RECORD NUMBER:

United States Supreme Court

ANDREW HUY CHROSTOWSKI,
Petitioner,

- V. -

HAROLD W. CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF
CORRECTIONS,
Respondent

PETITION FOR CERTIORARI FROM JUDGMENT
OF THE VIRGINIA SUPREME COURT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

A. Did trial counsel's failure to make a constitutionally adequate inquiry into viable defenses deprive the petitioner of his right to present 'full and fair defense'?

B. Did his sentence violate the petitioner's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDINGS

All parties are as listed in the caption hereof. Andrew Huy Chrostowski is an individual for which no corporate disclosure statement is required by Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The Virginia Supreme Court denied a Petition for Writ of Habeas on January 25, 2021. The Order was not entered into an official report but is reproduced as App. B.

The Supreme Court of Virginia entered its Order denying a motion for rehearing the Petition on May 14, 2021. The Order was not entered into an official report but is reproduced as App. A.

JURISDICTION

The Virginia Supreme Court entered its Judgment on May 14, 2021.

This Court has appellate jurisdiction in this appeal pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment and the Fourteenth Amendment to the United States Constitution are involved in this case.

STATUTORY PROVISIONS INVOLVED

Mr. Chrostowski was convicted pursuant to Va. Code § 18.2-266 and Va. Code § 46.2-391 involved in this instant case.

STATEMENT OF THE CASE

On May 6, 2017, at approximately 11:30 PM, Mr. Chrostowski was observed operating his moped on a paved road, Main Street. The moped was weaving in the lane in which it was traveling. App. D at p.10; App. C, Exh. 6 Chrostowski Decl. at ¶ 8. After being stopped by the police, Mr. Chrostowski

was tested with a blood alcohol content of 0.15 grams per 210 liters of breath, above the legal limit. App. C, Exh. 2. No injuries occurred as a result of Mr. Chrostowski riding his moped that evening. App. C, Exh. 6 Chrostowski Decl. at ¶ 8.

A public defender was assigned to represent Mr. Chrostowski. App. C, Exh. 6 Chrostowski Decl. at ¶ 9. In preparation for trial, the public defender assigned to Mr. Chrostowski had minimal contact with him. App. C, Exh. 6 Chrostowski Decl. at ¶ 10. Mr. Chrostowski's assigned public defender did not inquire into Mr. Chrostowski's mental health even after Mr. Chrostowski advised her of his issues. App. C, Exh. 6 Chrostowski Decl. at ¶ 11. For example, Mr. Chrostowski's assigned public defender did not move the trial court for a psychiatric examination of Mr. Chrostowski. App. C, Exh. 6 Chrostowski Decl. at ¶ 12. As a result of inadequately preparing to

defend Mr. Chrostowski, after a motion to strike was denied at trial, Mr. Chrostowski's assigned public defender coerced Chrostowski into changing his plea in the case to guilty. App. C, Exh. 6 Chrostowski Decl. at ¶ 13.

On August 1, 2018, the trial court entered an Order sentencing Mr. Chrostowski for: (1) driving under the influence of alcohol, fourth or subsequent offense within ten years, in violation of Va. Code §18.2-266 (case number 30933); and (2) driving with a revoked license while under the influence of alcohol in violation of Va. Code § 46.2-391 (D, 2a, ii) (case number 30933-01). Mr. Chrostowski was sentenced to five years with two years suspended for violating Va. Code §18.2-266 and two years with one year suspended for violating Va. Code § 46.2-391 (D, 2a, ii).

At all relevant times, Mr. Chrostowski has had posttraumatic stress disorder ("PTSD"), attention deficit hyperactivity disorder ("ADHD"), Oppositional Defiant Disorder, Bi-Polar Disorder, as well, as other emotional disorders and learning disabilities. App. C, Exh. 6, Chrostowski Decl. at ¶ 2. Symptoms of PTSD are proven to include self-destructive behavior, such as drinking too much or driving too fast. See, e.g., App. C, Exh. 1 (copied from https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967. Symptoms of ADHD include impulsiveness and trouble coping with stress. See, e.g., https://www.mayoclinic.org/diseases-conditions/adult-adhd/symptoms-causes/syc-20350878.

