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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee, the State of Maryland, accepts the Statement of the Case in Appellant Lee Boyd Malvo's brief.

QUESTION PRESENTED

Are Malvo's six consecutive life-without-parole sentences for six distinct sniper-style murders legal under the Eighth Amendment and Article 25?

STATEMENT OF FACTS

The State of Maryland accepts Sections C-G of the Statement of Facts set forth in Malvo's brief, subject to the following additions, corrections, and modifications:

A. Malvo and Muhammad shot 18 people, killing 12 of them, over a six-week period in 2002.

"'For 22 days in October of 2002, Montgomery County, Maryland, was gripped by a paroxysm of fear[.]'" (E. 180) (quoting *Muhammad v. State*, 177 Md. App. 188, 198 (2007)). Malvo and Muhammad shot random strangers going about their daily lives, pumping gas, buying groceries, and mowing the lawn. (E. 95-99).

They hunted their victims with a high velocity Bushmaster rifle from a 1990 Chevrolet Caprice outfitted with a sniper's nest in the trunk, leading the media to dub them the "D.C. Snipers." (E. 180-81). "'Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of the shootings had occurred at gas stations. Schools were placed on lock-down status. On one occasion, Interstate 95 was closed in an effort to apprehend the sniper.'" (E. 180-81) (quoting *Muhammad*, 177 Md. App. at 200). In the words of the prosecutor at Malvo's sentencing, it was "the worst criminal act ever perpetrated upon our community." (E. 121).

In the first 22 days of October, Muhammad and Malvo killed six people in Montgomery County, Maryland. (E. 95-99). They killed four more people in D.C. and Virginia and wounded three others, including a 13-year-old boy in Prince George's County, Maryland. *Muhammad*, 177 Md. App. at 195-211.

The six murders that Malvo and Muhammad committed in Montgomery County were:

- October 2, 2002, 6:02 p.m.: James Martin was shot in the back as he walked toward the Shoppers Food Warehouse. (E. 95). He said "help me" and died almost immediately. (E. 95).
- October 3, 2002, 7:41 a.m.: James Sonny Buchanan was shot in the back as he was mowing the lawn at the Fitzgerald Auto Mall. (E. 96). He ran toward the dealership, where he collapsed and died. (E. 96).
- October 3, 2002, 8:12 a.m.: Premkumar Walekar was shot while fueling his taxi cab at a Mobile gas station. (E. 96). He died within minutes. (E. 96).
- October 3, 2002, 8:37 a.m.: Maria Sarah Ramos was shot in the head while she sat on a bench at the Leisure World Shopping Center. (E. 97). She died instantly. (E. 97).
- October 3, 2002, 9:58 a.m.: Lori Ann Lewis-Rivera was shot in the back and killed while vacuuming her minivan at the gas station. (E. 97).
- October 22, 2002, 6:00 a.m.: Conrad Johnson was shot in the abdomen while onboard a commuter bus. (E. 98). He later died at the hospital. (E. 98).

The violence spread beyond Montgomery County. Malvo and Muhammad killed a man in the District of Columbia on October 3, 2002; shot and seriously wounded a woman in Fredericksburg, Virginia on October 4, 2002; shot and nearly killed a 13-year-old boy outside his middle school in Prince George's County, Maryland on October 7, 2002; killed a man in Manassas, Virginia on October 9, 2002; killed a man at a Fredericksburg, Virginia gas station on October 11, 2002; killed a woman in a Home Depot parking lot in Falls Church, Virginia on October 14, 2002; and seriously wounded a man in the parking lot of the Ponderosa Steak House in Ashland, Virginia on October 19, 2002. *Muhammad*, 177 Md. App. at 205-11. All these victims were shot from a distance with a high velocity rifle. *Id.*

During the October sniper attacks, Muhammad and Malvo left notes for the police in an attempt to extort money from the government. (E. 100-01, 103). One of the notes was written on a "death Tarot card." (E. 104). Another stated that more people would be killed unless $10 million was placed into a particular bank account. (E. 105). It closed with, "P.S. your children are not safe anywhere at any time." (E. 106).

After Muhammad and Malvo were apprehended, it was discovered that their crime spree began before October 2002. They shot Paul LaRuffa five times outside his restaurant in Clinton, Maryland on September 5, 2002. (E. 101). Ten days later on September 15, 2002, Malvo shot Muhammad Rashid also in Clinton, Maryland. (E. 101). On September 21, 2002, they shot two women in Alabama during a liquor store robbery. *Id*. at 213. One of the women died and the other suffered serious injuries. *Id*. Two days later, they shot and killed the manager of a beauty shop in Baton Rouge, Louisiana. (E. 102).

Malvo and Muhammad were captured on October 24, 2002, while sleeping in their blue Chevrolet Caprice at a rest stop in Frederick, Maryland. (E. 99). Paul LaRuffa's laptop was found in their car, loaded with software containing "many maps of the Washington D.C. area." (E. 100). One of the maps had "skull and crossbones" icons marking the location of several shootings. (E. 100). The backseat of the car was hinged to allow for easy access to the trunk, and a hole was cut in the trunk just above the license plate that allowed a muzzle of a rifle to extend out. (E. 100).

B. Malvo pleaded guilty to six counts of first-degree murder in the Circuit Court for Montgomery County and was sentenced to six consecutive counts of life without parole.

After Malvo was convicted in Virginia of three counts of murder and one count of attempted murder, he pleaded guilty to all six counts of first-degree murder that he was facing in the Circuit Court for Montgomery County.[1] On October 10, 2006, Malvo's plea was accepted and he was found guilty of all six counts. (E. 108).

Sentencing was held on November 8, 2006, before the Honorable James L. Ryan. (E. 113). The State sought six consecutive sentences of life without parole. (E. 119). While acknowledging that Malvo was "under the sway of a truly evil man who infused a 17-year-old with the ideology of hate[,]" the State also noted that Malvo committed all of his "brutal" crimes as "a

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[1] Malvo was sentenced to four terms of life imprisonment plus 11 years for his Virginia convictions. Although Malvo was not originally eligible for parole in Virginia, a subsequent change to Virginia law makes all juvenile offenders parole-eligible after 20 years' incarceration. See Va. Code Ann. § 53.1-165.1E (2020).

cognizant, thinking, and deliberate 17-year-old" "without mental defect." (E. 121).

