Louisiana,* 577 U.S. —, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), do not suggest but rather require that this Court reexamine our position. However, because I conclude that Johnson's sentencing ultimately comported with *Miller* and *Montgomery,* and the trial court met its burden under the Eighth Amendment, I concur in the result.

I.

As an initial matter, *Miller* and *Montgomery* are not limited in scope to mandatory life sentences. Rather, *Miller*, as explicated in *Montgomery*, is the touchstone for constitutional sentencing of children potentially facing a sentence of life imprisonment without parole.

In examining the scope of *Miller* and *Montgomery*, it is necessary to take two short steps back in the jurisprudence of the Supreme Court of the United States. In *Roper v. Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005), the Supreme Court found the death sentence to be a disproportionate punishment, and therefore cruel and unusual for juveniles for Eighth Amendment purposes. In *Graham v. Florida*, 560 U.S. 48, 74, 75, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), the Supreme Court issued a blanket ban on the imposition of a sentence of life without parole for juvenile nonhomicide offenders, in part because the penalty of life without parole "forswears altogether the rehabilitative ideal." These two cases would ultimately form the bedrock of the holdings reached in *Miller* and *Montgomery*.

Two years later, *Miller* arose in the context of a challenge to mandatory life without parole for a juvenile homicide offender. In *Miller*, the Supreme Court did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*. Instead, it man- dates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S. at —, 132 S. Ct. at 2471. Such a process is required, in short, because "children are constitutionally different from adults for the purposes of sentencing." 567 U.S. at —, 132 S. Ct. at 2464 (citing *Roper*, 543 U.S. at 569–70, 125 S. Ct. 1183 and *Graham*, 560 U.S. at 68, 130 S. Ct. 2011). The Court held not that a life sentence without parole was *never* appropriate for a juvenile, but rather that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at —, 132 S. Ct. at 2475. Accordingly, *Miller* held mandatory life

sentences for juvenile offenders to be unconstitutional, and mandated that a process be followed considering the "offender's youth and attendant characteristics" before sentencing juveniles to life with-out parole. *Id.* at —, 132 S. Ct. at 2471.

Courts initially struggled with the interaction of *Miller's* substantive and procedural components, resulting in the subsequent opinion of *Montgomery*, which plainly states *Miller's* key substantive and procedural holdings. *Montgomery* clarified that *Miller* set forth the following substantive rule of law:

> Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity." Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

577 U.S. at —, 136 S. Ct. at 734 (citations and internal quotation marks omitted). *Montgomery* also emphasized *Miller*'s parallel, prospective procedural holding: "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.*

While *Miller* rendered mandatory sentences of life without parole facially unconstitutional, its impact was not limited to mandatory sentences. *Miller's*

facial holding that mandatory life sentences without parole were unconstitutional was required by the dual central holdings clarified in *Montgomery*: that life without parole is a violation of the Eighth Amendment for "juvenile offenders whose crimes reflect the transient immaturity of youth," and, that "*Miller* requires a sentencer to consider a juvenile offender's youth and its attendant characteristics" before rendering a sentence of life without parole. *Montgomery*, 577 U.S. at —, 136 S. Ct. at 734. Because mandatory sentences do not allow for such consideration, they "necessarily carr[y] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose on him": that "a child whose crime reflects unfortunate yet transient immaturity" might receive life without parole. *Id.* (citations and internal quotation marks omitted).

Yet a non-mandatory sentence of life without parole can still be unconstitutional as applied to a given defendant, if such a juvenile is sentenced to life without parole with- out consideration of "youth and its attendant characteristics." *Id.*; *United States v. Johnson*, No. 3:08–cr–0010, 2016 WL 3653753, at *5, 2016 U.S. Dist. LEXIS 83459, at *5–6 (W.D.Va. June 28, 2016) ("[A]bsolutist statutes like those in *Miller* and *Montgomery* are facially unconstitutional. But a particular life sentence (even one stemming from a sentencing regime that permits a non-life sentence) would be unconstitutional as-applied if the sentence did not abide by the commands of *Miller* and *Montgomery*."). *Montgomery* is clear that, prospectively, "[a] hearing *where youth and its attendant characteristics are considered as sentencing factors* is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing . . . gives effect to *Miller's* substantive

holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[5] *Montgomery*, 577 U.S. at —, 136 S. Ct. at 735 (emphasis added) (citation and internal quotation marks omitted).

The Supreme Court in *Miller* could have simply struck down mandatory life without parole as unconstitutional. Instead, it devoted the majority of its opinion and holding to the importance of this procedural consideration of youth. This procedural requirement is ineffectual if limited to only "mandatory" sentencing schemes. *Montgomery* clarifies that the substantive rule of law set forth in *Miller* is that life without parole—not mandatory life without parole, but "life without parole"—is "an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at —, 136 S. Ct. at 734.[6] Accordingly, *Montgomery* also makes clear that a *Miller* hearing procedurally requires not just discretion to enter a lesser sentence, but *actual* consideration of youth by the sentencer, *id.*, or the entire portion of the opinion and holding in *Miller* addressing procedure would be rendered superfluous.

II.

Of course, none of the foregoing observations are consequential if Johnson received a sentence that

---

[5] Retroactively, *Montgomery* allows for reviews after a term of years to satisfy this requirement without disturbing finality. 577 U.S. at —, 136 S. Ct. at 736.

[6] The Supreme Court's recent action bolsters this view. *Arias v. Arizona*, — U.S. —, 137 S. Ct. 370, 196 L.Ed.2d 287 (2016) (vacating and remanding a judgment predicated upon the refusal of the Court of Appeals of Arizona to grant *Miller* relief to a juvenile who did not receive a mandatory life sentence).

provides, through parole or a similar system, a meaningful opportunity for release based on maturation and rehabilitation. The majority, observing that *Miller* and *Montgomery* do not apply in instances of parole, relies on our previous decision in *Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386, 402 (2011), for the proposition that geriatric release is "akin to parole."

The Commonwealth abolished parole two decades ago. Code § 53.1-165.1. Non-capital juvenile homicide offenders in Virginia remain eligible to apply for geriatric release at the age of 60. Code § 53.1-40.01. Five years ago, in light of *Graham*, this Court was first tasked with examining whether those juvenile nonhomicide offenders eligible for geriatric release fell under *Graham's* prohibition against life imprisonment without parole, or rather had a "meaningful opportunity" for release. *Graham*, 560 U.S. at 75, 130 S. Ct. 2011.

At the time, I joined this Court's opinion in *Angel*, 281 Va. at 275, 704 S.E.2d at 402, concluding that nonhomicide offenders in Virginia were not subject to life without parole under *Graham* because geriatric release offered a "meaningful opportunity" for release, thereby preventing those life sentences from implicating the Eighth Amendment concerns raised by *Graham*.

Our mandate in light of *Graham* alone was substantially narrower than the vision of the Eighth Amendment set forth by the Supreme Court today. *Graham* noted, for example, that:

> It bears emphasis . . . that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natu-

> ral life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

560 U.S. at 75, 130 S. Ct. 2011. Additionally, the caveat that meaningful opportunity for release be "based on demonstrated maturity and rehabilitation," while present in *Graham*, *id.,* was not emphasized as central to the holding in the case. The opinion went on to refer to "meaningful opportunity to obtain release" without caveat, *id.* at 79, 130 S. Ct. 2011, and, notably, the conclusion in *Graham* synthesized the holding as simply: "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with *some realistic opportunity to obtain release* before the end of that term." *Id.* at 82, 130 S. Ct. 2011 (emphasis added).

Accordingly, in *Angel* this Court considered whether the Virginia geriatric release system was sufficiently distinguishable from life without parole as described in *Graham*, and concluded that it was; we found it offered a meaningful opportunity for release. 281 Va. at 275, 704 S.E.2d at 402. While we also noted that normally applicable consideration procedures of the Parole Board would provide for meaningful release based on demonstrated maturity and rehabilitation, we devoted only two sentences to consideration of that issue. *Id. Roper*, a death penalty case, was unrelated to our analysis. I believe we made an informed deci-

sion based on the guidance provided to us from the Supreme Court at the time.

I do not believe we sit in the same position today. We now must consider the issue in light of *Roper*, *Graham*, *Miller*, and *Montgomery*, and the clear indication by the Supreme Court of the United States that these cases are to be read together. *Montgomery*, 577 U.S. at —, 136 S. Ct. at 734; *Miller*, 567 U.S. at —, 132 S. Ct. at 2461–69. As stated in *Montgomery*, *Graham* was the "foundation stone" for *Miller*, and "*Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'" 577 U.S. at —, 136 S. Ct. at 732–33. We must consider these holdings not as substantive rules unto themselves but parts of the larger, functioning understanding of the Eighth Amendment; as such, they cannot be understood in a vacuum, but must be read together to properly apply Eighth Amendment protections.

