IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2021

No. 29

LEE BOYD MALVO,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

BRIEF OF JUVENILE LAW CENTER; THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE; THE CENTER ON RACE, INEQUALITY, AND THE LAW AT NYU SCHOOL OF LAW; FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; AND THE SENTENCING PROJECT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT LEE BOYD MALVO

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STATEMENT OF THE CASE

Amici[1] incorporate by reference Appellant's Statement of the Case.

STATEMENT OF THE QUESTIONS PRESENTED

Amici incorporate by reference Appellant's Statement of the Questions Presented.

STATEMENT OF THE FACTS

Amici incorporate by reference Appellant's Statement of Facts.

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

Amici incorporate by reference Appellant's Statement of the Applicable Standard of Review.

SUMMARY OF ARGUMENT

The U.S. Supreme Court has repeatedly held that youth matters in criminal sentencing; Mr. Malvo has never had a hearing that accounts for his youth. The imposition of Mr. Malvo's sentence took place within a racist criminal legal system. The historical origins of sentencing law in Maryland have contributed to the substantial racial disparities in today's carceral population; the lack of safeguards in sentencing further exacerbates this disparity. Mr. Malvo's sentence is unconstitutional under Article 25 of the Maryland Declaration of Rights, and this constitutional infirmity cannot be cured by any illusory

[1] Pursuant to Md. R. 8-511(a)(1), *Amici* have obtained written consent of all parties to file this brief in the Court of Appeals of Maryland. Consent is attached hereto.

remedy set forth by the Juvenile Restoration Act (JUVRA). Mr. Malvo must be resentenced.

ARGUMENT

I. THE CRIMINAL LEGAL SYSTEM CREATES A RACIAL HIERARCHY IN MARYLAND

A. The Criminal And Juvenile Legal Systems Were Created To Deepen The Racial Divide

Punishment was historically imposed differentially through legalized racial caste systems, including slavery, Black Codes, and Jim Crow laws. Enslaved Black children and adults were considered property and could not benefit from the rights conferred to other citizens. James Bell, W. Haywood Burns Inst. for Youth Justice Fairness & Equity, *Repairing the Breach: A Brief History of Youth of Color in the Justice System* 4 (2015), https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI_compressed.pdf. After slavery ended, Black people in America suffered under Jim Crow for years to come. In 1866, the United States passed the Freedmen's Code, which "enabled former slaveholders to force free Black children into apprenticeships and made them guardians of the youth until adulthood." *Id.* at 6 (citing Karin L. Zipf, *Reconstructing "Free Woman": African American Women, Apprenticeship, and Custody Rights During Reconstruction*, 12 J. Women's Hist. 8 (2000)). Newly created Black Codes incarcerated Black people for conduct that was not criminal for white people, capitalizing on an exception within the Thirteenth Amendment that legalized slave labor by imprisoned people. *Id*. (citing Leonard

P. Curry, *The Free Black in Urban America, 1800–1850: The Shadow of the Dream* (1981)). Incarcerated youth were forced to "work the land much like slaves." Youth First Initiative, *Jim Crow Juvenile Justice* 3:12-3:18, YouTube (Feb. 8, 2018), https://www.youtube.com/watch?v=7hgXWK7-1ZM. "[T]he criminal justice system and the juvenile justice system became the new vehicle for controlling the lives of people of color." *Id*. at 1:44-1:51.

At the same time, white youth were given opportunities to reform. Reform institutions categorically excluded Black children, reasoning that they were "undeserving subjects of the White-dominated parental state." Bell, *supra,* at 4 (quoting Geoff K. Ward, *The Black Child-Savers: Racial Democracy & Juvenile Justice* (2012)). The nation's first youth institution, the New York House of Refuge, opened in 1825 to address unsupervised and poor children. *Id.* at 5. The early houses of refuge excluded children of color, but later segregated "colored" sections were formed to admit Black children, yet they were routinely treated more harshly. Bell, *supra,* at 5.

"From the juvenile court's inception [in 1899], Black youth were overrepresented in court caseloads compared to the greater population. They were substantially underserved by the community-based agencies and services contracted to assist youthful offenders." *Id*. at 10. Black children were also more likely to be confined in adult prisons and excluded from the protections white youth received. *Id*. at 11. Rehabilitative measures were inequitably offered, often excluding Black youth. *Id.* at 10-11. In 1944, the execution of