In response, Malvo's attorneys accepted that "there will be no Lee Boyd Malvo in our community anymore," and that Malvo would be "locked in a cell for the rest of his life," but urged the court to make Malvo's sentences concurrent to each other and concurrent to his sentences in Virginia. (E. 123, 125). Defense counsel focused on Malvo's youth, referring to him repeatedly as a "young man," and explaining John Allen Muhammad's profound influence on Malvo. (E. 123-24). Counsel explained how Muhammad "took this young man under his wing" "[a]t the tender age of 15 or 16" "when there was no one else in the world to take care of this young man, and he turned him into a killing machine." (E. 123-24).

Counsel argued that "it is an absolute tragedy, absolute tragedy that this young man was abandoned and led down a road of random violence, murder, and hatred," but emphasized that "that's not who Lee Boyd Malvo is anymore." (E. 124). Counsel told the court about Malvo's expressed remorse and cooperation with police. (E. 123-25). Malvo, counsel said, "has made a sea change of

difference in his life, and is trying to make amends." (E. 124). He "wonders why he did what he did, and he'll have the rest of his life to try to figure it out." (E. 124).

Malvo himself addressed the court and expressed remorse for his actions. (E. 125-27). He accepted responsibility and said that he would never forgive himself for the loss he caused his victims' families. (E. 125-27).

Before imposing sentence, Judge Ryan acknowledged that Malvo expressed remorse and provided helpful information to the police and prosecutors, and that, upon meeting Muhammad, Malvo's "chances for a successful life became worse than they already were." (E. 128). The court also noted that Malvo appeared to have "changed" since he was taken into custody four years earlier. (E. 127-28). Nonetheless, Judge Ryan concluded that while Malvo "could have been somebody different," "could have been better," he instead "knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings." (E. 128). The court sentenced Malvo to six consecutive terms of life without parole. (E. 128-29).

C. After 11 years, Malvo claims his Maryland sentences are illegal.

In 2017, Malvo filed a motion to correct an illegal sentence, arguing that his six consecutive life-without-parole sentences violate the Eighth Amendment of the U.S. Constitution and Article 25 of the Maryland Declaration of Rights. The crux of Malvo's argument was that the Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), applied to discretionary sentences of life without parole and that, in order for a juvenile to be lawfully sentenced to life without parole, a judge must have made "a properly informed, forward looking determination that that particular child . . . exhibits such irretrievable depravity that rehabilitation is impossible." (E. 138). Judge Ryan did not comply with that procedural requirement, the argument goes, and, therefore, Malvo's sentences are illegal and he is entitled to a new sentencing hearing. (E. 142-44). Alternatively, Malvo argued that life without parole for juveniles is cruel or unusual punishment under Article 25 of the Maryland Declaration of Rights and requires a categorical ban. (E. 186).

By order dated August 15, 2017, the Honorable Robert A. Greenberg denied Malvo's motion. (E. 199). In the accompanying memorandum opinion, Judge Greenberg ruled that Malvo's sentence was not illegal. (E. 190). *Miller* and *Montgomery*, the court explained, applied only to mandatory life without parole sentences "because they deprive the sentencing judge of the ability to consider *any* mitigating circumstances that might otherwise ameliorate the harshest sentence, a case which most assuredly is not present here." (E. 190).

Even if the requirements of *Miller* and *Montgomery* applied to Malvo's discretionary life without parole sentences, Judge Greenberg continued, Judge Ryan's sentencing complied with those requirements. (E. 195-98).

Judge Ryan considered Malvo's youth, Muhammad's influence over Malvo, and Malvo's family and home environment, Judge Greenberg found. (E. 195-96). Judge Ryan also considered Malvo's participation with the prosecution and assistance to authorities. (E. 197). He considered the circumstances of the crimes, including the "elaborate" planning undertaken by Malvo and Muhammad to perpetrate the murders. (E. 196). Finally,

Judge Greenberg found, Judge Ryan considered "'the possibility of rehabilitation.'" (E. 197) (quoting *Miller*, 567 U.S. at 478). Assessing all those factors, Judge Ryan determined that Malvo "was among the most uncommon of juvenile offenders, deserving of a lifetime of imprisonment without the possibility of parole." (E. 197).

As for Malvo's Article 25 argument, The circuit court noted that Malvo cited no authority for the contention that Article 25 provides him more expansive rights than those provided by the Eighth Amendment and ruled that Article 25 should be interpreted in pari materia with the Eighth Amendment. (E. 198).

Malvo appealed the circuit court's decision, and then petitioned this Court for a prejudgment writ of certiorari. The case was stayed in the Court of Special Appeals pending further litigation and is now before this Court. (Brief of Appellant at 2). Additional facts will be provided in the Argument section as they become relevant.

ARGUMENT

MALVO'S SIX CONSECUTIVE LIFE-WITHOUT-PAROLE SENTENCES FOR SIX DISTINCT SNIPER-STYLE MURDERS ARE LEGAL UNDER THE EIGHTH AMENDMENT AND ARTICLE 25.

Malvo attacks the legality of his life-without-parole sentences on two main fronts. First, he claims that his sentences violate the Eighth Amendment for two reasons: 1) he was entitled under *Miller* to a hearing in which a judge considered his youth as mitigation, and Judge Ryan's sentencing hearing did not fulfill those procedural requirements, (Brief of Appellant at 20-34); and 2) as-applied, his life-without-parole sentences are disproportionate under the Eighth Amendment because Judge Ryan "implicitly determined that [Malvo] was reparable or corrigible." (Brief of Appellant at 34-43).

Second, Malvo argues that Article 25 provides greater protection than the Eighth Amendment, and claims that his sentences violate Article 25 for two reasons: 1) the passage of the Juvenile Restoration Act ("JUVRA")[2] demonstrates that life without parole is cruel or unusual in Maryland, (Brief of Appellant

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[2] *See* Juvenile Restoration Act, 2021 Md. Laws Ch. 61 (S.B. 494).

at 50-54); 2) alternatively, Article 25 requires a finding that a juvenile is permanently incorrigible in order for a life-without-parole sentence to be legal or, at the least, prohibits a juvenile found to be corrigible from being sentenced to life without parole. (Brief of Appellant at 54-57).