Miller and *Montgomery* provide a more robust analytical framework for considering the issue of geriatric release. *Graham's* requirement of "meaningful opportunity for release *based on demonstrated maturity and rehabilitation*," 560 U.S. at 75, 130 S. Ct. 2011 (emphasis added), contains new meaning and import in light of the emphasis in *Miller* and *Montgomery* on the distinction between transient behavior and incorrigibility. Through the lens of *Miller* and *Montgomery*, it appears that the "meaningful" or "realistic" opportunity to obtain release referred to in *Graham* always contemplated meaningful release based on demonstrated maturity and rehabilitation.

Geriatric release, as it currently exists in the Commonwealth, is fundamentally not a system that ensures review and release based on demonstrated maturity

and rehabilitation. Virginia's traditional parole system[7] requires consideration of enumerated factors by the Parole Board. Code § 53.1-155; Virginia Parole Board, Policy Manual, Section I (2006), available at https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf (last visited Dec. 1, 2016). While maturity and rehabilitation are not factors which are enumerated verbatim, they are substantially present. *See id.* However, geriatric release applicants are required to cite compelling reasons for their release, and the Parole Board can deny the application for any reason upon Initial Review.[8] Virginia Parole Board Admin. Proc. 1.226.[9] No consideration of particular factors is required. *Id.* If geriatric release as implemented in Virginia carries no mandate to ensure a process for consideration of maturation or rehabilitation, it would appear to fail the test set forth in *Graham* that release be "based on demonstrated maturity and rehabilitation." 560 U.S. at 75, 130 S. Ct. 2011. *See also LeBlanc v. Mathena*, 841 F.3d 256 (4th Cir. 2016) (holding Virginia's geriatric release statute failed to provide a meaningful opportunity for release based on maturity and rehabilitation under *Graham* in accordance with the Eighth Amendment). In this regard, it is also manifest that

---

[7] Traditional parole, while still operational, applies to sentences rendered in prosecutions for crimes that were committed prior to January 1, 1995. Code § 53.1-165.1.

[8] Applications that proceed past the Initial Review stage to the Assessment Review stage receive consideration under the same factors as those eligible for traditional parole. Virginia Parole Board Admin. Proc. 1.226.

[9] As of December 1, 2016, the Virginia Parole Board Administrative Procedure Manual was available at https://vpb.virginia.gov/files/1108/ vpb-procedure-manual.pdf.

geriatric release is not a meaningful opportunity for release that is "akin to parole."

Additionally, following *Miller* and *Montgomery*, the issue of rarity is no longer a mere empirical observation; it is instead linked to a substantive element: "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." *Montgomery*, 577 U.S. at —, 136 S. Ct. at 726 (citation and internal quotation marks omitted). Yet if geriatric release does not require consideration of irreparable corruption versus demonstrated maturity, or ensure that denial of release, and therefore life without parole, is indeed rare, then we cannot claim geriatric release serves as a basis for the validation of life without parole sentences without complying with the framework of *Montgomery*.

In requiring that "sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him to die in prison," *Graham*, *Miller,* and *Montgomery* now reflect an evident clarification of doctrine on the part of the Supreme Court of the United States to avoid condemning juveniles to life in prison without hope of parole due to the "transient immaturity of youth." *Montgomery*, 577 U.S. at —, —, 136 S. Ct. at 726, 734. As *Miller* emphasizes, "removing youth from the balance . . . contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 567 U.S. at —, 132 S. Ct. at 2466. Yet geriatric release treats juveniles no differently than adults, and is if anything harsher due to

the longer period of punishment the juvenile must serve before reaching the age of eligibility.

In light of recent Supreme Court precedent, I believe that the juveniles sentenced to life in Virginia are no different than the juveniles sentenced to "life imprisonment without parole" described in *Graham*, *Miller,* and *Montgomery*, and that geriatric parole does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 130 S. Ct. 2011. As a result, juveniles sentenced to life in Virginia are in fact facing "the harshest possible penalty for juveniles," *Miller*, 567 U.S. at —, 132 S. Ct. at 2475, regardless of whether we choose to invoke the phrase "life without parole." Accordingly, they should be protected by the substantive and, at least prospectively, procedural rules of law clarified in *Montgomery*.

III.

In the case at bar, the record reflects that the trial court considered peer-reviewed journals presented by the defendant concerning adolescent brain development and legal culpability, thereby considering "youth and its attendant characteristics" before rendering its sentence. *Montgomery*, 577 U.S. at —, 136 S. Ct. at 735. Because I believe the trial court satisfied the constitutional requirements articulated in *Miller* and *Montgomery*, I concur in the majority's opinion affirming Johnson's sentence.

APPENDIX H

FROM THE CIRCUIT COURT OF THE
CITY OF LYNCHBURG
Mosby G. Perrow, III, Judge

Record No. 1941-12-3

RAHEEM CHABEZZ JOHNSON

v.

COMMONWEALTH OF VIRGINIA

Filed March 25, 2014
Present: Judges Humphreys, Beales and Huff
Argued at Salem, Virginia

OPINION BY JUDGE RANDOLPH A. BEALES
MARCH 25, 2014

B. Leigh Drewry, Jr. (Cunningham and Drewry, on brief), for appellant.

Donald E. Jeffrey, III, Senior Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Raheem Chabezz Johnson (appellant) appeals the trial court's decision to impose a life sentence for appellant's first-degree murder conviction under Code § 18.2-32.[1] In his assignment of error that is before

---

[1] In addition to the life sentence, appellant was also sentenced to a total of forty-two years for several other offenses — i.e., statutory burglary, two counts of attempted robbery, and four counts

this Court, appellant alleges that the trial court "ignored his individuality and the holding of *Miller v. Alabama*, 132 S. Ct. 2455 (2012)." For the following reasons, we affirm appellant's life sentence for first-degree murder.

I. Background

Under settled principles of appellate review, we view "the evidence in the light most favorable to the Commonwealth, as we must since it was the prevailing party" in the trial court. *Riner v. Commonwealth*, 268 Va. 296, 330, 601 S.E.2d 555, 574 (2004). On April 11, 2011, about two months before appellant's eighteenth birthday, appellant and a co-defendant planned to rob the victim. After appellant and the co-defendant entered the victim's residence, appellant produced a handgun and ordered the victim to a bedroom. While the victim was on his knees looking in his bedroom closet for money, appellant shot the victim in the head. The victim's girlfriend and two-year-old son were in the bedroom and, thus, were forced to watch the murder of the victim.

On June 1, 2011, a grand jury indicted appellant on eight felony charges, including capital murder. Code § 18.2-31 classifies capital murder as a Class 1 felony. For defendants, such as appellant, who were under eighteen years of age at the time of the offense, Code

---

of using a firearm during the commission of a felony. Appellant has not challenged the sentences for those convictions on appeal. Furthermore, an appeal was not granted on assignments of error alleging that the trial court erred by denying appellant's motion to strike the statutory burglary and attempted robbery charges, erred by improperly instructing the jury on the issue of eyewitness identification, erred by denying appellant's request for the appointment of a neuropsychologist, and erred with respect to the preparation of the trial transcripts.

§ 18.2-10(a) states that the punishment for a Class 1 offense is life imprisonment. Furthermore, inmates who have been convicted of Class 1 felonies are not eligible to apply for conditional release under the geriatric parole statute, Code § 53.1-40.01.[2]

On June 25, 2012, prior to appellant's trial, the United States Supreme Court held in *Miller*, 132 S. Ct. at 2469, that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In 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. Code § 18.2-32 classifies first-degree murder as a Class 2 felony, and Code § 18.2-10(b) states that Class 2 felonies are punishable by a range of twenty years to life imprisonment. Furthermore, inmates who have been convicted of Class 2 felonies are eligible to apply for conditional release under the geriatric parole statute. See Code § 53.1-40.01. The trial court granted the Commonwealth's motion to amend the indictment against appellant to a charge of first-degree murder, and appellant has not challenged that decision on appeal.

Following the jury's verdict convicting appellant of first-degree murder, among other offenses, the trial

---

[2] Code § 53.1-40-01 states,

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

court sentenced appellant as a juvenile offender pursuant to Code § 16.1-272(A). In anticipation of sentencing, appellant's counsel submitted to the trial court a series of articles that addressed adolescent brain development. According to appellant's counsel, these articles supported a finding that the brain of a person who is appellant's age at the time that these offenses occurred has not completely grown and developed. Based on these articles, appellant's counsel contended that the trial court should not consider appellant as culpable as a fully mature adult would be. The Commonwealth, in turn, submitted documents from the City of Lynchburg Public Schools that detailed, *inter alia,* the many suspensions that appellant had received — including several that involved acts of violence.[3]

In addition, the probation officer prepared a presentence report that was presented to the trial court and to the parties prior to sentencing. The presentence

---

[3] Included in these documents was a report from appellant's principal explaining why appellant was suspended from school for ten days in January 2009. The principal wrote:

> On January 21, 2009 at approximately 9:05 a.m. Raheem was involved in a fight with another student in front of the school building. Raheem initiated the confrontation by punching and then slamming the other individual to the ground. This referral is Raheem's 12th referral for the 2008–09 school year. He has previously been suspended from school for 22 days. Raheem is a habitual offender. . . . This is to notify you that I am suspending Raheem for 10 school days and that I will forward a recommendation to the superintendent that the school board consider a long-term suspension/alternative educational placement.