Before his incarceration Mr. Chrostowski was a productive citizen and father, working to support his

family to the best of his ability. App. C, Exh. 6 Chrostowski Decl. at ¶ 3. The evening of his arrest, Mr. Chrostowski received the difficult and triggering news that his uncle was diagnosed with terminal cancer. App. C, Exh. 6 Chrostowski Decl. at ¶ 4. This diagnosis caused a relapse in Mr. Chrostowski's mental health because it triggered him to re-experience the trauma and stress of watching his mother die of terminal cancer. App. C, Exh. 6 Chrostowski Decl. at ¶ 5.

Despite a compelling need for such medication, Mr. Chrostowski did not have access to any mental health medication at the time to remain mentally competent. App. C, Exh. 6 Chrostowski Decl. at ¶ 6. Mr. Chrostowski was refused help by Loudoun County mental health services generally and specifically through its probation office despite Mr. Chrostowski's history and pleadings for help to

access mental health medication. App. C, Exh. 6 Chrostowski Decl. at ¶ 7.

In preparation for filing his Petition, Mr. Chrostowski contracted with a forensic psychologist to examine him. App.C, Exh. 6 Chrostowski Decl. at ¶ 14. Again, the petitioner was denied assistance, and the forensic psychologist was prevented from accessing Mr. Chrostowski. App. C, Exh. 6 Chrostowski Decl. at ¶ 15.

ARGUMENT

A. Did Defense counsels' failure to make a constitutionally adequate inquiry into viable defenses deprive the petitioner of his right to present a "full and fair defense"?

Mr. Chrostowski's trial counsel failed to make a constitutionally adequate inquiry into viable

defenses. As a result of his inadequate counsel, Mr. Chrostowski was denied reasonably effective assistance, thereby undermining the proper function of the adversarial process. Such a violation of minimum performance standards required by the U.S. Constitution, as decided in *Strickland*, deprived Mr. Chrostowski of his right to present a "full and fair defense." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

Reasonable, effective assistance of counsel is required for a properly functioning adversarial process as part of a "full and fair defense." Mr. Chrostowski had a substantial and reasonable defense based on mental health issues documented through psychiatric evaluations easily found in Mr. Chrostowski's medical history. *See* App. C Exh. 3 – for brevity only two pages (12 pages after reformatting) of 160 pages of Exh. 3 are presented

herein. The evidence of Mr. Chrostowski's history of mental health issues in Exh. 3 was extensive. Chrostowski's trial counsel was made aware of his general mental health condition; however, the same trial counsel refused to conduct a meaningful pre-trial mental health investigation. App. C Exh. 6 at ¶ 11-12. This Court demands that if counsel is aware of a defendant who may be incompetent to stand trial that they produce this evidence and raise such a claim.[1]

Through the Constitution's sixth amendment, a criminal defendant is guaranteed an absolute right to counsel at trial. This Court finds that defendants are deprived of their constitutional right to counsel when (1) the performance of their trial attorney does

[1] *Cf. Hawkins* v. *Wyrick*, 552 F.2d 1308,1313 (8th Cor. 1977)(failure to raise a claim that defendant was incompetent to stand trial no ineffective assistance where defense counsel had no knowledge of defendant's mental condition before trial).

not meet an "objective standard of reasonableness" and (2) that the outcome of the proceedings would have been different "but for counsel's unprofessional errors." *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The trial counsel's refusal to thoroughly investigate Mr. Chrostowski's mental health issues was objectively unreasonable. Moreover, the refusal to develop upon or even at a minimum, produce the existing medical evidence supporting Mr. Chrostowski's diminished capacity claim deprived Mr. Chrostowski of reasonable, effective assistance of counsel.

Trial counsel's failure to reasonably investigate an available defense is an established clear violation of the performance prong of *Strickland's* performance standard. Moreover, this critical failure prejudiced Mr. Chrostowski and

denied him effective assistance of counsel, thereby undermining the proper function of the adversarial process.

