IN THE
COURT OF APPEALS OF MARYLAND

NO. 29
SEPTEMBER TERM, 2021

LEE BOYD MALVO,

APPELLANT,

v.

STATE OF MARYLAND,

APPELLEE

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL submits this brief in support of appellant Lee Boyd Malvo because the issues

presented in this case are of paramount importance to criminal defense attorneys throughout the country and the clients they represent.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus submits this brief to make two important points: *first*, that there must be a strong presumption that juvenile life-without-parole sentences imposed before *Miller v. Alabama*, 567 U.S. 460, 480 (2012), are unconstitutional; and *second*, that Maryland's Juvenile Restoration Act ("JUVRA") is constitutionally inadequate to cure sentences that violate *Miller*.

1. When Lee Boyd Malvo was sentenced to life without parole in 2006, the legal landscape was profoundly different. At that time, a juvenile who committed a particularly egregious nonhomicide crime could be sentenced to life without parole with no consideration of whether he was permanently incorrigible. In fact, a juvenile defendant could be sentenced to life without parole even if a sentencing judge expressly concluded that he was *not* permanently incorrigible, and was capable of rehabilitation.

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[1] Pursuant to Rule 8-511(a)(1), NACDL submits this *amicus* brief with the prior written consent of all parties.

The Supreme Court's 2012 decision in *Miller v. Alabama* fundamentally altered the legal landscape, and reshaped the substantive rights of juvenile defendants in the criminal proceedings. *Miller* made clear that life-without-parole sentences are categorically unconstitutional for those juvenile offenders who are not permanently incorrigible. After considering recent discoveries in neuroscience and their import for States' penological interests, the Court declared for the first time that "children are different" as a matter of constitutional sentencing law. *Id.* at 481. The decision thus explained that a sentencing judge must consider age not just in a generalized way—but as it pertains to every aspect of the offense at issue. And the Supreme Court subsequently found that *Miller* announced "a substantive rule of constitutional law" that must be given retroactive effect. *Montgomery v. Louisiana*, 577 U.S. 190, 200, 208 (2016).

There is simply no reason to believe that pre-*Miller* sentencers could have anticipated *Miller*, which boldly marked new constitutional ground. By contrast, there is ample evidence that pre-*Miller* sentencers at times considered youth in ways that *directly contradict Miller*'s teachings. Accordingly, it should be presumed that pre-*Miller* juvenile life-without-parole sentences (like Malvo's) are

unconstitutional, because the sentencing judge could not have been expected to assess a juvenile's age in the manner that *Miller* later made clear was required. That presumption may be rebuttable if record evidence demonstrates that the sentencing judge *did* in fact consider the factors that were only subsequently elucidated in Supreme Court precedent. But the presumption has not been remotely overcome in this case, and Malvo's sentence is thus unconstitutional.

2. JUVRA is constitutionally inadequate to cure this violation of *Miller*. Juvenile life-without-parole sentences that violate *Miller* are "*void*" as a matter of law. *Montgomery*, 577 U.S. at 203 (emphasis added). Accordingly, states across the country have responded to *Miller* by making juvenile offenders parole eligible, or by ordering resentencings. And those are the *only* two remedies that the Supreme Court has recognized are constitutionally adequate to cure *Miller* violations.

JUVRA looks nothing like either. After a juvenile offender has been imprisoned for twenty years, JUVRA permits him three chances file a motion in court for—and present evidence supporting—a reduced sentence. But that is not the "resentencing" contemplated by *Miller* and *Montgomery*, which must occur immediately after a sentence is

found unconstitutional (not decades later). And it is nothing like parole, under which a commission of experts periodically considers whether release is warranted—with no requirement that a prisoner make a motion or present evidence and no cap on how many times release may be considered. Indeed, eligibility for parole is typically the *result* of a resentencing. Yet, under JUVRA, juvenile offenders must wait 20 years to see whether they are even *entitled* to a parole hearing.

Moreover, and critically, JUVRA mandates a fundamentally different inquiry from that required by *Miller*. Instead of placing the question whether a defendant has demonstrated "maturity" and "rehabilitation" at the center of the inquiry, JUVRA mandates that constitutionally irrelevant factors such as the "nature of the offense" matter just as much. Indeed, a judge may grant resentencing only if the "interests of justice" as a whole so require—even where a juvenile offender is found *not* incorrigible. *See* Md. Code Ann., Crim. Proc. § 8-110. That is precisely the opposite of *Miller's* teaching. JUVRA thus permits—and perhaps even encourages—a judge to resentence a juvenile in a way that *still* would violate *Miller*.

