APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6746

LEE BOYD MALVO,

Petitioner-Appellee,

v.

RANDALL MATHENA, Chief Warden, Red Onion State Prison,

Respondent-Appellant.

HOLLY LANDRY,

Amicus Supporting Appellee.

No. 17-6758

(Filed June 21, 2018)

LEE BOYD MALVO,

Petitioner-Appellee,

v.

RANDALL MATHENA, Chief Warden, Red Onion State Prison,

Respondent-Appellant.

HOLLY LANDRY,

Amicus Supporting Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:13-cv-00375-RAJ-LRL; 2:13-cv-00376-RAJ-LRL).

Argued: January 23, 2018 Decided: June 21, 2018

Before NIEMEYER, KING, and DIAZ, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge King and Judge Diaz joined.

ARGUED: Matthew Robert McGuire, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant. Craig Stover Cooley, Richmond, Virginia, for Appellee. **ON BRIEF:** Mark R. Herring, Attorney General, Trevor S. Cox, Acting Solicitor General, Donald E. Jeffrey III, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant. Michael Arif, ARIF & ASSOCIATES, P.C., Fairfax, Virginia, for Appellee. Danielle Spinelli, Beth C. Neitzel, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Amicus Curiae.

NIEMEYER, Circuit Judge:

In Virginia in 2004, a defendant convicted of capital murder, who was at least 16 years old at the time of his crime, would be punished by either death or life imprisonment without the possibility of parole, unless the judge suspended his sentence. After a Virginia jury convicted Lee Boyd Malvo of two counts of capital murder based on homicides that he committed in 2002 when he was 17 years old, it declined to recommend the death penalty, and he was instead sentenced in 2004 to two terms of life imprisonment without parole, in accordance with Virginia law.

Thereafter, Malvo, again seeking to avoid the death penalty, pleaded guilty in another Virginia jurisdiction to one count of capital murder and one count of attempted capital murder—both of which he also committed when 17 years old—and received two additional terms of life imprisonment without parole.

After Malvo was sentenced in those cases, the Supreme Court issued a series of decisions relating to the sentencing of defendants who committed serious crimes when under the age of 18. It held that such defendants cannot be sentenced to death; that they cannot be sentenced to life imprisonment without parole unless they committed a homicide offense that reflected their permanent incorrigibility; and that these rules relating to juvenile sentencing are to be applied retroactively, meaning that sentences that were legal when imposed must be vacated if they were imposed in violation of the Court's new rules. *See Roper v.*

Simmons, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

In these habeas cases filed under 28 U.S.C. § 2254, we conclude that even though Malvo's life-without-parole sentences were fully legal when imposed, they must now be vacated because the retroactive constitutional rules for sentencing juveniles adopted subsequent to Malvo's sentencings were not satisfied during his sentencings. Accordingly, we affirm the district court's order vacating Malvo's four terms of life imprisonment without parole and remanding for resentencing to determine (1) whether Malvo qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his "crimes reflect permanent incorrigibility" or (2) whether those crimes instead "reflect the transient immaturity of youth," in which case he must receive a sentence short of life imprisonment without the possibility of parole. *Montgomery*, 136 S. Ct. at 734.

I

A

Over the course of almost seven weeks in the fall of 2002, Lee Malvo and John Muhammad—better known as the "D.C. Snipers"—murdered 12 individuals, inflicted grievous injuries on 6 others, and terrorized the entire Washington, D.C. metropolitan area, instilling an all-consuming fear into the community.

The violence began on September 5, 2002, when Malvo—who was at the time 17 years old—ran up to a man's car in Clinton, Maryland, shot him six times with a .22 caliber handgun, and stole his laptop and $3,500 in cash. *See Muhammad v. Kelly*, 575 F.3d 359, 362 (4th Cir. 2009). Ten days later, again in Clinton, Maryland, Malvo approached a man who was in the process of closing a liquor store and shot him in the abdomen at close range with the handgun. *Id.*

Muhammad and Malvo then went south for a short period. On September 21, Muhammad used a high-powered, long-range Bushmaster assault rifle to shoot two women who had just closed a liquor store in Montgomery, Alabama. Malvo was seen approaching the women as the shots were being fired and then rummaging through their purses. One of the women died from her wounds. *Muhammad*, 575 F.3d at 362. Two days after that, a woman in Baton Rouge, Louisiana, was fatally shot in the head with a Bushmaster rifle after closing the store where she worked. Again, Malvo was seen fleeing the scene with her purse. *Id.* at 362-63.

Shortly thereafter, Muhammad and Malvo returned to the Washington, D.C. area and, from October 2 until their capture on October 24, embarked on a series of indiscriminate sniper shootings with the Bushmaster rifle that left 10 more people dead, 3 seriously wounded, and the entire region "gripped by a paroxysm of fear," convinced that "every man, woman, and child was a likely target." *Muhammad v. State*, 934 A.2d 1059, 1065-66 (Md. Ct. Spec. App. 2007). On October 2,

shortly after 6 p.m., they shot and killed a man while he was in a grocery store parking lot in Montgomery County, Maryland. *Id.* at 1066. The next day, they murdered five people—four in the morning at different locations in Montgomery County, and a fifth that evening in Washington, D.C. *Id.* at 1067-69. The following day, they shot and seriously wounded a woman in Spotsylvania County, Virginia, while she was loading goods into her car. *Id.* at 1070. On October 7, they shot and gravely injured a 13-year-old boy in Prince George's County, Maryland, while he was on his way to school; two days later, they shot and killed a man at a gas station in Prince William County, Virginia; two days after that, they shot and killed another man at a gas station in Spotsylvania County, Virginia; and three days after that, they shot and killed a woman outside a Home Depot store in Fairfax County, Virginia. *Id.* at 1070-72. On October 19, they shot and seriously wounded a man while he was leaving a restaurant in Ashland, Virginia, and on October 22, they shot and killed a bus driver in Montgomery County, Maryland, the last of their sniper shootings. *Id.* at 1068, 1072.

Malvo and Muhammad were apprehended in the early hours of October 24 at a rest area in Frederick County, Maryland, while sleeping in a blue Chevrolet Caprice. A loaded .223 caliber Bushmaster rifle was found in the car, and a hole had been "cut into the lid of the trunk, just above the license plate, through which a rifle barrel could be projected." *Muhammad*, 934 A.2d at 1075. Modifications had also been made to the car's rear seat to allow access to the trunk area

from the car's passenger compartment. *Id.* After his arrest, Malvo told authorities in Virginia that "he and his 'father,' John Allen Muhammad, had acted as a sniper team . . . in an effort to extort ten million dollars from the 'media and the government' " and that he had been the triggerman in 10 of the shootings. Later, however, when testifying as a witness at Muhammed's [sic] first-degree murder trial in Montgomery County, Maryland, Malvo stated that "he had been the actual shooter of [the 13-year old boy] in Prince George's County and of [the bus driver] in Montgomery County" and that "Muhammad had been the actual triggerman on all other occasions." *Id.* at 1078.

In January 2003, a grand jury in Fairfax County, Virginia, returned an indictment charging Malvo as an adult with (1) capital murder in the commission of an act of terrorism, in violation of Va. Code Ann. § 18.2-31(13); (2) capital murder for killing more than one person within a three-year period, in violation of § 18.2-31(8); and (3) using a firearm in the commission of a felony, in violation of § 18.2-53.1. The prosecutor in that case sought the death penalty. Malvo pleaded not guilty to the charges, and, to ensure an impartial jury pool, the case was transferred to the Circuit Court for the City of Chesapeake, Virginia.

At the trial, which took place during November and December 2003, Malvo acknowledged his involvement in the killings but asserted an insanity defense based on the theory that he had been indoctrinated by Muhammad during his adolescence and was operating under Muhammad's control. To that end, defense

counsel presented testimony from more than 40 witnesses who collectively described how Malvo was physically abused and largely abandoned as a child growing up in Jamaica and Antigua; how, when he was 15 years old, he befriended John Muhammad, an American veteran who had taken his three children to live in Antigua without their mother's knowledge; how Muhammad became a surrogate father for Malvo and brought him illegally to the United States in May 2001; how Malvo briefly reunited with his mother in the United States but then moved across the country in October 2001 to rejoin Muhammad, who had recently lost custody of his children; and how Muhammad then intensively trained Malvo in military tactics for nearly a year, telling Malvo that he had a plan to get his children back and force America to reckon with its social injustices. The jury rejected Malvo's insanity defense and convicted him of all charges, including the two capital murder charges.

At the sentencing phase of trial, the jury was instructed to choose between the death penalty and life imprisonment without parole. During this phase, Malvo's counsel presented additional evidence on Malvo's background and history, and he stressed Malvo's youth and immaturity in arguing that Malvo should be spared the death penalty. The jury returned its verdict on December 23, 2003, finding "unanimously and beyond a reasonable doubt after consideration of [Malvo's] history and background that there [was] a probability that he would commit criminal acts of violence that constitute a continuing serious threat

to society" and also "that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind." Nonetheless, the jury, "having considered all of the evidence in aggravation and mitigation of the offense," "fix[ed] his punishment at imprisonment for life" for each of his two capital murder convictions.

After the jury was excused and a presentence report was prepared, the court conducted a final sentencing hearing on March 10, 2004, sentencing Malvo to two terms of life imprisonment, as required by Virginia law. *See* Va. Code Ann. § 19.2-264.4(A) (2004) (providing, for capital murder convictions, that where "a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life"). Under Virginia law, a defendant sentenced to life imprisonment for a capital murder offense committed on or after January 1, 1995, is ineligible for any form of parole. *See* Va. Code Ann. §§ 53.1-165.1, 53.1-40.01. The court also sentenced Malvo to three years' imprisonment for the firearm conviction.

Following his conviction and sentencing in the Chesapeake City Circuit Court, Malvo entered an "*Alford* plea" pursuant to a plea agreement, *see North Carolina v. Alford*, 400 U.S. 25 (1970) (authorizing a defendant to waive trial and to consent to punishment without admitting participation in the acts constituting the crime), in the Circuit Court for the County of Spotsylvania, Virginia, pleading guilty to one count of capital murder, one count of attempted capital murder, and two counts of using a firearm in the commission of

a felony. The plea agreement indicated that Malvo's attorney had advised Malvo that he faced death or imprisonment for a term of life for the capital murder charge and a sentence of 20 years to life imprisonment for the attempted capital murder charge. In the agreement, Malvo waived his "right to an appeal" and admitted that "the Commonwealth ha[d] sufficient evidence to convict [him]." The Commonwealth in turn agreed to dismiss two pending charges and agreed that sentencing Malvo to two terms of life imprisonment without parole, as well as eight years' imprisonment for the firearm offenses, was the "appropriate disposition in this case."

The Spotsylvania County Circuit Court held a plea and sentencing hearing on October 26, 2004, at which it confirmed that Malvo understood "that by pleading guilty [he was] giving up constitutional rights"—specifically, his "right to a trial by jury" and his "right to confront and cross examine [his accusers]"—and that he was also "probably giving up [his] right to appeal any decisions made by this Court." After ensuring that Malvo understood the nature of the charges against him and had concluded, after consulting with his lawyers, that his *Alford* plea was "in [his] best interests," the court accepted Malvo's guilty pleas, finding that they "were freely, voluntarily, and intelligently made." It also "accepted and approved" the plea agreement itself. The court then sentenced Malvo to two terms of life imprisonment without parole for his capital murder and attempted capital murder convictions, plus eight years' imprisonment for the firearm convictions.

B

Nearly eight years after the conclusion of Malvo's Virginia prosecutions, the Supreme Court held that the Eighth Amendment prohibits juvenile homicide offenders from receiving "mandatory life-without-parole sentences" and that, before sentencing such an offender to life without parole, the sentencing court must first consider the "offender's youth and attendant characteristics." *Miller*, 567 U.S. at 476, 483. In light of *Miller*, Malvo filed two applications for writs of habeas corpus in the U.S. District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 2254, one challenging the life-without-parole sentences imposed by the Chesapeake City Circuit Court and the other addressing the same sentences from the Spotsylvania County Circuit Court.

