LEE BOYD MALVO,	IN THE
Petitioner	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2017
Respondent	No. 476

PRE-JUDGMENT PETITION FOR WRIT OF CERTIORARI

Petitioner, Lee Boyd Malvo, pleaded guilty in the Circuit Court for Montgomery County (Case No. 102675) to six counts of first degree murder. The Honorable James L. Ryan sentenced him on November 8, 2006 to six consecutive life without parole sentences. Petitioner filed a motion to correct illegal sentences on January 12, 2017, which was denied by the Honorable Robert A. Greenberg on August 15, 2017.

Petitioner filed a notice of appeal to the Court of Special Appeals on August 16, 2017. The case was set for argument in the Court's April 2018 session, and Petitioner's brief was filed on January 8, 2018. On January 12, 2018, the Court of Special Appeals, on its own initiative, stayed the appeal pending the decisions of this Court in *Bowie v. State*, Sept. Term 2017, No. 55; *Carter v. State*, Sept. Term 2017, No. 54; *McCullough v. State*, Sept. Term 2017, No. 56; and *State v. Clements*, Sept. Term 2017, No. 57 (arguments scheduled for February 6, 2018).

Petitioner, by counsel, Kiran Iyer, Assistant Public Defender, petitions this Court pursuant to Maryland Rule 8–303 to issue a writ of certiorari to review the decision of the Circuit Court for Montgomery County. The docket entries (App.1–12), extract from the sentencing transcript (App.13–16), judgment of the circuit court (App.17–36), brief filed in the Court of Special Appeals (App.37–89), and stay issued by that court (App.90) are attached.

QUESTIONS PRESENTED

Under *Miller v. Alabama*, 567 U.S. 460 (2012), which barred life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016), do the six life without parole sentences imposed on Petitioner violate the Eighth Amendment to the United States Constitution and/or Article 25 of the Maryland Declaration of Rights?

A. Does *Miller* apply to Maryland's sentencing scheme, which gives the sentencing court discretion to impose life without parole?
B. Did the sentencing court violate *Miller* by failing to consider Petitioner's youth and imposing life without parole for crimes which did not reflect permanent incorrigibility?
C. Did the sentencing court violate Article 25 by imposing life without parole without finding beyond a reasonable doubt that Petitioner was permanently incorrigible?
D. Does Article 25 categorically bar life without parole sentences for juveniles?
E. Did the trial court err in ruling that the life without parole sentences imposed on Petitioner are not "illegal" under Maryland Rule 4–345(a)?

PERTINENT AUTHORITY

U.S. Const., amend VIII; Md. Decl. Rts, Art. 25; Md. Rule 4–345(a).

STATEMENT OF FACTS

Petitioner pleaded guilty to six counts of first degree murder committed in Montgomery County when he was seventeen years old. The State proffered facts in support of the plea:

> Mr. Lee Boyd Malvo is pleading guilty to six counts of first degree murder for crimes that he and his co-defendant John Allen Muhammad committed here in Montgomery County ... Had the case gone to trial, the evidence would have shown that these six murders occurred on three separate days in October of 2002. ...
>
> These six murders were part of a larger robbery, extortion and killing spree that spanned from September the 5th of 2002 to October the 24th of 2002 in which six other victims were murdered and six more victims suffered gunshot wounds as a result of the defendant's actions. These other shootings occurred elsewhere in Maryland, Virginia, Washington, D.C., Alabama and Louisiana.[1]

The victims in Montgomery County were killed by a high-velocity rifle fired from a distance. After Petitioner was arrested on October 24, 2002, he "spoke to investigators at length" about his offenses:

> At that time he claimed to be the shooter in each of the October ... 2002 crimes. He had been instructed to accept responsibility for the shootings by Muhammad who told Mr. Malvo that as a juvenile he would be less likely to get the death penalty. Subsequently however as outlined in his testimony at the trial of

[1] In 2003, Petitioner was sentenced in two different proceedings in Virginia to a total of four terms of life imprisonment without parole: *see Malvo v. Mathena*, 254 F.Supp.3d 820, 823 (E.D.Va.2017). On May 26, 2017, a federal judge vacated those sentences and ordered that Petitioner be resentenced in accordance with *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). *Malvo*, 254 F.Supp.3d at 835. That decision is under appeal in the Fourth Circuit Court of Appeals (*Malvo v. Mathena*, No. 17–6746), with oral argument held on January 23, 2018.

> John Allen Muhammad, Mr. Malvo described the origins and the motive for the scheme that had been made up by Mr. Muhammad.[2]
>
> He described how he and Muhammad came to Montgomery County where they drove around scouting areas that would be good places to shoot. ... Mr. Malvo also testified that in all but three of the shootings he acted as the spotter, sitting in the front passenger seat of the Caprice while Muhammad went into the trunk where he fired the .223 Bushmaster rifle at the victims.
>
> In three of the shootings, Mr. Malvo fired the shots from outside the car while he remained in communication with Muhammad. These were the non-fatal shootings of Iran Brown and Jeffrey Hopper and the murder of Conrad Johnson.

The court accepted Petitioner's guilty plea, and convicted him of all six counts of first degree murder. The State sought the imposition of six consecutive life without parole sentences, emphasizing the "incredible loss inflicted upon the victims' families" and the fear and mistrust created by the attacks. Nevertheless, the State acknowledged that Petitioner had changed significantly in the four years since the shootings and "escaped" from the sway of Mr. Muhammad:

> [W]e would be remiss ... if we didn't acknowledge ... that the *defendant has changed. He's expressed what I'm sure is genuine remorse. He cooperated with our prosecution of Mr. Muhammad*, and then provided this Court and the community, through his testimony in that trial, a much better and more detailed understanding of their terrible crimes and their motivations.

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[2] Mr. Muhammad was convicted of capital murder in Virginia in 2003 and executed in 2009: *see Malvo v. Mathena*, 259 F.Supp.3d 321, 324–325 (D.Md.2017).

These acts of contrition in the testimony advanced the healing process and the closure process for the victims' families and for our entire community in Montgomery County.

I think it's fair to say that before the Montgomery County trial of Mr. Muhammad, we certainly knew the what, but it was only after Mr. Malvo's testimony that we knew so much more about the how and the why. And there is value in that contribution, and this Court must acknowledge it.

Mr. Malvo, in many ways, is a tragic figure ... His crimes, which he perpetrated as a cognizant, thinking, and deliberate 17-year-old – and those points are important, Your Honor – were brutal. *Yet, he has grown tremendously since then.*

It's not lost upon the State that he was under the sway of a truly evil man who infused a 17-year-old with the ideology of hate, an ideology, it appears that Mr. Malvo has *now escaped from*.

He's probably most tragic, Your Honor, because he can add his name to those long list of names, of those persons whose lives Mr. Muhammad destroyed.

Young man, we're still left with a terrible loss of six lives in the worst criminal act ever perpetrated upon our community, and with the fact that as a 17-year-old, without mental defect, this defendant must bear full responsibility for his criminal actions.

(emphasis added).

Petitioner exercised his right of allocution:

I know that I destroyed many dreams and many more lives, and that each of you relive this every morning, every birthday, every anniversary, every time you look in your children's eyes. You relive it, and I'm reminded of your loss in the countless many ways every day. I also know that nothing I can or will ever say will change that fact.

As to the question of why John Allen Muhammad chose me and directed me to kill and murder innocent people, chosen at random

by us, is a question that I'll never be able to answer. What I can tell you is that there's a stark difference between who I am today and who and what I was in October of 2002.

For a long time, I was unwilling and even incapable of comprehending just how terribly I've affected so many lives. I am truly sorry, grieved, and ashamed of what I've done to the families and friends of Mr. Martin, Mr. Buchanan, Mr. Walekar, Ms. Ramos, Mrs. Lewis Rivera, and Mr. Conrad Johnson. I accept responsibility for killing your mother, father, sister, brother, son, daughter, wife, husband, and friend.

The court sentenced Petitioner to six life without parole sentences to run consecutively to each other and to the sentences previously imposed in other jurisdictions:

Now, young man, while you were in our local jail waiting for your case to be heard, you contacted the prosecutors and offered to give them information and cooperation in the trial of John Allen Muhammad.

You testified at his trial. Your testimony appeared to be truthful and was helpful to the prosecution. *The information and evidence you revealed, alone, made these prosecutions worthwhile.*

You've also given local prosecutors ... and law enforcement in other jurisdictions helpful information to close other investigations in this and other states. You should be commended for your acceptance of guilt and voluntary assistance without any promise of leniency.

It appears you've changed since you were first taken into custody in 2002. As a child, you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him, your chances for a successful life became worse than they already were.

You could have been somebody different. You could have been better. What you are, however, is a convicted murderer. You will

> think about that every day for the rest of your life. You knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless, human beings.
>
> You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. *This community, represented by its people and the laws, does not forgive you.*

(App.14–15) (emphasis added).

Petitioner filed a motion to correct illegal sentences alleging that his sentences were unconstitutional under the Eighth Amendment[3] and Article 25.[4] The circuit court denied the motion on the basis that: (1) the challenge was not cognizable under Rule 4–345(a) as "[t]here was nothing inherently illegal" about the sentences (App.27); (2) *Miller* does not apply to life without parole sentences imposed under Maryland's discretionary sentencing scheme; (App.35–36) (3) even if *Miller* does apply, the sentencing judge "affirmatively considered all the relevant factors" and the "plain import of his words ... was that [Petitioner] [was] 'irreparably corrupted;'" (App.36) and (4) Article 25 does not categorically bar juvenile life without parole. (App.35)

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[3] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

[4] Article 25 provides: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."

REASONS FOR GRANTING THE WRIT

Since the Supreme Court's 2012 decision in *Miller*, state supreme courts and federal appeals courts have divided over whether, and under what circumstances, juvenile life without parole sentences are constitutionally permissible. Courts have reached different conclusions about: (1) whether *Miller* applies to discretionary sentencing schemes;[5] (2) if so, what safeguards are necessary to give effect to *Miller*;[6] and (3) whether juvenile life without parole is categorically unconstitutional.[7] This Court has not addressed these issues, leaving fundamental questions about juvenile life without parole in Maryland unresolved. This case is the ideal vehicle to decide these questions.

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[5] *Compare State v. Riley*, 110 A.3d 1205, 1213 (Conn.2015) ("*Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant") with *Jones v. Commonwealth*, 795 S.E.2d 705, 721 (Va.2017) (rejecting the "expansion" of *Miller* and *Montgomery* to non-mandatory life sentences).

[6] *See e.g. State v. Long*, 8 N.E.3d 890, 893 (Ohio.2014) (record must reflect that trial judge considered offender's youth as a mitigating factor at sentencing); *Veal v. State*, 784 S.E.2d 403, 412 (Ga.2016) (vacating life without parole sentence where court failed to make "distinct determination on the record" that child is permanently incorrigible); *Luna v. State*, 387 P.3d 956, 963 n.11 (Okla.Crim.App.2016) (sentencer must find beyond reasonable doubt that defendant is irreparably corrupt and permanently incorrigible).

[7] *See Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass.2013) (juvenile life without parole violates Massachusetts constitution); *State v. Sweet*, 879 N.W.2d 811 (Iowa.2016) (juvenile life without parole violates Iowa constitution); *Bassett v. State*, 394 P.3d 430 (Wash.App.2017), *review granted*, 402 P.3d 827 (Wash.2017) (juvenile life without parole violates Washington constitution).

I. This Case Presents Important and Recurring Questions About the Constitutionality of Juvenile Life Without Parole Sentences in Maryland.

This case raises important questions about the constitutionality of juvenile life without parole sentences which will inevitably require resolution by this Court. The first involves the scope and application of *Miller* in Maryland. *Miller* requires sentencers to consider a juvenile offender's "youth and attendant characteristics" before imposing life without parole, and prohibits this sentence for those whose "crimes reflect transient immaturity." *Montgomery*, 136 S.Ct. at 734. Petitioner argues that: (1) *Miller* applies to Maryland's discretionary sentencing scheme;[8] (2) the sentencing judge failed to conduct the inquiry required by *Miller*; and (3) he was illegally sentenced to life without parole for crimes which did not reflect "irreparable corruption." *Miller*, 567 U.S. at 479–480. As such, this case squarely raises the question of how *Miller* should be applied in Maryland. The circuit court departed from the "greater weight of authority" across the country, *People v. Holman*, — Ill. —, Supreme Court of Illinois, No. 120655, 2017 WL 4173340 (filed September 21, 2017), by concluding that *Miller* applies only to

[8] Petitioner was sentenced to life without parole in 2006 under Maryland Code, Criminal Law Article § 2–201(b) (2002), which provided that a person convicted of first degree murder could be sentenced to death, life without parole, or life.

mandatory life sentences. (App.35–36). And it held that even if *Miller* did apply, the sentencing judge "affirmatively considered all the relevant factors" and implicitly found that Petitioner was "irreparably corrupted," (App.36), notwithstanding the judge's recognition that Petitioner had "shown remorse" and "changed." (App.15) This Court should grant certiorari to confirm that juvenile life without parole sentences in Maryland must be imposed in accordance with *Miller*, and guide sentencers seeking to comply with the Supreme Court's mandate.

Second, this case involves the first categorical challenge under Article 25 to juvenile life without parole sentences. In *Miller*, the Supreme Court expressly left open whether this practice is unconstitutional under the Eighth Amendment, 567 U.S. at 479, limiting its application to the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S.Ct. at 734. Given the emerging national consensus against juvenile life without parole and the inability of sentencing judges to reliably determine that a child is permanently incorrigible (App.73–80), this Court should consider whether Maryland's "cruel or unusual punishments" clause forecloses juvenile life without parole. *See Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass.2013) (juvenile life without parole "cruel or unusual" under Massachusetts constitution);

State v. Sweet, 879 N.W.2d 811 (Iowa.2016) (juvenile life without parole "cruel and unusual" under Iowa constitution); *Bassett v. State*, 394 P.3d 430 (Wash.App.2017), *review granted*, 402 P.3d 827 (Wash.2017) (juvenile life without parole "cruel" under Washington constitution).

Finally, even if this Court decides that juvenile life without parole is permitted under Article 25, this case presents the opportunity to determine how *Miller* should be implemented in Maryland. *Miller* declined to require trial courts to "make a finding of fact regarding a child's incorrigibility" on federalism grounds, but did not leave states "free to sentence a child whose crimes reflects transient immaturity to life without parole." *Montgomery*, 136 S.Ct. at 735. To give effect to this mandate, juvenile life without parole should not be permitted under Article 25 unless the sentencer considers the mitigating qualities of youth and makes a finding on the record, beyond a reasonable doubt, that the child's crimes reflected permanent incorrigibility. State supreme courts across the country have imposed safeguards to give effect to *Miller*; this Court should now provide similar guidance to sentencing courts in Maryland. *See e.g. State v. Long*, 8 N.E.3d 890, 893 (Ohio.2014) ("record must reflect that the court specifically considered the juvenile offender's youth as a mitigating factor at sentencing"); *Veal v. State*, 784 S.E.2d 403, 412 (Ga.2016) (court must make a "distinct

determination on the record that Appellant is irreparably corrupt" before imposing life without parole); *Commonwealth v. Batts*, 163 A.3d 410, 416 (Pa.2017) (State "bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation"); *Luna v. State*, 387 P.3d 956, 963 n.11 (Okla.Crim.App.2016) (sentencer must find beyond reasonable doubt that defendant is permanently incorrigible); *State v. Hart*, 404 S.W.3d 232, 241 (Mo.2013) ("a juvenile offender cannot be sentenced to life without parole ... unless the state persuades the sentencer beyond a reasonable doubt that the sentence is just and appropriate").

II. This Case Is The Ideal Vehicle To Resolve These Questions.

This case is the ideal vehicle to determine the constitutionality of juvenile life without parole sentences in Maryland. It presents the full suite of issues: (1) whether Petitioner's claims are cognizable under Rule 4–345(a); (2) whether *Miller* applies to discretionary life sentences; (3) whether, if *Miller* applies, the sentencing court fulfilled its requirements; and (4) whether Article 25 imposes a categorical bar on juvenile life without parole or precludes its imposition unless the offender is found permanently incorrigible beyond a reasonable doubt. Since *Miller* was decided in 2012, state supreme courts across the

country have addressed these questions; this Court has the opportunity in this case to resolve these issues.

Further percolation in the Court of Special Appeals is neither necessary nor desirable. In three unreported opinions issued on June 28, 2016, the Court of Special Appeals ordered that defendants sentenced to life without parole before *Miller* receive resentencing hearings. *See Kenneth Benjamin Alvira v. State*, Sept. Term 2015, No. 960, 2016 WL 3548256; *Aaron Dwayne Holly v. State*, Sept. Term 2015, No. 408, 2016 WL 3548252; *Marcus William Tunstall v. State*, Sept. Term 2015, No. 814, 2016 WL 3548255. The State conceded in all three cases that the defendants should be resentenced in accordance with *Miller* and *Montgomery*. Notwithstanding those concessions, it argued successfully in the circuit court in the present case that *Miller* and *Montgomery* do not apply to life without parole sentences in Maryland. Accordingly, this Court's intervention is necessary to resolve the uncertainty at trial level about the application of *Miller* and *Montgomery*, and ensure the consistent application of those decisions.

Finally, the questions presented by this case are distinct from those raised in *Bowie*, *Carter*, *McCullough*, and *Clements*, which involve defendants sentenced to *parole-eligible* sentences. In those cases, the common constitutional question is whether the defendants

were afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" under *Graham v. Florida*, 560 U.S. 48, 75 (2010). Here, by contrast, Petitioner was sentenced to life without parole, and does not rely on the rule in *Graham*. Nor, unlike in *Bowie* and *Carter*, is his standing at issue: if Petitioner's sentences are illegal, there could be no dispute that they were illegal from the outset. This case presents a clean vehicle to resolve novel issues of juvenile sentencing law: whether, and under what circumstances, a juvenile offender may be sentenced to life without parole consistently with the Eighth Amendment and Article 25.

