Lee Boyd Malvo v. State of Maryland
No. 29, September Term, 2021.

Criminal Procedure – Constitutional Law – Sentencing of Juvenile Offender – Homicide. Recent Supreme Court decisions have held that the Eighth Amendment to the United States Constitution does not permit a sentence of life without parole for a juvenile offender convicted of homicide if the sentencing court determines that the offender's crime was the result of transient immaturity, as opposed to permanent incorrigibility. That constitutional constraint applies retroactively. However, a court that imposes a sentence in a discretionary sentencing regime need not make an explicit finding as to a juvenile offender's incorrigibility. In a case where sentencing took place prior to the recent Supreme Court decisions and where the sentencing judge may have determined that the defendant was not permanently incorrigible, the defendant is entitled to be resentenced to ensure compliance with the Eighth Amendment. The terms of that sentence remain within the discretion of the sentencing court.

Criminal Procedure – Sentencing of Juvenile Offender – Juvenile Restoration Act. Under the Juvenile Restoration Act ("JUVRA"), a juvenile offender who was convicted as an adult and who is serving a sentence that was imposed before October 1, 2021 may file a motion for reduction of sentence after serving 20 years of the sentence. JUVRA likely provides the "meaningful opportunity for release" required for most such offenders under the Supreme Court's recent decisions interpreting the Eighth Amendment. However, in the specific case of a juvenile offender serving multiple consecutive sentences of life without parole that were imposed prior to the Supreme Court decisions, and where the sentencing court could not have determined whether, under those decisions, the offender was one of the few offenders *not* entitled to a meaningful opportunity for release, JUVRA is not a substitute for resentencing.

Circuit Court for Montgomery County
Case No. 102675C
Argued: February 8, 2022

IN THE COURT OF APPEALS
OF MARYLAND

No. 29

September Term, 2021

LEE BOYD MALVO

v.

STATE OF MARYLAND

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*Getty, C.J.,
*McDonald
Watts
Hotten
Booth
Biran
Gould,

JJ.

Opinion by McDonald, J.
Watts, Hotten, and Gould, JJ., dissent.

Filed: August 26, 2022

*Getty, C.J., and McDonald, J., now Senior Judges, participated in the hearing and conference of this case while active members of this Court. After being recalled pursuant to Maryland Constitution, Article IV, §3A, they also participated in the decision and the adoption of this opinion.

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To be legal, a sentence in a criminal case must be consistent both with the law governing the offense for which the defendant was convicted and with the Eighth Amendment's proscription against "cruel and unusual" punishments. During the past two decades, the United States Supreme Court has issued several decisions elaborating on the application of the Eighth Amendment to juvenile offenders sentenced as adults. This case concerns whether a juvenile offender who was sentenced prior to key decisions pertinent to his situation should be resentenced to ensure that his sentence complies with the Constitution and therefore is legal.

Over the course of three weeks in October 2002, Petitioner Lee Boyd Malvo, then age 17, and John Allen Muhammad, then age 41, committed a series of murders in the greater Washington, D.C. area, primarily by shooting a high-powered rifle while concealed in the trunk of a modified automobile so as to terrorize the area of the country in which Mr. Muhammad's ex-wife lived. These crimes received considerable national media attention and became known as the "DC sniper attacks."

Mr. Malvo and Mr. Muhammad were charged with multiple counts of murder and other crimes in Virginia and Maryland. In Virginia, Mr. Malvo was convicted on four counts of first-degree murder. In Maryland, Mr. Malvo voluntarily testified against Mr. Muhammad and, in 2006, pled guilty to six counts of first-degree murder in the Circuit Court for Montgomery County. At his sentencing that year, the prosecutor stated that Mr. Malvo, once under the sway of an "evil man," had changed and "grown tremendously" since his participation in the crimes. The sentencing court similarly acknowledged Mr.

Malvo's cooperation with law enforcement, his remorse, and his transformation since he was arrested. The court sentenced Mr. Malvo to the maximum sentence of six terms of life in prison without the possibility of parole, to run consecutively to each other and to the four sentences of life without parole that he was serving in Virginia.

Mr. Malvo's sentence was consistent with the pertinent State statute and with the advisory State sentencing guidelines at that time. Since then, however, the Supreme Court has held that the Eighth Amendment does not permit a sentence of life without parole for a juvenile homicide offender if a sentencing court determines that the offender's crime was the result of transient immaturity, as opposed to permanent incorrigibility.[1] The Supreme Court has further held that this constraint applies retroactively and, thus, it applies to Mr. Malvo's case.

In 2017, Mr. Malvo filed a motion to correct an illegal sentence, based in part on the ground that the sentencing court did not have the benefit of the subsequent, but retroactive, Supreme Court decisions at the time he was sentenced. The Circuit Court for Montgomery County denied the motion.

This case presents the question whether ambiguity in a sentencing court's remarks about a juvenile offender's post-offense conduct and character, when made before the Supreme Court issued the decisions that govern the sentencing of a juvenile offender to life without the possibility of parole, rendered such a sentence illegal under the Eighth

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[1] *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016) (holding that the incorrigibility standard is retroactive); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (reaffirming *Miller* and *Montgomery* while holding that a sentencing court need not make a specific finding of incorrigibility).

Amendment. Based on the record of this case, opposing inferences can be drawn as to whether the sentencing judge determined that Mr. Malvo was not "the rare juvenile offender whose crime reflects irreparable corruption" for whom the Eighth Amendment allows a sentence of life without parole. If the sentencing judge reached that conclusion, the sentence failed to comport with the Constitution. In light of this ambiguity, Mr. Malvo must be resentenced.

As a practical matter, this may be an academic question in Mr. Malvo's case, as he would first have to be granted parole in Virginia before his consecutive life sentences in Maryland even begin. Ultimately, it is not for this Court to decide the appropriate sentence for Mr. Malvo or whether he should ever be released from his Maryland sentences. We hold only that the Eighth Amendment requires that he receive a new sentencing hearing at which the sentencing court, now cognizant of the principles elucidated by the Supreme Court, is able to consider whether or not he is constitutionally eligible for life without parole under those decisions.

I

Background

A. Limits on the Punishment of Juvenile Offenders

1. Limits under the Eighth Amendment to the United States Constitution

The Eighth Amendment to the United States Constitution forbids the imposition of "cruel and unusual" punishments. The Supreme Court has explained that giving effect to the provision's guarantee requires "referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate

as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citation and internal quotation marks omitted). "This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Graham v. Florida*, 560 U.S. 48, 58 (2010) (citation and internal quotation marks omitted).

In recent years, the Supreme Court has issued a series of decisions applying this Eighth Amendment standard in the context of juvenile offenders sentenced to severe punishments in the criminal justice system. As recounted in Part I.B.4 of this opinion, Mr. Malvo's sentencing occurred in late 2006 near the beginning of this series of decisions and preceded a number of decisions significant to the resolution of this case.

Supreme Court Precedent as of 2006

In 2005, *Roper* was the first in the Supreme Court's series of decisions concerning the application of the Eighth Amendment to the sentencing of juvenile offenders. There, the Court held that the Eighth Amendment forbids the execution of an offender who committed the crime when younger than 18 years old. 543 U.S. at 568. The Court noted that a majority of states had already banned the punishment and emphasized that "three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. Specifically, those differences are (1) juveniles' lack of maturity and an underdeveloped sense of responsibility resulting in "impetuous and ill-considered actions and decisions"; (2) juveniles' greater vulnerability or susceptibility to negative influences and outside pressures; and (3) the more mutable nature of juveniles' character and personality traits.

Id. at 569-70. In light of these differences, the Court determined that the two distinct social purposes served by the death penalty – retribution and deterrence – apply to juveniles with lesser force than to adults. *Id.* at 570. In rejecting the argument that juveniles' reduced culpability can be adequately considered on a case-by-case basis, the Court identified an "unacceptable likelihood … that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth … even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Id.* at 572-73.

Supreme Court Precedent after 2006

Roper dealt exclusively with the death penalty. Five years later, in 2010 – four years after Mr. Malvo's sentencing – the Supreme Court first declared that the Eighth Amendment also imposes constraints on the imposition of a life without parole sentence on a juvenile offender. In *Graham v. Florida*, 560 U.S. 48, 59, 74 (2010), the Court held that the Constitution forbids sentencing a juvenile non-homicide offender to life without parole, announcing for the first time a categorical restriction under the Eighth Amendment on a punishment other than the death penalty. The Court noted that "life without parole sentences share some characteristics with death sentences" in that they "alter[] the offender's life by a forfeiture that is irrevocable." *Id.* at 69. Such sentences are particularly harsh when imposed on a juvenile offender, who will "on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 70.

In addition to identifying a national and international consensus against sentencing juvenile non-homicide offenders to die in prison, the *Graham* Court returned to the

discussion of juvenile culpability that it began in *Roper*. 560 U.S. at 62, 80. In a review of the four legitimate penological objectives – retribution, deterrence, incapacitation, and rehabilitation – the Court found that none justified a life without parole sentence for a juvenile not convicted of murder. *Id.* at 71. Such offenders must instead have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Two years later, in the first of a trilogy of decisions that are particularly relevant to this case, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479 (2012). The Court reiterated the three general differences between juveniles and adults first articulated in *Roper* – immaturity, susceptibility to negative influences, and mutability – and extended the reach of its reasoning in *Graham*: "[N]one of what [*Graham*] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime specific. … So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 473. Thus, mandatory sentencing schemes that "remov[e] youth from the balance" contravene the "foundational principle" of *Graham* and *Roper*: "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474.

The Court went on to articulate some of the mitigating circumstances that mandatory sentences fail to account for:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

567 U.S. at 477-78. In the Court's view, occasions for sentencing juveniles to life without parole "will be uncommon" due to the difficulty inherent in distinguishing between juvenile offenders whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption. *Id.* at 478-80. Before a sentencing court could make that judgment, the Court required that it "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

In 2016, 10 years after Mr. Malvo's sentencing, the Supreme Court clarified that *Miller* announced a substantive rule of constitutional law with retroactive effect. *Montgomery v. Louisiana*, 577 U.S. 190 (2016). In *Montgomery*, the Court rejected the argument that *Miller* merely announced a new rule of procedure that applied prospectively. Instead, it held that the *procedural* component of *Miller* – "a hearing where youth and its attendant characteristics are considered as sentencing factors" – is the means of

implementing its *substantive* guarantee – "that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 209-10 (internal quotation marks omitted). The Court explained that even though "*Miller* did not impose a formal factfinding requirement," it "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id.* at 211.

In 2021, after Mr. Malvo had filed a motion to correct an illegal sentence, the Supreme Court returned yet again to the topic of juvenile life-without-parole sentencing, this time to clarify the procedural component of *Miller*. In *Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021), the Court held that "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." The petitioner in *Jones* had been given a mandatory life-without-parole sentence for a homicide he committed as a juvenile. After *Miller* was decided, he received a new sentencing hearing, at which his counsel argued that he was not the rare, irreparably corrupt juvenile offender. The sentencing judge acknowledged the Supreme Court's holding in *Miller* and his own sentencing discretion, but imposed the same life-without-parole sentence. *Id.*

On appeal, Jones argued that a sentencing court must make either an explicit or implicit finding of permanent incorrigibility before it can constitutionally sentence a juvenile homicide offender to life without parole. The Supreme Court disagreed, explaining that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel

advances an argument based on the defendant's youth." *Id*. at 1319 (emphasis in original). In the context of that case, the Court essentially concluded that the fact of the sentencing court's authority to exercise discretion as to whether to make parole available when sentencing a juvenile to life imprisonment, paired with the imposition of a life-without-parole sentence, is itself an implicit finding of incorrigibility.

The Court did not have occasion to address a situation in which a sentencing court finds that a crime was the result of the offender's transient immaturity but nonetheless sentences the offender to life without parole. Although the Court's opinion in *Jones* focused almost exclusively on *Miller*'s procedural component, it explicitly did "not disturb *Montgomery*'s holding that *Miller* applies retroactively on collateral review[,]" 141 S. Ct. at 1317 n.4, a holding that was based on the *Montgomery* Court's conclusion that *Miller* announced a new substantive rule. In a footnote, the *Jones* Court quoted *Montgomery*'s "key paragraph," which included the passage indicating that a court is not "free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 1315 n.2, quoting *Montgomery*, 577 U.S. at 211. Because *Miller*'s substantive holding, as articulated in *Montgomery*, remains good law, it follows that an offender deemed corrigible cannot constitutionally be sentenced to life without the possibility of parole.

