VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of January, 2020.

Present: All the Justices

Randy Dwayne Ross, Appellant,

against Record No. 181530
Court of Appeals No. 1190-17-3

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that there is no error in the judgment of the Court of Appeals.

On June 4, 1999, pursuant to a plea agreement in the Circuit Court of Bedford County, Randy Dwayne Ross (Ross) pled guilty to the capital murder of a 17-year-old in violation of Code § 18.2-31(4), robbery of the juvenile victim in violation of Code § 18.2-58, and two counts of use of a firearm in the commission of a felony in violation of Code § 18.2-53.1. Ross was 16 years old at the time he committed these crimes. He agreed to the following sentences, to run consecutively and without parole:

A) On the charge of Capital Murder – Imprisonment for Life.
B) On the charge of Robbery – Imprisonment for Life.
C) On the charge of Use of a Firearm during Robbery – Three (3) years in the penitentiary.
D) On the charge of Use of a Firearm during Murder – Five (5) years in the penitentiary.

In 2013, Ross filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia, contending that his two life sentences without parole did not comport with the rule announced by the Supreme Court of the United States in *Miller v. Alabama*, 567 U.S. 460, 465 (2012), which held "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.'" While Ross' petition was pending, the Supreme Court held

that *Miller* had retroactive effect. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 732 (2016).

On June 16, 2016, the district court granted Ross' habeas petition and ordered a new sentencing proceeding to take place in a Virginia state court in light of *Miller* and *Montgomery*, noting that the record lacked evidence that the circuit court had previously "considered any factors relating to [Ross'] youthful immaturity or incorrigibility."

Accordingly, the Circuit Court of Bedford County conducted a resentencing hearing for Ross on June 27, 2017. The circuit court heard extensive testimony from both sides.

The Commonwealth's evidence included testimony from the parents of the juvenile victim regarding how their son's murder impacted their family and community. A captain with the Bedford County Sheriff's Office testified about the details of the crimes. A probation and parole officer testified that Ross had numerous contacts with the juvenile justice system. A presentence investigative report noted Ross' first instance of juvenile probation at the age of 13, his multiple probation and parole violations, and his difficult family life with a father who was an abusive alcoholic and a mother who was a convicted felon. The report also provided details regarding Ross' offenses, criminal history, family background and childhood, education, employment and social involvement, mental health, substance abuse, and community supervision plans. Ross' juvenile probation officer testified regarding the involvement of the local Department of Social Services in Ross' childhood. The probation officer also noted that Ross was charged with larceny of a vehicle that belonged to his friend's family that he was living with at the time. The probation officer testified that Ross fled from a rehabilitative group home more than once and was "on the run" at the time he committed the murder and robbery.

The defense's evidence included testimony from Ross' mother concerning her absence from Ross' life, the use of drugs and alcohol by Ross' father, and the multiple homes that Ross lived in throughout his childhood. A director of food services for the Department of Corrections testified regarding Ross' employment within the correctional centers. Additionally, a psychologist with the University of Virginia's Institute of Law, Psychiatry, and Public Policy testified concerning Ross' psychological evaluation. She provided the circuit court with a 28-page report that described Ross' family and early development, education, employment, socialization, relationships, substance use, medical history, mental health, legal history, adjustment and functioning during incarceration, mental status and behavioral observations, and

psychological testing. The report additionally evaluated Ross in light of the factors noted in *Miller*, such as dependency, decision-making, the context of the offense, "incompetencies associated with youth," and rehabilitation potential. Lastly, Ross made a closing statement in which he urged the circuit court to give him a second chance.

After receiving the evidence, the circuit court resentenced Ross. It entered a sentencing order on June 28, 2017. The circuit court sentenced Ross to life, suspended after 91 years, for the murder conviction and to another 91 years for the robbery conviction. These two sentences were concurrent, but would run consecutively with the sentences previously received on the two firearm counts. The total sentence amounted to 99 years in the penitentiary, with credit for time served.