The district court denied and dismissed with prejudice both applications, concluding that *Miller* was not "retroactively applicable to cases on collateral review," 28 U.S.C. § 2244(d)(1)(C), and that Malvo's habeas applications therefore were time-barred under § 2244(d)'s 1-year period of limitation. After Malvo appealed, his case was placed in abeyance while this court and the Supreme Court addressed whether *Miller* was to be applied retroactively. On January 25, 2016, the Supreme Court held that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Montgomery*, 136 S. Ct. at 732. Accordingly, we remanded Malvo's case comprising his two habeas applications to the district court for further consideration in light of *Montgomery*.

By memorandum and order dated May 26, 2017, the district court granted both of Malvo's habeas applications, vacating his four sentences of life imprisonment without parole and remanding to the Chesapeake City Circuit Court and the Spotsylvania County Circuit Court for resentencing in accordance with *Miller* and *Montgomery*. *See Malvo v. Mathena*, 254 F. Supp. 3d 820 (E.D. Va. 2017). In entering that order, the district court rejected the Warden's argument that because the trial courts retained discretion under Virginia law to suspend Malvo's life sentences in whole or in part, those sentences were not mandatory and therefore were not covered by the *Miller* rule. The court explained that the constitutional rule announced in *Miller* and restated in *Montgomery* provided relief not only from *mandatory* life-without-parole sentences but also potentially from *discretionary* life-without-parole sentences. The district court also rejected the Warden's argument that in sentencing Malvo, the Chesapeake City Circuit Court had actually considered whether Malvo was one of those rare juvenile offenders whose crimes reflected irreparable corruption, as required by *Miller*. And finally, the court rejected the Warden's argument that Malvo, in entering the *Alford* plea in Spotsylvania County Circuit Court, waived the Eighth Amendment rights announced in *Miller*. In conclusion, the district court recognized that it was "completely possible that any resentencing conducted in accordance with *Miller* and *Montgomery* [might] result[] in the same sentences," *id.* at 834, but it concluded that Malvo was entitled to the procedure

described in those cases before being sentenced to life without parole.

From the district court's May 26, 2017 order, the Warden filed this appeal.

II

In its Eighth Amendment jurisprudence, the Supreme Court recognizes that persons under the age of 18 as a class are constitutionally different from adults for purposes of sentencing. Juveniles inherently lack maturity; they do not have a fully formed character and a fully developed sense of responsibility; and they are both more susceptible to external influences and less able to control their environment than are adults. Juveniles are also more capable of change than adults and therefore more capable of being reformed. Because of these attributes of youth, juveniles are not as morally culpable as adults when engaging in similar conduct. In light of these characteristics, the Court recognizes that juveniles as a class are less deserving of the most severe punishments. But it also recognizes that a rare few juveniles may nonetheless be found to be permanently incorrigible.

Giving effect to these observations, the Supreme Court has developed a juvenile-sentencing jurisprudence beginning with its 2005 decision in *Roper*, where it held that the death penalty cannot be imposed on juvenile offenders. *See* 543 U.S. at 571. That decision was followed by *Graham*, where the Court held that "[t]he Constitution prohibits the imposition of a life

without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. The *Graham* Court explained that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but it must give such defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75; *see also id.* ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life," but "[i]t does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society").

Two years later in *Miller*, the Court held that a juvenile offender convicted of homicide cannot receive a mandatory sentence of life without parole. It explained, "Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Miller*, 567 U.S. at 476. The Court stated, moreover, that not only must "a judge or jury . . . have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," *id.* at 489, but also the sentencer must actually "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *id.* at 480. The Court did not, however, adopt "a categorical bar on life without parole for juveniles," *id.* at 479, instead reserving the possibility that such a

severe sentence could be appropriately imposed on "the rare juvenile offender whose crime reflects irreparable corruption," *id.* at 479-80 (quoting *Roper*, 543 U.S. at 573).

Finally, in 2016, the Court decided *Montgomery*, holding that *Miller* announced a new "substantive rule" of constitutional law that applies retroactively "to juvenile offenders whose convictions and sentences were final when *Miller* was decided." 136 S. Ct. at 725, 732; *see also Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion) (recognizing that a new rule of constitutional law applies retroactively only if it qualifies as a substantive rule or a watershed rule of criminal procedure). Articulating the *Miller* rule, the *Montgomery* Court stated that "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge [must] take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 480). It then stated:

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller*

> determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, *it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, Miller announced a substantive rule of constitutional law.* Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.

Id. at 734 (alteration in original) (emphasis added) (internal quotation marks and citations omitted); *see also id.* ("Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence"). The Court explained further that *Miller* contained both a substantive rule and a procedural component: "*Miller*'s substantive holding" was that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity," and its procedural component implementing the substantive rule requires "[a] hearing where youth and its attendant circumstances are considered as sentencing factors" in order to "separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735 (internal quotation marks omitted).

III

In this appeal, the Warden contends that notwithstanding this new Eighth Amendment jurisprudence governing the sentencing of juveniles, the district court erred in awarding habeas corpus relief to Malvo, giving three reasons in support of his contention. *First*, he argues that "Malvo has no entitlement to relief under *Miller*" because "*Miller*'s new rule explicitly applies to *mandatory* life-without-parole sentences," whereas "the Virginia Supreme Court has conclusively held that Virginia does not impose mandatory sentences for any homicide offense" because judges retain the discretionary right to suspend sentences; *second*, that "Malvo received all that *Miller* would entitle him to during his trial in Chesapeake [City]" and therefore is not entitled to resentencing in that jurisdiction; and *finally*, that "Malvo's voluntary decision to enter into a plea agreement with stipulated sentences in Spotsylvania to eliminate the possibility of [the death penalty] waive[d] any claim he would have had under *Miller*" as to the two life-without-parole sentences he received in that jurisdiction. We consider these arguments in turn.

A

First, the Warden contends that because the *Miller* rule is limited to *mandatory* sentences of life imprisonment without parole, it does not implicate Malvo's sentences, which were, under Virginia law, subject to the sentencing court's discretion to suspend the sentence in whole or in part. He argues that

because Malvo had the *opportunity* under Virginia law to request that his life sentences be suspended, he did not receive *mandatory* life-without-parole sentences and therefore is not entitled to any relief under *Miller*. Responding to the district court's conclusion that *Montgomery* clarified that the rule in *Miller* applies more broadly than only to mandatory life-without-parole sentences, the Warden contends that *Miller* itself did not sweep so broadly and that only the *Miller* rule applying to mandatory sentences was made retroactive in *Montgomery*. Indeed, he argues that the district court violated the rule established in *Teague* "by crafting a new rule of constitutional law based on *Montgomery*'s discussion of *Miller* and applying that new rule retroactively." In other words, as the Warden argues, "the principles of finality discussed in *Teague* prohibit federal courts from expanding new rules of constitutional law beyond their holdings," and "the correct approach is to recognize that . . . *Miller*'s new rule is defined by *Miller* itself, not *Montgomery*."

In response, Malvo contends that he did indeed receive mandatory life-without-parole sentences within the meaning of *Miller* because Virginia law provided then and still provides that when a jury declines to recommend the death penalty for a defendant convicted of capital murder, the defendant must be sentenced to life imprisonment without parole. *See* Va. Code Ann. § 19.2-264.4(A); *see also id.* §§ 53.1-165.1, 53.1-40.01. He asserts further that Virginia trial courts were not aware at the time of his sentencings in 2004 that they were empowered to suspend capital murder sentences.

Finally, he argues that, in any event, the *Miller* rule is not limited to *mandatory* life-without-parole sentences but also applies, as noted in *Montgomery*, to *all* life-without-parole sentences where the sentencing court did not resolve whether the juvenile offender was "irretrievably corrupt" or whether his crimes reflected his "transient immaturity."

As the Warden asserts, the Virginia Supreme Court has now twice recognized that Virginia trial courts have long had the authority to suspend life sentences in whole or in part even following a capital murder conviction – an interpretation of Virginia law that is, of course, binding here. *See Jones v. Commonwealth* (*Jones II*), 795 S.E.2d 705, 712 (Va. 2017) (reaffirming the holding in *Jones v. Commonwealth* (*Jones I*), 763 S.E.2d 823, 824-25 (Va. 2014) (holding that when a Virginia trial court sentenced a juvenile homicide offender for capital murder in 2001, it had the authority to suspend part or all of his life sentence)). But also, as Malvo asserts, it is far from clear that anyone involved in Malvo's prosecutions actually understood at the time that Virginia trial courts retained their ordinary suspension authority following a conviction for capital murder. We need not, however, resolve whether any of Malvo's sentences were mandatory because *Montgomery* has now made clear that *Miller*'s rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence.

To be sure, all the penalty schemes before the Supreme Court in both *Miller* and *Montgomery* were

mandatory. Yet the *Montgomery* Court confirmed that, even though imposing a life-without-parole sentence on a juvenile homicide offender pursuant to a mandatory penalty scheme *necessarily* violates the Eighth Amendment as construed in *Miller*, a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's "crimes reflect permanent incorrigibility," as distinct from "the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734. And we are not free to conclude, as the Warden argues, that *Montgomery*'s articulation of the *Miller* rule was mere dictum. To the contrary, *Montgomery* stated clearly that, under *Miller*, the Eighth Amendment bars life-without-parole sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility. Indeed, this scope was the basis for its holding that *Miller* announced a substantive rule that applies retroactively to cases on collateral review. *See id.* And because *Montgomery* explicitly articulated the rule in *Miller* that it was retroactively applying, the district court could not have violated *Teague* in applying that rule. The Warden may well critique the Supreme Court's ruling in *Montgomery*—as did Justice Scalia in dissent, *see Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting) ("It is plain as day that the majority is not applying *Miller*, but rewriting it")—but we are nonetheless bound by *Montgomery*'s statement of the *Miller* rule.

At bottom, we reject the Warden's argument that Malvo "has no entitlement to relief under *Miller*" on

the ground that *Miller* applies only to mandatory life-without-parole sentences and instead conclude that *Miller*'s holding potentially applies to any case where a juvenile homicide offender was sentenced to life imprisonment without the possibility of parole.

B

The Warden next contends that even if *Miller* applies to discretionary life-without-parole sentences, "Malvo received all that *Miller* would entitle him to during his trial in Chesapeake," and thus the two life-without-parole sentences that he received in that proceeding must be permitted to stand. In advancing this argument, the Warden notes that "[o]ver the course of six weeks, the jury heard an enormous amount of mitigation evidence that was nearly all focused on [Malvo's] youth, upbringing, and impressionability," and that it also "heard from multiple expert witnesses who testified specifically about how Malvo's age and upbringing affected his competency." He argues further that "the trial court and the jury actually considered [Malvo's mitigation] evidence in imposing the sentences in this case" and that "the jury's finding of future dangerousness and vileness shows that Malvo is the 'rare juvenile offender whose crime reflect[ed] irreparable corruption.'" Moreover, according to the Warden, the fact "[t]hat Malvo chose not to use the evidence he introduced to argue for a sentence less than life without parole does not change the fact that he had the opportunity to present the relevant evidence and

argue for leniency, which is all that the Eighth Amendment requires."

The problem with the Warden's argument, however, is that, as a matter of Virginia law, the jury was not allowed to give a sentence less than life without parole. It was charged with deciding between the death penalty and life without parole, and it selected the more lenient of the two. Thus, even though the jury did find future dangerousness and vileness, as the Warden notes, it also considered Malvo's mitigation evidence and found that he deserved the lighter of the two sentences that it *could* give—life without parole.

Moreover, the Chesapeake City jury was never charged with finding whether Malvo's crimes reflected irreparable corruption or permanent incorrigibility, a determination that is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender. Nor were Malvo's "youth and attendant circumstances" considered by either the jury or the judge to determine whether to sentence him to life without parole or some lesser sentence. *Montgomery*, 136 S. Ct. at 735.