2. Maryland Juvenile Restoration Act

The General Assembly enacted the Juvenile Restoration Act ("JUVRA") in 2021. Chapter 61, Laws of Maryland 2021. JUVRA made three significant changes to Maryland's sentencing practices for juvenile offenders convicted as adults. Specifically, it gave sentencing courts discretion to impose sentences less than the minimum required

by law, prospectively banned sentences of life without the possibility of parole, and authorized offenders sentenced before October 1, 2021 who have spent more than 20 years in prison to file a motion to reduce their remaining sentence. Maryland Code, Criminal Procedure Article ("CP"), §§6-235, 8-110. Only the final provision is relevant here.

An eligible offender who files a motion to reduce the offender's remaining sentence is entitled to a hearing at which the offender must be present, either in person or by video. CP §8-110(b). Notice of the hearing must be given to the victim or the victim's representative. *Id.* Both the offender and the State may introduce evidence in support of or in opposition to the motion. *Id.* Following the hearing, the court may reduce the duration of the offender's sentence if it concludes that (1) the individual is not a danger to the public; and (2) the interests of justice will be better served by a reduced sentence. CP §8-110(c). The statute outlines 10 factors – as well as "any other factor the court deems relevant" – that a court is to consider and address in a written decision, including: the individual's age at the time of the offense; the nature of the offense and the history and characteristics of the individual; any statement offered by or on behalf of a victim of the offense; the extent of the individual's role in the offense and whether and to what extent an adult was involved in the offense; the diminished culpability of a juvenile as compared to an adult; and whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society. CP §8-110(d). If the offender's motion is denied or granted in part, the offender may file another motion after three years. A third and final motion can be filed after an additional three-year waiting period. CP §8-110(f). Relief sought under JUVRA is distinct from and

does not affect other terms of the sentence, such as the offender's opportunity to seek parole.

B. Facts and Proceedings

1. The Homicides

Mr. Malvo was born in Kingston, Jamaica, in 1985. In 2000, at the age of 15, he met Mr. Muhammad, a Gulf War veteran and United States citizen, in Antigua. At the time, Mr. Muhammad was engaged in a custody dispute concerning his own children. In May 2001, Mr. Muhammad brought Mr. Malvo to the United States. In February 2002, Mr. Muhammad and Mr. Malvo set out to find Mr. Muhammad's children. They also embarked on a series of shootings that would leave at least 12 people dead. They shot people at random, usually with a high-powered rifle while concealed in the trunk of Mr. Muhammad's modified Chevy Caprice. Apparently, the purpose was to terrorize the area of the country in which Mr. Muhammad's ex-wife lived.[2]

In July 2002, Mr. Muhammad learned that his children were living in Clinton, Maryland. On September 5, 2002, Mr. Malvo shot and robbed a man in Clinton. Ten days later, Mr. Malvo shot another man in Clinton. Neither victim died.[3] Mr. Malvo and Mr. Muhammad then traveled to Montgomery, Alabama, where, on September 21, 2002, Mr.

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[2] *Muhammad v. Commonwealth*, 619 S.E.2d 16, 37 (Va. 2005). Many of the facts concerning the offenses and prosecutions of Mr. Muhammad and Mr. Malvo are also described in *Muhammad v. State*, 177 Md. App. 188 (2007), *cert. denied*, 401 Md. 614 (2008); *Muhammad v. Kelly*, 575 F.3d 359 (4th Cir. 2009); and *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018).

[3] *Mathena*, 893 F.3d at 267.

Muhammad shot two women as they closed up a liquor store. One of the women died. Police officers responding to the scene reportedly saw Mr. Malvo going through the victims' purses and gave chase, but he was able to evade capture. However, he left behind evidence that would eventually tie him and Mr. Muhammad to the crimes, including the pistol used in the two Clinton shootings.[4] On September 23, 2002, the manager of a beauty salon was shot and killed in a Baton Rouge parking lot. Police later determined that the fatal bullet was fired from the same Bushmaster rifle later found in Mr. Muhammad's car when he and Mr. Malvo were ultimately apprehended in Maryland. Witnesses reportedly saw Mr. Malvo fleeing the scene.[5]

The pair then returned to the Washington, D.C. area, where they shot 13 people between October 2 and October 22, 2002. Ten were killed. All were struck by a single bullet fired from a distance. On October 24, 2002, Mr. Muhammad and Mr. Malvo were apprehended while sleeping in their vehicle at a rest stop in Frederick County.[6] Initially, following his apprehension, Mr. Malvo referred to Mr. Muhammad as "his father" and told authorities that he had pulled the trigger in 10 of the shootings. In his testimony four years later at Mr. Muhammad's trial in Maryland, he said that he had generally functioned as the "spotter" and that Mr. Muhammad was usually the shooter in the attacks.[7]

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[4] *Kelly,* 575 F.3d at 362.

[5] *Mathena*, 893 F.3d at 267-68.

[6] *Mathena*, 893 F.3d at 268.

[7] Appendix A, pp. 10-11.

On October 25, 2002, a Statement of Charges was filed against Mr. Malvo in the District Court in Montgomery County. It consisted of six charges of first-degree murder. That charging document was superseded on June 16, 2005, when he and Mr. Muhammad were indicted by a grand jury in the Circuit Court for Montgomery County on the same six counts.

2. Trial and Guilty Pleas

Mr. Malvo and Mr. Muhammad had also been charged with homicide and related offenses in Virginia, and those charges were tried first. Trial on the Virginia charges against Mr. Malvo took place in November and December of 2003. Mr. Malvo's attorneys presented an insanity defense on the theory that he had been controlled by Mr. Muhammad.[8] Calling more than 40 witnesses, defense counsel painted a portrait of Mr. Malvo's upbringing and relationship with Mr. Muhammad. However, the jury rejected the insanity defense and Mr. Malvo was convicted of the two murder charges and a firearms charge. In the sentencing phase of the case before the jury in March 2004, the prosecution

[8] Mr. Muhammad was tried separately in Virginia on essentially the same charges. He was convicted and sentenced to the death penalty. The convictions and sentence were affirmed on appeal. *Muhammad v. Commonwealth*, *supra*. He was executed in November 2009. Ian Urbina, *Sniper Who Killed 10 is Executed in Virginia*, NEW YORK TIMES (Nov. 10, 2009), available at https://perma.cc/G86B-NRWX.

sought the death penalty,[9] but the jury recommended, and the court imposed, two terms of life in prison without parole.[10]

In October 2004, Mr. Malvo entered an *Alford* plea,[11] pursuant to a plea agreement, to additional murder and firearms counts in a different county in Virginia. As part of the plea agreement, he was sentenced to two additional terms of life without parole plus eight years.[12]

Prior to the resolution of his own charges in Maryland, Mr. Malvo offered to testify against Mr. Muhammad at the latter's trial in the Circuit Court for Montgomery County.[13] At that trial, which took place in May 2006, Mr. Malvo testified voluntarily, without a plea deal, on behalf of the State. He testified for nearly two full days and gave a detailed account of his travels with Mr. Muhammad and their crime spree.[14] In affirming Mr. Muhammad's conviction, the Court of Special Appeals noted that much of what Mr. Malvo testified to

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[9] The sentencing preceded the 2005 *Roper* decision that held that the death penalty may not be constitutionally imposed on juvenile offenders.

[10] *Mathena*, 893 F.3d at 268-69.

[11] An *Alford* plea is the "functional equivalent" of a guilty plea without an actual admission of guilt. *Bishop v. State*, 417 Md. 1, 20 (2010); *see also North Carolina v. Alford*, 400 U.S. 25 (1970).

[12] *Mathena*, 893 F.3d at 269-70.

[13] Mr. Muhammad had been extradited to Maryland while awaiting execution in Virginia. At the trial in Maryland, Mr. Muhammad was convicted on all six counts and sentenced to life without parole on each of the six counts, to be served consecutively to each other and to the sentences imposed in Virginia. *Muhammad*, 177 Md. App. at 199.

[14] *Muhammad*, 177 Md. App. at 217-22.

was otherwise unknown to the police. *Muhammad v. State*, 177 Md. App. at 221. It further noted that the only inconsistency in his testimony with prior statements to law enforcement was that he had previously claimed to be the triggerman in all of the shootings, in accordance with Mr. Muhammad's direction that Mr. Malvo claim responsibility, while at trial he admitted to pulling the trigger in two of the shootings. *Id*. at 221-22.

Several months later, on October 10, 2006, Mr. Malvo pled guilty to all six charges of first-degree murder pending against him in the Circuit Court for Montgomery County. The prosecutor informed the court that the guilty pleas were not induced by any concessions by the State – in other words, there was no plea deal. Mr. Malvo agreed with the State's statement of facts concerning the six murders, as set forth in Appendix A to this opinion. Sentencing was scheduled for a month later.

3. Investigation of Mr. Malvo's Background

In preparation for Mr. Malvo's sentencing, his defense counsel sought to provide the court with information concerning Mr. Malvo's background, his bond with Mr. Muhammad, his break with Mr. Muhammad, and the developments that led him to testify against Mr. Muhammad and to plead guilty to all charges in Maryland without a deal with the State. Counsel commissioned a detailed report from a licensed clinical social worker and submitted that report to the sentencing court, together with a report by a forensic

psychiatrist that had been completed three years earlier in connection with the Virginia case.[15] Both are contained in Appendix B to this opinion.

According to the report of the forensic psychiatrist, Mr. Malvo's parents separated when he was five years old, after which he rarely saw his father. His mother was later diagnosed with bipolar disorder. Beginning when he was nine years old, his mother left him in the care of others for extended periods of time while she pursued work elsewhere in the Caribbean. Mr. Malvo suffered physical and emotional abuse during this period and began displaying symptoms of clinical depression.

In the fall of 2000, Mr. Malvo met Mr. Muhammad in Antigua. Mr. Muhammad had absconded to the island with his children in the midst of a custody dispute. Mr. Malvo's mother purchased fraudulent citizenship documents from Mr. Muhammad and moved to the United States in December 2000. Mr. Malvo then moved in with Mr. Muhammad, who quickly gained significant influence over Mr. Malvo. During this time, the 15-year-old Malvo adopted Mr. Muhammad's religion and accent, began referring to himself as "John Lee Muhammad," and underwent rigorous physical and ideological training by Mr. Muhammad. In May 2001, Mr. Muhammad took Mr. Malvo to Florida, where Mr. Malvo was reunited with his mother.

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[15] According to the report, the forensic psychiatrist personally interviewed Mr. Malvo on 20 occasions, conducted 11 phone interviews with key figures in Mr. Malvo's life, reviewed tapes or transcripts of more than 50 additional interviews conducted by defense investigators and mitigation specialists, and reviewed other records and discovery relevant to the case.

Mr. Malvo believed that his best chance of becoming a United States citizen was to be adopted by Mr. Muhammad. In October 2001, he left Florida to join Mr. Muhammad, who had since lost custody of his own children, in Washington State. There, his relationship with Mr. Muhammad deepened. In December 2001, Mr. Malvo and his mother – who had travelled to Washington State to attempt to pry her son away from Mr. Muhammad – were arrested and detained by the federal immigration authorities. After his release from confinement in January 2002, Mr. Malvo rejoined Mr. Muhammad, who dramatically escalated his isolation and indoctrination efforts, including combat training and constant exposure to anti-government thinking.

The forensic psychiatrist concluded that, as a result of Mr. Muhammad's coercive persuasion, Mr. Malvo developed a dissociative disorder: "He was programmed by Muhammad to become adept at inducing trance-like states, lost his sense of identity and became totally dependent on and obedient to his all-knowing father." The forensic psychiatrist concluded that, at the time he committed his crimes, Mr. Malvo was "severely impaired in his ability to distinguish right from wrong and was severely impaired in his ability to resist the impulse to commit the act."

According to the report, as Mr. Malvo awaited trial in Virginia, his defense counsel attempted to detach him from Mr. Muhammad, to whom he initially expressed complete devotion. They put Mr. Malvo in touch with his biological father for the first time in years, as well as an influential teacher and guardian from Mr. Malvo's youth. According to the report, Mr. Malvo improved enough to cooperate with his defense team in his initial trial, but in 2004 he would sometimes revert back into his Muhammad identity.