The short and complete answer to Malvo's procedural Eighth Amendment argument is that *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), forecloses it. *Jones*'s pronouncement is clear—so long as the sentencing court had the discretion to impose a sentence less than life without parole, the constitutional procedural requirements are met. *Id*. at 1313. Judge Ryan was not required to sentence Malvo to life without parole. No more procedural protection is required by the Eighth Amendment.[3]

As for Malvo's as-applied proportionality challenge, neither this Court nor the Supreme Court has announced the test for determining proportionality for a juvenile serving life without parole. Assuming, *arguendo*, that life without parole is a disproportionate sentence for a juvenile found to be corrigible,

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[3] As explained, *infra*, procedural defects are not cognizable as Rule 4-345(a) claims in any event.

Malvo's claim still fails for two reasons. First, the passage of JUVRA provides the meaningful opportunity for release necessary to resolve the proportionality challenge. Second, Judge Ryan did not find Malvo to be corrigible. To the contrary, Judge Ryan's comments at sentencing suggest that he found Malvo to be one of the rare juveniles that are not capable of rehabilitation.

Malvo's Article 25 claims fare no better. Article 25 is typically interpreted *in pari materia* with the Eighth Amendment. But even if Malvo is correct that Article 25 provides additional protections, and even if he is correct that it is cruel or unusual punishment under Article 25 to sentence a juvenile to life without a meaningful opportunity for release, JUVRA provides the necessary opportunity for release. If Article 25 requires a finding of incorrigibility, or at least the absence of a finding of corrigibility, the sentencing hearing in this case includes the necessary finding.

To the extent that Malvo's complaints are cognizable on a motion to correct an illegal sentence, the circuit court correctly

found that Malvo's sentences are not illegal and he is not entitled to resentencing.[4]

A. Malvo's sentences are not illegal because they do not violate the Eighth Amendment.

Malvo makes two Eighth Amendment claims. First, he argues that his sentencing hearing "did not satisfy *Miller*'s procedural requirements." (Brief of Appellant at 20). He next makes an as-applied proportionality challenge. (Brief of Appellant at 34). Sentences of life without parole for crimes committed as a juvenile, Malvo argues, are disproportionate where the sentencing court makes an implicit finding that the defendant is corrigible. (Brief of Appellant at 34-40). Judge Ryan made such a finding, Malvo says, and so the sentence of life without parole, as applied here, is constitutionally disproportionate. (Brief of Appellant at 41-43). Neither of Malvo's Eighth Amendment claims holds water.

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[4] Whether a sentence is illegal under Rule 4-345(a) is a question of law; reviewed de novo. *Meyer v. State*, 445 Md. 648, 663 (2015).

1. *Procedural defects are not cognizable illegal sentence claims and, regardless, under* Jones*, a discretionary sentencing scheme is the only procedural requirement necessary for a juvenile life without parole sentence to be constitutional.*

Malvo identifies two procedural requirements that he claims are necessary in order to legally sentence a juvenile to life without parole. (Brief of Appellant at 20-24). First, Malvo claims, when determining the appropriate sentence, a court must give "'individualized' consideration" to five "'hallmark features' of youth[.]" (Brief of Appellant at 20-21) (quoting *Miller*, 567 U.S. at 477-78). Second, a court must "consider the juvenile offender's postconviction conduct, and treat any subsequent growth in maturity as weighing against life without parole." (Brief of Appellant at 23-24). Malvo's sentencing did not comply with these procedural requirements, he contends, and his sentences are, therefore, illegal.

Preliminarily, procedural defects are not cognizable claims under a Rule 4-345(a) motion to correct an illegal sentence. *See Colvin v. State*, 450 Md. 718, 725 (2016) ("A sentence does not become 'an illegal sentence because of some arguable procedural flaw in the sentencing procedure.'") (quoting *Tshiwala v. State*, 424

Md. 612, 619 (2012)). So even if Malvo were right about the procedural requirements of a juvenile life without parole sentencing hearing, it would not render his sentences illegal.

More fundamentally, Malvo is wrong about the procedural requirements for his sentencing. Malvo's support for his argument lies in his interpretation of *Miller* and, to a lesser extent, *Montgomery*. (Brief of Appellant at 20-24). This is its fatal flaw. Malvo quotes extensively from *Miller* to argue that certain considerations are procedurally required in order to constitutionally sentence juveniles to life without parole. (Brief of Appellant at 21-24). According to Malvo, the Supreme Court in *Miller* held that a sentencing court must "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. (Brief of Appellant at 20). This includes "'individualized' consideration" of the "hallmark" characteristics of youth:

> (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."

(Brief of Appellant at 21) (quoting *Miller*, 567 U.S. at 477–478, 480).

A sentencing court must also, Malvo argues, consider the juvenile's postconviction conduct. (Brief of Appellant at 23-24). Any demonstration of growth in maturity must be considered mitigation and weighed against a life without parole sentence. (Brief of Appellant at 23-24). This is "key evidence of *transient* immaturity at the time of the crime" and suggests a capacity for rehabilitation. (Brief of Appellant at 24) (emphasis in original).

Malvo's interpretation of *Miller*'s procedural requirements is incorrect. We know so because, in April of this year, the Supreme Court itself interpreted *Miller* and *Montgomery*, and expressly pronounced the necessary procedures that the Eighth Amendment requires before sentencing a juvenile to life without parole. All that is required is a discretionary sentencing scheme that allows a court

to sentence a juvenile offender to less than life without parole. *Jones*, 141 S.Ct. at 1313.

Jones murdered his grandfather when he was 15 years old. *Id*. at 1312. He was sentenced to mandatory life without parole in 2006. *Id*. at 1312. After *Miller* was decided, the Supreme Court of Mississippi ordered that Jones be resentenced so the sentencing court could consider Jones's youth and exercise discretion in imposing sentence. *Id*. at 1312-13. At the resentencing, Jones was once again sentenced to life without parole. *Id*. at 1313.

Jones appealed, arguing that the sentencing court was required to make a separate finding of permanent incorrigibility, or at least an on-the-record explanation that serves as an implicit finding of permanent incorrigibility, in order for a life without parole sentence to be constitutional. *Id*. The Supreme Court granted certiorari to consider the procedural requirements necessary before sentencing a juvenile to life without parole. *Id*.

The Supreme Court held that the Eighth Amendment requires only a discretionary sentencing scheme that allows the sentencing court to take into consideration youth and its attendant characteristics. *Id*. at 1315-16. "In a case involving an individual

who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.[]" *Id*. at 1313.

