No. 18-217

In the Supreme Court of the United States

Randall Mathena, Warden, *Petitioner*

v.

Lee Boyd Malvo

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., IN SUPPORT OF PETITIONER

RUSSELL P. BUTLER, Esq.
Counsel of Record for Amicus
VICTOR D. STONE, Esq.
Maryland Crime Victims' Resource Center, Inc.
1001 Prince George's Blvd., # 750
Upper Marlboro, Maryland 20774
(301) 952 0063
rbutler@mdcrimevictims.org

QUESTION PRESENTED FOR REVIEW

Whether *Montgomery v. Alabama,* 136 S.Ct. 718 (2016), only provided narrow retroactive effect to the *Miller v. Louisiana,* 567 U.S. 460 (2012) prohibition against mandatory sentences of life without parole for juvenile murderers, or instead, whether *Montgomery,* contrary to state sovereignty and victims' rights, upended sentencing finality nationwide by widely broadening *Miller* and extending retroactive relief to all juvenile murderers with life sentences, including those with discretionary life sentences or sentences of life without parole which defendants sought by plea bargains?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions **Page(s)**

U.S. Constitution

Federal Court Opinions

United States Code

State Cases

Rules

Other

JURISDICTIONAL STATEMENT

A petition for certiorari was granted on March 18, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1). Petitioner and Respondent have consented to the filing of this brief in accordance with Rule 37(3)(a) of this Court's Rules.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process and Equal Protection Clauses of Amendment V, U.S. Constitution.

The Cruel and Unusual Punishment Clause of Amendment VIII, U.S. Constitution.

Amendment XIV, U.S. Constitution.

18 U.S.C.§3771 (Crime Victims' Rights Act, hereafter "CVRA") (Appendix A).

INTEREST OF THE AMICUS

Amicus, the Maryland Crime Victims' Resource Center, Inc.(MCVRC) is a non-profit corporate entity representing the interests of crime victims "to ensure" the comprehensive judicial consideration of victims' rights. 18 U.S.C. §3771(a)&(b)(2). MCVRC represents, in state and

federal court in Maryland, victim representative Nelson Rivera whose wife, Lori Ann Lewis-Rivera, was murdered by Respondent, where Malvo also received sentences of life without parole. *State v. Malvo*, 2017 WL3579711(June 15, 2017); *Malvo v. Mathena*, 259 F.Supp.3d 321(D.Md.2017). MCVRC represents several named victim's representatives, as well as itself, as amici in a civil case challenging Maryland's life with parole sentences as being "de facto life without parole" sentences in violation of *Miller* and *Montgomery*. *MRJI v. Hogan*, 2017 U.S. Dist. LEXIS 15160(D.Md.,Feb. 3, 2017); *MRJI v. Hogan*, 316 F.R.D. 106(D.Md. 2016).

---

[1] MCVRC counsel solely authored this brief, and no other person or entity made a monetary contribution to its printing and submission.

MCVRC was founded by Roberta and Vince Roper as a voice for victims after the kidnapping, rape, and murder of their daughter Stephanie. This case is relevant to MCVRC's overall mission to provide protecting victims' rights to fairness, dignity, finality, and justice.

SUMMARY OF ARGUMENT

Liberty and justice for all does not allow the consideration of only the interests of criminal defendants, but they demand that victims' interests be fully considered.[2]

The court's holding below focused upon the jury findings. However, requiring specific findings whether by juries (as in Respondent's Chesapeake City, Virginia cases), or by judges

---

[2] Hereafter, the terms "victim" and "victims" are used to reflect a "crime victim" as defined under 18 U.S.C. §3771(b)(2)(D) who in habeas actions is "the person against whom the State offense is committed or, if that person is killed … that person's family member or other lawful representative."

even if there is a plea bargain approving the life sentence (as in Respondent's Spotsylvania County, Virginia cases), was not part of this Court's holding in *Miller* and *Montgomery*.

There are meritorious reasons why this Court did not require particularly worded sentencing findings:

First, this Court's holdings were directed to and held invalid an entirely different practice, i.e., the inflexible situation where a legislative mandate had automatically and blindly required imposition of life without parole sentences by judges, giving no leeway for consideration of the youth's individual characteristics, and allowed no parole or other release procedure by executive branch officials at the back end of that life sentence which would ever consider the youth's individual characteristics.

Second, requiring particularly worded findings would be contrary to federalism requirements since each state has different sentencing schemes and release laws.

Third, requiring particularized sentencing findings cannot be implemented retroactively because virtually no judicial

determination prior to this Court's retroactive rulings would have been prescient and used the precise words and phrases subsequently announced in *Miller* and *Montgomery*. The consequences of judicially constructing and imposing such a formalistic requirement at sentencing, as determined by the court below, means that virtually all juvenile murders that were sentenced to life without parole, no matter how long ago, would, *per se,* need a new sentencing hearing and victims would have to both intellectually and emotionally re-experience their horror at this crime spree and crime scene more than a dozen years after the original sentencing .

Fourth, focusing on the jury at sentencing overlooks this Court's holding: i.e., that a discretionary release need not be available only at sentencing, but may occur later by other criminal justice system officials if release options are available, in addition to a pardon, at some later time. In this respect, the holding below contravenes this Court's summary reversal in *Virginia v. LeBlanc*, 137 S.Ct. 1726,1729 (2017). In *LeBlanc*, Virginia's geriatric release provisions were not found

to be objectively unreasonable and they satisfied this Court's Eighth Amendment *Montgomery* standard. The court's ruling below improperly fails to address *LeBlanc*'s holding.

Fifth and most important to Amicus, the decision below retroactively revising the state's judicial sentencing process overlooks that the sentencing process imposed below will inflict serious harm upon, and will retraumatize and disrespect the victims, to whose interest in avoiding a meritless reopening of their criminal victimization the opinion below gave no consideration whatsoever.

