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**IN THE COURT OF APPEALS OF MARYLAND**

**SEPTEMBER TERM 2021**

**No. 29**

**LEE BOYD MALVO,**
**Petitioner**

**v.**

**STATE OF MARYLAND,**
**Respondent.**

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

# AMICUS BRIEF OF CRIME VICTIM'S REPRESENTATIVE NELSON RIVERA

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## INTEREST OF THE AMICUS

Crime victim Lori Ann Lewis-Rivera was one of six Maryland strangers murdered by Malvo and his codefendant, John Muhammed. She was the wife of Amicus Nelson Rivera who is the victim's representative, and the mother of their then six year old daughter. Lori Ann's murder damaged the lives of her husband and her daughter whose family life, as they knew it, ended forever. Her survivors moved out of their residence to try, at least in part, to recover their privacy and to be spared some of the daily heartache from this tragedy. The victim's daughter's life since then – her childhood, her preteen and teen years, her young adulthood – all passed without her mother's love, praise, and

guidance. These victim losses and Md. Code, Crim. Proc.(CP) §7-105(victim's rights during post-conviction proceedings), CP §11-503(same), and Rule 4-345(e)(2)&(3)(same) trigger the victim representative's rights guaranteed by Article 47 of the Maryland Declaration of Rights. Malvo acknowledged the ongoing damage he caused his victims when, at his sentencing, he accepted "full and unmitigated responsibility...without excuse...without blaming other people" (E.125), i.e., not his codefendant nor his friends or relatives, for "what I've done to the families and friends" of the murdered victims (E.126). He stated, "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...every day. * * * I also think of the pain and loss I have inflicted on them...and the pain this absence and emptiness causes a child." (E.126). Malvo made that statement, accepting full responsibility for his actions, in support of his request that his six sentences all be imposed concurrent to each other and concurrent to his Virginia sentences, thereby adding no days of incarceration for his six Maryland murders (E.123). At that time, Malvo's defense team, which had been preapproved by his current counsel (E.124), asked the court to consider Malvo's "efforts to cooperate and aid families in closure...not only in this jurisdiction...[but also] to bring closure to the family in Arizona."(E.122). Now Malvo seeks a new sentencing hearing that is contrary to and undermines his prior efforts to provide closure for his victims' families.

## PROCEEDINGS BELOW

**1. Malvo's post-conviction pleadings before 2017.**

Malvo pursued no review of his conviction or sentence for more than a decade. In 2006, Malvo, after telling the court that his codefendant wanted him to rely on his juvenile status for leniency if he was caught, said he was rejecting his codefendant's directions(E.124). Malvo did not seek sentence review from either the sentencing judge, from a three judge sentencing review panel, or by filing a timely application for Leave to Appeal, and he never asked that his sentencing hearing take special cognizance of his juvenile status, as previously announced in *Roper v. Simmons*, 543 U.S. 551,569-70(2005). Thereafter, Malvo also chose not to argue to his sentencing judge in Malvo's motion for a reduction of sentence, which remained pending until September 2012, that his sentencing hearing in any respect violated *Miller v. Alabama*, 567 U.S. 460(June 25, 2012) or *Graham v. Florida*, 560 U.S. 48(2010).

**2. Malvo's post-conviction pleadings in 2017.**

Despite choosing not to rely for more than ten years on the decided Supreme Court cases Malvo now cites, which strategy was consistent with Malvo's 2006 stated desire to facilitate "closure" for his victims' families, in 2017 Malvo changed his mind. In 2017, which was more than ten years after his sentencing, Malvo filed a Rule 4-345 motion and for the first time cited *Miller, Graham,* and *Roper*(Def's January 2017 Motion,p.2), asserting that those cases required that every juvenile homicide defendant must get consideration articulated by the sentencing judge of specific sentencing criteria, and it must make specific sentencing findings about that juvenile defendant's corrigibility(*id.*

pp.3,10[1];E.142), whether or not the juvenile requested such a finding at sentencing.[2] Malvo also asserted that Article 25 of the Maryland Declaration of Rights was an alternative basis for his claim. Malvo told the court below that although Article 25 was "interpreted by controlling case law *in pari materia* with the Eighth Amendment, support exists for an expansive view of the Maryland Declaration of Rights, in particular when the Supreme Court has not yet addressed as[sic] issue."(Def's January 2017 Motion,p.12). The specific issue which Malvo then identified for the court below that was "not yet addressed" in *Miller,* was whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger."(*Id*.,p.13). At the 2017 hearing, Malvo added that "a factual finding" of incorrigibility also needed to be made(E.142).

The substance of Malvo's 2017 claim disavowed Malvo's representations to the sentencing court made more than a decade earlier in 2006, by which time he had been an adult for nearly four years, and after undergoing various psychological evaluations, and after having had 4 years to consider his 2002 actions. These earlier representations, which Malvo now sought to "take back", included that:(1) Malvo did not blame others, but accepted full and unmitigated responsibility without excuse for his actions;(2) that

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[1] "...no child may serve a life without parole penalty even for the most heinous offense without an informed sentencing decision...* * * Consistent with this rights[sic] under the 8th Amendment, Lee Boyd Malvo seeks this same relief."

[2] As the court below stated based upon Malvo's position at oral argument(E.142-143,E.172), Malvo "essentially argues that all pre-*Miller* life-without-parole sentencings for juveniles fail to meet the standard later announced by *Montgomery* [*v. Louisiana*, 577 U.S. 190(2016)]."(E.184) The retroactivity of *Miller* announced in *Montgomery* adds little to Malvo's legal position since Malvo's original motion for a reduction of his sentence was still pending when *Miller* was announced.