Respectfully submitted,

Kiran Iyer
Assistant Public Defender
CPF # 1702020011

Office of the Public Defender
Appellate Division
6 Saint Paul Street, Suite 1302
Baltimore, Maryland 21202
Work: (410) 767-0668
Facsimile: (410) 333-8801
KIyer@opd.state.md.us

Counsel for Petitioner

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I hereby certify that:

1. This petition contains 3391 words.

2. This petition complies with the font, spacing, and type size requirements stated in Rule 8-112.

Kiran Iyer

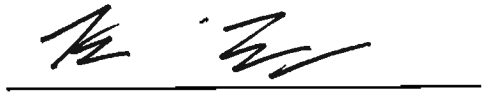
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of January, 2018, copies of the foregoing were delivered to

Carrie J. Williams
Chief Counsel
Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202

Three courtesy copies were also mailed, postage pre-paid, to

Russell P. Butler, Esq.
Victor Stone, Esq., and
Kristin M. Nuss, Esq.
Maryland Crime Victims' Resource Center
1001 Prince George's Blvd., Suite 750
Upper Marlboro, Maryland 20774



Kiran Iyer

APPENDIX

Criminal CIRCUIT CT # 102675 DIST CT #0D00126259 AS OF 2017-11-08 08:45
Tracking #02-1001-76277-3

Trial Election: JURY Status: Closed as of: 08/30/2017
Plea Judge: J. RYAN
Arrest/Citation Date: 05/25/2005 Age: Track: 4 4-271:Closed

Initial Appearance Date: 07/15/2005 DE 19

STATE OF MARYLAND

KATHERINE WINFREE 19882
ASSISTANT STATE'S ATTORNEY
50 MARYLAND AVE
ROCKVILLE MD 20850
PHONE 240-777-7392

-vs-

LEE BOYD MALVO

JAMES A JOHNSTON 33062
MD OFFICE OF THE PUBLIC DEFEND
POST-CONVICTION DEFENDERS DIVI
217 E REDWOOD ST STE 1020
BALTIMORE MD 21201
PHONE 410-209-8615

BRIAN M SACCENTI 29995
OFFICE OF THE PUBLIC DEFENDER
SUITE 1302
6 ST PAUL ST
BALTIMORE MD 21202-1608
PHONE 410-767-8556
FAX 410-333-8801

C H A R G E S

	Description	Statute
#001	MURDER/FIRST DEGREE	CL
#002	MURDER/FIRST DEGREE	CL
#003	MURDER/FIRST DEGREE	CL
#004	MURDER/FIRST DEGREE	CL
#005	MURDER/FIRST DEGREE	CL
#006	MURDER/FIRST DEGREE	CL

VERDICT: GUILTY

Costs	Assessed	Received	Waived/Susp	Due
(none of record)				

DATE	SCHEDULED EVENT		PLDG	TIME	RM.	LENGTH
07/15/2005	CS 1079*	SCHEDULING/PLANNING CONF		01:30		
09/02/2005	SH 0603	STATUS CONFERENCE		08:30		
09/02/2005	SH 0603	STATUS CONFERENCE		08:30		
09/23/2005		MOTION HEARING DATE*				
10/10/2006	PL 1081*	PLEA		09:30	1	
11/08/2006	SE 1084*	SENTENCING		01:00	1	
06/15/2017	MT 0573*	CORRECT ILLEGAL SENTENCE	69	01:30	9A	

D O C K E T I N F O R M A T I O N

06/16/2005 #1 DISTRICT COURT CASE NUMBER 636 KB
TYPE: DOCKET
DISTRICT COURT CASE NO.0D00126259; TRACKING NO.021001762773.

06/16/2005 #2 INDICTMENT 571 KB
TYPE: DOCKET
INDICTMENT; TRUE BILL, FILED. (4-215 HEARING SET)

06/16/2005 #3 LINE ENTERING APPEARANCE OF COUNSEL 609 KB
TYPE: DOCKET
LINE ENTERING THE APPEARANCE OF KATHERINE WINFREE AS ATTORNEY FOR THE STATE, FILED.

06/16/2005 #4 ORDER, CHARGING DOCUMENTS ADMIN. JOINED 1546 KB
TYPE: DOCKET
ADMINISTRATIVE ORDER OF COURT (HARRINGTON, J.) ADMINISTRATIVELY JOINING CHARGING DOCUMENTS PURSUANT TO RULE 4-203 (b) .
Judge: A HARRINGTON

06/16/2005 #5 ORDER, SCHEDULING 738 KB
TYPE: DOCKET
SCHEDULING ORDER (HARRINGTON, J.), ENTERED. (COPIES MAILED)
Judge: A HARRINGTON

06/16/2005 #6 SUMMONS ISSUED 248 KB
TYPE: DOCKET
SUMMONS ISSUED RETURNABLE: JULY 8, 2005 AT 9:00 A.M.

06/17/2005 #7 SHERIFF'S RETURN ON SUMMONS: SERVED 752 AB
TYPE: DOCKET
SHERIFF'S RETURN ON SUMMONS-SUMMONED, FILED.

06/23/2005 #8 STATE'S CERTIFICATION OF COMPLIANCE 926 CH
TYPE: DOCKET
SIX (6) STATE'S CERTIFICATION OF COMPLIANCE OF VICTIM NOTIFICATION FORM, FILED.

06/27/2005 #9 ORIGINAL RECORD RECEIVED FROM DISTRICT COU 489 AB
TYPE: DOCKET
ORIGINAL RECORD AND COPY OF DOCKET ENTRIES RECEIVED FROM DISTRICT COURT IN MONTGOMERY COUNTY, FILED.

06/29/2005 #10 LINE ENTERING APPEARANCE OF COUNSEL 609 AB
TYPE: DOCKET
LINE ENTERING THE APPEARANCE OF WILLIAM C. BRENNAN, JR. AND HARRY J. TRAINOR, JR. AS COUNSEL FOR DEFENDANT AND WAIVES ARRAIGNMENT, FILED.

06/29/2005 #11 DEFENDANT'S REQUEST FOR SPEEDY TRIAL 85 AB
TYPE: DOCKET
DEFENDANT'S DEMAND FOR SPEEDY TRIAL ON ALL COUNTS, AND WAIVES ARRAIGNMENT PRESENTLY SCHEDULED FOR JULY 8, 2005, FILED.

D O C K E T I N F O R M A T I O N CONT'D.

06/29/2005 #12 REQUEST, DISCOVERY AND INSPECTION 84 AB
TYPE: DOCKET
DEFENDANT'S MOTION FOR DISCOVERY AND INSPECTION, FILED.

07/05/2005 #13 CLERK ENTERS NOT GUILTY PLEA 89 RR
TYPE: DOCKET
CLERK ENTERS NOT GUILTY PLEA PURSUANT TO RULE 4-242(B)(4).

07/05/2005 #14 DISCOVERY 243 RR
TYPE: DOCKET
STATE'S LETTER OF DISCOVERY, FILED.

07/06/2005 #15 DISCOVERY 243 EJ
TYPE: DOCKET
STATE'S DISCOVERY LETTER, FILED.

07/11/2005 #16 (shielded)

07/15/2005 #17 HEARING, SCHEDULING/PLANNING HEARING 1079 RR
TYPE: DOCKET
SCHEDULING/PLANNING CONFERENCE HELD; MS. WINFREE, MR. MCCARTHY AND MR. CHOPRA, STATE'S ATTORNEYS.
Judge: J RYAN
TAPE# 16-050715 START# 13:43:07 STOP# 13:54:51 #SESSIONS 1

07/15/2005 #18 COURT SETS 684 RR
TYPE: DOCKET
COURT (RYAN, J.) SETS CASE FOR A STATUS CONFERENCE ON SEPTEMBER 2, 2005 AT 8:30 A.M.
Judge: J RYAN

07/15/2005 #19 DEFENDANT'S INITIAL APPEARANCE 765 RR
TYPE: DOCKET
MR. TRAINOR AND MR. BRENNAN, APPEARED ON BEHALF OF THE DEFENDANT WHO WAS NOT TRANSPORTED.
Judge: J RYAN

07/15/2005 #20 COURT ORDERS/DIRECTS/DETERMINES 536 RR
TYPE: DOCKET
COURT (RYAN, J.) ORDERS ALL OTHER DATES REMAIN THE SAME PENDING STATUS CONFERENCE.
Judge: J RYAN

08/09/2005 #21 (shielded)

08/11/2005 #22 (shielded)

08/29/2005 #23 DISCOVERY 243 MT
TYPE: DOCKET
STATE'S LETTER OF DISCOVERY, FILED.

D O C K E T I N F O R M A T I O N CONT'D.

08/29/2005 #24 DISCOVERY 243 MT
TYPE: DOCKET
STATE'S LETTER OF DISCOVERY, FILED.

08/29/2005 #25 MOTION, ADVANCE/EXPEDITE 177 MT
TYPE: MOTION STATUS: MOOT
STATE'S CONSENT MOTION TO ADVANCE SCHEDULING/PLANNING CONFERENCE, FILED.

09/02/2005 #26 HEARING, STATUS HEARING 603 JS
TYPE: DOCKET
STATUS CONFERENCE CALLED (HARRINGTON, J.) MS. WINFREE, MR. MCCARTHY AND MR. CHOPRA, STATE'S ATTORNEYS.
Judge: A HARRINGTON
TAPE# 16-050902 START# 08:49:56 STOP# 08:52:14 #SESSIONS 1

09/02/2005 #27 DEFENDANT APPEARED 681 JS
TYPE: DOCKET
DEFENDANT APPEARED VIA VIDEO, WITH COUNSEL, MR. BRENNAN (HARRINGTON, J.)
Judge: A HARRINGTON

09/02/2005 #28 HEARING 573 JS
TYPE: DOCKET
COURT (HARRINGTON, J.) ADVISES DEFENDANT OF HIS RIGHTS PURSUANT TO STATUTORY RIGHTS UNDER THE INTERSTATE AGREEMENT ON DETAINERS, TO A "SPEEDY TRIAL" AND TO BE TRIED WITHIN 180 DAYS.
Judge: A HARRINGTON
TAPE# 16-050902 START# 08:49:56 STOP# 08:52:14 #SESSIONS 1

09/02/2005 #29 COURT POSTPONES BEYOND 180 DAYS 1364 JS
TYPE: DOCKET
DEFENDANT CONSENTS TO A CONTINUANCE BEYOND 180 DAYS, WAIVES RIGHTS UNDER INTERSTATE AGREEMENT ON DETAINERS AND "SPEEDY TRIAL".
Judge: A HARRINGTON

09/02/2005 #30 HEARING, STATUS HEARING 603 JS
TYPE: DOCKET
STATUS CONFERENCE HELD (RYAN, J.) MS. WINFREE, MR. MCCARTHY AND MR. CHOPRA, STATE'S ATTORNEYS.
Judge: J RYAN
TAPE# 16-050902 START# 08:33:49 STOP# 08:35:05 #SESSIONS 2
TAPE# 16-050902 START# 08:52:41 STOP# 09:44:04 #SESSIONS 2

09/02/2005 #31 DEFENDANT APPEARED 681 JS
TYPE: DOCKET
DEFENDANT APPEARED VIA VIDEO, WITH COUNSEL, MR. BRENNAN.
Judge: J RYAN

09/02/2005 #32 MOTION, POSTPONEMENT 515 JS
TYPE: MOTION STATUS: GRANTED RULING: 40
JOINT ORAL MOTION MOTION FOR CONTINUANCE OF TRIAL DATE; (RYAN, J.)
Judge: J RYAN

D O C K E T I N F O R M A T I O N CONT'D.

09/02/2005 #33 COURT ORDERS/DIRECTS/DETERMINES 536 JS
TYPE: DOCKET
COURT (RYAN, J.) DIRECTS THAT ALL MOTIONS BE FILED BY NOVEMBER 7, 2005.
Judge: J RYAN

09/02/2005 #34 COURT ORDERS/DIRECTS/DETERMINES 536 JS
TYPE: DOCKET
COURT (RYAN, J.) DIRECTS THAT ALL RESPONSES TO ANY MOTIONS BE FILED BY NOVEMBER 28, 2005.
Judge: J RYAN

09/02/2005 #35 COURT ORDERS/DIRECTS/DETERMINES 536 JS
TYPE: DOCKET
COURT (RYAN, J.) DIRECTS THAT BOTH PARTIES TRIAL EXPERTS DESIGNATION BE FILED BY NOVEMBER 28, 2005.
Judge: J RYAN

09/02/2005 #36 COURT SETS 684 JS
TYPE: DOCKET
COURT (RYAN, J.) SETS CASE FOR A STATUS CONFERENCE ON DECEMBER 5, 2005 AT 9:30 A.M.
Judge: J RYAN

09/02/2005 #37 COURT SETS 684 JS
TYPE: DOCKET
COURT (RYAN, J.) SETS CASE FOR A ONE (1) DAY MOTIONS HEARING ON DECEMBER 23, 2005 AT 9:30 A.M.
Judge: J RYAN

09/02/2005 #38 JS
TYPE: DOCKET
COURT (RYAN, J.) RECOMMENDS CASE BE CONTINUED DUE TO CALENDER CONFLICTS (PARTIES NEED TO GET AFFAIRS IN ORDER) (A) AND CONTINUING CASE FOR A SEVEN (7) WEEK JURY TRIAL TO OCTOBER 10, 2006 AT 9:30 A.M. BEFORE THIS MEMBER OF THE BENCH.
Judge: J RYAN

09/02/2005 #39 COURT ORDERS/DIRECTS/DETERMINES 536 JS
TYPE: DOCKET
COURT (RYAN, J.) DIRECTS CASE BE SENT TO JUDGE HARRINGTON FOR RULING ON CONTINUANCE.
Judge: J RYAN

09/02/2005 #40 ORDER, POSTPONE 976 JS
TYPE: RULING STATUS: GRANTED MOTION: 32
ORDER OF COURT (HARRINGTON, J.) GRANTING JOINT ORAL MOTION FOR CONTINUANCE OF TRIAL DATE AND CONTINUED TO OCTOBER 10, 2006 AT 9:30 A.M. FOR SEVEN (7) WEEKS, ENTERED. (COPIES MAILED)
Judge: A HARRINGTON
REASON: A-CALENDAR CONFLICTS
REQ BY: JOINT MULTI: NO EVENT(S): 5

D O C K E T I N F O R M A T I O N CONT'D.

09/02/2005 #41 ORDER, SCHEDULING 738 JS
TYPE: DOCKET
SCHEDULING ORDER (RYAN, J.) SETTING: MOTIONS FILING DEADLINE FOR NOVEMBER 7, 2005, RESPONSES TO MOTIONS FILED BY NOVEMBER 28, 2005, STATUS HEARING FOR DECEMBER 5, 2005 AT 8:30 A.M., MOTIONS HEARING ON DECEMBER 23, 2005 AT 9:30 A.M FOR ONE (1) DAY AND TRIAL DATE FOR OCTOBER 10, 2005 AT 9:30 A.M. FOR SEVEN (7) WEEKS, ENTERED. (COPIES MAILED)
Judge: J RYAN

09/12/2005 #42 LINE ENTERING APPEARANCE OF COUNSEL 609 JS
TYPE: DOCKET
LINE ENTERING THE APPEARANCE OF TIMOTHY J. SULLIVAN AS CO-COUNSEL FOR DEFENDANT, FILED.

09/19/2005 #43 DISCOVERY 243 JS
TYPE: DOCKET
STATE'S SUPPLEMENTAL LINE OF DISCOVERY, FILED.

10/12/2005 #44 DISCOVERY 243 MT
TYPE: DOCKET
STATE'S SUPPLEMENTAL LETTER OF DISCOVERY, FILED.

10/19/2005 #45 DISCOVERY 243 EJ
TYPE: DOCKET
STATE'S SUPPLEMENTAL LINE OF DISCOVERY, FILED.

11/07/2005 #46 MOTION, AMEND 1 JA
TYPE: MOTION STATUS: GRANTED RULING: 47
JOINT MOTION TO AMEND SCEHDULING ORDER, FILED.
Judge: J RYAN

11/15/2005 #47 ORDER, AMEND 973 MT
TYPE: RULING STATUS: GRANTED MOTION: 46
ORDER OF COURT (RYAN, J.) ORDERS THAT THE SCHEDULING ORDER BE AMENDED TO REFLECT THE FOLLOWING DATES FOR THE DEFENDANT: MOTIONS FOR JULY 21, 2006, RESPONSES FOR AUGUST 11, 2006, TRIAL EXPERTS (NON-DEATH RELATED) FOR AUGUST 11, 2006, MOTIONS HEARING FOR AUGUST 24, 2006 AT 9:30 A.M., AND TRIAL FOR OCTOBER 10, 2006; IT IS FURTHER ORDERED THAT THE TRIAL DATES FOR THE TWO MATTERS REMAIN UNCHANGED, ENTERED. (COPIES MAILED)
Judge: J RYAN

01/20/2006 #48 DISCOVERY 243 RR
TYPE: DOCKET
STATE'S SUPPLEMENTAL LETTER OF DISCOVERY, FILED.

06/02/2006 #49 (shielded)

06/13/2006 #50 COURT SETS 684 AB
TYPE: DOCKET
MEMORANDUM OF COURT (RYAN, J.) SETTING MOTIONS HEARING ON AUGUST 24, 2006 AT 9:30 A.M., FILED.
Judge: J RYAN

D O C K E T I N F O R M A T I O N CONT'D.

06/14/2006 #51 NOTICE, DISREGARD/REMOVE 778 AB
TYPE: DOCKET
NOTICE TO DISREGARD/REMOVE,8/24/06 FILED AND MAILED.