We thus conclude that Malvo's sentencing proceedings in the Chesapeake City Circuit Court did not satisfy the requirements of the Eighth Amendment as articulated in *Miller* and *Montgomery.*

C

Finally, the Warden contends that "Malvo's voluntary decision to enter into a plea agreement with stipulated [life-without-parole] sentences in Spotsylvania . . . waive[d] any claim he would have had under *Miller*" as to those two sentences. The Warden notes that "Malvo received a substantial benefit" in "avoid[ing] a second trial at which he could have been sentenced to death" and contends that Malvo must therefore "be held to the terms of his bargain." He cites *Brady v. United States*, 397 U.S. 742 (1970), and *Dingle v. Stevenson*, 840 F.3d 171 (4th Cir. 2016), to argue that both the "Supreme Court and this Court have made clear that guilty pleas are not open to revision when future changes in the law alter the calculus that caused the defendant to enter his plea."

At the outset, we conclude that the resolution of this issue is not governed by *Brady* or *Dingle.* In *Brady*, the defendant pleaded guilty to a crime that carried the possibility of the death penalty in order to avoid that penalty, receiving instead a 50-year sentence of imprisonment (later reduced to 30 years). When the Supreme Court later held that the death-penalty provision involved in Brady's case was unconstitutional, Brady sought to set aside his plea agreement as invalid. The *Brady* Court rejected Brady's argument, noting that "even if we assume that Brady would not have pleaded guilty except for the death penalty provision . . . , this assumption merely identifies the penalty provision as a 'but for' cause of his plea," but it "does not necessarily prove that the plea was coerced and invalid

as an involuntary act." 397 U.S. at 750. Rather, "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty," even one subsequently invalidated. *Id.* at 755.

In *Dingle*, we applied *Brady* to similar circumstances, concluding that a plea agreement could not be set aside as involuntary and invalid because it was entered into by Dingle to avoid the death penalty when that penalty was later determined to be unconstitutional in the circumstances. We noted in *Dingle* that the Supreme Court had "not suggested that a substantive rule would stretch beyond the proscribed sentence to reopen guilty pleas with a different sentence." 840 F.3d at 174.

Thus, in both *Brady* and *Dingle*, the defendants sought to use new sentencing case law to attack their convictions—their guilty pleas—without any claim that the sentences they actually received were unlawful. The question in both cases was thus whether to set aside the guilty-plea *convictions* when the *penalties that induced the pleas* were later found to be unconstitutional. In both cases that relief was denied, and the legality *vel non* of the avoided sentences was thus held not to cast doubt on the validity of the guilty plea. In this case, by distinction, Malvo seeks to challenge his *sentences*, not his guilty-plea *convictions*, on the ground that they were retroactively made unconstitutional under the rule announced in *Miller*. Thus, whereas the defendants in *Brady* and *Dingle* sought to use new sentencing law as a sword to attack the validity of their guilty pleas, here the Warden seeks to use

Malvo's lawful guilty plea as a shield to insulate his allegedly unlawful life-without-parole sentences from judicial review. We conclude that *Brady* and *Dingle* do not provide him with that shield.

Nonetheless, that brings us to the more formidable question of whether Malvo waived his constitutional challenge to his sentences by signing the plea agreement.

In that agreement, Malvo agreed that Virginia's summary of the facts could be proven in the case were it to go to trial, accepting that summary "in lieu of presentation of any evidence by the Commonwealth." And, after expressly waiving his rights to a speedy and public trial by jury, to compel the production of evidence and attendance of witnesses, to have a lawyer, to not testify against himself, and to be confronted by his accusers, he entered an *Alford* guilty plea and waived his right to an appeal. With respect to punishment, he stated in his plea agreement, "I understand that the Commonwealth's Attorney has agreed that the following specific punishment is the appropriate disposition in this case": "life in prison without parole" for the offenses of capital murder and attempted capital murder and a term of years for the other offenses. Finally, he acknowledged that "the Court [could] accept or reject this plea agreement." It is noteworthy, however, that in the plea agreement, Malvo did not himself agree that life-without-parole sentences were appropriate punishments for his crimes. That is not to say, of course, that Malvo did not expect that he was avoiding the

death penalty by receiving life sentences without parole. *See* Va. S. Ct. Rule 3A:8(c)(1)(C).

To begin, it is far from clear that a broad waiver of a *substantive* constitutional right, as the Warden maintains happened here, would even be enforceable. *See Montgomery*, 136 S. Ct. at 729, 734 (explaining that "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether *beyond the State's power* to impose" and that, "[l]ike other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment *that the law cannot impose upon him*" (alteration in original) (emphasis added) (internal quotation marks omitted)); *see also United States v. Lemaster*, 403 F.3d 216, 220 & n.2 (4th Cir. 2005) (holding that, just as "a defendant may waive his right to appeal directly from his conviction and sentence," he may also "waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary," but noting that there is a "narrow class of claims that we have allowed a defendant to raise on direct appeal despite a general waiver of appellate rights," including a claim that the "sentence imposed [was] in excess of the maximum penalty provided by statute," and indicating that "we see no reason to distinguish between waivers of direct-appeal rights and waivers of collateral-attack rights").

But, in any event, the plea agreement in this case does not provide any form of *express* waiver of Malvo's right to challenge the constitutionality of his sentence

in a collateral proceeding in light of future Supreme Court holdings, nor was he advised during his plea colloquy that his *Alford* plea would have that effect. He did expressly waive constitutional rights relating to trial and his right to direct appeal, but nothing with respect to the right to pursue future habeas relief from his punishment. Consequently, the Warden's waiver argument must rest on some form of *inherent* or *implied waiver* of his right to challenge his sentences as unconstitutional.

In the circumstances, we decline to hold that Malvo implicitly waived his right to argue, based on intervening Supreme Court holdings, that his sentences were ones that the State could not constitutionally impose on him. *Cf. Class v. United States*, 138 S. Ct. 798, 804-05 (2018) (explaining that while "a guilty plea does implicitly waive some claims, including some constitutional claims," it "does not bar a claim on appeal 'where on the face of the record the court had no power to enter the conviction or impose the sentence' " (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989))). We thus conclude that, while Malvo's convictions remain valid, nothing in his plea agreement precludes him from obtaining habeas relief under the new rule in *Miller*. Accordingly, we reject the Warden's argument that Malvo waived his right to challenge his sentences.

IV

To be clear, the crimes committed by Malvo and John Muhammad were the most heinous, random acts of premeditated violence conceivable, destroying lives and families and terrorizing the entire Washington, D.C. metropolitan area for over six weeks, instilling mortal fear daily in the citizens of that community. The Commonwealth of Virginia understandably sought the harshest penalties then available under the law, and the Warden now understandably seeks to sustain the penalties that were then legally imposed with arguments that are not without substantial force.

But Malvo was 17 years old when he committed the murders, and he now has the retroactive benefit of new constitutional rules that treat juveniles differently for sentencing. Because we are bound to apply those constitutional rules, we affirm the district court's grant of habeas relief awarding Malvo new sentencings. We make this ruling not with any satisfaction but to sustain the law. As for Malvo, who knows but God how he will bear the future.

AFFIRMED.

FILED: June 21, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6746 (L)
(2:13-cv-00375-RAJ-LRL)

LEE BOYD MALVO,

Petitioner-Appellee,

v.

RANDALL MATHENA, Chief Warden, Red Onion State Prison,

Respondent-Appellant.

HOLLY LANDRY,

Amicus Supporting Appellee.

No. 17-6758
(2:13-cv-00376-RAJ-LRL)

LEE BOYD MALVO,

Petitioner-Appellee,

v.

RANDALL MATHENA, Chief Warden, Red Onion State Prison,

Respondent-Appellant.

HOLLY LANDRY,

Amicus Supporting Appellee.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LEE BOYD MALVO,

Petitioner,

v.

RANDELL MATHENA [sic], CHIEF WARDEN, RED ONION STATE PRISON,

Respondent.

CIVIL ACTION NO. 2:13-cv-375
CIVIL ACTION NO. 2:13-cv-376

MEMORANDUM OPINION AND ORDER

(Filed May 26, 2017)

Lee Boyd Malvo ("Petitioner") has submitted two motions pursuant to Title 28, United States Code, Section 2254 for writs of habeas corpus by a person in state custody ("§ 2254 motions"). Chief Warden Randall Mathena ("Respondent") filed a motion to dismiss Petitioner's § 2254 motions. Having thoroughly reviewed the Parties' filings in this case, the Court finds this matter is ripe for judicial determination. For the reasons set forth below, Respondent's motion to dismiss is DENIED and Petitioner's § 2254 motions are both GRANTED.

I. PROCEDURAL HISTORY

On December 18, 2003, a jury in Chesapeake Circuit Court convicted Petitioner, a juvenile, of two

counts of capital murder and one count of using a firearm during the commission of a felony. ECF No. 24 (2:13cv375). On March 10, 2004, the Chesapeake Circuit Court sentenced Petitioner to one term of life imprisonment on each capital murder conviction, and three years of imprisonment on the firearm conviction, for a total incarceration sentence of two terms of life imprisonment, plus three years. *Id.* Under Virginia law, because Petitioner was sentenced to a term of incarceration for a felony offense committed after January 1, 1995, he was not eligible for parole. *See* Va. Code § 53.1-165.1.

On October 26, 2004, in Spotsylvania County Circuit Court, Petitioner pled guilty through an "*Alford* plea" to one count of capital murder, one count of attempted capital murder, and two counts of using a firearm in the commission of a felony. ECF No. 38, Ex. 1 at 7 (2:13cv376). As part of his plea agreement in the Spotsylvania case, Petitioner agreed to "be sentenced to life in prison without parole" for the capital murder conviction and the attempted capital murder conviction. ECF No. 38, Ex. 1 at 6 (2:13cv376).

That same day, the Spotsylvania County Circuit Court sentenced Petitioner to life imprisonment on the capital murder conviction, life imprisonment on the attempted capital murder conviction, three years of imprisonment on the first firearm conviction, and five years of imprisonment on the second firearm conviction. ECF No. 38, Ex. 1 at 45 (2:13cv376). The total sentence imposed was two terms of life imprisonment, plus eight years. Again, because Petitioner was

sentenced to a term of incarceration for a felony offense committed after January 1, 1995, he was not eligible for parole. *See* Va. Code § 53.1-165.1.

On June 25, 2013, Petitioner filed two motions for writs of habeas corpus under 28 U.S.C. § 2254 in the Western District of Virginia. ECF No. 1 (2:13cv375, 2:13cv376). On July 8, 2013, both motions were transferred from the Western District of Virginia to the Eastern District of Virginia. ECF No. 3 (2:13cv375, 2:13cv376). The first motion addresses Petitioner's sentences in the Chesapeake Circuit Court.[1] The second motion addresses Petitioner's sentences in the Spotsylvania County Circuit Court.[2]

On June 20, 2014, this Court denied both of Petitioner's § 2254 motions. ECF No. 24 (2:13cv375); ECF No. 21 (2:13cv376). Thereafter, Petitioner appealed both denials to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). ECF No. 26 (2:13cv375); ECF No. 23 (2:13cv376). On March 9, 2015, the Fourth Circuit consolidated the cases for review. ECF No. 32 (2:13cv375); ECF No. 29 (2:13cv376). In January 2016, the United States Supreme Court ("Supreme Court") decided *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), which directly affects Petitioner's § 2254 motions. The Fourth Circuit then remanded Petitioner's appeals to this Court for further consideration

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[1] Court filings related to this motion are docketed under case number 2:13cv375.

[2] Court filings related to this motion are docketed under case number 2:13cv376.

in light of *Montgomery.* ECF No. 36 (2:13cv375); ECF No. 30 (2:13cv376).

This Court ordered the parties to file briefs discussing their respective positions in light of *Montgomery.* ECF No. 40 (2:13cv375); ECF No. 34 (2:13cv376). On August 15, 2016, both parties filed their respective briefs and Respondent filed a motion to dismiss. ECF Nos. 41, 42 (2:13cv375); ECF Nos. 35, 36 (2:13cv376). The parties have also filed supplemental briefings on the issue of exhaustion of state remedies. ECF Nos. 49, 52 (2:13cv375); ECF Nos. 43, 46 (2:13cv376). On April 5, 2017, this Court held oral argument on the motions.