By March 2006, Mr. Malvo decided that he should testify against Mr. Muhammad. Before he had discussed that decision with his defense counsel, he wrote to the prosecution, stating that "I need to do this for myself and for the victims." As noted above, two months later, he voluntarily testified as a key witness at Mr. Muhammad's trial and later pled guilty to all of the charges against him without a plea deal.

4. Sentencing

Mr. Malvo was sentenced in the Circuit Court on November 8, 2006. At the time of the sentencing, Maryland law required the sentencing court to impose a sentence of life imprisonment for each murder conviction. Maryland Code, Criminal Law Article ("CR"), §2-201(b) (2006).[16] However, the judge had discretion to, among other things, suspend all or part of a sentence, allow or prohibit eligibility for parole, and make a sentence concurrent with or consecutive to other sentences.

The presentence report that had been prepared by the Division of Parole and Probation stated that, under the Maryland sentencing guidelines, Mr. Malvo should receive six consecutive terms of life in prison without the possibility of parole, in light of the fact that his offenses resulted in the deaths of six persons. Relatives of two of the murder victims spoke at the sentencing proceeding. One understandably asked the court to ensure that Mr. Malvo would never re-enter society. The second forgave him for killing her son,

[16] At that time, the Maryland statute authorizing imposition of the death penalty for first-degree murder had set a minimum age of 18 for that punishment since 1987 – two decades before the Supreme Court's *Roper* decision. *See* CR §2-202(b)(2)(i) (2006); Chapter 636, Laws of Maryland 1987. The statutory provision authorizing the death penalty for adults has since been repealed as well. Chapter 156, Laws of Maryland 2013.

told Mr. Malvo it would have changed his life if he had known her son, and urged him to make amends with God. Both speakers expressed appreciation to the court system and others.

The State acknowledged that Mr. Malvo "has changed," and had expressed genuine remorse and "grown tremendously," but it also recommended that he receive "the absolute maximum allowable under the law" – six consecutive sentences of life without parole. Referring to Mr. Malvo's testimony against Mr. Muhammad, the prosecutor said "[t]hese acts of contrition … advanced the healing process and the closure process for the victims' families and the entire community…." In the prosecutor's words, Mr. Malvo was a "tragic figure," "under the sway of a truly evil man who infused a 17-year-old with the ideology of hate, an ideology, it appears that Mr. Malvo has now escaped from."

Mr. Malvo's defense counsel requested that the Circuit Court impose life sentences concurrent to one another and concurrent to his existing life sentences in Virginia. His attorneys did not request parole-eligible sentences. After his counsel gave brief remarks, Mr. Malvo expressed his remorse.

The Circuit Court first acknowledged Mr. Malvo's cooperation with law enforcement in the case against Mr. Muhammad and said that Mr. Malvo "should be commended for [his] acceptance of guilt and voluntary assistance without any promise of leniency." The court further stated:

> It appears you've changed since you were first taken into custody in 2002. As a child, you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him, your chances for a successful life became worse than they already were.

> You could have been somebody different. You could have been better. What you are, however, is a convicted murderer. You will think about that every day for the rest of your life. You knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings.
>
> You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. This community, represented by its people and the laws, does not forgive you.
>
> You've been held accountable for the crimes you've committed here. You will receive the maximum sentence allowed by the law of this State.

The Circuit Court then imposed six sentences of life without parole, consecutive to each other and to Mr. Malvo's life sentences in Virginia.

5. Motion to Correct an Illegal Sentence

More than a decade later, in January 2017, Mr. Malvo filed a motion to correct an illegal sentence under Maryland Rule 4-345(a) in the Circuit Court. The motion was based on the intervening Supreme Court decisions in *Miller* and *Montgomery*. Mr. Malvo's counsel asserted that, under those decisions, a juvenile homicide offender could be sentenced to life in prison without the possibility of parole only if the sentencing judge first determined that the offender was irredeemable. Because that determination had not been made at Mr. Malvo's sentencing, he argued, a new sentencing hearing was required.

The Circuit Court heard argument on the issue and, in August 2017, issued a memorandum opinion denying the request for a new sentencing hearing.[17] The Circuit

[17] The judge who had presided at Mr. Malvo's guilty plea and sentencing retired in 2006 shortly after sentencing Mr. Malvo. A different judge conducted the motion hearing and issued the memorandum opinion in 2017.

Court stated that the substantive rule on sentencing made retroactive by *Montgomery* applied only to mandatory life-without-parole sentences and, given that the sentencing judge in Mr. Malvo's case had discretion under Maryland law to sentence him to life *with* the possibility of parole, Mr. Malvo's sentence was not illegal within the meaning of Maryland Rule 4-345(a). Noting that the ruling was likely to be appealed, the court went on to consider whether Mr. Malvo's sentencing complied with the requirements of *Miller*. The court stated that the sentencing judge was presumed to be aware of the Supreme Court decision in *Roper* – the first of the Supreme Court's decisions distinguishing the juvenile and adult sentencing for purposes of the Eighth Amendment and the only one that preceded Mr. Malvo's sentencing. The court also noted that the sentencing judge was presented with mitigating evidence related to Mr. Malvo's youth at the time of sentencing, acknowledged some of it, and presumably took it into account in imposing the sentence. The court concluded that the sentence did not violate the principle set forth in *Miller*.

Mr. Malvo appealed the Circuit Court's ruling. The Court of Special Appeals stayed the appeal pending this Court's decision of several cases that later resulted in the decision in *Carter v. State*, 461 Md. 295 (2018). While that stay was still in effect, Mr. Malvo filed a pre-judgment petition for a writ of *certiorari* in this Court in January 2018. We held that petition pending the Supreme Court's decision in *Jones*. Following the Supreme Court's decision in that case and supplemental filings related to Mr. Malvo's petition, we granted a writ of *certiorari* in August 2021.

II

Discussion

A. Standard of Review

Under Maryland Rule 4-345(a), a court may correct an illegal sentence at any time. The legality of a sentence is a question of law that an appellate court reviews *de novo*. *Bailey v. State*, 464 Md. 685, 696 (2019). A sentence that constitutes cruel and unusual punishment under the Eighth Amendment or the Maryland Declaration of Rights is an illegal sentence for purposes of Maryland Rule 4-345(a). *Harris v. State*, 479 Md. 84, 113 (2022); *see also Randall Book Corp. v. State*, 316 Md. 315, 322 (1989).

B. Whether the Sentencing Complied with the Eighth Amendment

As outlined above, *Miller* and *Montgomery* established that the Eighth Amendment requires a hearing where "youth and its attendant characteristics" are considered as sentencing factors so that life without parole is not imposed in cases where a juvenile offender's crime resulted from transient immaturity. In *Jones*, where the sentencing occurred after *Miller* and *Montgomery*, the Court clarified that a discretionary sentencing system is "both constitutionally necessary and constitutionally sufficient" to satisfy the procedural component established by *Miller* and *Montgomery*. No explicit finding of the offender's incorrigibility is a prerequisite to a sentence of life without parole; instead, a defense presentation of argument about the offender's youth and the exercise of the court's discretion to impose a no-parole sentence can serve as an implicit finding of incorrigibility.

While sentencing Mr. Malvo against a constitutional background that lacked all of *Graham*, *Miller*, *Montgomery*, and *Jones*, the judge appeared to recognize that his crimes

– heinous as they were – were committed by a vulnerable and impressionable youth deeply under the sway of an adult he viewed as a father figure. Also, the judge stated that Mr. Malvo had changed in the four years since he had committed those crimes. At the same time, the judge told Mr. Malvo that "[w]hat you are, however, is a convicted murderer." These statements lead to two equally reasonable, though conflicting, inferences as to the sentencing judge's view on whether Mr. Malvo was "the rare juvenile offender whose crime reflects irreparable corruption" and who thus was constitutionally eligible under the subsequent Supreme Court cases for a sentence of life without parole. *Miller*, 567 U.S. at 479-80. A third, and perhaps more likely, inference is that the sentencing judge, who in 2006 had no reason to predict the Supreme Court's development of that standard, did not consider it.

The State argues that resentencing of Mr. Malvo is foreclosed by the Supreme Court's most recent decision in *Jones* and the fact that Maryland has a discretionary sentencing system. Mr. Malvo's sentencing is distinct from that in *Jones*. It is certainly true that Maryland had a discretionary sentencing regime when Mr. Malvo was sentenced in 2006 and, as usual, we presume that a sentencing judge knows the applicable law – that is, the range of the judge's discretion under the extant law. However, the sentencing in *Jones* took place *after Miller* had been issued and was in fact a resentencing following a remand from an appellate court as a result of *Miller*. The sentencing court in *Jones* acknowledged that it had discretion to impose a different sentence in light of *Miller* and explicitly exercised its discretion not to do so. *See Jones*, 141 S. Ct. at 1311, 1313.

In contrast, Mr. Malvo was sentenced *before* the decisions in *Miller* and *Montgomery* were issued and the sentencing court was therefore unaware of the Eighth Amendment constraints that those decisions would announce. We presume that a sentencing judge knows and applies the law, but we do not presume that a sentencing judge is clairvoyant.[18] Indeed, in *Jones*, the Supreme Court acknowledged that most offenders

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[18] The dissenting opinion of Judge Watts equates Mr. Malvo's sentencing proceeding to that in *Harris v. State*, 479 Md. 84 (2022). As Judge Watts acknowledges, in that case, a juvenile offender was sentenced to life *with* parole and, accordingly, the *substantive* requirement of *Miller* did not apply. However, the Court in *Harris* noted in *dicta* that the sentencing proceeding complied with *Miller*'s *procedural* requirement, as construed in *Jones*. 479 Md. at 118-20. Like the resentencing at issue in *Jones*, the sentencing in *Harris* occurred *after* the Supreme Court had announced the substantive incorrigibility standard in *Miller* and *Montgomery*. We can presume, as we usually do, that the sentencing court applied that existing law. As explained in the text, that is not this case, where the sentencing occurred *before* those decisions.

The dissenting opinion of Judge Hotten likewise merges the procedural and substantive elements of *Miller* and therefore does not recognize that *Jones* "[did] not disturb" the substantive requirement of *Miller* that, as recognized in *Montgomery*, made it retroactive to cases such as this one. *Jones*, 141 S. Ct. at 1317 n.4. Contrary to the suggestion in Judge Hotten's dissent, there is no dispute that *Jones* held that a "separate factual finding" is not required to satisfy the procedural component of *Miller*. Dissent of Judge Hotten at 7-8 n.2. But that does not mean that a sentencing that is completely ignorant of the substantive standard set by *Miller* – i.e., one that preceded its announcement – necessarily complies with the Eighth Amendment. Indeed, if the mere existence of a discretionary sentencing regime that could take a defendant's youth into account alone is sufficient to satisfy *Miller*, there would have been no reason for the Supreme Court to vacate life-without-parole sentences imposed prior to *Miller* and *Montgomery* under discretionary sentencing regimes and remand those cases for resentencing in light of those cases. But that is what the Court did. *See, e.g., Tatum v. Arizona*, 137 S. Ct. 11 (2016); *Purcell v. Arizona*, 137 S. Ct. 369 (2016); *Najar v. Arizona*, 137 S. Ct. 369 (2016); *Arias v. Arizona*, 137 S. Ct. 370 (2016); *DeShaw v. Arizona*, 137 S. Ct. 370 (mem.) (2016); *Blackwell v. California*, 568 U.S. 1081 (2013); *Mauricio v. California*, 568 U.S. 975 (2012); *Guillen v. California,* 567 U.S. 950 (2012). As noted in the text, in referring to juvenile offenders like Mr. Malvo, for whom *Miller* and *Montgomery* applied retroactively,

to whom *Miller* and *Montgomery* applied retroactively had already been resentenced. *Jones*, 141 S. Ct. at 1317 n.4. ("By now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*.").

