LEE BOYD MALVO, Petitioner v. STATE OF MARYLAND, Respondent	IN THE COURT OF APPEALS OF MARYLAND COA-PET-0476-2017 Cir. Ct. No. 102675-C

SUPPLEMENT TO PRE-JUDGMENT PETITION FOR WRIT OF CERTIORARI

Petitioner, Lee Boyd Malvo, filed a pre-judgment petition for writ of certiorari ("Petition") in this Court on January 25, 2018. On April 28, 2021, this Court granted leave to amend or supplement the Petition. Mr. Malvo, by counsel, Kiran Iyer, Assigned Public Defender, and Celia Davis, Assistant Public Defender, files this supplement to update the Court on the status of Mr. Malvo's legal proceedings, and to address two important developments: (1) Maryland's passage of the Juvenile Restoration Act on April 10, 2021, which prohibits courts from sentencing juveniles to life without parole and authorizes sentence reductions for certain juvenile offenders; and (2) the Supreme Court's April 22, 2021 decision in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021). Neither of these developments resolves the question presented in this case, and both reinforce the need for this Court to determine whether juveniles sentenced to life without parole in Maryland are entitled to be resentenced under the Eighth Amendment and/or Article 25 of the Maryland Declaration of Rights.

I. Mr. Malvo's offenses, plea, and sentencing.

In October 2002, 41-year-old John Allen Muhammad and Mr. Malvo, who was then seventeen, committed a series of shootings in the greater Washington, D.C. area. Four years later, on October 10, 2006, Mr. Malvo pleaded guilty to six counts of first degree murder in the Circuit Court for Montgomery County. At the sentencing hearing on November 8, 2006, the State acknowledged that he had "changed," "grown tremendously," "cooperated" with the prosecution of Mr. Muhammad, and "escaped" from his sway. (Sent. Tr. at 9–10). Judge James L. Ryan accepted that he had "changed" and "shown remorse," but said that the community did not "forgive" him for his crimes.[1] (Petition App.15). He sentenced him to six consecutive life without parole sentences running consecutively to sentences previously imposed in other jurisdictions.[2] *Id*. at 15–16.

II. *Miller* and *Montgomery* change the sentencing landscape for juvenile homicide offenders.

Nearly six years after Mr. Malvo's sentencing hearing, the Supreme Court held that the Eighth Amendment "requires" a sentencing court to "take into account how children are different, and how those differences *counsel against* irrevocably sentencing them to a lifetime in

[1] Under Maryland law at the time, Judge Ryan was not required to "consider an accused's youthful age to be a mitigating factor at sentencing" before imposing life without parole. *See Mack v. State*, 69 Md. App. 245, 255 (1986), *cert. denied*, 309 Md. 48 (1987).

[2] In 2004, Mr. Malvo was sentenced in Virginia to four terms of life imprisonment without parole: *see Malvo v. Mathena*, 893 F.3d 265, 266–267 (4th Cir. 2018). He is currently incarcerated in Virginia.

prison," before imposing life without parole on a juvenile. *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (emphasis added). *Miller* "mandate[d]" that a sentencer "consider[] an offender's youth and attendant characteristics" before imposing this penalty. *Id.* at 483. And it identified five of those characteristics ("the *Miller* factors"): (1) the child's "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him … from which he cannot usually extricate himself"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) "incompetencies associated with youth," including an inability to "deal with police officers or prosecutors" and an "incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation." *Id.* at 477–478. *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.").

In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Supreme Court held that *Miller* applies retroactively on collateral review to juveniles sentenced to life without parole. Under the *Teague v. Lane*, 489 U.S. 288 (1989) framework for retroactivity in cases on federal collateral review, "a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced" unless the rule is a new "substantive rule[] of constitutional law" or

"watershed rule of criminal procedure." *Montgomery*, 577 U.S. at 198.[3] *Montgomery* held that *Miller* "announced a substantive rule"—"life without parole [is] an unconstitutional penalty for … juvenile offenders whose crimes reflect the transient immaturity of youth." *Id*. at 206, 208, 211. *See also id*. at 209 ("*Miller* did bar life without parole … for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."). "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence *still violates* the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.' " *Id*. at 208 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)) (emphasis added). *Miller*'s "procedural component"—a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors"—"does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id*. at 209–210.