In addition, it appears that appellant was suspended at least twice during the 2009–10 school year after hitting other students.

report indicated that many prior juvenile petitions had been filed against appellant, with several of those petitions resulting in probation or adjudications of guilt.[4] The presentence report also stated that appellant had been a member of the Bloods gang since he was about thirteen years old and that appellant admitted to a juvenile and domestic relations district court officer in August 2008 that he had risen to "the rank of 2-Star General" in that gang.

At the sentencing hearing, the Commonwealth argued that a life sentence for appellant's first-degree murder conviction was appropriate. In support of this argument, the prosecutor contended that appellant's prior record was "atrocious," that appellant's murder of the victim was "brutal," "heartless," and "sick,"[5] and that a life sentence would "guarantee the next two to three generations of Lynchburg residents that this defendant will no longer harm anyone on our streets." The prosecutor noted that appellant would be eligible to apply for geriatric parole at age sixty and asserted that it should be the role of "the geriatric parole board

---

[4] For example, in November 2005, Johnson was charged with assault and battery. After being placed on probation, appellant was found guilty of a probation violation in February 2006. Appellant was also found guilty of disorderly conduct in April 2006. Johnson was then charged with assault and battery and brandishing a firearm in April 2008, and he was found guilty of that assault and battery offense in June 2008. Appellant remained on supervised probation until March 2010.

[5] The victim's mother and the victim's girlfriend both testified at the sentencing hearing. The victim's girlfriend, who had dated the victim for eight years and is the mother of the victim's son, testified at sentencing that her then-three-and-a-half-year-old son "knows who his father is." She testified that the victim's death has been especially difficult for their son (who witnessed his father's murder), adding, "He remembers everything."

to make the determination whether it's ever safe for him to be released again." In response, appellant's counsel relied on the United States Supreme Court's decision in *Miller* for the view that "juveniles are different." Appellant's counsel asserted, "Whether you are an adult at eighteen by the law does not negate the psychological and scientific evidence that you remain a juvenile with regard to the development of the brain until your mid-twenties." Appellant's counsel requested that the trial court impose a total sentence that was within the recommended sentencing guidelines range of twenty-eight years, two months and forty-seven years of imprisonment.

The trial court decided to impose a life sentence for the first-degree murder conviction, explaining from the bench at the sentencing hearing:

> [I]n this case we had a helpless victim, the shooting was unprovoked, and it was cruel and callous. It was just mean. It was, it's as cruel and callous as anything I've seen since I've been sitting here on the bench and that's been awhile. Just totally unnecessary to put a bullet in this young man's head.

Appellant's counsel filed a motion for reconsideration. Summarizing the ways in which he alleged that the trial court had erred at sentencing, appellant's counsel argued in the motion for reconsideration, "Nothing announced in the court's imposition of sentence demonstrates an individualized sentencing taking into consideration the various characteristics of Raheem Chabezz Johnson detailed in the presentence report, the trial of the case, or the scientific studies of the brain received by the Court."

The trial court: denied the motion for reconsideration in a written order that also incorporated a letter opinion, in which the trial court found:

> The life sentence was imposed after careful consideration of your client's individual characteristics as reflected in the record, including without limitation, the presentence report and school records. The materials submitted with your letter dated September 4, 2012 were reviewed. The sentencing guidelines were also considered and felt to be inappropriate due to the horrendous nature of the crime. Raheem Chabezz Johnson has a history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense, make him, in my opinion, a danger to himself and others should he be returned to society.

II. Analysis

A. Sentencing in Virginia

Virginia's law pertaining to appellant's appeal of his sentence is well established.

We review the trial court's sentence for abuse of discretion. *Valentine v. Commonwealth*, 18 Va. App. 334, 339, 443 S.E.2d 445, 448 (1994). Given this deferential standard of review, we will not interfere with the sentence so long as it "'was within the range set by the legislature'" for the particular crime of which the defendant was convicted. *Jett v. Commonwealth*, 34 Va. App. 252, 256, 540 S.E.2d 511, 513 (2001) (quoting *Hudson v. Commonwealth*, 10 Va. App. 158, 160–61, 390 S.E.2d 509, 510 (1990)).

Scott v. Commonwealth, 58 Va. App. 35, 46–47, 707 S.E.2d 17,23 (2011); see *Abdo v. Commonwealth*, 218 Va. 473, 479, 237 S.E.2d 900, 903 (1977) ("We have held in numerous cases that when a statute prescribes a maximum imprisonment penalty and the sentence does not exceed that maximum, the sentence will not be overturned as being an abuse of discretion."); *see also Rawls v. Commonwealth*, 272 Va. 334, 351, 634 S.E.2d 697, 706 (2006); *Williams v. Commonwealth*, 270 Va. 580, 584, 621 S.E.2d 98, 100 (2005); *cf.* Code § 19.2-298.01(F) (stating that a trial court's decision not to follow the discretionary sentencing guidelines range "shall not be reviewable on appeal or the basis of any other post-conviction relief").

In this case, appellant was convicted of first-degree murder. That offense is a Class 2 felony, which is punishable by a statutory sentencing range of twenty years to life imprisonment. *See* Code § 18.2-32; *see also* Code § 18.2-10(b). The trial court sentenced appellant to life imprisonment for the first-degree murder conviction. That sentence did not exceed the statutory maximum penalty for first-degree murder. Accordingly, "the sentence will not be overturned as being an abuse of discretion" under Virginia law. *Abdo*, 218 Va. at 479, 237 S.E.2d at 903.

Nevertheless, appellant argues that the United States Supreme Court's recent decision in *Miller* requires this Court to reverse his life sentence for first-degree murder as a matter of federal constitutional law. Neither this Court nor the Supreme Court of Virginia previously has addressed *Miller* in a published opinion. To the extent that appellant's argument under *Miller* raises a question of constitutional interpretation, that issue is reviewed *de novo*. *Lawlor v. Com-*

monwealth, 285 Va. 187, 240, 738 S.E.2d 847, 877 (2013).

B. The Decision in *Miller v. Alabama*

The United States Supreme Court limited its review in *Miller* to the constitutionality of *mandatory sentencing statutes* that provide sentencing courts *no discretion* to sentence juvenile offenders to anything other than life sentences *without the possibility of parole.* Indeed, the first paragraph of the majority opinion in *Miller* summarizes the issue before the Supreme Court and states the scope of its holding as a matter of constitutional law:

> The two 14-year-old offenders in this case were convicted of murder and sentenced to life imprisonment *without the possibility of parole.* In neither case did the sentencing authority have *any discretion* to impose a different punishment. State law *mandated* 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. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida*, 560 U. S. __, __ (2010) (slip op., at 17, 23), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. *We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's*

> *prohibition on "cruel and unusual punishments."*

Miller, 132 S. Ct. at 2460 (emphasis added); *see also id*. at 2461, 2463 (explaining that both juvenile defendants who petitioned the Supreme Court in Miller were sentenced under state statutes that mandated life without the possibility of parole for their offenses). The Supreme Court then repeated its central holding in Miller - i.e., that a mandatory life sentence without the possibility of parole for juvenile offenders violates the Eighth Amendment's prohibition against cruel arid unusual punishments - at least two more times later in the majority opinion. *See id.* at 2468, 2475.

Thus, the Supreme Court clearly did not hold in *Miller* that *all* life sentences for juvenile offenders violate the Eighth Amendment. The Supreme Court in that case addressed a specific type of life sentence — a *mandatory* life sentence *without the possibility of parole*.[6] The Supreme Court expressly *declined* to consider in *Miller* whether "the Eighth Amendment requires a categorical bar" on all life sentences without the possibility of parole for juvenile offenders. *See id*. at 2469 ("[W]e do not consider [the petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger."). The Supreme Court's actual holding in *Miller* states that "the Eighth Amendment forbids a sentencing scheme that *man-*

---

[6] The majority opinion in *Miller* simply cannot be read outside of the context of a life sentence without the possibility of parole. Indeed, the phrases "without parole," "without the possibility of parole," and "life-without-parole" appear approximately seventy times in the majority opinion in *Miller*.

dates life in prison without possibility of parole for juvenile offenders." *Id*. (emphasis added).

C. Appellant's sentence was within the trial court's discretion

It is plainly evident that the life sentence imposed by the trial court here passes the United States Supreme Court's test for constitutionality that it expressed in *Miller*. An Eighth Amendment violation occurred in *Miller*, in the view of the Supreme Court, because the fourteen-year-old defendants were automatically sentenced to mandatory terms of life imprisonment without the possibility of parole for their offenses. By contrast, as discussed *supra,* the trial court here indisputably had the discretion to sentence appellant to a term that ranged from twenty years to life imprisonment for the first-degree murder that appellant committed about two months before his eighteenth birthday. That discretion alone places this case clearly outside of the category of cases that the Supreme Court addressed in *Miller*.[7]

---

[7] Furthermore, contrary to appellant's argument on appeal, the trial court here actually *did* render an "individualized" sentencing decision in this case. *See Miller*, 132 S. Ct. at 2475 (noting that the Supreme Court's recent "individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles" (citing *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005)). In its letter opinion denying appellant's motion to reconsider - which the trial court incorporated in its final order - the trial court expressly stated that appellant's "life sentence was imposed after careful consideration of [appellant's] *individual* characteristics as reflected in the record" before the trial court at the time of sentencing. (Emphasis added). The trial court's statements indicating that it sentenced appellant on an individualized basis speak for themselves, and this Court will not second-guess them.

