LEE BOYD MALVO,	IN THE
Appellant	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2021
Appellee	No. 29

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of October, 2021, a copy of Appellant's Brief and the Joint Record Extract were delivered via the MDEC system by arrangement with the Office of the Attorney General to:

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

/s/

Kiran Iyer
Assigned Public Defender

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2021

NO. 29

LEE BOYD MALVO,

Appellant

v.

STATE OF MARYLAND,

Appellee

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

APPELLANT'S BRIEF

PAUL B. DEWOLFE
Public Defender

KIRAN IYER
Assigned Public Defender
AIS # 1806190077
Counsel for Appellant
(P): 617-230-8264

CELIA ANDERSON DAVIS
Assistant Public Defender
AIS # 9012180154
Counsel for Appellant
(P): 410-767-8527

Office of the Public Defender
Appellate Division
6 Saint Paul Street, Suite 1302
Baltimore, Maryland 21202

INDEX

TABLE OF CONTENTS

APPELLANT'S BRIEF

Page

TABLE OF CITATIONS

Page

Cases

Statutes & Session Laws

Rules

Regulations

Other Authorities

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2021

NO. 29

LEE BOYD MALVO,

Appellant

v.

STATE OF MARYLAND,

Appellee

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

APPELLANT'S BRIEF

STATEMENT OF THE CASE

In October 2002, 41-year-old John Allen Muhammad and seventeen-year-old Lee Boyd Malvo, Appellant, committed a series of shootings in the greater Washington, D.C. area. Four years later, on October 10, 2006, Malvo pleaded guilty to six counts of first degree murder in the Circuit Court for Montgomery County (Case 102675). On November 8, 2006, Judge James L. Ryan sentenced him to six

consecutive life-without-parole sentences running consecutively to his four life-without-parole sentences in Virginia.

On November 27, 2006, Malvo filed a motion to modify his sentences under Maryland Rule 4-345(e)(1), and asked the court to hold it in abeyance until he requested a ruling. He did not request a ruling, and the motion was denied on September 18, 2012 after the Rule's five-year limitation period elapsed.

Following the Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), Malvo filed a motion to correct illegal sentence under Maryland Rule 4-345(a) on January 12, 2017. Following a hearing on June 15, 2017, Judge Robert A. Greenberg denied the motion on August 15, 2017.

Malvo noted an appeal, and filed his brief in the Court of Special Appeals on January 8, 2018. On January 12, 2018, the Court of Special Appeals stayed the appeal pending this Court's 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. The stay remains in effect.

Malvo filed a pre-judgment petition for writ of certiorari in this Court on January 25, 2018, and a supplement on June 1, 2021. The petition was granted on August 25, 2021.

QUESTION 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*, 577 U.S. 190, 209 (2016), do the six life-without-parole sentences imposed on Appellant 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 Appellant'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 Appellant 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 Appellant are not "illegal" under Rule 4-345(a)?

STATEMENT OF FACTS

A. Malvo's childhood.

Malvo was born on February 18, 1985, in Kingston, Jamaica. (E.59). He was a "happy child" until his parents, Leslie and Una, separated when he was five years old. *Id*. Malvo was very close to Leslie—"a loving and nurturing figure in his life"—but saw him "infrequently" after Una took him to an "isolated, rural district" without Leslie's knowledge. (E.59, 65). Una, who was later diagnosed

with bipolar disorder, was a violent parent, once beating Malvo "so ferociously that he had welts all over his body." (E.64, 69).

When Malvo was nine years old, Una started placing him with others for extended periods while she sought employment on other islands. (E.59). Malvo was reportedly "physically and emotionally abused" during these placements. *Id*. He "became clinically depressed," and tried to hang himself when he was twelve years old. (E.59, 69–70). After moving to Antigua with Una when he was fourteen years old, he was left alone for seven months. (E.27). He was described as a "bright, well-behaved, loving[,] and obedient child" "desperately searching for a stable, loving[,] and nurturing parent." (E.59).

B. Malvo meets Muhammad.

Malvo was fifteen years old when he met Muhammad in October 2000. *Id*. Muhammad, a United States army veteran, "had taken his three children to live in Antigua without their mother's knowledge." *Mathena v. Malvo*, 893 F.3d 265, 269 (4th Cir. 2018). Malvo noticed Muhammad laughing with his son, and was "immediately impressed by [his] care and attention[.]" (E.27, 59).

In December 2000, Muhammad helped Una illegally enter the United States, leaving Malvo behind in Antigua. (E.27). Malvo lived with Muhammad in Antigua between January and May 2001. *Id*.

During this time, Muhammad became a "father figure" to Malvo (E.34), and Malvo became the "obedient son." (E.60). Malvo "converted to Islam, adopted Muhammad's American accent, began studying Muhammad's view of the plight of the black man in America, lost interest in school, began rigorous physical training[,] and began assisting Muhammad in his illegal activities." *Id*. Malvo started calling himself "John Lee Muhammad." (E.75).

Muhammad smuggled Malvo into the United States in May 2001. (E.27). Malvo initially lived with Una in Florida, but escaped to Washington State to be with Muhammad in October 2001. (E.27–28). Una tried to get her son back, but they were both arrested by immigration authorities in December 2001, and Malvo was sent to a juvenile detention center. (E.28, 60). After his release, he ran away again and was reunited with Muhammad in January 2002. (E.28).

Malvo underwent "training" with Muhammad from January-February 2002. *Id*. Muhammad's program for Malvo included "weapons and martial arts training" and "indoctrination focused on the oppression of the Black man in America." (E.60–61). Muhammad "dominated every aspect of Malvo's life," "isolated him," and turned him into a "soldier in [his] personal war on America." (E.61).

In March 2002, Malvo, who had just turned seventeen, travelled across the United States with Muhammad, purportedly to recover Muhammad's children who had been lost in his custody dispute. (E.28). Muhammad gave Malvo "missions" to complete on their journey, training him to become "heartless." (E.29). Malvo started having second thoughts about these missions, but decided he could not leave because Muhammad was his "father" and "universe." *Id*. He tried to commit suicide around August 2002 by playing "Russian Roulette." *Id*. Muhammad convinced him to stay the course. *Id*. He told Malvo that they were going to "establish a utopian society" of boys and girls who were going to "bring about a just world." (E.29, 73).

C. The "DC Sniper" attacks.

In October 2002, Muhammad and Malvo killed six people in Montgomery County as part of a spree of shootings—"spread[ing] over seven separate jurisdictions and involv[ing] 10 murders and 3 attempted murders"—that gripped the entire region "by a paroxysm of fear." *Muhammad v. State*, 177 Md. App. 188, 198, 200 (2007), *cert. denied*, 403 Md. 614 (2008). Malvo pleaded guilty in Montgomery County to the murders of James Martin (killed in a parking lot) (E.95), James Buchanan (killed cutting grass) (E.96), Premkumar Walekar (killed pumping gas) (*id*.), Maria Sarah Ramos (killed sitting on a

bench) (E.97), Lori Ann Lewis-Rivera (killed outside her vehicle) (*id.*), and Conrad Johnson (killed aboard his bus). (E.98). Each of these victims was killed with a rifle later recovered from Muhammad's Chevrolet Caprice. (E.95–99). Muhammad had transformed the Caprice into a "killing machine" by cutting a hole in the trunk through which a rifle could fire. *Muhammad*, 177 Md. App. at 215. The plan was to "extort $10 million from the government." (E.100–101).

Muhammad and Malvo were arrested on October 24, 2002. The prosecutor proffered that Malvo initially "claimed to be the shooter in each of the October … 2002 crimes" because he "had been instructed to accept responsibility … by Muhammad" who told him that he would be "less likely to get the death penalty" as a juvenile. (E.106). Subsequently, however, at Muhammad's Montgomery County trial, Malvo testified about the "origins and … motive for the scheme … made up by Muhammad." *Id*. He described how he and Muhammad scouted suitable areas for shootings. *Id*. He "testified that in all but three of the shootings he acted as the spotter," sitting in the front seat "while Muhammad went into the trunk" and fired. (E.107). Malvo "fired the shots" in three of the shootings: "the non-fatal shootings of Iran Brown [in Prince George's County] and Jeffrey Hopper [in Virginia] and the murder of Conrad Johnson [in Montgomery County]." *Id*.

D. Malvo's life-without-parole sentences in Virginia.

Malvo was tried first in Virginia because it permitted juvenile offenders to be executed. *Sniper Suspects Handed to Va. for Trials*, Wash. Post (Nov. 8, 2002), https://tinyurl.com/v7nmavj3. On December 18, 2003, a jury in Chesapeake Circuit Court convicted him of two counts of capital murder after rejecting his insanity defense. *Malvo v. Mathena*, 254 F. Supp. 3d 820, 822–823 (E.D. Va. 2017).[1] Malvo "expressed no remorse" to his presentence investigator, stating that he had "disassociat[ed] himself from the world." (E.35). On March 10, 2004, he was sentenced to two terms of life without parole. *Malvo*, 254 F. Supp. 3d at 823. On October 26, 2004, he entered an "*Alford* plea" in Spotsylvania Circuit Court pleading guilty to capital murder and attempted capital murder and was sentenced to two additional terms of life without parole. *Id*. Malvo is incarcerated at Red Onion State Prison, Virginia's supermax facility, and spent years in solitary confinement.

E. Malvo's life-without-parole sentences in Maryland.

Malvo demonstrably changed after his Virginia sentencings. After "cognitive reframing" therapy helped him "detangle himself" from Muhammad's "psychological hold" (E.81), he wrote to prosecutors and

[1] Muhammad was convicted of capital murder in Virginia and executed in 2009.

offered to testify against Muhammad in his Montgomery County trial. (E.127). He testified for almost two days, providing "thorough" and previously unknown information. *Muhammad*, 177 Md. App. at 218–222. He pleaded guilty in Montgomery County without any "sentencing concessions" and accepted "complete responsibility." (E.53, 86).

At Malvo's sentencing, the prosecutor sought the "maximum sentence allowable"—six consecutive life-without-parole sentences—because of the "incredible loss inflicted upon the victims' families" and the "[f]ear and mistrust" caused in the community. (E.120). He acknowledged, however, that Malvo had "changed," expressed "genuine remorse," and offered testimony at Muhammad's trial that provided a "much better … understanding of their terrible crimes and their motivations." (E.120–121). These "acts of contrition" "advanced the healing process" and "closure process for the victims' families" and the "entire community." (E.121). He concluded:

> 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 … 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*. And as such … the State is asking for six consecutive [life-without-parole] sentences[.]

(E.121–122) (emphases added).

The defense did not seek parole-eligible sentences for Malvo, asking only that his sentences be concurrent to each other and to his Virginia sentences. (E.123). Counsel stated Malvo was no longer the "killing machine" Muhammad had turned him into: He "accepted full and unmitigated responsibility," had "made a sea change of difference in his life," and was "trying to make some amends." (E.124–125).

The presentence investigation report (PSI) recommended that Malvo receive six consecutive life-without-parole sentences in "view of the fact the … offenses resulted in" six deaths. (E.41). It attached two documents submitted by the defense: an October 15, 2003 psychiatric evaluation prepared for Malvo's Virginia capital proceedings that stated that he was the victim of "intense coercive persuasion" from Muhammad (E.61), and an October 25, 2006 report containing a mental

health summary stating that Malvo "currently exhibits evidence of remission and tremendous remorse." (E.81).

Malvo allocuted:

> 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 … 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. … I know that no matter how I or anyone tries, you 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.

(E.125–127).

Judge Ryan acknowledged that Malvo had "changed" and "shown remorse," but sentenced him to die in prison:

> 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 [Muhammad's] trial[.]
>
> 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 … 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 … *This community, represented by its people and the laws, does not forgive you*.

(E.127–128) (emphases added).

F. The Supreme Court imposes retroactive limits on juvenile life-without-parole sentences.

The Supreme Court issued three landmark decisions after Malvo's sentencings addressing the constitutionality of juvenile life-without-parole sentences under the Eighth Amendment. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that life without parole—"an especially harsh punishment for a juvenile"—was prohibited under the Eighth Amendment for juvenile non-homicide offenders. *Id*. at 70, 74. In *Miller*, the Court held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment," and "require[d]" sentencers to "take into account how children are different, and how those differences counsel against" life without parole. 567 U.S. at 470, 480. And in *Montgomery*, the Court held that *Miller* applies retroactively on state collateral review to juvenile offenders sentenced to life without parole. 577 U.S. at 208–210.