06/22/2006 #52 PLEA AGREEMENT 482 RR
TYPE: DOCKET
PLEA AGREEMENT BEFORE JUDGE RYAN, FILED.
Judge: J RYAN

06/22/2006 #53 ORDER, CONSENT 758 RR
TYPE: DOCKET
CONSENT ORDER OF COURT (HARRINGTON J.) PLEA DATE TO REMAIN ON OCTOBER 10, 2006 AT 9:30 A.M., ENTERED. (COPIES MAILED)
Judge: A HARRINGTON

10/10/2006 #54 DEFENDANT'S ORAL PLEA 766 KJ
TYPE: DOCKET
DEFENDANT PLACED UNDER OATH AND WITHDRAWS NOT GUILTY PLEA AND ENTERS A PLEA OF GUILTY TO COUNTS #1,2,3,4,5 AND 6 OF THE INDICTMENT. COURT (RYAN, J.) ADVISES DEFENDANT OF HIS RIGHTS, FINDS DEFENDANT HAS FREELY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL, ENTERS PLEA, ACCEPTS PLEA AND ENTERS A FINDING OF GUILTY TO COUNT #1 (MURDER-FIRST DEGREE) COUNT #2 (MURDER-FIRST DEGREE), COUNT #3 (MURDER-FIRST DEGREE) , COUNT #4 (MURDER-FIRST DEGREE) , COUNT #5 (MURDER-FIRST DEGREE), AND COUNT #6 (MURDER-FIRST DEGREE). MRS. WINFREE, STATE'S ATTORNEY, DEFENDANT APPEARED WITH COUNSEL, MR. SULLIVAN AND MR. BRENNAN.
Judge: J RYAN
TAPE# 1-061010 START# 10:00:00 STOP# 10:28:00 #SESSIONS 1

10/10/2006 #55 COURT SETS 684 KJ
TYPE: DOCKET
COURT (RYAN, J.) ORDERS DEFENDANT TO BE HELD WITHOUT BOND PENDING SENTENCING NOVEMBER 9, 2006 AT 1:00 PM.
Judge: J RYAN

10/10/2006 #56 ORDER, PRE-SENTENCE INVESTIGATION 732 KJ
TYPE: DOCKET
ORDER OF COURT (RYAN, J.) FOR PRE-SENTENCE INVESTIGATION, ENTERED. (NOT DONE ON RECORD)
Judge: J RYAN

11/02/2006 #57 P.S.I. RECEIVED 259 AB
TYPE: DOCKET
PRE-SENTENCE INVESTIGATION RECEIVED ON NOVEMBER 2, 2006 AND HAND DELIVERED TO JUDGE RYAN. COPIES PROVIDED TO STATE'S ATTORNEY AND DEFENDANT'S COUNSEL HARRY J. TRAINOR, JR., FILED. (LP)
Judge: J RYAN

11/03/2006 #58 COURT POSTPONES HEARING/TRIAL TO 555 AB
TYPE: DOCKET
MEMORANDUM OF COURT (RYAN, J.) RESETTING SENTENCING HEARING TO NOVEMBER 8, 2006 AT 1:00 P.M., FILED. (LP)
Judge: J RYAN

D O C K E T I N F O R M A T I O N CONT'D.

11/08/2006 #59 DISPOSITION 262 J3
TYPE: DOCKET
DEFENDANT WAS ASKED IF HE HAD ANYTHING TO SAY BEFORE SENTENCING. COURT (RYAN, J.) SENTENCES DEFENDANT AS TO COUNT #1 TO THE MARYLAND DEPARTMENT OF CORRECTIONS FOR A PERIOD OF LIFE WITHOUT PAROLE. AS TO COUNT #2 FOR A PERIOD OF LIFE WITHOUT PAROLE CONSECUTIVE TO COUNT #1. AS TO COUNT #3 FOR A PERIOD OF LIFE WITHOUT PAROLE CONSECUTIVE TO COUNT #1 & 2. AS TO COUNT #4 FOR A PERIOD OF LIFE WITHOUT PAROLE CONSECUTIVE TO COUNT #1,2 & 3. AS TO COUNT #5 FOR A PERIOD OF LIFE WITHOUT PAROLE CONSECUTIVE TO COUNT #1,2,3 & 4. AS TO COUNT #6 FOR A PERIOD OF LIFE WITHOUT PAROLE CONSECUTIVE TO COUNT #1,2,3,4 & 5. SENTENCE TO RUN CONSECUTIVE TO ANY OTHER SENTENCE. COURT IMPOSES NO PROBATION. COURT COSTS WAIVED. MS. WINFREE AND MR. CHOPRA, STATE'S ATTORNEYS.
Judge: J RYAN
TAPE# 1-061108 START# 13:02:15 STOP# 13:26:30 #SESSIONS 1

11/08/2006 #60 DEFENDANT APPEARED 681 J3
TYPE: DOCKET
DEFENDANT APPEARED WITH COUNSEL, MR. BRENNAN AND MR. SULLIVAN.
Judge: J RYAN

11/08/2006 #61 DEFENDANT ADVISED OF RIGHTS (RULE 4-342) 677 J3
TYPE: DOCKET
DEFENDANT ADVISED OF RIGHTS PURSUANT TO RULE 4-342 AND RIGHTS FORM, FILED.
Judge: J RYAN

11/08/2006 #62 P.S.I. SEALED PER ORDER OF COURT 553 J3
TYPE: DOCKET
PRE-SENTENCE INVESTIGATION AND SENTENCING DOCUMENTS SEALED PER ORDER OF COURT (RYAN, J.) AND FILED.
Judge: J RYAN

11/08/2006 #63 MARYLAND SENTENCING GUIDELINES 669 J3
TYPE: DOCKET
MARYLAND SENTENCING GUIDELINES, FILED.
Judge: J RYAN

11/09/2006 #64 CLERK'S CORRECTION 493 J3
TYPE: DOCKET
CLERK'S CORRECTION: DOCKET ENTRY (#54) SHOULD READ AS FOLLOWS: 10/10/06 DEFENDANT PLACED UNDER OATH AND WITHDRAWS NOT GUILTY TO COUNTS #1,2,3,4,5 AND 6 OF THE INDICTMENT. COURT (RYAN, J.) ADVISES DEFENDANT OF HIS RIGHTS, FINDS DEFENDANT HAS FREELY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL, ENTERS PLEA, ACCEPTS PLEA AND ENTERS A FINDING OF GUILTY TO COUNT #1 (MURDER-FIRST DEGREE), COUNT #2 (MURDER-FIRST DEGREE), COUNT #3 (MURDER-FIRST DEGREE), COUNT #4 (MURDER-FIRST DEGREE), COUNT #5 (MURDER-FIRST DEGREE), AND COUNT #6 (MURDER-FIRST DEGREE). MRS. WINFREE, STATE'S ATTORNEY. DEFENDANT APPEARED WITH COUNSEL, MR. SULLIVAN AND MR. BRENNAN. TAPE: 10/10/06-1-10:00:00-10:28:00
Judge: J RYAN

D O C K E T I N F O R M A T I O N CONT'D.

11/09/2006 #65 COMMITMENT DELIVERED TO SHERIFF 665 J3
TYPE: DOCKET
COMMITMENT DELIVERED TO SHERIFF.
Judge: J RYAN

11/27/2006 #66 MOTION, MODIFICATION OF SENTENCE (CRM) 17 RR
TYPE: MOTION STATUS: DENIED RULING: 68
DEFENDANT'S MOTION FOR MODIFICATION OR REDUCTION OF SENTENCE, FILED.
Judge: R GREENBERG

12/20/2006 #67 HELD IN ABEYANCE 1049 J3
TYPE: DOCKET
ORDER OF COURT (HARRINGTON, J.) FOR JUDGE RYAN THAT THE DEFENDANT'S MOTION FOR MODIFICATION OR REDUCTION OF SENTENCE BE HELD IN ABEYANCE UNTIL FURTHER ORDER OF COURT, ENTERED. (COPIES MAILED)
Judge: A HARRINGTON

09/18/2012 #68 ORDER, MODIFICATION PETITION 323 KJ
TYPE: RULING STATUS: DENIED MOTION: 66
ORDER OF COURT (GREENBERG, J.) DENYING DEFENDANT'S MOTION FOR MODIFICATION OF SENTENCE, ENTERED. (COPIES MAILED)
Judge: R GREENBERG

01/12/2017 #69 MOTION, APPROPRIATE RELIEF 930 D6
TYPE: MOTION STATUS: DENIED OPPOSITION: 77 RULING: 88
DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE AND REQUEST FOR HEARING, FILED.
Judge: R GREENBERG Hearing: 06/15/2017 01:30

02/15/2017 #71 MOTION, EXTENSION OF TIME 60 D6
TYPE: MOTION STATUS: GRANTED RULING: 74
STATE'S MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE, FILED.
Judge: R GREENBERG

02/16/2017 #72 MEMORANDUM 727 D6
TYPE: DOCKET
MEMORANDUM OF COURT (GREENBERG, J.) SCHEDULING MOTION TO CORRECT ILLEGAL SENTENCE FOR JUNE 15, 2017 AT 1:30 P.M., FILED.
Judge: R GREENBERG

02/17/2017 #70 SAO NOTIFIED VICTIM(S) OF UPCOMING HEARING 1810 NS
TYPE: DOCKET
STATE'S ATTORNEY NOTIFIED 4 VICTIMS OF THE FOLLOWING EVENT (S): EVENT #0001 CORRECT ILLEGAL SENTENCE 06/15/2017 at 01:30 pm. REFER TO THE STATE'S ATTORNEY'S OFFICE

02/23/2017 #73 NOTICE, HEARING DATE (MAILED) 437 D6
TYPE: DOCKET
NOTICE OF HEARING DATE FILED AND MAILED. (HEARING DATE: 06/15/2017 AT 1:30 P.M.)

D O C K E T I N F O R M A T I O N CONT'D.

03/03/2017 #74 ORDER, EXTENSION OF TIME 907 S6
TYPE: RULING STATUS: GRANTED MOTION: 71
ORDER OF COURT (GREENBERG, J.) GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO MOTION TO CORRECT ILLEGAL SENTENCE, ENTERD. (COPIES MAILED)
Judge: R GREENBERG

03/10/2017 #75 MOTION, EXTENSION OF TIME 60 P2
TYPE: MOTION STATUS: GRANTED RULING: 76
STATE'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE, FILED.
Judge: R GREENBERG

03/20/2017 #76 ORDER, EXTENSION OF TIME 907 FG
TYPE: RULING STATUS: GRANTED MOTION: 75
ORDER OF COURT (GREENBERG, J.) GRANTING STATE'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE, ENTERED. (COPIES MAILED)
Judge: R GREENBERG

03/22/2017 #77 OPPOSITION TO MOTION 900 MH
TYPE: OPPOSITION MOTION: 69 RULING: 88
STATE'S RESPONSE TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE, FILED.
Judge: R GREENBERG Hearing: 06/15/2017 01:30

05/09/2017 #78 (shielded)

05/09/2017 #79 (shielded)

06/14/2017 See Docket Entry #83

06/14/2017 See Docket Entry #84

06/14/2017 See Docket Entry #85

06/15/2017 #80 HEARING H4 573 BN
TYPE: DOCKET
HEARING (GREENBERG, J.) ON DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE AND REQUEST FOR HEARING (#69). STATE'S ATTORNEY, MR. KLEINBOARD. VICTIM (RIVERA) COUNSEL, MR. BUTLER.
Judge: R GREENBERG
TAPE# 9A-170615 START# 13:37:11 STOP# 14:41:10 #SESSIONS 1

06/15/2017 #81 DEFENDANT NOT PRESENT OR NOT TRANSPORTED 1768 BN
TYPE: DOCKET
MR. JOHNSTON APPEARED ON BEHALF OF THE DEFENDANT WHO WAS NOT TRANSPORTED.
Judge: R GREENBERG

D O C K E T I N F O R M A T I O N CONT'D.

06/15/2017 #82 COURT TAKES MATTER UNDER ADVISEMENT 91 BN
TYPE: DOCKET
COURT (GREENBERG, J.) TAKES MATTER UNDER ADVISEMENT.
Judge: R GREENBERG

06/15/2017 #83 (shielded)

06/15/2017 #84 LINE ENTERING APPEARANCE OF COUNSEL 609 C0
TYPE: DOCKET
LINE ENTERING THE APPEARANCE OF RUSSELL P. BUTLER AS COUNSEL FOR VICTIM, FILED. (LP)
(Actual Filed Date: 06/14/2017)

06/15/2017 #85 MOTION, APPROPRIATE RELIEF 930 C0
TYPE: MOTION STATUS: MOOT
VICTIM REPRESENTATIVE'S ASSERTION OF RIGHT TO BE HEARD ON DEFENDANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE, FILED. (LP)
(Actual Filed Date: 06/14/2017)

06/21/2017 #86 LINE 488 C0
TYPE: DOCKET
VICTIM REPRESENTATIVE'S POST HEARING SUPPLEMENTAL ARGUMENT, FILED. (LP)

07/12/2017 #87 LINE 488 CL
TYPE: DOCKET
DEFENDANT'S LINE TO PROVIDE ADDITIONAL CASE LAW, FILED. (LP)

08/16/2017 #88 ORDER, FOR APPROPRIATE RELIEF 977 D6
TYPE: RULING STATUS: DENIED MOTION: 69 OPPOSITION: 77
ORDER OF COURT (GREENBERG, J.) DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE, ENTERED. (COPIES MAILED)
Judge: R GREENBERG

08/30/2017 #89 MOTION DEEMED MOOT PER... 1585 CL
TYPE: DOCKET
ORDER OF COURT (GREENBERG, J.) THAT THE MOTION AT TAB #85 HAS BEEN DEEMED MOOT AS VICTIM PARTICIPATED IN HEARING THROUGH COUNSEL, ENTERED. (COPIES MAILED)
Judge: R GREENBERG

09/14/2017 #90 NOTICE OF APPEAL-COURT SPECIAL APPEALS 823 G1
TYPE: DOCKET
DEFENDANT'S NOTICE OF APPEAL, FILED. (LP)

09/15/2017 #91 COPY OF DOCKET ENTRIES MAILED: PUB DEF OFC 358 G1
TYPE: DOCKET
COPY OF DOCKET ENTRIES MAILED TO THE OFFICE OF THE PUBLIC DEFENDER, CHIEF, APPELLATE DIVISION. (LP)

D O C K E T I N F O R M A T I O N CONT'D.

10/12/2017 #92 LINE ENTERING APPEARANCE OF PUBLIC DEFENDE 843 G1
TYPE: DOCKET
PUBLIC DEFENDERS LINE ENTERING THE APPEARANCE OF BRIAN M. SACCENTI AS COUNSEL FOR THE DEFENDANT FOR THE PURPOSE OF THE APPEAL ONLY, FILED.

11/08/2017 #93 TRANSCRIPT OF PROCEEDINGS 399 G1
TYPE: DOCKET
TRANSCRIPT OF PROCEEDINGS ON HEARING ON JUNE 15, 2017, FILED.

Rule 4-271 Date: Closed

*** END OF INFORMATION FOR CASE #102675C ***

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	:	
v.	:	Criminal No. 102675
LEE BOYD MALVO,	:	
Defendant.	:	

SENTENCING

Rockville, Maryland

November 8, 2006

DEPOSITION SERVICES, INC.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

something for which I'll never be able to forgive myself. It is pure folly for me to think that they or anyone can forgive me for taking the lives of their loved one.

That is all, Your Honor.

THE COURT: Okay. Thank you.

Young man, would you stand up, please?

Before I actually impose the sentence, I'd like to acknowledge, for the record, the skill and professionalism of the Sheriff's Department, not only in this case, but in the previous trial for the, just the way they managed the entire proceedings, that was very helpful to me, and I appreciate that; as well as I want to acknowledge the assistance of my law clerk, Joanna Worster (phonetic sp.). She was a big help through this case and the previous case. I couldn't have done this without her.

Now, young man, while you were in our local jail waiting for your case to be heard, you contacted the prosecutors and offered to give them information and cooperation in the trial of John Allen Muhammad.

You testified at his trial. Your testimony appeared to be truthful and was helpful to the prosecution. The information and evidence you revealed, alone, made these prosecutions worthwhile.

You've also given local prosecutors, law enforcement, and law enforcement in other jurisdictions helpful information

to close other investigations in this and other states. You should be commended for your acceptance of guilt and voluntary assistance without any promise of leniency.

It appears you've changed since you were first taken into custody in 2002. As a child, you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him, your chances for a successful life became worse than they already were.

You could have been somebody different. You could have been better. What you are, however, is a convicted murderer. You will think about that every day for the rest of your life. You knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings.

You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. This community, represented by its people and the laws, does not forgive you.

You've been held accountable for the crimes you've committed here. You will receive the maximum sentence allowed by the law of this State. After the sentence has been imposed, I will order the sheriff to remove you from this County and State, and return you to where you came from.

The sentence I'm going to impose is consecutive to

every sentence or any sentence previously imposed in any jurisdiction or in any state.

SENTENCING

For Count 1, the murder of James Martin, your sentence is life without the possibility of parole.

Count 2, the murder of James S. Buchanan, your sentence is life without the possibility of parole, consecutive to, and that sentence will be consecutive to Count 1.

Count 3, the murder of Prem Kumar Walekar, your sentence is life without the possibility of parole. That sentence will be served consecutive to Counts 1 and 2.

And Count 4, the murder of Maria Sarah Ramos, sentence will be a life sentence without the possibility of parole, consecutive to the sentences imposed in Counts 1, 2, and 3.

And in Count 5, the murder of Lori Ann Lewis Rivera, your sentence will be life without the possibility of parole, consecutive to the sentences imposed in Counts 1, 2, 3, and 4.