Petitioner argues that, following the Supreme Court's decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana,* his sentences in both Chesapeake Circuit Court and Spotsylvania County Circuit Court violate the Eighth Amendment to the U.S. Constitution. Therefore, Petitioner requests that this Court vacate his life sentences and order new sentencing proceedings in both Chesapeake Circuit Court and Spotsylvania County Circuit Court, during which each court would need to consider the factors set forth in *Miller* and *Montgomery.*

Respondent makes four arguments against Petitioner's § 2254 motions. The first two arguments apply to both of Petitioner's cases. Respondent's third argument is specific to Petitioner's sentences in Chesapeake Circuit Court. Respondent's fourth argument is specific to Petitioner's sentences in Spotsylvania County Circuit Court.

First, Respondent argues that *Miller* and *Montgomery* do not apply to Petitioner's sentences because Virginia's life-without-parole sentencing scheme is not mandatory. Second, Respondent argues that Petitioner's crimes are so heinous that life-without-parole sentences are warranted. Third, regarding Petitioner's Chesapeake case, Respondent argues that Petitioner received an individualized sentencing proceeding that meets the requirements of *Miller* and *Montgomery.* Finally, regarding Petitioner's Spotsylvania case, Respondent argues that Petitioner waived his right to challenge his sentences when he pled guilty in that case.

II. LEGAL STANDARDS

A. Exhaustion

Section 2254 of Title 28 of the United States Code governs post-conviction relief for prisoners in custody pursuant to a state court judgment. 28 U.S.C. § 2254. District courts must entertain § 2254 motions "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Additionally, a § 2254 motion cannot be granted unless the petitioner has first exhausted all remedies available in state court. 28 U.S.C. § 2254(b). This exhaustion requirement does not apply, however, if no state corrective process is available, or if such a process would be ineffective in protecting the petitioner's rights. *Id.*

B. *Miller* and *Montgomery*

In *Miller v. Alabama,* the Supreme Court decided the constitutionality of sentencing juvenile offenders to life imprisonment without parole. 132 S. Ct. 2455. This case involved two juvenile offenders (one from Alabama and one from Arkansas) who had been sentenced to life imprisonment without the possibility of parole. *Id.* at 2460. In neither state did the court have discretion to impose a different punishment. *Id.*

In analyzing whether such a penalty scheme violates the Constitution, the Supreme Court first noted that "'the concept of proportionality is central to the Eighth Amendment.'" *Id.* at 2463 (quoting *Graham v. Florida,* 560 U.S. 48, 59 (2010)). Therefore, to comport with the Constitution, the punishment for crimes must be proportioned, not only to the type of offense, but also to the age of the offender. *Id.* at 2462.

The Court found that juveniles are constitutionally different from adults for purposes of sentencing "[b]ecause juveniles have diminished culpability and greater prospects for reform," which makes them "less deserving of the most severe punishments." *Id.* at 2464. In light of this difference, the Eighth Amendment requires that sentencing courts consider the juvenile's youth and its attendant characteristics when imposing life-without-parole sentences. *Id.* at 2471. The Court explained as follows:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them,

> immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 2468.

Therefore, the *Miller* Court held that the mandatory life-without-parole penalty schemes in Alabama and Arkansas violated the Eighth Amendment because they "prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2458. Proportionality requires an "individualized sentencing" before a court can impose "the law's most serious punishments," including life imprisonment without parole. *Id.* at 2471.

In *Montgomery v. Louisiana,* the Supreme Court addressed the retroactivity of its holding in *Miller.* 136

S. Ct. 718. In 1963, a juvenile offender was tried for murder and the jury returned a verdict of "guilty without capital punishment." *Id.* at 725. Under state law, this verdict required the court to impose a life-without-parole sentence, and the sentence was automatic upon the jury's verdict. *Id.* at 725-26. After *Miller* was decided, the defendant sought collateral review of his life-without-parole sentence. The Louisiana Supreme Court denied his motion, finding that the rule announced in *Miller* was not retroactive. In *Montgomery,* the U.S. Supreme Court reversed that ruling and held that *Miller* is retroactive on collateral review. *Id.* at 736.

In *Montgomery,* the Court explained the full scope of its holding in *Miller.* The Court took care to emphasize that, among the juveniles who will receive sentences of life imprisonment, those who will not have the opportunity for parole should be few. *See id.* at 726. A sentencing court must consider more than just the juvenile offender's age before imposing life imprisonment without parole. *Id.* at 734. Such a penalty, the Court intimated, must be the result of a sentencing hearing in which the sentencer considers whether the crime committed reflects "irreparable corruption" on the one hand, or "the transient immaturity of youth" on the other. *Id.* at 734-35. The Court explained as follows:

> The [*Miller*] Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without

> parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."
>
> *Miller,* then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. . . .
>
> A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Id. at 733-35 (citations omitted).

Finally, the *Montgomery* Court explained that states can remedy *Miller* violations either by resentencing the petitioners in accordance with *Miller* and *Montgomery,* or by allowing the petitioners to be considered for parole. *Id.* at 736.

III. DISCUSSION

A. Exhaustion

Both parties agree that the state corrective process available to Petitioner would be ineffective to protect Petitioner's rights. ECF No. 49 at 2-8, ECF No. 52 at 1-2 (2:13cv375); ECF No. 43 at 2-8, ECF No. 46 at 1-2 (2:13cv376). This Court agrees.

The Virginia Supreme Court recently ruled that a *Miller* violation "cannot be addressed by a motion to vacate filed years after the sentence became final." *Jones v. Commonwealth,* 795 S.E.2d 705, 720 (Va. 2017). Although a *Miller* violation can be addressed in a state habeas proceeding, such a petition must be timely. *Id.* at 719-20. According to Virginia Code § 8.01-654(A)(2), a state habeas petition attacking a criminal conviction or sentence "shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later." These deadlines have expired. Therefore, Petitioner is exempted from the exhaustion requirement. *See Ross v. Fleming,* 2016 U.S. Dist. LEXIS 78500, *5 (W.D. Va. June 16, 2016) (reaching the same conclusion).

B. Whether *Miller* and *Montgomery* Apply to Petitioner's Cases

Respondent first argues that the requirements of *Miller* and *Montgomery* do not apply to Petitioner's cases.[3] ECF No. 54 at 1 (2:13cv375). This argument consists of two parts. First, Respondent claims that Virginia's life-without-parole penalty scheme is not a mandatory scheme. *Id.* Under Virginia law, life imprisonment without parole is the only sentence available for juveniles convicted of capital murder and attempted capital murder. *See* Va. Code §§ 18.2-10(a), 18.2-31. Nevertheless, Respondent cites a state statute that gives sentencing courts the option of suspending a defendant's sentence in whole or in part.[4] This, according to Respondent, gives sentencing courts discretion, thereby making Virginia's life-without-parole penalty scheme discretionary, rather than mandatory. ECF No. 54 at 1 (2:13cv375).

The second part of Respondent's argument is that the rule announced in *Miller* only applies to mandatory penalty schemes. *Id.* Therefore, because Virginia's penalty scheme is discretionary, Respondent maintains that *Miller* does not apply to the sentences Petitioner received from Virginia courts. *Id.*

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[3] Respondent's argument on this issue applies to both of Petitioner's cases.

[4] "After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine . . . ." Va. Code § 19.2-303.

This Court need not determine whether Virginia's penalty scheme is mandatory or discretionary because this Court finds that the rule announced in *Miller* applies to all situations in which juveniles receive a life-without-parole sentence. A thorough review of *Miller* and *Montgomery* reveals that the Eighth Amendment right announced therein is not possessed solely by those juveniles who are fortunate enough to be sentenced in states with mandatory penalty schemes. Rather, the Supreme Court recognized that juveniles are constitutionally different from adults and that they are, therefore, entitled to certain considerations before being sentenced to die in prison.

In *Montgomery,* the Supreme Court clarified the scope of the rule in *Miller,* stating, "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' . . . ." *Montgomery,* 136 S. Ct. at 734 (quoting *Miller,* 132 S. Ct. at 2469) (emphasis added). If only the "rare," irreparably corrupted juvenile deserves a life-without-parole sentence, as *Montgomery* states, then there must be a system in place to ensure that undeserving juveniles are not given an unconstitutionally "excessive" sentence. This, then, is the purpose of the *Miller* rule: to evaluate all juveniles facing life imprisonment without parole and sort out which ones are irreparably corrupted and which are not.

In order to guarantee that only the few deserving juveniles receive a life-without-parole sentence, the *Miller* rule must be applicable to all states, not only the

ones that employ a mandatory penalty scheme. For this Court to decide otherwise would mean that juveniles in states with discretionary penalty schemes would not be entitled to a hearing where the judge must determine whether they are irreparably corrupted. This would result in a system where juveniles who are not deserving of a life-without-parole sentence could nevertheless receive such a sentence because the circumstances of their crime are not being evaluated according to the *Miller* standard. Such a system does not comport with the *Miller* rule as it was explained in *Montgomery.*

The Supreme Court further stated, "[*Miller*] rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the *transient immaturity* of youth." *Montgomery,* 136 S. Ct. at 734 (emphasis added). Indeed, "*Miller*'s substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect *transient immaturity*." *Id.* at 735 (emphasis added). "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet *transient immaturity*.'" *Id.* at 734 (quoting *Miller,* 132 S. Ct. at 2469) (emphasis added).

The test required by the *Miller* rule is not a two-step inquiry that first asks what type of penalty scheme was used and then only imposes *Miller*'s Eighth Amendment requirement if the scheme is mandatory. The true test announced in *Miller* and *Montgomery* is whether the sentencing judge actually

weighed the evidence sufficiently to determine whether the circumstances surrounding the juvenile's actions reflect "irreparable corruption" on the one hand, or "the transient immaturity of youth" on the other.

This Court recognizes that the penalty schemes addressed in *Miller* and *Montgomery* were mandatory. However, this fact does not overpower the breadth and depth of the Supreme Court's detailed discussion about the Eighth Amendment right possessed by juveniles facing life imprisonment without parole. It seems clear that the Supreme Court discussed those mandatory penalty schemes to explain how they categorically denied to those juveniles an Eighth Amendment right that is possessed by all juveniles, regardless of where they are sentenced.

The Supreme Court's discussion shows that, while this Eighth Amendment right can be violated by any sentencing judge, it is *necessarily* violated by every sentencing judge operating under a mandatory penalty scheme because they are denied "the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller,* 132 S. Ct. at 2475. In other words, mandatory penalty schemes create a *per se* violation of the Eighth Amendment right announced in *Miller* because they preclude the possibility of an "individualized sentencing," to which all juveniles are entitled before they receive "the law's most serious punishments." *Id.* at 2471. However, as explained above, this does not mean that mandatory penalty schemes are the only situations in which the

Eighth Amendment right announced in *Miller* can be violated.

Justice Sotomayor reaffirmed this rule in *Tatum v. Arizona,* 137 S. Ct. 11 (2016) (Sotomayor, J., concurring). In *Tatum,* trial courts in Arizona sentenced several juveniles to life imprisonment without parole. The Arizona Court of Appeals held that *Miller* did not apply to Arizona's life-without-parole penalty scheme because it was not a mandatory scheme. *State v. Tatum,* 2015 WL 728080, at *1 ¶5 (Ariz. Ct. App. Feb. 18, 2015), *review denied* (Jan. 5, 2016), *cert. granted,* and *judgment vacated,* 137 S. Ct. 11 (2016). Without addressing whether Arizona's penalty scheme was mandatory or discretionary, the U.S. Supreme Court vacated the Arizona Court of Appeals' decision and remanded the case for further consideration in light of *Montgomery.* The majority opinion contained no analysis or explanation of its decision. However, Justice Sotomayor penned a substantive concurring opinion, which stated the following:

> On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."
>
> . . .
>
> It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole.

> It requires that a sentencer decide whether the juvenile offender before it is a child "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. There is thus a very meaningful task for the lower courts to carry out on remand.

Tatum v. Arizona, 137 S. Ct. 11, 12-13 (2016) (citations omitted).