14-year-old George Stinney, who falsely confessed to murder and was denied the effective assistance of counsel or notice of appeal, aptly captured the racism of our legal system. Deanna Pan & Jennifer Berry Dawes, *In 1944, George Stinney was Young, Black, and Sentenced to Die*, Post & Courier (Mar. 25, 2018, updated Nov. 1, 2021), https://www.postandcourier.com/news/special_reports/in-1944-george-stinney-was-young-black-and-sentenced-to-die/article_a87181dc-2924-11e8-b4e0-4f958aa5ba1c.html. Though seventy years later a South Carolina court cleared George's name, then, George's case led several advocates to argue for greater protections for youth tried in juvenile and adult court. Bell, *supra,* at 14; *see In re Gault*, 387 U.S. 1, 33-34, 41, 57-58 (1967) (conferring the right to counsel, appeal, confront and cross-examine witnesses, and notification of the charges). These due process protections, however, failed to address the ongoing disproportionate punishment of Black youth. In the 1980s and 1990s headlines emerged depicting inner-city youth as "hedonistic . . . 'youngsters' from 'badland' neighborhoods who 'murder, assault, rape, rob, burglarize, deal [. . .] drugs, join [. . .] gangs and create [. . .] disorder.'" Elizabeth R. Jackson-Cruz, *Social Constructionism and Cultivation Theory in Development of the Juvenile "Super-Predator*" 6 (2019) (MA Thesis, University of South Florida) (second, third, and fourth alterations in original) (quoting William J. Bennett, John J. DiIulio, Jr. & John P. Walters, *Body Count: Moral Poverty—and How to Win America's War Against Crime and Drugs* 27 (1996)), digitalcommons.usf.edu/etd/7814. Violent crime dominated the media's coverage of youth. Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth,*

Race & Crime in the News 17-24 (2001), http://www.bmsg.org/sites/default/files/bmsg_other_publication_off_balance.pdf. The stories created a "moral panic" in anticipation of increased numbers of violent young criminals that was replete with racist undertones. Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. C.R. & Econ. Dev. 765, 768-69, 771 (2015). Youth who engaged in criminal conduct were cast as "violent, morally deficient, and of color." *Id.* at 770-71 (citing Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 Md. L. Rev 849, 865-67 (2011)). This perceived link between race and teen crime led the public to believe that Black and Brown youth posed a higher threat of violent crime. *Id.* at 769-70. In 1995, Professor John DiIulio, Jr. coined the term "Super-Predator." *See* John DiIulio, *The Coming of the Super-Predators*, Wkly. Standard (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators. DiIulio warned that a wave of "morally impoverished juvenile super-predators" was coming to commit "the most heinous acts of physical violence for the most trivial reasons." *Id.* The infamous "Central Park Jogger" case cemented the link between race and teen crime. Southerland, *supra,* at 772. While the youth known as the "Central Park Five" were exonerated in 2002, the fear of violent Black and Brown youth had a lasting effect; terms like "super-predator" lingered to "describe the criminal behavior of African-Americans and Latinos." *See, infra* note 2; Southerland, *supra*, at 772-73. Such depictions of youth disassociated youth of color from the mitigation of their youth status. *Id.* at 773 (citing

Perry Moriearty & William Carson, *Cognitive Warfare on Young Black Males in America*, 15 J. Gender Race & Just. 281, 283 (2012)). The ultimate discrediting of the "super-predator" concept[2] as "utter madness," Becker, *supra* note 2, did little to stem the mass incarceration of Black youth that we see today.

The debunked "super-predator" myth is a particularly pernicious stereotype impacting Black boys; it "amplified the American public's predisposition to associate adolescents of color, and in particular young [B]lack males, with violence and moral depravity." Moriearty & Carson, *supra,* at 283. Young Black men were denied their childhood, *id.*, and the super-predator imagery allowed the public to "suspend our feelings of empathy towards young people of color." Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth,* Marshall Project (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth (quoting New York University law professor Kim Taylor-Thompson).

[2] In fact, John DiIulio apologized for how the term took off and its lasting effects. In 2001, DiIulio stated that he "wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators.'" Elizabeth Becker, *As Ex-Theorist on Young 'Super-predators,' Bush Aide Has Regrets*, N.Y. Times (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-super predators-bush-aide-has-regrets.html.

B. Maryland's Criminal Legal System Disproportionately Levies Punishment Against Its Black Residents

Maryland itself has a deeply racially disproportionate criminal legal system rooted in over-policing communities of color. Just. Pol'y Inst., *Rethinking Approaches to Over Incarceration of Black Young Adults in Maryland* 3 (2019), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/Rethinking_Approaches_to_Over_Incarceration_MD.pdf. Racial disparities are particularly pronounced for youth prosecuted in the adult criminal legal system. Between 2013 and 2020, 80% of Maryland youth tried as adults were Black. Hannah Gaskill, *Amid Juvenile Justice Reform Push, Commission Examines Maryland's High Rate of Trying Young People as Adults*, Maryland Matters (July 21, 2021), https://www.marylandmatters.org/2021/07/21/amid-juvenile-justice-reform-push-commission-examines-marylands-high-rate-of-trying-young-people-as-adults/.