And in Count 6, the murder of Conrad Johnson, your sentence will be life without the possibility of parole, and will be served consecutive to the Counts imposed, sentenced imposed in Counts 1, 2, 3, 4, and 5.

Good luck to you, young man.

Sheriff, this defendant's in your custody.

MR. CHOPRA: Thank you, Your Honor.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	:	
	:	
v.		**Case No. 102675-C**
	:	
LEE BOYD MALVO	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

This case came before the court on June 15, 2017, for a hearing on Defendant's Motion to Correct Illegal Sentence. The court heard oral argument from both parties and victim representative's attorney Russell P. Butler, Esq. In reaching its decision, the court has considered those arguments, memoranda submitted, and applicable case law.

The facts of the underlying case are best described by Judge Charles E. Moylan, Jr., in *Muhammad v. State,* 177 Md. App. 188, 198 (2007), who compared it to that of the notorious Jack the Ripper:

> For 22 days in October of 2002, Montgomery County, Maryland was gripped by a paroxysm of fear, a fear as paralyzing as that which froze the London district of Whitechapel in 1888. In Whitechapel, however, the terror came only at night. In Montgomery County, it struck at any hour of the day or night.... In Montgomery County, every man, woman, and child was a likely target. The body count in Whitechapel was five; in Montgomery County the death toll reached six. The name of the Whitechapel terrorist has never been discovered. In Montgomery County, their names are John Allen Muhammad and Lee Boyd Malvo.

Judge Moylan continued:

> Although the reign of terror perpetrated by Muhammad and Malvo ultimately spread over seven separate jurisdictions and involved 10 murders and 3 attempted murders, the epicenter was unquestionably Montgomery County. Six of the ten murders were committed in Montgomery County. The terror began in Montgomery County on Wednesday evening, October 2, 2002. The terror ended in Montgomery County on Tuesday evening, October 22, 2002....
>
> Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of shootings had

> occurred at gas stations. Schools were placed on lock-down status. On one occasion, Interstate 95 was closed in an effort to apprehend the sniper. A multi-jurisdictional state and federal task force was formed to cope with the crisis. "Hot lines" to receive tips were created by both the Montgomery County Police Department and the Federal Bureau of Investigation. Over 60,000 tips were ultimately received. The sense of dread that hovered over the entire community was immeasurable. The six lives that were taken were but a part of an incalculable toll. *Id.* at 200.

Ultimately, Malvo and Muhammad were located and arrested near Frederick, Maryland. It was discovered that the automobile in which the two had traveled had been fashioned into a mobile sniper's nest, with a hole carved out of the trunk through which the muzzle of a Bushmaster .223 rifle, the murder weapon in each of the homicides, could protrude. The trunk was large enough to accommodate either of the co-defendants, who could lie prone and wreak their havoc. Testimony at trial showed that the Bushmaster .223 propels a shell at a speed of 300 feet per second, causing devastating injury. According to the state's proffer at the time of Defendant's guilty plea on October 10, 2006, there were at least six other shootings in the District of Columbia, Louisiana, Arizona, and Alabama, resulting in at least four deaths for which Malvo and Muhammad were also responsible.

Muhammad was convicted of first degree murder in both Maryland and Virginia. During Muhammad's trial in Montgomery County, Malvo provided testimony against his accomplice. He also admitted to lying during his testimony in Virginia in order to potentially spare Muhammad from the death penalty. On November 9, 2009, Muhammad was executed via lethal injection for the murders he committed in Virginia.

Malvo was convicted by a Chesapeake County, Virginia, jury on two counts of capital murder and one count of using a firearm during the commission of a felony. Under Virginia law, he was not eligible for parole. He also pled guilty in Spotsylvania County to one count of capital murder, one count of attempted murder, and two counts of using a firearm in the commission of a felony. He received life-without-parole on the murder charges.

In the instant case, Defendant entered a plea of guilty to six counts of first degree murder. During his sentencing hearing in Montgomery County, on November 9, 2006, the Assistant State's Attorney acknowledged that the "defendant has changed," and that he had "grown tremendously since [the time of the murders]."

Sentencing Judge James L. Ryan had previously been provided with Victim Impact Statements from the decedents' families; a Pre-Sentence Investigation report, prepared by an

agent of the Maryland Department of Parole and Probation, to which was attached a letter from Malvo's attorneys; a psychiatric forensic evaluation report by Neil Blumberg, M.D.; and a report prepared by Carmeta Albarus, a licensed social worker, and Denese Shervington, M.D., a forensic psychiatrist. These reports discussed in detail Malvo's upbringing, family life, and how he became associated with co-defendant Muhammad. Judge Ryan was informed that Malvo had earned a high school diploma while in prison; was enrolled in college courses; had a family history of mental disorders; and needed therapy to prevent his suffering from a range of mental disorders while incarcerated. Finally, a pre-sentence report from Virginia, dated March 1, 2004, was also included among the documents for the sentencing judge's review. In that report, Malvo expressed no remorse for the victims or their families.

In addition to the materials provided to Judge Ryan for sentencing, he had the opportunity to hear Malvo's testimony and observe his demeanor at the trial of his co-defendant Muhammad. Malvo's testimony at that trial, with Judge Ryan presiding, described in detail the plot to kill innocent persons in Montgomery County, took up 468 pages of the trial transcript and lasted for most of two days. *Muhammad, supra,* at 218.

At sentencing, Malvo's counsel pointed out that his client had assisted Maryland and Virginia prosecutors, as well as authorities in Arizona, where another shooting victim resided. His co-counsel requested the court to impose concurrent sentences for the six murders, conceding that Malvo would be "locked in a cell for the rest of his life," but that "he has a future, and he'll have to do it from a prison cell in Virginia." Defendant himself described the "stark difference between who I am today and who and what I was in October of 2002," and expressed remorse for his actions.

Judge Ryan noted the assistance Malvo had provided to authorities, saying: "It appears you've changed since you were first taken into custody in 2002." Nevertheless, in his concluding remarks, Judge Ryan observed: "You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. This community, represented by its people and the laws, does not forgive you." Shortly thereafter, Defendant, then 21 years old (although 17 years and eight months at the end of his criminal rampage), was sentenced to six consecutive life-without-parole sentences, consecutive to any other sentences (namely, those in Virginia) then being served.

After sentence was pronounced, Defendant signed a "Notice to the Defendant," informing him that he had the right to file a written request to have his sentence reviewed by a three-judge panel, and also the right to ask the trial court to reconsider his sentence (DE 61). Since he received the maximum sentence, a three-judge panel could only reduce his sentence or keep it the same. Judge Ryan, on a motion for reconsideration, could likewise only reduce the sentence or uphold it. No three-judge panel sentence review was ever requested, and no such hearing was held.

On November 27, 2006, Defendant filed a Motion for Modification or Reduction of Sentence under MD. R. 4-345. That rule permits the trial court to reconsider its sentence for a period of five years. He requested that the motion be held in abeyance until such time as a hearing was requested, and averred that the motion would be supplemented "with information regarding his current status and the basis...to modify and/or reduce the sentence of six consecutive sentences of life imprisonment without parole...." (DE 66).

By order docketed on December 20, 2006, the court agreed to hold the motion in abeyance. No supplements were ever filed by Defendant, however, nor was there a request for hearing. Therefore, on September 18, 2012, the court denied the Motion for Modification or Reduction of Sentence, as it no longer had jurisdiction to grant relief because of the passage of more than five years.

On June 25, 2012, the Supreme Court issued its opinion in *Miller v. Alabama*, 567 U.S. 460 (2012), holding that mandatory life imprisonment without parole for juveniles in most cases violates the Eighth Amendment's prohibition on cruel and unusual punishment. The court ruled that such a penalty is acceptable only in the most uncommon of cases after the sentencing court has determined that the juvenile is "irreparably corrupt[ed]." *Id.* at 479-80. Then, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), the Court provided that this substantive right applies retroactively.

In *Malvo v. Mathena,* 2017 WL 2462188, decided on May 26 of this year, the United States District Court for the Eastern District of Virginia vacated and remanded Malvo's Virginia state sentences, asserting *inter alia* under Note 5 of the slip opinion: "This Court need not determine whether Virginia's penalty scheme is mandatory or discretionary because this Court finds that the rule announced in *Miller*... applies to all situations in which juveniles receive a life-without-parole sentence." The court is informed that the case is now on appeal to the Fourth Circuit.

In light of the holdings in *Miller* and *Montgomery*, Defendant asks this court to correct an illegal sentence pursuant to Eighth Amendment jurisprudence and Article 25 of Maryland's Declaration of Rights ("Article 25"). For the reasons articulated below, Defendant's motion is denied.

Defendant's Motion to Correct Illegal Sentence

Defendant raises three allegations that he believes entitle him to be resentenced. First, he argues that *Miller* and *Montgomery* apply to Maryland's *discretionary* life-without-parole sentencing scheme. Second, it is contended that the provisions of Maryland law requiring a life sentence for homicide offenders violates the Eighth Amendment of the United States Constitution ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). and Article 25 of the Maryland Declaration of Rights ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."). Finally, Defendant contends that the Declaration of Rights provides an alternative state law grounds upon which a court must conclude that his sentences are invalid and illegal.

a. Miller/Montgomery Applies to Maryland's Discretionary Sentencing Scheme and Mandates a New Sentencing Hearing.

Despite Maryland's discretionary life-without-parole sentencing scheme, Defendant avers that his sentences are illegal under *Miller* and *Montgomery*, because the Supreme Court has specifically stated that such a sentence is not permitted by the Constitution unless the juvenile offender has been found to be "irreparably corrupt." *See also Williams v. State*, 220 Md. App. 27, 43, *cert. denied*, 441 Md. 219 (2015) (enhanced penalty improperly imposed is an illegal sentence and may be corrected at any time). He essentially argues that *all* pre-*Miller* life-without-parole sentencings for juveniles fail to meet the standard later announced by *Montgomery*. This is because the Eighth Amendment requires specific consideration of whether the juvenile's crime reflects transient immaturity. *Montgomery, supra,* 136 S. Ct. at 734. *See also McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (even discretionary life sentences must be guided by consideration of age-relevant factors).

That Maryland has a discretionary sentencing scheme is of no consequence, argues Defendant; the substantive rights of children are to be procedurally protected in all states. Defendant posits that the Supreme Court has recently attempted to further explain its holdings in *Miller* on this point. In *Adams v. Alabama,* 136 S. Ct. 1796 (2016), the court vacated and remanded the defendant's case for reconsideration in light of *Montgomery.* In a concurring opinion, Justice Sotomayor emphasized that pre-*Miller* courts, even when handing down discretionary sentences, have "not [had] the benefit of [the Supreme Court's] guidance regarding the diminished culpability of juveniles; and the ways that penological justifications apply to juveniles with lesser force than to adults." *Adams, supra,* 136 S. Ct. at 1800.

Further, Defendant notes that more states are finding that *Miller* applies to discretionary sentencing schemes and invalidating existing life without parole sentences. *See Veal v. State,* 784 S.E. 2d 403 (Ga. 2016) (discretionary life without parole sentence for a minor was illegal because the court did not make a "specific determination that he is irreparably corrupt"); *State v. Valencia,* 370 P. 3d 124 (Ariz. 2016) (discerning that the key feature of *Miller* and *Montgomery* was whether the court took into account how children are different and how those differences counsel against irrevocably sentencing them to lifetime in prison); *Luna v. State,* 2016 OK CR 27, ¶ 14 (applying *Montgomery* and *Miller* to Oklahoma's discretionary sentencing scheme). Like the defendant in *Montgomery,* Malvo requests that he be given the opportunity to show that his crime "did not reflect irreparable corruption." *Montgomery, supra,* at 736-37.

b. Maryland's Homicide Sentencing Scheme is Illegal

Defendant additionally complains that the State's sentencing scheme for juvenile homicide offenders is illegal because a sentencing judge is required to impose a life sentence upon conviction for murder in the first degree, regardless of age or circumstances. *See* MD. CODE ANN., CRIM. LAW§ 2-201. He notes that no statutory guidance exists to assist the sentencing court when imposing a life sentence. The Governor has discretion to deny parole to an inmate serving a life sentence, and there are no established standards taking into account the special circumstances of a juvenile. Accordingly, Defendant characterizes Maryland's sentencing scheme as mandatory, in violation of *Miller* and *Montgomery.*

c. Alternative State Grounds

Defendant believes that *Miller* leaves open the question of whether the Eighth Amendment requires a categorical ban on juvenile life without parole in all cases, as evidenced by its statement that "[b]ecause our holding is sufficient to decide these cases, we do not consider . . . [the] alternative argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles, or at least for those 14 and younger." 567 U.S. at 479. Accordingly, he concludes that consideration of Article 25 of the Declaration of Rights demonstrates that Defendant's sentences constitute cruel and unusual punishment. *But see Dua v. Comcast Cable*, 370 Md. 604, 621 (2002) (holding that a Maryland constitutional provision will not always be interpreted or applied in the same manner as its federal counterpart).

d. Rule 4-345 Motion for Reconsideration of Sentence

Defendant asserts that his six life-without-parole sentences are illegal pursuant to the Eighth Amendment prohibition on cruel or unusual punishment as explicated in *Miller* and *Montgomery*, and that the court may correct an illegal sentence at any time. MD. RULE 4-345(a). Such a correction can occur even if: "(1) no objection was made when the sentence was imposed; (2) the defendant purported to consent to it; or (3) the sentence was not challenged in a timely-filed direct appeal." *Chaney v. State*, 397 Md. 460, 466 (2007). An illegal sentence is one that is "not permitted by law" or otherwise "constitutionally invalid in any other respect." *State v. Wilkins*, 393 Md. 269, 273-75 (2006).

State's Response

Because the Supreme Court's holding in *Miller* explicitly referred to mandatory juvenile life-without-parole sentences, the state avers that the case does not apply where such a penalty is discretionary. Alternatively, the state asserts that even if the analysis is the same for mandatory and discretionary life-without-parole sentence, the trial court fully complied with the current standard for sentencing juvenile offenders.

a. Miller and Montgomery Apply Only to Mandatory Sentencing Schemes

The state objects to the suggestion that *Miller* and *Montgomery*, which are cases involving mandatory life-without-parole sentencing schemes, apply to the discretionary sentencing permitted in Maryland. It avers that it was the mandatory nature of the sentence that violated the Eighth Amendment in *Miller* and *Montgomery*, because such a procedure eliminates the opportunity for the defendant to present, and for the court to consider, mitigating evidence. *Miller*, 567 U.S. at 490. Because judges in Maryland have the discretion to impose a sentence of life with the possibility of parole, the state contends that Defendant's case does not raise the same concerns articulated by the Supreme Court. Additionally, the state notes that in Maryland a judge has the ability to suspend all or part of a defendant's sentence. *See Cathcart v. State*, 397 Md. 320, 327 (2007).

Furthermore, the state reasons that Maryland law already provides that, in every sentencing hearing, a court is required to "tailor the criminal sentence to fit the 'facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background.'" *Jones v. State*, 414 Md. 686, 693-97 (2010); MD. RULE 4-342(f). To that end, the state posits that Defendant already had the opportunity to "face the sentencing body . . . and to explain in his own words the circumstances of the crime as well as his feelings regarding his conduct, culpability, and sentencing." *Shifflett v. State*, 315 Md. 382, 386 (1989) (citations omitted). Thus, the state asserts that Defendant's case is materially different from the mandatory, life-without-parole sentencing regimes discussed in *Miller* and *Montgomery*.

b. *The Sentencing Court Complied with Miller/Montgomery*

The state notes the Supreme Court found in *Montgomery* that *Miller* does not require a specific finding regarding a child's incorrigibility or irrevocable corruption. In reaching this conclusion, the court was "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary" upon State sovereignty. *Montgomery, supra,* at 735. Thus, the state proffers that the only step a court needs to take to comply with *Miller*'s procedural component is to "consider a juvenile offender's youth and attendant characteristics" before determining that life without parole is a proportionate sentence. *Id.*

In this case, the state avers that the sentencing court properly considered all relevant factors when it sentenced Defendant to life without parole.[1] It asserts that there is no doubt that Defendant represents that "rare juvenile offender whose crime reflects irreparable corruption." *Montgomery, supra,* at 734. The court found that Defendant "knowingly, willfully, and voluntarily" committed six "cowardly murders of innocent, defenseless human beings." T. 11/8/06 at 17. It considered mitigating evidence such as the possible influence of Muhammad over Defendant and took into account his age, but nevertheless found that the life-without-parole sentences were just and proportionate.

c. Alternative State Grounds

In opposing Defendant's argument that Article 25 should be read more expansively than the Eighth Amendment, the state asserts that it is to be read *in pari materia* with the Eighth Amendment because they both "were taken virtually verbatim from the English Bill of Rights of 1689." *Walker v. State*, 53 Md. App. 171, 183 (1982). The state notes that Defendant offers no rationale for departing from this precedent nor provides legal support for his assertions. Accordingly, the state maintains that Defendant's sentence violates neither the Eighth Amendment nor Article 25.

Victim Representative's Response

The principal argument advanced by the victim representative Nelson Rivera, husband of the fifth person murdered, Lori Ann Lewis-Rivera, is that the life-without-parole sentence is not illegal. That being the case, the use of a Rule 4-345 motion – which can be filed at any time – to attack a facially valid sentence is improper.

Furthermore, it is contended that expanding the definition of "illegal sentence" would render nugatory the remedies provided to a criminal defendant in the Uniform Post Conviction Procedure Act, codified at MD. CODE ANN., CRIM. PROC. §7-101, *et seq.*, and would encourage incarcerated litigants to challenge their sentences *ad infinitum*, with the ability to file a direct appeal from any adverse judgment. Such a procedure, it is argued, re-victimizes family members

[1] The state notes that the court received evidence including: the facts of the case, a Presentence Investigation Report, Victim-Impact Statements, the defendant's allocution, and the arguments of counsel.

and violates the statutory policy in MD. CODE ANN., CRIM. PROC. §11-1002 (b)(13) that victims are entitled to a speedy disposition of criminal cases, to minimize anxiety and stress.