G. Malvo seeks collateral review of his Virginia and Maryland life-without-parole sentences.

Malvo filed federal habeas petitions challenging his Virginia life-without-parole sentences. *Malvo*, 254 F. Supp. 3d at 823. On June 21, 2018, the Fourth Circuit held that he must be resentenced "because the retroactive constitutional rules for sentencing juveniles adopted subsequent to Malvo's sentencings were not satisfied during his

sentencings." *Mathena*, 893 F.3d at 267. The Supreme Court granted Virginia's petition for writ of certiorari from this decision, *Mathena v. Malvo*, 139 S.Ct. 1317 (2019), and heard argument, but dismissed the petition by stipulation on February 24, 2020 after Virginia made all juvenile offenders parole-eligible after 20 years' imprisonment. Va. Code Ann. § 53.1-165.1E (2020); *see also* Va. Code Ann. § 53.1-136(2) (Parole Board must adopt "rules providing for the granting of parole" to eligible juvenile offenders "on the basis of demonstrated maturity and rehabilitation and the lesser culpability of juvenile offenders."). Malvo is eligible for parole in Virginia in November 2022.

Malvo also filed a federal habeas petition challenging his Maryland life-without-parole sentences (stayed pending the exhaustion of these proceedings) and a motion to correct under Rule 4-345(a). He alleged in the Rule 4-345(a) motion that he should be resentenced because his sentences violate the Eighth Amendment and Article 25 and that he must be afforded a "meaningful opportunity for release through demonstrated rehabilitation and maturity[.]" (MCIS at 1, 14).

Judge Greenberg denied the motion. *First*, he ruled that Malvo is "not entitled to seek review of his sentence[s]" under Rule 4-345(a) because they are not "inherently illegal." (E.190). *Second*, he concluded that *Miller* only applies to mandatory life-without-parole sentencing

schemes, and did not apply to Maryland's discretionary life-without-parole sentencing scheme. (E.198–199). *Third*, he determined that even if *Miller* applied, "Judge Ryan affirmatively considered all the relevant factors at play and the plain import of his words … was that Defendant is 'irreparably corrupted.' " (E.199). *Finally*, he concluded that Article 25 does not provide Malvo with greater protection than the Eighth Amendment. (E.198).

H. Maryland passes the Juvenile Restoration Act.

On April 10, 2021, the Legislature passed the Juvenile Restoration Act ("JUVRA") by gubernatorial veto override. Acts of 2021, ch. 61 (effective October 1, 2021). JUVRA prospectively bans juvenile life-without-parole sentences, and eliminates mandatory minimum sentences for juveniles. Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-235.

JUVRA authorizes any juvenile offender "sentenced for the offense before October 1, 2021" and "imprisoned for at least 20 years for the offense" to move to reduce the sentence in the trial court. CP § 8-110(a). It does not, however, invalidate the sentences of the approximately[2] thirteen juvenile offenders sentenced to life without parole before the

[2] The parties will file a joint stipulation with exact data when received from the Department of Public Safety and Correctional Services.

repeal. *First*, the trial court's *authority* to modify a life-without-parole sentence—either through JUVRA or a motion to modify under Rule 4-345(e)(1)—does not *itself* alter the sentence. Unless the court exercises its discretion under JUVRA or Rule 4-345(e)(1) to reduce the sentence, it remains life without parole. *Second*, JUVRA—unlike the parole system—does not afford a constitutionally-sufficient "meaningful opportunity to obtain release" for juvenile offenders. Argument V.B, *infra*. *Third*, juveniles sentenced to life without parole are more likely to be subjected to harsh prison conditions, and less likely to receive rehabilitative programming, than "juvenile lifers" under Maryland's parole system.[3] *See* COMAR 12.02.29.02B(6) (defining "juvenile lifers" as juvenile offenders serving "life sentence[s]"). Juvenile lifers are assigned to the "least restrictive security level" possible, COMAR 12.02.29.03A(2), and the Parole Commission may recommend "specified inmate programming" to address their "risks and needs" and "improve" their "suitability for parole." COMAR 12.02.29.02B(8), 12.02.29.03B(7). Juveniles sentenced to life without parole are initially classified to the "maximum security level," COMAR 12.02.07.02D, and not given any preference for programming under the regulations. *See*

[3] Maryland has recently amended its parole regulations following the settlement of a federal lawsuit. *Maryland Restorative Justice Initiative v. Hogan*, Civil Action No. ELH-16-1021 (D. Md. 2016).

Graham, 560 U.S. at 79 ("[T]he system itself [may] become[] complicit in the lack of development [by] withhold[ing] counseling, education, and rehabilitation programs for [the parole-ineligible] … [T]he lack of maturity that led to [the] crime is reinforced by the prison term.").

ARGUMENT

I. Summary of Argument.

Malvo was sentenced at a very different time. Back in 2006, a Maryland judge had virtually boundless discretion to sentence a child to life without parole and did not need to consider the child's youth at the time of the offense or subsequent growth in maturity as mitigating factors. Judge Ryan thus sentenced Malvo, like any adult offender, to vindicate the state's interest in retribution. *See* E.128 ("This community … does not forgive you.").

Nearly six years later, *Miller*, made retroactive by *Montgomery*, changed the rules for sentencing juvenile homicide offenders. *Miller* explained how the "distinctive attributes of youth diminish the penological justifications"—including retribution—for sentencing juveniles to life without parole. 567 U.S. at 472. And it "require[d]" sentencers to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before imposing this penalty. *Id*. at 480.

The record does not reflect, on *de novo* review, that Judge Ryan anticipated and fulfilled *Miller*'s requirements. *Cf. Bratt v. State*, 468 Md. 481, 494 (2020) (the legality of a sentence under Rule 4-345(a) is a "purely legal" question that is reviewed *de novo*). And *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), which held that a sentencing explanation is "not required" to ensure sentencers consider an offender's "youth and attendant characteristics" under *Miller*, *id*. at 1311, 1320, does not salvage life-without-parole sentences imposed *before Miller*. Malvo's sentences violate the Eighth Amendment, and are illegal under Rule 4-345(a). Argument II, *infra*.

Malvo's sentences also violate the Eighth Amendment because life without parole is a disproportionate penalty as-applied to Malvo. *Miller* announced, and *Jones* did not disturb, a substantive rule prohibiting life without parole for juvenile offenders who are not "irreparably corrupt" or "permanently incorrigible." Judge Ryan (albeit unintentionally) resolved the question of Malvo's "corrigibility"—his capacity for change—by finding that he *had* "changed," "shown remorse," and testified against Muhammad "without any promise of leniency." (E.128). Life without parole is thus an unconstitutional penalty for Malvo, and illegal under Rule 4-345(a). Argument III, *infra*.

This Court need not, however, decide this case under the Eighth Amendment. Article 25's "cruel or unusual punishment" clause affords greater protection to juvenile offenders than the Eighth Amendment and independently resolves this case. Now that Maryland has prospectively banned juvenile life without parole, this punishment has unequivocally become "cruel" or "unusual," and this Court should vacate the illegal sentences imposed before its repeal. Argument IV.C, *infra*. Alternatively, this Court should vacate Malvo's life-without-parole sentences because Article 25 prohibits this sentence for a juvenile found to be *corrigible*, Argument IV.D, *infra*, or not found to be *incorrigible*. Argument IV.E, *infra*.

Malvo's sentences must be vacated, and the case remanded for a *Miller*-compliant resentencing. Maryland Rule 8-604(d)(2). Malvo cannot be resentenced to life without parole, and must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Argument V.D, *infra*.

JUVRA's sentence-review mechanism does not "correct" Malvo's illegal sentences. *First*, JUVRA's review process does not apply to Malvo, and may never apply to him, because he may never be released from Virginia custody. A resentencing is the only way to ensure that Malvo can present his growth and maturity to a Maryland decision-

maker. *Second*, JUVRA, on its face, does not afford a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juveniles sentenced to life-without-parole because it grants expansive authority to deny relief to juveniles who *have* demonstrated maturity and rehabilitation. *Third*, even if JUVRA is an adequate "*Miller*-fix," it does not remedy the Article 25 violations in this case. Argument V.C, *infra*.

II. Malvo's life-without-parole sentences violate the Eighth Amendment because his pre-*Miller* sentencing did not satisfy *Miller*'s procedural requirements.

A. *Miller* requires sentencers to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before imposing life without parole.

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits "cruel and unusual punishments." *Miller* held that mandatory life without parole for juvenile offenders violates this prohibition. 567 U.S. at 465. Although the Court permitted discretionary life without parole for juvenile offenders, it "require[d]" sentencers to "take into account *how children are different*, and *how those differences counsel against* irrevocably sentencing them to a lifetime in prison," before imposing this penalty. 567 U.S. at 480 (emphases added); *id.* at 483 ("Our decision … *mandates … that a*

sentencer follow a certain process—considering an offender's *youth and attendant characteristics*—before imposing" life without parole) (emphases added).

Miller spelled out five "hallmark features" of youth (the "*Miller* factors") that merit "individualized" consideration: (1) the child's "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of his participation … and the way familial and peer pressures may have affected him"; (4) "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"; and (5) "the possibility of rehabilitation." *Id*. at 477–478, 480. Drawing on *Graham*—the first Supreme Court case to address juvenile life-without-parole sentences—*Miller* explained how the "distinctive attributes of youth diminish the penological justifications" for life without parole "even when [juveniles] commit terrible crimes." 567 U.S at 472. *First*, " 'the case for retribution is not as strong with a minor as with an adult' " because " '[t]he heart of the retribution rationale' relates to an offender's blameworthiness." *Id*.

(quoting *Graham*, 560 U.S. at 71). *Second*, deterrence does not suffice because " 'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.* (quoting *Graham*, 560 U.S. at 72). *Third*, the need for incapacitation is lessened because " 'incorrigibility is inconsistent with youth.' " *Id.* at 473 (quoting *Graham*, 560 U.S. at 73). *Finally*, rehabilitation cannot justify the sentence because "[l]ife without parole 'forswears altogether the rehabilitative ideal' " and is "at odds with a child's capacity for change." *Id.* (quoting *Graham*, 560 U.S. at 74).

The Supreme Court has subsequently clarified the scope and application of this procedural requirement. *Montgomery* held that *Miller*'s prescribed procedure—a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors"—was a "procedural requirement necessary to implement a substantive guarantee" that applies retroactively on collateral review. 577 U.S. at 208–210. And *Jones* reiterated that *Miller* "mandated" a procedure that "ensures that the sentencer affords individualized 'consideration' to … the defendant's 'chronological age and its hallmark features,' " 141 S.Ct. at 1316 (quoting *Miller*, 567 U.S. at 477), but clarified that an on-

the-record explanation is not necessary to ensure consideration of a defendant's youth. *Id*. at 1319; *see also* Argument II.D, *infra*.

B. *Miller* also requires sentencers to consider the juvenile offender's postconviction conduct, and treat any subsequent growth in maturity as weighing against life without parole.

Miller cautioned that "appropriate occasions for sentencing juveniles to [life without parole] will be uncommon" because of the "great difficulty" of "distinguishing" between "the juvenile offender whose crime reflects *unfortunate yet transient immaturity*, and the rare juvenile offender whose crime reflects *irreparable corruption*." 567 U.S. at 479–480 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)) (emphases added). *Miller* thus requires, *at a minimum*, that sentencers deciding whether life without parole is "appropriate" consider whether a child's immaturity is "transient" or "irreparable," and treat transient immaturity as a mitigating factor. *See also* Argument III.B, *infra* (*Miller* barred life without parole for transiently immature juvenile offenders). As part of this consideration, sentencers must take into account a child's postconviction conduct, especially when there is a significant delay between crime and sentencing. *See United States v. McCain*, 974 F.3d 506, 516–517 (4th Cir. 2020) (explaining that a juvenile's "postconviction conduct"—positive or negative—is critical to

determining "whether [the] offender is capable of rehabilitation or is instead permanently incorrigible."). A child's growth in maturity subsequent to the offense—key evidence of *transient* immaturity at the time of the crime—must weigh against condemning the child to die in prison. *See Montgomery*, 577 U.S. at 212–213 (Petitioner's "evolution from a troubled, misguided youth to a model member of the prison community" is "one kind of evidence that prisoners might use to demonstrate rehabilitation."); *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016) ("[T]he critical question under *Miller* was [defendant's] capacity to change after he committed the crimes … [W]hether [he] *has* changed in some fundamental way since that time, and in what respects, is surely *key* evidence.") (second emphasis added).

C. Malvo's sentencing, which took place nearly six years before *Miller* was decided, did not satisfy these procedural requirements.