The Maryland prison population likewise reflects these disparities, as data from 2020 shows that more than 70% of Maryland's prison population is Black as compared to 31% of the state population. *DPSCS Annual Data Dashboard* 5, Maryland Department of Public Safety & Correctional Services (2020), https://dpscs.maryland.gov/community_releases/DPSCS-Annual-Data-Dashboard.shtml; Just. Pol'y Inst., *supra,* at 3. This racial disparity is higher than any other state and more than double the national average. Just. Pol'y Inst., *supra,* at 3. It is mirrored among incarcerated youth. In 2019, Black youth were 6.3 times more likely to be incarcerated than white youth, while the national average is 4.4 times. Josh Rovner, The Sent'g Project, *Black Disparities in Youth Incarceration* (2021),

https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/ (182 out of every 100,000 Black youth and 29 out of every 100,000 white youth were in placement). Maryland's Latinx youth are 90% more likely to be incarcerated than white youth while the national average is 28%. Josh Rovner, The Sent'g Project, *Latinx Disparities in Youth Incarceration* (2021), https://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/. Nationally, Tribal youth are more than three times as likely to be incarcerated than white youth. Josh Rovner, The Sent'g Project, *Disparities in Tribal Youth Incarceration* (2021), https://www.sentencingproject.org/publications/native-disparities-youth-incarceration/.

These disparities are not the product of higher crime rates, but rather stereotypes, implicit bias, and structural racism related to segregation and over-policing of neighborhoods of color. *See, e.g.*, The Sent'g Project, *Report of the Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the United States Criminal Justice System* 3-6 (2013), https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf (citing, *e.g.*, Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 Law & Hum. Behav. 483, 485 (2004), Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 Soc. Forces 619, 642 (1996) (discussing structural disadvantage)); Michael Siegel et al., *The Relationship between Racial Residential Segregation and Black-White Disparities in Fatal Police*

Shootings at the City Level, 2013-2017, 111 J. Nat'l Med. Ass'n 580, 585-86 (2019) (discussing effect of neighborhood segregation on racial disparities in police shootings); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1554-56 (2018) (citing, *e.g.*, Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police among Inner-City Youth*, 50 Soc. Q. 235, 235-36, 241 (2009)) (Black youth experience extensive surveillance and harmful police encounters, including constant police presence and frequent pedestrian or vehicle stops); Patricia Foxen, *Perspectives from the Latino Community on Policing and Body Worn Cameras*, Medium (May 4, 2017), https://medium.com/equal-future/perspectives-from-the-latino-community-on-policing-and-body-worn-cameras-47f150f71448 (documenting reactions to the hyper-policing of Latino communities).

C. Life Without Parole (LWOP) Sentences Are Disproportionately Imposed On Black Youth

In 2016, people of color comprised 67.5% of those serving life and virtual life sentences nationally—and nearly half (48.3%) were Black. Ashley Nellis, The Sent'g Project, *Still Life: America's Increasing Use of Life and Long-Term Sentences* 14 (2017) [hereinafter *Still Life*], https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf. Similarly, race often dictates who receives a death sentence; research

consistently demonstrates the dominant role the race of the victim plays in sentencing.[3] *See* Ashley Nellis, The Sent'g Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 14 (2012) (citing David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience* 74 J. Crim. L. & Criminology 661 (1983)), https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf; *see also DPIC Analysis: Racial Disparities Persisted in U.S. Death Sentences and Executions in 2019*, Death Penalty Info. Ctr. (Jan. 21, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-racial-disparities-persisted-in-the-u-s-death-sentences-and-executions-in-2019. "Only African Americans were predominantly sentenced to death for interracial murders" and "[n]o non-[B]lack defendant was sentenced to death [in] a killing involving only [B]lack victims." *DPIC Analysis, supra.*

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[3] *See, e.g.*, Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 Harv. C.R.-C.L. L. Rev. 585, 587 (2020) (finding that "2.26% (22/972) of the [Georgia] defendants who were convicted of killing a white victim were ultimately executed, compared to just 0.13% (2/1503) of the defendants convicted of killing a Black victim. Thus, the overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim."); Daniel S. Medwed, *Black Deaths Matter: The Race-of-Victim Effect and Capital Punishment* 3, 7-9 Ne. U. Sch. L. Res. Paper No. 367-2020 (2020), https://ssrn.com/abstract=3527059; Glenn L. Pierce et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. Crim. L. & Criminology 733, 750 (2017); Frank Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013*, 3 Pol. Groups & Identities 209, 209 (2015) (finding that capital punishment is very rarely used where the victim is a Black male, despite the fact that this is the category most likely to be the victim of homicide); Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 Criminology 971, 991 (2008); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & Soc'y Rev. 437, 437 (1984).

These sentencing disparities are particularly prevalent for youth tried as adults. One out of every 17 persons sentenced to life were children at the time of their offense, comprising 5.7% of those serving life sentences. *Still Life*, *supra,* at 16. There are 7,346 individuals serving parole-eligible life sentences for crimes committed as children and an additional 2,089 serving sentences of 50 or more years. *Id*. at 17. These sentences are overwhelmingly imposed on youth of color (80.4%), primarily Black youth (55.1%). *Id.* Prior to *Graham* and *Miller*, courts sentenced Black juvenile offenders to life without parole *ten times* more often than white offenders. Letter from the U.S. & Int'l Hum. Rts. Orgs. to the Comm. on the Elimination of Racial Discrimination 3 (June 4, 2009), https://perma.cc/8KB2-E4CM.