This Court should thus make clear that Malvo, and other juvenile offenders like him, are entitled to the remedies set forth in *Miller* and

Montgomery—a resentencing that actually complies with *Miller* or parole eligibility with an opportunity to obtain release based on rehabilitation and maturity—and nothing less.

ARGUMENT

I. PRE-*MILLER* JUVENILE LIFE-WITHOUT-PAROLE SENTENCES ARE PRESUMPTIVELY UNCONSTITUTIONAL

Under the logic of the decisions of this Court and the Supreme Court, there must be a strong presumption that juvenile life-without-parole sentences imposed before the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 480 (2012), did *not* adequately "consider[] an offender's youth and its attendant characteristics" and are therefore constitutionally infirm. That presumption has not been remotely overcome by the record in this case.

A. *Miller* Substantially Reworked the Legal Landscape as to Juvenile Sentencing

As this Court has recognized, the Supreme Court's decision in *Miller* established a rule that "required 'tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Carter v. State*, 461 Md. 295, 312 (2018) (quoting *Miller*, 567 U.S. at 480). The upshot of *Miller* is "very clear" "for a case in which a court sentenced a juvenile

offender to life without parole" before *Miller* was decided: "In such a case, the defendant *must be re-sentenced* to comply with the holdings of . . . *Miller*." *Id.* at 333-34 (emphasis added). In particular, "[i]f the defendant was convicted of homicide, the court will need to hold an individualized sentencing hearing to consider whether the defendant is incorrigible." *Id.*; *see id.* at 340 ("[A] 'meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation' – by parole or otherwise – is not simply a 'matter of grace' for juveniles serving life sentences. It is required by the Eighth Amendment."). Thus, this Court has already acknowledged that *Miller* (1) represents a critical break from previous Eighth Amendment decisions and (2) renders pre-*Miller* life-without-parole sentences for juveniles, at a minimum, presumptively unconstitutional.

The reasons why are evident from an examination of *Miller* and related cases. "*Miller* announced a substantive rule of constitutional law," holding that "mandatory life-without-parole sentences for children 'pos[e] too great a risk of disproportionate punishment.'" *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016) (quoting *Miller*, 567 U.S. at 479). *Miller* thus emphasized that "appropriate occasions for

sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon." 567 U.S. at 479.

In reaching that result, the Supreme Court conducted a detailed analysis of the penological justifications (or lack thereof) for juvenile life-without-parole sentences. As the Court held, juveniles "'are less deserving of the most severe punishments'" like life without parole due to their "diminished culpability and greater prospects for reform." *Miller*, 567 U.S. at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)); *see generally Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). The Court focused on "three significant gaps between juveniles and adults": (1) "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking"; (2) "children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings"; and (3) "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely

to be evidence of irretrievabl[e] deprav[ity]." *Id.* (internal quotation marks omitted).

The Court crucially based these conclusions on its review of recent empirical findings that juveniles were more likely than adults to display "transient rashness, proclivity for risk, and inability to assess consequences." *Id.* at 472; *see id.* n.5 (citing conclusions in *amicus curiae* briefs collecting scientific literature on juvenile brain development). The evidence the Court considered demonstrated that "[o]ver the past decade," the scientific community had reached "consensus" on a number of issues that are critical to juvenile sentencing. Brief for J. Lawrence Aber et al. as *Amici Curiae* 15-16 ("Aber *Amicus* Br."), *Miller v. Alabama*, Nos. 10-9646, 10-9647 (U.S.) (collecting studies).

Recent research, for instance, had recognized that "middle adolescence (roughly 14 to 17)" is "a period of especially heightened vulnerability to risky behavior"—including "criminal behavior"—"because sensation-seeking is high and self-regulation is still immature." Laurence Steinberg, *Commentary: A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 Brain &

Cognition 160 (2010) (cited by Aber *Amicus* Br. 15, 27).[2] In neurochemical terms, a "rapid rise in dopaminergic activity [occurs] around the time of puberty, which leads to an increase in reward-seeking"—while there is a "slower and more gradual maturation of the prefrontal cortex and its connections to other brain regions, which leads to improvements in cognitive control." *Id.* Indeed, contemporary scientific literature recognized "the role of the prefrontal regulatory system in rational judgment and emotional control," and extensive contemporary studies showed that "*the prefrontal cortex is among the last regions of the brain to mature*" and "is not fully mature until an individual reaches his or her twenties." Aber *Amicus* Br. 15-16.[3]

Based on this evidence, the Court concluded that children had lesser moral culpability and greater likelihood of reformation "as the years go by and neurological development occurs." *Miller*, 567 U.S. at 472. Accordingly, while the Court in *Miller* did not entirely "foreclose a

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[2] Manuscript version available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904973/.