Malvo was aware that juveniles, even those 4 months from adulthood, get special treatment by the criminal justice system but that Malvo decided not to ask for that special treatment; and (3) that Malvo acknowledged and had chosen to facilitate "closure" for his victims which was proffered by him as a basis for him receiving more lenient concurrent sentences than the consecutive sentences the State was requesting.

**3. The 2017 Circuit Court Ruling on Malvo's Motion.**

The 2017 post-conviction court ruled that since Malvo had the statutorily required sentencing hearing in 2006 and received a lawful sentence, his sentence was not "inherently illegal" and the balance of his claims, about the manner in which his sentencing hearing was conducted, was not challengeable under Rule 4-345. In addition, the court addressed the merits of Malvo's claim because, the court stated, it anticipated appellate review of its ruling. On the merits, the court ruled that in 2006 Malvo was found incorrigible but was not entitled to any specifically worded sentencing findings in that regard under the 8th Amendment, a conclusion later validated by *Jones v. Mississippi*, 141 S.Ct. 1307(2021). The court also provided its reasons for concluding that the sentencing judge considered all the relevant factors before sentencing Malvo(E.195-197). The court rejected Malvo's Article 25 contention "that only baldly implies that there is a categorical ban on juvenile life-without-parole sentences" because that proposition had been rejected by the U.S. Supreme Court, was not the law in Maryland, and because Malvo "offer[ed] no reasons to depart from judicial precedent that Article 25 should be interpreted *in pari materia* with the Eighth Amendment. *See Walker v. State*, 53 Md. App. 171,183(1982)."(E. 198)

In this Court, Malvo mounts two new legal challenges not presented below. Malvo, due to the ruling in *Jones, supra,* can no longer demand, along with every life-sentenced juvenile, a *per se* specifically worded finding, *nunc pro tunc*, of irreparable incorrigibility. Consequently, Malvo now argues that "as applied" in his case, the statutory sentencing hearing that was held and about which Malvo never timely complained before 2017, violated *Miller*. Second, Malvo argues that if the sentencing hearing did not violate the rulings in *Miller* and *Jones* which were based on the Eighth Amendment, then this Court should hold that his original sentencing hearing violated Article 25 of the Maryland Declaration of Rights which he asserts gives him more protection than the Eighth Amendment. This latter argument, never presented to the court below, is contrary to Malvo's argument below that Article 25 can only go beyond the Eighth Amendment to reach issues not yet decided by the Supreme Court.

## ARGUMENT

### I. Crime victims have a constitutionally based right to rely on the finality guarantees of the Maryland Uniform Post-Conviction Procedure Act (the Act).

The court below was correct that Malvo's more than ten year post-sentencing "change of position" motion was not proper.

As this Court stated in *State v. Zimmerman,* 261 Md. 11,23–24(1971):

> The Maryland version of the Uniform Post Conviction Procedure Act, [formerly] Code (1967 Repl.Vol.), Art. 27, ss 645A-645J, was passed with the intent that there be brought together 'into one simple statute all the remedies, beyond those that are incident to the usual procedures of trial and review, which are at present available for challenging the validity of a sentence * * *.' *Brady v. State*, 222 Md. 442,447,160 A.2d 912,915(1960), and *State v. D'Onofrio*, 221 Md. 20,29 155 A.2d 643(1959).

> * * *
> The public and the accused are entitled to speedy administration of justice. Memories fade with the passage of time. Therefore, the quest for truth and justice will best be served by the earliest possible determination of factual questions. For that reason it becomes important that orderly processes for those determinations be established and, once established, that there be adherence to those processes.

In 2016, this Court explained in *Colvin v. State*, 450 Md. 718,724-8(2016) the limited scope of Rule 4-345's exception to the finality of criminal convictions:

> The rule creates **a limited exception to the general rule of finality**, and sanctions a method of **opening a judgment otherwise final** and beyond the reach of the court. An illegal sentence, for purposes of Rule 4-345(a), is one in which the illegality inheres in the sentence itself; *i.e.*, **there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one** for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful. **A sentence does not become an illegal sentence because of some arguable procedural flaw in the sentencing procedure**. **A motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case.** Other cases are to like effect, holding the claimed illegality in the sentence was not cognizable under Rule 4-345(a). *See Tshiwala [v. State*,424 Md. 612(2012)] at 618 (holding that the complaint that Tshiwala's sentencing review panel did not have jurisdiction to review a motion to reconsider the sentence that panel imposed "clearly does not involve an 'illegal sentence' within the meaning of Rule 4-345(a)"); *Hoile v. State*, 404 Md. 591, 622-23, 948 A.2d 30 (2008) (rejecting Hoile's claim that the trial court's not affording the victim an opportunity to speak at Hoile's sentencing rendered his sentence illegal, for purposes of Rule 4-345(a), because **the sentence was not "illegal on its face"**), *cert. denied sub nom. Palmer v. Maryland*,555 U.S.884,129 S.Ct. 257,172 L.Ed.2d 146(2008);[*State v.*]*Wilkins*, 393 Md. 269(2006)] at 284 (holding that Wilkins was not entitled to correction of the sentence by way of a Rule 4-345(a) motion, because **the life sentence he received was not an "illegal sentence," notwithstanding the judge's failure to recognize his discretion** to suspend a portion of a life sentence). * * * **This result** avoids suborning the important purpose of Rule 4-345(a) and **heeds our extensive precedent on this matter, the important concepts of finality and judicial economy**." (Emphasis added; some citations omitted)