Notwithstanding the Arizona Court of Appeals' finding that its penalty scheme was not mandatory, the U.S. Supreme Court nevertheless ruled that Arizona must still comply with the requirements of *Miller* and *Montgomery.* It is apparent, therefore, that the rule announced in *Miller* and made retroactive in *Montgomery* requires sentencing judges to consider the factors articulated in those opinions *every time* a juvenile is sentenced to life imprisonment without parole. This, of course, includes Petitioner's sentences.

C. Whether Petitioner's Crimes Warrant Life-Without-Parole Sentences

Respondent next argues that Petitioner's crimes are so heinous that the life-without-parole sentences he received are warranted.[5] ECF No. 44 at 4-9 (2:13cv375); ECF No. 38 at 6-10 (2:13cv376). Respondent states, "[P]etitioner's extended course of violent conduct militates against a finding that his 'life

[5] This argument applies to both of Petitioner's cases.

without parole' sentence violates *Miller* and *Montgomery.*" ECF No. 44 at 4 (2:13cv375); ECF No. 38 at 6 (2:13cv376).

This Court cannot consider this argument from Respondent because this matter is not the appropriate forum for such an argument. In effect, Respondent is asking this Court to engage in the type of Eighth Amendment considerations that *Miller* and *Montgomery* require sentencing judges to undertake. This Court's task is to determine whether Petitioner is entitled to the relief he seeks under § 2254. Among Petitioner's pleas for relief is a request for a resentencing hearing conducted in accordance with the requirements of *Miller* and *Montgomery.* If this Court were to grant Petitioner's request, the resultant resentencing hearings would be the appropriate forums for Respondent to make arguments about the nature of Petitioner's crimes and how that "militates" for or against a certain sentence. Such an argument is outside the scope of this Court's current inquiry.

D. Whether Petitioner's Sentencing Proceedings Comported with *Miller* and *Montgomery*

Respondent next argues that, even if *Miller* and *Montgomery* were to apply to Petitioner's sentences, Petitioner would not be entitled to the relief he seeks because the sentencing proceedings in Chesapeake satisfied the constitutional requirements announced

in *Miller* and *Montgomery.*[6] ECF No. 44 at 4 (2:13cv375).

In the Chesapeake Circuit Court case, Petitioner had a bifurcated trial. The first trial was held to determine Petitioner's guilt for the charged crimes. This trial resulted in two capital murder convictions, in addition to a firearm conviction. Petitioner's capital murder offenses were classified as Class 1 felonies in Virginia. *See* Va. Code § 18.2-31 (2002). Therefore, at that time, these offenses were punishable by only two sentences: death or life imprisonment without parole. *See* Va. Code § 18.2-10(a) (2003) (amended 2006).[7]

Virginia law in 2003 stated, "Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. . . . In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life." Va. Code § 19.2-264.4 (2003). Pursuant to the statute, a second proceeding was held to allow the jury to hear evidence before making a recommendation to the sentencing judge

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[6] This argument only applies to Petitioner's case in Chesapeake Circuit Court.

[7] *Roper v. Simmons,* 543 U.S. 551 (2005), the Supreme Court case that prohibited capital punishment for all juveniles, was decided in 2005. However, Petitioner was convicted and sentenced in 2003. Therefore, Petitioner was eligible for the death penalty at that time.

regarding which of the two possible punishments was appropriate.

Respondent argues that the jury found that Petitioner constituted a "future danger" and that his crimes were "vile." ECF No. 44 at 4 (2:13cv375). According to Respondent, this shows that Petitioner is the "rare juvenile offender whose crime reflects irreparable corruption." *Id.* As support for this assertion, Respondent states, "Under Virginia law, the Commonwealth must prove one or both of these aggravating factors [('future danger' or 'vileness of crimes')] beyond a reasonable doubt for the defendant to be eligible for the death penalty." ECF No. 44 at 4 n.6 (citing *Lawlor v. Commonwealth,* 285 Va. 187, 239 (2013) (2:13cv375).

However, a review of the *Lawlor* opinion reveals that the jury must unanimously find one or both of these aggravating factors beyond a reasonable doubt in order for the judge to *impose* the death penalty. *Lawlor v. Commonwealth,* 285 Va. 187, 237-39 (2013). The *Lawlor* opinion mentions nothing regarding these aggravating factors being prerequisites for *eligibility* for the death penalty. Furthermore, the definition of "capital murder," the crime for which Petitioner was eligible for the death penalty in Chesapeake, makes no mention of either of these factors. *See* Va. Code § 18.2-31 (2002). Therefore, the jury's decision to convict Petitioner for death-penalty-*eligible* offenses provides no evidence that the jury made any finding regarding "future danger" or "vileness."

Moreover, even if there were indicia that the jury had made a finding about either of these two aggravating factors, this Court is not convinced that such a finding would satisfy the requirements of *Miller* and *Montgomery.* Indeed, *Miller* and *Montgomery* require the *sentencing judge* to consider certain factors before sentencing a juvenile to life imprisonment without parole. Any findings made by the jury, notwithstanding their possible impact on the jury's penalty recommendation, cannot supplant the judge's duty to consider the factors expressed in *Miller* and *Montgomery.*

Turning to the judge's role in the Chesapeake sentencing, Petitioner argues that the sentencing judge did not consider the appropriate mitigating factors before imposing the life-without-parole sentences. ECF No. 41 at 7-8 (2:13cv375). Respondent argues that it was Petitioner's responsibility to ask the judge to consider mitigating factors and suspend his sentences. ECF No. 46 at 4-5 (2:13cv375). Respondent claims that, in the absence of such a request, the judge did not violate *Miller* and *Montgomery* by not considering mitigating factors. *Id.* This Court disagrees.

As explained above, a sentencing judge must consider the factors articulated in *Miller* and *Montgomery* every time a juvenile is sentenced to life imprisonment without parole. Here, there is no evidence to suggest that the sentencing judge considered "whether the juvenile offender before it [was] a child 'whose crimes reflect transient immaturity' or [was] one of 'those rare children whose crimes reflect irreparable corrupion' for whom a life without parole sentence may be

appropriate." *Tatum,* 137 S. Ct. at 13. This is a violation of the Eighth Amendment, as announced in *Miller* and *Montgomery.*

E. Whether Petitioner Waived his Right to Challenge His Sentences

Finally, Respondent argues that Petitioner waived his right to appeal his sentences in the Spotsylvania County Circuit Court case when he signed the "*Alford* plea" agreement.[8] ECF No. 38 at 4-5 (2:13cv376). Petitioner's plea agreement states, "I understand that by entering an 'Alford plea', . . . I waive my right to an appeal. . . ." ECF No. 38, Ex. 1 at 6 (2:13cv376). The plea agreement also states, "It is further understood and agreed that the defendant will be sentenced to life in prison without parole. . . ." *Id.* Respondent argues that these two statements constitute a waiver of Petitioner's right to appeal his sentence and preclude the relief he seeks. ECF No. 38 at 1,4-5 (2:13cv376).

1. Appeal Waiver

First, Respondent argues that Petitioner cannot achieve review of his sentences because he has waived his appeal right. Respondent appears to assert that Petitioner's § 2254 motion is included in the appeal right that Petitioner waived in his guilty plea. This assertion is incorrect.

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[8] This argument only applies to Petitioner's case in Spotsylvania County Circuit Court.

An application for a writ of habeas corpus pursuant to § 2254 is a method of collaterally attacking a sentence. The Fourth Circuit has made it clear that an appeal is distinct from a collateral attack. In *United States v. Lemaster,* 403 F.3d 216 (4th Cir. 2005), the defendant's plea agreement read as follows:

> WAIVER OF RIGHT TO APPEAL *AND* WAIVER OF RIGHT TO COLLATERALLY ATTACK
>
> I hereby waive my right of appeal as to any and all issues in this case, and consent to the final disposition of this matter by the United States District Court. *In addition*, I waive any right I may have to collaterally attack, in any future proceeding, my conviction and/or sentence imposed in this case.

Lemaster, 403 F.3d at 218 (emphasis added).

At the Federal Rule of Criminal Procedure 11 proceedings in *Lemaster,* the prosecutor asked the defendant if he understood that he was waiving his right to an appeal. *Id.* After receiving an affirmative response, the prosecutor then asked the defendant if he understood that he was *also* waiving his right to file a collateral attack. *Id.* The district judge at those proceedings likewise discussed this section of the guilty plea as involving two separate rights that require two separate waivers. *Id.* In *Lemaster,* the Fourth Circuit stated, "Although it is well settled that a defendant may waive his right to appeal directly from his conviction and sentence, we have never considered whether a defendant may *also* waive his right to attack his conviction and

sentence collaterally. . . . [W]e hold that a criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary." *Id.* at 220 (emphasis added) [sic].

Petitioner's waiver of his right to an appeal does not also operate as a waiver of his right to collaterally attack his sentence through a § 2254 motion. While it is possible for a defendant to waive his right to collaterally attack his sentence, Petitioner's plea agreement does not include such a waiver. *See* ECF No. 38, Ex. 1 at 1-9 (2:13cv376). The transcript of Petitioner's sentencing hearing reveals that his colloquy with the sentencing judge was likewise devoid of such a waiver. *See* ECF No. 38, Ex. 1 at 27-42 (2:13cv376). Therefore, Petitioner did not waive his right to collaterally attack his sentence through a § 2254 motion.

2. Agreement on Sentence

Respondent's second argument highlights the section of Petitioner's plea agreement wherein he agrees to be sentenced to life in prison without parole for both the capital murder offense and the attempted capital murder offense. Respondent argues that Petitioner cannot challenge these two sentences because he explicitly agreed to them in the plea agreement. ECF No. 38 at 1, 4-5 (2:13cv376). Because juveniles facing life-without-parole sentences are entitled to the Eighth Amendment protections discussed in *Miller* and *Montgomery,* any agreement regarding sentencing necessarily implicates and involves that Eighth Amendment

right. Therefore, in order for that provision of the plea agreement to be enforceable, Petitioner must have waived the right announced in *Miller*.

Juveniles facing life imprisonment without parole have an Eighth Amendment right to a sentencing hearing where the judge must determine "whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption'. . . ." *See Tatum,* 137 S. Ct. at 12; *Montgomery,* 136 S. Ct. at 735. In *Montgomery,* the Supreme Court held that this right was a substantive rule of constitutional law. *Montgomery,* 136 S. Ct. at 734. "Like other substantive rules, *Miller* is retroactive because it 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'" *Id.* (quoting *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004)). Therefore, this Court must analyze the sentencing process in the Spotsylvania County Circuit Court case within the context of the Eighth Amendment right announced in *Miller*.

Inherent in Respondent's argument is the underlying assertion that Petitioner effectively waived the Eighth Amendment right announced in *Miller* when he agreed to be sentenced to life imprisonment without parole. The law is well-settled that a criminal defendant can waive many substantive constitutional rights that would inure to him during all phases of a criminal prosecution, including at the sentencing phase. This Court is unaware of any reason that the Eighth Amendment right announced in *Miller* cannot be waived in

like manner. The question for this Court is whether such a waiver took place in Petitioner's Spotsylvania case.

"A plea agreement is 'essentially a contract between an accused and the government' and is therefore subject to interpretation under the principles of contract law." *United States v. Davis,* 689 F.3d 349, 353 (4th Cir. 2012) (quoting *United States v. Lewis,* 633 F.3d 262, 269 (4th Cir. 2011)). "Because a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or breach thereof is conducted with greater scrutiny than in a commercial contract." *United States v. McQueen,* 108 F.3d 64, 66 (4th Cir. 1996).

The Supreme Court has adopted a "'high standar[d] of proof for the waiver of constitutional rights.'" *Minnick v. Mississippi,* 498 U.S. 146, 159 (1990) (quoting *Miranda v. Arizona,* 384 U.S. 436, 475 (1966)). "Waiver . . . of constitutional rights in the criminal process generally, must be a 'knowing, intelligent ac[t] done with sufficient awarenes of the relevant circumstances.'" *Iowa v. Tovar,* 541 U.S. 77, 81 (2004) (quoting *Brady v. United States,* 397 U.S. 742, 748 (1970)). "Waiver is 'an intentional relinquishment or abandonment of a known right or privilege,' and whether such a relinquishment or abandonment has occurred depends 'in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Minnick,* 498

U.S. at 159 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)).