The State argues that the sentencing judge in Mr. Malvo's case would be presumed to be aware of the *Roper* decision – the first of the series of Supreme Court decisions on Eighth Amendment constraints on the sentencing of juvenile offenders, which prohibited imposition of the death penalty. No doubt the sentencing court was well aware that the death penalty was off the table in Mr. Malvo's case under the relevant Maryland statute, as it had been for almost two decades.[19] And the court may well have been familiar with the *Roper* decision's interpretation of the Eighth Amendment. But it would be quite another thing for a sentencing court to extrapolate from that case, forecast the future holdings of *Miller* and *Montgomery*, and then silently apply that foresight in a sentencing proceeding.[20]

In our view, the legality of a sentence under the Eighth Amendment is not a topic for this Court's speculation. Here, it is unclear at best whether Mr. Malvo's sentencing proceeding complied with the Eighth Amendment constraint announced in *Miller*, made

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the Supreme Court observed in *Jones* that "[b]y now, most offenders … have received new discretionary sentences under *Miller*." 141 S. Ct. at 1317 n.4.

[19] *See* footnote 16 above.

[20] Notably, the trial and appellate courts in Arkansas, Alabama, and Louisiana, which issued the decisions reversed in *Miller* and *Montgomery*, also had the benefit of the *Roper* decision at the time they issued the decisions that were later overturned by the Supreme Court.

retroactive in *Montgomery*, and affirmed in *Jones*. Accordingly, we shall remand to the Circuit Court for resentencing.[21]

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[21] Mr. Malvo's flagship argument is based on the Eighth Amendment and the recent Supreme Court decisions construing it. Alternatively, he argues that his sentence was illegal under Article 25 of the Maryland Declaration of Rights, which prohibits the imposition of "cruel *or* unusual punishment." (emphasis added). This Court has generally construed the language of Article 25, which pre-dates the Eighth Amendment, consistently with the Supreme Court's construction of the Eighth Amendment, although the Court has noted that the textual difference in the two provisions may in some circumstances support a broader interpretation of Article 25. *Thomas v. State*, 333 Md. 84, 103 n.5 (1993).

State supreme courts that have construed similarly-worded state constitutional provisions to provide additional protections have noted a grammatical basis for doing so. *See, e.g.*, *People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992) (observing that "it seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are either 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are both 'cruel' *and* 'unusual.'"); *see also* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L.J. 929, 967 (2002) (articulating similar reasoning with respect to Article 25); *cf.* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018) at pp. 92-96 (describing early decision striking down forced sterilization sentence under "cruel or unusual" provision of a state constitution).

Some state supreme courts have held that such language bars the imposition of a sentence of life without the possibility of parole for a juvenile offender. *See, e.g., Bullock, supra*; *Diatchenko v. District Attorney for Suffolk District*, 1 N.E.3d 270 (Mass. 2013); *see also State v. Kelliher*, 873 S.E.2d 366, 382-387 (N.C. 2022) (holding that the ban on "cruel or unusual" punishments in the North Carolina constitution prohibits the imposition of a juvenile life-without-parole sentence "unless the trial court expressly finds that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated"); *State v. Bassett*, 428 P.3d 343, 349-350 (Wash. 2018) (holding that a Washington constitutional provision prohibiting "cruel" punishment categorically bars life-without-parole sentences for juvenile offenders).

C. Whether JUVRA Renders a Resentencing Unnecessary

The State argues that, regardless of whether Mr. Malvo's life-without-parole sentences violate the Eighth Amendment, the possibility of a sentence reduction under JUVRA cures any constitutional deficiency. Thus, in the State's view, Mr. Malvo's sentences are each effectively life with the possibility of parole – at least as far as the Eighth Amendment is concerned.

In many instances in which a juvenile offender is serving a lengthy sentence, the State's argument is likely to be correct. As this Court has noted, "[t]here is no constitutional requirement that a state have a parole system *per se*, so long as the state provides a meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Carter*, 461 Md. at 318.[22] Both JUVRA and the parole regulations require that a court and the Parole Commission, respectively, consider the individual's youth at the time of the offense(s) and assess the offender's subsequent maturity and rehabilitation. *Compare* CP §8-110 (JUVRA review criteria) *with* COMAR 12.08.01.18 (considerations for parole).

As noted above, JUVRA provides that a court may reduce the duration of a juvenile offender's sentence if the court finds that (1) the individual is not a danger to the public;

As we are holding that the Eighth Amendment requires that Mr. Malvo be resentenced, we need not decide whether Article 25 would require that relief even if the Eighth Amendment did not.

[22] In *Carter*, the Court concluded that the Maryland parole system provided the requisite opportunity for release for Eighth Amendment purposes. 461 Md. at 365. *Carter* pre-dated the passage of JUVRA.

and (2) the interests of justice will be better served by a reduced sentence. CP §8-110(c). Of the 10 statutory factors that a reviewing court must consider, most direct the court to consider the offender's youth at the time of the offense and the offender's subsequent progress while incarcerated. These include "whether the individual has substantially complied with the rules of the institution," "whether the individual had completed an educational, vocational, or other program," "whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction," and "the diminished culpability of a juvenile as compared to an adult…." CP §8-110(d). The court must issue a written decision that addresses these factors. CP §8-110(e).

If anything, review of a sentence under JUVRA may provide a better opportunity than the parole process for many offenders to secure release or a sentence reduction. Unlike parole hearings, which are described by the regulations as "interview[s]" where "formal presentations by attorneys, relatives, and others interested are not permitted," COMAR 12.08.01.18C,[23] a juvenile offender who files a motion under JUVRA is entitled to a court hearing at which the offender may introduce evidence in support of the motion. CP §8-110(b). Thus, as a general rule, JUVRA is likely to provide the "meaningful opportunity for release" contemplated by the Supreme Court.

But it is not clear that JUVRA alone would cure an illegal sentence and provide a meaningful opportunity for release equivalent to parole for a defendant serving multiple

[23] *See Farmer v. State*, ___ Md. ___, ___ (2022), slip op. at 2-8, for a more detailed description of the parole standards and process.

consecutive life-without-parole sentences. Assuming that the individual's sentences are illegal for failure to comply with *Miller* and the defendant is entitled to be resentenced, JUVRA might not be an adequate substitute for the imposition of legal sentences. There are many variables at play: whether on resentencing, the sentencing court, newly mindful of the Eighth Amendment constraints, determines that the defendant is incorrigible; if not, how the defendant is resentenced (whether the sentences are appropriately consecutive or concurrent and how they are aggregated[24]); and how JUVRA is construed to apply to them.[25]

In Mr. Malvo's case, this may be an entirely academic question. His Maryland life-without-parole sentences run consecutively to each other and to the Virginia sentences that he is currently serving.[26] The first step – a sentencing compliant with the Eighth Amendment – has not yet happened. At this time, we cannot say that JUVRA alone renders his sentence compliant with the Eighth Amendment as construed in *Miller*.

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[24] That determination can also affect a defendant's timeline for parole eligibility.

[25] As noted in *Farmer*, ___ Md. at ___, slip op. at 26, there are several open questions concerning the application of JUVRA. The answers to those questions may determine the extent to which the statute functions as a meaningful opportunity for release equivalent to parole for a juvenile offender serving multiple consecutive life-without-parole sentences.

[26] Under a law enacted in 2020, all juvenile offenders in Virginia are now eligible for parole after serving 20 years. Va. Code §53.1-165.1(E). Of course, that law does not mean that Mr. Malvo will be paroled in Virginia when he becomes eligible – or ever.

III

Conclusion

To comply with the standard that the Supreme Court has set for sentencing a juvenile offender to life without parole, the Circuit Court must resentence Mr. Malvo. We express no opinion on what sentence the Circuit Court should impose.[27] As in any criminal case, the sentencing court has broad discretion and there will be no question in this instance that the sentencing court is aware of the relevant Eighth Amendment constraints.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BETWEEN PETITIONER AND MONTGOMERY COUNTY.

[27] Judge Hotten's dissent concludes that the offenses committed by Mr. Malvo were not the product of transient immaturity and that the six consecutive life-without-parole sentences are "just, fair, and compliant with the Eighth Amendment." Although the Supreme Court standard still permits a sentencing court to sentence a juvenile homicide offender to life without parole, she asserts that the General Assembly's policy choice in the prospective provision of JUVRA will eliminate that option on remand. Dissent of Judge Hotten at 22 n.8. That may well be true, but as horrible as we may find these crimes, it is not our role to advocate for any particular sentence or to make the decision for the sentencing court. Rather, it is to ensure that sentences are imposed in compliance with the Eighth Amendment as interpreted by the Supreme Court.

Circuit Court for Montgomery County
Case No. 102675-C

Argued: February 8, 2022

IN THE COURT OF APPEALS

OF MARYLAND

No. 29

September Term, 2021

LEE BOYD MALVO

v.

STATE OF MARYLAND

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*Getty, C.J.
*McDonald
Watts
Hotten
Booth
Biran
Gould,

JJ.

Dissenting Opinion by Watts, J., which Gould, J., joins.

Filed: August 26, 2022

*Getty, C.J., and McDonald, J., now Senior Judges, participated in the hearing and conference of this case while active members of this Court. After being recalled pursuant to Md. Const., Art. IV, § 3A, they also participated in the decision and adoption of this opinion.

Respectfully, I dissent. I have no quarrel with the Majority's conclusion that this case is subject to the Supreme Court's holding in Miller v. Alabama, 567 U.S. 460, 489 (2012) that a trial court must consider a juvenile offender's youth and attendant circumstances before imposing a sentence of life imprisonment without the possibility of parole, which was made retroactive in Montgomery v. Louisiana, 577 U.S. 190 (2016). See Maj. Slip Op. at 22-24.[1] That said, I would reach a different conclusion than the majority opinion based on the record in this case, which demonstrates that the Circuit Court for Montgomery County essentially complied with the forthcoming requirements of Miller by considering the youth or juvenile status of Lee Boyd Malvo, Petitioner, at sentencing.

The record in this case demonstrates that Mr. Malvo received an individualized sentencing procedure at which his youth was considered, and the circuit court recognized that it had the discretion to impose a lesser sentence than life without parole. At the sentencing proceeding, while explaining the basis for the sentences, when speaking to Mr. Malvo, among other remarks, the circuit court stated: "As a child**,** you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him**,** your chances for successful life became worse than they already were." Immediately afterward, the circuit court told Malvo: "You could have been somebody different. You could have been better."

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[1]On November 8, 2006, the circuit court conducted the sentencing proceeding. On January 12, 2017, Malvo filed a motion to correct an illegal sentence. Malvo contended, among other things, that the Supreme Court's decision in Miller applied to Maryland's discretionary scheme for imposing a sentence of life imprisonment without the possibility of parole.

The circuit court's explanation of the reason for the sentence demonstrates that it took Mr. Malvo's status as a juvenile into account. To be sure, at sentencing, the circuit court did not make an explicit finding that it would impose consecutive life without parole sentences despite Mr. Malvo's juvenile status or that Mr. Malvo was incorrigible. But the circuit court pointed out that Muhammad had corrupted Mr. Malvo while he was an impressionable child, observed that Mr. Malvo could have grown up to be a better person, and acknowledged that Mr. Malvo remained a young man at the time of the sentencing proceeding. The record demonstrates that Mr. Malvo received a personalized sentencing procedure at which his youth and its attendant characteristics were considered, and the circuit court was aware that it had the discretion to impose a lesser sentence. As such, the circuit court satisfied the requirements of the Supreme Court's holding in Miller. The conclusion that the Supreme Court's holding in Miller was satisfied in this case is supported by Jones v. Mississippi, ___ U.S. ___, 141 S. Ct. 1307, 1319 (2021), in which the Supreme Court held that, under Miller, a trial court is not required to find that a juvenile offender is permanently incorrigible before imposing a sentence of life imprisonment without the possibility of parole.

According to the majority opinion's interpretation of the Supreme Court's holdings in Miller and Jones, "an offender deemed corrigible cannot constitutionally be sentenced to life without the possibility of parole." Maj. Slip Op. at 9. And "[n]o explicit finding of the offender's incorrigibility is a prerequisite to a sentence of life without parole; instead, a defense presentation of argument about the offender's youth and the exercise of the court's discretion to impose a no-parole sentence can serve as an implicit finding of

incorrigibility." Maj. Slip Op. at 22. I will not take issue with the Majority's distillation of the Supreme Court's holdings in Miller and Jones to the extent that the Majority concludes that after Jones, Miller's substantive holding remains good law.

