

No. 18-217

IN THE
**Supreme Court of the
United States**

Randall Mathena, Warden,
Petitioner

v.

Lee Boyd Malvo,
Respondent

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

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

RUSSELL P. BUTLER, Esq.

Counsel of Record for Amicus

VICTOR D. STONE, Esq.

Maryland Crime Victims'

Resource Center, Inc.

1001 Prince George's Blvd., # 750

Upper Marlboro, Maryland 20774

(301) 952 0063

rbutler@mdcrimevictims.org

QUESTION PRESENTED FOR REVIEW

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

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JURISDICTIONAL STATEMENT

A petition for certiorari was filed under 28 U.S.C. §1254 on August 20, 2018. Petitioner and Respondent have consented to this brief's filing in accordance with Rule 2(a) of this Court's Rules.¹

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

Amendment XIV, U.S. Constitution.

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

¹ Counsel for MCVRC are the sole author of this brief, and no other person or entity made a monetary contribution to its printing and submission.

INTEREST OF THE AMICUS

Amicus, the Maryland Crime Victims' Resource Center, Inc.(MCVRC) is a non-profit corporate entity representing the interests of crime victims "to ensure" the comprehensive judicial consideration of victims' rights. 18 U.S.C. §3771(a)&(b)(2). In the Maryland cases arising out of Respondent's crime spree, MCVRC represents, in state and federal court, victim representative Nelson Rivera whose wife, Lori Ann Lewis-Rivera, was murdered by Respondent, and for which Respondent also received a sentence of life without parole. *State v. Malvo*, 2017 WL3579711(June 15, 2017); *Malvo v. Mathena*, 259 F.Supp.3d 321(D.Md.2017). MCVRC represents several named victim's representatives, as well as itself, as amici in a civil case challenging Maryland's life with parole sentences as being "de facto life without

parole” sentences in violation of *Miller* and *Montgomery*. *MRJI v. Hogan*, 2017 U.S. Dist. LEXIS 15160(D.Md.,Feb. 3, 2017); *MRJI v. Hogan*, 316 F.R.D. 106(D.Md. 2016).

MCVRC was founded by Roberta and Vince Roper as a voice for victims after the kidnapping, rape, and murder of their daughter Stephanie. The petition in this case is relevant to MCVRC's overall mission because expanding the reach of defendants' retroactive right to resentencing revictimizes both homicide victim's representatives and family members rights to fairness, dignity, and finality, often decades after the crime and sentencing.

SUMMARY OF ARGUMENT

Amicus raises the interests of not only Malvo's Virginia homicide victims' families or

representatives,² but also the interests of victims from across the nation, as a reason to take up and decide the petition.

On its face, the holding of the court below improperly focused upon the jury. However, requiring specific findings whether by juries (as in Respondent's Chesapeake City, Virginia cases), by judges even if there is a plea bargain approving the life sentence (as in Respondent's Spotsylvania County, Virginia cases), was not part of this Court's holding in *Miller* and *Montgomery*.

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

First, this Court's holdings were directed to and held invalid the inflexible situation where

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

a legislative mandate had blindly required imposition of a life sentence at the front end of a life without parole sentence and allowed no parole or other release procedure by executive branch officials at the back end of that life sentence.

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

Third, particularized findings would be impossible to implement retroactively because virtually no judicial determination prior to this Court's rulings would have been prescient and used the precise "magic words" subsequently announced in *Miller* and *Montgomery*. The consequences of such a requirement at sentencing, as determined by the court below, means that all juvenile murders and were sentenced to life in Virginia would, *per se*, need to be resentenced.

Fourth, focusing on the jury at sentencing overlooks this Court's holding: i.e., that a discretionary release need not occur at the time of

sentencing, but can occur later by other criminal justice system officials at the routine time that release is considered. In this respect, the holding below contravenes this Court's summary reversal in *Virginia v. LeBlanc*, 137 S.Ct. 1726,1729 (2017). In that case, the Virginia scheme of geriatric release was not found to be objectively unreasonable and it satisfied this Court's Eighth Amendment *Montgomery* standard. For that reason, the court below was required to follow the law and uphold Respondent's state sentences. Respondent is not entitled to review under special broader Eighth Amendment standards.