It is emphasized that Defendant had a number of post-sentencing options available to him, only some of which he has utilized. He has a pending federal *habeas corpus* case in the United States District Court for the District of Maryland, which has been stayed pending exhaustion of his state remedies. He could have, but did not, file a request for sentence review by a three-judge panel, under MD. RULE 4-344. He filed a motion for reconsideration of sentence under MD. RULE 4-345, which was ultimately denied by the court because no request for hearing or disposition was made, and more than five years had elapsed since the filing. He did not seek leave to appeal his plea to the Court of Special Appeals.

Law & Analysis

a. Legality of the Sentence

Before undertaking analysis of the constitutional issues raised by Defendant, the court must decide whether the sentence imposed in this case is illegal, so as to give rise to a motion under Rule 4-345. That rule permits the court to correct an illegal sentence at any time. Historically, motions to correct illegal sentences have been granted only where the illegality inheres in the sentence itself, or the sentence should never have been imposed. *Baker v. State,* 389 Md. 127, 133 (2005).

Thus, the sentence in *Jones v. State,* 384 Md. 669 (2005) was illegal because no verdict was announced in court by the jury, so that it could be hearkened and polled. *State v. Griffiths,* 338 Md. 485 (1995) held that sentences imposed for an offense and its lesser-included crime were prohibited by double jeopardy principles, and thus illegal and subject to a Rule 4-345 motion. *Walczak v. State,* 302 Md. 422 (1985) involved the award of restitution to a victim of a crime for which defendant was not convicted, and thus was illegal. In *Roberts v. Warden of Maryland Penitentiary,* 206 Md. 246 (1955), the court stated, albeit in *dicta,* that a sentence exceeding that permitted by law is illegal.

It is true that in *Evans v. State,* 382 Md. 248 (2004) and *Oken v. State,* 378 Md. 179 (2003), the Court of Appeals reviewed death sentences under Rule 4-345 where, subsequent to the imposition of sentence, a United States Supreme Court decision "might support an argument

that an alleged error of constitutional dimension may have contributed *to the imposition of the death sentence." Baker, supra,* at 134 (emphasis supplied). In this case, of course, Defendant did not receive the death penalty.

Nor is a life-without-parole sentence the functional equivalent of a death sentence. In rejecting a similar claim advanced by the appellant in *Woods v. State,* 315 Md. 591 (1989), the Court of Appeals has stated its disagreement "with the notion that a life sentence without the possibility of parole is, even relatively, the equivalent of death itself." *Id.* at 606-07.

There was nothing inherently illegal about Defendant's sentence. There was no jury trial, and thus no problem as arose in *Jones.* There were no **merger** issues as presented in *Griffiths,* nor issues of restitution like that in *Walczak.* There was also nothing illegal about the length of the sentence as in *Roberts.*

This court is cognizant of the rule laid down in *Montgomery v. Louisiana* that a state court collaterally reviewing a sentence must give retroactive effect to the pronunciation of a new substantive rule of constitutional law. That new substantive rule, however, is that *mandatory* life-without-parole sentences for juveniles are disproportionate sentences which violate the Eighth Amendment. This is so because they deprive the sentencing judge of the ability to consider *any* mitigating circumstances that might otherwise ameliorate the harshest sentence, a case which most assuredly is not present here.

Accordingly, this court rules that Defendant is not entitled to seek review of his sentence under Rule 4-345. It does not opine whether he has another state law remedy. Because it is a virtual certainty that this case will be appealed, the court will address other relevant issues raised by the parties.

b. A Judge is Presumed to Know the Law

Trial judges in Maryland are presumed to know the law and apply it correctly. Failure to recite a particular incantation or mere imprecision of words does not necessarily render a judge's decision erroneous. The judge is not required "to spell out in words every thought and step of logic" taken to reach a particular conclusion. *Dickens v. State,* 175 Md. App. 231, 241 (2007). Numerous appellate decisions of this state reaffirm that maxim.

In *State v. Chaney,* 375 Md. 168 (2003), the failure of a trial judge to acknowledge the existence of a statute permitting suspension of a life sentence for murder was insufficient to infer that he was unaware of his ability to suspend that sentence.

In *Gilliam v. State,* 331 Md. 651, 673 (1993), the trial judge's failure to state the correct standard of proof required to show the voluntariness of a confession was held to not constitute error. *See also Ball v. State,* 347 Md. 156 (1997) (judge presumed to know proper use of victim impact evidence); *Whittlesey v. State,* 340 Md. 30 (1995) (no error by trial judge in failure to state his reasons for overruling a *Batson* challenge); *Dickens v. State, supra* (no error by judge in failing to discuss authentication of text messages that were admitted at trial).

In the case at bar, Judge Ryan was an experienced jurist who served on the Circuit Court bench for 15 years, and would have been well-aware of the options presented to him at sentencing. They ranged from a suspended sentence to life-without-parole. Furthermore, it is presumed that he was aware of the Supreme Court pronouncements on the issue of punishment for juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), which was established law when Malvo's sentence was imposed, the Supreme Court held that capital punishment of individuals under the age of 18 is cruel and unusual punishment and therefore violative of the Eighth Amendment, overruling *Stanford v. Kentucky,* 492 U.S. 361 (1989). The *Roper* court pointed out that juvenile offenders, because of immaturity, are likely to engage in "impetuous and ill-considered actions and decisions;" are more susceptible to negative influences and peer pressure; and that their character is not well-formed, resulting in "transitory" personality traits. As a result, "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 569-70.[2]

While *Roper* was not a life-without-parole case, it is not insignificant that the term "irretrievably depraved character" presages *Miller*'s requirement that the court find "irreparable corruption" before imposing such sentence. Judge Ryan would have been well-aware that a juvenile (albeit one four months from majority) ought to be beyond rehabilitation before life-without-parole could be imposed.

[2] The court respectfully suggests that Justice Sotomayor's suggestion in her *Adams v. Alabama* concurrence (upon which Malvo relies) that pre-*Miller* courts did not have the benefit of the Supreme Court's guidance regarding the diminished culpability of juveniles is belied by this statement, penned by Justice Kennedy more than a year before sentencing took place in the case at bar. It should also be noted that there were other concurring opinions filed in *Adams*, including that of Justice Thomas, joined by Justice Alito, who wrote that by granting the decision to vacate, the court was not addressing "whether petitioner's sentence actually qualifies as a mandatory life without parole sentence." 136 S. Ct. at 1797.

Judge Ryan is also presumed to have knowledge of the Maryland statutory law regarding life-without-parole, and the case law which did not require him to utter any particular phraseology before pronouncing sentence.

c. Were the Life-Without-Parole Sentences in this Case Cruel and Unusual In Light of the Decision in Miller?

Beginning in 2005 the Supreme Court, in a trilogy of cases, held that the Eighth and Fourteenth Amendments forbid imposition of disproportionate sentences on juveniles, which the court seems to define as persons under 18 years of age. First, in *Roper*, discussed above, the court found that the death penalty for a juvenile offender is unconstitutional. In *Graham v. Florida*, 560 U.S. 48 (2010), the court held that the Eighth Amendment prohibits imposition of life without parole for juvenile offenders who committed non-homicide criminal offenses.

Finally, in *Miller v. Alabama, supra*, the Court considered the cases of two 14-year-old offenders who 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. Ultimately, the Court 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." 567 U.S. at 465. In *Montgomery v. Louisiana, supra,* the court concluded that its holding in *Miller* "announced a substantive rule of constitutional law," giving *Miller* retroactive effect. 136 S. Ct. at 736.

While it is understandable that those heartened by the decision believe that *Miller* may someday be extended to *discretionary* life-without-parole sentence, that issue was simply not presented therein for decision, and *Miller*'s explicit holding applies only to *mandatory* life-without-parole sentencing schemes. 567 U.S. at 4650. The suggestion that the ruling applies to discretionary sentences is *dicta.*

In a concurring and dissenting opinion in *Baby v. State,* 404 Md. 220, 276-77, Judge Irma Raker wrote: "Most lawyers recall learning in law school that the term 'holding' refers 'to a rule or principle that decides the case,' the *ratio decidendi* of the case, whereas *dicta* 'typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court [citation omitted].'" The *ratio decidendi* of *Miller* and *Montgomery* was that a *mandatory* life-without-parole requirement for juveniles robbed a trial judge of his or her ability to exercise discretion.

Clearly, Maryland employs a discretionary sentencing scheme. To the extent that Defendant characterizes his life-without-parole sentence as mandatory, his arguments are unconvincing. That the Governor of Maryland has the ability to deny him parole without consideration of the *Miller* factors does not make the judicially-imposed sentence any less discretionary. *See Lomax v. Warden, Maryland Correctional Training Ctr.*, 356 Md. 569, 577 (1999). As required by *Miller*, judges in this state are still able to consider youth and attendant circumstances and can sentence juvenile offenders being tried as adults to sentences that are more lenient than life-without-parole.

There is currently no reported Maryland appellate decision that has passed upon the applicability of *Miller* to Maryland's discretionary life-without-parole for juveniles sentencing scheme. In *State v. Lawson*, 2016 WL 3612773, in the Circuit Court for Baltimore County, a Motion to Correct Illegal Sentence was decided by Judge Robert E. Cahill, Jr., 15 years after the juvenile defendant was convicted of first degree murder. Judge Cahill upheld the life-without-parole sentence imposed by then-Circuit Court Judge Alexander Wright. In denying the defendant's motion, the court found that Judge Wright considered the *Miller* factors in imposing sentence, without discussion of the mandatory v. discretionary aspect of the sentence. That case was appealed to the Court of Special Appeals, where it was submitted on brief in April, 2017. It has not been decided as of the date of this Memorandum Opinion and Order.

Federal and state courts from around the country have considered *Miller* and its applicability to discretionary life-without-parole sentences. Counsel have cited several of them in their memoranda, but not all. Cases finding *Miller* inapplicable to juvenile discretionary life-without-parole sentences include *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (observing that federal circuit courts have "uniformly declined to apply *Miller's* categorical ban to discretionary life sentences"); *Davis v. McCollum*, 798 F.3d 1317 (10th Cir. 2015); *Croft v. Williams*, 773 F.3d 170 (7th Cir. 2014) (ample justification for life-without-parole sentence where defendant's crimes were described by the judge as among the most brutal he had ever seen); *Evans-Garcia v. United States*, 744 F.3d 235 (1st Cir. 2014); *Bell v. Uribe*, 748 F.3d 857 (9th Cir. 2013), *cert. denied*, 135 S.Ct. 1545 (2015); *State v. Houston*, 353 P.3d 55 (Utah 2015); and *Conley v. State*, 972 N.E. 2d 864 (Ind. 2012).

Representative cases holding that *Miller* applies even to discretionary life-without-parole sentences include *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (*but see Croft v. Williams, supra)*; *State v. Valencia*, 2016 WL 1203414 (Ariz.); *Veal v. State*, 784 S.E. 2d 403 (Ga. 2016);

State v. Seats, 865 N.W. 2d 545 (Iowa 2015); and *Commonwealth v. Batts,* 2017 WL 2735411 (Pa.).

The court finds *State v. Houston, supra,* instructive. There, a 17 year-old was convicted of aggravated murder and the jury voted a sentence of life-without-parole. His sentence was challenged on several grounds. In upholding the discretionary sentencing scheme in Utah for juvenile life-without-parole offenders, the Supreme Court of Utah remarked:

> "[T]hough the penological justifications for [life-without-parole] may be diminished for a juvenile compared to an adult, such a sentence is not without justification in our criminal sentencing scheme....[O]ur statutory scheme enables the kind of individualized sentencing determination that the Supreme Court has deemed necessary for serious offenses. Utah [law] permits the sentencer to consider any and all relevant factors which would affect the sentencing determination....[A] great majority of states as well as the federal system permit [life-without parole] sentences for juveniles while only six jurisdictions affirmatively prohibit them. In looking to these as an indication of society's standards, we cannot conclude that the 'national consensus' favors the prohibition of [life-without-parole] for juveniles convicted of homicide." *Id.* at 75-76.
>
> [W]here, as here, we find no constitutional violation, we may not "substitute our judgment for that of the legislature regarding the wisdom of a particular punishment [citation omitted]." *Id.* at 77.

State v. Houston is in accord with the law of this state, as represented by the following language from *Phipps v. State,* 39 Md. App. 206, 212 (1978):

> The validity of legislatively determined punishment is presumed [citation omitted] and courts "may not require" that "a democratically elected legislature" enact the least severe possible penalty as the sanction for a crime. As long as the punishment that is decreed conforms "with the basic concept of human dignity [citation omitted] and is neither "cruelly inhumane [n]or disproportionate [citation omitted] to the offense, there is no violation of the Eighth Amendment [citation omitted], nor of the Maryland Declaration of Rights, Articles 16 and 25.

In reaching its decision in *Miller,* the Supreme Court heavily relied upon its decisions in *Roper* and *Graham*. Summarizing those two cases, the court found five factors that a mandatory sentencing scheme prevents a court from considering. Those factors are:

1. A defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."

2. A defendant's "family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."

3. "[T]he circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him."

4. **Whether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist** his own attorneys."

5. "[T]he possibility of rehabilitation . . ."

567 U.S. at 477.

Miller mandates an inquiry into whether the sentencing court availed itself of the opportunity to consider those factors and determine "how those differences counsel against irrevocably sentencing [the particular juvenile offender] to a lifetime in prison." *Id.* at 480. The holding does not "categorically bar a penalty for a class of offenders or a type of crime." *Id.* at 483. "Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attending characteristics—before imposing a particular penalty." *Id.*

"*Miller*'s substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735. A court must consider the "penological justifications for life without parole . . . in light of the distinctive attributes of youth." *Id.* at 734. In other words, when evaluating the considerations outlined in *Miller*, a court cannot sentence a juvenile homicide offender to a life-without-parole sentence unless then defendant is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (citing *Miller*, 567 U.S. at 479-80).

Miller does not mandate that a judge make a specific factual finding that adopts the verbiage of *Miller* or *Montgomery*. Rather, the judge needs to only consider "the [child's] diminished culpability and heightened capacity for change." *Montgomery*, 136 S. Ct. at 733. An examination of the record considered by Judge Ryan is appropriate to determine if the requirements of *Miller* and *Montgomery* were met.

The first factor Judge Ryan considered was Defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. At the time of the last murder in this case, Defendant was 17 years old, roughly four months shy of turning 18. The sister of one of the victims spoke

at the sentencing hearing, telling Defendant "I say to you, Mr. Malvo, you were old enough to know right from wrong." T. 11/8/06, at 5-6. Judge Ryan stated that he was aware of the apparent influence that John Allen Muhammad had over Defendant as a youth. *Id.* at 17. Defendant's actions were not the result of a 14 year-old's lesser-crime-gone-wrong as was seen in *Miller*. Instead, the facts of the case showed ample evidence of planning and premeditation, and the court expressly found that Defendant "knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings." *Id.* Thus, the court expressly considered Defendant's youth in sentencing him, finding that it did not absolve him from the utmost culpability for his crimes.

The second factor considered was defendant's "family and home environment that surround[ed] him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Miller*, 567 U.S. at 477. The court received a Presentence Investigation Report and acknowledged that "as a child, [Defendant] had no one to establish values or foundations" for him. T. 11/8/06, at 17. Attached to that Presentence Investigation Report was a letter from Defendant's attorneys, a Virginia Presentence Investigation Report, and reports of two medical doctors and a licensed social worker totaling nearly 30 pages. In their letter to the court, Malvo's attorneys described the medical reports as "incredibly germane to Lee's development, culpability, and future." As stated above, Judge Ryan was completely aware of the influence that Muhammad had over Defendant and that his "chances for a successful life became worse than they already were." T. 11/8/06, at 17. Despite these considerations, Judge Ryan determined that life without parole on each count was the appropriate sentence for Defendant.

Third, Judge Ryan had to consider "the circumstances of the homicide offense, including the extent of [Defendant's] participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 567 U.S. at 477. There is no doubt that the court appreciated the circumstances surrounding commission of Defendant's crimes. From the state's proffer at the time of Defendant's plea hearing, and Defendant's testimony at the Muhammad trial, the judge knew that Defendant and Muhammad had devised an elaborate plan to terrorize the citizens of Montgomery County and surrounding jurisdictions. Judge Ryan described Defendant's actions as "cowardly murders of innocent, defenseless human beings." T. 11/8/06, at 17. The court understood that Defendant had willfully participated in what many have characterized as the most heinous acts ever committed in the county.

The fourth factor is "[w]hether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller*, 567 U.S. at 477-78. The court acknowledged that Defendant took steps to aid authorities by offering to provide information and cooperation in Muhammad's trial and that his testimony "made these prosecutions worthwhile." T. 11/8/06, at 16. Judge Ryan went so far as to commend the Defendant for his "acceptance of guilt and voluntary assistance without any promise of leniency." *Id.* at 17. Further, there is no indication on the record or in Defendant's motion that he was unable to assist his own attorneys. The court simply felt that Defendant's assistance was not enough to mitigate his sentence.

Finally, the court was charged with inquiry into "the possibility of rehabilitation." *Miller*, 567 U.S. at 478. Judge Ryan acknowledged that Defendant "could have been somebody different," and that he had "shown remorse and . . . asked for forgiveness." T. 11/8/06, at 17. Nonetheless, he also concluded that "Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. *This community, represented by its people and the laws, does not forgive you.*" *Id.* (emphasis supplied).