But in our recent opinion in Harris v. State, 479 Md. 84, 119-20, 276 A.3d 1071, 1092 (2022), we concluded that in sentencing Mr. Harris the trial court complied with Miller. If that is so, the record in this case plainly demonstrates that the circuit court complied with Miller in sentencing Mr. Malvo. In Harris, a case involving a sentence of life with the possibility of parole imposed after the Supreme Court issued Miller, we concluded that, although Miller did not apply and the trial court was not required to take youth into account before imposing a sentence of life imprisonment with the possibility of parole, the record demonstrated that at sentencing the trial court had indeed complied with Miller. See Harris, 479 Md. at 119-20, 276 A.3d at 1092. In Harris, in imposing sentence, the circuit court did not make any statements or observations whatsoever with respect to Harris's youth or juvenile status. Instead, we concluded that the circuit court considered Harris's youthful status based on the circumstance that the circuit court received a presentence investigation report that mentioned the Harris's age, that Harris's counsel made arguments based on his age at the sentencing proceeding, and that a letter written by Harris in which he emphasized his age was read aloud at the sentencing proceeding. See id. at 118-19, 276 A.3d at 1091.

Under these circumstances, we reached the conclusion that in imposing sentence the circuit court considered Mr. Harris's status as a juvenile and although *dicta* (because Mr. Harris received a sentence of life with parole), we concluded that the circuit court satisfied

the requirements of Miller. Measured against the standard that this Court set forth in Harris for determining whether a sentencing court considered a defendant's youth and attendant circumstances, the resentencing ordered by the Majority in this case is unwarranted. The circuit court plainly took Mr. Malvo's youth, *i.e.*, his juvenile status, into account at sentencing.

In a footnote, the Majority criticizes this dissent as equating the sentencing proceedings in Harris and this case. See Maj. Slip Op. at 24 n.18. But rather than critiquing the dissent, the Majority's remarks reinforce its point. The sentencing proceeding in Harris occurred after the Supreme Court's announcement of the incorrigibility standard in Miller and Montgomery, *i.e.*, the sentencing in Harris occurred at a time when the trial court was presumed to have known the law. And indisputably, in reviewing the sentencing in Harris, this Court stated that "all *Miller* requires is an individualized sentencing proceeding where the sentencing judge has discretion to give the juvenile offender a sentence that is less than life in prison without the possibility of parole." Harris, 479 Md. at 117, 276 A.3d at 1090 (citation omitted). Thus, with the sentencing judge having made no acknowledgment of Harris's youth at all, this Court concluded that the sentencing proceeding in Harris would have fulfilled the requirements set forth by the Supreme Court in Miller. See Harris, 479 Md. at 119-20, 276 A.3d at 1092. Irrespective of the circumstance that the sentencing in this case occurred before Miller and Montgomery, the record clearly shows that the circuit court took Mr. Malvo's youth into consideration and that he was afforded an individualized sentencing proceeding. If we are to rely on the discussion of Miller and Montgomery that

this Court set forth in Harris, the remand ordered by the Majority in this case is plainly unjustified.[2]

Under the standard set by the Majority, every sentencing of a juvenile that occurred before the Supreme Court's decision in Miller and resulted in a sentence of life without parole would be subject to resentencing—because the sentence occurred before Miller. In this case, it could not be more evident that the sentencing judge took Mr. Malvo's juvenile status into account, even though the sentencing proceeding occurred before Miller. The circumstance that a juvenile sentencing may have occurred before the Supreme Court's holding in Miller does not automatically mean that the sentencing judge failed to consider the juvenile's age and youthful characteristics or to provide an individualized sentencing proceeding.

It is not the timing of the sentencing in Mr. Malvo's case that raises an issue. Rather, it is that in its discussion of what is required under Miller of a sentencing judge, this Court explained in Harris a view that would be consistent with affirming the sentence in Mr. Malvo's case. But, now, the Majority raises the bar as to what Miller requires and, in doing so, authorizes a resentencing for Mr. Malvo. The Majority does not attempt to rectify the dichotomy between its discussion of Miller in this Court's opinion in Harris and the conclusions reached in this case.

The reality is that it is difficult to conceive of more egregious offenses committed by a juvenile than those committed by Mr. Malvo. Mr. Malvo's murders were numerous,

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[2]The Majority's statement that the dissent equates the Harris and Malvo sentencings is obviously not accurate and requires no further response. See Maj. Slip Op. at 24 n.18.

carefully planned, involved random victims whom he did not know, took place in public over a prolonged period of time, and terrorized multiple communities. In sum, Mr. Malvo engaged in a series of arbitrary public executions of people who happened to be outdoors. The record reflects that although the circuit court considered Mr. Malvo's youth, it determined, among other things, that the nature of the offenses outweighed the circumstance that he was seventeen years old when he committed the offenses. In other words, the circuit court considered the circumstances of the six murders, and Mr. Malvo's youth and its attendant characteristics as required by Miller, and imposed six consecutive sentences of life imprisonment without the possibility of parole given the unprecedented and heinous nature of the offenses.

For the above reasons, respectfully, I dissent.

Judge Gould has authorized me to state that he joins in this opinion.

Circuit Court for Montgomery County
Case No. 102675C
Argued: February 8, 2022

IN THE COURT OF APPEALS

OF MARYLAND

No. 29

September Term, 2021

LEE BOYD MALVO

v.

STATE OF MARYLAND

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*Getty, C.J.,
*McDonald,
Watts,
Hotten,
Booth,
Biran,
Gould,

JJ.

Dissenting Opinion by Hotten, J., which Gould, J., joins.

Filed: August 26, 2022

* Getty, C.J. and McDonald, J., now Senior Judges, participated in the hearing and conference of this case while active members of this Court. After being recalled pursuant to Maryland Constitution, Article IV, Section 3A, they also participated in the decision and adoption of the majority opinion.

I respectfully dissent. Petitioner, Lee Boyd Malvo, received sentences that were just, fair, and compliant with the United States and Maryland Constitutions.

When Petitioner was 17-year-old, he, together with John Allen Muhammad, perpetrated one of the most heinous series of crimes in the history of the State. Between October 2 and 22, 2002, Petitioner and Mr. Muhammad systematically murdered six people in Montgomery County, Maryland. Their victims were targeted at random, in the course of their daily activities, and shot by Petitioner and Mr. Muhammad with a long-range rifle fired from a vehicle outfitted with a sniper's nest in its trunk. The victims included: James Martin, who was killed in a parking lot of a Shoppers Food Warehouse; James Sonny Buchanan, who was killed while mowing the lawn; Premkumar Walekar, who was killed while fueling his car at a gas station; Maria Sarah Ramos, who was killed while sitting on a bench at the Leisure World Shopping Center; Lori Ann Lewis-Rivera, who was killed while vacuuming her minivan at a gas station; and Conrad Johnson, who was killed stepping out of a commuter bus. In addition, a student, Iran Brown, was shot and severely wounded on the grounds of his middle school in Prince George's County.

These crimes were a part of a larger spree that spanned into Virginia and the District of Columbia, during which Petitioner and Mr. Muhammad killed ten people and attempted to kill three others. Petitioner and Mr. Muhammad became known as the "Beltway Snipers" and intentionally perpetrated a "reign of terror" over the Washington, D.C. metropolitan area and Montgomery County in particular. *Muhammad v. State*, 177 Md. App. 188, 198, 934 A.2d 1059, 1065 (2007). Petitioner and Mr. Muhammad left threatening notes near the scenes of their crimes, including one that said: "P.S. your

children are not safe anywhere at any time." *Id.* at 210–11, 934 A.2d at 1072. Many more murders were planned and doubtless would have been carried out, had authorities failed to capture Petitioner and Mr. Muhammad on October 24, 2002.

For each of the six murders committed in Maryland, Petitioner received a sentence of life imprisonment without the possibility of parole, to be served consecutively with each other and with any sentence imposed by another jurisdiction. Petitioner has yet to serve any of his Maryland sentences. Thus far, he has been serving sentences in Virginia that were imposed for the murders he committed in that State. Virginia recently passed legislation making any juvenile eligible for parole after serving twenty years in prison. *See* Va. Code Ann. § 53.1-165.1E (2020). As the twenty-year anniversary of the Beltway Sniper attacks approaches, Petitioner has chosen to challenge the validity of his Maryland sentences.[1]

The Majority believes that a recent series of United States Supreme Court cases, addressing the circumstances under which the Eighth Amendment of the United States Constitution permits a juvenile offender to be sentenced to life in prison without the possibility of parole, likely renders Petitioner's sentences unconstitutional and requires his resentencing. I disagree. As will be discussed in greater detail below, the most recent iteration of that line of cases, *Jones v. Mississippi,* ___ U.S. ___, 141 S. Ct. 1307 (2021), unequivocally holds that *all* that is procedurally required prior to sentencing a juvenile

[1] In February 2020, the United States Supreme Court dismissed another case filed by Petitioner that challenged his life-without-parole sentence in Virginia given the recent passage of Va. Code Ann. § 53.1-165.1E (2020). Petitioner could be eligible for parole in Virginia this year.

offender to life in prison without the possibility of parole is an individualized sentencing proceeding in which the court has discretion to sentence the offender to less than life without the possibility of parole. Petitioner received the required sentencing proceeding. The sentencing court had the discretion to impose a sentence of less than life in prison without the possibility of parole and considered mitigating factors such as Petitioner's youth and its attendant circumstances prior to sentencing. The record confirms that the sentencing court considered those mitigating factors, including Petitioner's immaturity and ability to reform, prior to sentencing, but nonetheless, determined Petitioner's crimes warranted life in prison without the possibility of parole. The sentencing court was permitted to do so under the Eighth Amendment.

Neither were Petitioner's sentences unconstitutionally disproportionate as applied under the Eighth Amendment, as Petitioner's crimes were not the result of "transient immaturity." Article 25 of the Maryland Declaration of Rights affords no additional protections beyond those provided under the Eighth Amendment. Finally, any alleged deficiencies in Petitioner's sentence have been cured by the General Assembly's passage of the Juvenile Restoration Act ("JUVRA"). For the foregoing reasons, which are described below, I would affirm Petitioner's sentences.

The Eighth Amendment and Juvenile Sentencing

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments[.]" U.S. CONST. amend. VIII. This guarantee "flows from the basic precept of justice that punishment for crime should be graduated and proportioned

to both the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469, 132 S. Ct. 2455, 2463 (2012) (cleaned up).

In *Graham v. Florida*, the United States Supreme Court held that the Eighth Amendment categorically prohibited a juvenile nonhomicide offender from being sentenced to life without the possibility of parole. 560 U.S. 48, 82, 130 S. Ct. 2011, 2034 (2010), *as modified* (July 6, 2010). The Court elaborated that a state "is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime" but must impose a sentence that provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 130 S. Ct. at 2030. The Court stated the Eighth Amendment does permit some juvenile non-homicide offenders to be incarcerated for life, as "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.*, 130 S. Ct. at 2030. However, it prohibited courts "from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*, 130 S. Ct. at 2030.

Two years later, in *Miller v. Alabama*, the United States Supreme Court addressed the relevance of the Eighth Amendment to juveniles sentenced to life without the possibility of parole for homicide offenses. 567 U.S. 460, 465, 132 S. Ct. 2455, 2460 (2012). The Court declined to categorically prohibit all sentences of life without parole for juvenile offenders, but instead held that the Eighth Amendment prohibits states from imposing *mandatory* life sentences without parole for homicide offenses. *Id.*, 132 S. Ct. at 2460. The Court reasoned "youth matters in determining the appropriateness of a lifetime

of incarceration without the possibility of parole[,]" *id.* at 473, 132 S. Ct. at 2465, and sentencing schemes that impose "mandatory life-without-parole sentences on juvenile homicide offenders[] . . . by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476, 132 S. Ct. at 2467.

Alternatively, the Court required "that a sentencer have the ability to consider the 'mitigating qualities of youth[]'" through an individualized sentencing proceeding in which the sentencer had discretion to give a lesser sentence. *Id.*, 132 S. Ct. at 2467. The Court listed some of the "hallmark features" of youth that mandatory life-without-parole sentences prohibit sentencers from considering, including: "immaturity, impetuosity, and failure to appreciate risks and consequences[,]" "the family and home environment[,]" the "extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him[,]" the "incompetencies associated with youth" including the "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys[,]" and "*the possibility of rehabilitation*[,]" *i.e.*, corrigibility. *Id.* at 477–78, 132 S. Ct. at 2468 (emphasis added). These are not a checklist of "factors" the Court in *Miller* required every sentencing judge to review before sentencing. Rather, they are examples of mitigating qualities of youth that are precluded from consideration by mandatory life-without-parole sentences.