Most importantly to Amicus, the decision below retroactively revising the judicial sentencing process overlooks that the new sentencing process imposed below inflicts serious harm upon, and unlawfully revictimizes and disrespects victims here, as to whom the court below improperly gave no consideration whatsoever. Victims in federal collateral attack proceedings may no longer be

ignored. Congress has required "fairness" to victims in federal habeas actions like this one challenging state convictions and sentences. 18 U.S.C. § 3771(a)(8), (b)(2). The interests of victims during the criminal justice process was explicitly recognized by Congress. This Court in *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) articulated the harm that befalls victims and must now be considered. Here the actions of the court below violated the victims' rights under the Fifth Amendment since their rights and interests to finality, fairness, and dignity were paid no heed whatsoever. Extending *Montgomery's* holding beyond the holding itself implicates the respective "weighty" interests in finality. In fairness to the victims, both in the Fourth Circuit and nationwide, this Court should grant the petition for review and reverse the decision below.

ARGUMENT

The Resentencing Ruling Below Inflicts Serious Harm Upon, and Unlawfully Re-victimizes and Disrespects Victims.

1. Congress and every state have recognized and guaranteed victims' legal rights.

For every juvenile murderer who is incarcerated and seeks opportunities to move on with the inmate's life, there may be many times more victims per case – typically family members including each spouse, child, sibling and parent—who will grieve for their murdered love one many times day and night, whose lives have been permanently altered for the worse and who forever wonder what might have been. Victims' lives and pain can never be restored to their prior state and they have a right not to have to, *unnecessarily*, reopen and relive the nightmare of their loss at resentencing proceedings.

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

At common law dating back to the Middle Ages, victims initiated and controlled

criminal prosecutions. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv.J.L.&Pub.Pol'y 357,359(1986). By the early twentieth century, public criminal prosecutors became the norm in the United States. Thereafter, the role of a victim was turned on its head and victims were shunted aside. As one federal appeals court stated:

The criminal justice system has long functioned on the assumption that **crime victims should behave like good Victorian children—seen but not heard**. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process. See Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, §§ 101-104, 118 Stat. 2260, 2261-65 (2004) (codified at 18 U.S.C. §3771).

Kenna v. United States Dist. Court, 435 F.3d 1011,1013(9th Cir.2006)(emphasis added). The Final Report of the 1982 President's Task Force on Victims of Crime concluded that the American criminal justice system was "treating the victim with institutionalized disinterest" (*id.* at vi), and that the rights and interests of crime victims during the criminal justice process needed restoration. Thirty-four states have amended their constitutions to recognize independent victims' rights, and every state, the District of Columbia, and the federal government enacted statutory and rule-based protections for victims. See, *Fundamentals of Victims' Rights: A Brief History of Crime Victims' Rights in the United States*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), p.2 n.15(listing state constitutional provisions), Nov.2011, available at <http://law.lclark.edu/live/files/26523-updated-history-of-vr-bulletin>; *Morris v. Slappy*, 461 U.S. 1,14(1983)("courts may not ignore the interests of victims").

At the federal level, the Crime Victims' Rights Act (CVRA), Pub.L. No.108-405,118 Stat. 2251,

codified at 18 U.S.C. § 3771, gave victims specific enforceable “rights” in the federal criminal justice process and independent federal trial and appellate court standing to enforce those rights and as such a legal interest in the case. 18 U.S.C. § 3771(a), (b)(1), (d)(1) & (e)(3).³ Congress designed the CVRA to be “the most sweeping federal victims’ rights law in the history of the nation.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 Lewis & Clark L.Rev. 581, 582 (2005). “Remedial laws are to be interpreted in the light of previous experience and prior enactments... [and] informed congressional discussion.” *United States v. Congress of Industrial*

³ When Congress creates statutory legal rights, the invasion of them creates standing, even if no injury would have existed prior to that statute. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

Organizations, 335 U.S. 106,112-113(1948)(footnotes omitted).