Mr. Chrostowski engaged a qualified psychiatrist to conduct a thorough mental health evaluation in preparation for submitting his Habeas Petition. App C. Exh. 6 Chrostowski Decl. at ¶ 14. However, Mr. Chrostowski was again denied this referenced psychiatric evaluation or any equivalent evaluation by the petitioner. App C. Exh. 6 Chrostowski Decl. at ¶ 15. As a result, Mr. Chrostowski has been denied the opportunity to provide a "full and fair defense." Here a full and fair defense" demands that a thorough discovery including, without limitation, a complete mental health evaluation must be performed before ruling on Mr. Chrostowski's Petition. A just ruling cannot come out of any tribunal that is missing facts on a material issue.

Here, without a complete record of facts, the Supreme Court of Virginia unjustly upheld the trial court's conviction and sentence.

An established defense available to courts for trial counsel falling below the *Strickland* standard can be offered if trial counsel cannot readily know the existence of a fact or if the information is irrelevant or supports a futile defense.

Here, however, trial counsel was timely alerted to Mr. Chrostowski's enduring battle with debilitating mental health issues. Knowing Mr. Chrostowski may suffer diminished capacity but refusing to conduct an adequate pre-trial investigation into this realistically viable defense is a decision that denied Mr. Chrostowski reasonable, effective assistance of counsel. Furthermore, this decision lacked reason and ultimately forfeited Mr. Chrostowski's opportunity to enjoy the proper

function of the adversarial process. Accordingly, Mr. Chrostowski's trial counsel's inaction violates the minimum required performance standard for counsel as stated, inter alia, in *Strickland*, supra, and *Wiggins v. Smith*, 539 U.S. 510 (2003).

In *Wiggins*, supra, the Court held (emphasis added):

> Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."
>
> *Id*. [*Strickland*], at 690-691.
>
> Our opinion in *Williams* v. *Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and *present voluminous mitigating evidence at*

sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions because counsel had not "fulfilled" their obligation to conduct a thorough investigation of the defendant's background." 529 U.S., at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). While *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, *cf*. post, at 156 L Ed 2d, at 497-498 (Scalia, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, post, at 156 L Ed 2d, at 499, we, therefore, made no new law in resolving Williams' ineffectiveness claim. See *Williams*, 529 U.S., at 390 (noting that the merits of Williams' (123 S.Ct. 2536) claim "are squarely governed by our holding in *Strickland*"); see also *id*., at 395, (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland*'s performance prong). In highlighting counsel's duty to investigate and referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. *Strickland*, 466 U.S., at 690-691, 80 L Ed 2d 674, 104 S Ct 2052 (establishing

> that "thorough investigations" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also id., at 688-689, 80 L Ed 2d 674, 104 S Ct 2052 ("Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable")."

539 U.S. at 521-522.

Mr. Chrostowski's trial counsel was not reasonably prepared and, as a result, also failed to advocate on behalf of Mr. Chrostowski appropriately. Counsel's *failure to investigate* is a clear violation of the performance prong of *Strickland's* counsel performance standard. As a result of this deprivation of the effective assistance of counsel, Mr. Chrostowski suffered prejudice when his trial continued without the opportunity to present beneficial evidence depriving him of a "full and fair defense." Had trial counsel provided a complete investigation on behalf of Mr. Chrostowski and

presented the court with the opportunity to contemplate the effect of his mental health issues, Mr. Chrostowski's acquittal would have been very likely.

Mr. Chrostowski attempted to develop medical evidence supporting his Petition for Writ of Habeas Corpus by retaining an expert in forensic psychiatry. That expert required an in-depth personal examination of Mr. Chrostowski to prepare an expert testimony the Virginia Department of Corrections, under the direction of Respondent, denied Mr. Chrostowski access to the referenced expert.

