LEE BOYD MALVO,	IN THE
Petitioner,	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2017
Respondent.	Petition Docket No. 0476

ANSWER TO SUPPLEMENT TO PRE-JUDGMENT PETITION FOR A WRIT OF CERTIORARI

The State of Maryland, Respondent, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Carrie J. Williams, Assistant Attorney General, in answer to the Supplement to the Pre-Judgment Petition for Writ of Certiorari filed herein, pursuant to Maryland Rule 8-303(d), states that the Petition should be denied, pre-judgment review being neither necessary nor in the public interest.

REASONS FOR DENYING THE PETITION

On January 18, 2018, Lee Boyd Malvo filed a pre-judgment petition for writ of certiorari asking whether his six life-without-parole sentences violated the Eighth Amendment to the

United States Constitution and/or Article 25 of the Maryland Declaration of Rights. In his petition, he argued that certiorari review should be granted because his case "raises important questions about the constitutionality of juvenile life without parole sentences," namely, (1) whether *Miller v. Alabama*, 567 U.S. 460 (2012), applies to Maryland's discretionary sentencing scheme and, if so, how *Miller* should be applied in Maryland; and (2) whether sentencing a juvenile to life without parole violates Article 25 of the Maryland Declaration of Rights. (Cert. Pet. at 9-11).

Since Malvo filed his petition, the legal landscape for defendants serving life without parole for crimes committed as juveniles has changed substantially. In August of 2018, this Court decided *Carter v. State*, 461 Md. 295, 317 (2018), which held that, unless a sentencing court conducts an individualized sentencing hearing that takes into account the defendant's youth and concludes that the defendant is incorrigible, the Eighth Amendment requires that juvenile offenders be given a "meaningful opportunity to obtain release" based on "demonstrated maturity and rehabilitation." On April 22, 2021,

the Supreme Court of the United States held that a separate factual finding of permanent incorrigibility is not required under the Eighth Amendment. *Jones v. Mississippi*, 141 S.Ct. 1307, 1314 (2021). This Court need not consider the effect of the *Jones* opinion on *Carter*, however, because the Juvenile Restoration Act effectively eliminates life without parole for juveniles in Maryland.

In April of this year, the General Assembly provided just such a meaningful opportunity for release for *all* inmates serving sentences for crimes committed as juveniles. The Juvenile Restoration Act prospectively abolishes life without parole for juveniles and provides persons sentenced for crimes committed as juveniles prior to October 1, 2021, an opportunity to seek a modification of their sentence after they have served 20 years' incarceration. *See* Juvenile Restoration Act, 2021 Md. Laws Ch. 61 (S.B. 494). These two legal developments resolve Malvo's claim that his sentence is illegal.

In a supplement to his pre-judgment petition, Malvo argues that, notwithstanding the change in the law, this Court should grant review for three reasons: (1) *Carter* requires that juvenile offenders serving life without parole "'must be resentenced'"; (2)

juveniles serving life without parole "should not have to wait 20 years for a sentence-reduction hearing"; and (3) the argument that juvenile life without parole is a cruel or unusual sentence under Article 25 is "even stronger" now that the legislature has abolished life without parole for juvenile offenders. (Supp. Cert. Pet. 14-16).

Malvo's explanations as to why his claim is still viable fall flat. First, *Carter* does not suggest that all juvenile life without parole defendants are entitled to resentencing. Second, whether 20 years is "too long" to wait before juvenile offenders are given a meaningful opportunity for release is not a constitutional claim or any claim cognizable for this Court's review. Third and finally, whether sentencing a defendant to life without parole for crimes committed as a juvenile is cruel or unusual under Article 25 of the Maryland Declaration of Rights is, practically speaking, moot in light of the passage of the Juvenile Restoration Act.

A. *Carter* does not require resentencing for all juvenile offenders serving life without parole.

Malvo claims that *Carter* recognized "in dicta" that all defendants serving life without parole for crimes committed as

juveniles "'must be resentenced' and given an 'individualized sentencing hearing to consider whether' they are incorrigible." (Cert. Pet. Supp. at 15). This Court should grant certiorari review, Malvo contends, to clarify that *Jones* did not change this resentencing requirement. (Cert. Pet. Supp. at 15).

Malvo misreads *Carter*. *Carter*'s discussion of the constitutional limits on juvenile offenders relies solely on Supreme Court jurisprudence. In the section entitled "Limitation on sentencing juvenile homicide offenders to life without parole," this Court described the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012) as a "synthesis" of two principles: (1) children are constitutionally different for purposes of sentencing; and (2) "individualized sentencing is required *before imposing harsh and immutable sentences*." *Carter*, 461 Md. at 312 (emphasis added).