Unlike the situation presented in *Miller*, Defendant, his lawyers and experts had every reason and opportunity to present mitigating information to the court. While he did not employ the precise phrasing of the Supreme Court in *Miller* and *Montgomery*, Judge Ryan clearly concluded that Defendant was among the most uncommon of juvenile offenders, deserving of a lifetime of imprisonment without the possibility of parole. He expressly told Defendant that he wanted the sheriffs "to remove you from this County and State, and return you to where you came from." T. 11/8/06, at 17. Obviously, even taking into consideration Defendant's acceptance of responsibility, the court determined that it would be inappropriate for him ever to return to this community.

A juvenile convicted of murder in Maryland has numerous procedural remedies available to him after trial or plea. Defendant Malvo was afforded procedural and substantive due process throughout his proceedings in Maryland, and Judge Ryan had the discretion to impose what he considered to be the appropriate sentence, including authority to suspend all or part of the time imposed. Defendant Malvo had the right to appeal to the Maryland Court of Special Appeals if he had been convicted after trial and, if permitted, to the Court of Appeals. Even after the guilty

plea, he could have sought leave to appeal on limited issues, including competency of counsel, voluntariness, and the legality of the sentence imposed.

As previously discussed, Malvo could have asked three judges of the court to review the sentence which, in this case, could not have been increased. The trial judge also had the power to reduce or modify the sentence, for a period of five years, but that remedy was never pursued. Malvo may also seek relief under the Post-Conviction Procedure Act. He also has the ability to ask for a pardon or remission of sentence from the Governor. MD. CODE ANN., CORR. SERVS §7-601(a).

As a final matter, Defendant asserts that Article 25 provides him more expansive rights than those granted under the Eighth Amendment. He cites no authority for his contention and only baldly implies that there is a categorical ban on juvenile life-without-parole sentences. This is simply not the state of the law in Maryland, and Defendant offers no reasons to depart from judicial precedent that Article 25 should be interpreted *in pari materia* with the Eighth Amendment. *See Walker v. State*, 53 Md. App. 171, 183 (1982).

Conclusion

This court finds that Defendant is not entitled to seek review of his sentence under MD. R. 4-345, as the sentence imposed was substantively and procedurally legal under the law of this state. Whether a remedy exists under the Post-Conviction Procedure Act or by some other mode is not before the court.

The six consecutive life-without-parole sentences were imposed after a full consideration of Defendant's physical, mental, and emotional state. Two presentence investigations, reports of medical doctors and a licensed social worker, together with Victim Impact Statements were presented to the court for its consideration. Both sides allocuted for what they thought was an appropriate sentence, and defense counsel never requested imposition of any sentence other than life.

Judge Ryan is presumed to have known the law, including the juvenile/adult sentencing dichotomy described in *Roper v. Simmons* that "[juveniles struggling to find their identity make it] less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character", as well as Maryland statutory considerations, at the time he imposed the sentence. *Miller* and *Montgomery* applied only to mandatory life-without-parole

sentences, and statements suggesting an expansion of that rule to discretionary sentences are *dicta.*

Even if *Miller* and *Montgomery* apply to discretionary life-without-parole sentences, however, no specific *mantra* is required of the judge in rendering his sentence. In this case, Judge Ryan affirmatively considered all the relevant factors at play and the plain import of his words at the time of sentencing was that Defendant is "irreparably corrupted."

For these reasons, it is this 15th day of August, 2017, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that Defendant's Motion to Correct Illegal Sentence is **DENIED.**

Robert A Greenberg

ROBERT A. GREENBERG, Judge
Circuit Court for Montgomery County, Maryland

LEE BOYD MALVO,	IN THE
Appellant	COURT OF SPECIAL APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2017
Appellee	No. 1436

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of January, 2018, three copies of the Appellant's Brief and Appendix were delivered to

Carrie J. Williams
Chief Counsel
Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202

Three courtesy copies of Appellant's Brief and Appendix were also mailed, postage pre-paid, to

Russell P. Butler, Esq.,
Victor Stone, Esq., and
Kristin M. Nuss, Esq.
Maryland Crime Victims Resource Center, Inc.
1001 Prince George's Blvd., Suite 750
Upper Marlboro, Maryland 20774

Kiran Iyer

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2017

NO. 1436

LEE BOYD MALVO,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY
(THE HONORABLE ROBERT A. GREENBERG PRESIDING)

APPELLANT'S BRIEF AND APPENDIX

PAUL B. DEWOLFE
Public Defender

KIRAN IYER
Assistant Public Defender

Office of the Public Defender
Appellate Division
6 Saint Paul Street, Suite 1302
Baltimore, Maryland 21202-1608
P: (410) 767-0668
F: (410) 333-8801
KIyer@opd.state.md.us
CPF #1702020011

Counsel for Appellant

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IN THE
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APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY
(THE HONORABLE ROBERT A. GREENBERG PRESIDING)

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Appellant, Lee Boyd Malvo, was charged by indictment in the Circuit Court for Montgomery County with six counts of first degree murder. On October 10, 2006, Mr. Malvo pleaded guilty to all counts. The Honorable James L. Ryan sentenced him on November 8, 2006 to six life without parole sentences to run consecutively to each other and to the sentences previously imposed in other jurisdictions. Mr. Malvo

filed a motion to correct illegal sentences on January 12, 2017. Following a hearing on June 15, 2017, the Honorable Robert A. Greenberg denied the motion. This appeal followed.

QUESTION PRESENTED

Did the trial court err in denying Mr. Malvo's motion to correct illegal sentences?

STATEMENT OF FACTS

A. Facts Underlying the Convictions

Mr. Malvo was seventeen years old when he committed his offenses in Montgomery County. (T2 10).[1] The prosecutor proffered facts in support of his guilty plea:

> Mr. Lee Boyd Malvo is pleading guilty to six counts of first degree murder for crimes that he and his co-defendant John Allen Muhammad committed here in Montgomery County, Maryland. Had the case gone to trial, the evidence would have shown that these six murders occurred on three separate days in October of 2002. These victims were James Martin who was killed on October 2nd, James Buchanan who was killed on October 3rd, Premkumar Walekar was also killed on October 3rd, Maria Sarah Ramos killed on October 3rd, Lori Ann Lewis-Rivera killed on October 3rd and finally Conrad Johnson who was murdered on October 22nd.
>
> These six murders were part of a larger robbery, extortion and killing spree that spanned from September the 5th of 2002 to October the 24th of 2002 in which six other victims were

[1] Transcript references are as follows: "T1" for the October 10, 2006 plea hearing; "T2" for the November 8, 2006 sentencing hearing; "T3" for the June 15, 2017 hearing on the motion to correct illegal sentences.

> murdered and six more victims suffered gunshot wounds as a result of the defendant's actions. These other shootings occurred elsewhere in Maryland, Virginia, Washington, D.C., Alabama and Louisiana.

(T1 12–13).

The prosecutor proffered that the victims in Montgomery County were shot by a high-velocity rifle fired from a distance. (T1 13–17). She also described a series of murders and robberies carried out by Mr. Muhammad and Mr. Malvo in other jurisdictions. (T1 19–23).[2] After Mr. Malvo was arrested on October 24, 2002, and transferred to Fairfax County, Virginia, he "spoke to investigators at length":

> At that time he claimed to be the shooter in each of the October ... 2002 crimes. He had been instructed to accept responsibility for the shootings by Muhammad who told Mr. Malvo that as a juvenile he would be less likely to get the death penalty. Subsequently however as outlined in his testimony at the trial of John Allen Muhammad, Mr. Malvo described the origins and the motive for the scheme that had been made up by Mr. Muhammad.

---

[2] Mr. Muhammad was convicted of capital murder in Virginia in 2003 and executed in 2009: *see Malvo v. Mathena*, 259 F.Supp.3d 321, 324–325 (D.Md.2017). In 2003, Mr. Malvo was sentenced in two different proceedings in Virginia to a total of four terms of life imprisonment without parole: *see Malvo v. Mathena*, 254 F.Supp.3d 820, 823 (E.D.Va.2017). On May 26, 2017, a federal judge vacated those sentences and ordered that Mr. Malvo be resentenced in accordance with *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). *Id.* at 835. That decision is currently under appeal in the Fourth Circuit Court of Appeals (*Malvo v. Mathena*, No. 17–6746) with argument scheduled for January 23, 2018.

> He described how he and Muhammad came to Montgomery County where they drove around scouting areas that would be good places to shoot. ... Mr. Malvo also testified that in all but three of the shootings he acted as the spotter, sitting in the front passenger seat of the Caprice while Muhammad went into the trunk where he fired the .223 Bushmaster rifle at the victims.
>
> In three of the shootings, Mr. Malvo fired the shots from outside the car while he remained in communication with Muhammad. These were the non-fatal shootings of Iran Brown and Jeffrey Hopper and the murder of Conrad Johnson.

(T1 24–25).

Mr. Malvo agreed to the State's proffer "as to the six first degree murders to which he'[d] pled." (T1 25). The court accepted his plea and convicted him of all offenses. (T1 26).

B. Sentencing Hearing

The State sought that Mr. Malvo be sentenced to six consecutive life sentences without the possibility of parole. (T1 4–5). The sentencing judge was provided with Victim Impact Statements from the families, a pre-sentence investigation (PSI) report, and reports from two psychiatrists and a social worker who examined Mr. Malvo. Ms. Carmeta Albarus, licensed social worker, and Dr. Denese Shirvington, Director of Psychiatry at Harlem Hospital, observed in their report that "with the mental health intervention that [Mr. Malvo] has received, he currently exhibits evidence of remission and tremendous remorse ... [h]e has successfully detangled himself from

Muhammad's psychological hold." (Report of CVA Consulting Services, Inc., Oct. 25 2006, at 19). The PSI did not specifically address Mr. Malvo's capacity for rehabilitation.

At the hearing, the State emphasized the "incredible loss inflicted upon the victims' families" and the fear and mistrust created by the attacks. (T2 9). Nevertheless, it acknowledged that Mr. Malvo had changed significantly in the four years since the shootings:

> [W]e would be remiss ... if we didn't acknowledge [what] has been so ably demonstrated by the defendant's counsel in their filings, and that is that the *defendant has changed. He's expressed what I'm sure is genuine remorse. He cooperated with our prosecution of Mr. Muhammad,* and then provided this Court and the community, through his testimony in that trial, a much better and more detailed understanding of their terrible crimes and their motivations.
>
> These acts of contrition in the testimony advanced the healing process and the closure process for the victims' families and for our entire community in Montgomery County.
>
> I think it's fair to say that before the Montgomery County trial of Mr. Muhammad, we certainly knew the what, but it was only after Mr. Malvo's testimony that we knew so much more about the how and the why. And there is value in that contribution, and this Court must acknowledge it.
>
> Mr. Malvo, in many ways, is a tragic figure ... His crimes, which he perpetrated as a cognizant, thinking, and deliberate 17-year-old – and those points are important, Your Honor – were brutal. *Yet, he has grown tremendously since then.*
>
> It's not lost upon the State that he was under the sway of a truly evil man who infused a 17-year-old with the ideology of hate, an ideology, it appears that Mr. Malvo has *now escaped from.*

> He's probably most tragic, Your Honor, because he can add his name to those long list of names, of those persons whose lives Mr. Muhammad destroyed.
>
> Young man, we're still left with a terrible loss of six lives in the worst criminal act ever perpetrated upon our community, and with the fact that *as a 17-year-old, without mental defect, this defendant must bear full responsibility for his criminal actions.*

(T2 9–11) (emphasis added).

The defense sought that Mr. Malvo receive sentences that ran concurrently to each other and to his life without parole sentences in Virginia. (T2 12). Defense counsel argued that Mr. Muhammad took Mr. Malvo "under his wing" "[a]t the tender age of 15 or 16" and "turned him into a killing machine." (T2 12–13). Counsel observed that Mr. Malvo "accepted full and unmitigated responsibility" for his actions, had "made a sea change of difference in his life," and was "trying to make some amends for [his] egregious conduct." (T2 13–14).

Mr. Malvo exercised his right of allocution:

> I know that I destroyed many dreams and many more lives, and that each of you relive this every morning, every birthday, every anniversary, every time you look in your children's eyes. You relive it, and I'm reminded of your loss in the countless many ways every day. I also know that nothing I can or will ever say will change that fact.
>
> As to the question of why John Allen Muhammad chose me and directed me to kill and murder innocent people, chosen at random by us, is a question that I'll never be able to answer. What I can

tell you is that there's a stark difference between who I am today and who and what I was in October of 2002.

For a long time, I was unwilling and even incapable of comprehending just how terribly I've affected so many lives. I am truly sorry, grieved, and ashamed of what I've done to the families and friends of Mr. Martin, Mr. Buchanan, Mr. Walekar, Ms. Ramos, Mrs. Lewis Rivera, and Mr. Conrad Johnson. I accept responsibility for killing your mother, father, sister, brother, son, daughter, wife, husband, and friend.

For weeks and months, the image that haunted me the most was that of Conrad Johnson. I thought of his sons who, just for once, would like to play basketball with their father, just one more time to see his face and hear his voice. ... [Y]ou just can't explain away the pain this absence and emptiness causes a child.

The holidays are here and with it the memories, and to know that I robbed you and them of that opportunity is something for which I'll never be able to forgive myself. It is pure folly for me to think that they or anyone can forgive me for taking the lives of their loved one.

(T2 14–16).

The court then imposed sentence:

Now, young man, while you were in our local jail waiting for your case to be heard, you contacted the prosecutors and offered to give them information and cooperation in the trial of John Allen Muhammad.

You testified at his trial. Your testimony appeared to be truthful and was helpful to the prosecution. *The information and evidence you revealed, alone, made these prosecutions worthwhile.*

You've also given local prosecutors ... and law enforcement in other jurisdictions helpful information to close other investigations in this and other states. You should be commended for your acceptance of guilt and voluntary assistance without any promise of leniency.

It appears you've changed since you were first taken into custody in 2002. As a child, you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him, your chances for a successful life became worse than they already were.

You could have been somebody different. You could have been better. What you are, however, is a convicted murderer. You will think about that every day for the rest of your life. *You knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless, human beings.*

You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. *This community, represented by its people and the laws, does not forgive you.*

You've been held accountable for the crimes you've committed here. You will receive the maximum sentence allowed by the law of this State.

(T2 16–17) (App 2–3) (emphasis added).

C. Motion to Correct Illegal Sentences

Mr. Malvo filed a motion alleging that his sentences were unconstitutional under the Eighth Amendment to the United States Constitution[3] and Article 25 of the Maryland Declaration of Rights[4] and

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[3] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

[4] Article 25 provides: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."

thereby illegal.[5] Relying on *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), he argued that his life without parole sentences were illegal because the sentencing court did not find him to be irreparably corrupt and did not consider the mitigating qualities of his youth. (T3 7, 11, 42, 44) (Motion to Correct Illegal Sentence and Request for Hearing, filed Jan. 12 2017, at 3, 5–8, 10). He also alleged that juvenile life without parole sentences are categorically unconstitutional under Article 25. *Id.* at 12–13.

The circuit court issued a written opinion denying the motion on August 15, 2017. The court concluded that: (1) the challenge was not cognizable under Maryland Rule 4–345(a) as "[t]here was nothing inherently illegal about Defendant's sentence;" (App 14–15) (2) the sentencing judge should be presumed to have known "that a juvenile ... ought to be beyond rehabilitation before life-without-parole could be imposed;" (App 15–16) (3) *Miller* does not apply to the discretionary life without parole sentences imposed here; (App 23–24) (4) even if *Miller* did apply, the sentencing judge "affirmatively considered the relevant factors"; (App 24) and (5) Article 25 does not support a categorical ban on juvenile life without parole. (App 23).

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[5] A federal judge stayed Mr. Malvo's federal habeas proceedings in Maryland until he exhausted his state remedies: *Malvo v. Mathena*, 259 F.Supp.3d 321 (D.Md.2017).

ARGUMENT

THE TRIAL COURT ERRED IN DENYING MR. MALVO'S MOTION TO CORRECT ILLEGAL SENTENCES.

I. Mr. Malvo's Claims Are Cognizable Under Rule 4-345(a).

Rule 4–345(a) provides that "[t]he court may correct an illegal sentence at any time." "'If a sentence is "illegal" ..., the defendant may file a motion in the trial court to "correct" it,' even if the defendant did not object when the sentence was imposed, purported to consent to it, or failed to challenge the sentence on direct appeal." *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). *See also Bowers v. State*, 227 Md.App. 310, 316 (2016) ("a guilty plea [does] not alter the illegality of the sentence imposed"). An illegal sentence is "one in which the illegality 'inheres in the sentence itself; i.e., there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.'" *Colvin*, 450 Md. at 725 (quoting *Chaney*, 397 Md. at 466). A "constitutionally invalid" sentence is illegal. *Pollard v. State*, 394 Md. 40, 42 (2006).