In *Carter v. State*, 461 Md. 295,337–39(2018), this Court reaffirmed the distinction between a sentence "illegal on its face" that can be challenged under Rule 4-345, and other challenges to sentencing proceedings that cannot. The Court stated in language equally applicable here:

> In *Kanaras* [357 Md. 170(1999)], the Court **distinguished between sentences that are "inherently" illegal and those that are carried out in some illegal fashion**. How [criminal justice system officials] **are supposed to discharge their duties** under Maryland law **is inherent in the sentence, but what they do in practice is not.** As the Court stated in *Kanaras*, **other causes of action are more appropriate to litigate claims** that [criminal justice system officials] are **not carrying out their responsibilities**. *Kanaras*, 357 Md. at 185,742 A.2d 508. To the extent that Mr. Carter and Mr. Bowie are **challenging the actual practice** of the Parole Commission and the Governor in making parole decisions, their **claims are outside the scope of a motion to correct an illegal sentence.**
>
> * * * **the distinction between the *existence* of discretion and how that discretion is exercised was the distinction recognized in *Kanaras* between what is cognizable on a motion to correct an illegal sentence and what must be pursued in other causes of action.** (Italics in the original; emphasis in bold added; footnote omitted.)

In the post-conviction court below, there was no disagreement that the original sentencing court was required to hold an individualized sentencing hearing or about the *Miller/Montgomery* need for a conclusion about incorrigibility, and the court below found that both had in fact occurred in 2006(E.199).

The General Assembly has provided crime victims a statutory interest in the finality of criminal convictions. Subsection (b)(13) of Md. Code, Crim. Proc. (CP)§11-1002 provides: "A victim of crime, victim's representative, or

witness...should be entitled to a speedy disposition of the case to minimize the length of time the person must endure responsibility and stress in connection with the case." This statute implements the sensitivity and respect guarantees provided to crime victims in Article 47(a) of the Maryland Declaration of Rights.

The legal interest of victims and the public in finality is not unique to Maryland. As the U.S. Supreme Court explained in *Calderon v. Thompson*, 523 U.S. 538,555-556(1998):

> "Finality is essential to both the retributive and the deterrent functions of criminal law. 'Neither innocence nor just punishment can be vindicated until the final judgment is known.' *McCleskey* [v. *Zant*], *supra*,[499 U.S. 467] at 491. 'Without finality, the criminal law is deprived of much of its deterrent effect.' *Teague* [v. *Lane*],*supra*,[489 U.S. 288] at 309.
>
> Finality also enhances the quality of judging. There is perhaps 'nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.' Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441,451(1963).
>
> "* * * Only with an assurance of real finality can the State execute its moral judgment in a case. **Only with real finality can the victims of crime move forward** knowing the moral judgment will be carried out. See generally *Payne* v. *Tennessee*, 501 U.S. 808,115 L.Ed.2d 720,111 S.Ct. 2597(1991). **To unsettle these expectations is to inflict a profound injury** to the 'powerful and legitimate interest in punishing the guilty,' *Herrera* v. *Collins*, 506 U.S. 390,421,122 L.Ed 2d 203, 113 S.Ct. 853(1993)(O'CONNOR, J.,concurring), an interest shared by the State and the victims of crime alike.(Emphasis added)."

Accord, *United States v. Herrera-Pagoada*, 14 F.4th 311,318(4th Cir. 2021)(upholding one-year limitations period statutorily imposed by Congress in 28 U.S.C. § 2255(f)(1) on federal criminal collateral attacks).

In 1995, the General Assembly promulgated the explicit limits in the Maryland Uniform Post-Conviction Procedure Act that protect crime victims from the "profound injury" caused by the abrogation of finality. Those limits include a ten year period, per CP§7-103(b), during which criminal judgments can be challenged on the grounds asserted by Malvo that "the sentence or the judgment was imposed in violation" of the federal constitution or state constitution or laws, CP§7-102(a)(1). The only statutory exception to this ten year period specified in the Act is one that allows the application of new retroactive Supreme Court or state constitutional holdings that have been issued about rights "not previously recognized", CP§7-106(b). As explained in *Lopez v. State*, 433 Md. 652,660(2013):

> "In 1995, the General Assembly overrode the holding in *Creighton* [*v. State*, 87 Md.App.736(1991)] by deleting the provision that an application for post-conviction relief could be filed "at any time" and establishing a 10–year period of limitations. Chapter 258, Laws of Maryland 1995, *now codified at* CP§7–103(b)."

*State v. Schlick*, 465 Md. 566,575(2019)(by statute, a post-conviction petition "may not be filed more than 10 years after the sentence was imposed"). The Supreme Court in *Jones* confirmed that no retroactive 8th Amendment rights, such as requiring an "incorrigibility" finding *in haec verba*, are required. As a result, the statutory exception in the Act to the ten year filing requirement does not extend to collateral attacks like Malvo's that complain about the manner of the imposition of sentence or seek to establish new retroactive constitutional rights. If it did, every collateral attack would seek to establish a new constitutional

justification and this narrow exception would entirely nullify the Act's ten year filing period and this Court's *Lopez* ruling.

As a result, the statutory ten year period codified at CP§7-103(b) governs this post-conviction challenge to the finality of the manner of the imposition of Malvo's sentence, whether or not Malvo invoked it as a basis of jurisdiction. For the same reason, Rule 4-345 which has no time limitation, cannot displace the Act as the jurisdictional basis for a collateral attack on the manner in which a sentence is imposed since court rules cannot override laws enacted by the General Assembly. *State v. Diggs*, 24 Md.App. 681,682(1975)(the Maryland rules "have the force of Law, until rescinded, changed, or modified by the said Judges [of the Court of Appeals], or the General Assembly. Constitution of Maryland, Art. IV,§18; *Wilson v. State*, 227 Md. 99[1961]"); *Brown v. State*, 470 Md. 503,544(2020)(the courts "do not have authority to retroactively redraft [by rule] the legislation that actually was enacted").