Maryland data show that while the state population is 31% Black, the Maryland state prison population is 70% Black. Just. Pol'y Inst., *supra,* at 3. Moreover, 82% of youth sentenced to LWOP are Black—the highest percentage of Black people serving LWOP offenses for crimes committed as children of any state. The Campaign for the Fair Sentencing of Youth, *Juvenile Restoration Act (HB409/SB494),* Factsheet (2021) (presented at Hearing on Senate Bill 494 before the Senate Judicial Proceedings Committee via written testimony).

II. YOUTH AND RACIAL DISPROPORTIONALITY REQUIRE HEIGHTENED PROTECTION

A. Article 25 Provides Greater Protection To Youth In The Criminal System

"Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, courts have consistently considered the distinct developmental characteristics of youth in measuring the scope and breadth of minors' rights in civil and criminal law. In particular, the U.S. Supreme Court has established that young people are entitled to heightened protection under the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Miller v. Alabama*, 567 U.S. 460, 470 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016); *Jones v. Mississippi*, 141 S. Ct. 1307, 1314 (2021). These decisions and others underscore that age "is far 'more than a chronological fact;'" it creates commonsense conclusions about youth perceptions and behavior that are "self-evident to anyone who was a child once himself." *J.D.B. v. North Carolina,* 564 U.S. 261, 272 (2011) (first quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), then citing *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004)). Maryland courts have endorsed these heightened Eighth Amendment protections and, in some cases, have suggested Article 25's prohibition against "cruel or unusual" punishment may provide additional safeguards. This Court noted that while Article 25 is usually construed to provide the same protections as

the Eighth Amendment, there is "some textual support for finding greater protection." *Carter v. State*, 461 Md. 295, 308 n.6, 347 (2018) ("[I]f one thing is clear in *Graham*, it is that the rules that apply to adult offenders are not necessarily the same for juvenile offenders.").[4]

Moreover, the history of Maryland's Declaration of Rights supports additional protections for youth. Over 100 years ago this Court stated that "[Article 25] inflicts pain, not in a spirit of vengeance, but to promote the essential purposes of public justice." *Mitchell v. State*, 82 Md. 527 (1896); *Thomas v. State*, 333 Md. 84, 97 (1993). With passage of JUVRA in 2021, Maryland's lawmakers have made it clear that juvenile LWOP sentences no longer promote "the essential purposes of public justice," *see infra* Section III, or serve the best interest of the state.

B. The Racial Impact Of Sentencing Laws In Maryland Requires Heightened Review

Pervasive racial disparities erode equal justice. The U.S. Supreme Court has noted the "imperative to purge racial prejudice from the administration of justice." *See, e.g., Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("It must become the heritage of

[4] Other states have interpreted similar constitutional provisions proscribing "cruel or unusual punishment" to be more expansive than the federal constitution. *See, e.g.*, *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284-85 (Mass. 2013) ("discretionary imposition of a sentence of life in prison without the possibility of parole on juveniles . . . violates the prohibition against 'cruel or unusual punishment[ ]' in art. 26" (third alteration in original)); *State v. Bassett*, 428 P.3d 343, 350 (Wash. 2018) (state constitutional prohibition of "cruel punishment" broader than federal Eighth Amendment for juvenile sentencing).

our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979))). The Eighth Amendment was designed to ward against discriminatory punishments. *See* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment,* 79 Brook. L. Rev. 1141, 1147-53 (2014) (one intent of the Eighth Amendment was to protect against punishments that were discriminately imposed); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

In *Furman*, where the U.S. Supreme Court invalidated the application of the death penalty in part because it was "so wantonly and so freakishly imposed," 408 U.S. at 310 (Stewart, J., concurring), Justice Douglas further reinforced the origin of the Eighth Amendment as a safeguard against punishment that is applied in a discriminatory manner:

> Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment.

Furman, 408. U.S. at 255 (Douglas, J. concurring) (citation omitted).