Justice is not only due to offenders, but also to the victims harmed by those offenders. If the victims had only slowly recovered after years of psychotherapy and only recently recovered the psychological ability to speak about how they were victimized, would their desire to avoid being retraumatized be ignored? By statute, victims now have a legal interest in being heard in federal collateral attack proceedings, and their desire not to be

unnecessarily harassed and harmed must be weighed against inmates' claims who have little incentive not to seek "free" trips to federal court in order to challenge their state sentencing laws. These federal proceedings are not "no cost" hearings for crime victims. They are anything but "no cost" hearings and they inflict a great emotional and psychological toll on the victims. Congress has addressed this concern and required "fairness" to victims, as well as to defendants, during the litigation of federal habeas actions like this one in 18 U.S.C.§3771(a)(8),(b)(2).

This Congressional legislation is applicable in federal criminal cases and habeas cases from state convictions. It renders moot this Court's earlier 5-4 ruling indicating that, in the absence of legislation, crime victims had no legal interest in a criminal case. *Linda R. S. v. Richard D.,* 410 U.S. 614, 619 (1973)("a private citizen lacks a judicially cognizable interest in the prosecution"). At the time of the Constitution and the Bill of Rights' enactments, private prosecution of criminal cases by victims as well as public prosecution was the law of the land.

More recently, this Court has recognized that the interests of victims not to be routinely revictimized or ignored by the criminal justice process, absent compelling reasons, was explicitly recognized by Congress.

This Court in *Calderon v. Thompson*, 523 U.S. 538,556 (1998) articulated the harm that befalls victims and that their interests must be considered. Below, the court's single-minded focus on the defendant's rights violated the victims' rights under the Fifth and Fourteenth Amendment, since their rights and interests in finality, fairness, and dignity were neither weighed nor paid any heed whatsoever. Victims were treated, instead, as if they were extraneous bystanders, rather than the lawful representative of an indispensable corpus of each murder. Extending *Montgomery's* reach, based upon sociological arguments about juvenile rehabilitation, a subject about which trial courts have little or no training and -- unlike the legislative and executive branches of government -- no ongoing jurisdiction, violates the victims' protected interests in

finality and the Constitutional separation of powers. In fairness to the victims, whose rights were never even acknowledged below in violation of 18 U.S.C. 3771(b)(1) and controlling state law and sovereignty, this Court should reverse the decision below.

ARGUMENT

The Resentencing Ruling Below Inflicts Serious Harm Upon, and Unlawfully Re-traumatizes, Revictimizes, and Violates the Legal and Human Rights of Victims.

1. Congress and every state have recognized and guaranteed victims' legal and human rights as legal interests entitled to protection in criminal cases.

For every juvenile murderer who is incarcerated and seeks opportunities to move on with that inmate's life, there may be many times more victims per case – typically family members including each spouse, child, sibling and parent– who will grieve for their murdered loved one many times day and night, and whose lives have been permanently altered for the worse and forever wonder what might have been. Victims' lives,

traumatic memories, and pain can never be restored to the *status quo ante*, and they have a right not to have to, *unnecessarily*, reopen and relive the nightmare of their loss at resentencing proceedings because their offenders want judicial orders to allow them to move on with their lives, notwithstanding the available state judicial sentencing discretion and the executive branch release options available to them.

a. The victims' role in the criminal process has significantly changed to include legal rights and interests.

At common law dating back to the Middle Ages, victims initiated and controlled criminal prosecutions. Juan Cardenas, *The Crime Victim in the Prosecutorial Process,* 9

Harv.J.L.&Pub.Pol'y 357,359(1986).[3] By the early twentieth century, public criminal prosecutors became the norm in the United States. Thereafter, the victim's role was turned on its head and victims were shunted aside as prosecutors "took over" the prosecution and decided what course of action was in the "public's" best interest, such as a plea bargain to some counts, even if not in each crime victim's best interest. As one federal appeals court stated:

> The criminal justice system has long functioned on the assumption that **crime victims should behave like good Victorian children--seen but not heard**. The Crime Victims' Rights Act sought to change this by making

---

[3] America's first public prosecutor was appointed in 1705. *See. Prosecution in Connecticut: A Brief History.* https://portal.ct.gov/DCJ/About-Us/About-Us/About-Us (last reviewed June 11, 2019)

> victims independent participants in the criminal justice process. *See,* Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, §§ 101-104, 118 Stat. 2260, 2261-65 (2004) (codified at 18 U.S.C. §3771).

Kenna v. United States Dist. Court, 435 F.3d 1011,1013(9th Cir.2006)(emphasis added). When the Constitution and the Bill of Rights were adopted, private and public prosecution co-existed and both victims and the state had a legal interest in criminal cases. This Court's closely divided ruling in *Linda R. S. v. Richard D.,* 410 U.S. 614, 619 (1973) appeared to end any common law legal interests of victims in the prosecution of others. Subsequently, however, the Final Report of the 1982 President's Task Force on Victims of Crime concluded that the American criminal justice system was "treating the victim with institutionalized disinterest"(*id.* at vi), and that the rights and interests of the actual victims who suffered harm during the criminal justice process,

rather than a sole focus on the "greater good," needed restoration. Drawing upon footnote 3 in *Linda R.S.* opinion, -- which stated, "But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute" – much legislation has been enacted to restore the legal interests of victims in criminal cases both at the state and federal levels. *Id.* at 617 n.3.

Thirty-four states, including Virginia, have amended their constitutions to recognize independent victims' rights, and every state, the District of Columbia, and the federal government enacted statutory and rule-based protections for victims. See, *Fundamentals of Victims' Rights: A Brief History of Crime Victims' Rights in the United States*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.) (referencing that the system of permitting victims to act as private prosecutors existed as the norm in the United States through the 19th century and listing state constitutional provisions), Nov.2011, available at

http://law.lclark.edu/live/files/26523-updated-history-of-vr-bulletin (Last reviewed June 11, 2019).

At the federal level, the Crime Victims' Rights Act (CVRA), Pub.L. No.108-405,118 Stat. 2251, codified at 18 U.S.C.§3771, gave victims specific enforceable legal "rights" in the federal criminal justice process as well as independent federal trial and appellate court standing to enforce those rights during federal habeas review of state convictions, and consequently, a legal interest in this case. 18 U.S.C.§3771(a),(b)(1), (d)(1)&(e)(3). Congress designed the CVRA to be "the most sweeping federal victims' rights law in the history of the nation." Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L.Rev. 581,582(2005). "Remedial laws are to be interpreted in the light of previous experience and prior enactments… [and] informed congressional discussion." *United States v. Congress of Industrial Organizations*, 335 U.S. 106,112-113(1948)(footnotes omitted).