In addition to Malvo's statutory violation of the Act's ten year filing period, Malvo seeks to evade another limitation in the Act. The Act requires as a precondition to post-conviction relief that unless the defendant carries the burden of showing that "special circumstances" exist, an allegation of error is "deemed waived" if the defendant could have but failed to make the allegation on direct appeal or in an application for leave to appeal, CP§7-106(a). Malvo could have, but did not, complain at his sentencing about a failure to follow *Roper,* which the post-conviction court below pointed out, and Malvo also could have complained

while his motion to reduce sentence was pending about a failure to follow *Graham* or *Miller*. He did neither and in his instant challenge he has not sought to carry his statutory burden of showing "special circumstances" that will excuse the Act's statutory waiver of his attack on the finality of his comprehensive presentence presentation in 2006.

Furthermore, even in timely collateral attacks on death penalty sentences, this Court has repeatedly held that new sentencing hearings may not be based on belated requests to withdraw and redo strategic decisions arrived at in hindsight. *State v. Borchardt*, 396 Md. 586,604(2007) (quoting *Strickland v. Washington*, 466 U.S. 668,690(1984), "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); *Oken v. State*, 343 Md. 256,283(1996) ("it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight*..."; italics in the original).

In sum, Malvo's desire to redo his sentencing strategy is both untimely and not permitted by Maryland law. In addition, it disrespects his crime victims and does not treat them with sensitivity for their losses or with dignity, all in violation of Article 47(a) of the Maryland Declaration of Rights. Such belated changes of a prior sentencing strategy, and Malvo's 2017 departure from his 2006 efforts to provide closure for the victims' representatives, treats victims' representatives as

meaningless pawns to be casually manipulated whenever beneficial to the defendant. This is not unlike a defendant seeking judicial leniency for paying victim restitution prior to sentencing, and then stopping the restitution check shortly after sentence is pronounced.

For these reasons, the court below was correct that there is no jurisdiction for Malvo's current challenge under Rule 4-345 in this case, or if Malvo were correct, in every case so long as defendants allege a constitutional violation, despite the contrary language in CP§7-102(a)(1). As this Court stated in *Colvin*, *supra*, "A sentence does not become an illegal sentence because of some arguable procedural flaw in the sentencing procedure. A motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case [and thereby also evading CP§7-109]." Although post-conviction rule-based motions to challenge illegal sentences in other states may encompass different subject matter, those different state procedures do not apply in Maryland or override the legislative actions of the Maryland General Assembly.

**II. There are no factual no circumstances in this case that warrant allowing this defendant to redo and contradict his original strategic sentencing presentation.**

*A. Maryland does not have mandatory life without parole sentences for juveniles and also does not require per se findings of incorrigibility.*

Had the Supreme Court ruled differently in *Jones* and retroactively required an explicit sentencing "incorrigibility" finding in every case where a juvenile was sentenced

to life without parole, then it is an open question whether entitlement, *per se*, to a particular *verbatim* sentencing finding would have overcome Malvo's decisions: not to blame others, to discuss and then not ask the sentencing court for special juvenile treatment, and to rely at sentencing for leniency on his efforts to provide closure to his victims. However, no *per se* legal entitlement to a finding of incorrigibility emerged from the *Jones* case, and no *per se* finding has been independently required in Maryland.

*B. Malvo, with the advice of experienced counsel, discussed but expressly declined to ask the sentencing court for consideration of his juvenile status.*

Prior to his sentencing, Malvo was assisted by a team of well qualified lawyers and psychological experts who for years had prepared reports detailing his situation and background, all of which were submitted to the sentencing court in this highly publicized case. Malvo's attorneys in 2006, whom his current lead attorney approved (E.124), explained that Malvo was "one of the most intelligent, articulate people that [his attorneys] have encountered."(E. 124). Malvo's attorneys also told the sentencing court that "part of [codefendant John Muhammad's criminal] plan" that Malvo originally implemented was for Malvo, because he was a juvenile (and juveniles get more lenient judicial treatment), to take credit "for murders [by Muhammad that Malvo] didn't commit." Thereafter, Malvo, without asking the sentencing court for that special lenient juvenile treatment from the court that he had just finished discussing, proffered that he had now rejected and moved beyond his codefendant's direction to seek judicial leniency on the basis of his juvenile status. Specifically, Malvo's counsel

explained that Malvo's prior perjury at Muhammad's Virginia trial was designed to exculpate Muhammad, but that since then, Malvo admitted he was a full partner in the crimes to which he pled guilty, and "accepted full and unmitigated responsibility for what happened in this community [in 2002]...without blaming other people"(*id.*), i.e., not his codefendant who befriended him during his juvenile years, nor his parents who did little to ameliorate his difficult childhood.

Malvo had more than four years after committing repeated murders at age 17 and 8 months, to decide what resolution he wanted of the charges against him while represented by well qualified counsel. Malvo then had five more years after his 2006 sentencing, while his motion to reduce his sentence was pending, to ask his sentencing judge to reconsider and reduce or suspend part of his life sentences. During that time, every mitigating factor mentioned in the Supreme Court decisions which Malvo, then in his late 20's, and now in his late 30's, raises regarding life sentences for juveniles, was discussed at length by the United States Supreme Court.