Judge Ryan was not required to satisfy, and did not satisfy, these procedural requirements at Malvo's 2006 sentencing. Malvo was sentenced to life without parole after a non-capital sentencing proceeding under Maryland Code (2002), Criminal Law Article § 2-304(a)(i). *Cf.* Acts of 1987, ch. 626 (abolishing capital punishment for juvenile offenders). In 2006, Maryland sentencers were not required in non-capital cases to "take into account how children are different, and

how those differences counsel against" life without parole, or to consider a child's post-offense growth in maturity as mitigating. Quite the opposite: The court had "virtually boundless discretion" to impose life without parole, and the sentencing procedure was in the judge's "sound discretion." *Woods v. State*, 315 Md. 591, 600–601, 604 (1989) (quoting *Smith v. State*, 308 Md. 162, 166 (1986)). The court was "encourage[d] to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters," *Bartholomey v. State*, 267 Md. 175, 193 (1972), but was not required, in "a non-capital case[,] to consider an accused's youthful age to be a mitigating factor[.]" *Mack v. State*, 69 Md. App. 245, 253–255 (1986), *cert. denied*, 309 Md. 48 (1987) (affirming juvenile life sentence where court considered age to be the "opposite" of mitigating); *see also* Maryland Code (2002), Criminal Law Article § 2-303(h)(2)(v) (statutory mitigating circumstances in capital cases included "youthful age"). The judge was *allowed* to "take into consideration the defendant's conduct after the offense was committed … to whatever extent he may deem necessary," *Bartholomey*, 267 Md. at 194, but was not *required* to consider a child's subsequent growth in maturity as mitigating.

By 2006, the Supreme Court had prohibited the execution of juvenile offenders, *Roper*, 543 U.S. at 568, but had not imposed any constitutional limitations on juvenile life-without-parole sentences. *See Miller*, 567 U.S. at 475 (*Graham* was "unprecedented" in banning a "term of imprisonment" for a class of offenders). *Miller* had not "bar[red] life without parole" for juvenile offenders whose crimes did not reflect "permanent incorrigibility." *Montgomery*, 577 U.S. at 209; *see also* Argument III.B, *infra*. And the *Miller* factors had not entered the legal lexicon, let alone become constitutionally-mandated "sentencing factors." *Id*. at 210.

So the question is: Does the record reflect that Judge Ryan, by sheer chance, satisfied the procedural requirements announced nearly six years later in *Miller*? Plainly not. *First*, he was not presented with, and thus could not consider, argument that Malvo's youth at the time of his offenses and subsequent growth counseled against life without parole. The defense—which did not have the benefit of *Graham*'s reasoning or *Miller*'s mandate—did not even seek parole-eligible sentences for Malvo (E.123), let alone argue that his transformation "diminish[ed] the penological justifications" for this penalty. *Miller*, 567 U.S at 472. And the prosecutor acknowledged Malvo had "changed" and "grown tremendously"—major concessions in a post-*Miller* case—but

argued that "as a 17-year-old, *without mental defect*, *[he] must bear full responsibility*." (E.120–122) (emphasis added). Malvo's sentencing would have been radically different after *Miller*.

Second, the Maryland PSI—which the sentencing court was required to consider under Maryland Code (1999), Correctional Services Article, § 6-112(c)(3)—was an artifact of its pre-*Miller* time. The PSI did not state Malvo's age at the time of his offenses. In its two-line discussion of Malvo's "personal history," it merely noted his most recent communications with his parents. (E.40). It did not even mention Muhammad. And its perfunctory sentencing recommendation did not address Malvo's rehabilitative potential:

> In view of the fact the Instant Offenses resulted in [six] deaths … it is recommended the defendant be sentenced to serve six Life terms consecutively without … parole as indicated in the Maryland Sentencing Guidelines.

(E.41).

Third, as the State acknowledged at the hearing on the motion to correct illegal sentence, Judge Ryan was "not clairvoyant." (E.152). He had no way of knowing that the Supreme Court would expand its Eighth Amendment jurisprudence to juvenile life-without-parole sentences, *Graham*, 560 U.S. at 69–70, 78, or require him to consider a

juvenile's "youth and attendant characteristics" or subsequent growth as mitigating factors. *Miller*, 567 U.S. at 479, 483.

So it is no surprise Judge Ryan did not anticipate and fulfill *Miller*'s requirements. *First*, he described Malvo as a "young man" (E.127), but did not acknowledge that he was a child at the time of his offenses, a fact with no constitutional significance at that time. *Second*, he did not adequately consider the "hallmark features" of youth—the *Miller* factors—or the ways in which those features "diminish the penological justifications" for life without parole. *See State v. Keefe*, 478 P.3d 830, 837 (Mont. 2021) ("If a district court fails to adequately consider any of the *Miller* factors, a remand for resentencing is appropriate."). He stated that Malvo "knowingly, willingly, and voluntarily participated in [these] cowardly murders" (E.128) without acknowledging the "immaturity, impetuosity, and failure to appreciate risks and consequences" which "diminish" the "culpability" of all children. *Miller*, 567 U.S. at 477, 479. He alluded to Malvo's difficult "family and home environment"—"[Malvo] had no one to establish values or foundations" (E.128)—without recognizing that this counseled against life without parole. He made a passing reference to Muhammad's "influence" (*id.*) without any suggestion that this weighed against the harshest juvenile penalty. He did not address any

"incompetencies associated with youth" which may have led Malvo to testify against Muhammad and implicate himself in unsolved murders without seeking any sentencing concessions. And he hinted at the "possibility of rehabilitation"—Malvo "changed since [he was] first taken into custody" (*id.*)—but never recognized that this "capacity for change" weighed against condemning him to die in prison. *Miller*, 567 U.S. at 473. The record patently does not reflect adequate consideration of Malvo's "youth and attendant characteristics." *Id.* at 483.

Now it is true that the defense submitted reports to the PSI investigator noting Muhammad's "coercive persuasion" and Malvo's "remorse" and "remission." (E.61, 81). And we can assume that Judge Ryan read everything in the sentencing record. But there is a difference between the existence of *evidence relevant* to the *Miller* factors, and *adequate consideration* of the *Miller* factors. On this record, it is sheer speculation that Judge Ryan intuited, several years before *Miller* and without any argument from the parties, that this evidence "diminished the penological justifications" for life without parole.

Finally, Judge Ryan did not appear to afford any significance to Malvo's post-offense growth in maturity. He acknowledged Malvo had "changed" since his offenses (E.128), but did not recognize that his transient immaturity was an important (and arguably dispositive)

reason *not* to sentence him to life without parole. *See also* Argument III, *infra*. He sentenced Malvo (like any adult offender) to die in prison based on the seriousness of his crimes—"you are … a convicted murderer … [t]his community … does not forgive you" (E.128)—rather than what those crimes reflected about his potential for rehabilitation. Malvo's pre-*Miller* sentencing plainly did not comply with *Miller*'s procedural requirements. *See State v. Riley*, 110 A.3d 1205, 1217–1218 (Conn. 2015) (remanding discretionary life-without-parole sentence for resentencing where "the record [did] not clearly reflect" that court, prior to *Miller*, "considered and gave mitigating weight to the defendant's youth and its hallmark features"); *Aiken v. Byars*, 765 S.E. 2d 572, 577 (S.C. 2014) (remanding discretionary life-without-parole sentences imposed before *Miller* for resentencing where none of the pre-*Miller* hearings "approach[ed] the sort of hearing envisioned by *Miller* where the factors of youth are carefully and thoughtfully considered.").

D. *Jones* does not salvage Malvo's unconstitutional life-without-parole sentences.

Jones held that a "State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" in cases involving a juvenile homicide offender, and concluded that "an on-the-

record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth." 141 S.Ct. at 1313, 1319. Malvo was sentenced under a discretionary sentencing system. *See* Maryland Code (2002), Criminal Law Article § 2-201(b)(1) (juveniles convicted of first degree murder could be sentenced to life without parole or life). But *Jones* does not salvage Malvo's unconstitutional life-without-parole sentences for one simple reason: Malvo was sentenced *before Miller*, by a judge with "virtually boundless discretion" and no requirement to consider youth or subsequent growth as mitigating circumstances; Jones was resentenced *after Miller*, by a judge who is "deemed to have considered the relevant … mitigating circumstances." 141 S.Ct. at 1321 (quoting Campbell 477; 22A Cal. Jur. 3d, Crim. Law: Posttrial Proceedings § 408, p. 234 (2017)). Put differently: After *Miller*, sentencers are presumed to know and apply its requirements without any need for a sentencing explanation; before *Miller*, the record must reflect that the judge anticipated and fulfilled these requirements.

Jones illustrates the difference between a pre-*Miller* and a post-*Miller* discretionary sentencing procedure. Jones was sentenced to a mandatory life-without-parole sentence after a murder in 2004. In the wake of *Miller*, the Mississippi Supreme Court "ordered a new sentencing hearing where the sentencing judge could *consider Jones's*

youth and exercise discretion in selecting an appropriate sentence." 141 S.Ct. at 1312–1313 (emphasis added). At the resentencing hearing in 2015, "Jones's attorney argued that Jones's 'chronological age and its hallmark features' diminished the 'penological justifications for imposing the harshest sentences,' " 141 S.Ct. at 1313 (quoting *Miller*, 567 U.S. at 472, 477), and "added that nothing in this record ... would support a finding" of "irreparable corruption." *Id*. (citation omitted). The sentencing judge stated that he had "considered each and every factor that is identifiable in the *Miller* case and its progeny," and accepted that "consideration of the *Miller* factors and others relevant to the child's culpability might well counsel against irrevocably sentencing a minor to life in prison." (Mississippi Resp. Br. at 9–10). He nevertheless determined that life without parole remained appropriate. *Jones*, 141 S.Ct. at 1313. Jones, who was resentenced after *Miller*, received consideration of how the distinctive attributes of youth counsel against life without parole; Malvo, who was sentenced before *Miller* (and nearly a decade before *Jones*), did not. Malvo is seeking precisely what Jones was afforded under *Miller*.[4]

[4] Appellant's counsel is unaware of *any* juvenile offenders sentenced to life without parole in Maryland after *Miller*. *Miller*'s procedural requirements thus appear, to some extent, to have been outcome-

Jones, therefore, does not support affirming a pre-*Miller* sentence that does not even come close to complying with *Miller*. It repeatedly affirmed *Miller*'s requirement that a court consider a child's "youth and attendant characteristics" before imposing this sentence. 141 S.Ct. at 1311 ("Miller mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence") (quoting *Miller*, 567 U.S. at 483); *id*. at 1316 (*Miller* "required that a sentencer consider youth as a mitigating factor"); *id*. (a sentencer must consider "the murderer's 'diminished culpability and heightened capacity for change' " and "afford[] individualized 'consideration' to … the defendant's 'chronological age and its hallmark features.' " (quoting *Miller*, 567 U.S. at 477, 479). And it compared this requirement to the procedure in capital cases, where sentencers are "required" to "consider relevant mitigating circumstances when deciding whether to impose the death penalty." *Id*. at 1316. Here, in Malvo's non-capital sentencing proceeding, Judge Ryan was not required to consider *any* mitigating circumstances, let alone Malvo's youth or transient immaturity.

---

determinative. The parties' joint stipulation will address this point. *See* n.2, *supra*.

E. Conclusion.

Malvo's sentences violate the Eighth Amendment because his sentencing did not comply with *Miller*. His sentences are illegal under Rule 4-345(a) because *Miller*'s consideration requirement is not a mere "procedural rule," but rather a "procedural requirement necessary to implement a substantive guarantee." *Montgomery*, 577 U.S. at 210; *see also id*. (*Miller*'s hearing requirement "*gives effect to Miller*'s substantive holding[.]") (emphasis added).[5] He must be granted a *Miller*-compliant resentencing. Argument V, *infra*.

III. Malvo's life-without-parole sentences violate the Eighth Amendment because the sentencing judge implicitly determined that he was corrigible.

A. As-applied Eighth Amendment proportionality challenges.

Jones expressly left open the possibility of an "as-applied Eighth Amendment claim of disproportionality regarding [a child's] sentence." 141 S.Ct. at 1322. An "as-applied challenge" is a "claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." Black's Law Dictionary (11th ed. 2019). Life without parole is a disproportionate penalty as-applied to Malvo because: (1) *Miller* announced, and *Jones* did not disturb, a retroactive

[5] *Montgomery* itself was an appeal from a motion to correct illegal sentence under La. Code Crim. Proc. Ann., Art. 882(A) (West 2008) ("An illegal sentence may be corrected at any time[.]").

substantive rule prohibiting life without parole for juvenile offenders unless their crimes reflect "irreparable corruption" or "permanent incorrigibility"; (2) *Miller*'s substantive rule controls the evaluation of an as-applied proportionality challenge to a juvenile life-without-parole sentence; and (3) Judge Ryan implicitly determined that Malvo was reparable or corrigible by finding that he had "changed" since he was taken into custody, "shown remorse," and voluntarily assisted in Muhammad's trial "without any promise of leniency." (E.128).