> Among the rights that the Act extends to crime victims is that federal courts at both the trial and appellate levels must enforce the victims' rights. The CVRA directs that **"[i]n any court proceeding** involving an offense against a crime victim, **the court shall ensure** that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. §3771(b)(1) (emphasis added). The CVRA guarantees crime victims eight different rights, **and unlike the prior crime victims' rights statute, allows** both the government and **the victims to enforce them.**
>
> * * *
>
> "**The statute was enacted to make crime victims full participants in the criminal justice system**. * * * our interpretation puts crime victims **on the same footing**." *Kenna, supra* at 1013,1016(emphasis added).

New and enhanced state constitutional amendments have recently been enacted. See, https://www.marsyslaw.us/states (Last reviewed June 11, 2019) These legislative and constitutional

enactments reinstated the legal interests of victims, undercutting the Court's ruling in *Linda R.S.,* and granting explicit legal interests to victims in criminal cases.[4]

During federal habeas proceedings arising from a state conviction like the instant one, the federal courts have an obligation to ensure, *sua sponte,* that the rights of state victims are afforded, not ignored, pursuant to 18 U.S.C.§3771(b)(2)(A) and applicable state law. The CVRA also gives victims independent standing to enforce their rights. Congress enacted this enforcement provision because

---

[4] Today for example, victims can assert their rights in criminal cases and participate in appellate proceedings to uphold their rights. *See e.g. Lafontant v. State*, 197 Md. App. 217 (2011)(restitution); *United States v. Laraneta*,700 F.3d 983 (7th Cir. 2012)(same); *Lopez v. State*, 458 Md. 164 (2018)(victim impact at sentencing); *Kenna v. United States Dist. Court*, 435 F.3d 1011(9th Cir.2006)(same); *In re Simons*, 567 F.3d 800 (6th Cir.2009)(notice).

"[w]ithout the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. **We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality**." 150 Cong.Rec.7303(Apr. 22, 2004)(statement of Sen. Kyl, emphasis added). Senator Kyl also stated:

> [i]t is not the intent of this bill that its significance be whittled down or marginalized **by the courts** or the executive branch. **This legislation is meant to correct, not continue the legacy of the poor treatment of crime victims in the criminal process.**

150 Cong.Rec. 22953(Oct. 8, 2004)(statement of Sen. Kyl)(emphasis added). Can one conclude that the victims' interests and rights were considered and weighed by the federal courts below? Not from the silent record below.

Instead of what occurred below, victims must be provided with due process of law and dignity to protect their interests in the finality of the outcome of ancient underlying convictions, which defendants, if allowed, would relitigate forever. *Cf., Goldberg v. Kelly,* 397 U.S. 254,267-268(1970)(legal rights may not be terminated without proper consideration that complies with due process of law).

b. The victims' rights that were violated below.

Victims' rights to be treated fairly, with respect and dignity, and not to be *unnecessarily* revictimized by reopenings for formalistic reasons of otherwise valid sentencing proceedings in closed cases of their murdered loved ones, requires recognition, consideration, and a weighing on the record, of the victims' legal interests regarding the finality of the offender's sentence. This did not occur below.

Victims' rights are both substantive and procedural and, in order to afford victims due process of law, the victim's substantive and procedural legal rights, which the federal courts are

statutorily charged "to ensure", cannot be ignored but must be considered “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo,* 380 U.S. 545,552(1965); see also *Mathews v. Eldridge*, 424 U.S. 319,333(1976). These Fifth and Fourteenth Amendment constitutional and federal statutory substantive and procedural due process fairness protections were guaranteed to victims by enactment of 18 U.S.C.§3771(a)(8), which provides to victims “The right to be treated with fairness and with respect for the victim’s dignity and privacy….”[5] Victims are not disinterested vicarious spectators at criminal justice proceedings, but are indispensably interested participants at murder trials without whose "corpus" the case could never have been

---

[5] The victim’s federal rights fully accord with the victim's state constitutional rights. Va. Constitution, Article I, Section 8-A(2)("The right to be treated with **respect, dignity and fairness at all stages of the criminal justice system**")(emphasis added) State constitutional victims’ interests are protected by the Fourteenth Amendment and by state sovereignty.

initiated and who have legally enforceable rights and interests. This current Malvo criminal justice proceeding only exists because Malvo victimized, i.e. murdered, victims who previously had been innocent bystanders. Those murdered victims' legal rights now devolve to their victim representatives who stand in their shoes, under 18 U.S.C. §3771(b)(2)(D). As a result, due process and dignity requirements mandate that any ruling which strips away victims' rights of victims without properly considering and weighing those victim's rights and legal interests is improper. *Morris v. Slappy*, 461 U.S. 1,14(1983)("courts may not ignore the interests of victims"). *Accord, Paroline v. United States*, 134 S.Ct. 1710, 1719-1720 (2014); *United States v. Laraneta*, 700 F.3d 983, 986 (7th Cir. 2012), *cert. denied*, 134 S.Ct. 235 (2013); *In re Simons*, 567 F.3d 800 (6th Cir.2009).

Victims are not unaware that juvenile murderers' rights have changed. Unlike their adult counterparts, they may not be subject to the death penalty, *Roper v. Simmons*, 543 U.S. 551(2005), or to permanent incarceration with no statutory right

either before or after sentencing to request leniency.[6] *Miller, supra*.

This difference legal status, as between adult and juvenile murderers, has been adopted as a bright line test not dependent upon any individual offenders' immaturity or likelihood of rehabilitation. These same criminal justice systems allow those exactly 18 or a few days older to suffer the death penalty or permanent incarceration despite the science surrounding gradual psychological maturation that applies to them in virtually the same way as to an offender one day shy of that same offender's eighteenth birthday. Instead, society treats criminals under eighteen years of age differently, not because they are automatically transformed into fully mature adults on their eighteenth birthday, but because our laws have

---

[6] The opportunity to obtain a pardon ruling in most jurisdictions remains a matter of "grace," although processing such requests could be made regularly available, just like parole processing, if state legislatures should so choose.

adopted a clear administratively feasible rule to separate adults and adult sentencing, incarceration, and treatment, from criminals not yet 18.