[3] *See* Steinberg, *supra* (explaining that middle adolescence is characterized by "three changes – the change in the ratio of grey to white matter in prefrontal areas, the increase in connectivity between prefrontal and other regions, and the increase in dopaminergic activity in prefrontal-striatal-limbic pathways").

sentencer's ability" to impose life without parole for homicide, it required the sentencer "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.

Subsequently, in *Montgomery*, the Court held that *Miller* applied retroactively and that states were constitutionally compelled to apply *Miller* in postconviction review. *Montgomery*, 577 U.S. at 200, 208. The Court in *Montgomery* explained that "*Miller* established that [life without parole] is disproportionate under the Eighth Amendment" where a child's "crime reflects transient immaturity," *id.* at 211. Accordingly, the Court emphasized, "[i]n light of what [the] Court ha[d] said in [past decisions like] *Miller* about how children are constitutionally different from adults in their level of culpability," juvenile prisoners "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 213.

The *Montgomery* Court recognized that, after *Miller*, there is a "significant risk" that "juvenile offenders . . . face[] a punishment that the law cannot impose." 577 U.S. at 208-09 (internal quotation marks omitted). Indeed, the Court made clear that *Miller* "bar[red] life

without parole . . . for *all but the rarest* of juvenile offenders, [] whose crimes reflect permanent incorrigibility" and that "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id.* at 209 (emphasis added). The Court held that *Miller* has a "procedural component"—which "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence"—but that the procedural component is "necessary to implement a substantive guarantee." *Id.* at 209-10.

B. These Changes Render Pre-*Miller* Sentences Presumptively Constitutionally Infirm

A sentencing judge before *Miller* could not have been expected to anticipate the substantive considerations that decision mandated. As a result, there should be a strong presumption that sentences like Malvo's are unconstitutional, which can be rebutted only if there is record evidence that the sentencing judge *did* in fact engage in the subsequently elucidated inquiry.

This Court has implicitly recognized as much. In considering a challenge to a juvenile life sentence imposed in 1999 which *did* provide

for parole, the Court held that if the structure of the Maryland parole system "effectively" rendered the sentence life *without parole*, then the offender "*would be entitled to a new sentencing proceeding* at which the court would consider whether he was one of the few juvenile homicide offenders who is incorrigible and may therefore be sentenced constitutionally to life without parole." *Carter*, 461 Md. at 341 (emphasis added). That holding is a matter of common sense, implicitly recognizing that pre-*Miller* sentencers generally would not have been thinking in the terms *Miller* prescribed, and a new sentencing would thus be required to consider incorrigibility. *Id.*

A closer look at *Miller* illustrates why a sentence that predates that decision is so likely to be constitutionally deficient. As noted, *Miller* marked a sharp doctrinal shift from previous law, barring life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 208; *see supra*, at 6-7. There is no reason to believe that pre-*Miller* sentencing judges would have understood the constitutional significance of "permanent incorrigibility." Indeed, before *Miller*, a sentencing judge was not required to consider permanent incorrigibility at all. And, critically, even if a judge *did* consider incorrigibility before

Miller, life without parole could still be imposed *even if* the judge found that a defendant was *not* permanently incorrigible.

Miller, however, made clear that a sentence violates the Eighth Amendment if the sentencing judge (1) failed to take permanent incorrigibility into account, or (2) imposed life without parole despite the judge's recognition that the juvenile defendant was *not* permanently incorrigible. Thus, barring a persuasive indication to the contrary, it must be presumed that a pre-*Miller* sentencing judge did not undertake the permanent-incorrigibility inquiry that was first announced in 2012—much less find that the juvenile defendant *was* permanently incorrigible.

Similarly, although a pre-*Miller* sentencing judge may well have considered age in a general way, *Miller* makes clear that that is not enough. *Miller* created a requirement that a "sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 480). And under *Miller*, the sentencer is to consider age as it pertains to *every aspect* of the offense. For instance, in *Miller* itself, the Court concluded that a juvenile defendant's "age could well have affected his calculation

of the risk" posed by his friend's carrying a gun, "as well as his willingness to walk away" upon learning that the friend was armed. *Id.* at 478 (emphasis added). The Court emphasized that "[a]ll these circumstances go to [the defendant]'s culpability for the offense." *Id.* There is no reason to think that pre-*Miller* sentencing judges consistently assessed age with the specificity *Miller* requires.