B. *Miller*'s substantive rule prohibits life without parole for juvenile offenders unless their crimes reflect "irreparable corruption" or "permanent incorrigibility."

The starting point in an as-applied challenge is determining the "substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1127 (2019). *Miller* furnished that rule: "[L]ife without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.' " *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 479–480). We know this because *Montgomery* said so. The question in *Montgomery* was "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as

juveniles to die in prison." 577 U.S. at 197.[6] *Montgomery* held that "*Miller* announced a substantive rule": Life without parole is "disproportionate under the Eighth Amendment" for "a child whose crime reflects transient immaturity." *Id*. at 208, 211; *see also id*. at 209 ("*Miller* … bar[red] life without parole … for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.").[7]

Jones did not disturb *Miller*'s substantive rule. It *expressly* did "not overrule *Miller* or *Montgomery*," and it "carefully follow[ed] both" decisions. 141 S.Ct. at 1321. It restated *Miller*'s substantive rule as part of *Montgomery*'s "key paragraph": "That *Miller* did not impose a formal factfinding requirement *does not leave States free to sentence a child whose crime reflects transient immaturity* to life without parole. … *Miller* established that this punishment is *disproportionate* under the Eighth Amendment." *Id*. at 1315 n.2 (quoting *Montgomery*, 577 U.S. at 211) (emphasis added). And it did "not disturb *Montgomery*'s

---

[6] Under the *Teague v. Lane*, 489 U.S. 288 (1989) retroactivity framework for cases on federal collateral review, "courts must give retroactive effect to new substantive rules of constitutional law," which include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

[7] *Montgomery* used the terms "irreparable corruption" and "permanent incorrigibility" to refer to juveniles "who exhibit such irretrievable depravity that rehabilitation is impossible." 577 U.S. at 208.

holding that *Miller* applies retroactively on collateral review," *id.* at 1317 n.4, which rested on *Montgomery*'s determination that *Miller* announced a substantive rule.

Now *Jones* did state that "permanent incorrigibility" in juvenile life-without-parole cases is "not an eligibility criterion akin to sanity or a lack of intellectual disability" in death penalty cases. 141 S.Ct. at 1315. Tellingly, however, it reached this conclusion, in part, because neither *Miller* nor *Montgomery* "require[d] the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence," *id.* at 1316, or mentioned a possible Sixth Amendment jury right on the question of incorrigibility. *Id.* at 1316 n.3; *see also id.* at 1316–1317 (*Montgomery* "explicitly stated that 'a finding of fact regarding a child's incorrigibility ... is not required' ") (quoting *Montgomery*, 577 U.S. at 211). *Montgomery* and *Jones* thus do not necessarily conflict, and should be read harmoniously: *Montgomery* held that *Miller* announced a *substantive* rule barring life without parole for non-permanently incorrigible juvenile offenders, and *Jones* clarified that *Miller*'s *procedural* requirements do not include an express or implicit factual finding of permanent incorrigibility. *See State v. Haag*, 495 P.3d 241, 246 n.3 (Wash. 2021) ("*Jones* … does not … disturb … [*Miller*'s substantive] rule … *Jones* holds only that no

finding of incorrigibility is *necessary* prior to sentencing a juvenile to life without parole."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts are not to "conclude" that the Supreme Court has "by implication, overruled [its] earlier precedent."). After *Jones*, the "constitutionally relevant question" in a juvenile life-without-parole case remains "whether the crime reflects a Plaintiff's 'irreparable corruption' or 'transient immaturity.' " *Office of Prosecuting Attorney for St. Louis County v. Precythe*,——F.4th——, 2021 WL 4235846, *7 (8th Cir. Sept. 17, 2021).

C. *Miller*'s substantive rule controls the evaluation of Malvo's as-applied challenge to his life-without parole sentences.

Jones did not decide the standard that controls the evaluation of an as-applied Eighth Amendment proportionality challenge to a juvenile life-without-parole sentence:

> [T]his case does not properly present—and thus *we do not consider*—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence. *See* Brief for United States as *Amicus Curiae* 23; *Harmelin v. Michigan*, 501 U.S. 957, 996–1009, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment).

141 S.Ct. at 1322 (emphasis added).

The Court cited to its leading case about as-applied Eighth Amendment proportionality challenges—*Harmelin*—but did not

state that *Harmelin*'s "narrow proportionality principle," which only forbids "grossly disproportionate" sentences, 501 U.S. at 997, 1001, controls the evaluation of as-applied proportionality challenges to *juvenile* life-without-parole sentences. *See* Tr. of Oral Arg. 35 (Barrett, J.) ("I have a question about an as-applied Eighth Amendment challenge here … why isn't [Jones] better off … directly challenging the substantive decision that he's permanently incorrigible?"); *Jones*, 141 S.Ct. at 1337 n.6 (Sotomayor, J., dissenting) ("In the context of a juvenile offender," an as-applied claim of disproportionality "should be controlled by this Court's holding that sentencing 'a child whose crime reflects transient immaturity to life without parole ... is disproportionate under the Eighth Amendment.' ") (quoting *Montgomery*, 577 U.S. at 211). The Court has never articulated "the approach for an individual as-applied challenge to a [juvenile life-without-parole] … case." Berry, *The Evolving Standards, As Applied*, 74 Fla. L. Rev. (forthcoming 2022), (manuscript at 32, online at: https://tinyurl.com/5acv7a2w).

This Court thus must decide whether the applicable standard for Malvo's as-applied challenge to his life-without-parole sentences is *Harmelin*'s "narrow proportionality principle" barring "grossly disproportionate sentences" or *Miller*'s "substantive rule" barring life

without parole for corrigible juveniles. *Miller*'s substantive rule should control for two reasons. *First*, as the Supreme Court recently explained in addressing a different Eighth Amendment as-applied challenge, "classifying a lawsuit as facial or as-applied affects the *extent* to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy,' but it *does not speak at all* to the substantive rule of law necessary to establish a constitutional violation … '[T]he substantive rule of law is the *same* for both [facial and as-applied] challenges.' " *Bucklew*, 139 S.Ct. at 1127–1128 (quoting *Gross v. United States*, 771 F.3d 10, 14–15 (D.C. Cir. 2014) (emphases added)). As *Jones* did not disturb *Miller*'s substantive rule, this Court must apply that rule in evaluating Malvo's as-applied challenge. *Second*, this Court should apply *Miller*'s *specific* rule governing the proportionality of juvenile life-without-parole sentences rather than *Harmelin*'s *general* proportionality rule. *See* Black's Law Dictionary (11th ed. 2019) (the "general/specific canon" is the doctrine that the specific prevails over the general if there is a conflict). *Harmelin* was decided in 1991, long before the Supreme Court recognized that "children are constitutionally different from adults for sentencing purposes." *Miller*, 567 U.S. at 471. As *Miller* explained, "*Harmelin* had *nothing to do with children* and did not purport to apply its holding to

the sentencing of juvenile offenders." *Id.* at 481 (emphasis added). *Miller*, rather than *Harmelin*, furnishes the standard for evaluating Malvo's as-applied challenge to his life-without-parole sentences. *See* Berry, *supra*, at 34, 37 ("[A]pplying heightened as-applied scrutiny to [juvenile life-without-parole] … sentences logically follows the Court's jurisprudence … because the Court treats 'different' cases differently and there is no reason to distinguish between categorical and individual cases with respect to their differentness … The kind of juvenile offender for which a [life-without-parole] punishment is proportional would be one who is permanently incorrigible.").

D. Malvo's life-without-parole sentences violate the Eighth Amendment because the sentencing judge implicitly determined that he was reparable or corrigible.

Malvo's life-without-parole sentences are disproportionate under the Eighth Amendment because the sentencing judge implicitly determined that he was reparable or corrigible. "Irreparability" and "incorrigibility" both denote an "incapacity" to change. *See* Black's Law Dictionary (11th ed. 2019) (defining "incorrigible" as "[i]ncapable of being reformed" and "irreparable" as "[i]ncapable of being rectified, restored, remedied, cured, regained, or repaired"); *Montgomery*, 577 U.S. at 212 ("The opportunity for release will be afforded to those who

demonstrate … that children who commit even heinous crimes are *capable of change*.") (emphasis added). As there was no dispute that Malvo *had* substantially changed in the four years between his offenses and sentencing, his life-without-parole sentences are disproportionate.

The prosecutor's sentencing remarks are instructive. *Cf. Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (statements of "more disinterested" parties, such as "jailers who would have … no particular reason to be favorably predisposed toward one of their charges … would quite naturally be given much greater weight."). *First*, the prosecutor acknowledged that Malvo had "changed" and "grown tremendously" since his crimes. (E.120–121). *Second*, he stated that Malvo had "expressed … genuine remorse," and acted to express his "contrition" by cooperating with the prosecution of Muhammad. (E.120–121). *Third*, he stressed that Malvo was "under the sway of a truly evil man who infused a 17-year-old with the ideology of hate," an ideology he had "now *escaped* from." (E.121) (emphasis added). The prosecutor, therefore, accepted that Malvo was corrigible.

Judge Ryan agreed. He found that Malvo had "changed since [he was] first taken into custody in 2002." (E.128). He observed that Malvo had "shown remorse" and "asked for forgiveness." *Id*. He noted that Malvo had offered truthful and helpful testimony at Muhammad's trial

that, "alone, made these prosecutions worthwhile." (E.127). He stated that Malvo "should be commended for [his] acceptance of guilt and voluntary assistance without any promise of leniency." (E.128). And he acknowledged that Malvo "could have been better" had he not met Muhammad and "became influenced by him." *Id*. Although he did not use the words "reparable" or "corrigible," his findings clearly established that Malvo is not an "irreparably corrupt" or "permanently incorrigible" juvenile offender, and is not properly subject to life without parole. *Cf*. *Haag*, 495 P.3d at 251 (de-facto life sentence was "unconstitutional under the Eighth Amendment because the resentencing court expressly found [defendant] was 'not irretrievably depraved nor irreparably corrupt.' ") (citation omitted).

E. Conclusion.

Malvo's sentences violate the Eighth Amendment because life without parole is a disproportionate penalty as-applied to him.[8] His sentences are illegal under Rule 4-345(a) because penalties that are "cruel and unusual punishment" are substantively unlawful. *Randall Book Corp v. State*, 316 Md. 315, 322, 329–330 (1989). He must be

[8] This Court can reach the same conclusion under Article 25. Argument IV.D, *infra*.

resentenced and afforded a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." Argument V, *infra*.

IV. Malvo's life-without-parole sentences violate Article 25.

A. Article 25 independently resolves this case.

Article 25's prohibition of the "inflict[ion]" of "cruel *or* unusual punishment … by the Courts of Law" is similar, but not identical, to the Eighth Amendment's prohibition of the "inflict[ion]" of "cruel *and* unusual punishments." Article 25 has "usually been construed to provide the same protection as the Eighth Amendment," but as this Court acknowledged in its most recent juvenile sentencing case, "there is some textual support for finding greater protection" in Maryland's provision. *Carter v. State*, 461 Md. 295, 308 n.6 (2018); *see also Thomas v. State*, 333 Md. 84, 103 n.5 (1993) ("The defendant's argument that we should afford greater protection under Article 25 … than … the Eighth Amendment …, based upon the disjunctive phrasing 'cruel or unusual' of the Maryland protection, is not without support."). This Court should now hold that Article 25 affords greater protection to juvenile offenders than the Eighth Amendment because of: (1) the textual difference between these provisions; (2) Article 25's drafting history; and (3) Maryland's distinctive tradition of shielding juvenile

offenders from adult punishments. Argument IV.B, *infra*. And it should conclude that: (1) Article 25 invalidates the juvenile life-without-parole sentences imposed before Maryland's repeal because this punishment has become "cruel" or "unusual" (Argument IV.C, *infra*); (2) Article 25 invalidates Malvo's life-without-parole sentences because it is "cruel" or "unusual" to impose this penalty on a juvenile who is implicitly determined to be corrigible (Argument IV.D, *infra*); or (3) Article 25 invalidates Malvo's life-without-parole sentences because the imposition of this penalty, without an express or implicit factual finding of "permanent incorrigibility," poses too great a risk of "cruel" or "unusual" punishment. (Argument IV.E, *infra*).