In *Graham v. Florida,* 560 U.S. 48 (2010) and later in *Miller* and *Montgomery*, this Court dealt with specific kinds of legislatively imposed mandatory sentences (death or life imprisonment) which were impermissible for those convicted of certain offenses who had not yet crossed that bright line test, even though eighteen-year plus killers may also be immature. The fact that a "bright line" test and not proof of each individual juvenile offender's emotional maturity, was the basis for the *Graham* holding was clear from this Court's verbatim adherence in *Graham* in 2010, to this Court's earlier 2005 language in *Roper, supra.* As this Court reiterated in *Graham*, *id.* at 68:

> "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

> irreparable corruption." *Roper supra* at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1. (Emphasis added)

If "expert psychologists" cannot differentiate without difficulty between juvenile offenders in this regard, and if their opinions differ based upon their personal philosophy, which is often reflected by whether the State or a defendant repeatedly retains them, then the claim that the Supreme Court's prior holdings obligated judges to do what expert child psychologists cannot, i.e., state sufficient justifiable reasons for making such findings (as opposed to simply reviewing whether the sentencing judges have considered all relevant information), is both implausible and unrealistic. That is precisely why specific judicial sentencing findings and reasons are not required. Doing so would lead to the invalidation nationwide of every juvenile life without parole sentence, without any hope of any of them

ever being lawfully reimposable.[7] Preventing harm to victims is also why a non-legislatively mandated life without parole juvenile sentencing process, rather than specific judicial findings, is all that is Constitutionally required. This Court emphasizcd this precise conclusion in *Miller v. Alabama*, 567 U.S. 460, 483 (2012), where the Court stated:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime--as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty. (Emphasis added.)

---

[7] Malvo has already advanced this argument in state court in Maryland, *infra*.

Similarly, those who oppose life sentences without parole for juveniles argue at length about the juvenile's right to rehabilitative treatment and reward, i.e., the right to some presumptive release date, if a juvenile supplies evidence from prison programs that he is "rehabilitated". This is another unprovable nonjudicial determination. As this Court explained in *Graham, id*. at 73-74:

> [R]ehabilitation [is] a penological goal that forms the basis of parole systems. See *Solem* [*v. Helm*], 463 U.S. [277 (1983) at 300, 103 S. Ct. 3001, 77 L. Ed. 2d 637; *Mistretta* v. *United States,* 488 U.S. 361, 363, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, *e.g.,* Cullen & Gendreau, Assessing Correctional Rehabilitation: Policy, Practice, and Prospects, 3 Criminal Justice 2000, pp. 119-133 (2000)

> (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is for legislatures to determine what rehabilitative techniques are appropriate and effective. (Emphasis added.)

In sum, not only is the concept of what constitutes effective and necessary rehabilitation "imprecise", but also just like a juvenile's "transient or irrevocable immaturity," what one concludes depends entirely upon which school of penological experts one credits. Both for that reason, and more importantly because this is not a sentencing function but a question of post-sentencing treatment, i.e., "it is for legislatures to determine" under our Constitutionally mandated scheme of separation of powers. Ongoing sentence modification is not a subject about which judges either have the authority or a wealth of personal expertise or experience upon which to override the legislative and executive branches of government. *See e.g.* 18 U.S.C. §3626 (legislative restrictions on the ongoing judicial

supervision of already sentenced prisoners); *United States v. Somers*, 552 F.2d 108, 114 (3d Cir. 1977)("sentencing courts are not vested with those functions belonging to the Parole Board, … or "with [the] powers of a super parole board.") Finality applies to sentencing determination subject to executive branch determination to reduce the consequences of a judicial sentence.

This Court in *Miller* decided that the Eighth Amendment did prohibit legislators from authorizing imposition of life sentences without parole upon juvenile murders which could never allow discretionary release, either before or after imposition. *Miller* is concerned with what exists as a matter of law at the time of sentencing, and not on future conditions that might, or possibly could, prevail in the future. By contrast, the *per se* mandatory determinate life without parole sentencing statutes at issue in *Miller* improperly ended a murderer's liberty permanently. *Bell v. Uribe*, 748 F.3d 857, 869 (9th Cir.2014) (mandatory life without parole scheme is prohibited for juvenile offenders); compare, *Carter v. State*, 461 Md. 295

(2018) (parolable life sentences are not "de facto" life without parole sentences).

Miller did not to invalidate all discretionary sentences of life without parole because discretionary sentences were not presented in the facts before the Court. Those discretionary sentences not violative of the Eighth Amendment include individually judicially considered and imposed sentences for juvenile murderers where either a judicial sentencing authority at the time of imposition or a subsequent executive branch parole authority could revise and impose at the front end of the sentencing process or at the back end, a term lesser than life. Moreover, this Court's analysis stated that discretionary life without parole sentences remained valid.

In *Miller* and *Montgomery*, the Court took its "death is different" *Roper* rationale, which had allowed the Court to bar the death penalty to punish juvenile criminals in every state under the Eighth Amendment, and extended that concept to bar mandatory life without parole in situations where a

mandatory sentence failed to provide either at the time of sentencing or after sentencing, any opportunity to review the juvenile murderer's sentence. But that concept, that juvenile killers should not be mandatorily sentenced to life without parole due to a pre-existing legislative initiative that barred both judicial and executive branch officials at sentencing and afterwards from ever taking any account of the details of the future crime or the future offender, has now been stretched far beyond that rationale.

The court below, based on *dicta* in *Montgomery*, improperly read that *dicta* to extend *Montgomery's* retroactivity holding to Respondent. But two of Respondent's life sentences were only imposed after the court heard more than 40 witnesses discussing the defendant's level of maturity and after the court received a presentence report, the substance of which was not criticized or even analyzed below, but surely examined the offender's corrigibility and maturity. Respondent's other two life sentences were specifically agreed to by Respondent in his voluntary plea bargain.