Ross appealed to the Court of Appeals on the grounds that his sentences for robbery and murder were inconsistent with the Eighth Amendment and case law from the Supreme Court of the United States regarding juvenile sentences. The Court of Appeals affirmed Ross' sentences in an unpublished opinion, *Ross v. Commonwealth*, No. 1190-17-3, 2018 WL 5517232, at *4-5 (Oct. 30, 2018). The Court of Appeals held that under *Angel v. Commonwealth*, 281 Va. 248, *cert. denied*, 565 U.S. 920 (2011), Ross' 91-year sentence for the robbery conviction did not violate *Graham v. Florida*, 560 U.S. 48 (2010), because Virginia's geriatric parole statute, Code § 53.1-40.01, provided Ross with a meaningful opportunity for release. *Ross*, 2018 WL 5517232, at *2-3. Moreover, the Court of Appeals held that Ross' life sentence for the murder conviction, suspended after 91 years, did not violate *Miller* and *Montgomery* in part because Ross presented evidence to the circuit court regarding "his youth and immaturity" during the resentencing hearing, giving Ross the protections afforded under *Miller* and *Montgomery*. *Id.* at *4.

We granted Ross an appeal regarding whether the Court of Appeals acted contrary to the Eighth Amendment and case law from the Supreme Court of the United States and our Court concerning juvenile sentencing when it affirmed Ross' 91-year sentence for robbery and his life sentence for murder, suspended after 91 years.

Regarding his 91-year sentence for robbery, Ross argues that the Court of Appeals erred in affirming his sentence because it exceeds his life expectancy and violates *Graham*'s prohibition regarding a life sentence without parole for a juvenile who committed a non-homicide offense. Ross contends that the geriatric parole statute, Code § 53.1-40.01, does not

provide a meaningful opportunity for release based on "maturity and rehabilitation" as required by the Supreme Court of the United States. We disagree.

We review a circuit court's criminal sentencing decision for abuse of discretion. *Du v. Commonwealth*, 292 Va. 555, 563 (2016). "Such decisions—if within the lawful boundaries of applicable sentencing statutes and constitutional limitations—are vested in the sound discretion of trial judges, not appellate judges." *Id.* To the extent that a sentencing decision raises questions of constitutional interpretation, we review such questions of law de novo. *Gallagher v. Commonwealth*, 284 Va. 444, 449 (2012).

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. The Supreme Court of the United States has held that sentencing a juvenile to life without parole for a non-homicide offense violates the Eighth Amendment. *Graham*, 560 U.S. at 74. Juvenile defendants must receive a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

As we have previously stated, "[t]he Supreme Court has left it up to the states to devise methods of allowing juvenile offenders an opportunity for release based on maturity and rehabilitation." *Angel*, 281 Va. at 275. Virginia's geriatric release statute provides as follows:

> 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.

Code § 53.1-40.01. If a criminal offender "meets the qualifications for consideration contained in the [geriatric release] statute, the factors used in the normal parole consideration process apply to conditional release decisions under this statute." *Angel*, 281 Va. at 275. We have held that the geriatric release statute provides "the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment." *Id.*

In the instant case, we assume without deciding that Ross' 91-year sentence for robbery is the functional equivalent to life without parole. *See Vasquez v. Commonwealth*, 291 Va. 232, 241 (2016) (indicating that the Supreme Court of the United States has not ruled on whether a lengthy term-of-years sentence is constitutionally the same as a life without parole sentence). Under our holding in *Angel*, Ross' 91-year sentence for robbery does not violate the principles

set forth in *Graham* concerning juvenile sentencing for non-homicide crimes because Ross has an opportunity for geriatric release under Code § 53.1-40.01. *See Angel*, 281 Va. at 275.

Ross asks our Court to overrule *Angel*, although we have previously upheld *Angel*'s validity. *See Johnson v. Commonwealth*, 292 Va. 772, 781 (2016) (relying on *Angel*'s holding regarding the geriatric release statute); *Vasquez*, 291 Va. at 239 n.3 (citing to *Angel* concerning geriatric release). Moreover, as indicated by the Court of Appeals,

> [t]he United States Supreme Court denied certiorari when *Angel* was challenged on direct appeal, and it reversed the latest challenge to *Angel* through a habeas proceeding. *See Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (finding that "the Virginia trial court's ruling, resting on the Virginia Supreme Court's earlier ruling in *Angel*, was not objectively unreasonable in light of this Court's current case law").

Ross, 2018 WL 5517232, at *2.

We again uphold the principles set forth in *Angel*. Because Ross has a meaningful opportunity for release under the geriatric release statute, we conclude that the Court of Appeals did not err in affirming Ross' 91-year sentence for robbery.

Regarding his life sentence for murder, suspended after 91 years, Ross argues that the circuit court erred because it did not "make a finding of permanent incorrigibility" as required by *Miller* and *Montgomery*, and that the facts do not support a finding that he was permanently incorrigible.