III. Mr. Malvo moves to correct his life without parole sentences.

On January 12, 2017, Mr. Malvo filed a motion to correct illegal sentence under Maryland Rule 4-345(a), alleging that his sentences violated the Eighth Amendment and Article 25, and seeking a resentencing hearing.[4] At the hearing on the motion on June 15, 2017, the State conceded

[3] The Supreme Court has recently held that "no new rul[e] of criminal procedure can satisfy the watershed exception." *Edwards v. Vannoy*, 141 S.Ct. 1547, 1559 (2021).

[4] Mr. Malvo had previously filed a petition pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus in the U.S. District Court for the District of Maryland. On April 11, 2017,

that "Judge Ryan, though an outstanding jurist … was not clairvoyant. He could not have known that terms like transient immaturity and irreparable corruption would become part of the lingo that the Supreme Court wanted sentencing courts to address." (Mot. Tr. at 20–21). Nevertheless, Judge Robert A. Greenberg denied the motion. (Petition App.17).

Mr. Malvo noted an appeal to the Court of Special Appeals, and filed his brief in that Court on January 8, 2018. (Petition App.37). On January 12, 2018, the Court of Special Appeals, on its own initiative, stayed the appeal pending the decisions of this Court in *Bowie v. State*, Sept. Term 2017, No. 55; *Carter v. State*, Sept. Term 2017, No. 54; *McCullough v. State*, Sept. Term 2017, No. 56; and *State v. Clements*, Sept. Term 2017, No. 57. (Petition App.90). The stay remains in effect.

Mr. Malvo filed his Petition in this Court on January 25, 2018. He presented the following question:

> Under *Miller v. Alabama*, 567 U.S. 460 (2012), which barred life without parole 'for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility,' *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), do the six life without parole sentences imposed on Petitioner violate the Eighth Amendment to the U.S. Constitution and/or Article 25 of the Maryland Declaration of Rights?
>
> A. Does *Miller* apply to Maryland's sentencing scheme, which gives the sentencing court discretion to impose life without parole?
>
> B. Did the sentencing court violate *Miller* by failing to consider Petitioner's youth and imposing life without parole for crimes which did not reflect permanent incorrigibility?

Judge Peter J. Messitte granted his application to stay those proceedings until his state court proceedings had been exhausted.

> C. Did the sentencing court violate Article 25 by imposing life without parole without finding beyond a reasonable doubt that Petitioner was permanently incorrigible?
>
> D. Does Article 25 categorically bar life without parole sentences for juveniles?
>
> E. Did the trial court err by ruling that the life without parole sentences are not 'illegal' under Maryland Rule 4-345(a)?

(Petition at 2).

The State filed an answer on February 6, 2018, and the Victim's Representative filed an answer and conditional cross-petition on February 12, 2018. On February 14, 2018, Mr. Malvo moved to strike the Victim's Representative's answer and conditional cross-petition, and the State moved to treat its filing as an amicus curiae brief in support of the Petition. The Victim's Representative filed a response on February 23, 2018. This Court has not ruled on these motions, or on the Petition.

IV. The Fourth Circuit applies *Miller* and *Montgomery* to vacate Mr. Malvo's life without parole sentences in Virginia.

On June 21, 2018, the Fourth Circuit vacated Mr. Malvo's life without parole sentences in Virginia "because the retroactive constitutional rules for sentencing juveniles adopted subsequent to [his] sentencings were not satisfied during his sentencings." *Mathena*, 893 F.3d at 267. The Court remanded for resentencing to determine whether Mr. Malvo was "one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole." *Id.* The

Commonwealth of Virginia filed a petition for writ of certiorari in the Supreme Court on August 16, 2018.

V. *Carter* states, in dicta, that juveniles sentenced to life without parole "must be re-sentenced" to comply with *Miller*.