Malvo's sentence was discretionary on the front end. Furthermore, consideration for a geriatric parole applies to every Virginia prisoner, including Respondent. See *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017). In essence, Respondent here seeks to overturn the holding in *LeBlanc* because since Respondent has the ability to seek geriatric parole, his sentence is not, on its face, a mandatory life without parole sentence on the back end.

The extension of the ruling below -- that a "specific" judicial finding is required, already sought by Respondent in his Maryland appellate brief -- is that under *Montgomery's dicta*, the maturity of juvenile murders can never be unfailingly predicted at sentencing regardless of the process used. *Malvo v. State*, 2017 WL 8221808 (Maryland Appellate Brief of Malvo at 35)(sentencing judges cannot reliably determine at the outset that a juvenile murderer is permanently incorrigible.)

Thus, if a finding at sentencing of being "permanently incorrigible" as Respondent has

alleged in Maryland and we show this Court agreed in *Graham*, is an impossibility, then no matter what words appear in the record when these murderers were first sentenced, all murderers with life sentences who committed their crime before age eighteen and were convicted in any U.S. jurisdiction are mandatorily entitled to resentencing or some regular expectation of future parole evaluation, despite this Court's explicit refusal to so rule in *Miller*. 567 U.S. at 479-80. This conclusion does not appear in *Montgomery*. *See, e.g., Foster v. Alabama*, 136 S.Ct. 1371 (Thomas and Alito, JJ.,concurring, 2016) (affirmative defense to *Miller/Montgomery* claims include, "whether an adequate and independent state ground bars relief, whether petitioner forfeited or waived any entitlement to relief (by, for example, entering into a plea agreement waiving any entitlement to relief), or whether petitioner's sentence actually qualifies as a mandatory life without parole sentence.") In sum, the court below has broadly and improperly extended rather than applied this Court's *Montgomery* ruling, disregarding, harming, and

denying victims' rights to finality, fairness, and dignity, as well as state sovereignty.

The thousands of victims nationwide cannot be ignored. Victims do not get to move on, ever, even if the juvenile convicted of homicide was under 18 years of age at the time of the murder. Finality of sentences is a part of justice. No sentencing judge or parole board, no matter how diligent, can release these victims from their lifetime of rational or irrational fear of defendants, and from deep psychological trauma at ever having to reopen and relive their wounds especially where an offender has received the "benefit of his bargain" from a plea, and from suffering pain every day due to the loss of their loved ones. This Court's holding in *Abney v. United States*, 431 U.S. 651,661-2(1977), albeit arising in another context, applies to victims and their ongoing mental trauma:

> "an individual…will 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. * * * "The underlying idea, one that is **deeply ingrained in at least the Anglo-American system of jurisprudence**, is that [having repeated adversarial proceedings involves] subjecting him to **embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity**…(emphasis added).

Consequently, in modern criminal justice systems, if a juvenile murderer chooses to contest his or her sentence, trial and appellate courts cannot simply ignore the legal rights of the victims but must consider and balance a victim's rights, along with the murderer's rights and respect and accommodate,

in so far as possible, the interests of all individuals involved in the judicial proceedings.[8]

This Court noted in *Obergefell v. Hodges*, 135 S.Ct. 2584(2015) that the Constitution's Fifth Amendment Due Process Clause protection extends "to choices central to **individual dignity**" (135 S.Ct. at 2597), which is the same interest, i.e., in "dignity," that is legislatively and constitutionally extended to victims under federal and state law. This Court stated that protection of rights is an enduring part of the judicial duty to interpret the Constitution. *Id.* at 2598. In the instant case, the victims' dignity interest and requirement for fairness was explicitly

---

[8] See e.g. *Commonwealth v. Rugg*, 183 A.3d 1052 (Pa. Super. Ct. 2018)(recognizing that a victim and his mother did not speak at a resentencing proceeding out of fear that facing the defendant might re-traumatize them.)

conferred by Congress in 18 U.S.C.§3771(a)(8),(b)(2). The Court below failed to acknowledge, no less weigh, the victim's dignity, fairness, and speedy disposition rights but instead "serve[d] to disrespect and subordinate" (*id.* at 2591) the victims' dignity and fairness regarding finality, by only considering the alleged situation as compared with the consideration afforded Respondent.

This disparate treatment, the *Obergefell* Court observed, violates the Constitution's Fifth Amendment Equal Protection Clause guarantee (*id.* at 2604), and applies as well "to all federal officials," which includes the federal judiciary. *United States v. Windsor*, 570 U.S. 744, 755 (2013). In words equally applicable to victims, the *Obergefell* Court stated, "They ask for equal dignity in the eyes of the law. The Constitution grants them that right." *Obergefell* at 2608. Here, the congressional statute and the state and federal constitutions' grant various rights to victims, including the right to be treated with dignity which includes consideration and weighing of the victim's critical interest in finality. As *Obergefell, supra*,

observes, protection of the fundamental right of dignity is a "part of the judicial duty." Moreover, Congress has made this judicial obligation explicit by providing that "the court shall ensure that a victim is afforded the rights..." 18 U.S.C.§3771(b)(2)(A).

This case involves the federal judiciary's proper functioning within the administration of our criminal justice system and federalism, *McNabb v. United States*, 318 U.S. 332, 340-341 (1943); and the proper construction of the judicial rules of procedure, *United States v. Beggerly*, 524 U.S. 38 (1998); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964); *Upshaw v. United States*, 335 U.S. 410 (1948); *Hickman v. Taylor*, 329 U.S. 495 (1947). *see also, Devlin v. Scardelletti*, 536 U.S. 1 (2002);*Watson v. Philip Morris Cos.*, 551 U.S. 142, 146-47 (2007). The interests of victims must be respected, i.e. considered and weighed, whenever the proper functioning of the administration of the criminal justice system is at issue, in order not to infringe on the CVRA and in order to "ensure" that victims are afforded their rights. 18 U.S.C.§3771(b)(2)(A).

2. The *Miller* and *Montgomery* cases are the law of the land, unlike the ruling below which improperly expanded those rulings to the detriment of and harm to victims.