B. Article 25 affords greater protection to juvenile offenders than the Eighth Amendment.

Article 25 affords juvenile offenders greater protection than the Eighth Amendment for three reasons. *First*, Article 25's prohibition—"cruel *or* unusual punishment"—is expressed disjunctively, whereas the Eighth Amendment's prohibition—"cruel *and* unusual punishments"—is expressed conjunctively. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 12, at 116 (2002) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives … With a conjunctive list, *all* ... *things are*

required—while with the disjunctive list, at least one of the [things] is required, but *any one ... satisfies the requirement*.") (emphases added). Under the text's most natural reading, Article 25 prohibits punishment that is *either* "cruel" or "unusual"; the Eighth Amendment prohibits punishment that is *both* "cruel" and "unusual." *See People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992) ("[I]t seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* "cruel" and "unusual."); *Hale v. State*, 630 So.2d 521, 526 (Fla. 1993) ("The federal constitution protects against sentences that are *both* cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are *either* cruel or unusual."); *State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) ("This difference in wording is 'not trivial' because the 'United States Supreme Court has upheld punishments that, although they may be cruel, are not unusual.' ") (citation omitted). Maryland's distinctive text should be given its distinctive meaning. *Cf. State v. Bassett*, 428 P.3d 343, 349–350 (Wash. 2018) (extending broader protection to juvenile offenders under state constitution's "cruel punishment" clause in part "because it

prohibits conduct that is *merely* cruel; it does not require that the conduct be *both* cruel and unusual.") (emphasis added).

Second, Article 25's drafting history suggests that this textual difference was "purposeful and substantive rather than merely semantic." *People v. Baker*, 20 Cal. App. 5th 711, 723, 229 Cal. Rptr. 3d 431, 442 (2018) (discussing California's "cruel or unusual punishment" clause). Article 25 was ratified in November 1776 (then as Article 22 of the Declaration of Rights). The Declaration was drafted after Virginia's Declaration of Rights, and "made use of [Virginia's] draft as a starting point for [its] own labors." Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L.J. 929, 942 (2002). Virginia's provision—a "verbatim copy of the English Bill of Rights (1689)"—proscribed the infliction of "cruel and unusual punishments." *Id.* at 968. As Friedman (now Judge Friedman) explains, "[t]he Maryland drafters *explicitly rejected* the phrase 'cruel and unusual' in favor of the broader construction 'cruel or unusual.' " *Id.* (emphasis added); *cf. Leidig v. State*, 475 Md. 181, 256 A.3d 870, 881 (2021) ("[T]he assembly of freemen [who drafted the Maryland Declaration] surely understood that they had included

additional language regarding examination of witnesses that was not contained in the Virginia and Pennsylvania declarations of rights.").[9]

Third, Maryland's distinctive tradition of shielding juvenile offenders from adult punishments warrants classifying a broader range of juvenile punishments as unconstitutional under state law. *See* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 Temp. L. Rev. 637, 639 (1998) (noting that the Supreme Court "must address the 'lowest common denominator' that can be applied to every state," whereas state supreme courts "have the freedom to tailor more narrowly the rules they create to the unique characteristics, history, and traditions of their individual states."). Maryland was one of the first States to pass legislation establishing a "House of Refuge for Juvenile Delinquents," Acts of 1830, ch. 64, as part of a progressive movement that sought to "rescue children from the degradations of adult prison." Nell Bernstein,

---

[9] The Eighth Amendment, ratified 15 years later in 1791, "tracked Virginia's prohibition of 'cruel *and* unusual punishments,' … which most closely followed the English provision," rather than State constitutions prohibiting "cruel or unusual punishments." *Harmelin*, 501 U.S. at 966 (Scalia, J.); *see also* Meghan J. Ryan, *Does the Eighth Amendment Punishment Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 Wash. U. L. Rev. 567, 608 (2010) ("[I]t is highly likely that the drafters and ratifiers of the Eighth Amendment were aware of the significance of using the term 'and' instead of the term 'or' " as "various states [including Maryland] had used different permutations of the language of the prohibition.").

Burning Down the House: The End of Juvenile Prison 38 (2014).[10] Maryland was one of the first States to create a specialized court for juvenile offenders. *See* Acts of 1902, ch. 611. Maryland banned capital punishment for juvenile offenders nearly two decades before *Roper* held that this practice was "cruel and unusual." *See* Acts of 1987, ch. 626. And Maryland has gone further than the Supreme Court in banning the imposition of juvenile life-without-parole sentences in *all* cases. As Maryland has not moved in lockstep with other jurisdictions with respect to juvenile sentencing, Article 25 should not be applied to juveniles in lockstep with the Eighth Amendment. *Cf. Leidig*, 256 A.3d at 902 ("[T]his Court in numerous instances has declined to read a Maryland constitutional provision in lockstep with its federal constitutional counterpart where such a divergence is necessary and appropriate to give full effect to the rights afforded under Maryland law.").

This Court does not need to overturn its prior Article 25 cases to reach this conclusion. *See, e.g.*, *Thomas*, 333 Md. at 103 n.5 (rejecting an as-applied proportionality challenge to an *adult* sentence because "the prevailing view of the Supreme Court recognizes the existence of a

[10] The Act provided that minors convicted of *any* offense punishable by imprisonment in the penitentiary could be committed to the House of Refuge during their minority for instruction in "useful knowledge." §§ 6, 7.

proportionality component in the Eighth Amendment [and] we perceive no difference between the protection afforded by that amendment" and Article 25). This Court has never specifically addressed Article 25's protections for *juvenile* offenders,[11] and should now hold that it affords greater protection than the Eighth Amendment. *Cf. Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270, 285 (Mass. 2013) (juvenile offenders have broader protections than adult offenders under state constitution's "cruel or unusual punishment" clause because of their "unique characteristics").

C. Article 25 invalidates the juvenile life-without-parole sentences imposed before Maryland's repeal because this punishment has become "cruel" or "unusual."

The Legislature has decided that after October 1, 2021, life without parole is *never* appropriate for juvenile offenders, regardless of the heinousness of their crimes. This penalty, which was already "unusual" in Maryland, is now "cruel" under Article 25, as there is no legitimate penological purpose for retaining life-without-parole sentences imposed prior to the repeal. *Cf. State v. Santiago*, 122 A.3d 1,

---

[11] In *Trimble v. State*, 300 Md. 387 (1984), the defendant argued that executing juvenile offenders violated the Eighth Amendment and Article 25. *Id.* at 416–417. This Court rejected the Eighth Amendment challenge, and only said regarding the Article 25 claim that it saw "no obstacle presented by … the Declaration … to prevent the death penalty on account of [defendant's] age." *Id.* at 435. The Court did not address any claim that Article 25 afforded broader protection to juvenile offenders.

10 (Conn. 2015) (invalidating previously-imposed death sentences under state constitution's prohibition against "cruel and unusual punishment" because "following its prospective abolition, [the] death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose.").

This Court has never set forth an approach for evaluating a *categorical* challenge to a punishment under Article 25. The Supreme Court's two-step approach to Eighth Amendment categorical challenges is instructive. *Cf. Trimble*, 300 Md. at 420–421 (applying this approach to determine the constitutionality of executing juvenile offenders). This Court should apply this approach, unshackled by federalism concerns, and hold that juvenile life without parole is "cruel" or "unusual" punishment under Article 25. *See State v. Sweet*, 879 N.W.2d 811, 835, 839 (Iowa 2016) (applying Supreme Court's two-step approach to hold juvenile life without parole violates state constitution's "cruel and unusual punishment" clause); *Bassett*, 428 P.3d at 350–351 (applying this approach, rather than gross disproportionality test, to hold juvenile life without parole violates state constitution's "cruel punishment" clause).

First, the Supreme Court "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." *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 572). "One way of understanding the examination of objective indicia relates to the proscription against *unusual* punishments—a punishment not allowed by a majority of jurisdictions is *unusual*." *Berry*, *supra*, at 14 (emphases added); *see also Miller*, 567 U.S. at 494 (Roberts, C.J., dissenting) (the "objective indicia" determine whether a punishment is "unusual"). Under Article 25, the most important "objective indicia" are Maryland enactments and sentencing practices, though a "national consensus" is persuasive.

Life without parole for juvenile offenders is an "unusual" punishment under Article 25. To start, Maryland has banned the imposition of this penalty. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.") (quoting *Penry*, 492 U.S. at 331). Maryland has decided that this penalty—which does not appear to have been imposed in the past decade (*see* n.4, *supra*)—should never be imposed again. Furthermore, a review of "actual sentencing practices"—an "important part of the … inquiry into consensus," *Graham*, 560 U.S. at 62—reveals that only around twelve juvenile offenders are serving life-without-

parole sentences in Maryland, *see* n.2, *supra*, with Malvo yet to start serving his sentences. To put this in perspective, this is around one percent of the 1159 juvenile offenders in Division of Correction custody as of December 30, 2020. Revised Fiscal and Policy Note for Senate Bill 494, at 5 (2021). Juvenile life without parole is also falling into disuse nationally—25 States and the District of Columbia have banned it, and a further nine States have no offenders serving it. Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project, May. 24, 2021, https://tinyurl.com/272d5eje; *see also Bassett*, 428 P.3d at 352 ("[T]he direction of change in this country is unmistakably and steadily moving toward abandoning [this] practice"). This Court should invalidate Maryland's "unusual" juvenile life-without-parole sentences imposed before the repeal.

Second, the Supreme Court "determine[s] in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham*, 560 U.S. at 61. In this inquiry, the Court considers "whether the challenged sentencing practice serves legitimate penological goals." *Id*. at 67. "One way of understanding the examination of subjective indicia relates to the proscription against *cruel* punishments—a punishment not supported by a purpose of punishment is *cruel*." *Berry*, *supra*, at 15 (emphases added).

Life without parole for juvenile offenders is a "cruel" punishment under Article 25 because it is an "especially harsh" punishment for juveniles, *Graham*, 560 U.S. at 70, that no longer serves any legitimate penological goals. *First*, any deterrent value juvenile life without parole may have had "no longer exists" after its repeal. *Santiago*, 122 A.3d at 57. *Second,* the "case for retribution"—which is already "not as strong" for juveniles, *Miller*, 567 U.S at 472—is even weaker when the Legislature has determined that retribution will never warrant sentencing another juvenile to life without parole. *Third*, life without parole has never been "justified by the goal of rehabilitation" because it "forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. *Fourth*, now that the Legislature has decided that sentencing juveniles to life without parole is not necessary to protect the public, there is no legitimate basis to permanently incapacitate juveniles sentenced before the repeal. *Finally*, juvenile life without parole is "cruel" because of its disproportionate application to black youth: 82% of juveniles sentenced to life without parole in Maryland are black, the highest percentage in the nation. The Campaign for the Fair Sentencing of Youth, *Juvenile Restoration Act Factsheet*, Hearing on Senate Bill 494 before the Senate Judicial Proceedings Committee (2021) (written testimony).

D. Alternatively, Article 25 invalidates Malvo's life-without-parole sentences because it is "cruel" or "unusual" to impose this penalty on a juvenile offender who is implicitly determined to be corrigible.

If this Court concludes that *Jones* has overruled *Miller*'s substantive rule barring life without parole for all juvenile offenders who are not permanently incorrigible, Argument III, *supra*, it should recognize such a rule under Article 25, and apply this rule to uphold Malvo's as-applied proportionality challenge. Life without parole is an especially "cruel" penalty for corrigible juvenile offenders like Malvo because it does not serve any legitimate penological goals. *First*, retribution does not support this punishment because juvenile offenders whose crimes reflect the transient immaturity of youth—and who have since matured—are less blameworthy than irreparably corrupt juvenile offenders. *Second*, there is no deterrent value in retaining the life-without-parole sentences of juveniles—corrigible or otherwise—now that this sentence has been banned. *Third*, rehabilitation cannot justify denying juveniles who have demonstrated their capacity to change a meaningful opportunity for release. *Finally*, incapacitation—which depends on the judgment that the juvenile is "incorrigible," *Graham*, 560 U.S. at 72–73—cannot support retaining the sentence of a juvenile found to be corrigible. Furthermore, life

without parole is an "unusual" penalty in this case because Malvo, unlike other juvenile offenders, had four years to demonstrate his increased maturity, and established that he had "changed." (E.128). Retaining life without parole for offenders like Malvo is "cruel" or "unusual" under Article 25.