Now in this Court more than fifteen years after his sentencing, Malvo seeks to take back the version of the offense and of his criminal behavior that Malvo presented to the sentencing court as the predicates for his sentencing, i.e., that he blamed no one else and that he was facilitating closure for his victims. In addition, he now disavows his volunteered repudiation at his 2006 sentencing of the idea that Malvo rely at sentencing on his juvenile status. Instead, he seeks to reopen the trauma for his victims by starting over and proffering a new and contradictory sentencing strategy before a successor

sentencing judge. To justify this retraumatization of his victims, Malvo relies on legal analyses and issues never presented to the post-conviction court below.

When a counseled defendant informs a court that the defendant does not want certain rights, e.g. a jury trial, then no jury trial need occur. Similarly, when a defendant who is then an adult and is represented by counsel explicitly informs a court that he takes full responsibility for his actions and is abandoning a prior plan that included seeking a sentencing benefit based on his juvenile status (that still attached for a few more months at the time of his crime), a court is not bound to engage in the "useless act" of analyzing at length the defendant's abandoned sentencing submission. *Foster v. Alabama*, 577 U.S. 1188(2016)(THOMAS & ALITO, JJ., concurring: Defendants at sentencing can choose to waive and forgo "any entitlement to relief" under *Miller* and *Montgomery*); *Jones v. Commonwealth*, 293 Va. 29,39 fn.4, 795 S.E.2d 705,710(2017)(same,citing cases); *Sims v. State*, 319 Md. 540,549(1990)(when a "useless act" is involved, "we will excuse the absence of literal compliance"); *Jackson v. Taylor*, 353 U.S. 569,574(1957)(courts do not "require the doing of a useless act.") Given the permissiveness of the original sentencing court that accepted and considered all of Malvo's extensive submissions[E.18-E.82], Malvo actually received more judicial consideration of his juvenile status than his own position at sentencing required or warranted.

In addition, because Malvo disclaimed relying for leniency on his juvenile status when that status was drawing to a close at the time of his murders, and then failed to raise his 2002 juvenile status during the five additional years when his pending motion to amend his sentence could have addressed this reversal of his position, Malvo's current

claim to special juvenile findings is “deemed waived” as a matter of law under the Maryland Uniform Post-Conviction Procedure Act, CP§7-306(b). Even if it had not been deemed waived, it would constitute invited error.

Under the "invited error" doctrine, "a defendant who himself invites or creates error cannot obtain a benefit ... from that error." *Klauenberg v. State*, 355 Md. 528, 544(1999). "The doctrine of invited error is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel." *United States v. Morrison*, 771 F.3d 687,694(10th Cir.2014) (citation omitted) (cleaned up). "Having induced the court to rely on a particular erroneous proposition of law or fact, a party may not at a later stage use the error to set aside the immediate consequences of the error." *Id.*; *State v. Rich*, 415 Md. 567,574(2010)(defendant’s appeal limited to the “argument actually asserted by his trial counsel.”) Malvo’s actions fall within the category of “a number of situations in which a defendant disputes decisions initially prompted or condoned by his or her actions[.]”*Allen v. State*, 89 Md.App. 25,43(1991); *Rich, supra at* 575(“ ‘The [invited error] doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal.’”, quoting *United States v. Brannan*, 562 F.3d 1300,1306(11th Cir.2009) ).

In addition, the doctrine of estoppel forecloses Malvo’s complaints about his sentencing. While this post-conviction case was pending, Malvo briefed and argued virtually identical substantive claims about the unconstitutionality of imposing life sentences upon him in the United States Supreme Court in No. 18-217, *Mathena v. Malvo*. The record in the instant case reflects that Malvo called the attention of this

Court this to his U.S. Supreme Court case, as well as to Malvo's successful Virginia federal court sentencing challenge (in Malvo's 1/2018 Petition to this Court at p.3 fn.1); to Malvo's successful appellate ruling in that same case (in Petitioner's "Notice of Supplemental Authority" filed in this Court on 6/22/2018); and to the disposition of the U.S. Supreme Court review of his Virginia federal sentencing challenge (by Petitioner's letter to this Court dated March 4, 2020 advising that his Virginia federal case was dismissed in the Supreme Court).

Malvo's brief (p.14) recounts that in the Supreme Court in *Mathena v. Malvo,* after full briefing and oral argument on the merits in the Supreme Court, including briefing by this Amicus, and after the case was taken under submission, Malvo and the State of Virginia submitted a stipulation in which both parties stated, pursuant to U.S. Supreme Court Rule 46.1, "that the case be dismissed in light of legislation signed today [February 24, 2020] by the Governor of Virginia." (Referenced in the Supreme Court docket entry dated 2/24/2020, submitted by Petitioner to this Court on March 4, 2020.) The legislation at issue, Virginia HB35, made all juveniles sentenced to life imprisonment in Virginia eligible for parole after twenty years of incarceration, which in Malvo's case had not then and still has not occurred. Malvo's Supreme Court stipulation to dismiss his Eighth Amendment challenges to his Virginia life sentences due to the signing of new legislation that allowed reconsideration in the future of his Virginia life sentences, cannot be distinguished from this case. As Malvo notes (Br.,p.15), the Maryland legislature enacted new legislation, the 2021 Juvenile Restoration Act, that

allows reconsideration at a new sentencing of Malvo's Maryland life sentences in the future.