The Court in *Miller* concluded its opinion by stating that

> [w]e therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . By making youth (and all that accompanies it) irrelevant to

> imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Id. at 479, 132 S. Ct. at 2469. The Court declined to categorically prohibit the imposition of sentences of life without the possibility of parole for juveniles, recognizing that a sentencing judge may find "the rare juvenile offender whose crime reflects irreparable corruption[]" justifying such a sentence. *Id.* at 479–80, 465, 132 S. Ct. at 2469. It stated that "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480, 132 S. Ct. at 2469 (footnote omitted). In *Montgomery v. Louisiana*, 577 U.S. 190, 212, 136 S. Ct. 718, 736 (2016), *as revised* (Jan. 27, 2016), the Court held *Miller* announced a substantive rule that applied retroactively.

Any doubt regarding the precise holding of *Miller* was quelled last year, in *Jones v. Mississippi*, __U.S. __, 141 S. Ct. 1307. In that case, the Court explained that *Miller* does not require a sentencer to make a specific finding as to a juvenile homicide offender's permanent incorrigibility before sentencing the offender to life without the possibility of parole, so long as the sentencer has the discretion to give a lesser sentence. *Id.* at __, 141 S. Ct. at 1319. The Court unequivocally held that "[i]n a case involving an individual who was under 18 when he or she committed a homicide, *a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.*" *Id.* at __, 141 S. Ct. at 1313 (emphasis added) (footnote omitted).

The Court in *Jones* was incredibly clear that, so long as a sentencing judge has discretion to consider a juvenile youth in sentencing, it *necessarily* will consider the defendant's youth. It stated:

> *First*, and most fundamentally, an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. Jones's argument to the contrary rests on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth. *But if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth*, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, *it would be all but impossible for a sentencer to avoid considering that mitigating factor.*
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> It is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case. Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth. *But the key point remains that, in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor.*

Id. at __, 141 S. Ct. at 1319–20 (some emphasis added) (footnotes omitted).

Whether a juvenile sentence of life in prison without the possibility of parole is "constitutionally sufficient" under the Eighth Amendment depends upon the presence discretionary sentencing procedure.[2] It is decisively *not*, as the majority holds, whether the

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[2] The Majority contends that *Miller* imposed a substantive requirement that the sentencing court make a determination, at least implicitly, of permanent incorrigibility that is distinct and apart from this procedural requirement. *Malvo v. State*, No. 29, Sept Term 2021, slip op. at 24 n.18 (Md. Aug. __, 2022). This interpretation was expressly rejected

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> by the United States Supreme Court in *Jones*:
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> Jones relies on language in *Montgomery* that described *Miller* as permitting life-without-parole sentences only for "those whose crimes reflect permanent incorrigibility," rather than "transient immaturity." 577 U.S. at 209, 136 S. Ct. 718. In other words, because the *Montgomery* Court deemed *Miller* to be a substantive holding, and because *Montgomery* said that life without parole would be reserved for the permanently incorrigible, Jones argues that the *Montgomery* Court must have envisioned a separate factual finding of permanent incorrigibility, *not just a discretionary sentencing procedure where youth would be considered.*
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> *That is an incorrect interpretation of* Miller *and* Montgomery. We know as much because *Montgomery* said as much. To reiterate, the *Montgomery* Court explicitly stated that "a finding of fact regarding a child's incorrigibility . . . is not required." 577 U.S. at 211, 136 S. Ct. 718.
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> *To break it down further:* Miller *required a discretionary sentencing procedure*. The Court stated that a mandatory life-without-parole sentence for an offender under 18 "poses too great a risk of disproportionate punishment." 567 U.S. at 479, 132 S. Ct. 2455. Despite the procedural function of *Miller*'s rule, *Montgomery* held that the *Miller* rule was substantive for retroactivity purposes and therefore applied retroactively on collateral review. 577 U.S. at 206, 212, 136 S. Ct. 718. But in making the rule retroactive, the *Montgomery* Court unsurprisingly declined to impose new requirements not already imposed by *Miller*. As *Montgomery* itself explained, the Court granted [*certiorari*] in that case not to consider whether the rule announced in Miller should be expanded, but rather simply to decide whether *Miller*'s "holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." 577 U.S. at 194, 136 S. Ct. 718. On the question of what *Miller* required, *Montgomery* was clear: "A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id*., at 210, 136 S. Ct. 718 (internal quotation marks omitted). But a separate finding of permanent incorrigibility "is not required." *Id*., at 211, 136 S. Ct. 718.

Jones, ___ U.S. at ____, 141 S. Ct. at 1316–18 (emphasis added) (footnote omitted). As *Jones* is the most recent word on the matter, it is the case we must follow.

sentencing court, at least implicitly, found the juvenile to be "incorrigib[le]." *Malvo*, slip op. at 22; *see Jones*, ___ U.S. at ___, 141 S. Ct. at 1320 ("[A]n on-the-record sentencing explanation with an implicit finding of permanent incorrigibility is not required by or consistent with Miller."). Contrary to the assertions of the Majority and Petitioner, a sentencing court's consideration of an offender's youth and its attendant characteristics, including his potential for corrigibility, is not dependent on the sentencer's previous knowledge of *Miller* or its progeny. *See Malvo*, slip op. at 23–25. Rather, as the Court in *Jones* explained, when a sentencing court has discretion to consider a defendant's youth, it "*necessarily* will" consider it, "it would be all but *impossible* for a sentencer to avoid" considering it, and the sentencing court "*cannot avoid*" considering it. *Id.* at __, 141 S. Ct. at 1319–20 (emphasis added). In fact, the Court explained in a footnote that the only conceivable way for a sentencer to not consider a juvenile offender's youth when given discretion to do so is if defense counsel somehow failed to make the sentencer aware that the offender was a juvenile. *Id.* at __ n.6, 141 S. Ct. at 1320 n.6. Yet the Court said that *even in that* "*highly unlikely scenario*, the defendant may have a potential ineffective-assistance-of-counsel claim, *not a* Miller *claim*[.]" *Id.*, 141 S. Ct. at 1320 n.6 (emphasis added). The proposition that a sentencing court, which has discretion to impose a sentence less than life without the possibility of parole, could violate *Miller* simply because it did not expressly consider the juvenile offender's youth and its attendant circumstances, directly contradicts the United States Supreme Court's opinion in *Jones.*

The holding in *Jones* also makes practical sense. No sentencing judge is unaware that youth entails certain infirmities in decision making due to immaturity or that juveniles

generally have a greater capacity to reform than adults. To say that a sentencing judge, who has discretion and is tasked with considering mitigating and aggravating factors prior to sentencing a juvenile offender, would not consider an offender's youth and its attendant characteristics as mitigating factors simply because he or she did not yet have the benefit of reading the United States Supreme Court's decision in *Miller*, contradicts both common sense and the express holding of *Jones*.

Petitioner's sentences did not violate the Eighth Amendment

Petitioner's sentences were not violative of the Eighth Amendment under *Miller* and *Jones*. It is uncontested that the sentencing court in Petitioner's case had the discretion to sentence Petitioner to less than life without the possibility of parole and was aware that he was a juvenile when he committed the murders. That alone is sufficient under *Miller* and *Jones* to find that the sentencing court considered Petitioner's youth and its attendant circumstances prior to rendering its sentence. The record in this case goes even further, and *explicitly* demonstrates the sentencing court's consideration of Petitioner's youth and its attendant circumstances.

As contemplated in *Jones*, many of defense counsel's arguments during Petitioner's sentencing hearing focused on his youth and its attendant circumstances. *See Jones*, ___ U.S. at ____ 141 S. Ct. at 1319 ("But if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, *especially if defense counsel advances an argument based on the defendant's youth*.") (some emphasis added). In seeking to mitigate Petitioner's sentence, defense counsel stated, among other things:

> [T]his young man, but for the random intervention of John Allen Muhammad in his life, would not be sitting in a courtroom in Maryland, would not be sitting in a cell in Red Onion in Pound, Virginia for the rest of his life.
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> At the tender age of 15 or 16, John Allen Muhammad, who I join the choir of people to say is a coward, took this young man under his wing when there was no one else in the world to take care of this young man, and he turned him into a killing machine.
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> * * *
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> But it is an absolute tragedy, absolute tragedy that this young man was abandoned and led down a road of random violence, murder, and hatred . . .
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> * * *
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> . . . soon, there will be no Lee Boyd Malvo in our community anymore, and Your Honor, I think that's a sad thing because this young man has potential, and he has a future, and he'll have to do it from a prison cell in Virginia.

A pre-sentence investigative report was also submitted to the sentencing court for consideration in rendering its decision. The report noted Petitioner's age and described in detail, among other things, his difficult upbringing and abusive family situation, which led him to come under the sway of Mr. Muhammad and his hateful ideology. The State also acknowledged at the sentencing hearing the relevance of Petitioner's youth to culpability for his crimes:

> It's not lost upon the State that [Petitioner] was under the sway of a truly evil man who infused a 17-year-old with the ideology of hate, an ideology, it appears that Mr. Malvo has now escaped from.
>
> He's probably most tragic, Your Honor, because he can add his name to those [sic] long list of names, of those persons whose lives Mr. Muhammad destroyed.

Finally, the sentencing court's own statements prior to pronouncing the sentence reflected a consideration of Petitioner's youth and attendant circumstances:

> As a child, you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him, your chances for a successful life became worse than they already were.
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> You could have been someone different. You could have been better. . . .

These mitigating circumstances, emphasized by defense counsel, described in detail in the pre-sentencing investigation, acknowledged by the State, and reiterated by the sentencing judge, cover nearly all of the "hallmark features of youth" discussed in *Miller*, including: "immaturity, impetuosity, and failure to appreciate risks and consequences[,]" "the family and home environment[,]" the "extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him[,]" as well as the "possibility of rehabilitation[.]" *Miller*, 567 U.S. at 477–78, 132 S. Ct. at 2468. The sentencing court was *required* under Maryland Rule 4-342 to consider mitigating information presented by defense counsel prior to sentencing.[3] *See Mainor v. State*, 475

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[3] At the time of the Petitioner's sentencing hearing, Maryland Rule 4-342 provided, in relevant part:

> (b) **Statutory sentencing procedure.** When a defendant has been found guilty of murder in the first degree and the State has given timely notice of intention to seek a sentence of imprisonment for life without the possibility of parole, but has not given notice of intention to seek the death penalty, the court shall conduct a sentencing proceeding, separate from the proceeding at which defendant's guilt was adjudicated, as soon as practicable after the trial to determine whether to impose a sentence of imprisonment for life or imprisonment for life without parole.
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> (f) **Allocution and information in mitigation**. Before imposing sentence, the court shall afford the defendant the opportunity, personally and through
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> (continued . . .)

Md. 487, 502, 257 A.3d 648, 656 (2021) ("[T]he trial judge has to consider mitigating evidence when it is offered[]" prior to sentencing) (quoting *Jones v. State*, 414 Md. 686, 701, 997 A.2d 131, 139 (2010)); *see also Kent v. State,* 287 Md. 389, 393, 412 A.2d 1236, 1238 (1980). "Trial judges are presumed to know the law and to apply it properly." *State v. Chaney*, 375 Md. 168, 179, 825 A.2d 452, 458 (2003) (quoting *Ball v. State*, 347 Md. 156, 206, [699 A.2d 1170, 1194] (1997)). We must therefore presume the sentencing court considered the mitigating arguments proffered by defense counsel based on Petitioner's youth and attendant circumstances.

The record reflects the sentencing court, in its exercise of sound discretion, determined that despite the mitigating factors presented surrounding Petitioner's youth, the severity of his crimes warranted the punishment of life in prison without the possibility of parole.[4] The Eighth Amendment did not prohibit it from making this judgment. *See Miller*,

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> counsel to make a statement and to present information in mitigation of punishment.

Md. Rule 4-342 (2006 Repl. Vol.). The present form of the Rule remains largely the same. *See* Md. Rule 4-342 (2022 Repl. Vol.).