This Court's *Miller* and *Montgomery* holdings on their face require only a prohibition of statutory automatic mandatory life sentence without parole. Sentencing courts and parole board-like entities can consider and weigh a juvenile murderer's maturity, and consequently the "danger to the public" of reoffending which in violent crime cases amounts to another way of evaluating the likelihood of the inmate's rehabilitation. The *Miller* and *Montgomery* holdings, which explicitly required no formalistic "findings" in recognition of federalism's reservation of powers to both the states and the people, must allow and defer to state statutory grants of sentencing discretion as allowed during each state's sentencing process, and not as dictated to the states by the federal courts.

The proposition that state sentencing judges act without the greatest degree of concern about a

juvenile murderer's age and lack of maturity despite knowing their age before imposing upon them any very long sentence, no less one that will permanently deprive a juvenile murderer of freedom, is not only unsupported by the record, unfounded, and naïve, but it also is illogical, and contrary to common sense, if not demeaning to all the participants in the criminal justice process and justice. As this Court observed in *Graham v. Florida*, 560 U.S. 48 (2010), discussing the difficult job that judges have when assessing whether to impose life without parole sentences on juveniles, but which the court below did not appear to credit, judges do not routinely sentence juveniles to long sentences without the most conscientious exercise of their discretion:

> "Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just

> demands of a wronged society." *(Id.* at 77)

Virginia law allows modification, including by geriatric release provisions, of juvenile life without parole sentences, unlike in Alabama (in *Miller*) and Louisiana (in *Montgomery*) where there existed mandatory life without parole sentences and where no release, other than by pardon, was possible. *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017) Because imposing long sentences on juvenile murderers, is one of the most difficult, weighty, and unforgettable tasks that judges face, it occurs, after *Miller* and *Montgomery,* only after a hearing where everyone is allowed to voice their views, and typically after a professionally prepared presentence report and sentencing guidelines have been reviewed and considered. In addition, when judges raise concerns about the community safety that requires incapacitating the killer by incarceration, that conclusion is premised on the fact that the court has determined in its discretion from everything before it that the murderer, for that period of the sentence cannot be

rehabilitated, and consequently is an incorrigible danger to the community.

There is no assertion here or evidence anywhere that judges impose long sentences on juvenile murderers arbitrarily or in bad faith (e.g., simply to fill up prisons at great expense to taxpayers). Moreover, there is no logical reason that judges must make findings that publicly label any murderer as permanently and "irreparably" incorrigible, even if the judge harbors only a faint hope founded upon no facts but only the court's optimism or religious belief in the future of humanity, that in the event of a future pardon application, that the destructive self-image of the juvenile or adult offender (which the court is not required to publicly reinforce as a self-fulfilling prophecy) could, contrary to all the objective evidence, hypothetically improve. Judges are obligated to appropriately sentence convicted murderers, but they are not obligated to brand a "scarlet letter" on their foreheads.

The Supreme Court in *Miller* and *Montgomery* followed its centuries old practice of invalidating unconstitutional state statutes. This

Court did not order the reopening of every old homicide sentencing of a juvenile murderer because sentencing courts did not predict and use the exact same sentencing words and phrases adopted in *Miller* and *Montgomery*. Contrary to the court below, *Montgomery* stated at 734:

> Giving *Miller* retroactive effect, moreover, **does not require states to relitigate sentences**, **let alone convictions, in every case** where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by **permitting juvenile homicide offenders to be considered for parole, rather than resentencing them**.(Emphasis added.)[9]

---

[9] For example, Virginia would be free to fix its geriatric release provisions, even assuming they were constitutionally infirm, rather than be required to convene a new sentencing proceeding.

However, if *Montgomery* is read to require particular worded explicit sentencing findings, then the effect will be to require states to relitigate sentences in every case where a juvenile offender received a life without parole sentence in violation of both federalism and applicable victims' rights and interests. In the *Miller* and *Montgomery* opinions, no presentence report or sentencing guideline was analyzed, discussed, or even mentioned as a sentencing tool. In addition, this Court's language rejecting the need for findings in those cases would be out of place and surplusage if specific worded findings had been mandated by this Court.

Furthermore, scientific hypotheses about juvenile killer's maturation, as noted by this Court in *Graham, supra*, have and will continue to evolve, and new questions will always appear regarding the general data

---

As such the remedy of the lower court of ordering a resentencing was improper.

about the class of juvenile offenders and its application to the small subclass of violent juvenile murderers, especially since there is no predesignated identical "control group" with which to compare them. No class characteristic is ever *per se* determinative, except as a topic warranting attention when looking at sentencing guidelines and any individual's social disorders, e.g. the offender's psychopathology since each and every juvenile offender is different, which is the very point *Miller* was making when it invalidated mandatory legislative sentencing provisions.

Generalizations and purported averages from the scientific community do not define individuals. *Williams v. New York*, 337 U.S. 241 (1949)]; *Payne v. Tennessee*, 501 U.S. 808, 820-21 (1991)("Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material.").

For similar reasons, ruling that a particular "life without parole" sentence is "rare" is also not an objectively meaningful legal standard. "Rareness"

concerns may be subjectively suitable as a rationale for doing away with mandatory life without parole sentences for juvenile killers. However, if employed as a legal standard, it is objectively problematic. It raises questions of "rare" compared to what: to the overall domestic population; to the national population of juveniles; to the national population of juvenile offenders sentenced as adults; to the number of life without parole murderers of any age incarcerated in each state; to the number of such sentences a particular judge meets out to juvenile homicide offenders in the course of that judge's career on the bench; to the number of times in his or her lifetime that a specific victim has been grievously harmed by a juvenile murderer? Neither the record in *Miller*, *Montgomery*, nor the instant case provides any definitive underpinnings for utilizing this temporal frequency term, "rare", as a legal standard.

Moreover, imposing such sentences only in "rare" cases would not make such sentences any more or less proportional. If a group of equally culpable foreign terrorist juvenile offenders bomb a U.S. elementary school

killing dozens of children, would a sentence of life without parole automatically be barred for more than one of the murderers? Finally, allowing such harsh sentences only for "rare cases," assuming *arguendo* that those cases could somehow be reliably identified, is dubious since it opens the door to questions of whether those sentences that are "rare" run afoul of the "unusual" prong of the Eighth Amendment's "cruel and unusual punishment" prohibition, and that problem was not addressed or analyzed in *Miller* or *Montgomery*.