Concerns about arbitrary or racially biased sentences continue to animate death penalty jurisprudence. Justice Thomas noted that racial prejudice is the "paradigmatic capricious and irrational sentencing factor." *Graham v. Collins,* 506 U.S. 461, 484 (1993) (Thomas, J., concurring)*; see also Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (finding the State must "guard against bias or caprice" in sentencing (citing *Gregg v. Georgia*, 428 U.S. 153, 189 (1976))); *Kennedy v. Louisiana*, 554 U.S. 407, 440-41 (2008) (noting the Court spent more than 32 years articulating factors to help avoid arbitrary imposition of the death penalty). Yet, in *McCleskey v. Kemp*, the Supreme Court upheld the death penalty despite a showing that Black defendants who killed White victims were more likely to be sentenced to death. 481 U.S. 279, 286-87, 313 (1987). Notably, Justices in *McCleskey* were paradoxically concerned that widespread racial disparities would lead to *too many* challenges of the criminal legal system. *See id.* at 314-19. The dissenters in *McCleskey* condemned this reasoning as a "fear of too much justice" and noted that evidence of additional discrimination does not justify abdicating judicial responsibilities. *Id.* at 339 (Brennan, J., dissenting). Since *McCleskey*, courts have taken a more realistic look at the role race plays in the criminal legal system, particularly in the context of Fourth Amendment protections.[5]

[5] Black Americans may flee from the police for reasons unrelated to guilt. *See Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016); *Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018). Similarly, race may be relevant to whether an individual has been seized under the Fourth Amendment. See *Dozier v. United States*, 220 A.3d 933, 944-

Moreover, notwithstanding *McCleskey*, some states have recently invalidated the use of the death penalty based on racially disparate outcomes or bias. *See State v. Gregory*, 427 P.3d 621, 633 (Wash. 2018) (Black defendants were between 3.5 and 4.6 times more likely to receive the death penalty; punishment was held "arbitrary and racially biased.")[6]; *see also State v. Santiago*, 122 A.3d 1, 19, 84-85 (Conn. 2015) (striking the sentence under ban on excessive punishment; it "goes without saying" that the Eight Amendment is offended by both the arbitrary imposition of the death penalty and the "greater evils of racial discrimination and other forms of pernicious bias").

Reference to the death penalty's historic, racially biased application is apt because, like the death penalty, juvenile LWOP is the harshest sentence that can be imposed on a young person *and* its use likewise reflects enduring racial disparities. The Supreme Court recognized the risk of error in imposing juvenile LWOP sentences and insists that courts consider the individual circumstances of each youth before imposing this harshest punishment. *See Miller*, 567 U.S. at 477-78. However, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

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45 (D.C. 2019) (noting that fear of the police is "particularly justified for persons of color" who may feel forced to submit to police)*; see also* Henning, *supra,* at 1518-19 (arguing that the intersection of race, adolescence, and policing calls for a different standard under the Fourth Amendment when Black children are stopped by the police).

[6] Washington's constitution prohibits imposing "cruel punishment." Wash. Const. art. I, § 14.

irreparable corruption." 543 U.S. at 573 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014–1016 (2003)). As with the death penalty, there is a heightened risk for arbitrary decision-making where factors like race play an outsized role. It therefore runs the same risk Justice Stewart outlined when discussing the death penalty in *Furman:* receiving the punishment is akin to being "struck by lightning." 408 U.S. at 309 (Stewart, J., concurring).

The specter of cruel and unusual punishment includes the risk that the majority will "tolerate cruelty when applied primarily against minorities." *See* Cover, *supra*, at 1162-65. This threat is particularly strong if members of the majority are unlikely to realistically face the consequences of severe punishment. *Id.* Any punishment that creates racially disparate results requires heightened review to avoid these pitfalls.

Although this court ruled against an Eighth Amendment challenge to a death sentence based on racial and geographic bias, *Evans v. State*, 396 Md. 256, 323-27 (2006), the decision was prior to *Carter*, which suggests that Article 25's protections may extend beyond the Eighth Amendment. Further, *Evans* predates significant changes in how the U.S. Supreme Court views young people under the Eighth Amendment. *See* Section II.A, *supra.*

Additionally, the unique history of Article 25 supports a heightened review for punishments imposed in a racially disproportionate manner. The Maryland Court of

Appeals cautioned against penalties imposed "by passion, prejudice, ill will, or any other unworthy motive" and said such penalties would violate Article 25. *See Mitchell*, 82 Md. at 527; *Thomas*, 333 Md. at 96; *State v. Stewart*, 368 Md. 26, 33 n.9 (2002).

More recently, Maryland courts have adopted an expansive view of how to assess an invalid punishment under Article 25. *Thomas*, 333 Md. at 96-97. Interpreting a claim under the Eighth Amendment and Article 25 requires an inquiry into the "specific facts of the case." *Id.* The analysis should not be conducted using "stringent and rigid standards" but rather involves "a plethora of considerations, both obvious and subtle." *Id.* Given Maryland's commitment to considering all relevant factors, racial disparities in sentencing should be key criteria for consideration. The judiciary took notice of this history and suggested it is relevant to determining the validity of claims under Article 25. *See Colvin-El v. State*, 359 Md. 49, 54-55 (2000) (Eldridge, J., dissenting). Justice Eldridge noted in his dissent from a denial of an application for leave to appeal and to stay an execution that the death penalty disproportionately falls on poor Black males accused of killing White victims. *Id*. This disproportionality, he wrote, raises "substantial issues" under Article 25. *Id.*

III. IMPLICIT AND EXPLICIT BIASES PERMEATE SENTENCING DECISIONS WITHOUT A MORE EXACTING STANDARD

Rather than the explicit statutory mechanisms to control racial minorities that existed immediately after slavery ended, "[t]oday, the source of the racial inequality is . . . the result of layers of discretionary decision-making and complex socioeconomic and

cultural dynamics, both within and without the criminal justice system." Cover, *supra*, at 1143. Racial disparities are especially pronounced when it comes to the imposition of juvenile LWOP sentences. *See* Section I.C, *supra*.