The Supreme Court of the United States has held that mandatory life without parole sentences for juveniles violate the Eighth Amendment when a juvenile is not given the opportunity to present, and a court does not have the opportunity to assess, "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 479-80. Although a judge may still sentence a juvenile to life without parole for homicide, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489. Such factors include the offender's age, maturity, family and home environment, the influence of peer pressure, the "incompetencies associated with youth," and the possibility of rehabilitation. *Id.* at 477-78. There is a distinction "between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479-80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

The Supreme Court gave *Miller* retroactive effect in *Montgomery*, characterizing *Miller* as banning mandatory life without parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 732, 734. Complying with *Miller* requires "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors [] necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at ___, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465). Juvenile offenders must be given the opportunity to demonstrate that "their crime did not reflect irreparable corruption." *Id.* at ___, 136 S. Ct. at 736.

In the instant case, the circuit court held a hearing as required by *Miller* prior to sentencing Ross to the life sentence he is currently serving. We will assume without deciding that a life sentence for murder, suspended after 91 years, is the same as a life without parole sentence. *Cf. Jones v. Commonwealth*, 293 Va. 29, 56-57 (2017) (noting that *Miller* and *Montgomery* only "addressed *mandatory* life sentences without possibility of parole").

At the resentencing hearing, the defense provided testimony related to mitigating factors such as Ross' background, family history, home environment, susceptibility to peer pressure, cognitive development, and likelihood of rehabilitation. Moreover, the report submitted by the University of Virginia's Institute of Law, Psychiatry, and Public Policy expressly evaluated Ross in light of the *Miller* factors, such as dependency, decision-making, the context of the offense, "incompetencies associated with youth," and rehabilitation potential. Thus, the circuit court was provided with the very evidence that *Miller* requires, including evidence relating to Ross' youth and other mitigating factors.

In his habeas petition, Ross requested a *Miller* hearing and he received such a hearing prior to his resentencing. Nonetheless, Ross contends that the circuit court erred when it failed to make an express finding that he was "irreparably incorrigible" before sentencing him to life without parole for murder, suspended after 91 years.

The Supreme Court of the United States has acknowledged "[t]hat *Miller* did not impose a formal factfinding requirement." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735; *see also Jones*, 293 Va. at 37 n.3 (recognizing that *Montgomery* and *Miller* do not require circuit courts to make factual findings regarding incorrigibility). Rather, all that is required is for the circuit court to conduct "[a] hearing where 'youth and its attendant characteristics' are considered as

sentencing factors." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465). In other words, "juvenile defendants 'must be given the *opportunity* [at the time of sentencing] to show their crime did not reflect irreparable corruption.'" *Jones*, 293 Va. at 37 (alteration in original) (quoting *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736).

Because the Supreme Court has not required circuit courts to make an express factual finding regarding incorrigibility, we decline to create a formal factfinding requirement here. We agree with the Court of Appeals that

> [w]hen the trial court holds a hearing, and the record shows that the defendant had the chance to present evidence about mitigating circumstances, "[a]bsent clear evidence to the contrary in the record, the judgment of a trial court comes to us on appeal with a presumption that the law was correctly applied to the facts."

Ross, 2018 WL 5517232, at *4 (quoting *Yarborough v. Commonwealth*, 217 Va. 971, 978 (1977)). We hold that the circuit court in the instant case did not err by failing to make an express finding on the record regarding Ross' incorrigibility.

Moreover, in criminal sentencing, we "must rest heavily on judges closest to the facts of the case—those hearing and seeing the witnesses, taking into account their verbal and non-verbal communication, and placing all of it in the context of the entire case." *Du*, 292 Va. at 563. "Absent an alleged statutory or constitutional violation, [t]he sole statutory limitation placed upon a trial court's discretion in its determination of such conditions is one of reasonableness." *Id.* (alteration in original) (citation and internal quotation marks omitted). In the instant case, there is nothing in the record to suggest that the circuit court abused its discretion in evaluating the mitigating evidence at the resentencing hearing and sentencing Ross to life, suspended after 91 years, for the murder of a 17-year-old. Therefore, we hold that the Court of Appeals did not err in affirming the circuit court's imposition of its sentence.

Accordingly, we affirm the judgment of the Court of Appeals.

This order shall be certified to the Court of Appeals and the Circuit Court of Bedford County.

A Copy,

Teste:

Clerk