Among the rights that the Act extends to crime victims is that federal courts at both the trial and appellate levels must enforce the victims' rights. The CVRA directs that **“[i]n any court proceeding** involving an offense against a crime victim, **the court shall ensure** that the crime victim is afforded the rights described in [the CVRA].” 18 U.S.C. §3771(b)(1) (emphasis added). The CVRA guarantees crime victims eight different rights, **and unlike the prior crime victims' rights statute, allows** both the government and **the victims to enforce them.**

* * *

“The statute was enacted to make crime victims full participants in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing, see Fed.R.Crim.P. 32(i)(4)(A); our interpretation puts crime victims on the same footing.”

Kenna, supra at 1013,1016(emphasis added).

During federal habeas proceedings arising from a state conviction like the instant one, the court's obligation to ensure *sua sponte* that the rights of state victims are "afforded" to them is required by 18 U.S.C. § 3771(b)(2)(A). The CVRA also gives victims independent standing for enforcement of their rights. Congress enacted this enforcement provision because "[w]ithout the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. **We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality.**" 150 Cong.Rec.7303(Apr. 22, 2004)(statement of Sen. Kyl, emphasis added). Senator Kyl also stated:

[i]t is not the intent of this bill that its significance be whittled down or marginalized **by the courts** or the executive branch. **This**

**legislation is meant to correct, not
continue the legacy of the poor
treatment of crime victims in the
criminal process.**

150 Cong.Rec. 22953(Oct. 8, 2004)(statement of Sen. Kyl)(emphasis added).

As a result, victims must be provided with due process of law to protect their interests even though not a named party in the underlying prosecution. *Cf., Goldberg v. Kelly*, 397 U.S. 254,267-268(1970)(legal rights may not be terminated without proper consideration that complies with due process of law).

b. The victims' rights that were violated below.

Victims' rights to be treated fairly, with respect and dignity, and not be *unnecessarily* revictimized by unnecessary resentencing proceedings in closed cases of their murdered loved ones requires recognition, consideration, and where possible, consideration and accommodation of their

legal interests regarding the finality of sentences. In the court below, this did not occur.

Victims' rights are both substantive and procedural. Procedural due process at its core requires consideration of a victim's legal rights, which the courts were statutorily charged to ensure, "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545,552(1965); see also *Mathews v. Eldridge*, 424 U.S. 319,333(1976).

These Fifth Amendment constitutional and federal statutory substantive and procedural due process fairness protections were Constitutionally guaranteed to victims by enactment of 18 U.S.C. §3771(a)(8), which provides to victims "The right to be treated with fairness and with respect for the victim's dignity and privacy..."⁴ Victims are not

⁴ The victim's federal rights fully accord with the victim's state constitutional rights. Va. Constitution, Article I, Section 8-A(2)("The right to be treated with **respect, dignity and fairness at all stages of the criminal justice system**")(emphasis added) State

random spectators at these criminal justice proceedings but are indispensable participants with legally enforceable rights and interests. This current criminal justice proceeding only exists because Malvo's murders and legal rights thereafter devolve to their victims under 18 U.S.C. §3771(b)(2)(D). As a result, due process demands that any ruling which strips away victims' rights without properly considering those victim's rights and interests is improper. *Accord. Paroline v. United States*, 134 S.Ct. 1710,1719-1720 (2014); *United States v. Laraneta*, 700 F.3d 983,986(7th Cir. 2012), *cert. denied*, 134 S.Ct. 235(2013); *In re Simons*, 567 F.3d 800(6th Cir.2009); *Hoile v. State*, 404 Md. 591,609(2008).

Victims are not unaware that juvenile murderers' rights have changed. Unlike their adult

interests are protected by the Fourteenth Amendment.

counterparts, they may not be subject to the death penalty, *Roper v. Simmons*, 543 U.S. 551(2005), or to permanent incarceration with no statutory right either before or after sentencing to request leniency.⁵ *Miller, supra*. This difference between adult and juvenile murderers may not be related to these latter offenders' immaturity or likelihood of rehabilitation. For example, these same criminal justice systems allow those exactly 18 and older to suffer the death penalty or permanent incarceration despite the science surrounding gradual psychological maturation that applies to them in virtually the same way as to an offender one day shy of that offender's eighteenth birthday. Instead, society treats criminals under eighteen years of age differently, not because they are automatically transformed into fully mature adults on their