Mr. Malvo raises three challenges to the constitutional validity of his life without parole sentences under Rule 4–345(a). First, his sentences violated the Eighth Amendment, as he was not the "rare juvenile offender whose crime[s] reflect[ed] irreparable corruption." *Miller*, 567 U.S. at 479–480 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). *Miller* announced a "substantive rule" of constitutional law: "life without parole [is] an unconstitutional penalty for 'a class of defendants because of their status' – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S.Ct. at 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). Mr. Malvo's crimes did not reflect irreparable corruption, rendering his "punishment disproportionate under the Eighth Amendment." *Montgomery*, 136 S.Ct. at 735. And he was deprived of his constitutional entitlement to have his "youth and attendant characteristics" considered by the sentencing judge. *Montgomery*, 136 S.Ct. at 734. Accordingly, his Eighth Amendment challenge is cognizable under Rule 4–345(a).[6] *See McCullough v. State*, 233 Md.App. 702, 745 (2017), *cert. granted*, 456 Md. 82 (2017) (juvenile non-homicide

[6] *Montgomery* itself involved an appeal from the denial of a motion to correct illegal sentence. 136 S.Ct. at 726–727. Art. 882(A) of the Louisiana Code of Criminal Procedure provided that "[a]n illegal sentence may be corrected at any time by the court that imposed the sentence." *Id.* at 726.

offender's Eighth Amendment challenge to Maryland's parole system cognizable under Rule 4–345(a)); *Randall Book Corp v. State*, 316 Md. 315, 322 (1989) (Eighth Amendment challenge to sentences cognizable under Rule 4–345(a)). Second, his sentences violated Article 25 of the Declaration of Rights, which categorically bars life without parole sentences for *all* juvenile offenders. *See Miles v. State*, 435 Md. 540, 545 (2013) ("issue of substantive constitutional law is within Rule 4–345(a)"); *Johnson v. State*, 213 Md.App. 582, 585 (2013) (illegal sentence includes a sentence that "constitutes cruel and unusual punishment or violates other constitutional requirements.") Third, even if juvenile life without parole sentences are constitutional under Maryland law, the sentencing judge had no power to impose Mr. Malvo's sentences without making the predicate finding that his crimes reflected irreparable corruption. *See Johnson v. State*, 427 Md. 356, 371 (2012) (claim going to "trial court's power or authority" cognizable under Rule 4–345(a)); *Williams v. State*, 220 Md.App. 27, 43 (2014) ("an enhanced penalty imposed improperly is an illegal sentence"); *Parker v. State*, 185 Md.App. 399, 415, 421 (2009) (enhanced sentence illegal where jury did not determine whether predicate facts for enhancement existed).

In reviewing the legality of a sentence, this Court employs a de novo standard of review. *Bishop v. State*, 218 Md. App. 472, 504 (2014), *cert. denied*, 441 Md. 218 (2015).

II. Mr. Malvo's Sentences Violated the Eighth Amendment to the United States Constitution.

A. *Miller* Applies to Mr. Malvo's Life Sentences.

Mr. Malvo was sentenced to life without parole in 2006 under Maryland's discretionary sentencing scheme. *See* Maryland Code, Criminal Law Article § 2–201(b) (2002) (person convicted of first degree murder could be sentenced to death, life without parole, or life). Although the General Assembly abolished the death penalty for juvenile offenders in 1987, *see Lovell v. State*, 347 Md. 623, 656–657 (1997), the sentencing court retained "virtually boundless discretion" in deciding whether to impose life without parole or life. *Woods v. State*, 315 Md. 591, 604 (1989) (quoting *Smith v. State*, 308 Md. 162, 166 (1986)). In a non-capital case, the court was not required to "consider an accused's youthful age to be a mitigating factor at sentencing." *Mack v. State*, 69 Md.App. 245, 255 (1986), *cert. denied*, 309 Md. 48 (1987).

In a trilogy of recent cases, the Supreme Court has reshaped juvenile sentencing law by recognizing that "children are constitutionally different from adults for purposes of sentencing."

Miller, 567 U.S. at 471. In *Roper*, the Court held that the Eighth Amendment bars capital punishment for children. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that the Amendment prohibits life without parole for a child who committed a non-homicide offense. And in *Miller*, which was held to have retroactive effect in *Montgomery*, the Court held that the Amendment barred mandatory life without parole for a juvenile homicide offender. Those cases relied on science establishing "three significant gaps between juveniles and adults":

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Miller, 567 U.S. at 460 (citations omitted).

Miller prohibits a juvenile homicide offender from being sentenced to life without parole unless the sentencer "take[s] into account how children are different, and *how those differences counsel against* irrevocably sentencing them to a lifetime in prison." *Id.* at 480 (emphasis added). This requirement applies with full force to Maryland's discretionary sentencing scheme. As the Seventh Circuit

recognized in *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir.2016), "[t]he relevance to sentencing of 'children are different' ... cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors." Mandatory penalty schemes, by their nature, "preclude[] consideration of [the juvenile's] chronological age and its hallmark features." *Miller*, 567 U.S. at 477. But *the Miller inquiry* applies to <u>all</u> juvenile life without parole sentences:

> To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes ... But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. So Graham's reasoning implicates *any life-without-parole sentence* imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.
>
> Most fundamentally, *Graham* insists that *youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.* ... the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. ... "An offender's age," we made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." ...
>
> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a

> juvenile offender. That 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.*

Id. at 473–474 (emphasis added) (citations omitted).

Although some courts have confined *Miller*'s application to mandatory life sentences, *see e.g., Arredondo v. State*, 406 S.W.3d 300, 306 (Tex.App.2013), the "greater weight of authority has concluded that *Miller* and *Montgomery* send an unequivocal message: Life sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." *People v. Holman*, — Ill. —, Supreme Court of Illinois, No. 120655, 2017 WL 4173340 (filed September 21, 2017). *See also Malvo v. Mathena*, 254 F.Supp.3d 820, 828 (E.D.Va.2017) ("while [the] Eighth Amendment right can be violated by any sentencing judge, it is necessarily violated by every sentencing judge operating under a mandatory penalty scheme") (emphasis in original); *Steilman v. Michael*, — Mont. —, Supreme Court of Montana, No. 16-0328, 2017 WL 6348119 (filed December 13, 2017) ("the aspect that is cruel and unusual for juvenile offenders is the sentence of life without parole itself, not whether the scheme under which the sentence is imposed is mandatory"); *Luna v.*

State, 387 P.3d 956, 961 (Okla.Crim.App.2016) ("there is no genuine question that the rule in *Miller* as broadened in *Montgomery* rendered a life without parole sentence constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term," unless the sentencer takes into account how children are different); *State v. Riley*, 110 A.3d 1205, 1213 (Conn.2015) ("*Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant"); *Landrum v. State*, 192 So.3d 459, 460, 466–467 (Fla.2016) (restricting *Miller* to mandatory sentences "would mean that sentencing juveniles to life imprisonment would not be, as the Supreme Court has stated in its juvenile sentencing precedent, 'rare' and 'uncommon'"); *Veal v. State*, 784 S.E.2d 403, 410–412 (Ga.2016) (*Montgomery* clarifies that *Miller* applies to non-mandatory sentences).

Any doubt about *Miller*'s application to discretionary penalty schemes was dispelled by *Montgomery*. *See Landrum*, 192 So.3d at 467 ("*Montgomery* clarified that the *Miller* Court had no intention of limiting its rule of requiring individualized sentencing for juvenile offenders only to mandatorily-imposed sentences.") The Supreme Court explained that *Miller* "held that a juvenile convicted of a homicide

offense could not be sentenced to life in prison without parole *absent consideration* of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Montgomery*, 136 S.Ct. at 725 (emphasis added). As such, *Miller* is not satisfied by merely vesting the sentencing judge with discretion: a "hearing where 'youth and its attendant characteristics' are *considered* as sentencing factors is necessary." *Id.* at 735 (quoting *Miller*, 567 U.S. at 465) (emphasis added). And "[e]ven 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 crimes reflects 'unfortunate yet transient immaturity.'" *Id.* at 734 (quoting *Miller*, 567 U.S. at 479). Thus, the same rule applies to mandatory and discretionary sentencing schemes: juveniles are entitled to consideration of the mitigating qualities of youth and a determination of irreparable corruption before being sentenced to life without parole. Accordingly, the Supreme Court in *Tatum v. Arizona*, 137 S.Ct. 11 (Mem) (2016) granted petitions for certiorari filed by juveniles sentenced to life without parole under Arizona's *discretionary* sentencing scheme, vacated the judgments, and remanded for further consideration in light of *Montgomery*. *Id.* at 13.

B. Mr. Malvo's Sentences Did Not Comply With *Miller*.

Miller requires sentencers to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. The Court identified five relevant considerations ("the *Miller* factors"): (1) the "chronological age" of the youth and "its hallmark features – among them immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the "family and home environment" that surrounded the youth "from which he cannot usually extricate himself"; (3) "the circumstances of the homicide offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected [the youth]"; (4) the "incompetencies associated with youth—for example, [the youth's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the youth's] incapacity to assist [the youth's] own attorneys"; and (5) "the possibility of rehabilitation." *Id.* at 477–478. *See People v. Gutierrez*, 324 P.3d 245, 269 (Cal.2014) ("the emerging body of post-*Miller* case law has uniformly held that a sentencing court must consider the [*Miller*] factors ... before imposing life without parole.") But "*Miller* ... did more than require a sentencer to consider a juvenile offender's youth before

imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S.Ct. at 734 (quoting *Miller*, 567 U.S. at 472). Accordingly, the court must "consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison." *Montgomery*, 136 S.Ct. at 726 (quoting *Miller*, 567 U.S. at 479). And "[e]ven 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.'" *Montgomery*, 136 S.Ct. at 734 (quoting *Miller*, 567 U.S. at 479). Thus, *Miller* tilts the scales against the imposition of life without parole, prohibiting this sentence "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S.Ct. at 734. *See also Riley*, 110 A.3d at 1214 ("the mitigating factors of youth establish, in effect, a *presumption* against imposing [life without parole] that must be overcome by evidence of unusual circumstances") (emphasis added).

In short, a juvenile offender cannot be sentenced to life without parole unless the sentencing court takes into account the distinctive attributes of youth but nevertheless determines, correctly, that the child is among the rarest of juvenile offenders whose crimes reflect

"permanent incorrigibility." *Montgomery*, 136 S.Ct. at 734. Here, the record shows that Mr. Malvo was not permanently incorrigible, rendering his sentences illegal. As the State acknowledged at the sentencing hearing, Mr. Malvo had "changed" and "grown tremendously" in the four years since he committed his crimes, and "escaped" from the sway of Mr. Muhammad's hateful ideology. (T2 9–10). Accordingly, the judge did not conclude that Mr. Malvo was beyond rehabilitation. Instead, he acknowledged Mr. Malvo's remorse, commended him for his voluntary cooperation in the prosecution of Mr. Muhammad, and observed that he had "changed since [he was] first taken into custody in 2002." (T2 17) (App 3). The finding that Mr. Malvo had "changed" is flatly inconsistent with the determination of *permanent* incorrigibility required to sentence a juvenile to life without parole. *See* Black's Law Dictionary (10th ed.2014) (defining "incorrigible" as "[i]ncapable of being reformed"). Given this finding, Mr. Malvo's life without parole sentences were unconstitutional under *Miller*, and the maximum sentences that could be imposed on remand are life *with* parole. *See Commonwealth v. Batts*, 163 A.3d 410, 433, 435–437, 439 (Pa.2017) (where trial court found that defendant had "demonstrated some capacity for change" and that rehabilitation was possible, his life without parole sentence was illegal, and he was

entitled upon resentencing to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

Mr. Malvo's sentences were also illegal because Judge Ryan failed to conduct the inquiry mandated by *Miller*. Under Maryland law in 2006 (see Argument II.A, *supra*), the sentencing judge had "virtually boundless discretion" in deciding whether to impose life without parole. *Woods*, 315 Md. at 604. The court was not required to consider the offender's age, and even if it did so, it was not obliged to treat youth as a mitigating factor. *Mack*, 69 Md.App. at 253–255. *Compare Miller*, 567 U.S. at 480 (sentencer must take into account how the distinctive attributes of youth "counsel against" imposing life without parole). Although the court was required to "consider" a PSI before imposing life without parole, Maryland Code, Correctional Services Article § 6–112(c)(3) (1999, 2006 Supp.), there was no requirement that the report address the defendant's youth or rehabilitative prospects.[7] And critically, even if the court had the necessary information, it did not have to answer the fundamental question under *Miller*: Did the crimes reflect permanent incorrigibility or transient immaturity?

[7] Thus, Mr. Malvo's PSI did not acknowledge that he was a juvenile offender, and did not address his amenability to rehabilitation.

Accordingly, Mr. Malvo's sentences could only be valid if the sentencing judge, by happenstance, anticipated and fulfilled the requirements of *Miller*. Quite the contrary: the court did not consider the ways in which the distinctive attributes of Mr. Malvo's youth counseled against the imposition of life without parole, and did not determine that he was permanently incorrigible. Judge Ryan did not refer to Mr. Malvo's "chronological age" when he committed his crimes, or the "hallmark features of youth – among them immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. Although he acknowledged that Mr. Malvo "had no one to establish value or foundations" for him as a child and "became influenced" by Mr. Muhammad (T2 17) (App 3), he did not recognize that those considerations "diminished [Mr. Malvo's] moral culpability." *Miller*, 567 U.S. at 478 (quoting *Graham*, 560 U.S. at 59). Nor did he even refer to the "possibility of rehabilitation." *Miller*, 567 U.S. at 478. And he did not determine that Mr. Malvo was the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible," *Montgomery*, 136 S.Ct. at 733, a conclusion which cannot be squared with his recognition that Mr. Malvo had "shown remorse" and "changed." (T2 17) (App 3).

Instead, Judge Ryan advanced a retributive rationale for Mr. Malvo's punishment, observing that "[t]his community ... does not forgive [him]" and emphasizing his heinous conduct: "knowingly, willingly, and voluntarily participat[ing] in the cowardly murders of innocent, defenseless human beings." (T2 17) (App 3). But the "case for retribution is not as strong with a minor as with an adult." *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 71). And the Supreme Court has repeatedly made clear that the commission of a heinous offense does not foreclose the possibility of rehabilitation for a juvenile. *See Roper*, 543 U.S. at 570 ("[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character"); *Miller*, 567 U.S. at 472 ("the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes"); *Montgomery*, 136 S.Ct. at 736 ("*Miller*'s central intuition [is] that children who commit even heinous crimes are capable of change"); *Adams v. Alabama*, 136 S.Ct. 1796, 1800 (Mem) (2016) (Sotomayor J., concurring in decision to grant, vacate, and remand) (describing the Court's "repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is

beyond redemption.") Judge Ryan erred by addressing the heinousness of Mr. Malvo's conduct without considering the *permanence* of his state, which is the constitutionally significant issue under *Miller*.

Judge Ryan sentenced Mr. Malvo to life without parole before *Miller* and *Montgomery*. As such, he "did not have the benefit of [the Supreme] Court's guidance regarding the diminished culpability of juveniles," and did not "ask[] the question *Miller* required [him] not only to answer, but to answer correctly: whether [Mr. Malvo's] crimes reflected 'transient immaturity' or 'irreparable corruption.'" *Adams*, 136 S.Ct. at 1800. As the court did not address the required factors or make the necessary determination, Mr. Malvo's life without parole sentences were unconstitutional under the Eighth Amendment.

III. Mr. Malvo's Sentences Violated Article 25 of the Maryland Declaration of Rights.

Miller and *Montgomery* left two issues open: (1) are juvenile life without parole sentences categorically unconstitutional; and (2) if not, do those sentences require an explicit finding of fact regarding a child's incorrigibility? Article 25's prohibition of "cruel or unusual punishment" requires that those questions be answered in a manner protective of the distinctive rights of juvenile offenders.

A. Article 25 Assists In Resolving Questions About The Constitutionality of Punishment Left Open By The Supreme Court.

Article 25 provides: "That excessive bail ought not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law." Although Article 25 is interpreted *in pari materia* with the Eighth Amendment, *Evans v. State*, 396 Md. 256, 327 (2006), that does not mean that its meaning will always be identical. "[S]imply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart ... cases interpreting and applying a federal constitutional provision are only persuasive authority with respect to the similar Maryland provision." *Dua v. Comcast Cable*, 370 Md. 604, 621 (2002) (emphasis in original). *See also Thomas v. State*, 333 Md. 84, 103 n. 5 (1993) (the "argument that we should afford greater protection under Article 25 ... than is afforded by the Eighth Amendment ..., based upon the disjunctive phrasing 'cruel or unusual' of the Maryland protection, is not without support.") Nevertheless, Maryland courts interpreting Article 25 have hewed closely to the Supreme Court's interpretation of the Eighth Amendment. *See e.g. Walker v. State*, 53 Md.App. 171, 183 (1982) (Eighth Amendment provides "firm

constitutional starting point" to determine proportionality of sentence); *Thomas*, 333 Md. at 103 n. 5 ("[b]ecause the prevailing view of the Supreme Court recognizes the existence of a proportionality component in the Eighth Amendment, we perceive no difference between the protection afforded by that amendment and by [Article 25]"); *McCullough*, 233 Md.App. at 747 ("[b]ecause appellant's 100-year aggregate sentence does not fall within the categorical bar imposed by *Graham*, [it was] not illegal as cruel and unusual punishment under the Eighth Amendment or Article 25.")

Here, by contrast, Mr. Malvo is not asking this Court to depart from the prevailing interpretation of the Eighth Amendment, but rather urging that two questions *expressly* left open by the Supreme Court be resolved in his favor under Article 25. With respect to the first issue (Argument III.B, *infra*), the *Miller* Court did not "consider [petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles." 567 U.S. at 479. Accordingly, this Court must independently assess the merits of such a bar under Article 25. And regarding the second issue (Argument III.C, *infra*), the *Montgomery* Court observed that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," because of the "important principle of federalism" that

limits intrusions "upon the States' sovereign administration of their criminal justice systems." 136 S.Ct. at 735. This Court is not constrained by the same federalism concerns, and must determine under Article 25 how Maryland courts should give effect to *Miller*. *See* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMPLE L. REV. 637, 645, n. 117 (1998) ("decisions of the Supreme Court based on federalism concerns ... are not structurally relevant" to Maryland courts construing Declaration).