Miller requires a sentencing court to engage in an individualized assessment of each juvenile offender and the JUVRA requires review of sentences to ensure youth is considered, yet Mr. Malvo has not benefitted from either of these sentencing procedures. *Miller*, *Montgomery*, and *Jones* together require an individualized assessment of the child's background, characteristics, and circumstances to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 577 U.S. at 210. Indeed, a sentencing court must consider whether the child before it is one "'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." *Tatum v. Arizona*, 137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring) (mem.) (quoting *Montgomery*, 570 U.S. at 209). Although specific words are not required, *Jones* at 1311, the "record must reflect that the court meaningfully engaged in *Miller*'s central inquiry"—meaning that the court concluded, under the totality of the circumstances, that the particular person before the court falls into the very small category of juvenile offenders who are beyond hope, *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc), *vacated on other grounds and remanded*, 141 S. Ct. 2589 (May 3, 2021) (mem.).

JUVRA prospectively bans juvenile LWOP sentences and eliminates mandatory minimum sentences for juveniles. Md. Code Ann., Crim. Proc. § 6-235. Delegate Jazz Lewis reasoned that, "it's not morally defensible for [people] to die in jail for things that they did when their brains weren't fully developed." Hannah Gaskill, *Juvenile Restoration Act Pushes for Resentencing of Youthful Offenders*, Maryland Matters (Mar. 1, 2021) (alteration in original), https://www.marylandmatters.org/2021/03/01/juvenile-restoration-act-pushes-for-resentencing-for-youthful-offenders/. While JUVRA provides an opportunity for a hearing for some individuals serving LWOP sentences, this procedure is inadequate as a "meaningful opportunity for release" under the Eighth Amendment and Article 25. The practical effect of the JUVRA for individuals like Mr. Malvo, is that it merely provides an opportunity for a court to overturn prior findings of corrigibility. (E.128). Indeed, JUVRA does not resolve the Article 25 unconstitutionality of Mr. Malvo's sentence because (1) he cannot yet benefit from it, (Br. of Appellant 60-62), (2) even if he were eligible, his stacked sentences would prevent a meaningful opportunity for release, (*see id.*), and (3) it is based on vague and biased standards, *see infra* Section III.A-C. Even if Mr. Malvo were given the opportunity to have his sentence modified pursuant to JUVRA, the standard set forth in the Act denies the procedural safeguards set forth in *Miller*. The court is required to consider "whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction," the "nature of the offense," any "statement offered by a victim or victim's representative," and

"any other factor the court deems relevant." Md. Code Ann., Crim. Proc. § 8-110(d). While the court *is* directed to consider the individualized considerations set forth in *Miller*, it is not required to treat them as mitigating, as required by *Miller*. *See Williams v. United States*, 205 A.3d 837, 853 (D.C. 2019).

After consideration of all these factors, the court may reduce an individual's sentence if it deems the "individual is not a danger to the public" and that the "interests of justice will be better served by a reduced sentence." Md. Code Ann., Crim. Proc. § 8-110(c). Indeed, the procedure set forth in *Miller*—when properly administered—creates little room for sentencing courts to give undue weight to individual factors or to override the core principles of *Miller* "in the interests of justice." Although the sentencer originally found Mr. Malvo was rehabilitated, (Br. of Appellant 18 (citing E.128)), the vague standards set forth in JUVRA significantly increase the risk that a court may succumb to bias and arbitrarily *undo* this finding of corrigibility.

A. "Nature Of Offense"

The circumstances of the crime cannot be dispositive on the question of whether an individual is a "danger to the public." *Miller*'s "central intuition" is that even youth who commit heinous crimes are capable of change. *Montgomery*, 577 U.S. at 212*; see also Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (mem.) (the "gruesomeness of a crime is not sufficient" to conclude a defendant is the rare juvenile offender who can constitutionally receive the harshest punishment). *See also Thomas*, 333

Md. at 96 ("In comparing the punishment to the offense, a court must consider the specific facts of the case, not only as to the crime but also as to the criminal."); *see also Walker v. State*, 53 Md. App. 171, 193 (1982) (upholding a 20-year sentence for assault but noting it is important to evaluate not just the "label of the crime" but also the "behavior of the criminal").