Miller, the *Jones* Court held, required neither a separate factual finding of incorrigibility nor an on-the-record explanation of the sentence imposed. *Id*. at 1317, 1321. *Miller* cited *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), for the proposition that "[y]outh matters in sentencing." *Jones*, 141 S.Ct. at 1316. "[B]ecause youth matters," the *Jones* Court said, a sentencing court "must have discretion to consider youth before imposing a life-without-parole sentence." *Id*. at 1316. But nothing more is required. *Accord United States v. Grant*, 9 F.4th 186, 193 (3d Cir. 2021) (en banc) (explaining that in *Miller* and *Jones*, "[t]he Court has guaranteed only a sentencing procedure in which the sentence must weigh youth as a mitigating factor.").

Malvo acknowledges *Jones*, and concedes that he was sentenced under a discretionary sentencing scheme, but argues that his life without parole sentences are nevertheless illegal because he was sentenced pre-*Miller* and, therefore, Judge Ryan

would not have known to consider "how the distinctive attributes of youth counsel against life without parole[.]" (Brief of Appellant at 30-32). The *Jones* Court noted, however, that so long as the sentencer has the discretion to consider a defendant's youth, the "sentencer necessarily *will* consider the defendant's youth[.]" *Id*. at 1319. In fact, "[f]aced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor.[]" *Id*.

The Supreme Court was well aware in *Jones* that its explication of *Miller*'s requirements would apply to defendants sentenced both before and after *Miller*. The Court granted review in *Jones* in order to resolve uncertainty as to the interpretation of both *Miller* and *Montgomery*—in which the Court had held that *Miller* applies retroactively. *Montgomery*, 577 U.S. at 206. The *Jones* Court expressly did "not disturb that holding." 141 S.Ct. at 1321. Yet it also did not suggest that the "discretionary sentencing procedure" *Miller* requires applies any differently to pre-*Miller* cases. To the contrary, the Court recognized that in applying *Miller*

retroactively, *Montgomery* did not "impose new requirements not already imposed by *Miller*." *Id.* at 1317.

In any event, while Judge Ryan did not have the benefit of the Supreme Court's decisions in *Miller* or *Graham*, he did have the benefit of *Roper*, which was decided 18 months before Malvo's sentencing. *Roper* identified three differences between juveniles and adults: 1) juveniles lack maturity and a sense of responsibility; 2) juveniles are "more vulnerable and susceptible to negative influences and outside pressures"; and 3) a juvenile's personality traits "are more transitory, less fixed." *Roper*, 543 U.S. at 569-70.

The *Roper* Court then went on to discuss why these differences "render suspect any conclusion that a juvenile falls among the worst offenders." *Id*. at 570. It concluded that the penological justifications for capital punishment, "retribution and deterrence," apply "with lesser force" to juveniles than adults. *Id*. at 570-71. Although *Roper* did not address life without parole, it provided Judge Ryan a blueprint for how to consider youth as a mitigating factor in sentencing.

Judge Ryan had the discretion to consider Malvo's youth and its attendant characteristics when deciding whether to impose life

without parole for any or all of Malvo's six murder convictions. That is all the procedure necessary for Malvo's sentences to be procedurally compliant with *Miller* and *Jones*. Even if a procedural defect in sentencing could render Malvo's sentences illegal, there was no defect here.

2. *Malvo's sentence is not disproportionate under the Eighth Amendment.*

Malvo next claims that his sentences of life without parole are unconstitutional as applied to him because they are a disproportionate penalty. (Brief of Appellant at 34-43). Malvo argues that life without parole sentences imposed for crimes committed as juveniles should be subject to a different constitutional disproportionality test than usually applied. (Brief of Appellant at 38-41). Rather than the "narrow proportionality" principle explained in *Harmelin v. Michigan*, 501 U.S. 957, 996-1001 (1991) (Kennedy, J. concurring in part and concurring in the judgment), which forbids only "grossly disproportionate sentences," Malvo asks this Court to hold that the "substantive rule" in *Miller* should govern a proportionality challenge for juvenile life without parole sentences. (Brief of Appellant at 38-

41). That is, a life without parole sentence is disproportionate "for corrigible juveniles." (Brief of Appellant at 39-40).

This Court need not decide the appropriate test for as-applied challenges to juveniles serving life without parole for two reasons: 1) the passage of JUVRA provides a meaningful opportunity for release for all juveniles serving life without parole sentences in Maryland; and 2) even if JUVRA does not provide Malvo an adequate opportunity for release, Judge Ryan did not make an implicit finding of corrigibility that would violate *Miller*'s substantive rule.

i. No court has opined on the appropriate test for an as-applied proportionality challenge in juvenile life without parole cases.

Whether a different proportionality test exists for juveniles sentenced to life without parole is an open question. To be sure, Justice Sotomayor, in her *Jones* dissent joined by Justices Breyer and Kagan, said that "such a claim should be controlled by [the Supreme] Court's holding that sentencing 'a child whose crime reflects transient immaturity to life without parole . . . is disproportionate under the Eighth Amendment.'" *Jones*, 141 S.Ct.

at 1337 n.6 (Sotomayor, J., dissenting) (quoting *Montgomery*, 577 U.S. at 211). The Third Circuit, in *Grant*, noted in dicta that "[i]f a sentencer imposes *de jure* or *de facto* LWOP after finding—gratuitously—that a defendant is corrigible, the vehicle for challenging the sentence is an as-applied Eighth Amendment claim based on disproportionality of the punishment to the crime and criminal." *Grant*, 9 F.4th at 197. And at least one legal commentator is advocating for a different proportionality standard for "special" cases—death penalty cases and juveniles sentenced to life without parole.[5]

On the other hand, the Supreme Court in *Jones* expressly did not consider an as-applied Eighth Amendment claim of disproportionality. In declining to consider a disproportionality claim, the Court cited Justice Kennedy's concurrence in *Harmelin*, which synthesized the "grossly disproportionate" test. *Jones*, 141 S.Ct. at 1322. Chief Justice Roberts, in his concurrence in *Graham*, applied the "narrow proportionality" test when concurring in the

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[5] Berry, William, *The Evolving Standards, As-Applied*, 74 Fla. L. Rev. ____ (forthcoming 2022) (manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887823#).

judgment that life without parole for juveniles in non-homicide cases violates the Eighth Amendment. *Graham*, 560 U.S. at 86-90.