Ultimately, the trial court found that a life sentence for appellant's first-degree murder of the victim was appropriate because appellant's prior record, "coupled with the brutality of the offense," made appellant "a danger to himself and others should he be returned to society." To hold that the trial court somehow lacked the discretion to impose a life sentence under the circumstances of this case would require us to step far outside the United States Supreme Court's holding in Miller — which addresses statutes *mandating* life sentences without the possibility of parole for juvenile offenders. In addition, the Supreme Court of Virginia has already held that geriatric parole under Code § 53.1-40.01 (for which appellant will be eligible to apply at age sixty) represents a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for purposes of the Eighth Amendment. *Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386,402 (2011). Accordingly, it is clear that appellant's life sentence for the horrific first-degree murder of the victim in this case must be affirmed.

See McBride v. Commonwealth, 24 Va. App. 30, 35,480 S.E.2d 126, 128 (1997) ("A court speaks through its orders and those orders are presumed to accurately reflect what transpired.").

As the trial court explained in its letter opinion, it considered the contents of the presentence report and appellant's school records. The trial court also explained that it reviewed the articles on adolescent brain development submitted by appellant's trial counsel. The trial court's decision not to accord those articles significant weight certainly will not be disturbed on appeal-given that the trial court exercised its discretion in selecting an appropriate sentence for appellant within the statutory sentencing range. *See Williams*, 270 Va. at 584, 621 S.E.2d at 101. The trial court also considered, but rejected, the range of recommended sentences under the sentencing guidelines, and that decision is not reviewable on appeal. *See* Code § 19.2-298.01(F).

III. CONCLUSION

The trial court, in its discretion, sentenced appellant to life imprisonment for first-degree murder. This sentence was proper under Virginia law, given that life imprisonment is within the sentencing range for first-degree murder. Furthermore, the United States Supreme Court's decision in *Miller* simply does not apply here because *Miller* concerns the mandatory imposition of life imprisonment without the possibility of parole for juvenile offenders. Accordingly, for the foregoing reasons, we affirm appellant's life sentence for his first-degree murder conviction.

Affirmed.

APPENDIX I

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA

v.

RAHEEM CHABEZZ JOHNSON,
DOB [REDACTED]

Defendant.

July 17, 2012

Present, the Honorable Mosby G. Perrow, III, Judge

ORDER

Felony No. CR11022622-00-07 — First Degree Murder; Statutory Burglary with Intent to Commit Murder, Rape, or Robbery While Armed with a Deadly Weapon; Attempted Robbery, 2 Counts; Use of a Firearm During the Commission of a Felony, 4 Counts

This day came the Commonwealth, represented by Charles Felmlee and Bethany Harrison, and Raheem Chabezz Johnson, who stands indicted for felonies, to-wit: first degree murder, statutory burglary with intent to commit murder, rape, or robbery while armed with a deadly weapon, attempted robbery, 2 counts, and use of a firearm during the commission of a felony, 4 counts, appeared in proper person, in custody, and came Leigh Drewry, defense counsel previously appointed, and came also the jury, previously sworn according to their adjournment.

The evidence was presented by the Commonwealth, and at the conclusion thereof, the defendant, by counsel, made a motion to strike the Commonwealth's evidence as to the charges of statutory burglary with intent to commit murder, rape, or robbery while armed with a deadly weapon, and attempted robbery, 2 counts, for the reasons stated to the record, which motion the Court overruled, and exception was noted.

Thereupon the defendant presented his evidence and renewed his motion to strike the Commonwealth's evidence, which motion the Court overruled, and exception was noted.

After hearing all the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words, to-wit: "We, the jury, find the defendant guilty of first degree murder, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of statutory burglary with the intent to commit murder of robbery while armed with a deadly weapon, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of the attempted robbery of Timothy Irving, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of the attempted robbery of Artenna Horsley-Robey, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm during the commission of murder, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm during the commission of burglary, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm dur-

ing the commission of the attempted robbery of Timothy Irving, as charged in the indictment. Steven Powers, Foreman." "We, the jury, find the defendant guilty of using a firearm during the commission of the attempted robbery of Artenna Horsley-Robey, as charged in the indictment. Steven Powers, Foreman."

The Court enters judgment on the verdict as to guilt and the jury was discharged.

Thereupon, the defendant, by counsel, renewed his motion to strike the Commonwealth's evidence, and made a motion to set aside the verdict, for reasons stated on the record, to which motions the Court doth deny.

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, and sentencing is set for September 14, 2012 at 2:00 o'clock p.m., to which time this case is continued. The Court doth order that the defendant submit to a substance abuse screening and follow-up pursuant to Section 18.2-251.01 as deemed appropriate by the Probation Officer.

The Court certifies that at all times during the trial of this case the defendant was personally present and defense counsel was likewise personally present and capably represented the defendant.

And the defendant is remanded to jail.

APPENDIX J

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

Felony No. CR11022622-00-07

COMMONWEALTH OF VIRGINIA

v.

RAHEEM CHABEZZ JOHNSON,
DOB [REDACTED]

Defendant.

August 15, 2012

Present, the Honorable Mosby G. Perrow, III, Judge

ORDER

First Degree Murder; Statutory Burglary with Intent to Commit Murder, Rape, or Robbery While Armed with a Deadly Weapon; Attempted Robbery, 2 Counts; Use of a Firearm During the Commission of a Felony, 4 Counts

This day came the Commonwealth's Attorney, represented by Charles Felmlee, and the defendant, Raheem Chabezz Johnson, in proper person, and came also Leigh Drewry, defense counsel previously appointed.

Thereupon, the defendant, by counsel, made a motion to appoint a neuropsychologist, for reasons stated on the record, to which the Commonwealth was opposed,

and the Court, having heard evidence and argument of counsel, doth deny said motion, and exception was noted.

And this case is continued to September 14, 2012 at 2:00 o'clock p.m. for sentencing.

And the defendant is remanded to jail.

APPENDIX K

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

FIPS CODE 680

COMMONWEALTH OF VIRGINIA

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

Hearing Date: October 5, 2012

Filed October 5, 2012

Judge: Mosby G. Perrow, III

ORDER

Felony No. CR11022622-00-07 – First Degree Murder; Statutory Burglary with Intent to Commit Murder, Rape, or Robbery While Armed with a Deadly Weapon; Attempted Robbery, 2 Counts; Use of a Firearm During the Commission of a Felony, 4 Counts

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, Leigh Drewry. The Commonwealth was represented by Charles Felmlee.

On July 17, 2012, the defendant was found guilty of the following offenses:

Case Number	Offense Description & Indicator Felony/ Misdemeanor (F/M)	Offense Date	Code Section
CR11022622-00	First Degree Murder (F) MUR0925F2	4/11/2011	18.2-32
CR11022622-01	Statutory Burglary with Intent to Commit Murder or Robbery While Armed with a Deadly Weapon (F) BUR2212F2	4/11/2011	18.2-90
CR11022622-02	Attempted Robbery (F) ROB1214A9	4/11/2011	18.2-58 & 18.2-26
CR11022622-03	Attempted Robbery (F) ROB1214A9	4/11/2011	18.2-58 & 18.2-26
CR11022622-04	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/2011	18.2-53.1
CR11022622-05	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/2011	18.2-53.1

CR11022622-06	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/2011	18.2-53.1
CR11022622-07	Use of a Firearm During the Commission of a Felony (F) ASL1319F9	4/11/20011	18.2-53.1

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code Section 19.2-299.

Pursuant to the provisions of Code Section 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court SENTENCES the defendant to:

Incarceration with the Virginia Department of Corrections for the term of: life on the charge of first degree murder, 20 years on the charge of statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, 2 years on each of the attempted robbery charges, 3 years on the charge of use of a firearm during the commission of a felony (CR11022622-04), and 5 years on each of the use of a

firearm during the commission of a felony charges (CR11022622-05-07). The total sentence imposed is life plus 42 years.

These sentences shall run consecutively with any other sentences imposed.

Costs. The defendant shall pay the costs of this prosecution in accordance with a schedule prepared by the Clerk.

Credit for Time Served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187.

And the defendant is remanded to jail.

DEFENDANT IDENTIFICATION:

Alias:_____ SSN: [REDACTED]

DOB: [REDACTED] Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Life, plus 42 years

TOTAL SENTENCE SUSPENDED: none

TOTAL SENTENCE TO SERVE: Life, plus 42 years

APPENDIX L

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

Order CR11022622

COMMONWEALTH OF VIRGINIA,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

Filed October 23, 2012

The Motion to reconsider life sentence filed by Raheem Chabezz Johnson, by counsel, in the Clerk's Office of the Circuit Court for the City of Lynchburg on October 15, 2012, is denied. The Court's letter to B. Leigh Drewry, Jr., counsel for the defendant, dated October 23, 2012, is incorporated herein by reference.