The court below held that "The problem with the Warden's argument, however, is that, as a matter of Virginia law, the jury was not allowed to give a sentence less than life without parole." 893 F.3d at 275. This rationale focused exclusively on the front end of Respondent's sentence and took no account of Virginia's "geriatric" release provisions at the back end of Respondent's sentence, which passed Eighth Amendment constitutional scrutiny in *LeBlanc, supra*. As this Court held in *Montgomery, supra* at 736:

> A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.

Virginia has, *inter alia*, adopted that "back end" approach.

Nor did this Court in *Montgomery* empower the lower federal courts to demand a specific and explicit "finding" that negates the contrary rulings of state courts of last resort about the post-conviction relief available in each state to juvenile murderers, and concomitantly their rulings regarding each state's victims' rights in situations where the underlying *Miller* factors were considered at sentencing, albeit without an explicit and specifically worded "finding." Citing federalism concerns, this Court confirmed in *Montgomery* that *Miller* upheld and approved the principles of federalism. 136 S.Ct. at 735. If a specifically worded formulation reflecting a perpetrator's rehabilitation potential were required by the Eighth Amendment in such sentencings, such a rule would impermissible

intrude upon each state's sovereignty and upon an "important principle of federalism." *Montgomery, supra,* citing *Ford v. Wainwright*, 477 U.S. 399, at 416–417 (1986)("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.") States remain free to determine if the discretion to shorten life sentences will occur at the time of sentencing, or instead at the time of post sentencing release consideration, and there is no requirement that there be multiple consideration points as under Virginia law.

No wholesale reopening nationwide of every juvenile murderer sentenced to life was ordered, but just the opposite, since states constitutionally have flexibility within their sovereignty to decide how to implement *Montgomery*. State sovereignty demands that federal courts cannot and should not be "taking over" the supervision of how state courts "ought to have" treated juvenile murderers who were individually and carefully sentenced or will at the appropriate time, have a release determination. Those determinations are a state function, not a federal judicial function. Federal courts are not

ongoing monitors of state sentencing and release procedures, with either the power to look back decades or into the future. See, 18 U.S.C. §3626)(prohibiting federal courts from assuming the role of long term monitors of state prison procedures). Courts, both Federal and State, get to make a sentencing determination at the time of conviction, and if correct when made, the administration of that sentence is thereafter the proper function of the executive branch, as prescribed by the legislative branch under state law. Action of course, if unconstitutional, may be enjoined. But beyond stopping unconstitutional actions, the proper supervision and rehabilitation of juvenile murderers is the responsibility of the executive branch, and not the judicial branch, no matter how much Malvo and the court below wish it was the federal court's direct responsibility. Ongoing regulation of the treatment of prisoners, including juvenile prisoners, is a well-recognized function of the legislative and executive branches under our constitutionally mandated separation of powers under state law. Trained penological administrators struggle with decisions about which

juvenile murderers can be rehabilitated, and by what means, and in what time period. They, not the judiciary, advise members of the executive branch if geriatric parole, or even pardon, whether on an ad hoc basis or even if regularized[10], is appropriate. The court's function in this regard, is to impose sentence and, per this Court's decisions, assure that the sentence when imposed, not its administration since that time, is constitutional. To emphasize this proper separation of power, this Court stated in *Graham, supra*, at 74,

> "It is for legislatures to determine what rehabilitative techniques are

---

[10] Traditional pardons consisted of "nothing more than a hope for 'an *ad hoc* exercise of clemency,' *Solem v. Helm*, 463 U.S. 277, 303, 103 S. Ct. 3001, 3016 (1983)", but that is not written in stone. Pardons may be administratively regularized by a state, for example, at least once a decade an application by a juvenile murderer could result in an official pre-dispositional evaluation (of the *Miller* factors), and a ruling, granting or denying the pardon or commutation.

> appropriate and effective." This statement restated what this Court has stated since *Rummel v. Estelle*, 445 U.S. 263, 284 (1980), namely "that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."

With particular focus on what is required of state legislatures toward juvenile murderers, this Court stated in *Graham*, at 75:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted [even] of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.

Parole rights are created under state law. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (Under our federal system, states possess primary authority for defining and enforcing the criminal law)

Consequently, this Court must consider the serious adverse impact and harm upon victims nationwide if the effect of the ruling below, despite the enormous amount of input of every type that was introduced at sentencing, leads to repetitive reopening hearings for every life sentence imposed upon every juvenile murderer. Courts are not super parole boards.

3. The ruling below not only ignores, but it also burdens the victims' state and federal rights to be treated fairly and with dignity.

Resentencing determinations are not a "no cost" event, or of only *de minimus* harm to victims. A victim's interest in finality constitutes a very critical

interest in fairness to victims. As this Court has stated:

> Only with **real finality can the victims of crime move** forward knowing the moral judgment will be carried out. ... To unsettle these expectations is to inflict a **profound injury** to the "powerful and legitimate interest in punishing the guilty," … **an interest shared by** the State and the **victims of crime** alike. (citations omitted; emphasis added.)

Calderon, supra. Reopening a sentence causes harm to victims because it nullifies sentencing finality. The determination set out in *Calderon* protects the interests and rights of victims. The emotional exhaustion, depression, fear and horror for a victim, often never ending, is greatly amplified by resentencing proceedings. During each resentencing proceeding, the crime's gruesome details committed against the victim's loved one are re-raised and re-examined.

Resentencing proceedings subject victims presenting impact statements to having to recall all the details and speak publicly about the impact upon them of murders that often the victims have, until then, repressed and decided never to think about or discuss again in public or private, with respect to the persons they have lost, the terror that they felt when the crime was fresh, and the fear that likely still stalks them at night about the crime, which they 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 of Legal Intervention, 16 J. Traum. Stress 159(2003).