The Fourth Circuit has also imposed this heightened review standard on contracts that purport to include a waiver of constitutional rights. "[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable. But a waiver of constitutional rights in a contract might well heighten the scrutiny of its enforceability because the law does not presume the waiver of constitutional rights. The contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest in order to be enforceable." *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke Cty., N.C.,* 149 F.3d 277, 280 (4th Cir. 1998) (citations omitted) (emphasis in original).

As the Supreme Court has stated, a waiver of constitutional rights must be knowing, meaning that it must be an intentional relinquishment of a known right that is done with a sufficient awareness of the relevant circumstances. *See Iowa,* 541 U.S. at 81; *Minnick,* 498 U.S. at 159. Upon review of the facts and circumstances surrounding Petitioner's case, it is clear that Petitioner did not waive the Eighth Amendment right announced in *Miller.*

There is no evidence in the record to suggest that Petitioner was aware of the existence of this right, much less that he intended to relinquish or abandon it. The plea agreement notifies Petitioner that, by signing

the agreement, he is waiving constitutionally-guaranteed rights. *See* ECF No. 38, Ex. 1 at 6-7 (2:13cv376). The specific rights that he is waiving are explicitly listed in the plea agreement. *See* ECF No. 38, Ex. 1 at 6-7 (2:13cv376). During Petitioner's sentencing hearing, the judge verbally confirmed with Petitioner that he understood the constitutional rights he was waiving by signing the plea agreement. *See* ECF No. 38, Ex. 1 at 28-41 (2:13cv376). Courts have routinely upheld such circumstances and procedures as sufficient to establish that a knowing, intelligent waiver of rights has occurred. *See, e.g., Libretti v. United States,* 516 U.S. 29, 50 (1995); *United States v. Johnson,* 410 F.3d 137, 151 (4th Cir. 2005); *Lemaster,* 403 F.3d at 222-23.

Crucially, neither the plea agreement nor the sentencing judge provided any notification to Petitioner that, by signing the plea agreement, he was waiving his Eighth Amendment right to a sentencing hearing in which the judge must determine "whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption'. . . ." *See Tatum,* 137 S. Ct. at 12; *Montgomery,* 136 S. Ct. at 735.

This Court recognizes, given the fact that Petitioner was sentenced more than eight years before *Miller* was decided, that it is not likely that any such notification would have been included among the plea agreement's provisions or the judge's verbal admonitions. Nevertheless, the very nature of the *Miller* rule's retroactive applicability compels this court to apply

that rule to situations and circumstances that predate the rule. Such is the case here.

In order to adopt Respondent's view on this issue, this Court would have to find that Petitioner implicitly or indirectly waived the Eighth Amendment right announced in *Miller* when he agreed to be sentenced to life imprisonment without parole. This Court cannot adopt such a view. As the Supreme Court has stated, there is a high standard for the waiver of constitutional rights. *See Minnick,* 498 U.S. at 159. In addition to being voluntary, a valid waiver must also be knowing, intelligent, and intentional. *See Iowa,* 541 U.S. at 81; *Minnick,* 498 U.S. at 159. Constitutional rights cannot be waived implicitly, indirectly, and without notice.

3. Paragraph 8(B) of the Plea Agreement

Having found that Petitioner did not waive the Eighth Amendment right announced in *Miller,* this Court must now determine the proper application of that finding to the Spotsylvania plea agreement.

Petitioner's agreement to be sentenced to life imprisonment without parole is recorded in Paragraph 8(B) ("¶8(B)") of the plea agreement. *See* ECF No. 38, Ex. 1 at 6 (2:13cv376). The pertinent provisions read, "It is further understood and agreed that the defendant will be sentenced to life in prison without parole for the Capital Murder of Kenneth Bridges; to life in prison without parole for the Attempted Capital Murder of Caroline Seawell; . . . ." ECF No. 38, Ex. 1 at 6 (2:13cv376).

As stated above, a plea agreement is "subject to interpretation under the principles of contract law." *Davis,* 689 F.3d at 353. "[A] contract will be enforced unless the interest promoted by its enforcement is outweighed by the public policy harms resulting from enforcement." *Burke Cty., N.C.,* 149 F.3d at 280 (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981)). Within the context of contractual principles, this case clearly represents a situation in which certain terms of the agreement (i.e., the life-without-parole provisions of ¶8(B)) are unenforceable on grounds of public policy.

The Restatement (Second) of Contracts states, "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable *or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms*." RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (emphasis added).

In considering the weight of the interest in enforcing a term of the agreement, courts should take into account (1) the parties' justified expectations, (2) any forfeiture that would result if enforcement were denied, and (3) any special public interest in the enforcement of the particular term. *Id.*

The agreement terms at issue here are the two life-without-parole provisions of ¶8(B). Based on these terms, the parties' expectations were that Petitioner would receive two life-without-parole sentences in

Spotsylvania. It is important to note that, if the life-without-parole provisions of ¶8(B) were not enforced, the parties' expectations would not necessarily be thwarted. While non-enforcement of these provisions would eliminate the certainty that Petitioner will receive two life-without-parole sentences, it is completely possible that any resentencing conducted in accordance with *Miller* and *Montgomery* results in the same sentences.

Next, no forfeiture would result if enforcement were denied. Lastly, this Court finds that there exists a special public interest in the enforcement of plea agreement provisions because they provide advantages for both defendants and prosecutors in the form of certainty, efficiency, and economy. *See Brady,* 397 U.S. at 752. For these reasons, and in consideration of the ubiquity of plea agreements in our criminal justice system, the special public interest in enforcing these plea agreement provisions is quite large.

In considering the weight of a public policy against the enforcement of a contract term, courts should take into account (1) the strength of that policy as manifested by legislation or judicial decisions, (2) the likelihood that a refusal to enforce the term will further that policy, (3) the seriousness of any misconduct involved and the extent to which it was deliberate, and (4) the directness of the connection between that misconduct and the term. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (emphasis added).

The public policy at issue here is the Eighth Amendment right and the corresponding rule announced in *Miller*. The Supreme Court has decided that the *Miller* rule is a substantive rule of constitutional law that is so fundamental that it requires retroactive application. *See Montgomery,* 136 S. Ct. at 734. That this public policy is a constitutionally-protected right derived from the Eighth Amendment weighs quite heavily. In other words, the strength of this public policy is exceedingly large, given that it implicates our most foundational rights as citizens. Indeed, it is doubtful that there exists a public policy more foundational than those safeguarding the constitutional due process by which the state deprives citizens of their life and liberty.

Next, it is clear that a refusal to enforce the two life-without-parole provisions of ¶8(B) will further the public policy discussed in *Miller* and *Montgomery.* Lastly, there is no evidence in the record to suggest that any misconduct occurred here.

After weighing the Restatement factors, this Court finds that the public policy involved here outweighs the interest in enforcing the two life-without-parole provisions of ¶8(B). Therefore, the two provisions of ¶8(B) that dictate sentences of "life in prison without parole" are unenforceable on the grounds of public policy.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Petitioner is entitled to relief. Accordingly, Respondent's motion to dismiss is **DENIED** and Petitioner's § 2254 motions are both **GRANTED**.

The sentences Petitioner received in Chesapeake Circuit Court for the two capital murder convictions are hereby **VACATED** and his case (2:13cv375) is **REMANDED** to Chesapeake Circuit Court for disposition on those two convictions in accordance with *Miller* and *Montgomery*.

The sentences Petitioner received in Spotsylvania County Circuit Court for the capital murder conviction and the attempted capital murder conviction are hereby **VACATED** and his case (2:13cv376) is **REMANDED** to Spotsylvania County Circuit Court for disposition on those two convictions in accordance with *Miller* and *Montgomery*.

The Court **DIRECTS** the Clerk to send a copy of this Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia
May 26, 2017

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

COMMONWEALTH OF VIRGINIA

v.

LEE BOYD MALVO, Defendant
Black male
DOB: [redacted]
SSN: NONE

PLEA AGREEMENT

1. My name is Lee Boyd Malvo and my age is 19 years.

2. I am represented by counsel whose names are Craig S. Cooley, Esquire and Michael S. Arif, Esquire, and I am satisfied with their services as my attorneys.

3. I have received a copy of the indictments before being called upon to plead, and I have read and discussed it with my attorney, and believe that I understand the charges against me in this case. I am the person named in the indictment. I have told my attorney all the facts and circumstances, as known to me, concerning the case against me. My attorney has discussed with me the nature of the charge, has explained to me the elements of the offense, and has advised me as to any possible defense I might have in this case. I have had ample time to discuss the case and all possible defenses with my attorney.

4. STIPULATION OF FACTS: I agree to the following summary of the Commonwealth's evidence against me (which I stipulate can all be proven by the Commonwealth) in the foregoing case, and I request that the Court accept this summary in lieu of presentation of any evidence by the Commonwealth. I further stipulate that the Commonwealth's evidence constitutes a *prima facie* case in the instance of the crime with which I am charged.

SUMMARY:

Using numerous eye-witnesses, police officers, as well as expert witnesses, the Commonwealth would establish evidence of the following chain of interconnected crimes, which evidence is summarized as follows:

On October 24, 2002, while armed with a search warrant, F.B.I. agents seized an older model faded blue Chevrolet Caprice automobile and arrested the two persons found inside of it – Lee Boyd Malvo, age 17, and John Allen Muhammad, age 42. Also found inside the vehicle was a Bushmaster .223 caliber assault rifle and scope, which rifle was hidden behind the rear seat. The rear seat of the car had been modified so that it would fold forward, allowing access to the trunk area, and a hole had been bored into the rear trunk of the car near the license plate to enable a person to slide a rifle barrel through the hole while lying in the trunk of the automobile. Also found in the car was a laptop computer belonging to Paul La Ruffa of Clinton, Maryland.

This arrest by the F.B.I. brought to the end a series of events commencing September 5, 2002 through October 22, 2002, during which thirteen people had been shot, eight fatally, between Prince George's County, Maryland and Hanover County, Virginia, in a string [sic] slayings that had come to be known as "the sniper slayings". Throughout this period, a person claiming to be the sniper had repeatedly left telephone messages and notes to the police and the media demanding ten million dollars to stop the slayings, which slayings are summarized, as follows:

- On September 5, 2002, Paul La Ruffa, age 55, was shot six times with a 22-caliber handgun and robbed of his laptop computer and $3,500 outside of his Pizzeria in Clinton, Maryland.
- On September 15, 2002, Muhammad Rashid, age 32, was shot in the abdomen at close range with the same 22-caliber pistol that was used in the La Ruffa robbery. Rashid was also robbed of his wallet as he was closing a liquor store in Prince George's County, Maryland.
- On October 3, 2002, four more fatal shootings occurred. Premkumar Walekar, age 54, was fatally shot in the chest while putting gasoline in his cab at a Mobil station in Aspen Hill, Maryland. A ballistics test of the Bushmaster rifle recovered in Muhammad and Malvo's car confirmed that that rifle was used to kill Mr. Walekar.
- Also on October 3, 2002, Sarah Ramos, age 34, was fatally shot in the head while sitting on a shopping center bench near Leisure World in

Silver Spring, Maryland. Ballistic tests also established that the same Bushmaster rifle killed Ms. Ramos.

- Also on October 3, 2002, Lori Lewis Rivera, age 25, was fatally shot in the back while vacuuming an automobile at a Shell gasoline station in Kensington, Maryland. Again, ballistic tests established that the same Bushmaster rifle was used to kill Ms. Rivera.

- Continuing on October 3, 2002, Pascal Charlot, age 72, was fatally shot below the neck at [sic] busy intersection in northwest Washington, D.C. Ballistic tests on the same Bushmaster rifle established that it was used to kill Mr. Charlot. Additionally, eyewitnesses saw a the [sic] faded blue Chevrolet Caprice near the scene of the shooting.