Endorsement by counsel is dispensed with and the objection of the defendant to the Court's action is noted. The Clerk is directed to forward a certified copy of this order to B. Leigh Drewry, Jr., counsel for the defendant, and to the Charles Felmlee, Deputy Commonwealth's Attorney for the City of Lynchburg.

Entered this 23 day of October, 2012.

/s/ Mosby G Perrow, III, Judge

[LETTERHEAD OMITTED]

October 23, 2012

B. Leigh Drewry, Jr., Esq.
Cunningham & Drewry
105 Archway Court
Lynchburg/ VA 24502

Re: Commonwealth of Virginia v.
Raheem Chabezz Johnson

Dear Mr. Drewry:

I have reviewed the defendant's motion to reconsider the life sentence imposed by the Court upon his conviction by a jury of first degree murder. The motion will be denied without a hearing.

The life sentence was imposed after careful consideration of your client's individual characteristics as reflected in the record, including without limitation the presentence report and school records. The materials submitted with your letter dated September 4, 2012, were reviewed. The sentencing guidelines were also considered and felt to be inappropriate due to the horrendous nature of the crime. Raheem Chabezz Johnson has a history of disrespect for authority and aggressive behavior which, coupled with the brutality of the offense l make him, in my opinion, a danger to himself and others should he be returned to society.

Very truly yours,

/s/ Mosby G. Perrow
Mosby G Perrow, III, Judge

MGP, III/vkh
cc: Charles Felmlee, Esq.
Eugene Wingfield, Clerk

APPENDIX M

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

File No. CR11-022622-00

COMMONWEALTH OF VIRGINIA

Plaintiff,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

Filed August 1, 2012

MOTION

COMES NOW Raheem Chabezz Johnson, by counsel, and respectfully moves this Honorable Court for an Order appointing Joseph Conley, Ph.D., to serve as an expert in preparation for the sentencing hearing currently scheduled for Friday, September 14, 2012 at 2:00 p.m. In support of this motion, Raheem Chabezz Johnson says as follows:

1. *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Husske. v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996) hold that upon a showing of a specific need due process requires an indigent defendant be afforded the same resources as a defendant capable of employing his own experts.
2. Raheem C. Johnson is indigent and currently represented by appointed counsel.

3. Raheem C. Johnson was convicted by a jury on Tuesday, July 16, 2012 on the charges of first degree murder, statutory burglary with the intent to commit murder or robbery while armed with a deadly weapon, two (2) counts of attempted robbery, and four (4) counts of use of a firearm in the commission of a felony.

4. Sentencing is currently scheduled for Friday, September 14, 2012 at 2:00 p.m.

5. A presentence investigation report has been directed to be prepared by the Court pursuant to VA CODE ANN § 19.2-299.

6. VA CODE ANN § 19.2-299 says the probation officer shall "thoroughly investigate and report upon the history of the accused, . . . and all other relevant facts to fully advise the Court so the Court may determine the appropriate sentence to be imposed." (Emphasis added.)

7. *Miller v. Alabama*, __ U.S. __ (June 25, 2012, slip op. at 6) has found "[t]he concept of proportionality is central to the Eighth Amendment." (Internal citations omitted.)

8. The standard presentence report does not explore the development of an individual's brain or how mature the individual's brain is.

9. Peer reviewed literature in the field of psychology reveals an individual's brain does not fully mature until the mid-twenties, with males maturing later than females.

10. This same literature demonstrates numerous cognitive deficits go undetected by the layman and in the absence of a proper examination.

11. Joseph Conley, Ph.D., is a licensed clinical neuropsycologist [sic] who has devoted his practice to the study of the maturation of the brain and its functioning.

12. Raheem C. Johnson is currently 19 years of age.

13. An examination of Raheem C. Johnson by Joseph Conley, Ph.D., will provide relevant facts specific to Raheem C. Johnson so as "to fully advise the court" of all matters specific to Raheem C. Johnson and allow the fashioning of a sentence in compliance with the 8th Amendment to the United States Constitution.

14. It is expected Dr. Conley's services will cost $2,000.

Wherefore, Raheem Chabezz Johnson respectfully requests this Honorable Court enter an Order appointing Joseph Conley, Ph.D., to assist counsel for Raheem Chabezz Johnson in the development of additional facts specific to Defendant in the preparation of his sentencing hearing scheduled for September 14, 2012.

Respectfully Submitted,

/s/ B. Leigh Drewry, Jr.
B. Leigh Drewry, Jr.
Counsel for Defendent

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX N

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA

Plaintiff,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

TRANSCRIPT OF PROCEEDINGS
THE HONORABLE MOSBY G. PERROW, III,
PRESIDING
AUGUST 15, 2012
Lynchburg, Virginia

Filed August 15, 2012

FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF
THE CITY OF LYNCHBURG
DATE 14/4/12 TIME 1030 AM
TESTE: EUGENE C. WINGFIELD, CLERK
by: _____ Dep. Clerk

Vicki K. Hunt
P. O. Box 11292
Lynchburg, VA 24506
(434) 851-8991

[Pgs. 1–2 Omitted]

[Pg. 3]

THE CLERK: Commonwealth versus Raheem Johnson

THE COURT: Alright. Counsel are we ready?

Mr. Felmlee: We are, Your Honor

Mr. Drewry: Yes, Sir.

The Court: And we're here on your motion, Mr. Drewry, for appointment. My docket says of a neuro-psychologist.

MR. DREWRY: Yes, Sir, Judge.

THE COURT: To assist with the sentencing?

MR. DREWRY: Yes, Sir.

THE COURT: Alright.

MR. DREWRY: Judge . The , uh, the last – I think the motion is the last four pages in that file that you have.

We're making this motion on several grounds. One., *Ake v. Oklahoma*, and *Husske v. Commonwealth* 1996 version of Ake, asking for a. specific situation. And we would submit that the subsequent reasons are the specific reasons outlined. 19.2-299 is the presentence investigation report statute which this Court is ordered

[Pg. 4]

to be direct, or has directed to be prepared. Within that Code section, it directs the probation officer to thoroughly investigate and report from the history of the accused, and emphasis towards the end, all other relevant facts to fully advise the Court so as the Court may determine the appropriate sentence to impose.

And then I cite the Court to my new favorite case *Miller v. Alabama,* which is a capital case, that emphasizes proportionality as central to the Eighth Amendment. We would submit, Judge, that the probation officer does not have the ability to collect the necessary details about what is happening within my client's mind, how my client's mind has developed. And he's still only nineteen. And research within the field of psychology indicates that the human brain does not fully mature until the mid-twenties and later for males than for females. There's also some indication in talking to Dr. Conley that there may be additional developmental delays in my particular client that can only be confirmed with regard to testing.

So we would submit that Dr. Conley's facts or unique abilities allow us to develop' the other relevant facts needed to individualize the punishment that this Court is going to have to mete out when we return in

[Pg. 5]

September. And ask the Court to enter the order.

THE COURT: Mr. Felmlee.

MR. FELMLEE: Your Honor, the Commonwealth is opposed to this order. We do not believe the defense has shown a particularized need for this particular expert. Reading from the Husske case that Mr. Drewry cited in his motion, it states that the Commonwealth of Virginia upon request must provide indigent defendants with the basic tools of an adequate defense. This defendant is indigent, Mr. Drewry has been appointed in this case. The case goes on to state this requirement, however, does not confer a right upon an indigent defendant to receive at the Commonwealth's expense all assistance that a non-indigent defendant may purchase. The indigent defendant who seeks appoint-

ment of an expert must show a particularized need. Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided. The determination whether the defendant has made an adequate showing of particularized necessity lies within the discretion of the trial judge and will not be overturned unless plainly wrong.

Your Honor, in this case, I believe, you know, this is not an issue of competency to stand trial. This is not an issue of insanity. I think the Commonwealth

[Pg. 6]

has provided the basic tools of an adequate defense for this defendant already. I think Your Honor in this case appointed a private investigator at the Commonwealth's expense to assist the defense in their preparation. There was also an ex parte judge, Judge Yeatts was appointed as an *ex parte* judge. And I believe the Commonwealth was put on notice that Dr. Michael Light, a renowned professor from New York University was gonna be traveling down at the Commonwealth's expense to potentially testify at the trial stage. The defense elected not to call him as a witness. But we had two outside people that were provided funds. The private investigator, potentially this professor from the State of New York.

Your Honor, in the defense's motion bullet point eight states that the standard presentence report does not explore the development of an individual's brain or how mature the individual/s brain is. Bullet point nine goes on to state that the brain is not fully mature until the mid-twenties. I think it's just sort of common sense, you know, as you get older, you get more mature. We're not dealing with a jury sentencing. We/re dealing with Your Honor. Your Honor is gonna be

sentencing this-defendant. This is not a capital case. He's not looking at the death penalty. He's not looking at life in prison without parole. No matter what sentence this Court fashions on

[Pg. 7]

the defendant at age sixty this defendant will be eligible for geriatric parole if he petitions the parole board.