Fortunately for this Court, it need not wade into these muddy waters because JUVRA provides a meaningful opportunity for release, and even if it does not, Judge Ryan did not make a finding of corrigibility, so Malvo's claim fails even under his proposed test.

ii. JUVRA provides the meaningful opportunity for release that *Miller* requires.

In April of this year, the General Assembly passed JUVRA, which prospectively abolishes life without parole for juveniles and provides persons sentenced for crimes committed as juveniles prior to October 1, 2021, an opportunity to seek a modification of their sentence after they have served 20 years' incarceration. *See* Juvenile Restoration Act, 2021 Md. Laws Ch. 61 (S.B. 494). This legal development resolves Malvo's claim that his sentence is illegal because it provides a meaningful opportunity for release.

Codified in pertinent part as § 8-110 of the Criminal Procedure Article, JUVRA allows an individual convicted before

October 1, 2021 for an offense committed as a juvenile to move for a modification of sentence after the individual has been imprisoned for 20 years for the offense. Md. Code Ann., Crim. Pro. Art., § 8-110 (LexisNexis 2021). The statute requires a court to hold a hearing on a motion under § 8-110, where the inmate and the State can introduce evidence, and dictates that a court "shall" consider the following factors when determining whether to modify a sentence:

> (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.

Md. Code Ann., Crim. Proc., § 8-110(d).

The court may modify an individual's sentence where, upon consideration of the above factors, the court determines that the individual is not a danger to the public, and a reduced sentence will "better serve[]" the "interests of justice." *Id*. at (c). The court must issue its decision on the motion in writing and must address the mandatory factors in its decision. *Id*. at (e). A qualifying individual has the right file three separate motions for modification no less than three years apart.

Consideration for resentencing under JUVRA constitutes a meaningful opportunity for release. As this Court has recognized, the potential infirmity under the Eighth Amendment of a sentence of life imprisonment that is formally or effectively without parole

is that such a sentence would lack "a 'meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation'—by parole *or otherwise*[.]" *Carter v. State*, 461 Md. 295, 340 (2018) (emphasis added) (quoting *Miller*).[6] "It is for the State, in the first instance, to explore the means and mechanisms for compliance." *Graham*, 560 U.S. at 75. One way of providing such a meaningful opportunity is "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 577 U.S. at 212. But that is not the only way. *See Carter*, 461 Md. at 318 ("There is no constitutional requirement that a state have a parole system *per se*, so long as the state provides a meaningful opportunity for release based on demonstrated maturity and rehabilitation.") (citing *Graham*).

The factors that a court must consider when considering a motion to modify under JUVRA effectively encompass the same criteria that the Parole Commission and the Governor consider (by

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[6] *Carter* was decided before *Jones* and, to the extent that it interpreted *Miller* and *Montgomery* as requiring resentencing or parole eligibility for inmates serving life without parole for crimes committed as juveniles, it is no longer good law. Its discussion of what constitutes a meaningful opportunity for release, however, is unaffected by *Jones*.

regulations and executive order, respectively) when deciding whether to grant an inmate parole. *See Carter*, 461 Md. at 320–23 (listing criteria). Consideration of those criteria, the Court held in *Carter*, "provides a juvenile offender serving a life sentence with [the] 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" that the Eighth Amendment requires.[7] *Id.* at 365.

Malvo claims that JUVRA is not sufficient to provide a meaningful opportunity for parole to any juvenile offender because it does not mandate that a court consider the juvenile-specific factors as mitigating, it does not require that a court grant a motion to modify to those offenders who demonstrate sufficient maturity, and the "interests of justice" standard vests too much discretion in the courts. (Brief of Appellant at 59, 62-65). First,

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[7] Comparison to a conventional motion for modification of sentence under Rule 4-345(e) is instructive. A Rule 4-345(e) motion, unlike a JUVRA motion, is committed entirely to the sentencing judge's unguided discretion, *Brown v. State*, 470 Md. 503, 551 (2020), may be denied without a hearing or explanation, *Franklin v. State*, 470 Md. 154, 195 (2020), and "[i]f the motion is denied, the defendant is finished—he or she may not file another motion for reconsideration." *Greco v. State*, 347 Md. 423, 436 (1997) (emphasis in original).

courts are presumed to know the law and apply it correctly, *Medley v.* State, 386 Md. 3, 7 (2005), which, in this case, means considering the juvenile-related factors as mitigation and properly exercising discretion when considering the interests of justice.[8]

Second, contrary to Malvo's contention, (Brief of Appellant at 62), nothing in the regulations governing parole consideration, or the executive order relating to the Governor's consideration of a parole recommendation, *mandates* release if an inmate demonstrates maturity and rehabilitation. For inmates who committed crimes as juveniles, the regulations direct the Parole Commission to consider "[w]hether the inmate has adequately demonstrated maturity and rehabilitation since commission of the crime[,]" and to consider certain "mitigating factors, to which it affords appropriate weight," including "[t]he individual's level of

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[8] Although the right to appeal a motion to modify under § 8-110 has not been litigated, and need not be decided here, if, in the written order explaining the denial of a motion to modify, a court were to make clear that it did not consider the mandatory factors or considered the mandatory factors improperly, that decision would likely be appealable based upon a mistake of law. *Cf. Brown v. State*, 470 Md. 503, 546–53 (2020) (discussing the appealability of motions to modify under Md. Rule 4-345(e) and the Justice Reinvestment Act).

maturity and sense of responsibility at the time of the crime was committed[,]" and "[w]hether 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[.]" COMAR 12.08.01.18(A)(3)-(4).

Executive Order 01.01.2018.06 requires the Governor to consider "[t]he juvenile offender's age at the time the crime was committed and the lesser culpability of juvenile offenders as compared to adult offenders[,]" "[t]he degree to which the juvenile offender has demonstrated maturity since the commission of the crime[,]" and "[t]he degree to which the juvenile offender has demonstrated rehabilitation since the commission of the crime[,]" when deciding whether to approve a recommendation of parole for an inmate who was a juvenile at the time of the crime. COMAR 01.01.2018.06. Neither of those regulations require release for any inmate who meets any particular criteria or demonstrates a particular level of maturity or rehabilitation. Yet this Court held that they were sufficient to provide a meaningful opportunity for release. *Carter*, 461 Md. at 365.