In fact, pre-*Miller* sentencing decisions at times reflect the opposite. In *Mack v. State*, for instance, a Maryland sentencing judge emphasized "specific brutal, senseless crimes committed by juveniles" and "statistics reflecting that a disproportionate amount of crime was committed by young people." 69 Md. App. 245, 254 (1986). On that basis, the judge concluded that "appellant's age was *not a mitigating factor but was*, if anything, *just the opposite*." *Id.* (emphasis added). And a Maryland appellate court affirmed that sentence, concluding that "[i]n a non-capital case, the trial judge, as the case warrants, may or may not choose to consider an accused's youthful age to be a mitigating factor at sentencing." *Id.* at 255. That reasoning is profoundly at odds with *Miller*.

Worse, these errors were not isolated incidents. *See generally* Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of*

Juvenile Crime Regulation, 31 Law & Ineq. 535, 537-41 (2013) (explaining that the 1990s saw increasingly dramatic media coverage of high profile crimes by juveniles and the creation of a juvenile "'super-predator' label and stereotype," which resulted in a strong push for "ignor[ing] differences between young offenders and their adult counterparts as irrelevant to criminal punishment"). Nor were these misunderstandings limited to judges: In Malvo's case, for instance, the defense *did not even seek* parole-eligible sentences before *Miller*. E.123. The very real possibility that these sorts of misunderstandings tainted any particular pre-*Miller* juvenile life-without-parole sentencing further necessitates a presumption that such sentences are unconstitutional.

Finally, pre-*Miller* sentencing judges could not have been expected to understand the scientific "consensus" that emerged in the years before *Miller* and that was crucial to the Supreme Court's decision. Aber *Amicus* Br. 15-16; *see Miller*, 567 U.S. at 472 & n.5. To be sure, *Miller* does not necessarily require a sentencing judge to consider the full extent of scientific findings demonstrating that even a seventeen-year-old has a significantly underdeveloped prefrontal regulatory system, which regulates "rational judgment and emotional

control." Aber *Amicus* Br. 15-16. But it is doubtful that even the most conscientious pre-*Miller* judge would have known or understood those findings at the heart of *Miller* regarding the extent to which juveniles (particularly sixteen- or seventeen-year-olds) have lesser moral culpability and greater likelihood of reformation "as the years go by and neurological development occurs." *Miller*, 567 U.S. at 472.

In sum, it simply cannot be assumed that a sentencing judge anticipated *Miller* and considered the constitutionally crucial legal, moral, and scientific factors outlined in that decision. This requires a strong presumption that pre-*Miller* juvenile life-without-parole sentences are unconstitutional. The burden should rest squarely on the State to show that a pre-*Miller* sentencing judge *did* in fact anticipate and consider the relevant constitutional factors—a burden that the State has not remotely met in this case.

Jones v. Mississippi, 141 S. Ct. 1307 (2021), does not undermine—and in fact supports—this result. Crucially, that case considered a sentence that was imposed *after Miller*: Although Jones had initially been sentenced to life without parole before *Miller*, the Mississippi Supreme Court had "concluded that *Miller* applied retroactively" and "ordered a new sentencing hearing where the

sentencing judge could consider Jones's youth and exercise discretion in selecting an appropriate sentence." *Jones*, 141 S. Ct. at 1312-13.

Jones complained that his post-*Miller* sentence, which also imposed life without parole, was deficient because the sentencer had not made a formal *finding* of "permanent incorrigibility." *See* Cert. Pet. i, *Jones v. Mississippi*, No. 18-1259, 2019 WL 1453516 (U.S.). The Supreme Court rejected that argument, holding that "*Miller* did not require the sentencer to make a separate finding of permanent incorrigibility before imposing" life without parole. *Jones*, 141 S. Ct. at 1316; *see also Montgomery*, 577 U.S. at 211 (clarifying that "*Miller* did not impose a formal factfinding requirement" and that "a finding of fact regarding a child's incorrigibility . . . is not required"). The Court explained that *after Miller* and *Montgomery*, a sentencing judge would naturally engage in the constitutionally required assessment of age as a mitigating factor. *See Jones*, 141 S. Ct. at 1319 ("[T]he sentencer necessarily *will* consider the defendant's youth."). Indeed, the Court emphasized that a judge could not possibly fail to consider age because defense counsel would undoubtedly raise age as a key mitigating factor rendering life-without-parole inappropriate—and counsel's failure to

make such an argument in the wake of *Miller* might well constitute ineffective assistance. *See Jones*, 141 S. Ct. at 1319 & n.6.