So what we've seen in this motion, I — we do not believe the defense has shown a particularized need. This is sort of just common sense that you're not, you're — you're more mature when you're twenty-five than you are when you are, when you're seventeen. This defendant was seventeen years old and approximately ten months when he committed this homicide. And now all of a sudden he's the older he gets the more mature he will be getting.

So for these reasons, Your Honor, it would be at a cost·of two thousand dollars to the Commonwealth. We do not believe the defense has shown a particularized need. We believe we've provided, the Commonwealth has provided the defense with the adequate tools of defense. We do not believe this is — this is needed for this case.

THE COURT: Mr. —

MR. DREWRY: Judge

THE COURT: Mr. Drewry.

MR. DREWRY: If we're gonna get into a dollar and cents calculation, which I submit that we shouldn't.

THE COURT: I think the case law says fundamental fairness over weighs cost to the Commonwealth, Mr. Drewry.

[Pgs. 8–9 Omitted]

[Pg. 10]

MR. DREWRY: The reality is that we're stuck with the problems that I don't have all of the tools. And I understand that indigent doesn't equal. And that's part of the problem. Indigent doesn't equal retained client or a retained attorney. That creates a dual system in violation of equal protection. But more importantly in this case, Miller v. Alabama looks at the Eighth Amendment and says that proportionality has to be involved and Miller also goes on as do other cases, in traditional cases not capital cases, say that punishment has to be tailored for the individual. This helps the Court in the words of presentence find the relevant factors for that tailoring.

THE COURT: Well, you're telling me there's nothing in the school records that would support your position that this evaluation is needed? Other than.

MR. DREWRY: No, Sir.·

THE COURT: Okay. Well, Mr. Drewry, I don't think you've shown a particularized need. I don't think Miller requires this evaluation in every case where the accused was a juvenile at the time he — of the offense. He's been convicted, he's now an adult. You know, this — and I don't think there's anything in the case law that requires us to have every individual who has been convicted of an offense committed when he was a

[Pg. 11]

juvenile to have this type of evaluation.

I'm gonna deny your motion and your exception is noted.

I'd be willing to review the school records but you obviously have and there's nothing in them that would support your position.

MR. DREWRY: Judge, the Court. is making a ruling based upon the fact that you believe that I'm gonna be asking for this or that other lawyers are gonna be asking for this —

THE COURT: No.

MR. DREWRY: in every juvenile situation. That's not the case. I'm asking for it in this case. In this case only.

THE COURT: I'm saying you haven't shown a particularized need, Mr. Drewry.

MR. DREWRY: Judge, it's not sole — this motion is not based solely upon a particularized need. It's based upon 19.2-299 and the presentence investigation. And you're not gonna be able to get the relevant facts that are available in this case by this examination.

THE COURT: Alright. Well, you have my ruling. Your exceptions noted.

(Whereupon the proceeding was concluded)

APPENDIX O

Filed September 4, 2012

[Letterhead Omitted]

The Honorable Mosby O. Perrow, III. Judge
Lynchburg Circuit Court
P.O. Box 4
Lynchburg, VA 24505

Re: Commonwealth v. Raheem Chabezz Johnson

Dear Judge Perrow:

On Wednesday, August 15,2012, you heard a defense motion seeking the appointment of Joseph Conley, Ph.D., a licensed clinical neuropsychologist, to serve as a defense expert in preparation for sentencing in this case currently set for Friday, 'September 14, 2012.

The Commonwealth argued the defense had failed to show a specific reason for the need to appoint an expert in this matter. The chief thrust of the prosecution's argument was that it is common sense an individual of Mr. Johnson's age was not as mature as an individual of thirty (30) years of age. While not agreeing in *toto*, the defense agreed there was maturing still occurring as an individual aged.

My argument went on to say there were additional changes to the brain as one aged.

Unfortunately, it appears the prosecution and the defense were using the same word to describe two distinct concepts. I am also afraid I failed to properly identify the reasons why I believe Dr. Conley, as a licensed, clinical neuropsychologist, should be appointed.

A quick reference to Webster's New Collegiate Dictionary (1976) and to the online version of the free

Miriam-Webster Dictionary highlights the difference in concepts represented by the single word, "mature". Both dictionaries identify "mature" as an adjective. The first definition of "mature" as an adjective defines it as "slow, careful consideration".

The second definition for the adjective "mature" says it is "having completed natural growth and development."

The 1976 version of Webster's goes on to identify "mature" as a verb meaning to become fully developed or ripe.

It appears the prosecution was using the word "mature" to mean that as one ages the individual acquires the ability to give their action mature consideration.

On the other hand, I was referring to the growth and the physiological changes the adolescent brain experiences until fully developed.

Since our August 15, 2012 hearing, I have been able, with the help of Dr. Conley, to identify four (4) articles which illustrate my definition of "mature". Two (2) of these articles are "Adolescence, Brain Development, and Legal Culpability", Journal of the American Bar Association, January, 2004 and Section 3, "Adolescent Brain" from Wisconsin Council on Children & Families, Rethinking the Juvenile in Juvenile Justice (2006). I have enclosed a copy of both of these articles for your review.

These articles identify four (4) physiological changes occurring in the adolescent brain as it progresses towards its completed development.

The first is an explosion of a gray matter which is that portion of the brain involved in thinking. This

explosion of gray matter, results in the development of additional synapses. Following the explosion of gray matter the brain engages in a process these articles refer to as "pruning". The pruning is in fact myelination, which is the installation of insulation and the creation of the white matter portion of the brain. This myelination creates a more precise and efficient brain and allows thought processes to clarify.

The articles also confirm the prefrontal cortex continues to grow in size serving as a check on the amygdala.

It is important to remember as individuals enter adolescence the amygdala, which controls emotion, is the predominant structure within the brain. It is only after the prefrontal cortex has completed its development is it able to overcome the emotion generated by the amygdala. Please keep in mind included in emotion is the body's natural response known as "fight or flight".

As individuals enter adolescence their body is awash in new hormones, particularly, testosterone. Testosterone only serves to aggravate the emotional response of the amygdala. At the same time the adolescent brain is experiencing this infusion of testosterone, it is dealing with an inadequate supply of the neurotransmitter dopamine. This depressed level of dopamine does not allow for the efficient operation of the prefrontal cortex and an overriding of the emotion of the amygdala. Therefore, adolescents tend to engage in higher risk behaviors than adults in their effort to receive the same emotional satisfaction all human beings seek.

In addition to these four (4) physiological components there are a variety of traumatic experiences

which have an impact upon the physiological development of the brain. These experiences include, but are not limited to, family dysfunction, poverty, neglect, and a mental health diagnosis such as Attention Deficit Hyperactivity Disorder (ADHD). A review of school records along with the records of the Lynchburg Department of Social Services reveals Mr. Johnson experienced all of these and most likely additional events which adversely impacted the physiological development of his brain. Only an in-depth examination by an expert, such as Dr. Conley, will allow the court, at sentencing, to more fully appreciate the individual characteristics of Mr. Johnson as you seek to fashion a sentence specific to him.

I submit this letter along with the articles I have enclosed provide the court with the specificity case law requires to appoint Dr. Conley as an expert to assist the defense in the sentencing of this matter.

Should the court agree and elect to appoint Dr. Conley, please accept this letter as my additional request for a continuance of the sentencing currently set for Friday, September 14, 2012.

Should the court reject the request to appoint an expert and to continue this matter, I ask the court to accept these two (2) articles and the additional two (2) articles you will find enclosed as the "common sense" exhibits referenced by the prosecution.

Thank: you very much for your attention to this matter.

Sincerely,

/s/ B. Leigh Drewry, Jr.
B. Leigh Drewry

BLD/lag
Enclosures:
cc: Chuck Felmlee
Raheem Johnson
Eugene Wingfield, Clerk

APPENDIX P

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA

Plaintiff,

v.

RAHEEM CHABEZZ JOHNSON,

Defendant.

TRANSCRIPT OF PROCEEDINGS
THE HONORABLE MOSBY G. PERROW, III,
PRESIDING
October 5, 2012
Lynchburg, Virginia

Filed October 5, 2012

FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF
THE CITY OF LYNCHBURG
DATE 12/4/12 TIME 1030 AM
TESTE: EUGENE C. WINGFIELD, CLERK
by: _____ Dep. Clerk

Vicki K. Hunt
P. O. Box 11292
Lynchburg, VA 24506
(434) 851-8991

[Pgs. 1–22 Omitted]

[Pg. 23]

Is there anything you want to say before the Court sentences you?

THE DEFENDANT: No, Sir.

THE COURT: Alright. Well, Mr. Johnson, in this case we had a helpless victim, the shooting was unprovoked, and it was cruel and callous. It was just mean. It was, it's as cruel and callous as anything I've seen since I've been sitting here on the bench and that's been awhile. Just totally unnecessary to put a bullet in this young man's head.

Upon your conviction of use of a firearm in the commission of murder, I'm gonna sentence you to the mandatory three years confinement in the penitentiary.

Upon your conviction of use of a firearm in the commission of statutory burglary — not statutory burglary, uh, yeah, statutory burglary, I'm gonna sentence you to five years confinement in the penitentiary.