⁵ The opportunity to obtain a pardon remains a matter of "grace."

eighteenth birthday, but because our laws have adopted a bright line test to delineate adulthood. In *Graham v. Florida*, 560 U.S. 48(2010), *Miller, supra*, and *Montgomery*, this Court dealt with specific kinds of legislatively imposed mandatory sentences (death or life imprisonment) which were impermissible for those convicted of offenses who had not yet crossed that bright line, even though eighteen-year plus killers may also be immature. This Court in *Miller* decided that the Eighth Amendment prohibited legislators from mandating, in advance, life sentences without parole upon these juvenile murders which would never allow discretionary release, either before or after imposition. Such *per se* mandatory indeterminate life without parole improperly end an age applicable murder's liberty permanently. *Bell v. Uribe*, 748 F.3d 857,869(9th Cir.2014)(mandatory life without parole scheme is what is prohibited); *Carter v. State, __Md__,2018 Md.LEXIS 50(2018)(parolable life sentences are not "de facto" life without parole sentences).*

In *Miller*, this Court did not invalidate discretionary sentences of life with parole because discretionary sentences were not

presented in the facts before the Court. e.g. Whether the Eighth Amendment was violated by individually judicially considered and imposed sentences for juvenile murderers where either a judicial sentencing authority at the time of imposition or a subsequent executive branch parole authority, could revise at the front end of the sentencing process or at the back end for a term lesser than life. If anything, the Court's analysis indicated that such sentences remained valid.

In *Miller* and *Montgomery*, the Court took its “death is different” *Roper* rationale, which had allowed the Court to bar the death penalty to punish juvenile criminals in every state under the Eighth Amendment, and extended that concept to bar mandatory life without parole in situations where a mandatory sentence failed to provide either at the time of sentencing or post-sentencing any opportunity to review the juvenile murderer’s sentence. But that concept, that juvenile killers should not be mandatorily sentenced to life without parole due to a pre-existing legislative initiative that barred both judicial and executive branch officials at sentencing and afterwards from ever taking any

account of the details of the future crime or the future offender, has now been stretched far beyond that rationale.

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

The logical extension of the ruling below, already raised by Respondent in his Maryland appellate brief, is that under *Montgomery's dicta*, the maturity of juvenile murders can never be unfailingly predicted at sentencing regardless of the process used. *Malvo v. State*, 2017 WL 8221808 (Maryland Appellate Brief of Malvo at 35)(sentencing

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

Montgomery ruling, harming and denying victims' rights to finality, fairness, and dignity.

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

“an individual...will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a

criminal trial more than once for the same offense. * * * "The underlying idea, one that is **deeply ingrained in at least the Anglo-American system of jurisprudence**, is that [having repeated adversarial proceedings involves] subjecting him to **embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity...**(emphasis added).

Consequently, in modern criminal justice systems, if a juvenile murder chooses to contest the killer's sentence, the appellate court cannot simply ignore the legal rights of the victims but must consider and balance a victim's rights, along with the murder's rights.

This Court noted in *Obergefell v. Hodges*, 135 S.Ct. 2584(2015) that the Constitution's Fifth Amendment Due Process Clause protection extends "to choices central to individual dignity" (135 S.Ct. at 2597), which is the same interest, i.e., in "dignity," that the people of the United States have

legislatively and constitutionally extended to victims. This Court stated that this “protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.” *Id.* at 2598. In the instant case, the victims’ dignity interest and requirement for fairness was explicitly conferred by Congress in 18 U.S.C. §3771(a)(8), (b)(2). The Court below failed to acknowledge, no less weigh, the victim’s dignity, fairness, and speedy disposition rights but instead “serve[d] to disrespect and subordinate” the victims’ dignity and fairness regarding finality, as compared with the consideration afforded Respondent.