E. Alternatively, Article 25 invalidates Malvo's life-without-parole sentences because Judge Ryan did not find, expressly or implicitly, that he was "permanently incorrigible."

Jones held that the Eighth Amendment does not require a court to make an express or implicit finding of permanent incorrigibility before imposing life without parole on a juvenile offender, but recognized that "States may require sentencers to make extra factual findings." 141 S.Ct. at 1323. This Court should now hold that juvenile life-without-parole sentences imposed before Maryland's repeal must be vacated under Article 25 unless the judge expressly or implicitly found that the juvenile was some variant of "permanently incorrigible." In other words, the record must reflect that the judge determined that the defendant was incapable of rehabilitation. Absent such a rule, there is an unacceptable risk that corrigible juvenile offenders were condemned to die in prison. Malvo's sentencing plainly violates this rule:

Judge Ryan did not find that he was permanently incorrigible, and expressly found that he had "changed." (E.128).

F. Conclusion.

Malvo's sentences violate Article 25 because: (1) juvenile life without parole is categorically "cruel" or "unusual"; (2) life without parole is "cruel" or "unusual" for a corrigible juvenile like Malvo; or (3) Judge Ryan did not find Malvo to be incorrigible. Malvo's first two claims establish that his sentences are cruel or unusual punishment, and thus illegal under Rule 4-345(a). *Randall Book Corp*, 316 Md. at 322. His third claim establishes that an "error of constitutional dimension," "based upon a [Supreme Court] decision" rendered after his sentencing proceeding, contributed to his sentences, rendering them illegal under Rule 4-345(a). *Baker v. State*, 389 Md. 127, 134–137 (2005).[12] His sentences must be retroactively invalidated under Article 25. *See Wiggins v. State*, 275 Md. 689, 701 (1975) ("retrospective application is mandated … where the punishment is not constitutionally permissible.") He must be resentenced to sentences

[12] This exception to the ordinary limits on Rule 4-345(a) motions has so far only been applied in capital proceedings. *Id*. at 134. The Supreme Court has, however, recognized subsequent to *Baker* that life without parole is "akin to the death penalty" for juveniles, and is "treated … similarly to that most severe punishment." *Miller*, 567 U.S. at 475. This claim is thus appropriately reviewed under Rule 4-345(a).

that afford him a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." Argument V, *infra*.

V. Malvo must be resentenced.

A. Summary.

Malvo's sentences violate *Miller*'s individualized sentencing requirement for juvenile offenders and *Miller*'s substantive rule barring life without parole for corrigible juvenile offenders. Arguments II & III, *supra*. To remedy these *Miller* violations, he must receive a new sentencing that complies with *Miller*, or access to a release mechanism that affords him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75). As he is not eligible for parole, and does not have a "meaningful opportunity to obtain release" through JUVRA, he must be resentenced. Argument V.B, *infra*. His sentences also violate Article 25, Argument IV, *supra*, and he must be resentenced to remedy these violations. Argument V.C, *infra*.

B. Malvo must be resentenced to remedy the Eighth Amendment violations in his sentencing.

Montgomery explained that *Miller* violations may be remedied by "permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 577 U.S. at 212. Extending parole eligibility remedies *Miller* violations because it "ensures that juveniles

whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment," and that those "who have shown an inability to reform will continue to serve life sentences." *Id*. *See also Graham*, 560 U.S. at 75 ("A State is not required to guarantee eventual freedom" because some "who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.").

A parole system—or other release mechanism—comports with the Eighth Amendment if it affords a juvenile offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75); *see also Carter*, 461 Md. at 307 (holding that Maryland's parole system satisfied this requirement). Malvo is not eligible for parole. The question is whether JUVRA affords him the necessary "meaningful opportunity." The Supreme Court has indicated that two requirements must be met. *First*, the opportunity for release must be "realistic" for that offender. *Graham*, 560 U.S. at 82. It must come at a time that provides a "chance for fulfillment outside prison walls." *Id*. at 79; *see also Carter*, 461 Md. at 348–349, 362–363 (holding that defendant's lengthy term-of-years sentence constituted a *de facto* life-without-

parole sentence). *Second*, the release determination must actually be "based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. For the opportunity to be "meaningful," the decision-maker must have limited discretion to deny relief to juveniles who have demonstrated maturity and rehabilitation. *See Montgomery*, 577 U.S. at 212 (parole is a remedy to the extent that it "*ensures* that juveniles … who have … matured … *will not be forced* to serve a disproportionate sentence") (emphasis added); *Carter*, 461 Md. at 316 ("The amount of discretion the decision maker has is a recurring theme in Supreme Court cases distinguishing parole from other forms of early release."). An "assessment of whether the prisoner has matured and rehabilitated must be central to the release decision." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 412 (2014); *see also Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751, 777 (Iowa 2019) ("If the Board determines that a juvenile offender has demonstrated maturity and rehabilitation, parole … is required *as a matter of law*.") (emphasis added).

JUVRA does not afford Malvo a "realistic" possibility of release for two reasons. *First*, it does not "ensure[]," *Montgomery*, 577 U.S. at 212, or even create a significant likelihood, that he will ever have the opportunity to present his youth at the time of the offense and maturity

and rehabilitation to a Maryland judge. Malvo, who is 36 years old, is serving four life-with-parole sentences in Virginia. He cannot move to "reduce the duration of the sentence" imposed in Maryland until he "has been imprisoned for at least 20 years for [that] offense." CP § 8-110(a)(3),(b). But Malvo may never be paroled in Virginia, which has had "one of the lowest" grant rates in the country. Virginia Capital Case Clearinghouse, *Parole in Virginia, 2021: The Final Report of the Washington and Lee Law Representation Project* 3 (2021). And even if he is eventually paroled, he may not live the additional 20 years in Maryland custody to qualify for a JUVRA hearing. At best, therefore, JUVRA provides a speculative remedy for Malvo's unconstitutional sentences. *See Graham*, 560 U.S. at 70 (the "remote possibility" of release does not satisfy the Eighth Amendment). The only way to ensure him an "opportunity to show that [his] crime did not reflect irreparable corruption" is a resentencing. *Montgomery*, 577 U.S. at 213.

Second, JUVRA may deny Malvo any realistic possibility of release even if he does enter Maryland custody because of his "stacked sentence." The Act permits a juvenile offender to seek modification of "a sentence" "for an offense" after being "imprisoned for at least 20 years for the offense," and appears to contemplate separate motions for each "specific sentence." CP § 8-110(a)(3), (c), (f). Malvo, after 20 years in

Maryland custody, will only have been imprisoned for the prescribed period for the *first* of six life-without-parole sentences, and it is unclear whether the court would have the authority to modify his subsequent sentences. This Court thus does not need to reach JUVRA's substantive provisions: It is exceedingly unlikely to afford Malvo—a uniquely situated juvenile offender—any realistic "chance for fulfillment outside prison walls." *Graham*, 560 U.S. at 79.

Furthermore, JUVRA—unlike the parole system—does not adequately limit the decision-maker's discretion to deny sentence reductions to juveniles who have demonstrated maturity and rehabilitation. Under the parole system, the Parole Commission "shall consider whether the inmate has adequately demonstrated maturity and rehabilitation since commission of the crime" and "afford[] appropriate weight" to youth-related "mitigating factors" corresponding to the *Miller* factors. COMAR 12.08.01.18A(3)-(4).[13] *Cf. People v. Franklin*, 63 Cal. 4th 261, 276, 370 P.3d 1053, 1060, 202 Cal. Rptr. 3d 496, 505 (2016) (holding that parole statute mooted *Miller* claim

[13] Under a 2018 Executive Order, the Governor, in deciding whether to approve a parole recommendation for a juvenile lifer, considers "the same factors" as the Parole Commission, as well as the juvenile's "age" and "lesser culpability" and the degree to which the juvenile has demonstrated "maturity" and "rehabilitation" since the crime. COMAR 01.01.2018.06A, C(1).

because Parole Board was required, "[c]rucially," "*not just to consider but to give great weight* to the diminished culpability of juveniles …, the hallmark features of youth, and any subsequent growth and increased maturity.") (emphasis added). Significantly, if parole is denied, the Commission must "[s]tate why [it] has determined that the inmate has *not yet demonstrated* sufficient maturity and rehabilitation." COMAR 12.08.01.18E(3)(c) (emphasis added). The parole regulations, therefore, do not contemplate that an individual who *has* demonstrated sufficient maturity and rehabilitation will be denied parole.

Under JUVRA, the court is required to consider "whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction," as well as the *Miller* factors, the "nature of the offense," any "statement offered by a victim or victim's representative," and "any other factor the court deems relevant." CP § 8-110(d). It must address these factors in its written decision granting or denying relief. CP § 8-110(e)(2). The court is not required to treat the juvenile-specific factors as mitigating. *Cf. Williams v. United States*, 205 A.3d 837, 853 (D.C. 2019) (holding that sentence-review process provided meaningful opportunity for release where statute "explicitly" required individualized consideration of juvenile-specific factors that "counsel *against* sentencing them to a

lifetime in prison."). The court may only reduce a sentence if it determines that the "individual is not a danger to the public" *and* that the "interests of justice will be better served by a reduced sentence." CP § 8-110(c). It is not statutorily required to address these criteria in its written decision.

The "interests of justice" standard conveys expansive discretionary authority. *See Howard v. State*, 440 Md. 427, 441 (2014) ("This Court has declined to place limiting factors on the exercise of broad discretion 'in the interest of justice' ") (quoting *Jones v. State*, 403 Md. 267, 294 (2008)); Black's Law Dictionary (11th ed. 2019) (defining "interests of justice" as "the proper view of what is *fair and right*" in a discretionary matter) (emphasis added). It gives the court "latitude to consider a broad range of factors in addition to an individual's behavior" in determining whether to grant relief. *United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999). Ordinarily, this is not problematic: Judges are entitled to weigh competing equities in deciding whether to grant discretionary relief. *See, e.g.,* Maryland Rule 4-331(a) (court may order a new trial "in the interest of justice"); CP § 7-104 (court may reopen a postconviction proceeding "in the interests of justice"). Here, however, there is a constitutional right at stake for those juveniles sentenced to life without parole: the Eighth Amendment right to a release

determination that is "based on demonstrated maturity and rehabilitation." Under the plain language of JUVRA, the court may deny relief to an individual who *has* demonstrated maturity and rehabilitation sufficient to justify a sentence reduction, and proved that they are not a danger, because the "interests of justice"—the nature of the crime, the need to deter offenders, community sentiment—counsel against a reduction. As JUVRA, on its face, does not ensure that only those juveniles "who have shown an inability to reform will continue to serve life sentences," *Montgomery*, 577 U.S. at 212, it does not remedy unconstitutional life-without-parole sentences like Malvo's. Malvo must be resentenced.

C. Malvo must be resentenced to remedy the Article 25 violations in his sentencing.

This Court has exclusive authority to determine the remedies for violations of Maryland's constitution. *Cf. Bullock*, 485 N.W.2d at 877–878 (striking down life-without-parole sentences under Michigan's "cruel or unusual punishment" clause and crafting a distinct remedy of parole-eligibility). Article 25 requires that Malvo be resentenced for two reasons. *First*, Malvo should not have to rely on the remote possibility of a JUVRA hearing to remedy the constitutional errors in his sentencing. *See* Maryland Declaration, Article 19 ("That every man, for

any injury done to him in his person or property, *ought to have remedy* by the course of the Law … and *ought to have justice* and right, … *speedily without delay*, according to the Law[.]") (emphases added); *Espina v. Jackson*, 442 Md. 311, 336 (2015) ("It is a basic tenet, expressed in Article 19 … that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong.") (quoting *Piselli v. 75th Street Medical*, 371 Md. 188, 205 (2002)). He should promptly be resentenced to give effect to his Article 19 "right of access to the courts." *Piselli*, 371 Md. at 208. *Second*, a resentencing is required under state law. *See* Rule 8-604(d)(2) ("[I]f the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand … for resentencing.").

D. Scope of resentencing.

At Malvo's resentencing, the trial court "is charged … with 'exercising its sentencing discretion' as if the sentence was occurring for the first time." *Jones v. State*, 414 Md. 686, 695 (2010) (quoting *Bartholomey*, 267 Md. at 193). As Malvo will be resentenced after October 1, 2021, the court cannot impose life without parole, and may depart from the mandatory minimum life sentence. CP § 6-235. Under the Eighth Amendment, Malvo's sentencing must comply with *Miller* because he is statutorily exposed to *de facto* life without parole: six

consecutive life sentences. *Cf. Carter*, 461 Md. at 356–361. And he must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" because he is corrigible. Argument III, *supra*. Under Article 25, Malvo cannot be resentenced to sentences amounting to life without parole. Argument IV, *supra*.