B. Juvenile Life Without Parole Sentences Are Categorically Unconstitutional Under Article 25.

Article 25 imposes a categorical bar on juvenile life without parole sentences. Typically, when evaluating an Article 25 challenge to the proportionality of a sentence, "a reviewing court must first determine whether the sentence appears to be grossly disproportionate [considering] the seriousness of the conduct involved, the seriousness of any relevant past conduct ..., any articulated purpose supporting the sentence, and the importance of deferring to the legislature and to the sentencing court." *Thomas*, 333 Md. at 94–95 (endorsing *Harmelin v. Michigan*, 501 U.S. 957, 1001, 1004–1005 (1991) (Kennedy, J., concurring in part and concurring in judgment)). In *Roper*, however,

the Supreme Court eschewed a case-by-case inquiry and concluded that the death penalty was unconstitutional as applied to juveniles "no matter how heinous the crime." 543 U.S. at 568. And in *Graham*, the Court again rejected a "case-specific gross disproportionality inquiry" in favor of a categorical bar on life without parole for juvenile non-homicide offenders. 560 U.S. at 77–79. *See id.* at 61 ("[t]his case implicates a particular type of sentence as it applies to an entire class of offenders ... a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis.") *See also Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (categorically unconstitutional to impose death penalty on the "mentally retarded"). This Court should adopt the same categorical mode of analysis under Article 25 and conclude that the "evolving standards of decency that mark the progress of a maturing society" require a ban on juvenile life without parole. *Graham*, 560 U.S. at 58 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

A categorical bar accords with the national consensus against juvenile life without parole sentences. *See Graham*, 560 U.S. at 61 (in evaluating a categorical rule, the Court "first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus

against the sentencing practice at issue") (quoting *Roper*, 543 U.S. at 572). When *Miller* was decided in 2012, four states prohibited this practice: Alaska, Colorado, Kansas, and Kentucky.[8] Since *Miller*, an additional *seventeen* jurisdictions have barred it: Arkansas, California, Connecticut, the District of Columbia, Hawaii, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming by statute;[9] Massachusetts and Iowa by court ruling;[10]

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[8] Alaska Stat. § 12.55.125; Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1); Kan. Stat. Ann. § 21-6618; Ky. Rev. Stat. 640.040(1).

[9] *See* Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections); SB 394, 2017-2017 Sess. (Cal.); S.B. 796, Jan. Sess. (Conn. 2015), amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a; B21-0683, D.C. Act 21-568 (D.C. 2016) (amending D.C. Code §§ 24-403 et seq.); H.B. 2116, 27th Leg. Sess. (Haw. 2014), amending Haw. Rev. Stat. §§ 706-656(1), 706-657 (2014); A. 373, 217th Leg. (N.J. 2017), amending N.J.S. 2C:11-3; A.B. 267, 78th Reg. Sess. (Nev. 2015), enacting Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107; N.D. H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (amending N.D. Cent. Code §12.1-20-03 and enacting new section in ch. 12.1-32); S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016), amending S.D. Codified Laws § 22-6-1 and enacting new section; S.B. 2, 83d Leg. Special Sess. (Tex. 2013), enacting Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071; H.B. 405 (Utah 2016), amending Laws of Utah §§76-3-203.6, -206, -207, -207.5, -207.7 and enacting § 76-3-209; H. 62, 73rd Sess. (Vt. 2015), enacting Vt. Stat. Ann. tit. 13, § 7045; 5 H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), enacting W. Va. Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b; H.B. 23, 62nd Leg., Gen. Sess. (Wy. 2013), enacting Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402.

[10] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass.2013) (juvenile life without parole violates Massachusetts

and Delaware by giving juveniles sentenced to life without parole the opportunity to petition for a sentence reduction.[11] *See Roper*, 543 U.S. at 566 ("[i]t is not so much the number of these States that is significant, but the consistency of the direction of change") (quoting *Atkins*, 536 U.S. at 315). The trend toward abolition has been rapid and uninterrupted: "no State that previously prohibited [juvenile life without parole] has reinstated it." *Roper*, 543 U.S. at 566 (discussing the trend against the juvenile death penalty).

Additionally, an examination of "[a]ctual sentencing practices" discloses that the imposition of this sentence is infrequent even where it remains on the books. *Graham*, 560 U.S. at 62. A 2016 study found that "[a] handful of jurisdictions–California, Florida, Louisiana, Michigan, and Pennsylvania–are responsible for imposing two-thirds of all [juvenile life without parole] sentences," with "ten counties alone account[ing] for nearly thirty-five percent" of these sentences nationwide. John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 563, 571 (2016).

Constitution); *State v. Sweet*, 879 N.W.2d 811 (Iowa.2016) (juvenile life without parole violates Iowa Constitution).

[11] S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), amending Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d).

California has subsequently banned this practice, and Florida, Louisiana, and Pennsylvania have significantly curtailed its application.[12] As of November 2017, six states appeared to have zero juveniles serving this sentence: Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island; a further seven states had five or fewer people serving these sentences: Idaho, Indiana, Montana, Nebraska, Nevada, New Hampshire, and Oregon.[13] In Maryland, no juvenile has been sentenced to life without parole since *Miller*, and only 16 people are currently serving this sentence.[14] Given the consistent trend toward abolition of juvenile life without parole, its concentration in a small number of jurisdictions, and its infrequent use (even in those jurisdictions), this practice should now be considered "unusual," foreclosing its imposition under Article 25.

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[12] *See e.g.* Fla. Stat. §§ 921.1402, 775.082 (juvenile life without parole available only for juveniles who commit capital murder after having previously been convicted of an enumerated violent felony). Florida now has only 11 juveniles eligible for life without parole sentences, down from 278 when *Miller* was decided: Juvenile Sentencing Project at Quinnipiac University School of Law and the Vital Projects Fund, Juvenile Life Without Parole Sentences in the United States, November 2017 snapshot, available at https://www.juvenilelwop.org/wpcontent/uploads/November%202017%20Snapshot%20of%20JLWOP%20Sentences%2011.20.17.pdf [Juvenile Sentencing Project].

[13] Juvenile Sentencing Project, supra n. 12.

[14] *Id.* (observing that since *Miller*, one juvenile offender previously sentenced to life without parole has been resentenced to a parole-eligible sentence).

Furthermore, juvenile offenders, as a class, do not warrant the harshest possible penalty available under Maryland law. As the Supreme Court has emphasized, the "distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juveniles "even when they commit terrible crimes":

> Because retribution "relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." ... The deterrence rationale likewise does not suffice, since "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." ... The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender "'forever will be a danger to society.'" ... Rehabilitation is not a satisfactory rationale, either. Rehabilitation cannot justify the sentence, as life without parole "forswears altogether the rehabilitative ideal."

Montgomery, 136 S.Ct. at 733 (quoting *Miller*, 567 U.S. at 472–473) (citations omitted).

Accordingly, the Court recognized that "appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon." *Miller*, 567 U.S. at 479. Although the Court did not determine whether to categorically ban life without parole, it emphasized the "great difficulty ... of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime

reflects irreparable corruption.'" *Id.* at 479–480 (quoting *Roper*, 543 U.S. at 573). For "most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570 (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569. *See also Graham*, 560 U.S. at 77 (sentencing courts cannot with "sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change"); Brief for Am. Psychological Ass'n et al. as Amici Curiae, *Miller v. Alabama*, 567 U.S. 460 (Nos.10–9646, 10–9647), at 15 ("even *experts have no reliable way to predict* whether a particular juvenile offender will continue to commit crimes as an adult ... [t]he positive predictive power of juvenile psychopathy assessments ... remains poor") (emphasis added).

As sentencing judges cannot reliably determine at the outset that a juvenile is permanently incorrigible, this Court should not vest ultimate decision-making authority in their hands. Parole boards or reviewing courts, equipped with information about offenders' prospects for rehabilitation *after* their brains have fully matured, are in a better position to make this assessment. Other state courts have reached this conclusion. In *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass.2013), the Supreme Judicial Court of Massachusetts held that life without parole for juveniles violated the state constitutional prohibition of "cruel or unusual punishments." The Court observed that "because the brain of a juvenile is not fully developed, either structurally or functionally ... a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." *Id* at 284. In *State v. Sweet*, 879 N.W.2d 811 (Iowa.2016), the Supreme Court of Iowa reached the same conclusion under the "cruel and unusual punishment" clause of its constitution, observing that sentencers should not be asked to "do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination ... the trial court simply will not have adequate information and the risk of error is unacceptably high."

Id. at 837. Finally, in *Bassett v. State*, 394 P.3d 430 (Wash.App.2017), *review granted*, 402 P.3d 827 (Wash.2017), the Court of Appeals of Washington held that juvenile life without parole was a "cruel punishment" under its constitution, pointing to the "unacceptable risk that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole ... because the sentencing court mistakenly identifies the juvenile as one of the uncommon, irretrievably corrupt juveniles." *Id.* at 445.

Article 25 requires a credible process for determining whether a less culpable class of offenders – juveniles – should forever be denied the prospect of release. Vesting ultimate decision-making authority with sentencing judges is unacceptable given the startling inaccuracy of predictive assessments about juvenile offenders' incorrigibility. Parole boards or reviewing courts, equipped with information about a child's disciplinary record, maturation, and preparation for life outside prison, are in a better position to decide whether he or she is irretrievably depraved. This Court should ban juvenile life without parole.

C. Alternatively, Juvenile Life Without Parole Sentences Cannot Be Imposed Consistently With Article 25 Unless the Sentencing Court Makes An Explicit Finding of Permanent Incorrigibility.

If this Court chooses not to categorically bar juvenile life without parole sentences, the question remains: how should Maryland implement "*Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S.Ct. at 735. *Miller* declined to require trial courts to "make a finding of fact regarding a child's incorrigibility" on federalism grounds, but did not leave states "free to sentence a child whose crimes reflects transient immaturity to life without parole." *Montgomery*, 136 S.Ct. at 735. To give effect to this mandate, sentencers should not be permitted to impose this sentence without considering the mitigating qualities of youth and making a finding on the record, beyond a reasonable doubt, that the child's crimes reflected "permanent incorrigibility," "irretrievable depravity," or "irreparable corruption."[15] By requiring sentencing courts to explicitly conduct the constitutionally mandated inquiry, this Court would make it more

[15] *Montgomery* uses these terms interchangeably: 136 S.Ct. at 733–734. A trial judge does not need to recite any "magic words" to comply with this requirement, but must address the *concept* of incorrigibility before imposing life without parole.

likely that only "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," would receive the harshest punishment available. *Id.* at 734.

Such an approach accords with the safeguards that state courts across the country have imposed to give effect to *Miller*. In *State v. Long*, 8 N.E.3d 890 (Ohio.2014), the Supreme Court of Ohio held that "the record must reflect that the court specifically considered the juvenile offender's youth as a mitigating factor at sentencing when ... life without parole is imposed." *Id.* at 893. Such a requirement flows directly from *Miller*'s requirement that sentencers "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. And it "aid[s] appellate review of the sentence imposed after resentencing." *State v. Montgomery*, 194 So.3d 606, 609 (La.2016).

Additionally, the sentencing court must expressly determine whether the child is in the rare class of juvenile offenders warranting life without parole. In *Veal*, the Supreme Court of Georgia remanded appellant's case for resentencing where the sentencing court considered his "age and ... some of its associated characteristics," but did not "make any sort of *distinct determination on the record* that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put

him in the narrow class of juvenile murderers for whom [a life without parole] sentence is proportional." 784 S.E.2d at 412 (emphasis added). Similarly, in *Luna*, the Court of Criminal Appeals of Oklahoma precluded life without parole without a finding "beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible." 387 P.3d at 963 n.11. And in *Sen v. State*, 301 P.3d 106, 127 (Wy.2013), the Supreme Court of Wyoming held that the sentencing court "must set forth specific findings supporting a distinction between the 'juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"

Finally, the State should have to prove beyond a reasonable doubt that this sentence is justified. Life without parole is an "especially harsh punishment for a juvenile" that "share[s] some characteristics with death sentences ... [including] alter[ing] the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69–70. Just as the State bore the burden under Maryland's death penalty statute of proving aggravating circumstances beyond a reasonable doubt, *Tichnell v. State*, 287 Md. 695, 730 (1980), it should bear the burden of proving permanent incorrigibility to the same standard. Such an approach has been adopted by other state courts. *See Batts*, 163 A.3d at 416

(Commonwealth "bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation"); *State v. Hart*, 404 S.W.3d 232, 241 (Mo.2013) ("a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate"); *Luna*, 387 P.3d at 963 n.11 (court must "find beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible"). By requiring the State to meet the "highest standard" of proof, *Wills v. State*, 329 Md. 370, 374 (1993), this penalty is limited, consistent with *Miller*, to the "rarest of juvenile offenders." *Montgomery*, 136 S.Ct. at 734.

CONCLUSION

Mr. Malvo's life without parole sentences must be vacated because: (1) the sentencing record demonstrates that his crimes did not reflect permanent incorrigibility (Argument II.B, *supra*); and (2) Article 25 categorically bars juvenile life without parole sentences (Argument III.B, *supra*). Accordingly, he is entitled to a new sentencing hearing at which the maximum possible sentences are life with parole. Alternatively, the sentencing judge failed under the Eighth Amendment and Article 25 to conduct the inquiry mandated by *Miller* (Argument II.B, *supra*), and failed to make the finding of permanent

incorrigibility required by Article 25 (Argument III.C, *supra*). As such, Mr. Malvo is entitled to a new sentencing hearing at which the judge could not impose life without parole without considering the mitigating qualities of youth and finding, beyond a reasonable doubt, that he was permanently incorrigible. (Argument III.C, *supra*).[16]

Respectfully submitted,

Paul B. DeWolfe
Public Defender

Kiran Iyer
Assistant Public Defender

Counsel for Appellant

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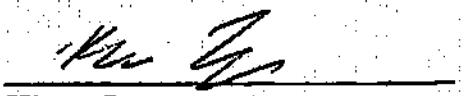
[16] Although the Court does not need to decide at this juncture whether the imposition of six consecutive life *with* parole sentences is permissible on remand, such sentences would unconstitutionally deprive Mr. Malvo of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I hereby certify that:

1. This brief contains 9094 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.



Kiran Iyer

PERTINENT AUTHORITY

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Maryland Constitution, Declaration of Rights

Article 25. Excessive Bail and Fines; Cruel or Unusual Punishment

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.

MARYLAND STATUTES

Criminal Law Article (2002)

§ 2–201. Murder in the first degree.

...

(b) ***Penalty.*** **— (1) A person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to:**
(i) death;
(ii) imprisonment for life without the possibility of parole; or
(iii) imprisonment for life.

(2) Unless a sentence of death is imposed in compliance with § 2–202 of **this** subtitle and Subtitle 3 of this title, or a sentence of imprisonment for life without the possibility of parole is imposed in compliance with § 2–203 of this subtitle and § 2–304 of this title, the sentence shall be imprisonment for life.

§ 2–203. Sentence of imprisonment for life without the possibility of parole.

A defendant found guilty of murder in the first degree may be sentenced to imprisonment for life without the possibility of parole only if:

(1) at least 30 days before trial, the State gave written notice to the defendant of the State's intention to seek a sentence of imprisonment for life without the possibility of parole; and
(2) the sentence of imprisonment for life without the possibility of parole is imposed in accordance with § 2–304 of this title.

§ 2–304. Sentencing procedure – Imprisonment for life without the possibility of parole.

(a) *In general.* — (1) If the State gave notice under § 2-203(1) of this title, but did not give notice of intent to seek the death penalty under § 2–202(a)(1) of this title, the court shall conduct a separate sentencing proceeding as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether the defendant shall be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.

...

(b) *Findings.* — (1) A determination by a jury to impose a sentence of imprisonment for life without the possibility of parole must be unanimous.

(2) If the jury finds that a sentence of imprisonment for life without the possibility of parole shall be imposed, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(3) If, within a reasonable time, the jury is unable to agree to imposition of a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life.

Correctional Services Article (1999, 2006 Supp.)

§ 6–112. Presentence investigation report; other investigations and probationary services.

(a) *In general.* — (1) On request of a court, a parole and probation agent of the Division shall:
(i) provide the court with a presentence investigation report;
(ii) conduct other investigations; and
(iii) perform other probationary services.

...

(c) *Same — Required.* — (1) The Division shall complete a presentence investigation report in each case in which the death penalty or imprisonment for life without the possibility of parole is requested under § 2–202 or § 2–203 of the Criminal Law Article.
(2) The report shall include a victim impact statement as provided under § 11–402 of the Criminal Procedure Article.

(3) The court or jury before which the separate sentencing proceeding is conducted under § 2–303 or § 2–304 of the Criminal Law Article shall consider the report.

MARYLAND RULES

Rule 4–345. Sentencing – Revisory Power of Court

(a) Illegal Sentence. The court may correct an illegal sentence at any time.

LEE BOYD MALVO,	*	IN THE
	*	COURT OF SPECIAL APPEALS
Appellant,	*	OF MARYLAND
v.	*	September Term, 2017
STATE OF MARYLAND,	*	No. 1436
Appellee.	*	

* * * * * * * * * * * * *

ORDER

It is this 12th day of January, 2018, by the Court of Special Appeals, on its own initiative,

ORDERED, that the above-captioned appeal be, and is hereby, stayed pending a decision by the Court of Appeals in *Bowie v. State*, Sept. Term 2017, No. 55; *Carter v. State*, Sept. Term 2017, No. 54; *McCullough v. State*, Sept. Term 2017, No. 56; and *State v. Clements*, Sept. Term 2017, No. 57; and it is further

ORDERED, that the parties shall immediately notify this Court of the Court of Appeals' decisions in *Bowie v. State*, Sept. Term 2017, No. 55; *Carter v. State*, Sept. Term 2017, No. 54; *McCullough v. State*, Sept. Term 2017, No. 56; and *State v. Clements*, Sept. Term 2017, No. 57; and of any effort to seek further review in the U.S. Supreme Court, and, upon resolution of these cases, counsel for the parties shall propose a mutually agreeable briefing schedule for the above-captioned case.

COURT OF SPECIAL APPEALS MARYLAND

CHIEF JUDGE'S SIGNATURE APPEARS ON ORIGINAL ORDER.

PATRICK L. WOODWARD, CHIEF JUDGE