Miller clearly contemplated that severity of the crime would be a starting point, not the ending point. Homicide offenses are by their nature severe crimes. *See Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) ("[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980))). That is why the Supreme Court warned that sentencing courts must not allow the "brutality or cold-blooded nature of any particular crime" to "overpower" the analysis of whether a sentence is constitutionally permissible. *Roper*, 543 U.S. at 573. Put another way, "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73. Rather than permitting sentencing judges to give disproportionate weight to the nature of the offense when considering the *Miller* factors, interpretation of JUVRA instead must require a more precise standard consistent with juvenile sentencing jurisprudence that does not give undue weight to the crime itself.

B. "Any Other Factor The Court Deems Relevant"

A standard that permits courts to consider "any other factor the Court deems relevant" creates risk that bias will influence sentencing and allows judges broad discretion to insert their individual biases and prejudices about an individual into their sentencing decisions. Judges are not immune to the effects of implicit and explicit biases. *See* Prescott Loveland, *Acknowledging and Protecting Against Judicial Bias at Fact-Finding in Juvenile Court*, 45 Fordham Urb. L.J. 283, 301 (2017) ("[E]ach of us in doing our jobs are viewing the functions of that job through the lens of our experiences, and all of us are impacted by biases, stereotypes and other cognitive functions that enable us to take shortcuts in what we do." (quoting *Judges: 6 Strategies to Combat Implicit Bias on the Bench*, Am. Bar Ass'n (Sept. 2016), https://perma.cc/U24F-HUZY)).

False racial stereotypes like the "super-predator" myth continue to infect treatment of youth in the justice system. "Adultification bias" of Black youth shows that people are likely to perceive Black children as older, less innocent, and more culpable. *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 540 (2014). Other research shows sentencing and culpability biases toward Black youth as compared to white youth. *See* Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLoS ONE 1, 2 (2012). A heightened standard for evaluating sentencing decisions reduces the risk these "powerful" stereotypes pose. *Buck*, 137 S. Ct. at 776. In

one study, researchers "found a strong white preference among the white [trial] judges," stronger even than that observed among a sample of white subjects from the general population obtained online. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1210-11 (2009). Another study of trial judges found that they often rely on intuitive, rather than deliberative, decision-making processes, which risks leading to reflexive, automatic judgments, including intuitively "associat[ing] . . . African Americans with violence." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 156-57 (2010) (citing Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 31 (2007)). Judges' implicit biases undoubtedly contribute to the fact that "at virtually every stage of the juvenile justice process, [Black youth] receive harsher treatment than white youth, even when faced with identical charges and offending histories." Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. Marshall L.J. 437, 440 (2015) (citing Richard A. Mendel, The Annie E. Casey Found., *No Place for Kids: The Case for Reducing Juvenile Incarceration* 23 (2011)); *see also* Bennett, *supra*, at 157 ("judges harbor the same kinds of implicit biases as others [and] that these biases can influence their judgment" (quoting Rachlinski et al., *supra*, at 1195)).

Requiring a heightened standard for the imposition of LWOP sentences will mitigate the risk that racial biases will adversely affect Black youth during sentencing. One of the most effective ways to avoid group biases is to engage in "[i]ndividuation," or "gathering very specific information about a person's background, tastes, hobbies and family so that [the] judgment will consider the particulars of that person, rather than group characteristics." *Judges: 6 Strategies to Combat Implicit Bias on the Bench, supra*; *see* Sean Darling-Hammond, *Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts*, 21 U.C. Davis J. Juv. L. & Pol'y 169, 185-86 (2017) (judges that lack information unique to the defendant "may struggle to view out-group members (like Black juveniles) through non-stereotypical lenses").

C. "Interests of Justice"

As with the permission to consider any "relevant" information, allowing judges to modify a sentence "if the interests justice" warrant it provides expansive authority to judges, well beyond the scope of *Miller*. Although judges routinely exercise discretion in their decision-making, such broad discretion "could allow personal racial bias or prejudice to have an enhanced role in adjudications." Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 Geo. J. Legal Ethics 97, 132 (2011) (commenting on discretion afforded to juvenile court judges). In the context of juvenile courts, with an analogous grant of broad discretion, one scholar argued that the lack of a precise standard can result in discriminatory punishments.

> [T]he exercise of "sound discretion" simply constitutes a euphemism for idiosyncratic judicial subjectivity. Racial, gender, geographic, and socio-economic disparities constitute almost inevitable corollaries of a treatment ideology that lacks a scientific foundation. At the least, judges will sentence youths differently based on extraneous personal characteristics for which they bear no responsibility. At the worst, judges will impose haphazard, unequal, and discriminatory punishment on similarly situated offenders without effective procedural or appellate checks.

Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. Crim. L. & Criminology 68, 91-92 (1997).