CONCLUSION

Malvo's sentences violate the Eighth Amendment and Article 25, and are illegal under Rule 4-345(a). He must be resentenced.

Respectfully submitted,

Paul B. DeWolfe
Public Defender

Kiran Iyer
Assigned Public Defender

Celia Anderson Davis
Assistant Public Defender

Counsel for Appellant

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 13978 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.

/s/

_____

Kiran Iyer

PERTINENT AUTHORITY

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 CODE (1999), CORRECTIONAL SERVICES ARTICLE

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

…

(c)(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 CODE (2001, 2018 REPL. VOL.), CRIMINAL PROCEDURE ARTICLE

§ 6-235. Minor convicted as an adult.

Notwithstanding any other provision of law, when sentencing a minor convicted as an adult, a court:

(1) may impose a sentence less than the minimum term required under law; and

(2) may not impose a sentence of life imprisonment without the possibility of parole or release.

§ 8-110. Minor convicted as an adult; procedure to reduce duration of sentence.

(a) This section applies only to an individual who:

(1) was convicted as an adult for an offense committed when the individual was a minor;

(2) was sentenced for the offense before October 1, 2021; and

(3) has been imprisoned for at least 20 years for the offense.

(b)(1) An individual described in subsection (a) of this section may file a motion with the court to reduce the duration of the sentence.

(2) A court shall conduct a hearing on a motion to reduce the duration of a sentence.

(3)(i) The individual shall be present at the hearing, unless the individual waives the right to be present.
(ii) The requirement that the individual be present at the hearing is satisfied if the hearing is conducted by video conference.

(4)(i) The individual may introduce evidence in support of the motion at the hearing.
(ii) The State may introduce evidence in support of or in opposition to the motion at the hearing.

(5) Notice of the hearing under this subsection shall be given to the victim or the victim's representative as provided in §§ 11-104 and 11-503 of this article.

(c) Notwithstanding any other provision of law, after a hearing under subsection (b) of this section, the court may reduce the duration of a sentence imposed on an individual for an offense committed when the individual was a minor if the court determines that:
(1) the individual is not a danger to the public; and
(2) the interests of justice will be better served by a reduced sentence.

(d) A court shall consider the following factors when determining whether to reduce the duration of a sentence under this section:

(1) the individual's age at the time of the offense;

(2) the nature of the offense and the history and characteristics of the individual;

(3) whether the individual has substantially complied with the rules of the institution in which the individual has been confined;

(4) whether the individual has completed an educational, vocational, or other program;

(5) whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction;

(6) any statement offered by a victim or a victim's representative;

(7) any report of a physical, mental, or behavioral examination of the individual conducted by a health professional;

(8) the individual's family and community circumstances at the time of the offense, including any history of trauma, abuse, or involvement in the child welfare system;

(9) the extent of the individual's role in the offense and whether and to what extent an adult was involved in the offense;

(10) the diminished culpability of a juvenile as compared to an adult, including an inability to fully appreciate risks and consequences; and

(11) any other factor the court deems relevant.

(e)(1) The court shall issue its decision to grant or deny a motion to reduce the duration of a sentence in writing.

(2) The decision shall address the factors listed in subsection (d) of this section.

(f)(1) If the court denies or grants, in part, a motion to reduce the duration of a sentence under this section, the individual may not file a second motion to reduce the duration of that sentence for at least 3 years.

(2) If the court denies or grants, in part, a second motion to reduce the duration of a sentence, the individual may not file a third motion to reduce the duration of that sentence for at least 3 years.

(3) With regard to any specific sentence, an individual may not file a fourth motion to reduce the duration of the sentence.

MARYLAND CODE (2002), CRIMINAL LAW ARTICLE

§ 2-201. Murder in the first degree.

(b)(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.

§ 2-303. First degree murder—Sentencing procedure—Death penalty.

…

(h)(2) If the court or jury finds beyond a reasonable doubt that one or more of the aggravating circumstances under subsection (g) of this section exist, it then shall consider whether any of the following mitigating circumstances exists based on a preponderance of the evidence:

(i) the defendant previously has not:
1. been found guilty of a crime of violence;
2. entered a guilty plea or a plea of nolo contendere to a charge of a crime of violence; or
3. received probation before judgment for a crime of violence;
(ii) the victim was a participant in the conduct of the defendant or consented to the act that caused the victim's death;
(iii) the defendant acted under substantial duress, domination, or provocation of another, but not so substantial as to constitute a complete defense to the prosecution;
(iv) the murder was committed while the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder, or mental incapacity;
(v) the defendant was of a youthful age at the time of the murder;
(vi) the act of the defendant was not the sole proximate cause of the victim's death;
(vii) it is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society; or
(viii) any other fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case.

(i)(1) If the court or jury finds that one or more of the mitigating circumstances under subsection (h) of this section exists, it shall determine by a preponderance of the evidence whether the aggravating circumstances under subsection (g) of this section outweigh the mitigating circumstances.

(2) If the court or jury finds that the aggravating circumstances:

(i) outweigh the mitigating circumstances, a death sentence shall be imposed; or
(ii) do not outweigh the mitigating circumstances, a death sentence may not be imposed.

(3) If the determination is by a jury, a decision to impose a death sentence must be unanimous and shall be signed by the jury foreperson.

(4) A court or jury shall put its determination in writing and shall state specifically:
(i) each aggravating circumstance found;
(ii) each mitigating circumstance found;
(iii) whether any aggravating circumstances found under subsection (g) of this section outweigh the mitigating circumstances found under subsection (h) of this section;
(iv) whether the aggravating circumstances found under subsection (g) of this section do not outweigh the mitigating circumstances found under subsection (h) of this section; and
(v) the sentence determined under subsection (g)(2) of this section or paragraphs (1) and (2) of this subsection.

§ 2-304. First degree murder—Sentencing procedure imprisonment for life without the possibility of parole.

(a)(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.

(2) If the State gave notice under both §§ 2-202(a)(1) and 2-203(1) of this title, but the court or jury determines that the death sentence may not be imposed, that court or jury shall determine whether the defendant shall be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.

(b)(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.

MARYLAND RULES

Rule 4-345. Sentencing—Revisory power of court.

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

…

(e) *Modification Upon Motion.*
(1) Generally. Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

Rule 8-604. Disposition.

(d) *Remand.*

…

(2) Criminal Case. In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing.

MARYLAND REGULATIONS

COMAR 01.01.2018.06. Gubernatorial Considerations in Parole of Inmates Serving Terms of Life Imprisonment.

A. In deciding whether to approve or disapprove a decision of the Maryland Parole Commission to grant parole to an inmate serving a term of life imprisonment, the Governor shall assess and consider, among other lawful factors deemed relevant by the Governor, the same factors and information assessed by the Maryland Parole Commission as provided by the Maryland Parole Commission's governing statutes and regulations.

B. If the Governor disapproves parole for an inmate serving a term of life imprisonment, the Governor shall issue a written decision delivered to the Maryland Parole Commission confirming that the Governor has considered, among other relevant and lawful factors and information, the same factors and information assessed by the Maryland Parole Commission as provided by its governing statutes and regulations.

C. Additional factors and information for juvenile offenders. In deciding whether to approve or disapprove a decision of the Maryland Parole Commission to grant parole to an inmate serving a term of life imprisonment with the possibility of parole for a crime committed before he or she reached 18 years of age (a "juvenile offender"), the Governor shall consider, in addition to other lawful factors deemed relevant by the Governor and the factors and information assessed by the Maryland Parole Commission as provided by the Maryland Parole Commission's governing statutes and regulations:

(1) i. The juvenile offender's age at the time the crime was committed and the lesser culpability of juvenile offenders as compared to adult offenders;
ii. The degree to which the juvenile offender has demonstrated maturity since the commission of the crime; and
iii. The degree to which the juvenile offender has demonstrated rehabilitation since the commission of the crime.

(2) If the Governor disapproves parole for a juvenile offender, the Governor shall issue a written decision delivered to the Maryland Parole Commission that:

i. confirms that the Governor has considered the applicable statutory and regulatory factors and information and the factors and information set forth in this executive order; and
ii. states reasons supporting the decision to disapprove parole.

D. This executive order may not be construed to have any retroactive effect on any decision or recommendation of the Maryland Parole Commission or any decision of the Governor, made prior to the effective date of this order, to approve, disapprove, grant, deny, or modify the conditions of a parole.

COMAR 12.02.07.02. Case Management Procedure.

…

D. An inmate with a sentence of life or death shall be initially classified to not less than the maximum security level.

COMAR 12.02.29.01. Scope.

A. This regulation applies solely to an inmate convicted of a crime that the inmate committed while younger than 18 years old and for which the inmate was sentenced to life imprisonment.

B. This regulation supersedes any conflicting regulation or policy.

COMAR 12.02.29.02. Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Case manager" means the case management specialist assigned to an inmate during the case management process.

(2) "Commissioner" means the Commissioner of Correction.

(3) "Division" means the Division of Correction.

(4) "Inmate" has the meaning stated in Correctional Services Article, § 1-101, Annotated Code of Maryland.

(5) “Inmate case record” means documentation assembled, maintained, and used under Correctional Services Article, § 3-601, Annotated Code of Maryland.

(6) “Juvenile lifer” means an inmate serving a life sentence for a crime committed while younger than 18 years old.

(7) “Outside detail” means a work assignment at a location other than the facility where an inmate is housed, and during which the inmate is under the direct supervision of a correctional officer.

(8) “Programming” means the process of placing an inmate in programs that address the inmate's risks and needs.

(9) Release.
(a) “Release” means any type of discharge from custody of the Division.
(b) “Release” includes administrative release, parole, court ordered release, mandatory supervision release, expiration of sentence, work release, and community leave.
(c) “Release” does not include an escape.

(10) “Release date” means the date a juvenile lifer may be released from incarceration if the juvenile lifer:
(a) Has been conditionally approved for parole by the Governor; or
(b) Is entitled to release on mandatory supervision.

(11) “Secretary” means the Secretary of Public Safety and Correctional Services.

(12) “Security” means a correctional facility's physical features which help control inmate behavior and prevent escape.

COMAR 12.02.29.03. Classification.

A. Initial Security Classification.

(1) Upon intake of a juvenile lifer to a Division correctional facility and in accordance with the procedures established in COMAR 12.02.24, a case manager shall use the Division's initial security classification instrument to conduct an individualized assessment of the juvenile lifer

to determine an appropriate security level as defined in COMAR 12.02.08.02.

(2) A Division case manager shall assign the juvenile lifer to the least restrictive security level consistent with the:
(a) Outcome of the security classification instrument;
(b) Identified risk and needs;
(c) Public safety; and
(d) Safe and orderly operation of the facility.

(3) After a juvenile lifer's initial classification, eligibility for a less restrictive security level that includes participation in an outside detail, a work release program, or specific programs shall be determined during the juvenile lifer's annual classification status review in accordance with the Case Management Manual and other applicable directives and regulations.

B. Security Reclassification and Status Review.

(1) A Division employee shall use the Division's security reclassification instrument to conduct an individualized assessment of the juvenile lifer to determine an appropriate security level as defined in COMAR 12.02.08.02:
(a) Annually in accordance with the Case Management Manual and other applicable directives and regulations; or
(b) Upon the Maryland Parole Commission's request following a hearing conducted in accordance with the provisions established in COMAR 12.08.01 to improve a juvenile lifer's suitability for parole.

(2) A juvenile lifer, regardless of whether the juvenile lifer has a release date, shall be eligible for reclassification to a security level below medium security, if approved by the Commissioner, or a designee of the Commissioner.

(3) A Division employee shall presume that a juvenile lifer is permitted to be assigned to the least restrictive security level, if the juvenile lifer's score on the security reclassification instrument indicates eligibility for a less restrictive security level than the juvenile lifer's current classification.

(4) A Division employee may not apply the mandatory override in the security classification instrument that precludes a juvenile lifer from assignment to a security level below medium security.

(5) Any override of the security classification instrument requires the Division employee to:
(a) Document the reason for the override in the inmate's case record; and
(b) Provide the juvenile lifer with a written explanation of the reason for the decision.