Finally, one further powerful (albeit contextual) indication that JUVRA constitutes a meaningful opportunity for release bears mention: in April 2021, the same month that the General Assembly overrode the Governor's veto to pass JUVRA into law, the Office of the Public Defender launched a new project, the "Decarceration Initiative," with the exclusive focus of "reduc[ing] mass incarceration in Maryland by providing representation to people eligible to file motions to reduce their sentences under the newly-enacted [JUVRA]."[9] This investment of resources reflects an expectation that the opportunity for release offered by JUVRA is meaningful.

Malvo also claims that JUVRA does not provide *him* a meaningful opportunity for release because he is not currently serving his Maryland sentences and, unless he is granted parole in Virginia, never will. (Brief of Appellant at 59-60). Even if he does begin serving his Maryland sentences, he continues, it is unclear what the effect of his "stacked sentence" would have on his ability

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[9] OPD, The Decarceration Initiative, https://www.opd.state.md.us/decarceration-initiative.

to seek modification of all six life-without-parole sentences. (Brief of Appellant at 60-62).

Malvo is serving four life sentences in Virginia because he killed three people and wounded a fourth in four separate incidents in Virginia. The fact that he was convicted and sentenced for murdering people in another jurisdiction has no effect on the legality of his sentence in Maryland. Had Malvo limited his crime spree to Maryland, he would be eligible to move for modification (at least with regard to his first sentence) in October 2022, when he is 37 years old.

The State has a similar response to Malvo's argument that the effect of his "stacked sentence" is unclear. Malvo received six life-without-parole sentences because he murdered six people during six separate incidents at six different locations. Assuming, *arguendo*, that under JUVRA he would be required to serve 20 years for each life-without-parole sentence before he could seek a modification of that sentence, these 20-year terms should not be considered cumulatively as one *de facto* life sentence.

This Court in *Carter* described the spectrum on which cases involving multiple sentences fall and when the sentences should

be considered in the aggregate. *Carter*, 461 Md. at 356-57. At one end of the spectrum is a juvenile who "is involved in one event or makes one bad decision" that results in several convictions that do not merge. *Id*. The argument to aggregate those sentences and treat them as a single *de facto* life sentence is strongest. *Id*. In such a circumstance, there is little "opportunity to reflect upon or abandon the underlying conduct between individual offenses." This counsels for considering the sentence cumulatively and treating it the same as a lengthy sentence for a single criminal offense. *Id*. At the other end of the spectrum is a juvenile who "embark[s] on a serious crime spree" involving a series of serious crimes over days, weeks, or months. *Id*. "These circumstances are least likely to warrant the aggregate sentence being treated as a *de facto* life sentence." *Id*. at 357.

Malvo's case is far to the latter end of the *Carter* spectrum. The six murders that he was convicted of committing in Montgomery County took place over a period of 20 days. Although four of the murders took place on October 3, 2002, they took place at different locations miles apart, and each murder required planning, set up, and forethought. Malvo had incalculable

opportunities for reflection over the 20 days and could have abandoned the plan to execute innocent people at any point during that time. Malvo's six sentences are not the result of a single impulsive decision. They are the result of a meticulously planned, weeks-long killing spree designed to extort millions of dollars from the government.

The only reason that the cumulative time that Malvo may have to serve exceeds his life expectancy is because he committed so many crimes. *See Vasquez v. Commonwealth*, 781 S.E.2d 920, 926 (Va. 2016) (remarking that the only reason Vasquez's stacked sentence exceeded his life expectancy was because he committed 18 separate robberies, burglaries, and sexual offenses). For each of Malvo's Maryland sentences, should he actually begin serving them, he will be afforded a meaningful opportunity for release under JUVRA. This satisfies his as-applied proportionality claim.

iii. Judge Ryan did not make an implicit finding of corrigibility.

Malvo's proportionality claim fails for a second, independent reason. Contrary to Malvo's claim, Judge Ryan did not make an implicit finding that Malvo was reparable or corrigible. (Brief of

Appellant at 41-43). Malvo cites the prosecutor's and Judge Ryan's remarks about the changes in Malvo's behavior in the four years between his arrest and sentencing as evidence that both found Malvo to be capable of rehabilitation. (Brief of Appellant at 41-43). That conclusion, however, does not flow from the court's remarks.

The prosecutor and Judge Ryan did comment upon Malvo's change of heart with regard to cooperating with the prosecution and expressing remorse for his actions. (E. 120-22, 127-28). But the prosecution also emphasized that Malvo committed the murders "as a cognizant, thinking, and deliberate 17-year-old" "without mental defect." (E. 120-21). And Judge Ryan noted that Malvo "*could have been* somebody different[,]" "*could have been* better," but instead was a convicted murderer who "knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings." (E. 128) (emphasis added).

While the prosecutor and Judge Ryan both said Malvo had changed, neither said anything to suggest that Malvo could change or mature to the point that he would be rehabilitated and no longer a danger to society. And while both acknowledged that Muhammad had a detrimental effect on Malvo, both said that

Malvo knowingly, willfully, and voluntarily participated in an elaborate plan to execute multiple innocent people over a period of weeks. Nothing about these comments show that Judge Ryan believed Malvo was reparable.

Even if this Court does not find that JUVRA provides Malvo a meaningful opportunity for release, because Judge Ryan never found Malvo to be corrigible, his claim that his life-without-parole sentences are disproportionate must fail nonetheless.

B. Malvo's sentences are not illegal because they do not violate Article 25.

Malvo claims that Article 25 of the Maryland Declaration of Rights "independently resolves this case" because it provides greater protection than the Eighth Amendment. (Brief of Appellant at 44-50). Malvo also argues that, post-JUVRA, life without parole for juveniles is no longer consistent with Maryland's community standards and no longer satisfies any legitimate penological purpose. (Brief of Appellant at 50-54). In the absence of a penological purpose, life without parole for juveniles is cruel, Malvo argues. (Brief of Appellant at 50). It is also unusual, he claims, because approximately 12 people are currently serving

life without parole sentences in Maryland for crimes committed as juveniles.[10] (Brief of Appellant at 52-53). Finally, Malvo argues, his sentence violates Article 25 because Judge Ryan implicitly found him corrigible. (Brief of Appellant at 55-56).