The expert testimony of the retained psychiatrist would have included a Declaration that Mr. Chrostowski desired to submit with his Petition for Writ of Habeas Corpus. Thus, Mr. Chrostowski should have been allowed to conduct discovery and

develop expert testimony supporting his Petition for Writ of Habeas Corpus.

A request for expert psychiatric testimony to further support that both the *Strickland* performance and prejudice prongs are met was raised again before the Supreme Court of Virginia in the Habeas Petition, where it was ultimately denied. App. B.

A psychiatric examination should have been conducted to make a medical determination of sanity or insanity as an initial matter. Discovery and an evidentiary hearing should have been granted for that purpose. Without any investigation into the petitioner's mental health, how could a court determine whether insanity is a viable defense? Moreover, had Mr. Chrostowski's trial counsel performed a proper pre-trial investigation evidence of his diminished capacity would have been critical for

sentencing as discussed in detail concerning the second question presented.

In *Cronic*, this Court Held,

> The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred.

466 U.S. at 656-657.

As evidenced by prior mental health evaluations, Mr. Chrostowski had a substantial and reasonable defense based on his mental health issues. App. C, See Exhibit 3, passim. To reiterate, Mr. Chrostowski has made attempts to be thoroughly evaluated by a licensed mental health professional in preparation for his Petition. App. C, Exh. 6 Chrostowski Decl. at ¶ 14. Mr. Chrostowski has continued to be denied any such evaluation. App. C, Exh. 6 Chrostowski Decl. at ¶ 15. As a result,

discovery including, without limitation, a full mental health evaluation should have been performed *before* ruling on Mr. Chrostowski's Petition.

The *Cronic* Court further held (emphasis added):

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The text of the Sixth Amendment itself suggests as much. The amendment requires not merely the provision of counsel to the accused, but "Assistance" which is to be "for his defense" Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). If no actual "Assistance" "for" the accused's "defense" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than formal compliance with the Constitution's

> requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery* v. *Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940) (footnote omitted)."

466 U.S. at 654-655.

Trial counsel's failure to competently evaluate viable defenses denied Mr. Chrostowski reasonable, effective assistance of counsel. Absent the presentation of an existing viable defense, Mr. Chrostowski's trial counsel undermined the entire adversarial process. These violations of the Constitutional minimum performance standards under *Strickland* ultimately deprived Mr. Chrostowski of his Constitutional right to present a 'full and fair defense.' *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

In *Crane*, this Court held that the Constitution guarantees criminal defendants "a

meaningful opportunity to present a complete defense." *Id*.

Mr. Chrostowski's defense counsel deprived him of any meaningful opportunity to present a complete defense because no inquiry into available defenses took place on his behalf. Instead, trial counsel ill-advised him to enter a guilty plea. Mr. Chrostowski's plea functionally concealed the absence of effort to build a defense or conduct a general investigation into Mr. Chrostowski's case.

In particular, his mental health issues were ignored. Where counsel failed to make anything approaching a constitutionally competent evaluation of potentially viable defenses, they denied Mr. Chrostowski reasonable, effective assistance of counsel and undermined the adversarial process in violation of *Strickland's* two-prong test.

Where defense counsel failed to provide Mr.

Chrostowski with assistance for his defense, counsel did not meet the performance standard of *Strickland* et al.. Mr. Chrostowski was denied his constitutionally guaranteed right to a proper, functioning adversarial process, which prejudiced Mr. Chrostowski.

Had Mr. Chrostowski's trial counsel performed adequately on his behalf, the outcome would have been entirely different. In its denial, the Supreme Court of Virginia held in its opinion that trial counsel had no duty to present a defense that lacked viability as their particular reason for the holding. The court recited in its opinion:

> [d]iminished capacity, however, is not a defense to driving under the influence of alcohol or driving with a revoked license while under the influence of alcohol. See *Stamper* v. *Commonwealth*, 228 Va. 708 (1985) (holding that evidence of a defendant's mental state at the time of the offense, absent insanity, is irrelevant to the issue of guilt).

Order dated Jan. 25, 2021. App. A.