On August 29, 2018, this Court issued its opinions in the consolidated cases of *Carter*, *Bowie*, and *McCullough*, *Carter v. State*, 461 Md. 295 (2018), *reconsideration denied*, October 4, 2018, and *State v. Clements*, 461 Md. 280 (2018).[5] *Carter* does not resolve this case: "None of the sentences imposed" in those cases "was explicitly 'life without parole,' " and each Petitioner asserted that he was "effectively" serving a sentence of life without parole. 461 Md. at 306–307. This Court did, however, make two important observations about juvenile life without parole sentences. *First*, the Court observed that *Miller* and *Montgomery* require "an *individualized sentencing process that takes account of the offender's youth*; the defendant may be sentenced to imprisonment without the possibility of future release *only if* the court determines that the defendant is incorrigible." *Id.* at 317 (emphases added). *See also id.* at 306 ("the Eighth Amendment's proscription against cruel and unusual punishments precludes a [life without parole sentence] for a juvenile offender unless the defendant is an incorrigible murderer."). *Second*, the Court reasoned that the "implications of the Supreme Court's recent Eighth Amendment decisions for a case in

[5] *Clements* was resolved on procedural grounds.

which a court sentenced a juvenile offender to life without parole are *very clear*. In such a case, the defendant *must be re-sentenced* to comply with the holdings of *Graham* and *Miller*. If the defendant was convicted of homicide, the court *will need to hold an individualized sentencing hearing* to consider whether the defendant is incorrigible." *Id*. at 333–334 (emphases added). Under this reasoning, Mr. Malvo, who was sentenced before *Miller*, is entitled to an "individualized sentencing hearing" that complies with *Miller*, and consideration of whether he is incorrigible.

VI. The Supreme Court grants certiorari in *Mathena* and *Jones*.

On March 18, 2019, the Supreme Court granted Virginia's petition for writ of certiorari from the Fourth Circuit's decision vacating Mr. Malvo's Virginia sentences. *Mathena v. Malvo*, 139 S.Ct. 1317 (2019). The Court heard argument on October 16, 2019, but dismissed the petition by stipulation on February 24, 2020 after Virginia enacted legislation making all juvenile offenders eligible for parole after 20 years' imprisonment. On March 9, 2020, the Supreme Court granted a petition for writ of certiorari in *Jones v. Mississippi* that presented the following question: "Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole." 140 S.Ct. 1293 (2020) (Mem).

VII. Maryland prohibits courts from sentencing juveniles to life without parole, and authorizes sentence reductions for certain juvenile offenders.

On April 10, 2021, the Legislature passed Senate Bill 494, the Juvenile Restoration Act, by gubernatorial veto override. 2021 Md. Laws, Ch. 61 (effective October 1, 2021). The Act prohibits a court from sentencing a juvenile to life without parole. Maryland Code (2001, 2018 Repl. Vol., 2020 Supp.), Criminal Procedure Article ("CP"), § 6-235(2). Maryland has joined 24 States and the District of Columbia in banning the imposition of this sentence, with a further nine States not having any offenders serving this penalty. Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project, May. 24, 2021, https://www.sentencingproject.org/publications/juvenile-life-without-parole/. And it has ended a punishment that is disproportionately applied to black youth: 82% of youth 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 of The Campaign for the Fair Sentencing of Youth).

As of December 30, 2020, Maryland had 47 inmates serving life without parole sentences for offenses committed when they were juveniles. Revised Fiscal and Policy Note for Senate Bill 494, at 5 (2021). The Act authorizes a juvenile offender who was sentenced for their offense before

October 1, 2021 and "imprisoned for at least 20 years for the offense" to "file a motion with the court to reduce the duration of the sentence." CP § 8-110(a), (b). The court may reduce the duration of a sentence if it determines that "the individual is not a danger to the public" and "the interests of justice will be better served by a reduced sentence." CP § 8-110(c).[6] The court "shall consider" eleven factors in making this determination, including factors corresponding to the *Miller* factors: the "individual's age at the time of the offense," "whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society," "the individual's family and community circumstances at the time of the offense," "the extent of the individual's role in the offense and whether and to what extent an adult was involved in the offense"; and "the diminished culpability of a juvenile as compared to an adult, including an inability to fully appreciate risks and consequences." CP § 8-110(d).[7] The court must address these factors in a written decision granting or denying the motion. CP § 8-110(e). The individual may file three motions to reduce their sentence, though there must be at least three years between each motion. CP § 8-110(f).