- On October 4, 2002, **Caroline Seawell**, age 43, was shot in the back as she loaded her car outside the Michael's craft store near Spotsylvania Mall in Spotsylvania County, Virginia. Ballistic tests, a Certificate of Analysis dated 11/5/02, which is attached hereto as Commonwealth's Exhibit "1", established that Mrs. Seawell was shot with the same Bushmaster rifle seized from Muhammad and Malvo's car. Additionally, an eyewitness saw the faded blue Caprice at the shooting scene.

- On October 7, 2002, Iran Brown, age 13, was shot in the abdomen outside of the Benjamin Tasker Middle School. Ballistic tests established that he was shot with the same Bushmaster rifle. Additionally, at the scene of the

shooting, a shell casing matching the rifle was found.

- On October 9, 2002, Dean Harold Meyers, age 53, was fatally shot in the head while he pumped gas at a Sunoco station in Prince William County, Virginia. Ballistic tests established that Mr. Meyers was shot with the same Bushmaster rifle seized from Muhammad and Malvo. Additionally, a Baltimore area map was found at the shooting scene with both Muhammad and Malvo's fingerprints on it. (See Summary of ATF lab fingerprint evidence attached as Commonwealth's Exhibit "4").

- On October 11, 2002, **Kenneth Bridges**, age 53, was fatally shot in the upper back, while pumping gasoline at an Exxon station near the Massaponax / I-95 interchange in Spotsylvania County, Virginia. Ballistic tests established that Mr. Bridges was shot with the same Bushmaster rifle seized from Muhammad and Malvo. (See ATF lab certificate of ballistics forensic analysis dated 11/7/02 attached as Commonwealth's Exhibit "2").

- October 14, 2002, Linda Franklin, age 47, was fatally shot in the head outside a Home Depot store in Fairfax County, Virginia. Again, ballistic tests positively connected the same Bushmaster rifle to that fatal shooting.

- On October 19, 2002, Jeffrey Hopper, was shot in the abdomen outside a Ponderosa steakhouse in Ashland, Virginia. Ballistic tests established that Mr. Hopper was shot with the

same Bushmaster rifle. A shell casing was found near the shooting scene. Near the shell casing was found a CinnaRaisins bag with Lee Boyd Malvo's DNA on it. Also left at the scene were extortion notes in plastic bags regarding Muhammad and Malvo's ten million dollar demand, which had earlier been telephoned into the police. (See a copy of the notes attached as Exhibit 6; see also summary of ATF lab DNA evidence attached as Commonwealth's Exhibit "3").

- On October 22, 2002, Conrad E. Johnson, age 35, was fatally shot under the rib cage, while standing in the doorway of his public bus in Aspen Hill, Maryland. Ballistic tests established that Mr. Johnson was shot with the same Bushmaster rifle as the other victims. A duffel bag was found at the crime scene with one shooter's glove left behind. The matching shooter's glove was found in the Chevrolet Caprice after Muhammad and Malvo's arrest. Additionally, another extortion note in a plastic bag was left at the crime scene. Malvo's DNA was found on the plastic bag containing that note and also in the shooter's glove left at the scene. (See a copy of the note attached as Exhibit 7; also see the Summary of ATF lab DNA evidence attached as Exhibit "3").

A Bureau of Alcohol, Tobacco & Firearms (ATF) fingerprint expert would testify that a fingerprint matching Lee Boyd Malvo's left fingerprint was found on the grip of the Bushmaster rifle seized from Muhammad &

Malvo's car. (See summary of ATF lab fingerprint evidence attached as Commonwealth's Exhibit "4").

Additionally, the Commonwealth would produce the testimony of Detective June Boyle of the Fairfax County Police Department, who would testify that, on November 7, 2002, Lee Boyd Malvo was first taken into custody on Virginia's capital murder charges arising from the Fairfax crime. Malvo was advised of his rights under *Miranda* at approximately 5:55 P.M. that day, which rights Malvo waived, stating that he wanted to talk to Detective Boyle and Detective Garrett without an attorney and indicating that he would answer only the questions that he decided to answer. Malvo signed a written *Miranda* waiver, a copy of which is attached hereto as Commonwealth's Exhibit "5".

Malvo then gave an extensive statement to those detectives, during which he boasted that he and his "father", John Allen Muhammad, had acted as a sniper team, randomly shooting people up and down the I-95 corridor in Maryland and Virginia, in an effort to extort ten million dollars from the "media and the government". Malvo boasted that he had personally performed ten of the thirteen shootings, stating that he did so either lying in the trunk of the car while shooting out of the bored hole in the trunk, or sometimes from a shooting position outside of the automobile, but always using the Bushmaster rifle. When he was acting as the sniper, Muhammad would be the spotter, and would tell him when the shot was clear and which shot to take. Sometimes they would trade positions,

and Muhammad would do the shooting and he would be the spotter.

Malvo admitted that he was the one who shot Caroline Seawell on October 4, 2002 and Kenneth Bridges on October 11, 2002 in Spotsylvania County, while Muhammad acted as the sniper team spotter and get-away driver on both occasions.

5. My attorney has advised me that the offense charges as follows:

- CAPITAL MURDER, in violation of Virginia Code Sections 18.2-31(13) & 31(8).
  Punishment: (Class 1 Felony) Death, or imprisonment for a term of life and a fine not to exceed $100,000.
- ATTEMPTED CAPITAL MURDER, in violation of Virginia Code Section 18.2-25.
  Punishment: (Class 2 Felony) Imprisonment for life, or for any term not less than 20 years and a fine not to exceed $100,000.
- AGGRAVATED MALICIOUS WOUNDING, in violation of Virginia Code Section 18.2-51.2.
  Punishment: (Class 2 Felony) Imprisonment for life, or for any term not less than 20 years and a fine not to exceed $100,000.
- 2 Counts – USE OF A FIREARM IN COMMISSION OF A FELONY, in violation of Virginia Code Section 18.2-53.1.
  Punishment: (1st conviction) 3 years imprisonment.

(2nd conviction) 5 years imprisonment.
Said sentences shall not be suspended in whole or in part.

- CONSPIRACY TO COMMIT CAPITAL MURDER, in violation of Virginia Code Section 18.2-22.
  Punishment: (Class 3 Felony) A term of imprisonment of not less than 5 years nor more than 20 years and a fine of not more than $100,000.

6. I understand that I may, if I so choose, plead "not guilty" to any charge against me, and that if I do plead "not guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury; (b) the process of the Court to compel the production of any evidence and attendance of witnesses in my behalf; (c) the right to have the assistance of a lawyer at all stages of the proceedings; (d) the right against self-incrimination; and (e) the right to be confronted by my accuser.

7. I understand that by entering an "Alford plea", which is a form of a guilty plea pursuant to *NC* v. *Alford*, 400 U.S. 25 (1970), I waive my right to an appeal and, although I am not conceding factual guilt, I am admitting the Commonwealth has sufficient evidence to convict me, and that it is in my best interest to enter this plea. The only remaining issue to be decided by the Court is punishment.

8. I understand that the Commonwealth's Attorney has agreed that the following specific punishment is the appropriate disposition in this case:

A. With the assent of Mrs. Caroline Seawell and the widow of Kenneth Bridges, the Commonwealth agrees that, upon the defendant's guilty / "Alford plea" to the indictments charging him with the Capital Murder of Kenneth Bridges, and Attempted Capital Murder of Caroline Seawell, as well as the 2 counts of Use of Firearm in commission of those felonies, to *nolle prosequi* all remaining indictments against him in Spotsylvania County.

B. It is further understood and agreed that the defendant will be sentenced to life in prison without parole for the Capital Murder of Kenneth Bridges; to life in prison without parole for the Attempted Capital Murder of Caroline Seawell; to 3 years in prison for Use of a Firearm in the Seawell shooting; and to 5 years in prison for Use of a Firearm in the Bridge's murder.

9. I understand that the Court may accept or reject this plea agreement. I understand that if the Court rejects this agreement, I will be permitted to withdraw my "Alford plea" and plead not guilty if I so desire, and if I do not withdraw my "Alford plea" neither side is bound by this agreement and the Court may impose any sentence within the limits set forth in Paragraph 5, which disposition may be less favorable to me than is contained in this agreement.

10. I declare no officer or employee of the State or County or Commonwealth's Attorney's office, or anyone else, has made any promise to me except as contained in this agreement.

11. After having discussed the matter with my attorney, I do freely and voluntarily enter an "Alford plea" to the offenses of **CAPITAL MURDER, ATTEMPTED CAPITAL MURDER, and 2 COUNTS OF USE OF A FIREARM IN COMMISSION OF A FELONY**, and waive my right to a trial by jury and request the Court to hear all matters of law and fact.

Signed by me in the presence of my attorney on this 27 day of Sep., 2004.

/s/ Lee Boyd Malvo
LEE BOYD MALVO
Defendant

CERTIFICATE OF DEFENDANT'S COUNSEL

The undersigned attorney for the above-named defendant, after having made a thorough investigation of the facts relating to this case, do certify that I have explained to the defendant the elements of the charges in this case, and that the defendant's "Alford plea" is voluntarily and understandingly made.

/s/ Craig S. Cooley
CRAIG S. COOLEY
Counsel for the defendant

/s/ Michael S. Arif
MICHAEL S. ARIF
Counsel for the defendant

CERTIFICATE OF COMMONWEALTH'S ATTORNEY

The above accords with my understanding of the facts in this case, and I further certify that, when applicable upon the written request of the victim, I have consulted with such victim(s) and I have notified him/her of the right to be present at this hearing (unless an exception is marked below), pursuant to Section 19.2-11.01 of the Code of Virginia.

Exceptions:

1. Victim unavailable due to incarceration: ____
2. Victim unavailable due to hospitalization: ___
3. Victim unavailable due to failure to appear when subpoenaed: _____
4. Victim unavailable due to change of address without notice: _____
5. Victim unavailable due to other reason as set forth here: _____ _____.

COMMONWEALTH OF VIRGINIA

By /s/ William F. Neely
WILLIAM F. NEELY
Commonwealth's Attorney

The Court, being of the opinion that the *Alford* plea and waiver of jury trial are voluntarily made, and that the defendant understands the nature of the charges and the consequences of said "Alford plea", doth accept the same and concur therewith.

Filed and made a part of record this 26 day of October, 2004.

/s/ [Illegible]
Judge

I certify that this document to which this authentication is affixed is a true copy of a record in the Spotsylvania Circuit Court, that I have custody of the record, and that I am the custodian of that record.

6/28/13 /s/ [Illegible]
Date Assistant Chief Deputy Clerk

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

In the United States District Court for the Western District of Virginia

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Lee Boyd Malvo,
(Red Onion State Prison, Prisoner No.: 1180834),

Petitioner,

v. **Docket or Case No.: [2:13-cv-00376]**

Randall Mathena, Chief Warden, Red Onion State Prison,

Respondent.

PETITION

1.(a) Name and location of court that entered the judgment of conviction you are challenging:

- Spotsylvania County Circuit Court, 9115 Courthouse Rd Spotsylvania, VA 22553

(b) Criminal docket or case number (if you know):

- CR 04-000392, CR 04-000393, CR 04-000395 and CR 04-000397

2. (a) Date of the judgment of conviction (if you know):

- 10/26/2004

(b) Date of sentencing:

- 10/26/2004

3. Length of sentence:

- two terms of Life Without Possibility of Parole, plus 8 years

4. In this case, were you convicted on more than one count or of more than one crime? Yes [X] No [ ]

5. Identify all crimes of which you were convicted and sentenced in this case:

Capital Murder, Attempted Capital Murder, Use of a firearm (x2)

6. (a) What was your plea? (Check one)

(1) Not guilty [ ] (3) Nolo contendere (no contest) [ ]

(2) Guilty [X] (4) Insanity plea [ ]

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

Capital Murder, Attempted Capital Murder, Use of a firearm (x2)

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury [ ] Judge only [ ]

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?