This ruling does not fully consider the magnitude of *the failure to investigate* or this Court's rulings. Additionally, the petitioner was not offering diminished capacity in isolation as a defense to driving under the influence itself. Instead, the petitioner's position is that when trial counsel is aware that a well-documented, debilitating mental disease exists, then a psychiatric evaluation at a minimum should have been presented and researched by trial counsel.

Furthermore, the results of the researched defense and the psychiatric evaluation should have been available to present to the trial court, making options available to that court which would have likely led to a different outcome for the petitioner.

For it is not simply guilt or innocence of the crime that may be considered as mitigating. The trial

counsel must present their client with the best defense and allow the court to adjudicate the case knowing all relevant factors and seeing the defendant in the best light is inarguably a relevant factor.

B. Mr. Chrostowski's right to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution was violated by his sentence.

The Eighth Amendment to the United States Constitution prohibits "excessive" sanctions. U.S. Const., Amend. VIII; *Atkins* v. *Virginia*, 536 U.S. 304, 311 (2002). The Eighth Amendment applies to Virginia through the operation of the Fourteenth Amendment to the United States Constitution. U.S.

Const., Amend. XIV; *Estelle* v. *Gamble*, 429 U.S. 97, 101 (1976).

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. In *Weems* v. *United States*, 217 U.S. 349 (1910), this Court held that a punishment of "12 years jailed in irons at hard and painful labor for the crime of falsifying records" was excessive. The Court explained, "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id*. at 367.

Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction" because such a sanction would be excessive. *Robinson* v.

California, 370 U.S. 660, 666 (1962). As Justice Stewart opined in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id*. at 667. Both illustrations imply that culpability, intent, and punishment are inseparably intertwined.

A claim that punishment is excessive is adjudged by standards that prevail today and not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted. Moreover, this Court has also read the text of the Eighth Amendment to prohibit "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins*, 122 S.Ct. at 2247 n.7.

As Chief Justice Warren explained in his opinion in *Trop* v. *Dulles*, 356 U.S. 86 (1958): "The basic concept underlying the Eighth Amendment is

nothing less than the dignity of man. * * * The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-101.

Atkins established lesser culpability of the developmentally disabled even in the commission of capital crimes and forbade the imposition of the death penalty on developmentally disabled offenders. Similarly, this Court recently recognized that persons who commit crimes while under 18 years of age are not as morally culpable as similarly disposed adult offenders and prohibited the imposition of the death penalty on juvenile offenders, regardless of the heinousness of them their crimes. *Roper* v. *Simmons*, 543 U.S. 551 (2005).

"This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself

remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy* v. *Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman* v. *Georgia*, 408 U.S. 238, 382(1972) (Burger, C. J., *dissenting).*

As 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." *Roper*, 543 U.S. at 569-570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. 543 U.S. at 573.

This Court has gone a step further regarding the imposition of life sentences on juvenile murders convicted of committing a non-murder offense. On May 17, 2010, this Court issued its decision in *Graham* v. *Florida*, 130 S.Ct. 2011, 2028 (2010). Writing for a 5-to-4 majority, Justice Anthony Kennedy called life without parole an "especially harsh punishment" for a juvenile and said that while states may be permitted to keep young offenders locked up, they must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." As such, juvenile offenders could not receive a life sentence for non-murder offenses.

The *Graham* decision further likened life without parole for juveniles to the death penalty, evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider

the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., *Woodson* v. *North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

This Court recently expanded the *Graham* decision in its decision issued in *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012). In *Miller*, the Court found that the Eighth Amendment to the United States Constitution forbade a sentencing scheme that mandated life in prison without the possibility of parole for juvenile offenders. *Id*.

The confluence of the two lines of precedent relied upon in *Graham* led the *Miller* Court to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment. *Id*. Such would violate "the evolving standards of decency that mark the progress of a maturing society." *Id*.

Mr. Chrostowski submits that the rationale underlying the *Graham* and *Miller* decisions should apply in any case in which a mitigating factor exists that would make a defendant less culpable than a similarly situated adult.