[4] This is plainly demonstrated in the statement the sentencing court made to Petitioner immediately prior to issuing its decision:

> It appears you've changed since you were first taken into custody in 2002. As a child, you had no one to establish values or foundations for you. After you met John Allen Muhammad and became influenced by him, your chances for successful life became worse than they already were.
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567 U.S. at 480, 132 S. Ct. at 2469 ("[W]e do not foreclose a sentencer's ability to make that judgment [that a juvenile offender's crime warrants life without parole] in homicide cases[.]"). *Miller* itself contemplates a circumstance very similar to Petitioner's as one that would likely warrant a sentencer making the judgment that this most extreme sentence is appropriate. In a footnote replying to arguments made by dissenting Justices, the Court stated:

> Given our holding, and the dissents' competing position, we see a certain irony in their repeated references to 17–year–olds who have committed the "most heinous" offenses, and their comparison of those defendants to the 14–year–olds here. *See post*, at 2477 (opinion of ROBERTS, C.J.) (noting the "17–year old [who] is convicted of deliberately murdering an innocent victim"); *post*, at 2478 ("the most heinous murders"); *post*, at 2480 ("the worst types of murder"); *post*, at 2489 (opinion of ALITO, J.) (warning the reader not to be "confused by the particulars" of these two cases); *post*, at 2489 (discussing the "17 1/2–year–old who sets off a bomb in a crowded mall"). Our holding requires factfinders to attend to *exactly such circumstances—to take into account the differences among defendants and crimes.*

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> You could have been somebody different. You could have been better. What you are, however, is a convicted murderer. You will think about that every day for the rest of your life. You knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings.
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> You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. This community, represented by its people and the laws, does not forgive you.
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> You've been held accountable for the crimes you've committed here. You will receive the maximum sentence allowed by the law of this State.

Miller, 567 U.S. at 480 n.8, 132 S. Ct. at 2469 n.8 (emphasis added). Petitioner was four months away from his eighteenth birthday when these heinous crimes were committed. If this is not one of the circumstances where a sentencing court could determine that, despite mitigating factors pertaining to juvenile offender's youth, life without parole was still warranted, there is no circumstance where it would be warranted.

Petitioner's crimes were not reflective of transient immaturity and his sentences were not unconstitutionally disproportionate as applied

In concluding Petitioner's sentences are likely violative of the Eighth Amendment, the Majority relies on a footnote in *Jones*, quoting *Montgomery*, which states, "[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Jones*,___ U.S. at ___ n.2, 141 S. Ct. at 1315 n.2 (quoting *Montgomery*, 577 U.S. at 211, 136 S. Ct. at 735). The Majority asserts that because the sentencing judge *may* have found Petitioner to be corrigible, it is at least unclear whether his sentence was constitutionally proportionate. *Malvo*, slip. op. at 25–26. Although not termed as such by the Majority, this amounts to a finding that a sentence of life in prison without the possibility of parole was potentially disproportionate as-applied to Petitioner.[5] *See Jones*, ___ U.S. at ___ n.8,

[5] Petitioner also phrases this argument as an as-applied argument in his brief. Notably, the United States Supreme Court has never expressly adopted a heightened as-applied challenge for disproportionality under the Eighth Amendment for juveniles sentenced to life in prison without the possibility of parole. *See Jones*, ___ U.S. at ___, 141 S. Ct. at 1322 ("[T]his case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's

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141 S. Ct. at 1337 n.8 (Sotomayor, J., dissenting) ("In the context of a juvenile offender, [an as-applied Eighth Amendment claim of disproportionality] should be controlled by this Court's holding that sentencing a child whose crime reflects transient immaturity to life without parole . . . is disproportionate under the Eighth Amendment.") (internal citations and quotations omitted).

An as-applied challenge of disproportionality considers whether a sentence is proportionate to the *crime committed*. *See State v. Stewart*, 368 Md. 26, 32, 791 A.2d 143, 146 (2002) ("[A] detailed proportionality review based on the criteria set out in *Solem* is appropriate only in the rare case in which a threshold comparison of the *crime committed* and the *sentence imposed* leads to an inference of gross disproportionality.'") (emphasis added) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S. Ct. 2680, 2707 (1991) (Kennedy, J., concurring)). *Montgomery* held that it is disproportionate under the Eighth Amendment to sentence "a child whose *crime* reflects transient immaturity to life without parole." 577 U.S. at 211, 136 S. Ct. at 735 (emphasis added). This does not equate to a determination that any juvenile offender who has ever shown himself to be "corrigible," is

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sentence[.]") (citing *Harmelin*, 501 U.S. at 996–1009, 111 S. Ct. 2680 (1991) (Kennedy, J., concurring in part and concurring in judgment)); *see also* William W. Berry, *The Evolving Standards, As Applied*, FLORIDA L. REV. (July 15, 2021) (forthcoming, available at SSRN: https://perma.cc/7FRF-BNVJ) at *29 (acknowledging the United States Supreme Court has "not articulated, in a majority opinion, the approach for an individual as-applied challenge" to a sentence of life in prison without the possibility of parole for a juvenile). Regardless, as articulated by Justice Sotomayor in her dissenting opinion, *see* Jones, ___ U.S. at ___ n.8, 141 S. Ct. at 1337 n.8 (Sotomayor, J., dissenting), the quote from *Montgomery* relied upon by the majority would amount to an as-applied test of proportionality under the Eighth Amendment.

prohibited from receiving a sentence of life in prison without the possibility of parole, regardless of the severity of their crimes. Such a categorical prohibition conflicts with *Jones*'s holding that there is *no* requirement for a sentencing court to make a finding, either explicitly or implicitly, of permanent incorrigibility prior to sentencing a juvenile offender to life in prison without the possibility of parole. *See Jones*, ___ U.S. at ___, 141 S. Ct. at 1313, 1319, 1322 (rejecting claims it was overruling *Miller* and *Montgomery* and stating "[w]e instead rely on what *Miller* and *Montgomery* said—that is, their explicit language addressing the precise question before us and *definitively rejecting any requirement of a finding of permanent incorrigibility*[]") (emphasis added).

I cannot agree Petitioner's crimes reflected "transient immaturity[,]" *Jones*, ___ U.S. at ___ n.6, 141 S. Ct. at 1337 n.6 (Sotomayor, J., dissenting), meriting a determination that his sentences were grossly disproportionate as applied. As explained above, we are concerned with whether the severity of sentence imposed is grossly disproportionate to the severity of the *crime committed*, and whether the *crime committed* is indicative of transient immaturity. In order to render this determination, it is helpful to revisit Judge Moylan's discussion in *Muhammad* of the crimes committed by Petitioner in Maryland:

> Although the reign of terror perpetrated by Muhammad and Malvo ultimately spread over seven separate jurisdictions and involved [ten] murders and [three] attempted murders, the epicenter was unquestionably Montgomery County. Six of the ten murders were committed in Montgomery County. The terror began in Montgomery County on Wednesday evening, October 2, 2002. The terror ended in Montgomery County on Tuesday evening, October 22, 2002.
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> Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of the shootings had occurred at gas stations. Schools were placed on lock-down status. On one

occasion, Interstate 95 was closed in an effort to apprehend the sniper. A multi-jurisdictional state and federal task force was formed to cope with the crisis. "Hot lines" to receive tips were created by both the Montgomery County Police Department and the Federal Bureau of Investigation. Over 60,000 tips were ultimately received. The sense of dread that hovered over the entire community was immeasurable. The six lives that were taken were but a part of an incalculable toll.

1. James Martin

James Martin was a systems analyst for the National Ocean and Atmospheric Administration. At just after 6 P.M. on October 2, 2002, he was standing in the parking lot of a Shoppers Food Warehouse in Wheaton. Three witnesses heard a "loud bang" as Martin clutched his chest, gave a cry for help, and collapsed to the ground. He died almost immediately from a bullet fired into his back.

It was determined that the shot had been fired from the rear of the parking lot. There was later recovered from Muhammad and Malvo, on October 24, a Bushmaster XM–15 semiautomatic .223–caliber rifle with a muzzle velocity of approximately 3,000 feet per second. The autopsy of Martin showed that his injuries were consistent with those inflicted by a .223–caliber bullet fired from a Bushmaster rifle. The medical examiner testified that a .223–caliber bullet fired by a high velocity weapon leaves a distinctive and extremely devastating injury, as it did to Martin, because the bullet fragments when it hits the body, causing "a tremendous amount of damage."

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2. James Buchanan

The senseless killing of October 2 escalated into a murderous rampage by the morning of October 3. James Buchanan, who owned and operated a landscaping business, was mowing the lawn at the Fitzgerald Auto Store near the White Flint Mall at about 7:45 A.M. Gary Huss, an employee at the auto store, heard a "loud bang" but looked around and saw nothing. A minute or two later, another employee rushed into his office and said that "someone was dead on the parking lot." Another employee had also heard a "loud shotgun blast" and saw Buchanan grab his chest, stumble toward the gate, and fall. Buchanan lay dead with a "huge wound" to his chest. The post-mortem examination revealed that a single bullet had entered Buchanan's body from the back. The wound was consistent with one caused by a .223 rifle shot fired by a high velocity weapon.

3. Premkumar Walekar

No more than 40 minutes after Buchanan was killed, Premkumar Walekar, a taxi driver, was filling his car with gasoline at a nearby Mobil station. Dr. Caroline Namrow was also at the gas station when she heard a "very loud bang" and then saw Walekar walk toward her, pleading, "Call an ambulance." Walekar collapsed to the ground and Dr. Namrow called 911 on her cell phone. She then attempted to administer CPR, but to no avail. Walekar was pronounced dead en route to the hospital.

The autopsy revealed that the fatal wound was from a long-range shooting. The examiner described a wound showing a "lead snowstorm" effect inside Walekar's chest, consistent with the firing of a high velocity rifle, such as a .223 rifle. After the October 24 arrest of Muhammad and Malvo, a ballistics examination showed that the lead fragments found in Walekar's chest had definitely been fired from the Bushmaster rifle recovered from Muhammad's car.

4. Maria Sarah Ramos

Less than 30 minutes later, Maria Sarah Ramos, a 32–year–old wife and mother who worked as a housecleaner, was shot through the head and died instantly. She was sitting on a bench at Leisure World Plaza, waiting for her employer to pick her up. A resident of a nearby retirement community was walking to the mailbox when he heard a "huge explosion" and saw Mrs. Ramos "slump over" with blood "pouring from her head."

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5. Lori Lewis Rivera

Lori Lewis Rivera was a 25–year–old nanny who was vacuuming her mini-van at a Shell station when she was fatally shot in the back a few minutes after 10 A.M. that same day. Maria Welsh had been loading groceries into her car on the parking lot of a Safeway store just behind the Shell station on Connecticut Avenue when she heard a "loud bang." As she drove away from the Safeway, she saw a woman lying on the ground near the vacuum cleaner at the nearby Shell station. The woman was calling for help, and Ms. Welsh called 911. When help arrived, Ms. Rivera had no pulse.

The autopsy revealed a gunshot wound to the back with no exit wound. The wound was consistent with one inflicted by a high velocity rifle. The

ballistics examination revealed that the bullet taken from Ms. Rivera had been fired from John Muhammad's Bushmaster rifle.

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6. Conrad Johnson

By the night of October 3, the vortex of carnage had moved beyond Montgomery County into 1) the District of Columbia; 2) Prince George's County, Maryland; and 3) four separate counties in northern Virginia. For the last of the [thirteen] shootings and [ten] murders, however, the scene of the crime, on October 22, returned to Montgomery County. At just before six A.M., Conrad Johnson, a husband and father of two sons and a bus driver, was shot while stepping out of his bus. A police officer found Johnson lying on the floor of the bus, bleeding from his chest but still conscious. Doctors were unable to control the extensive hemorrhaging and Johnson died on the operating table. The ballistics examination confirmed that the bullet that killed him had been fired by John Muhammad's Bushmaster rifle.

The officers who responded to the scene of the shooting searched a nearby wooded area. They found a black duffel bag, a single left-handed brown glove, and a note which had been placed inside two plastic ziplock bags and attached to a tree. What turned out to be Malvo's DNA was found on one of the ziplock bags and on the glove. Muhammad could not be excluded as the source of DNA extracted from a hair found on the duffel bag. The note declared, as had two earlier notes in Prince George's County and in Ashland, Virginia, "For you, Mr. Police, call me God." The note also taunted the police for their "incompetence" and warned that "Your children are not safe. Can you hear us now? Do not play these childish games with us. You know our demands. Thank you." The note concluded, "Next person, your choice."