Mandatory use of firearm in the commission of attempted robbery, two counts, five years on each count.

Upon your conviction of attempted robbery, two counts, I'm gonna sentence you to two years confinement in the penitentiary on each count.

[Pg. 24]

Upon your conviction of burglary with the intent to commit robbery, I'm gonna sentence you to twenty years confinement in the penitentiary.

And upon your conviction of first degree murder, I'm gonna sentence you to life in prison.

Mr. Drewry, you can advise him with regard to his appeal.

MR. DREWRY: I've already done it and I'll take care of it.

THE COURT: Alright. Alright. Anything further?

MR. FELMLEE: No, Your Honor.

THE COURT: Alright.

(Whereupon the proceeding was concluded)

APPENDIX Q

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

File No. CR11-022622-00

COMMONWEALTH OF VIRGINIA
v.
RAHEEM CHABEZZ JOHNSON,
Defendant.

Filed October 15, 2012

MOTION

COMES NOW Raheem Chabezz Johnson, by counsel, and respectfully moves this Honorable Court to reconsider its sentence of life in the penitentiary upon the charge of First Degree Murder entered on Friday, October 5, 2006. In support of this Motion, Raheem Chabezz Johnson says as follows:

1. He was initially indicted by the Lynchburg Circuit Court Grand Jury on the charge of capital murder in violation of VA CODE ANN §§ 18.2-30 and 31.
2. At the time of the alleged offense, Raheem Chabezz Johnson was 17 years of age.
3. Under VA CODE ANN §§ 18.2-10 and 31 and case law, Raheem Chabezz Johnson faced only one possible sentence if convicted of this offense, life without the possibility of parole.

4. On June 25, 2012 the United States Supreme Court issued its opinion in Miller v. Alabama, __ U.S. __ (June 25, 2012) which held such sentences were unconstitutional.

5. The United States Supreme Court said, "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." Miller v. Alabama, supra. (slip op. at p. 17.)

6. The Court acknowledged "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" Miller v. Alabama, supra (slip op. at p. 8.)

7. The Court went on to say. "And in Graham, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds' – for example, in 'parts of the brain involved in behavior control.' . . . We reasoned that those 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'". Miller v. Alabama, supra. (slip op. at p 9.)

8. The Court enunciated a variety of other reasons for its holding which Raheem Chabezz Johnson adopts in support of this Motion.

9. In a letter dated September 4, 2012 to this Court, counsel for Raheem Chabezz Johnson provided several articles detailing some of what the United States Supreme Court referenced in its Miller v. Alabama opinion.

10. At sentencing, the trial court acknowledged receiving this letter and these articles and made them a part of the record.

11. The sentencing court, however, did not rely on Miller v. Alabama nor on these articles to mitigate the life sentence nor to individualize the punishment it imposed upon Raheem Chabezz Johnson.

12. Instead, the Court accepted the recommendation of the prosecutor in the instant case and imposed life in the penitentiary without consideration of Raheem Chabezz Johnson's individual characteristics as required by Miller v. Alabama, supra and Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010).

13. This action ignores only 18% of the prisoners eligible for geriatric parole in 2011 applied and of this number only 2.3% were given geriatric release. In other words, only three (3) of 719 inmates eligible for early release received it, 0.4%. "Geriatric offenders within the SR Popluation" [sic] Virginia Department of Corrections, Research and Forecast Unit, August 2012.

14. Such statistics fail to establish a "realistic opportunity to obtain" an early release from a life term as required by Graham v. Florida,

supra, 560 U.S. at __, 130 S. Ct. at 2034 and Miller v. Alabama, supra.

15. The Court announced from the bench this was the most cruel and calloused homicide it had witnessed during its tenure.

16. Such comments ignore the reality the same trial judge presided in the case of Commonwealth v. Winston which saw the initial imposition of the death penalty for the killing of a pregnant woman in the presence of her two (2) minor children and Commonwealth v. Kenneth J. Davis which resulted in an active prison term of 35 years for the beating death of an eighty-five (85) years old gentleman walking on the streets of the City of Lynchburg. The latter defendant was a juvenile at the time the offense was committed.

17. The instant case involved in the killing of a young man involved in the drug trade before his girlfriend and two year old child.

18. Nothing announced in the Court's imposition of sentence demonstrates an individualized sentencing taking into consideration the various characteristics of Raheem Chahezz Johnson detailed in the presentence report, the trial of the case, or the scientific studies of the brain received by the Court.

WHEREFORE, Raheem Chabezz Johnson respectfully requests this Honorable Court modify its sentence of life in the penitentiary and impose a sentence in keeping with Raheem Chabezz Johnson's youth, his ability to mature and develop mentally and psychologically, and the sentencing guidelines detailed in the

presentence report as required by *Miller v. Alabama, supra*.

Respectfully Submitted,

RAHEEM CHABEZZ JOHNSON

By: /s/ B. Leigh Drewry, Jr.
Of Counsel

B. Leigh Drewry, Jr.
CUNNINGHAM & DREWRY
105 Archway Court
Lynchburg, VA 24505
434-846-3348
434-846-3351 - Fax
Counsel for Defendant

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX R

NO. _____

In the

Supreme Court of the United States

RAHEEM JOHNSON,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

PETITION FOR WRIT OF CERTIORARI

B. LEIGH DREWRY, JR.
104-B Archway Court
Lynchburg, VA 24502
(434) 239-0044

ASHLEY C. PARRISH
Counsel of Record
JOSHUA N. MITCHELL

KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 626-2627
aparrish@kslaw.com

Counsel for Petitioner

August 21, 2017

[EXCERPT]

QUESTIONS PRESENTED

The Commonwealth of Virginia sentenced Raheem Johnson to life in prison for a crime he committed when he was seventeen. Because Virginia has abolished parole, Johnson's only opportunity to leave prison before he dies, aside from executive clemency, is through Virginia's "geriatric release" program, which allows inmates, on reaching sixty, to petition for conditional release. But as one Virginia Supreme Court Justice explained in this case, geriatric release, "as it currently exists in the Commonwealth, is fundamentally not a system that ensures review and release based on demonstrated maturity and rehabilitation." App. 21. The Virginia Supreme Court's opinion below did not disagree with that observation, but nonetheless ruled that because geriatric release "provides a meaningful opportunity for release that is akin to parole," this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), "has no application" either to Johnson's sentence or to the procedures relied on by the trial court to impose it. App. 11–13. The questions presented are:

1. Does *Miller* apply to a sentence of life in prison imposed on a juvenile whose only opportunity for release from prison is Virginia's geriatric-release program?

2. When a juvenile faces a sentence equal to or exceeding his natural life, must the sentencing court conduct an individualized inquiry, including receiving expert testimony, to determine whether the defendant is the rare juvenile offender who should be treated as permanently incorrigible?

PETITION FOR WRIT OF CERTIORARI

This case, on direct appeal from the Virginia Supreme Court, presents an opportunity for this Court to address the merits of the important recurring question it could not reach in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam) — whether a geriatric-release program like Virginia's satisfies the requirements of the Eighth Amendment when applied to juveniles sentenced to life in prison. It also presents the Court with an ideal vehicle to clarify whether a sentencing court is required — before imposing a sentence equal to or exceeding a juvenile defendant's natural life — to make an individualized inquiry to determine whether the defendant falls within the small category of juveniles who are permanently incorrigible. Granting review would also allow the Court to reaffirm the principles set forth in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), and to clarify when an expert is needed to aid the sentencing court in distinguishing between a juvenile offender capable of rehabilitation and the rare juvenile offender who is irreparably corrupt.

This Court's decisions have directed the lower courts to take into account juvenile offenders' immaturity and potential for rehabilitation to ensure that their sentences are constitutionally appropriate. Nonetheless, the lower courts remain divided and confused over the proper scope and application of those decisions. That confusion is especially significant in cases, like this one, where a state purports to follow the narrow letter of the law, but does not appropriately comply with this Court's decisions or faithfully implement the important constitutional requirements they recognize. The lower courts' erroneous rulings in this case warrant further review. Addressing the important issues raised here

will provide much-needed guidance to the lower courts and reduce the need for this Court's intervention in future cases.

APPENDIX S

No. 17-326

In The Supreme Court of the United States

RAHEEM CHABEZZ JOHNSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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

BRIEF IN OPPOSITION

MARK R. HERRING
Attorney General of Virginia

TREVOR S. COX
Acting Solicitor General
November 20, 2017

MATTHEW R. MCGUIRE
Acting Deputy Solicitor General
Counsel of Record

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

[EXCERPT]

REVISED QUESTIONS PRESENTED

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that imposing a *mandatory* life-without-parole sentence on juvenile homicide offenders violates the Eighth Amendment's ban on "cruel and unusual punishments." In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court held that *Miller* announced a substantive rule of constitutional law that applied retroactively to cases on collateral review. Virginia's sentencing scheme does not mandate life sentences for juvenile homicide offenders convicted of first-degree murder, a Class 2 felony. Virginia provides for a presentence investigation and report, allows defendants to offer mitigating evidence before sentencing, and permits the sentencing judge to impose a discretionary sentence ranging from 20 years to life. Offenders convicted of first-degree murder also are eligible to apply for release at the age of 60, subject to consideration under the normal parole factors applied in Virginia.