A properly structured sentencing hearing under *Miller*, can avoid this boundless discretion. As set forth above, *Miller* requires consideration of several individualized factors that account for youth and its hallmark characteristics. *Miller*, 567 U.S. at 477-78. Sentencing courts that abide by *Miller*, cannot insert their own notions of what is "in the interests of justice." Indeed, research confirms that "interest of justice" dismissals of charges were granted disproportionately to white petitioners in one California county. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 562 (2009) (citing Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, San Jose Mercury News, Dec. 8, 1991, at 1A). The pervasiveness of racial disparities in sentencing warrants a more exacting standard.

CONCLUSION

Wherefore, *Amici* respectfully request that for the foregoing reasons this Honorable Court vacate Mr. Malvo's sentence and order a resentencing hearing.

Respectfully Submitted,

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Dated: December 2, 2021

Font: Times New Roman 13

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,322 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.

/s/ Booth Marcus Ripke
Booth Marcus Ripke

CERTIFICATION REGARDING RESTRICTED INFORMATION

I HEREBY CERTIFY that this document does not contain any restricted information as defined in the Maryland Rules. Therefore, no redacted or un-redacted copies are necessary under Rule 20-201.

/s/ Booth Marcus Ripke
Booth Marcus Ripke

APPENDIX

INTEREST AND IDENTITY OF *AMICI CURIAE*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

The **Charles Hamilton Houston Institute for Race and Justice** ("CHHIRJ") at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most harmed.

CHHIRJ has filed a number of amicus briefs on the influence of race in sentencing and the cruelty of life without the possibility of parole sentences for juveniles, including at the U.S. Supreme Court in *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*, and in *Diatchenko v. District Attorney for Suffolk District* before the Massachusetts Supreme Judicial Court, which interpreted both the Eighth Amendment to the U.S. Constitution and Art. 26 of the Massachusetts Declaration of Rights. CHHIRJ's *amicus* brief was cited by Justice Kennedy in the *Graham* majority opinion. *Graham v. Florida*, 560 U.S. 48, 78 (2010), as modified (July 6, 2010).

The **Center on Race, Inequality, and the Law at New York University School of Law** ("Center") was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Among the Center's top priorities is wholesale reform of the criminal legal system in this country, which has, since its inception, been infected by racial bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy, and litigation aimed at cleansing the criminal legal system of policies and practices that perpetuate racial injustice and inequitable outcomes.

The **Fred T. Korematsu Center for Law and Equality** is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has produced reports and participated in litigation and other reform efforts to ensure the fair

treatment of juveniles in the criminal legal system. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The **Sentencing Project**, founded in 1986, is a national nonprofit organization engaged in research and advocacy on justice reform. The organization is recognized nationwide for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced numerous studies that document the expansion of life imprisonment and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for lowering state and federal prison populations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2021, an electronic copy of the foregoing was has been filed and served electronically via the Court's MDEC system, by arrangement with the following:

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Marissa Lariviere

From: Kiran Iyer <kiran.r.iyer@gmail.com>
Sent: Wednesday, November 10, 2021 5:19 PM
To: Marissa Lariviere
Cc: Tiffany Faith; celia.davis@maryland.gov
Subject: Re: Consent for Amicus Sought (Malvo v. State, COA-REG-0029-2021)

We consent - thanks!

El El mié, 10 de noviembre de 2021 a la(s) 15:58, Marissa Lariviere <mlariviere@jlc.org> escribió:

> Dear Counsel,
>
> Juvenile Law Center seeks your consent to file an *amicus* brief before the Maryland Court of Appeals in *Lee Boyd Malvo v. State of Maryland.* Juvenile Law Center seeks to file an *amicus* brief in support of Mr. Malvo.
>
> Additional organizations and/or individuals may join the brief as well.
>
> Additionally, Juvenile Law Center seeks your consent to complete service via the MDEC system, waiving the requirement for service via paper copies.
>
> Please let me know if you have questions.
>
> Thank you,
>
> Marissa
>
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Marissa Lariviere

From: Williams, Carrie <cwilliams@oag.state.md.us>
Sent: Wednesday, November 10, 2021 6:08 PM
To: Marissa Lariviere
Cc: Tiffany Faith
Subject: RE: Consent for Amicus Sought (Malvo v. State, COA-REG-0029-2021)

Good evening,

The State consents to the filing of the amicus brief and being served via MDEC. Thank you and have a good evening.

Carrie

Carrie J. Williams

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Pronouns: she/her/hers

From: Marissa Lariviere <mlariviere@jlc.org>
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Cc: Tiffany Faith <tfaith@jlc.org>
Subject: Consent for Amicus Sought (Malvo v. State, COA-REG-0029-2021)

Dear Counsel,

Juvenile Law Center seeks your consent to file an *amicus* brief before the Maryland Court of Appeals in *Lee Boyd Malvo v. State of Maryland.* Juvenile Law Center seeks to file an *amicus* brief in support of Mr. Malvo.

Additional organizations and/or individuals may join the brief as well.

Additionally, Juvenile Law Center seeks your consent to complete service via the MDEC system, waiving the requirement for service via paper copies.

Please let me know if you have questions.

Thank you,

Marissa

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