(6) If the Commissioner, or the Commissioner's designee, denies a juvenile lifer assignment to a security level below medium security, the Commissioner, or the Commissioner's designee, shall:
(a) Document the reason for the denial in the inmate's case record; and
(b) Provide the juvenile lifer with a written explanation of the reason for the decision.

(7) In order to improve a juvenile lifer's suitability for parole, a case manager, the warden, and the Commissioner shall give significant weight to the requests or recommendations of the Maryland Parole Commission that a juvenile lifer be permitted to be assigned to a less restrictive security level or participate in specified inmate programming.

(8) A juvenile lifer may not lose a privilege, job, or housing assignment in order to undergo a risk assessment or security status review as requested by the Maryland Parole Commission.

COMAR 12.02.29.04. Program eligibility.

A. Juvenile Lifer with a Release Date.

(1) A juvenile lifer who has a release date shall be eligible for an outside detail or the work release program, if approved by the Commissioner, or the Commissioner's designee.

(2) If the Commissioner, or the Commissioner's designee, denies a juvenile lifer's participation in an outside detail or the work release program, the Commissioner, or the Commissioner's designee, shall:
(a) Document the reason for the denial in the inmate's case record; and

(b) Provide the juvenile lifer with a written explanation of the reason for the decision.

B. Juvenile Lifer Without a Release Date.

(1) If warranted by exceptional circumstances, a juvenile lifer who does not have a release date shall be eligible for an outside detail if recommended by the Commissioner of Correction, or a designee of the Commissioner, and approved by the Secretary.

(2) If the Secretary denies an outside detail for a juvenile lifer, the Secretary or the Secretary's designee shall:
(a) Document the reason for the denial in the inmate's case record; and
(b) Provide the juvenile lifer with a written explanation of the reason for the decision.

COMAR 12.08.01.18. Consideration for parole.

A. General.

(1) The Commission shall have the exclusive power of parole release. In determining whether a prisoner is suitable for release on parole, the Commission considers:
(a) The circumstances surrounding the crime;
(b) The physical, mental, and moral qualifications of persons who become eligible for parole;
(c) Whether there is reasonable probability that the prisoner, if released on parole, will remain at liberty without violating the laws; and
(d) Whether the release of the prisoner on parole is compatible with the welfare of society.

(2) The Commission also considers the following criteria:
(a) Whether there is substantial risk the individual will not conform to the conditions of parole;
(b) Whether release at the time would depreciate the seriousness of the individual's crime or promote disrespect for the law;
(c) Whether the individual's release would have an adverse affect on institutional discipline;

(d) Whether the individual's continued incarceration will substantially enhance his ability to lead a law abiding life when released at a later date.

(3) When deciding if an inmate serving a life sentence for a crime committed while younger than 18 years old is suitable for parole, the Commission shall consider whether the inmate has adequately demonstrated maturity and rehabilitation since commission of the crime.

(4) In addition to the factors contained in § A(1)--(3) of this regulation, the Commission shall consider the following mitigating factors, to which it affords appropriate weight, in determining whether an inmate who committed a crime as a juvenile is suitable for release on parole:
(a) Age at the time the crime was committed;
(b) The individual's level of maturity and sense of responsibility at the time of the crime was committed;
(c) Whether influence or pressure from other individuals contributed to the commission of the crime;
(d) Whether the prisoner's character developed since the time of the crime in a manner that indicates the prisoner will comply with the conditions of release;
(e) The home environment and family relationships at the time the crime was committed;
(f) The individual's educational background and achievement at the time the crime was committed; and
(g) Other factors or circumstances unique to prisoners who committed crimes at the time the individual was a juvenile that the Commissioner determines to be relevant.

(5) To make these determinations the Commission shall examine:
(a) The inmate's prior criminal and juvenile record and the inmate's response to prior incarceration, parole or probation, or both;
(b) The inmate's behavior and adjustment and the inmate's participation in institutional and self-help programs, including progression to Division of Correction facilities with a less restrictive security classification;
(c) The inmate's vocational, educational, and other training;
(d) The inmate's current attitude toward society, discipline, and other authority, etc.;

(e) The inmate's past use of narcotics, alcohol, or dangerous controlled substances;
(f) Whether the inmate has demonstrated emotional maturity and insight into the inmate's problems;
(g) Any reports or recommendations made by the sentencing judge, the institutional staff, or by a professional consultant such as a physician, psychologist, or psychiatrist;
(h) The inmate's employment plans, occupational skills, and job potential;
(i) The inmate's family status and stability;
(j) The inmate's ability and readiness to assume obligations and undertake responsibilities;
(k) The adequacy of the inmate's parole plan and the availability of resources to assist the inmate;
(l) The circumstances surrounding the crime, which diminish in significance as a consideration after the initial parole hearing; and
(m) Any other factors or information which the Commission may find relevant to the individual inmate's consideration for parole.

(6) The Commission may recommend that an inmate serving a sentence for a crime committed while younger than 18 years old progress to a facility with a less restrictive security classification, as provided in § E(4) of this regulation, and if the inmate:
(a) Has completed all programming and treatment options available at the inmate's current security level;
(b) Would be afforded the opportunity to demonstrate parole suitability if placed in a lower security classification, or would benefit from the privileges, programming, and treatment programs that are available only at a less restrictive security classification; or
(c) Was previously found to be suitable for release by the Commission.

(7) Any risk assessment tool used by the Commission for determining the risk of an inmate shall include dynamic risk factors as a method for assessing risk and shall require the healthcare professional administering the tool to exercise independent clinical judgment in assessing risk.

(8) In deciding whether to recommend parole for an inmate serving a sentence of life imprisonment, the Commission may not consider whether the inmate has successfully completed a period of work release if the inmate has never been eligible for work release.

B. Hearings.

(1) An application for parole is not necessary, and an application need not be made by an inmate or on his behalf.

(2) A record shall be maintained of the mandatory hearing dates, noting on the record the time when each prisoner must receive parole consideration.

(3) The Commission shall conduct hearings at the State penal and correctional institutions and the county jails and detention centers in accordance with a schedule to be determined by the Commission and as required by the laws of the State.

(4) Hearings shall be conducted by a hearing examiner, a commissioner acting as a hearing examiner, or by two or more commissioners in accordance with the appropriate statutory requirements of each case.

C. Procedure.

(1) A parole hearing is actually an interview of the inmate, and attendance shall be restricted to parole personnel and a representative of the institution. On occasions, others may be invited by the Commission to attend, provided their attendance does not impede the prisoner being interviewed. The hearings are private and shall be held in an informal manner, allowing the prisoner the opportunity to give free expression to his views and feelings relating to his case. Formal presentations by an attorney, relatives, and others interested are not permitted at the parole hearings. Attorneys, relatives, and others who are interested in the inmate may discuss the relative merits or other factors of the case with the Commission at its executive offices, any time before or after a parole hearing.

(2) A parole hearing conducted by a parole commissioner or hearing examiner shall be electronically or stenographically recorded to preserve a record for appeal.

(3) Except as provided in § C(4) of this regulation, the recording shall:
(i) Be destroyed 30 days after the hearing unless an appeal has been taken under the provisions of Regulation .19 of this chapter; or

(ii) In cases of appeal, be destroyed upon conclusion of the appeal hearing.

(4) The recording of a parole hearing conducted for an inmate serving a life sentence for a crime committed while younger than 18 years old shall be retained until the conclusion of the inmate's next parole hearing, or until the final disposition of any action seeking judicial review of the Commission's decision, whichever is later.

(5) Absent any unusual circumstances, the inmate's classification counselor shall attend all hearings concerning that inmate.

(6) The classification counselor, or other member of the institutional staff who has knowledge of relevant facts, shall be available to provide new information which may have developed since the completion of the reports provided to the Commission, and to assist in answering questions which may arise concerning institutional policy.

D. Parole Grant.

(1) Release on parole may not be granted unless recommended by a hearing examiner or acting hearing examiner and approved by a parole commissioner, or when required by law, by the affirmative vote of not less than two commissioners.

(2) When concurrence of at least two commissioners is required by law to grant parole, in the event of lack of concurrence, the case shall be continued and heard with a third commissioner present. The opinion of the majority shall represent the decision of the Commission.

E. Decisions.

(1) At the end of a parole interview, the inmate shall be verbally informed of the hearing examiner's recommendation, or of the decision in cases heard by two or more commissioners.

(2) A written copy of the hearing examiner's recommendation and the Commission's action relative to the recommendation, or a written copy of a Commission panel's decision shall be prepared and served upon the prisoner in accordance with Correctional Services Article, §§ 7-306 and 7-307, Annotated Code of Maryland. A copy of the written decision shall

be retained in the Commission's file on the prisoner and in the prisoner's institutional base file.

(3) A parole commissioner or hearing examiner issuing a written decision denying parole to an inmate serving a life sentence for a crime committed while younger than 18 years old shall:
(a) Include specific findings as to why the inmate has failed to demonstrate suitability for parole;
(b) Affirm that the Commission, in reaching the decision to deny parole, considered:
(i) The diminished culpability of youth;
(ii) The hallmark features of youth; and
(iii) An individual's capacity for growth and maturation;
(c) State why the Commission has determined that the inmate has not yet demonstrated sufficient maturity and rehabilitation;
(d) To the extent possible, provide guidance to the inmate that may improve the inmate's likelihood of demonstrating suitability at the next parole hearing;
(e) Provide specific recommendations with regard to programming and treatment, as appropriate; and
(f) Notify the inmate of the right to seek judicial review of the decision as permitted by law.

(4) If a parole commissioner or hearing examiner determines that an inmate serving a life sentence for a crime committed while younger than 18 years old is nearing suitability for parole, the Commission shall:
(i) Indicate that determination within the inmate's parole decision; and
(ii) Recommend that the inmate be transferred to a facility with a less restrictive security classification.

(5) If the Commission's decision is to rehear the inmate's case at a later date and if the parole rehearing is open to the public under COMAR 12.08.02, the rehearing may be held up to 90 days later than the rehearing date specified in the decision.

(6) Information shall be disclosed to the inmate in accordance with Regulation .17C(5) of this chapter.

(7) If the Commission requires additional information, it may defer issuing a decision pending receipt of the information and, upon receipt of the information, shall promptly:
(a) Render and serve a final decision; or
(b) Conduct another interview with the inmate before making a final decision.

(8) If the Commission decides not to recommend parole for an inmate serving a life sentence for a crime committed while younger than 18 years old, the Commission shall provide a copy of the decision to the inmate within 18 months of the parole hearing.

(9) If the Commission decides to recommend parole for an inmate serving a life sentence for a crime committed while younger than 18 years old, the Commission shall forward the recommendation to the Governor within 12 months of the parole hearing.

(10) For an inmate serving a life sentence for a crime committed while younger than 18 years old, the Commission shall provide the inmate with timely written notice of the inmate's status in the parole process when:
(a) A risk assessment has been ordered;
(b) A risk assessment has been received;
(c) The case will be considered en banc; and
(d) The case has been forwarded to the Governor with a recommendation for parole.

(11) Upon request from the inmate or the inmate's representative, the Commission shall disclose to the inmate or the inmate's representative the inmate's current status in the parole process.

(12) The Commission may neither permanently refuse parole to an inmate serving a life sentence for a crime committed while younger than 18 years old, nor schedule any rehearing in excess of 10 years from the date of the previous hearing.

…

I. Early Initial Hearings.

(1) The Commission may, in its discretion, grant early initial parole hearings before the mandatory hearing date.

(2) The sentencing judge, the prosecuting attorney, or the inmate may write to the Commission requesting early parole hearings, setting forth the reasons for the request.
(3) Institutional personnel, over the signature of the warden or superintendent, or both, may write the Commission and request an early hearing, setting forth the reasons for the request.

(4) Wardens or superintendents, or both, may make recommendations for early parole hearings.

(5) The Commission may adopt a policy for uniform scheduling of hearings in advance of the mandatory date in accordance with such specific plan as it may from time to time establish.

(6) Considerations of the Commission for early hearings are:
(a) The inmate's prior criminal record;
(b) The nature and circumstances of the crime;
(c) The length of the sentence;
(d) The amount of time served and the inmate's institutional adjustment;
(e) The date of the inmate's regularly scheduled hearing;
(f) The reasons set forth in the request for an early hearing;
(g) Adjustment to prior parole or probation supervision.

(7) Authority to grant early initial hearings lies solely within the discretion of the Commission and cannot be delegated. Unless a uniform policy for advancing parole hearings has been adopted by the Commission, a hearing may not be advanced in individual cases except by a majority vote of those commissioners considering the question, and in any event, by at least three commissioners. An order to advance the hearing shall be in writing and included in the case file.