In the next section, titled "Limitations on life without parole for juvenile offenders apply retroactively," this Court noted that the Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), "discussed how a postconviction court might resolve a claim under *Miller*." *Carter*, 461 Md. at 313. This Court explained:

> The [Supreme] Court stated that giving *Miller* retroactive effect did not require a state to relitigate the sentence, much less the conviction, in a case in which a juvenile homicide offender received a sentence of life without parole. *The Court stated that compliance with* Miller *could be accomplished either by re-sentencing the defendant or by permitting that defendant to be considered for parole.* [*Montgomery*,] 36 S.Ct. at 736. The Court reiterated that "prisoners who have shown an inability to reform will continue to serve life sentences." *Id*. However, "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id*. at 736-37.

Carter, 461 Md. at 313-14 (emphasis added).

Even assuming that *Carter*'s analysis of the *Miller/Montgomery* decisions is unaffected by the Supreme Court's subsequent pronouncement in *Jones*, *Carter* is clear that resentencing is not required for every person serving life without parole for crimes committed as a juvenile. According to this Court in *Carter*, compliance with *Miller* can be accomplished either by a resentencing "or by permitting [the] defendant to be considered for parole." *Id*. at 313-14. The Juvenile Restoration Act provides at least as meaningful an opportunity for release as eligibility for parole provides. Thus, with the passage of the Act, all Maryland

sentences are now in compliance with *Carter*'s interpretation of *Miller/Montgomery*. Further review of the issue is unnecessary.

B. Malvo's claim that 20 years is "too long to wait" is not a cognizable legal claim.

Malvo argues that the passage of the Juvenile Restoration Act does not resolve his claim because defendants serving life without parole for crimes committed as juveniles "should not have to wait 20 years for a sentence-reduction hearing[.]" (Supp. Cert. Pet. at 15). Malvo's opinion that juvenile offenders should be able to seek release before they have served 20 years' incarceration is not a constitutional claim or a cognizable claim of sentence illegality.[1] The Juvenile Restoration Act provides defendants serving life without parole for crimes committed as juveniles a meaningful opportunity for release. So long as that opportunity comes before the sentence is one of de facto life, the sentence is

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[1] Nor is Malvo's contention that, because he is serving a life sentence for murder in Virginia, he may never be eligible for a sentence reduction hearing in Maryland. (Supp. Cert. Pet. at 10-11). Malvo was convicted of murdering multiple people in two states. The fact that he is obligated to serve his Virginia sentence before beginning his sentence in Maryland does not render his Maryland sentence unconstitutional.

legal and constitutional. *See Carter*, 461 Md. at 347-356 (discussing when a term of years sentence must be considered a de facto sentence of life without parole). How long a defendant must wait before being eligible to seek modification based on maturity and rehabilitation is a policy question not appropriate for this Court's review.

C. Whether juvenile life without parole is cruel or unusual under Article 25 of the Maryland Declaration of Rights is moot in light of the passage of the Juvenile Restoration Act.

Lastly, Malvo asks this Court to grant certiorari and consider whether juvenile life without parole is a cruel or unusual sentence under Article 25 of the Declaration of Rights. Because the General Assembly has abolished life without parole for crimes committed as a juvenile, Malvo claims, the argument that this sentence "no longer comports with contemporary standards of decency" is even stronger than before the passage of the Act. (Supp. Cert. Pet. at 16).

Even if Malvo is correct about the effect the Juvenile Restoration Act has on the Article 25 analysis, review is not

necessary because, practically speaking, as of October 1, 2021, no one in Maryland will be serving life without parole for crimes committed as a juvenile. As discussed above, the Act abolishes life without parole for juveniles prospectively, and provides a meaningful opportunity for release to those inmates currently serving life without parole for crimes committed as juveniles. There is no need for this Court to review the constitutionality of a sentence that, practically speaking, no longer exists.

CONCLUSION

For the reasons set forth above and in the original answer to Malvo's Pre-judgment Petition for Writ of Certiorari, The State of Maryland respectfully asks the Court to deny the petition.

Dated: June 14, 2021

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 1,557 words.

/s/ Carrie J. Williams

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CERTIFICATE OF SERVICE

In accordance with Maryland Rule 20-201(g), I certify that on this day, June 14, 2021, I electronically filed the foregoing "Answer to Petition for a Writ of Certiorari " using the MDEC System, which sent electronic notification of filing to all persons entitled to service, and a service copy was mailed to, or by prior agreement with counsel, emailed to: Celia Anderson Davis, Assistant Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Street, Suite 1302, Baltimore, Maryland 21202.

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