Although Malvo took the position in the Supreme Court in 2020 in his Supreme Court case that the new Virginia state legislation that would apply to him in the future warranted a dismissal of his constitutional Eighth Amendment objections to his Virginia life without parole sentences, Malvo takes a contrary position in this Court about the new Maryland legislation that has the same effect. However, a litigant is equitably bound, including by both collateral and judicial estoppel, from taking inconsistent positions in order to avoid the appearance of forum and judge shopping, gamesmanship, and unjustifiable litigiousness. As this Court stated in *Bank of New York Mellon v. Georg*, 456 Md. 616,653(2017):

> "[J]udicial estoppel is "a principle that precludes a party from taking a position in a subsequent action inconsistent with a position taken by him or her in a previous action*." Dashiell* [*v. Meeks*, 396 Md. 149(2006)] at 170,913 A.2d at 22 (citation and internal quotation marks omitted). "[J]udicial estoppel applies when it becomes necessary to protect the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system*."Id.* at 171,913 A.2d at 23."

This Court was repeatedly advised by Malvo of Malvo's Virginia federal court challenge as being "supplemental authority". Since Malvo has decided that his substantive Eighth Amendment "cruel and unusual" claims are no longer ripe for Supreme Court review and warranted dismissal in that forum on account of new state legislation, then that same position applies to Malvo in this Court. Litigants do not get a second chance at litigation in an inferior court after intentionally deciding they want to

dismiss their case in a higher court, i.e. the U.S. Supreme Court, nor can a litigant take inconsistent positions. For example, if Malvo were to stipulate that his new future Maryland sentence-reduction eligibility warranted a dismissal in this Court, Malvo could not then return to a lower court, e.g., the Court of Special Appeals, and seek to continue litigating his abandoned substantive cruel and unusual punishment claims in that forum.

**III. Crime victims' Article 47(a) state constitutional rights cannot be overlooked.**

Crime victims in Maryland have a constitutional right to be treated with dignity, respect, and sensitivity during under Article 47(a) of the Maryland Declaration of Rights and under Md. Code, CP§11-1002(b)(1)(same) & (b)(13). The emotional exhaustion, depression, and trauma experienced by a crime victim, albeit never ending, is greatly amplified at a resentencing.[3] During post-conviction challenges to a sentence, the factual details of the crime committed against victims are re-examined, including the painful details of the impact upon them of violent crimes which victims have frequently sought, after the original sentencing, not to further publicly describe. Those details include the terror that they felt when the chaos of the crime raged around them, and the nightmares about the crime that still haunt them, which they manage to endure only with difficulty, counselling, and the passage of time. See, Jim Parsons & Tiffany Bergin, The Impact of Criminal Justice Involvement on Victims' Mental Health, 23 J.Traum.Stress 182-183(2010); See also, Judith Lewis Herman, The Mental Health of Crime Victims: Impact

[3] Presenting a victim impact statement is difficult task even by one familiar with the justice system. *See*, retired U.S. 4th Circuit Judge Michael Luttig's victim impact statement (viewed on 11/9/2021 at http://prodpinnc.blogspot.com/2016/04/judge-michael-luttigs-victim-impact.html).

of Legal Intervention, 16 J.Traum.Stress 159(2003). Despite this revived pain, victims do not turn a blind eye to such court hearings since victims often are the only individuals still available -- long after the original prosecutor, the investigators, and the original judicial officials have moved on or retired -- who can present a first-person account of the impact of a decades-old violent crime -- in order to provide a balanced presentation to a new sentencing court, in contrast to a defendant's self-interested partisan narrative. This places a heavy burden on victims who also undergo additional revictimization from again having to confront face-to-face, and be cross-examined by, their offenders at each new sentencing hearing. See, CP§11-403(c)("Cross-examination of Victim or Victim's Representative").

The Maryland legislature has recognized this cost to crime victims and addressed it in Article 47 and legislatively. CP§7-105; CP§§11-503 & 1002(b)(13)(crime victims "should be entitled to a speedy disposition of the case to minimize the length of time the person must endure the responsibility and stress in connection with the case." Emphasis added.) See, *United States v. MacDonald*, 435 U.S. 850,853-54(1978)("The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.' *Cobbledick v. United States*, 309 U.S. [323(1940)] at 325. See also *DiBella v. United States*, 369 U.S. [121(1962)], at 126."); *Abney v. United States*, 431 U.S. 651,661(1977)('wholly unrelated to the propriety of any subsequent conviction', individuals should not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.").

This Court has stated that consistent with Article 47(a) of the Maryland Declaration of Rights "trial judges *must* give appropriate consideration to the impact of crime upon the victims." *Lopez* v. *State*, 458 Md. 164,176(2018)(quoting *Cianos* v. *State*, 338 Md. 406,413(1995)). Despite Malvo's claimed efforts to promote closure for his victims and "make some amends"(E.124), Amicus Nelson Rivera has invested considerable effort, expense, and repeatedly suffered emotional retraumatization in order to have his voice heard: in Malvo's pending Maryland federal district court habeas case (*Malvo v. Mathena*, PJM 13-1863 (D. Md.)(Pet.Br.14)); in Malvo's Maryland state court cases being reviewed here; and in Malvo's U.S. Supreme Court *Malvo v. Mathena* case that originated in the District of Virginia.