For the same reason that the Court in *Jones* assumed that a post-*Miller* sentencing judge *would* have considered age as required by that decision, it should be assumed that a pre-*Miller* sentencing judge *would not* have anticipated and engaged in that constitutionally mandated consideration. Indeed, here, defense counsel did not even *seek* a parole-eligible sentence—a result that would have been unthinkable following *Miller*'s announcement and would, under the reasoning of *Jones*, likely have constituted ineffective assistance. *See id.*

Ultimately, Malvo is seeking exactly the relief that the juvenile offender in *Jones had already received* by the time his case got to the Supreme Court: a resentencing by a judge with the full benefit of the Supreme Court's teachings in *Miller*.

II. MARYLAND'S JUVENILE RESTORATION ACT DOES NOT CURE UNCONSTITUTIONAL PRE-*MILLER* SENTENCES

For juvenile offenders serving unconstitutional pre-*Miller* life-without-parole sentences, Maryland's Juvenile Restoration Act ("JUVRA") is constitutionally inadequate to cure the violation. As this Court has recognized, *Miller* permits life-without-parole sentences

"*only if the court determines that the defendant is incorrigible*." *Carter*, 461 Md. at 317 (emphasis added). In other words, a juvenile offender must at some point "be given the opportunity to show [his] crime did not reflect irreparable corruption." *Montgomery*, 577 U.S. at 213. Without such a determination, a juvenile life-without-parole sentence violates *Miller*.

And, in turn, a sentence that violates *Miller* is "void." *Montgomery*, 577 U.S. at 204. A state "may remedy a *Miller* violation" *either* "by permitting juvenile homicide offenders to be considered for parole" *or* "by resentencing them." *Id.* at 212. That is, states and the federal government must provide juvenile offenders subject to unconstitutional sentences "the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 213; *see also Carter*, 461 Md. at 318 (recognizing that "[a] parole system that takes into account the offender's youth at the time of the offense and demonstrated rehabilitation provides such a[n] [] opportunity"). Thus, while states "need not guarantee release," they must "devise the means and mechanisms" to provide release based on *Miller*'s juvenile-specific requirements. *Carter*, 461 Md. at 318.

In the wake of *Miller* and *Montgomery*, "[s]eventeen states" responded "by providing parole eligibility for juveniles" serving life sentences. Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 Cornell L. Rev. 1173, 1187 & n.69 (2021) (collecting authority). "Thirteen states . . . provided for automatic resentencing of juveniles who were previously sentenced to life without parole." *Id.* at 1185 & n.62.

By contrast, Maryland's putative mechanism for curing *Miller* violations—JUVRA—falls far short of the required remedy. This is so for two independent reasons. *First*, the mere *possibility* of a resentencing *decades after* a constitutional violation is identified is nothing like the immediate resentencing or parole eligibility that this Court and the Supreme Court have recognized as constitutionally adequate relief. *Second*, JUVRA permits, and in some cases would seem to require, courts to deny resentencing even if an offender is *not* incorrigible and in fact demonstrates maturity and rehabilitation—essentially permitting a second *Miller* violation in the very hearing that purportedly offers a "remedy" for the first violation.

A. JUVRA

The Juvenile Restoration Act, Maryland Code of Criminal Procedure § 8-110, allows certain people convicted as adults for offenses committed while minors to file a motion to reduce their sentences after having been incarcerated for at least 20 years. *Id.* at § 8-110(a).[4] At a hearing, the movant bears the burden of producing evidence in support of the motion, and the State may present evidence in opposition. *Id.* at § 8-110(b).

After the hearing, "the court may reduce the duration of a sentence . . . *if the court determines 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." *Id.* at § 8-110(c) (emphasis added). Beyond those two requirements, the statute offers ten other "factors" for a court to consider along with "any other factor the court deems relevant." *Id.* at § 8-110(d). But unlike the two statutory requirements in Section 8-110(c), which are presented as conditions precedent to relief, JUVRA does not require a court to give any particular weight to any of the ten factors in Section 8-110(d).

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[4] The State banned life-without-parole sentences for juveniles—but only prospectively. *See* Md. Code Ann., Crim. Proc. § 6-235; §8-110.

If the court denies the motion, the juvenile offender may file another motion after three years. If that motion is denied, a third motion may be filed after another three years. But if that motion is denied, no subsequent motion is permitted. *Id.* at § 8-110(f).