Malvo's Article 25 claim fares no better than his Eighth Amendment claim. First, JUVRA provides a meaningful opportunity for release that defeats Malvo's Article 25 claim. Second, even if JUVRA does not resolve Malvo's Article 25 claim, this Court has never held that Article 25 provides broader protections than the Eighth Amendment and should not do so now. Third, the prospective prohibition on juvenile life without parole does not affect the constitutionality of the remaining life without parole sentences. Fourth, Judge Ryan did not make an implicit finding that Malvo was corrigible.

1. *JUVRA provides a meaningful opportunity for release that defeats Malvo's Article 25 claim.*

For all the reasons discussed in Section A(2)(ii), above, the passage of JUVRA resolves Malvo's Article 25 claim. After

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[10] This number does not include Malvo, who is not serving his Maryland sentences.

October 1, 2021, everyone in Maryland who is serving a sentence for crimes committed as a juvenile has a meaningful opportunity to be released on that sentence. If and when Malvo begins serving his six life-without-parole sentences, each one will be eligible for a JUVRA motion to modify. As noted above, the fact that Malvo may never have an opportunity to serve his Maryland sentences is irrelevant to whether those sentences are legal. Equally irrelevant is Malvo's stacked sentences. Just as these sentences should not be considered cumulatively for Eighth Amendment purposes, neither should they be considered cumulatively for Article 25 purposes. "Juvenile defendants convicted of multiple offenses are not entitled to a volume discount on their aggregate sentence." *Detwiler v. State*, 449 P.3d 873, 875 (Okla. Crim. App. 2019) (cleaned up).

2. *Article 25 does not provide broader protections than the Eighth Amendment.*

This Court need not consider Malvo's Article 25 claim beyond holding that JUVRA provides him a meaningful opportunity for release and, therefore, his sentence satisfies Article 25. If, however, this Court considers Malvo's claim that Article 25

provides him broader protections than the Eighth Amendment, it should be rejected.

Malvo relies first on the disjunctive phrasing of Article 25, which bars "cruel *or* unusual punishment," to argue that it provides more protection than the Eighth Amendment. (Brief of Appellant at 45-47). This Court, however, has dismissed that argument. *Thomas v. State*, 333 Md. 84, 103 n.5 (1993). While first noting that support exists for a potential difference between "cruel *and* unusual" and "cruel *or* unusual" punishment, this Court went on to say that its "cases interpreting Article 25 of the Maryland Declaration of Rights have generally used the terms 'cruel and unusual' and 'cruel or unusual' interchangeably." *Id*. Moreover, this Court noted the Court of Special Appeals' conclusion that "'the adjective "unusual" adds nothing of constitutional significance to the adjective "cruel" which says it all, standing alone.'" *Id*. (quoting *Walker v. State*, 53 Md. App. 171, 193 n.9 (1982)). *See also Aravanis v. Somerset County*, 339 Md. 644, 656 (1995) ("Article 25 is, textually and historically, substantially identical to the Eighth Amendment. Indeed, both of them were taken virtually verbatim from the English Bill of Rights of 1689.").

More recently, the Court of Special Appeals, in a case involving a claim of *de facto* life without parole for a juvenile, again dismissed the idea that there is any substantive difference between "cruel and unusual" and "cruel or unusual":

> The "cruel or unusual punishments" clause of Article 25 of the Maryland Declaration of Rights has long been construed to have the same meaning as the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See, e.g.*, *Thomas*, 333 Md. at 103 n.5 ("[W]e perceive no difference between the protection afforded by [the Eighth Amendment] and by the 25th Article of our Declaration of Rights"); *Walker v. State*, 53 Md. App. 171, 183 (1982) (Eighth Amendment and Article 25 are construed to have the same meaning because "both of them were taken virtually verbatim from the English Bill of Rights of 1689"). Accordingly, there is no basis for the appellant's argument that he is afforded greater protections by Article 25 of the Maryland Declaration of Rights than by the Eighth Amendment.

McCullough v. State, 233 Md. App. 702, 747-48 n.34 (2017), *rev'd on other grounds sub nom.*, *Carter*, 461 Md. 295 (parallel citations omitted).

While this Court reversed *McCullough* on other grounds, it did not disavow the Court of Special Appeals' comments about Article 25. In fact, this Court noted that, although it has acknowledged the existence of "some textual support" for finding

greater protection in Article 25, it has "usually been construed to provide the same protection as the Eighth Amendment[.]"[11] *Id*. at 308 n.6. *See also* Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty As Cruel and Unusual Punishment*, 29 Hous. L. Rev. 493, 496 n.8 (1992) (explaining that the history of the phrase "cruel and unusual" "suggests that the word 'unusual' may have no independent meaning," and noting that the "text readily could bear a reading, consistent with the [Supreme] Court's tradition, that bars both cruel punishments and unusual punishments").

Equally unpersuasive is Malvo's argument that, because Maryland has a "distinctive" tradition of "shielding juvenile offenders from adult punishments," this Court should find his

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[11] This footnote in *Carter* undermines Malvo's claim that this Court has not considered Article 25 in the context of a juvenile offender. Of course, Malvo's own footnote also undermines this claim. (Brief of Appellant at 50 n.11). As he acknowledges, in *Trimble v. State*, 300 Md. 387, 435 (1984), this Court held that imposing the death penalty on juveniles does not violate the Eighth Amendment. The Court added, "[w]e further see no obstacle presented by . . . our state constitution, or the Declaration of Rights to prevent the imposition of the death penalty on account of [Trimble's] age." *Id*. With this sentence, the Court implicitly found that Article 25 provided Trimble no additional protections.

sentences illegal under Article 25. (Brief of Appellant at 48). This logic does not follow. That Maryland has placed limitations on when and how juveniles can be charged and convicted as adults does not mean that every conceivable limitation is constitutionally required. Moreover, the examples Malvo provides are all legislative enactments. The legislature has spoken with regard to juvenile life without parole and determined that the appropriate response is to ban juvenile life without parole prospectively and allow individuals serving long prison terms for crimes committed as juveniles to seek modification of the sentence. *See* Section B(3), *infra*.

This Court need not consider the merits of Malvo's Article 25 claim because JUVRA provides a meaningful opportunity for release for all individuals sentenced in Maryland for crimes committed as juveniles. If this Court does consider Malvo's claim, it should decline to find that Article 25 provides him more protections than the Eighth Amendment.