Despite this revived pain, victims cannot resist being pulled into these resentencing proceedings. They do not turn a blind eye to resentencing proceedings since victims typically are perhaps the only original crime participants still available -- long after the original prosecutor, investigators and judicial officials have moved on -- who can present a first-person account of ancient

murders, in opposition to an offender's self-serving and self-centered or biased recollection.

Moreover, even when victims do not attend these proceedings, they are harmed by their loss of privacy and may face *ad hominem* criticism in the mainstream and social media for whatever they say or do not say, especially here where Respondent is a juvenile killer of wide notoriety.

If sentence re-openings are broadly allowed, no victim can ever be assured when speculation about the crime will come to an end, if ever, and when finality will occur, or whether the details and fear associated with these horrific deaths can finally be suppressed by them from their daily thoughts. Ongoing fear about the lack of finality is the cause of the pain and the source of the emptiness and the exhaustion that makes victims wonder how much longer they can dredge up and articulate in a public courtroom, at a resentencing long after the conviction is final and typically in front of a successor judge, their pain and traumatic memories which force them, emotionally, back to the time and scene of the crime and its impact.

> Victims are entitled to the legal and emotional finality provided by each state, absent constitutional violations. *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978)("The rule of finality has particular force in criminal prosecutions"). This is particularly true long after the conviction is final when the underlying issue being judicially challenged is the rehabilitation of the juvenile murderer which is an executive branch responsibility, and a concededly difficult one at that. Consequently, victims have a protectable fairness interest in protecting the finality of judgments in criminal cases that cannot be overlooked but must be considered. *Calderon, supra.*

The expansive reading below of this Court's *Miller* and *Montgomery* rulings negatively impacts the due process and equal protection rights of virtually every victim of a juvenile killer. The Fifth Amendment interests of victims to finality must be considered and balanced, not ignored. This Court long ago decided that courts may not ignore victims. *Morris*, *supra.*

Extending the ruling below to every juvenile murderer sentenced to life by requiring specially

worded findings could have been routinely met by judges utilizing a check box with “magic words" on a standardized form, the use of which does not automatically imply special consideration. Therefore, the failure to use the correct magic words or a routine standard "check list" does not outweigh eliminating finality, and adversely affecting many victims of juvenile murderers.

The ruling below also ignores that regularized consideration for release on the back end of a juvenile's sentence is constitutionally sufficient. Furthermore, where the record of a plea bargained discretionary sentencing hearing on the front end of a sentence utilized a comprehensive presentence report, and Malvo was represented by counsel, and an original record shows either implicitly or explicitly that the correct legal standards were observed, “magic words” were not required by *Miller* or *Montgomery*. As one court has stated, “There also seems to be an evolving standard of decency afforded to victims in the United States of America.” *Chandler v. State*, 2015 WL 13744176, at *2 (2015)(emphasis added), *aff'd* 242 So. 3d 65 (Miss. 2018), *cert. denied, Chandler v. Mississippi*

(Jan. 7, 2019). Just as courts should protect the rights of juvenile murderers, they must also protect the rights of victims. Entirely failing to consider the victims' interests in finality violates victims legally protected fairness and dignity rights.

Jackie Robinson stated: "The most luxurious possession, the richest treasure anybody has, is his personal dignity."[11] Ultimately, dignity protects an individual from unjust treatment. Victims are historically disadvantaged by the criminal justice system, having been deemed in the past by this Court to lack a legal interest in the prosecution of another. *Linda R.S. supra.* Mandating dignity by statute requires corrective action that considers the interests of both defendants and victims. In *Payton v. State*, 266 So. 3d 630, 640 (Miss. 2019), the court articulated

---

[11]See. https://www.brainyquote.com/quotes/jackie_robinson_802703 (last reviewed June 11, 2019)

the need to consider victims' rights in language equally applicable here:

> We find Alaska's approach **beneficent, because it fairly balances defendants' and victims' rights alike**. Like Alaska, Mississippi has experienced a dramatic shift in the law…. Because of the increased recognition of crime victims in both our Constitution and statutory law, we find that departure from the abatement *ab initio* doctrine **is necessary to avoid the perpetuation of pernicious error**. *Hye* [*v. State*], 162 So. 3d [750] at 755 [Miss. 2015]. The abatement *ab initio* doctrine tramples upon victims' rights by denying victims "fairness, respect and dignity." [*State v.*] *Korsen*, 111 P.3d [130] at 135 [Idaho (2005)].

In *Montgomery*, this Court acknowledged the important role of finality but held that an exception

to finality was warranted in the narrow *Miller*/*Montgomery* situation. 136 S.Ct. at 732. The court below neither addressed nor applied this Court's narrow "finality rule" exception to its much broader ruling, and it failed to balance or even entertain consideration of the victims' Fifth and Fourteenth Amendment rights vis-a-vis Respondent's Eight Amendment rights. *See e.g., Christopher R. Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 Geo. Mason Civ. Rts. L.J.1 (2008)(duty to protect). Entirely eliminating finality from consideration denies the victims the fairness, respect, and dignity guaranteed by the federal and states laws protecting, to the maximum extent constitutionally permissible, finality and closure. *See Korsen, supra.*

This Court must recognize, consider, and afford victims their legal interests that have been provided by law. This case is not just about defendants' interests, but also victims' interests in finality including the consideration and weighing of their dignity rights which are crucial tenets that go to the

heart of the guarantee of justice for all in civilized and responsible societies.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

/s/ Russell P. Butler
RUSSELL P. BUTLER, Esq.
Counsel of Record for Amicus
VICTOR D. STONE, Esq.
MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC.
1001 Prince George's Blvd., #750
Upper Marlboro, Maryland 20774
Ph: (301) 952-0063
rbutler@mdcrimevictims.org

APPENDIX

18 U.S.C.A. § 3771. Crime victims' rights (as eff. 2015) provides, in pertinent part:

(a) A crime victim has the following rights:
(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.
(b)(1) In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) (A) In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).
(B) (i) These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).
(ii) In a case involving multiple victims, subsection (d)(2) shall also apply.
(C) This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.
(D) For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.
(c) (1) Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection,

investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).
(2) The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).
(3) Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.
(d) (1) The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.
* * * *
(e) For the purposes of this chapter:
* * * *
(2) (A) The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. * * * *