The Juvenile Restoration Act does not resolve Mr. Malvo's case. The Act prohibits the imposition of juvenile life without parole sentences from

[6] The court may impose a sentence "less than the minimum term required under law." CP § 6-235(1). Accordingly, juveniles convicted of first degree murder need not be sentenced to life imprisonment under Maryland Code (2002, 2012 Repl. Vol., 2020 Supp.), Criminal Law Article, § 2-201(b).

[7] The Act does not, however, *require* the court to grant the child's motion to reduce a life without parole sentence if the crime reflected transient immaturity.

October 1, 2021, but does not invalidate prior sentences. It does not, therefore, "correct" Mr. Malvo's "illegal" life without parole sentences. *See* Rule 4-345(a).[8] And Mr. Malvo might never qualify for a sentence-reduction hearing under the Act, as he is still serving his life sentences in Virginia, and might not ever be "imprisoned for at least 20 years for the offense[s]" he committed in Maryland. CP § 8-110(a)(3). Nor should he have to wait 20 years for a reduction hearing if his sentences are illegal.

VIII. *Jones* holds that the Eighth Amendment does not require a separate factual finding of permanent incorrigibility before a juvenile is sentenced to life without parole.

On April 22, 2021, the Supreme Court issued its opinion in *Jones*, a challenge to a life without parole sentence imposed following a post-*Miller* resentencing hearing. Jones killed his grandfather when he was fifteen years old, and was sentenced to a mandatory life without parole sentence under Mississippi law. In the wake of *Miller*, the Supreme Court of Mississippi ordered that Jones be resentenced in accordance with *Miller*. At the resentencing hearing, "Jones's attorney argued that Jones's 'chronological age and its hallmark features' diminished the 'penological justifications for imposing the harshest sentences.' " *Jones*, 141 S.Ct. at 1313 (quoting *Miller*, 567 U.S. at 472, 477). The sentencing judge stated that he had "considered each and every factor that is identifiable in the *Miller* case and its progeny," and that "consideration of the *Miller* factors and

[8] By the same token, an illegal sentence that might be modified under Maryland Rule 4-345(e)(1) is still an illegal sentence.

others relevant to the child's culpability might well counsel against irrevocably sentencing a minor to life in prison." (Resp. Br. at 9–10). The judge determined, however, that life without parole remained the appropriate sentence. *Jones*, 141 S.Ct. at 1313.

Jones argued in the Supreme Court that a "sentencer who imposes a life-without-parole sentence must … make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding" of permanent incorrigibility. *Jones*, 141 S.Ct. at 1311. The Supreme Court rejected that argument, relying on the "explicit language" in *Montgomery* that "*Miller* did not impose a formal factfinding requirement" and that "a finding of fact regarding a child's incorrigibility ... is not required." *Id*. (quoting *Montgomery*, 577 U.S. at 211). The Court stated that in cases involving a juvenile homicide offender, a "State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id*. at 1313. An "on-the-record sentencing explanation with an implicit finding of permanent incorrigibility [was] not necessary to ensure that a sentencer considers a defendant's youth." *Id*. at 1319.

Jones did not, however, disturb the holdings of *Miller* or *Montgomery*. *See id*. at 1321 ("Today's decision does not overrule *Miller* or *Montgomery*."). It did not overrule *Miller*'s requirement that a trial court consider a child's "youth and attendant characteristics" before imposing life

without parole. *See Jones*, 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). *See also id*. at 1316 (*Miller* "required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence."). *Jones* did not hold that sentencers in discretionary sentencing schemes are free to disregard the child's youth. *See id*. at 1320 n.7 ("[I]f a sentencer considering life without parole for a murderer who was under 18 expressly refuses as a matter of law to consider the defendant's youth … then the defendant might be able to raise an Eighth Amendment claim under the Court's precedents."). And it did not overrule *Montgomery*'s holding that *Miller* announced a substantive rule barring life without parole for a child whose crime reflects transient immaturity. *See Jones*, 141 S.Ct. at 1315 n.2 ("The key paragraph from *Montgomery* is as follows: … '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. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.' ") (quoting *Montgomery*, 577 U.S. at 211).[9] *Jones* merely clarified that *Miller*

[9] *Miller*, of course, could not apply retroactively on federal collateral review if it did not announce a substantive rule of constitutional law. *See Jones*, 141 S.Ct. at 1317 n.4 ("our decision today does not disturb *Montgomery*'s holding that *Miller* applies retroactively on collateral review.").

did not require a trial court to expressly or implicitly find that a child is incorrigible before sentencing the child to life without parole.