The questions presented are:

Does *Miller*, standing alone, prohibit a trial court from imposing a discretionary life sentence on a juvenile homicide offender when the offender is eligible for release at age 60 based on normal parole considerations?

Does *Miller*, standing alone, require State courts to appoint an expert witness at the State's expense in every case where a juvenile offender could receive a lengthy sentence?

STATEMENT OF THE CASE

1. Two months shy of his 18th birthday, Raheem Chabezz Johnson hatched a plan with his friend Dennis Watts to rob Timothy Irving. Va. App. 235[1]; *see also* Pet. App. 2. Because Watts had purchased marijuana from Irving on prior occasions, the two men agreed that, on April 11, 2011, Watts would knock on the door to gain entry to the home while Johnson hid out of sight. Va. App. 235. When Irving answered the door, Johnson made his presence known, brandished a handgun, and forced Irving into the house. *Id.*

Also home at the time were Irving's girlfriend and their two-year-old son. *Id.* They were in the bedroom when Johnson forced Irving into the room and ordered him to hand over his money and marijuana. *Id.* With Irving's girlfriend next to him on the floor and his toddler son on the bed, Johnson shot Irving in the back of the head. *Id.* Irving died. *See id.* "The victim's girlfriend and two-year-old son . . . thus, were forced to watch the murder" of their partner and father, respectively. Pet. App. 26.

Johnson was indicted by "a grand jury . . . on eight felony charges." *Id.* 27. Specifically, Johnson was indicted for capital murder, statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, two counts of attempted robbery, and four counts of use of a firearm in the commission of a felony. Va. App. 1-2. Prior to his trial in the Circuit Court of the City of Lynchburg, this Court decided *Miller v. Alabama*, which held that States must provide juvenile homicide offenders an opportunity to present mitigation evidence and argue for a sentence

---

[1] "Va. App." refers to the appendix filed in the Supreme Court of Virginia.

less than life without parole. 567 U.S. 460, 479 (2012). In response to this Court's decision, the Commonwealth amended the capital-murder charge to first-degree murder, which gave the trial court the option of imposing a sentence as short as 20 years if Johnson was convicted. *See* Va. App. 6-8; *see also* Va. Code Ann. § 18.210(b) (2014). A jury found Johnson guilty of all eight charges.

2. After Johnson was found guilty, the trial court ordered the preparation of a presentence report before "fixing punishment or imposing sentence." Pet. App. 41. Before the sentencing hearing was conducted, Johnson filed a motion asking the trial court to appoint a neuropsychologist to assist him with "preparation for the sentencing hearing." Va. App. 88-90. Johnson argued that, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), he was entitled to have an expert appointed because examination of Johnson by a neuropsychologist would "provide facts specific to [Johnson] so as 'to fully advise the court' of all matters specific to" him. Pet. App. 52.

After a hearing on the issue, the trial court denied Johnson's motion to appoint a neuropsychologist to assist during the sentencing phase. *Id.* 59. The court concluded that Johnson had not "shown a particularized need" and that *Miller* did not mandate this type of "evaluation in every case where the accused was a juvenile at the time . . . of the offense. He's been convicted, he's now an adult," having turned 18 during the pendency of the case. *Id.*

In light of the trial court's ruling, Johnson submitted a letter to the court on September 4, 2012, bringing to the court's attention four articles that he said addressed "the growth and the physiological changes

the adolescent brain experiences until fully developed." *Id.*

62. The articles were selected with the help of the expert Johnson had asked to have appointed. *Id.* Johnson's letter explained the science behind how the juvenile brain differs from an adult brain and how the juvenile brain continues to change with age. *See id.* 63-64. Johnson also linked the scientific evidence to his school records, which were before the court, to show how "family dysfunction, poverty, neglect, and" attention-deficit-hyper-activity disorder affected him and "adversely impacted the physiological development of his brain." *Id.* 64. Johnson asked the court to reconsider its decision on his motion to appoint an expert witness, but if the court refused, Johnson alternatively asked the court to accept the articles and consider them in imposing his sentence. *Id.* 65.

On October 5, 2012, the trial court held a sentencing hearing at which Irving's mother and his girlfriend testified. *See* Va. App. 193-200. Irving's girlfriend testified about how difficult it has been for her since the murder, and that Irving's son "remembers everything," "ask[s] about his father . . . [a]ll of the time," and that she does not "know how to explain [the murder] to him." *Id.* 199.

In its closing argument, the Commonwealth pointed out that Johnson would eligible for geriatric release in 41 years, so even if the court imposed a maximum sentence the parole board "will be able to make the determination whether it will be safe to ever release this defendant." *Id.* 203. And in asking the court to impose the maximum sentence, the Commonwealth noted that Johnson was a gang member, had a history of violent actions in school, and had "six years of criminal behavior listed on his criminal history." *Id.*

204-05. "Everything this defendant ha[d] ever done culminated" in the shooting of "an unarmed defenseless man at point blank range in the forehead in the man's own home in the middle of the night in front of his fiancé[e] and two year old child." *Id.* 205.

After hearing the testimony and argument, and after considering the presentence report as well as "the applicable discretionary sentencing guidelines and guidelines worksheets," Pet. App. 45, the trial court sentenced Johnson:

> [To] life on the charge of first degree murder, 20 years on the charge of statutory burglary with intent to commit murder or robbery while armed with a deadly weapon, 2 years on each of the attempted robbery charges, 3 years on the charge of use of a firearm during the commission of a felony, and 5 years on each of the [remaining] use of a firearm during the commission of a felony charges. *Id.* 46.

In sum, "[t]he total sentence imposed [was] life plus 42 years." *Id.* Before imposing that sentence, the trial court explained that "the shooting was unprovoked," the victim was "helpless," and that the murder was "as cruel and callous as anything I've seen since I've been sitting on the bench and that's been awhile." *Id.* 67.

On October 15, 2012, Johnson filed a motion asking the trial court to reconsider the life sentence Johnson received for murdering Irving. *See id.* 47. In rejecting Johnson's request, the trial court stated that "[t]he life sentence was imposed after careful consideration of [Johnson's] individual characteristics as reflected in the record, including without limitation the presentence report and school records." *Id.* 48. Additionally,

the trial court stated that the four articles Johnson submitted to the court about adolescent brain development "were reviewed." *Id.* The trial court explained that it had imposed the maximum sentence in this case "due to the horrendous nature of the crime" as well as Johnson's "history of disrespect for authority and aggressive behavior, which coupled with the brutality of the offense [ ] make him, in my opinion, a danger to himself and others should he be returned to society." *Id.*

3. Johnson appealed his sentence and the trial court's decision denying him an expert witness to the Court of Appeals of Virginia. The Court of Appeals denied Johnson's appeal with respect to the expert witness, but granted him an appeal to decide whether his life sentence violated *Miller*. *See* Pet. App. 25-26 & n.1. In upholding the life sentence, the court explained that "the Supreme Court clearly did not hold in *Miller* that *all* life sentences for juvenile offenders violate the Eighth Amendment." *Id.* 35. Here, "the trial court . . . indisputably had the discretion to sentence [Johnson] to a term that ranged from twenty years to life imprisonment for the first-degree murder that appellant committed about two months before his eighteenth birthday." *Id.* 36. According to the court, "[t]hat discretion alone places this case clearly outside of the category of cases" covered by *Miller*. *Id.* And, as the court explained, "the trial court here actually *did* render an 'individualized' sentencing decision in this case." *Id.* 36 n.7.

Again, Johnson appealed. The Supreme Court of Virginia awarded him an appeal with respect to two issues: (1) "the trial court's refusal to appoint a neuropsychologist at the Commonwealth's expense to assist in the preparation of his presentence report";

and (2) "the life sentence imposed by the trial court was in violation of the Eighth Amendment because the trial court failed to afford him the opportunity to present evidence about youth and its attendant characteristics." Pet. App. 2. With respect to the appointment of a neuropsychologist, the court held that Johnson had not shown "the requisite 'particularized need.' " *Id.* 6; *see also id.* 7 ("The indigent defendant who seeks the appointment of an expert must show a particularized need." (citation omitted)). The court based its decision on the fact that "Johnson sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way." *Id.* 8. The court declined to address whether *Miller* itself provides "the requisite 'particularized need.' " *Id.* 10 n.2.

With respect to Johnson's challenge to his life sentence, the court held "that *Miller* is inapplicable" to this case. *Id.* 10. Unlike the Court of Appeals, the Supreme Court of Virginia concluded that Johnson's eligibility for geriatric release at age 60 qualified as a form of parole. *See id.* 10-11. Consequently, Johnson is not serving a life-without-parole sentence, and *Miller* does not apply. *See id.* 11. Johnson argued that geriatric release does not provide a meaningful opportunity for release because of the asserted "low statistical probability of release." *Id.* 12 n.4. The court rejected that argument as "speculative because the statistical data Johnson relies on does not include juvenile offenders." *Id.*

Johnson timely filed a petition for a writ of certiorari.