Consideration of the mental particulars of a defendant is reasonably considered in sentencing as well as meeting the burden to prove *mens rea*. It is therefore not an exercise in futility to research and present to the trial court a defendant's mental status, maturity, and disability, to effectively alter the outcome of the trial. Herein, as noted, Mr. Chrostowski suffers PTSD, ADHD, Oppositional Defiant Disorder, and bipolar disorder at the time of the offenses at issue.

Symptoms of PTSD include self-destructive behavior, such as drinking too much or driving too fast. See, e.g., https://www.mayoclinic.org/diseases-

conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967. Symptoms of ADHD include impulsiveness and trouble coping with stress. See, e.g., App C Exh. 5, copied from https://www.mayoclinic.org/diseases-conditions/adult-adhd/symptoms-causes/syc-20350878.

Symptoms of Oppositional Defiant Disorder include active defiance or refusal to comply with rules. See, e.g., App C Exh. 4, copied from https://www.mayoclinic.org/diseases-conditions/oppositional-defiant-disorder/symptoms-causes/syc-20375831.

Symptoms of bipolar disorder include poor decision-making, such as the decision-making leading up to Mr. Chrostowski's arrest.

Even taken individually, Mr. Chrostowski's mental illnesses prove diminished culpability. However, taken together, they likely resulted in Mr.

Chrostowski not being responsible for his committed acts.

Just as a juvenile should not be sentenced as an adult, due at least in part to a lack of ability to control impulses, so should Mr. Chrostowski have received a lesser sentence than a similarly situated adult offender due to his psychological problems that inhibited impulse control and self-destructive behavior, which contributed to the appearance of the degradation of Mr. Chrostowski's moral character. Nevertheless, in Virginia, the judiciary has chosen to distinguish the *Graham* mandate on the theory that the conditional release provisions of Va. Code § 53.1-40.0 render the analysis in *Graham* in the opposite and ignore the role or culpability of individual offenders. *Angel* v. *Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (2011).

Mr. Chrostowski submits that such violates the spirit and logic of the *Graham* decision and its progeny and has, in effect, virtually the identical result as the sentence found to be unconstitutional in *Graham*. The plain language of Va. Code § 53.1-40.01 only comes into play if an inmate is at least 60 years old. It is estimated that "serving twenty years in prison will take 16 years off your life expectancy". Silverman, I. & M. Vega (1996) Corrections. St. Paul, MN: West. The average life expectancy in the United States is presently 78.7 years. http://www.cdc.gov/nchs/fastats/lifexpec.htm. Thus, for an inmate that has a sentence exceeding twenty years, the provisions of Va. Code § 53.1-40.01 offers effectively no relief. This result is because most prisoners would die before ever becoming eligible for its provisions, which effectively puts Virginia's *Angel* decision in violation of at least the spirit, and

possibly the actual black letter law, of *Graham*. Accordingly, the *Graham* decision must operate herein to result in a reduced sentence for Mr. Chrostowski.

Mr. Chrostowski avers that the reasoning of the *Graham* decision is such that he should have received mental health treatment rather than a prison sentence.

Accordingly, based upon Mr. Chrostowski's lessened culpability, Mr. Chrostowski's sentence, which failed to account for such mitigating factors, represents a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

The Supreme Court of Virginia denied relief on this issue solely on the basis that it should have been raised at trial.

Such a contention creates a "catch-22" scenario that should have no place in criminal jurisprudence.

On the one hand, the Virginia Supreme Court mischaracterizes Mr. Chrostowski's lack of proper pre-trial inquiry as justified because such a defense would be "frivolous." However, on the other hand, the Supreme Court of Virginia then dismisses Mr. Chrostowski's second grounds for relief because that same utter lack of inquiry resulted in trial counsel not raising the utterly uninvestigated issue at trial.

A. Overall Conclusion

For all of the reasons stated herein, Mr. Chrostowski's Petition for Certiorari should be granted.

Dated: September 27, 2021

by */s/ Dale R. Jensen*

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