B. The Constitution Requires An *Immediate* Remedy For Unconstitutional Sentences

JUVRA fails to remedy an unconstitutional life-without-parole sentence: The Constitution requires immediate action when a sentence is found to be unconstitutional, but JUVRA allows unconstitutional sentences to stand, unmodified, *for decades* before any relief may even be considered.

The Supreme Court has recognized two ways to "remedy a *Miller* violation": (1) "resentencing" juvenile homicide offenders, or (2) "permitting [them] to be considered for parole." *Montgomery*, 577 U.S. at 212; *see also Carter*, 461 Md. at 318 (recognizing that "[a] parole system that takes into account the offender's youth at the time of the offense and demonstrated rehabilitation" complies with *Miller*). But JUVRA does neither of those things, and falls far short of what the Constitution requires.

1. JUVRA Is Not A Constitutional "Resentencing"

While JUVRA permits a court "to reduce the duration" of a juvenile offender's sentence, that plainly is not a constitutional resentencing because it may occur only after an individual "*has been imprisoned for at least 20 years* for the offense." Md. Code Ann., Crim. Proc. § 8-110(a)(3) (emphasis added). Traditional resentencing, as contemplated by *Miller* and *Montgomery*, replaces an offender's unconstitutional sentence and occurs immediately after a sentence is found unconstitutional. Letting a sentence stand for decades after it is determined to be unconstitutional is obviously impermissible. *See, e.g.*, *Montgomery*, 577 U.S. at 203 ("[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule."); *Smallwood v. State*, 237 Md. App. 389, 412 (2018) ("Once the motions court determined that Mr. Smallwood's existing sentence was illegal, Mr. Smallwood needed to be resentenced."). A State cannot simply sit on its hands as juvenile offenders remain imprisoned under sentences already found to be "void."

Moreover, rather than requiring resentencing after twenty years, JUVRA only *permits* a court to *consider* resentencing a juvenile offender once the offender files a motion and produces evidence.

Section 8-110(b). To comply with *Miller*, resentencing must be both immediate and mandatory. *See Carter*, 461 Md. at 333-34 (for juvenile homicide offenders sentenced to life without parole before *Miller* was decided, "the court will need to hold an individualized sentencing hearing to consider whether the defendant is incorrigible.") The possibility that, in twenty years, a juvenile offender *may* become parole eligible or receive other relief in a discretionary resentencing simply does not provide the "hope for some years of life outside prison walls" that *Miller* requires. *Montgomery*, 577 U.S. at 213.

2. JUVRA Is Not Parole

JUVRA also does not provide for parole eligibility. As explained below, even if JUVRA were otherwise equivalent to parole, it would not satisfy the Constitution because it does not provide a meaningful opportunity to obtain release based on "demonstrated maturity or rehabilitation." *Carter,* 461 Md. at 306; *infra*, at 30-32.[5] But in any

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[5] Notably, this Court recognized in *Carter* that even a system called "parole" may fail to remedy a constitutional violation in some cases. The *Carter* appellants were sentenced to life *with* parole. 461 Md. at 327, 329. The only question was whether the parole system provided them a "meaningful opportunity for release." *Id.* at 317 (internal quotation marks and citation omitted). This Court ultimately answered that question in the affirmative. *Amicus* seeks the same

event, JUVRA is *not* equivalent to parole. Instead of parole, JUVRA offers the limited potential for resentencing by a court. *Compare* Maryland Code § 7-101 *et seq.* (parole), *with* Maryland Code of Criminal Procedure § 8-110 (JUVRA). But JUVRA is no substitute for the longstanding "function of parole in the correctional process," *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972), and lacks many of the core safeguards of traditional parole systems.

For instance, parole-eligible prisoners are automatically considered for parole at fixed intervals. *See* Md. Code, Corr. Servs. § 7-301; Md. Code Regs. 12.08.01.17, 12.08.01.18(B). And "[b]efore each parole hearing," Parole Commissioners are required to "review[] all information available"—which the State, rather than the prisoner, is obligated to "accumulat[e]." Md. Code Regs. 12.08.01.17.[6] By contrast, JUVRA puts the burden on juvenile offenders to (1) commence the process by "fil[ing] a motion with the court to reduce the duration of the

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relief for juvenile offenders serving pre-*Miller life-without-parole* sentences.