Now, more than a decade after sentencing and after expiration of both the five year period for seeking a reduction in sentence and the ten year period for filing under the Maryland Unform Post-Conviction Procedure Act, Malvo seeks to disavow his original sentencing presentation and to turn it on its head. Malvo seeks to take back and impeach his original pre-sentence admissions that he did not blame other people, i.e. his codefendant or his own family, that he accepted full and unmitigated responsibility for the crimes he voluntarily and knowingly committed at a time when he was 4 months shy of his 18th birthday, and that he did not wish to rely on his soon-to-end juvenile status but instead "to make some amends."(E.124)

As stated by Justice Cardozo, and quoted with approval in *Payne v. Tennessee*, 501 U.S. 808,827(1991), "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to

keep the balance true." *Snyder v. Massachusetts,* 291 U.S. 97,122(1934)(emphasis added). "[I]n the administration of criminal justice, courts may not ignore the concerns of victims", *Morris v. Slappy,* 461 U.S. 1,14(1983).

It violates Maryland's constitutionally required Article 47(a)'s guarantees of respect and sensitivity that are due to Maryland crime victim's representatives to reopen sentencings more than a decade after imposition for the reasons Malvo asserts. In addition, the courts have been explicitly charged with enforcing victims' statutory rights and the state constitution. CP§11-103(e)(1) provides that "In any court proceeding involving a crime against a victim, the court shall ensure that the victim is in fact afforded the rights provided to victims by law." (Emphasis added). Here, the victim's representative is entitled by legal precedent and equitable doctrines to be treated with sensitivity and respect, and this Court's ruling should recognize the courts' obligation to minimize the ongoing revictimization of a victim's representative constitutionally-based interests of "respect and sensitivity" required by Article 47(a) the Declaration of Rights and CP§11-103(e)(1), which outweighs a sentenced defendant's change of mind.

When post-conviction challenges are repackaged as challenges to "illegal sentences" that can be brought at any time, no victim's representative can ever feel assured that closure has occurred with respect to their enormous loss. Their ongoing fear of having to repeatedly recall and present the crime and describe all the injuries they suffered in a public courtroom is unlike the experience of a testifying criminal justice expert, and causes renewed pain, trauma, and anguish that makes victims wonder if they can dredge up and articulate publicly for a new judge their pain and old memories which

force them, emotionally back to the time of the crime, due to filings by defendants who are not discouraged by costs, sanctions for untimely filings, or changes of their strategy in hindsight.

The legislature and citizens of Maryland, by enacting Article 47 of the Declaration of Rights, affirmatively provided crime victims constitutional guarantees bolstering crime victims' statutory rights that protect against such unwarranted revictimization and pain, absent specific legislatively defined thresholds being met, e.g., CP§§7-103(b),106(b)&(c), and 109(a). While defendants can ask for sentencing reconsideration under Rule 4-345(e) within 90 days of sentencing determined within five years of sentencing, and Malvo did, that jurisdictional period, which has expired provides a timeline of finality for victims. Consequently, Rule 4-345(a) does not automatically, without any discussion of the limitations of the Maryland Uniform Post-Conviction Procedures Act, extend the five-year period for resentencing indefinitely, and in addition, thereby allow a subsequent appeal here by right, instead of by Application for Leave to Appeal, thereby also nullifying CP§7-109. Allowing such unauthorized filings improperly denies finality to the rule of law and to the requirement to treat victims justly, i.e., with "dignity, respect, and sensitivity during all phases of the criminal justice process" which the courts are obligated to "ensure." CP§11-103(e)(1).

As the court below agreed, the legislature has decreed that murder victims and their representatives have a right to expect that litigation by convicted offenders over the fairness of their sentencing allocution will not drag on forever but will comply with law,

no matter how notorious the murderer and the clamor of the mass media to repetitively replay the event.

Not honoring the Maryland Post-Conviction Procedure Act violates the Amicus victim representative's Article 47(a) rights to be treated fairly, and with dignity and respect, and also violates Article 24 of the Maryland Declaration of Rights, which guarantees all Marylanders, including crime victims, due process of law.

In the court below, the State acknowledged the harm to the victim's representatives, stating: "...for [the victim's families] the mere possibility that Mr. Malvo might be entitled to a new sentencing hearing tears open some very old and serious wounds."(E.146).

## CONCLUSION

The ruling below should be affirmed.

Respectfully submitted,

/s/ /Victor Stone

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## CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2022, copies of the foregoing Amicus Curiae Brief were filed by MDEC on the below listed parties and also sent first-class U.S. mail, postage prepaid to:

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## CERTIFICATE OF COMPLIANCE WITH RULES 8-112 & 20-201(f)(1)(B)

1. This brief contains 6798 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, and the font is 13-point Times New Roman.
3. This brief does not contain any restricted information.

/s/ Victor Stone
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## PERTINENT PROVISIONS

**MD Constitution, Declaration of Rights, Art. 24**

**Due process**

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

**MD Constitution, Declaration of Rights, Art. 47**

**Crime Victims' Rights**

(a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.

**MD Code, Criminal Procedure, § 7-102**

**Right of convicted person to begin proceeding**

**Claims required in order to begin proceeding**

(a) Subject to subsection (b) of this section, §§ 7-103 and 7-104 of this subtitle and Subtitle 2 of this title, a convicted person may begin a proceeding under this title in the circuit court for the county in which the conviction took place at any time if the person claims that:

(1) the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State;

(2) the court lacked jurisdiction to impose the sentence;

(3) the sentence exceeds the maximum allowed by law; or

(4) the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.

**Seeking to set aside or correct judgment or sentence and error not finally litigated or waived**

(b) A person may begin a proceeding under this title if:

(1) the person seeks to set aside or correct the judgment or sentence; and

(2) the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction.

**MD Code, Criminal Procedure, § 7-103**

**Filing of petitions**

**One petition for each trial or sentence**

(a) For each trial or sentence, a person may file only one petition for relief under this title.