177 Md. App. at 200–04, 934 A.2d at 1066–69. Petitioner was four months shy of his eighteenth birthday when he participated in the intentional execution of six individuals in Maryland, at complete random, while they went about their daily lives. Between each murder, he had the opportunity to stop, reflect, and consider what he was he was doing. As aptly stated by Judge Moylan, "[t]he six lives that were taken were but a part of an incalculable toll[]" that froze and terrorized an entire community. *Id.* at 200, 934 A.2d at

1066. These were not the only murders committed by Petitioner and Mr. Muhammad. More murders were planned, and no doubt would have been carried out had law enforcement not finally apprehended them on October 24, 2002.

In determining whether Petitioner's crimes were representative of "transient immaturity," it is relevant that Petitioner was nearly an adult. It is relevant that he killed, not only the six people in Montgomery County, but four others in Virginia and the District of Columbia,[6] and attempted to kill three others, including a thirteen-year-old student in Prince George's County.[7] *Id.* at 207, 934 A.2d at 1070. It is relevant each of the killings

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[6] Petitioner has also confessed to murders committed in Washington State, Arizona, Louisiana, and Alabama, and is suspected of more. *See* Josh White, *Lee Boyd Malvo, 10 years after D.C. area sniper shootings: 'I was a monster'*, WASH. POST (Sept. 29, 2012) https://perma.cc/TJF9-UZ92; *Belway Snipers*, FEDERAL BUREAU OF INVESTIGATION, https://perma.cc/REN4-Y9YY (last visited Apr. 11, 2022); Arthur H. Rotstein, *Convicted sniper confesses to 2002 Arizona killing, police say*, THE SEATTLE TIMES (Oct. 28, 2006, 12:00 AM) https://perma.cc/HPC8-NYAW; Eliott C. McLaughlin, *Sniper's apology brings closure, no justice*, CNN (Mar. 4, 2010, 9:54 AM) https://perma.cc/8MPJ-QBSF.

[7] Judge Moylan described that shooting as follows:

> Thirteen-year-old Iran Brown was dropped off by his aunt at the Benjamin Tasker Middle School in Prince George's County, Maryland, at approximately 8 A.M. on October 7. As he waited in front of the school for the doors to be opened, he heard a loud bang and felt a sharp and sudden pain in his chest. He remembered nothing further until he woke up in the Children's Hospital one week later. His aunt testified that just after she dropped Iran off, she heard him screaming her name and saw him lying on the ground. She rushed him to the clinic just around the corner and called 911. Iran remained hospitalized for approximately two months. He suffered damage to many of his internal organs; he lost his spleen, parts of his pancreas and liver, and 80% of his stomach. The ballistics examination revealed that the bullet that pierced his body had been fired from John Muhammad's Bushmaster rifle.

Muhammad, 177 Md. App. at 207, 934 A.2d at 1070.

were perpetrated in a removed, calculated, and repeated fashion, after which Petitioner had the opportunity to stop and reflect about what he had done, and affirmatively chose to continue. Under these circumstances, I cannot agree Petitioner's crimes were indicative of "transient immaturity" such that his sentences of life in prison without the possibility of parole are unconstitutionally disproportionate. [8]

The comments made by the circuit court during Petitioner's sentencing proceeding do not suggest otherwise as to require Petitioner's resentencing. The court found that Petitioner "*knowingly, willingly, and voluntarily* participated in the cowardly murders of innocent, defenseless human beings." (Emphasis added). The State likewise characterized Petitioner's crimes as perpetrated by a "cognizant, thinking, and deliberate 17-year-old" that was "without mental defect" and who should "bear full responsibility for his criminal actions." Petitioner's culpability in front of his crimes was not negated simply because the sentencing court and the State acknowledged Petitioner had "changed" since coming into custody. Neither does that recognition equate to a determination that Petitioner's crimes were the result of "transient immaturity." I therefore reject the Majority's conclusion that that Petitioner's sentences were disproportionate as applied under the Eighth Amendment.

[8] In passing JUVRA, the General Assembly prohibited imposing sentences of life in prison without the possibility of parole for juvenile offenders sentenced after October 1, 2021. *See* Md. Code, Criminal Procedure § 6-235; 2021 Maryland Laws Ch. 61 (S.B. 494). Thus, the new sentencing court will no longer have the discretion to determine that Petitioner should be given the same sentences he previously received.

Petitioner's sentences did not violate Article 25

Article 25 of the Maryland Declaration of Rights, which prohibits the imposition of "cruel or unusual punishments[,]" does not provide Petitioner with any greater protection than the Eighth Amendment. Petitioner argues because Article 25 uses the conjunction "or" between the terms "cruel" and "unusual," it provides greater protection than its Eighth Amendment parallel, which uses the term "and" between the terms "cruel" and "unusual". Petitioner also alleges our practice of interpreting Article 25 *in pari materia* with the Eighth Amendment has only occurred in the context of sentences for adult offenders, and Maryland has traditionally provided greater protections for juvenile offenders.

Contrary to Petitioner's assertion, we have not interpreted Article 25 *in pari materia* with the Eighth Amendment when considering the constitutionality of sentences for juvenile offenders. In *Carter v. State*, 461 Md. 295, 192 A.3d 695 (2018), we considered the federal and state constitutional limits of sentences for three juvenile offenders. *Id.* at 306–08, 192 A.3d at 701–02. In setting the constitutional standard, we discussed Article 25 and stated although "there is some textual support for finding greater protection in the Maryland provisions[,]" Article 16[9] and Article 25 "have usually been construed to provide the same protection as the Eighth Amendment[.]" *Id.* at 308 n.6, 192 A.3d at 702 n.6. In so holding, we relied on *Thomas v. State*, which held:

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[9] Article 16 of the Maryland Declaration of Rights provides: "[t]hat sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter." Petitioner does not advance any arguments premised on Article 16, so it need not be addressed.

> Our cases interpreting Article 25 of the Maryland Declaration of Rights have generally used the terms "cruel and unusual" and "cruel or unusual" interchangeably. The Court of Special Appeals has suggested that "the adjective 'unusual' adds nothing of constitutional significance to the adjective 'cruel' which says it all, standing alone." Because the prevailing view of the [United States] Supreme Court recognizes the existence of a proportionality component in the Eighth Amendment, we perceive no difference between the protection afforded by that amendment and by the 25th Article of our Declaration of Rights.

333 Md. 84, 103 n.5, 634 A.2d 1, 10 n.5 (1993) (internal citations omitted) (quoting *Walker v. State*, 53 Md. App. 171, 193 n.9 452 A.2d 1234, 1245 n.9 (1982)). Although Petitioner attempts to distinguish *Thomas* on the grounds that it is applicable only to sentences for adults, our holding in *Carter*, where we expressly applied its reasoning in the context of juvenile offenders, demonstrates otherwise.

Petitioner does not offer a compelling reason to depart from our well-established precedent and hold that Article 25 provides greater protection for juvenile offenders than the Eighth Amendment. Petitioner's textual argument has already been considered and dismissed in *Thomas*, as noted above. 333 Md. at 103 n.5, 634 A.2d at 10 n.5. There, we explained the term "unusual" likely adds nothing of constitutional significance to the word "cruel". *Id.*, 634 A.2d at 10 n.5; *see also*, Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty As Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493, 496 n.8 (1992) (explaining the word "unusual" as it appears in the Eighth Amendment may not have any independent meaning, as the United States Supreme Court "generally has not endeavored to articulate a separate requirement based on the word 'unusual,' but has proceeded by analyzing the word 'cruel'").

The examples given by Petitioner of instances where Maryland has provided heightened protections for juvenile offenders are all instances where the General Assembly has legislatively chosen to do so, not when this Court has done so through an expansive interpretation of the Maryland Constitution.[10] Fundamentally, they do not support Petitioner's interpretation of Article 25.

JUVRA cures any alleged deficiencies in Petitioner's Sentence

The General Assembly has most recently provided additional protections for juvenile offenders through JUVRA, codified in Md. Code, Criminal Procedure ("Crim. Proc.") §§ 6-235; 8-110. *See* 2021 Md. Laws, Ch. 61. Crim. Proc. § 8-110 provides juvenile offenders who have been sentenced prior to October 1, 2021, like Petitioner, automatically become eligible to have their sentences reduced after serving twenty years in prison. The General Assembly has provided Petitioner with an avenue which, although not guaranteed, may lessen his sentences.

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[10] Specifically, Petitioner mentions:

> Maryland was one of the first States to pass legislation establishing a "House of Refuge for Juvenile Delinquents," Acts of 1830, ch. 64, as part of a progressive movement that sought to "rescue children from the degradations of adult prison." Nell Bernstein, *Burning Down the House: The End of Juvenile Prison* 38 (2014). Maryland was one of the first States to create a specialized court for juvenile offenders. *See* Acts of 1902, ch. 611. Maryland banned capital punishment for juvenile offenders nearly two decades before *Roper* held that this practice was "cruel and unusual." *See* Acts of 1987, ch. 626.

(Footnote omitted).

In that manner, JUVRA could be said to remedy any alleged constitutional defect regarding Petitioner's sentences. The United States Supreme Court in *Montgomery* made clear that resentencing is not necessary to cure a *Miller* violation. In *Carter*, we explained that a violation of *Miller* may be remedied by permitting the offender a "'meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation' – by parole *or otherwise*." 461 Md. at 340, 192 A.3d at 720 (emphasis added). As discussed above, Petitioner is not constitutionally entitled to meaningful opportunity for release, and the sentences he received met the requirements of the Eighth Amendment and Article 25. Nonetheless, JUVRA still provides him with such an opportunity through the possibility of a sentence reduction.

Petitioner argues JUVRA does not grant him a meaningful opportunity to obtain release because he has not begun to serve his sentences in Maryland. He contends that, at a minimum, he would not become eligible for a sentence reduction under the statute for another twenty years, and indeed, may never serve his Maryland sentences if he is not granted parole in Virginia. The fact that Petitioner was convicted, sentenced, and is presently incarcerated for crimes he committed in other states has no effect on the legality of his sentences in Maryland.

Petitioner also argues it is not clear whether he would be required to serve twenty years for each of his six life sentences before becoming eligible for a sentence reduction under JUVRA. In *Carter*, we explained:

> There may be any number of circumstances under which an inmate – adult or juvenile – comes to be serving consecutive sentences that add up to a lengthy term of incarceration. At one end of the spectrum, an individual may

> embark on a serious crime spree, involving, for example, a series of armed robberies or sexual assaults over weeks or months or even years. Whether the crimes are prosecuted together or separately, the courts may sentence the individual to significant periods of incarceration for each incident. These circumstances are least likely to warrant the aggregate sentence being treated as a *de facto* life sentence. *The number of crimes, their seriousness, and the opportunity for the juvenile to reflect before each bad decision also makes it less likely that the aggregate sentence is constitutionally disproportionate even after taking youth and attendant characteristics into account*.

461 Md. at 356–57, 192 A.3d at 731 (emphasis added). Petitioner's crimes undoubtably fall under the "serious crime spree" end of the spectrum, as Petitioner committed six murders in Maryland and had the opportunity to reflect between each of them. Insofar as Petitioner's eligibility for a sentence reduction under JUVRA after twenty years is akin to a term of years sentence, being required to a serve minimum of twenty years for each of those six sentences still does not amount to a *de facto* life sentence under *Carter*.

CONCLUSION

As reflected above, the Eighth Amendment requires only that Petitioner received an individualized sentencing proceeding in which the sentencing court had discretion to give him a sentence amounting to less than life in prison without the possibility of parole. Petitioner received such a proceeding. It is also evident, both because the sentencing court had discretion and from the record itself, that the court considered Petitioner's youth and attendant characteristic prior to sentencing him. Any alleged finding of "corrigibility" did not render Petitioner's sentences unconstitutionally disproportionate as applied. Rather the proportionality of Petitioner's sentences must be weighed against the severity of his crimes. Petitioner committed some of the worst crimes in the history of the State. It was not grossly disproportionate that a heavy penalty was imposed. Article 25 of the Maryland

Declarations of Rights does not provide Petitioner any greater protection than the Eighth Amendment. Finally, any alleged constitutional insufficiency has been cured by the General Assembly's passage of JUVRA. Respectfully, I dissent and would affirm the sentences imposed on Petitioner by the circuit court.

Judge Gould has authorized me to state that he joins in this opinion.