Yes [ ] No [X]

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____
(c) Result: _____
(d) Date of result (if you know): _____
(e) Citation to the case (if you know): _____
(f) Grounds raised: _____
_____

(g) Did you seek further review by a higher state court? Yes [ ] No [X]
If yes, answer the following:
(1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Result: _____
(4) Date of result (if you know): _____
(5) Citation to the case (if you know): _____
(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes [ ] No [X]
If yes, answer the following:
(1) Docket or case number (if you know): _____
(2) Result: _____
(3) Date of result (if you know): _____
(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?
Yes [ ] No [X]

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Date of filing (if you know): _____
(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes [ ] No [ ]

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes [ ] No [ ]

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes [ ] No [ ]

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes [ ] No [x]
(2) Second petition: Yes [ ] No [x]
(3) Third petition: Yes [ ] No [x]

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: By plea agreement

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

The ground for the relief based on the "new rule" announce [sic] in *Miller v Alabama*, 132 S. Ct. 2455 (June 25, 2012). The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under *Teague v. Lane*, 489 U.S. 288 (1989).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. Malvo was under 18 years of age at the time of the commission of the crimes for which he is sentenced to life without the possibility of parole.

(b) If you did not exhaust your state remedies on Ground One, explain why:

Because relief sought based on the "new rule" announce [sic] in *Miller v. Alabama*, 132 S. Ct. 2455 (June 25, 2012). This rule did not go into effect until June 25, 2012. The Court held that mandatory life imprisonment without the possibility of parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under *Teague v. Lane*, 489 U.S. 288 (1989). This petition is filed within one year of the date on which the rule in *Miller v. Alabama* was initially recognized by the Supreme Court and went into effect. 28 U.S.C. § 2244(d)(1).

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [ ] No [ ]

(2) If you did not raise this issue in your direct appeal, explain why:

_____

_____

_____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?
Yes [ ] No [ ]

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition? Yes [ ] No [ ]

(4) Did you appeal from the denial of your motion or petition? Yes [ ] No [ ]

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes [ ] No [ ]

(6) If your answer to Question (d)(4) is "Yes," state: Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

_____

_____

_____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes [ ] No [X] If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

The basis for the relief sought is the "new rule" announced in *Miller v. Alabama*, 132 S. Ct. 2455 (June 25, 2012). The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under *Teague v. Lane*, 489 U.S. 288 (1989).

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The ground for the relief based on the "new rule" announced in *Miller v. Alabama*, 132 S. Ct. 2455 (June 25, 2012). The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under *Teague v. Lane*, 489 U.S. 288 (1989).

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes [ ] No [X]

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes [ ] No [X]

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Not applicable

(b) At arraignment and plea:

Craig Cooley, 3000 Idlewood Ave., Richmond, VA 23221;

Michael Arif, 8001 Braddock Road, 105, Springfield, VA 22151.

(c) At trial: Not applicable

(d) At sentencing:

Craig Cooley, 3000 Idlewood Ave., Richmond, VA 23221;

Michael Arif, 8001 Braddock Road, 105, Springfield, VA 22151

(e) On appeal: Not applicable

(f) In any post-conviction proceeding: Not applicable

(g) On appeal from any ruling against you in a post-conviction proceeding: Not applicable

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [X] No [ ]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

- Fairfax County Circuit Court, 4110 Chain Bridge Road, Fairfax, Virginia 22030;

- Montgomery County Circuit Court, 50 Maryland Ave Rockville, Maryland, 20850.

(b) Give the date the other sentence was imposed:

- Fairfax County: 3/10/2004;
- Montgomery County: 11/8/06.

(c) Give the length of the other sentence:

- Fairfax County: two terms of Life in Prison without Parole, plus three years:
- Montgomery County: six terms of Life in Prison without Parole

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes [X] No [ ]

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.

Because relief sought based on the "new rule" announce [sic] in *Miller v. Alabama*, 132 S. Ct. 2455 (June 25, 2012). This rule did not go into effect until June 25, 2012. The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under *Teague v. Lane*, 489 U.S. 288 (1989). This petition is filed within one year of the date on which the rule in

Miller v. Alabama was initially recognized by the Supree [sic] Court and went into effect. 28 U.S.C. § 2244 (d)(1).

Therefore, petitioner asks that the Court grant the following relief: Vacate his unconstitutional sentence, or any other relief to which petitioner may be entitled.

_____/s/_____

Craig Cooley

_____/s/_____

Michael Arif

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on

_____

_____(month, date, year).

_____

Executed (signed) on (date).

_____/s/_____

Signature of Petitioner – By Craig S. Cooley, Attorney for Petitioner, 3000 Idlewood Avenue, Richmond, VA 23221, VSB No. 16593, 804-358-2328, 804-358-3947 (Fax), Cooleycs@msn.com

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

Craig S. Cooley is counsel for petitioner Lee Boyd Malvo. Lee Malvo is incarcerated at Red Onion State

Prison and will forward the signed form from that facility.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

William F. Neely, Esquire
Commonwealth's Attorney
P. O Box 2629
Spotsylvania, VA 22553
540-507-7650

Kenneth T. Cuccinelli, II
Attorney General
900 East Main Street, Sixth Floor
Richmond, VA 23219
804-786-2071

/s/

Craig S. Cooley, Esquire
VSB No: 16593
Attorney for Lee Boyd Malvo
3000 Idlewood Avenue
P. O. Box 7268
Richmond, VA 23221
Phone: 804-358-2328
Fax: 804-358-3947
Cooleycs@msn.com

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court for the Western District of Virginia

---

Name (under which you were convicted): Lee Boyd Malvo

Docket or Case No.: [2:13-cv-00375]

Place of Confinement: Red Onion State Prison Prisoner No.: 1180834

Lee Boyd Malvo, Petitioner,

v.

Randall Mathena, Chief Warden, Red Onion State Prison, Respondent.

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

- Fairfax County Circuit Court, 4110 Chain Bridge Road, Fairfax, VA 22030

*(Due to a change in venue, the trial was conducted in the Chesapeake City Circuit Court, 307 Albemarle Drive, Chesapeake, Virginia 23322).

(b) Criminal docket or case number (if you know):

- CR 03-3089, CR 03-3090 and CR 03-3091

2.(a) Date of the judgment of conviction (if you know):

- 12/23/2003

(b) Date of sentencing:

- 3/10/2004

3. Length of sentence:

- two terms of Life in Prison without the Possibility of Parole, plus three years

4. In this case, were you convicted on more than one count or of more than one crime? Yes [X] No [ ]

5. Identify all crimes of which you were convicted and sentenced in this case:

Two counts of Capital Murder and Use of a Firearm During the Commission of a Felony

6.(a) What was your plea? (Check one)

(1) Not guilty [ ] (3) Nolo contendere (no contest) [ ]

(2) Guilty [ ] (4) Insanity plea [X]

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

_____

_____

_____

_____

_____

_____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury [X] Judge only [ ]

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes [X] No [ ]

8. Did you appeal from the judgment of conviction?

Yes [ ] No [X]

9. If you did appeal, answer the following:

(a) Name of court:

_____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised:

_____

_____

_____

_____

_____

_____

(g) Did you seek further review by a higher state court? Yes [ ] No [ ]

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

_____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes [ ] No [ ]

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes [ ] No [X]

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes [ ] No [ ]

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

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_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes [ ] No [ ]

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

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_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes [ ] No [ ]

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes [ ] No [ ]

(2) Second petition: Yes [ ] No [ ]

(3) Third petition: Yes [ ] No [ ]

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

_____

_____

_____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

The ground for the relief based on the "new rule" announced in *Miller v Alabama*, 132 S. Ct. 2455 (June 25, 2012). The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. This rule applies retroactively to Mr. Malvo under *Teague v Lane*, 489 U.S. 288 (1989).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim)

Mr. Malvo was under 18 years of age at the time of the commission of the crimes for which he is sentenced to life without the possibility of parole.

(b) If you did not exhaust your state remedies on Ground One, explain why:

Because relief sought based on the "new rule" announced in *Miller v Alabama*, 132 S. Ct. 2455 (June 25, 2012). This rule did not go into effect until June 25, 2012. The Court held that mandatory life imprisonment without the possibility of parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under *Teague v Lane*, 489 U.S. 288 (1989). This petition is filed within one year of the date on which the rule in *Miller v Alabama*, 132 S. Ct. 2455 was initially recognized by the Supreme Court and went into effect. 28 U.S.C. 2244(d)(1).

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [ ] No [ ]

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [ ]

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes [ ] No [ ]

(4) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ]

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes [ ] No [ ]

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

_____

_____

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

_____

_____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

_____

_____

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [ ] No [ ]

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [ ]

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition?

Yes [ ] No [ ]

(4) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ]

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes [ ] No [ ]

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

_____

_____

_____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes [ ] No [X] If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

The basis for relief based on the "new rule" announced in Miller v Alabama, 132 S. Ct. 2455 (June 25, 2012) [sic]. The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. This rule applies retroactively to Mr. Malvo under Teague v Lane, 489 U.S. 288 (1989) [sic].

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The ground for the relief based on the "new rule" announced in Miller v Alabama, 132 S. Ct. 2455 (June 25, 2012) [sic]. The Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. This rule applies retroactively to Mr. Malvo under Teague v Lane, 489 U.S. 288 (1989) [sic].

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes [ ] No [X]

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes [ ] No [X]

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

Michael Arif, 8001 Braddock Road, Suite 105, Springfield, VA 22151, Mark Petrovich and Thomas Walsh, 10605 Judicial Dr., A-5, Fairfax, VA 22030

(b) At arraignment and plea:

Craig Cooley, 3000 Idlewood Avenue, Richmond, VA 23221; Michael Arif, 8001 Braddock Road, Suite 105, Springfield, VA 22151, Mark Petrovich and Thomas Walsh, 10605 Judicial Dr., A-5, Fairfax, VA 22030

(c) At trial:

Craig Cooley, 3000 Idlewood Avenue, Richmond, VA 23221; Michael Arif, 8001 Braddock Road, Suite 105, Springfield, VA 22151, Mark Petrovich and Thomas Walsh, 10605 Judicial Dr., A-5, Fairfax, VA 22030

(d) At sentencing:

Craig Cooley, 3000 Idlewood Avenue, Richmond, VA 23221; Michael Arif, 8001 Braddock Road, Suite 105, Springfield, VA 22151, Mark Petrovich and Thomas Walsh, 10605 Judicial Dr., A-5, Fairfax, VA 22030

(e) On appeal: Not Applicable

(f) In any post-conviction proceeding: Not Applicable

(g) On appeal from any ruling against you in a post-conviction proceeding: Not Applicable

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [x] No [ ]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

- Circuit Court for Spotsylvania County, 9115 Courthouse Road, Spotsylvania County, Virginia 22553; and
- Circuit Court for Montgomery County, 50 Maryland Avenue, Rockville, Maryland 20850.

(b) Give the date the other sentence was imposed:

- Spotsylvania County: 10/26/2004;
- Montgomery County: 11/08/2006.

(c) Give the length of the other sentence:

- Spotsylvania County: two terms of Life in Prison without Parole, plus eight years;
- Montgomery County: six terms of Life in Prison without Parole.

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes [X] No [ ]

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* Because relief sought based on the "new rule"

announced in Miller v Alabama, 132 S. Ct. 2455 (June 25, 2012) [sic]. This rule did not go into effect until June 25, 2012. The Court held that mandatory life imprisonment without the possibility of parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. This rule applies retroactively to Mr. Malvo under Teague v Lane, 489 U.S. 288 (1989) [sic]. This petition is filed within one year of the date on which the rule in Miller v Alabama, 132 S. Ct. 2455 [sic] was initially recognized by the Supreme Court and went into effect. 28 U.S.C. 2244(d)(1).

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court,

if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

Vacate his unconstitutional sentence, or any other relief to which the petitioner may be entitled.

_____/s/_____

Craig Cooley

_____/s/_____

Michael Arif

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on

_____

_____(month, date, year).

_____

Executed (signed) on (date).

/s/

Signature of Petitioner – By Craig S. Cooley, Attorney for Petitioner, 3000 Idlewood Avenue, Richmond, VA 23221, VSB # 16593, 804-358-2328, 804-358-3947 (Fax), Cooleycs@msn.com

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

Craig S. Cooley is counsel for petitioner Lee Boyd Malvo. Lee Malvo is incarcerated at Red Onion State Prison and will forward the signed form from that facility.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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/s/

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