[6] Parole Commissioners also are required by law to "have training and experience in law, sociology, psychology, psychiatry, education, social work, or criminology." Md. Code Corr. Servs. § 7-202; *see Morrissey*, 408 U.S. at 480 (recognizing that "parole authorit[ies] "appl[y] [their] expertise . . . in making a prediction as to the ability of the individual to live in society without committing antisocial acts").

sentence," and (2) "introduce evidence in support of the motion." Md. Code Ann., Crim. Proc. § 8-110(b). Most strikingly, while Maryland law imposes no limit on the number of parole hearings an offender may receive, JUVRA is limited to three attempts. Md. Code Ann., Crim. Proc. § 8-110(f). In each of these aspects, JUVRA is fundamentally inferior to traditional parole systems, providing a second-class process that cannot cure the constitutional violation infecting an existing sentence.

In short, while States have some leeway to "devise the means and mechanisms" to remedy *Miller* violations, *see Carter*, 461 Md. at 318,[7] JUVRA looks nothing like the traditional forms of relief that remedy unconstitutional sentences—and it falls far short of what the Constitution requires when a sentence is found to be unconstitutional.

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[7] The benefits of state-law innovation must be weighed against the extremely high costs of misstepping in such a sensitive area. In crafting remedies of constitutional violations related to "the law's harshest term of imprisonment" possible for juveniles, *Miller*, 567 U.S. at 474, states should tread carefully in straying from traditional, constitutionally adequate remedies. Given JUVRA's clear inferiority as compared with those traditional remedies, it is not an adequate mechanism to remedy *Miller* violations.

C. JUVRA's Requirements Do Not Comply With *Miller*

JUVRA is constitutionally inadequate to remedy unconstitutional life-without-parole sentences for a second, independent reason: JUVRA conditions access to any resentencing on whether "the individual is not a danger to the public" and whether "the interests of justice will be better served by a reduced sentence." Md. Code Ann., Crim. Proc. § 8-110(c). This focus, which has nothing to do with maturity or rehabilitation, or "youth and its attendant characteristics," *Miller*, 567 U.S. at 465, overshadows the *Miller* factors and eviscerates the promise that a juvenile offender is entitled to parole if "[his] crime did not reflect irreparable corruption," *Montgomery*, 577 U.S. at 213; *see also Carter*, 461 Md. at 317 (*Miller* permits life-without-parole sentences "only if the court determines that the defendant is incorrigible."). Conditioning relief on a finding that those requirements are met frustrates the Supreme Court's clear instruction by allowing—and, in some circumstances, *requiring*—a court to deny relief despite finding that a crime does not reflect incorrigible corruption or that an offender has demonstrated maturity and rehabilitation.

If a crime does not "reflect irreparable corruption" and a defendant is not "incorrigible," then Supreme Court precedent requires

a prisoner's "hope for some years of life outside prison walls [to] be restored." *Id.* But under JUVRA, whether a prisoner is incorrigible is *irrelevant* if the court determines that either of the two requirements in Section 8-110(c) is unsatisfied. Thus, by its plain terms, JUVRA allows the judge to decide a juvenile offender is *not* permanently incorrigible—but still retain an existing sentence of life without parole if it is "in the interests of justice." *See generally Argyrou v. State,* 349 Md. 587, 599-600 (1998) (noting that "interest of justice" standard offers judge "wide latitude" and permits the judge "to rely on his or her own impressions in determining questions of fairness and justice"). Indeed, under JUVRA, a judge's conclusion that the interests of justice weigh against resentencing would seemingly *require* the judge to disregard *Miller* and deny relief. By subjugating consideration of the offender's youth and rehabilitation to two requirements *that have nothing to do with youth* or its attendant characteristics, JUVRA *forbids* the judge from giving dispositive consideration to a defendant's youth, as *Miller* and *Montgomery* require. JUVRA thus is plainly inadequate as a matter of constitutional law.

Moreover, in addition to these two supervening requirements, JUVRA requires a judge to balance a laundry-list of other "factors" in

Section 8-110(d) against a defendant's youth. Md. Code Ann., Crim. Proc. § 8-110(c)-(d). These "factors" include "the individual's age at the time of the offense," "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, including an inability to fully appreciate risks and consequences." *Id.* at § 8-110(d). But they also include "any statement offered by a victim or a victim's representative," "the nature of the offense," and "any other factor the court deems relevant." *Id.* It thus appears that under JUVRA, a judge could find that a juvenile defendant had demonstrated complete rehabilitation, but nonetheless find based on a "statement offered by a victim or victim's representative," the "extent an adult was involved in the offense," or the "nature of the offense," that the "interests of justice" do not warrant a reduced sentence. *Id.*

As a result, the constitutional requirements of *Miller* are lost in a sea of other—and sometimes opposing—factors, leaving the judge with no guidance in weighing the significance of an offender's youth at the time of his offense, or his subsequent rehabilitation and maturity. JUVRA thus does not offer juvenile offenders the constitutionally

required minimum of "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *see Carter*, 461 Md. at 340 (explaining that a "meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation" is "not simply a 'matter of grace' for juveniles serving life sentences") (citation omitted).