Jones, therefore, does not resolve the question presented in this case. Post-*Jones*, the Eighth Amendment still requires a trial court to consider a child's "youth and attendant circumstances" before imposing life without parole. *Miller*, 567 U.S. at 483. Jones received consideration of the *Miller* factors; Mr. Malvo, who was sentenced before *Miller*, did not. *See* Question Presented: A, B. And post-*Jones*, life without parole is still a disproportionate penalty under the Eighth Amendment for a child whose crime reflects transient immaturity. *Montgomery*, 577 U.S. at 208. Jones did not bring an "as-applied Eighth Amendment claim of disproportionality regarding [his] sentence," *Jones*, 141 S.Ct. at 1322; Mr. Malvo does. *See* Question Presented: B. Finally, *Jones* expressly states that its holding "does not preclude the States from imposing additional sentencing limits," including "categorically prohibit[ing] life without parole for all offenders under 18," or "requir[ing] sentencers to make extra factual findings" before imposing this sentence. 141 S.Ct. at 1323. This Petition asks this Court to impose those limits under Article 25. *See* Question Presented: C, D.

IX. This Court should grant the Petition.

As set forth above, none of the developments in the law since the Petition was filed has resolved the question presented. This Court should grant certiorari for the reasons set forth in the Petition, and for three

additional reasons. *First*, this Court has already recognized in dicta that juvenile offenders sentenced to life without parole before *Miller* "must be re-sentenced" and given an "individualized sentencing hearing to consider whether" they are "incorrigible." *Carter*, 461 Md. at 333–334. This Court should grant certiorari to clarify that *Jones* does not alter the position of defendants like Mr. Malvo who were sentenced before *Miller*. Further percolation in the Court of Special Appeals is unnecessary and contrary to the interests of judicial economy: This Court has recognized the applicable principle, and should apply it here.

Second, Mr. Malvo, and other juveniles illegally sentenced to life without parole, should not have to wait 20 years for a sentence-reduction hearing under the Juvenile Restoration Act. *See* Rule 4-345(a) (illegal sentences may be corrected "at any time"). Life without parole sentences exact an immense psychological toll on juvenile offenders, and may deprive them of programming focused on rehabilitation. *See Graham v. Florida*, 560 U.S. 48, 79 (2010) ("[I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."). This Court should grant certiorari to ensure swift resolution of these cases, and to ensure that those juveniles whose crimes reflect transient immaturity are not forced to languish under illegal life without parole sentences.

Finally, now that Maryland has prospectively abolished juvenile life without parole sentences, there is an even stronger argument that this penalty is "cruel or unusual" under Article 25. *See* Dan A. Friedman, The Maryland State Constitution: A Reference Guide (2006) at 36 ("Article 25 is phrased in the disjunctive ("cruel *or* unusual"), while the Eighth Amendment is in the conjunctive ("cruel *and* unusual")); *Carter*, 461 Md. at 308 n.6 (noting that "there is some textual support for finding greater protection" in Article 25 than in the Eighth Amendment). The Legislature has determined that it is categorically impermissible—"cruel"—to sentence *any* juvenile offender to life without parole for *any* offense. This Court should grant certiorari to determine whether the small number of juvenile offenders serving life without parole sentences should suffer a penalty that no longer comports with contemporary standards of decency. *See State v. Santiago*, 122 A.3d 1 (Conn. 2015) (following Connecticut's prospective abolition of the death penalty, the death penalty violated the state constitution's prohibition of cruel and unusual punishments).

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I hereby certify that:

1. This supplement contains 3890 words.

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

Kiran Iyer

Kiran Iyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2021, a copy of this "Supplement to Pre-Judgment Petition for Writ of Certiorari" was filed electronically using the MDEC system, with a copy delivered via email to:

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