3. *Juvenile life-without-parole sentences are not cruel or unusual post-JUVRA.*

Malvo next claims that Article 25 requires that all juvenile life-without-parole sentences be invalidated because post-prohibition they are cruel or unusual.[12] (Brief of Appellant at 50-54). Life without parole serves no legitimate penological purpose, Malvo claims, because it provides no deterrent effect, the case for retribution is "weak" at best, and it "'forswears altogether the rehabilitative ideal.'" (Brief of Appellant at 54). Malvo also says that, since the General Assembly has decided that life without parole for juveniles is not necessary to protect public safety, "there is no legitimate basis to permanently incapacitate juveniles sentenced before the repeal." (Brief of Appellant at 54).

The obvious response to Malvo's last point is that, thanks to JUVRA, no juvenile is permanently incapacitated on any sentence. Every person imprisoned for an offense committed as a juvenile before October 1, 2021, may seek a modification of the sentence

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[12] For purposes of this argument, the State adopts Malvo's approach of applying the Supreme Court's two-step test for Eighth Amendment categorical challenges to his categorical challenge under Article 25. (Brief of Appellant at 51); *see also Trimble*, 300 Md. at 420-21.

after serving 20 years for the offense. Md. Code Ann., Crim. Pro. § 8-110. Because of this opportunity for modification, these sentences serve the penological goal of rehabilitation. Inmates have an incentive to comply with institutional rules, complete "educational, vocational, or other program[s]," and demonstrate "maturity, rehabilitation, and fitness to reenter society," three of the factors a judge must consider when deciding whether to grant a JUVRA motion for modification.[13] Md. Code Ann., Crim. Pro. § 8-110.

Just as juvenile life without parole is not cruel post-JUVRA, it is also not unusual in the constitutional sense of the word. That approximately 12 inmates are currently serving life without parole sentences in Maryland for crimes committed as juveniles is not persuasive. The Supreme Court said that life without parole "is a disproportionate sentence for all but the rarest of children[.]" *Montgomery*, 577 U.S. at 195. The fact that only a handful of people

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[13] Requiring inmates to serve 20 years on each sentence before being eligible for modification also serves the penological purposes of retribution and deterrence.

are serving this sentence in Maryland means that it is being deployed constitutionally.

The suggestion that Article 25 might compel a "retroactive categorical ban" on life-without-parole sentences for juvenile offenders, due to the legislature's decision to abolish such sentences prospectively—thereby allegedly rendering them "unusual"—is unsound for an additional reason. In enacting JUVRA, the legislature made a considered choice to abolish formal sentences of life without parole for juveniles only prospectively. Courts do not "presume that the Legislature intended to enact unconstitutional legislation[.]" *Harrison-Solomon v. State*, 442 Md. 254, 287 (2015). The opposite presumption applies. *In re Adoption/G'ship of Dustin R.*, 445 Md. 536, 579 (2015) ("enactments of the General Assembly are presumed to be constitutionally valid") (cleaned up).

All the more so here, where the legislature did not simply prospectively eliminate life-without-parole sentences while overlooking existing sentences and leaving them untouched. Rather, the legislature addressed existing sentences with the other provisions of JUVRA which establish a detailed and robust

sentence-modification procedure. The General Assembly thus chose to address both existing and future sentences, but in distinct ways. Indeed, the fact that the sentence-modification provisions apply only to sentences imposed before JUVRA takes effect is a further clear indication of the comprehensive and deliberate nature of the legislature's judgment.

Beginning October 1, 2021, every person serving a sentence for crimes committed as a juvenile has a meaningful opportunity for release from that sentence. If Malvo ever begins to serve his Maryland sentences, he will have an opportunity to seek modification of those sentences at the appropriate time. Just as Malvo's sentences do not violate the Eighth Amendment, they do not violate Article 25.

4. *Judge Ryan did not implicitly determine that Malvo was corrigible.*

Malvo asks this Court to consider his as-applied proportionality claim separately under Article 25 and find that his sentence violates Article 25 because Judge Ryan implicitly found that Malvo was corrigible. (Brief of Appellant at 55). For the reasons explained in Section A(2)(iii), above, Judge Ryan made no

such finding. Moreover, even if he did, JUVRA provides a reasonable opportunity for release.

5. *Post-JUVRA, this Court need not consider whether Article 25 requires a finding of permanent incorrigibility in order to impose life without parole.*

Finally, Malvo asks this Court to find that Article 25 requires a finding of permanent incorrigibility before sentencing a juvenile to life without parole. (Brief of Appellant at 56-57). Maryland no longer has life without parole for crimes committed as juveniles, so this Court need not consider whether Article 25 requires such a finding. Even if it did, and even if Judge Ryan failed to follow the procedural requirements of Article 25, that would not render Malvo's sentence illegal. *See Colvin*, 450 Md. at 725 ("A sentence does not become 'an illegal sentence because of some arguable procedural flaw in the sentencing procedure.'").

The circuit court correctly denied Malvo's motion to correct an illegal sentence. None of Malvo's six sentences of life without parole, imposed for six separate murders, violate the Eighth Amendment. Even if a procedural violation were grounds for a

motion to correct an illegal sentence, *Jones* makes clear that the Eighth Amendment requires no more than a discretionary sentencing scheme where youth can be considered. Malvo's disproportionality claim must also fail. Assuming that *Miller*'s incorrigibility rule is the appropriate test to apply when determining whether a juvenile life without parole sentence is disproportionate, Judge Ryan did not implicitly find Malvo corrigible and, regardless, JUVRA provides the meaningful opportunity for release that *Miller* requires.

This Court need not consider Malvo's claim that Article 25 provides more protections than the Eighth Amendment because the passage of JUVRA means that all inmates serving life without parole sentences for crimes committed as juveniles will have the opportunity to seek a modification of sentence after serving 20 years on that sentence. This provides a meaningful opportunity for release on all those sentences, including Malvo's. Malvo's sentences are not illegal under Article 25.

CONCLUSION

The State respectfully asks the Court to affirm the judgment of the circuit court.

Dated: December 6, 2021

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 9,216 words, excluding the parts exempted from the word count by Maryland Rule 8-503.

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

CERTIFICATE OF SERVICE

In accordance with Md. Rule 20-201(g), I certify that on this day, December 6, 2021, I electronically filed the foregoing "Brief of Appellee" using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including Kiran Iyer, Assigned Public Defender, and Celia Anderson Davis, Assistant Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Street, Suite 1302, Baltimore, Maryland 21202.

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