**Time of filing petition**

(b) Unless extraordinary cause is shown, a petition under this subtitle may not be filed more than 10 years after the sentence was imposed.

**MD Code, Criminal Procedure, § 7-105**

**Rights of victim or victim's representative**

**Notice of hearing**

(a) Before a hearing is held on a petition filed under this title, the victim or victim's representative shall be notified of the hearing as provided under § 11-104 or § 11-503 of this article.

**Attendance at hearing**

(b) A victim or victim's representative is entitled to attend any hearing under this title as provided under § 11-102 of this article.

**MD Code, Criminal Procedure, § 7-106**

**Allegation of error**

**Allegations of error fully litigated**

(a) For the purposes of this title, an allegation of error is finally litigated when:
(1) an appellate court of the State decides on the merits of the allegation:
(i) on direct appeal; or
(ii) on any consideration of an application for leave to appeal filed under § 7-109 of this subtitle; or
(2) a court of original jurisdiction, after a full and fair hearing, decides on the merits of the allegation in a petition for a writ of habeas corpus or a writ of error coram nobis, unless the decision on the merits of the petition is clearly erroneous.

**Waiver of allegation of error**

(b)(1)(i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:
1. before trial;
2. at trial;
3. on direct appeal, whether or not the petitioner took an appeal;
4. in an application for leave to appeal a conviction based on a guilty plea;
5. in a habeas corpus or coram nobis proceeding began by the petitioner;
6. in a prior petition under this subtitle; or
7. in any other proceeding that the petitioner began.

(ii) 1. Failure to make an allegation of error shall be excused if special circumstances exist.
2. The petitioner has the burden of proving that special circumstances exist.
(2) When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.

**Procedural or substantive standards newly recognized**

(c)(1) This subsection applies after a decision on the merits of an allegation of error or after a proceeding in which an allegation of error may have been waived.
(2) Notwithstanding any other provision of this title, an allegation of error may not be considered to have been finally litigated or waived under this title if a court whose decisions are binding on the lower courts of the State holds that:
(i) the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and
(ii) the standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

**MD Code, Criminal Procedure, § 7-109**
**Appeal of final order**

**Applications for leave to appeal order**

(a) Within 30 days after the court passes an order in accordance with this subtitle, a person aggrieved by the order, including the Attorney General and a State's Attorney, may apply to the Court of Special Appeals for leave to appeal the order.

**MD Code, Criminal Procedure, § 11-103**
**Denial of victim's rights; Appeals**

**Rights of victim**

(e)(1) In any court proceeding involving a crime against a victim, the court shall ensure that the victim is in fact afforded the rights provided to victims by law.

**MD Code, Criminal Procedure, § 11-503**
**Notice of subsequent proceedings**

**Subsequent proceeding defined**

(a) In this section, "subsequent proceeding" includes:
(1) a sentence review under § 8-102 of this article;
(2) a hearing on a request to have a sentence modified or vacated under the Maryland Rules;
(3) in a juvenile delinquency proceeding, a review of a commitment order or other disposition under the Maryland Rules;
(4) an appeal to the Court of Special Appeals;
(5) an appeal to the Court of Appeals;
(6) a hearing on an adjustment of special conditions of lifetime sexual offender supervision under § 11-723 of this title or a hearing on a violation of special conditions of lifetime sexual offender supervision or a petition for discharge from special conditions of lifetime sexual offender supervision under § 11-724 of this title; and
(7) any other postsentencing court proceeding.

**Written notification requests by victim or victim's representative**

(b) Following conviction or adjudication and sentencing or disposition of a defendant or child respondent, the State's Attorney shall notify the victim or victim's representative of a subsequent proceeding in accordance with § 11-104(f) of this title if:

(1) before the State's Attorney distributes notification request forms under § 11-104(d) of this title, the victim or victim's representative submitted to the State's Attorney a written request to be notified of subsequent proceedings; or
(2) after the State's Attorney distributes notification request forms under § 11-104(d) of this title, the victim or victim's representative submits a notification request form in accordance with § 11-104(e) of this title.

**Notice of appeals or subsequent proceedings pertinent to appeal**

(c)(1) The State's Attorney's office shall:
(i) notify the victim or victim's representative of all appeals to the Court of Special Appeals and the Court of Appeals; and
(ii) send an information copy of the notification to the Office of the Attorney General.
(2) After the initial notification to the victim or victim's representative or receipt of a notification request form, as defined in § 11-104 of this title, the Office of the Attorney General shall:
(i) notify the victim or victim's representative of each subsequent date pertinent to the appeal, including dates of hearings, postponements, and decisions of the appellate courts; and
(ii) send an information copy of the notification to the State's Attorney's office.

**Contents of notice**

(d) A notice sent under this section shall include the date, the time, the location, and a brief description of the subsequent proceeding.

**MD Code, Criminal Procedure, § 11-1002**

**Guidelines for treatment of crime victims, victim's representatives, or witnesses**

**Information about guidelines**

(a) The appropriate criminal justice unit should inform a victim of a crime, a victim's representative, or a witness of the guidelines listed in subsection (b) of this section.

**Guidelines for treatment of crime victims, victim's representatives, or witnesses**

(b) A victim of a crime, victim's representative, or witness:
(1) should be treated with dignity, respect, courtesy, and sensitivity;
...
(11) on request of the State's Attorney and in the discretion of the court, should be allowed to address the court or jury or have a victim impact statement read by the court or jury at:
(i) sentencing before the imposition of the sentence; or
(ii) any hearing to consider altering the sentence;
...
(13) should be entitled to a speedy disposition of the case to minimize the length of time the person must endure responsibility and stress in connection with the case;