JUVRA's shift in focus from youth and rehabilitation to other factors stands in sharp contrast to those statutory schemes that courts have found constitutionally adequate to remedy *Miller* violations. For instance, in determining that California's statutory scheme providing for release of juvenile offenders complied with *Miller*, the California Supreme Court considered it "crucial[]" that that statute required the decisionmaker "*not just to consider* but to '*give great weight to* the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.'" *People v. Franklin*, 63 Cal. 4th 261, 277 (2016) (citation omitted) (emphasis added).

In short, JUVRA fails to remedy a *Miller* violation because it empowers a court to create *another Miller* violation by deciding a

juvenile offender is corrigible, but that the interests of justice nonetheless demand that he be denied an opportunity for parole or resentencing. JUVRA is thus a constitutionally inadequate substitute for the two traditional forms of relief approved by the Supreme Court and this Court.

CONCLUSION

Malvo's sentences violate the Eighth Amendment, and JUVRA does not cure that constitutional violation. He must be resentenced to remedy these violations.

Respectfully submitted,

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VERBATIM TEXT OF CITED STATUTES

Maryland Code of Criminal Procedure § 8-110

(a) This section applies only to an individual who:

(1) was convicted as an adult for an offense committed when the individual was a minor;

(2) was sentenced for the offense before October 1, 2021; and

(3) has been imprisoned for at least 20 years for the offense.

(b)

(1) An individual described in subsection (a) of this section may file a motion with the court to reduce the duration of the sentence.

(2) A court shall conduct a hearing on a motion to reduce the duration of a sentence.

(3)

(i) The individual shall be present at the hearing, unless the individual waives the right to be present.

(ii) The requirement that the individual be present at the hearing is satisfied if the hearing is conducted by video conference.

(4)

(i) The individual may introduce evidence in support of the motion at the hearing.

(ii) The State may introduce evidence in support of or in opposition to the motion at the hearing.

(5) Notice of the hearing under this subsection shall be given to the victim or the victim's representative as provided in §§ 11-104 and 11-503 of this article.

(c) Notwithstanding any other provision of law, after a hearing under subsection (b) of this section, the court may reduce the duration of a sentence imposed on an individual for an offense committed when the individual was a minor if the court determines 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.

(d) A court shall consider the following factors when determining whether to reduce the duration of a sentence under this section:

(1) the individual's age at the time of the offense;

(2) the nature of the offense and the history and characteristics of the individual;

(3) whether the individual has substantially complied with the rules of the institution in which the individual has been confined;

(4) whether the individual has completed an educational, vocational, or other program;

(5) whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction;

(6) any statement offered by a victim or a victim's representative;

(7) any report of a physical, mental, or behavioral examination of the individual conducted by a health professional;

(8) the individual's family and community circumstances at the time of the offense, including any history of trauma, abuse, or involvement in the child welfare system;

(9) the extent of the individual's role in the offense and whether and to what extent an adult was involved in the offense;

(10) the diminished culpability of a juvenile as compared to an adult, including an inability to fully appreciate risks and consequences; and

(11) any other factor the court deems relevant.

(e)

(1) The court shall issue its decision to grant or deny a motion to reduce the duration of a sentence in writing.

(2) The decision shall address the factors listed in subsection (d) of this section.

(f)

(1) If the court denies or grants, in part, a motion to reduce the duration of a sentence under this section, the individual may not file a second motion to reduce the duration of that sentence for at least 3 years.

(2) If the court denies or grants, in part, a second motion to reduce the duration of a sentence, the individual may not file a third motion to reduce the duration of that sentence for at least 3 years.

(3) With regard to any specific sentence, an individual may not file a fourth motion to reduce the duration of the sentence.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,402 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112. The font used for this brief was Century Schoolbook in size 13.

/s/ William Friedman
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CERTIFICATE OF ADMISSION TO PRACTICE

The undersigned hereby certifies that although he does not maintain an office for the practice of law in Maryland, he was admitted to the Maryland Bar on January 4, 2016, is currently in good standing with the Maryland Court of Appeals, and is authorized to practice law in Maryland.

/s/ William Friedman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December 2021, copies of the Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Appellant were delivered via MDEC system to:

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