This disparate treatment, the *Obergefell* Court observed, violates the Constitution’s Fifth Amendment Equal Protection Clause guarantee (*id.* at 2604), and applies as well “to all federal officials,” which includes the federal judiciary. *United States v. Windsor*, 570 U.S. 744, 755 (2013). In words equally applicable to victims, the *Obergefell* Court stated, “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.” *Obergefell* at 2608. Here, the congressional statute and the state and

federal constitutions' grant various rights to victims, including the right to be treated with dignity which includes an interest in finality. As *Obergefell, supra*, observes, protection of the fundamental right of dignity is a "part of the judicial duty," and a panel of the Fourth Circuit does not have the discretion to ignore the victim's state and federal rights. Congress has made this judicial obligation explicit by providing that "the court shall ensure that a crime victim is afforded the rights..." 18 U.S.C. §3771(b)(2)(A).

The pending petition directly involves the federal judiciary's proper functioning within the administration of our criminal justice system and federalism, *McNabb v. United States*, 318 U.S. 332, 340-341 (1943); and the proper construction of the judicial rules of procedure, *United States v. Beggerly*, 524 U.S. 38(1998); *Schlagenhauf v. Holder*, 379 U.S. 104,109(1964); *Upshaw v. United States*, 335 U.S. 410(1948); *Hickman v. Taylor*, 329 U.S. 495(1947). *see also, Devlin v. Scardelletti*, 536 U.S. 1(2002) (discussing appeal rights and interests of non-parties); and raises the scope of an appellate court's proper functioning and power. *Watson v. Philip*

Morris Cos., 551 U.S. 142,146-47(2007). The interests of victims must be respected and considered since federal courts must follow the CVRA and “ensure” that victims are afforded their rights. 18 U.S.C. §3771(b)(2)(A).

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

This Court's *Miller* and *Montgomery* holdings on their face require only a prohibition of mandatory life sentence without parole. Courts or parole board-like entities can consider and weigh a juvenile murderer's maturity, and consequently the danger to the public of reoffending which is the "flip side" of rehabilitation. The *Miller* and *Montgomery* holdings, which explicitly required no formalistic "findings" in recognition of federalism's reservation of powers to both the states and the people, must allow and defer to state rules of sentencing discretion as determined by each

state, and not as dictated to each state by federal courts.

The presumption that state sentencing judges act without concern for a juvenile murderer's age and lack of maturity on mere account of age before imposing upon them any very long sentence, no less one that will permanently deprive a juvenile killer of freedom, is not only unsupported by the record and unfounded, but it also is illogical, contrary to common sense, and naïve, if not demeaning to all the participants in the criminal justice process and justice. Virginia has discretion unlike in Alabama (in *Miller*) and Louisiana (in *Montgomery*) where there existed mandatory life without parole sentences and no release was possible. Imposing long sentences, especially on juvenile murderers, is one of the most difficult, weighty, and unforgettable tasks that judges face, and after *Miller* and *Montgomery* may occur after a hearing where everyone is allowed to voice their views, and typically after a professionally prepared presentence report and sentencing guidelines have been reviewed and considered. In addition, when judges raise

concerns about the community safety that requires incapacitating the killer by incarceration, that conclusion is premised on the fact that the court has determined in its discretion from everything before it that the murderer, for that period of the sentence, is an incorrigible danger to the community. There is no assertion here or evidence anywhere that judges impose long sentences on juvenile murderers arbitrarily or in bad faith (e.g., simply to fill up prisons at great expense to taxpayers). Moreover, there is no logical reason that judges must make findings that publicly label any killer as permanently and "irreparably" incorrigible, even if the judge harbors only a faint hope founded upon no facts but only the court's optimistic faith or religious belief in the future of humanity, that in the event of a future pardon application, that the destructive self-image of the juvenile (which the court is not required to publicly reinforce as a self-fulfilling prophecy) could, contrary to all the objective evidence, hypothetically improve. Judges are obligated to appropriately sentence

killers, but they are not obligated to brand a "scarlet letter" on their foreheads.

The Supreme Court in *Miller* and *Montgomery* followed its centuries old practice of invalidating unconstitutional state statutes. The Court did not order the reopening of every old homicide sentencing of a juvenile murderer. Contrary to the court below, *Montgomery* stated at 734:

Giving *Miller* retroactive effect, moreover, **does not require states to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for**

parole, rather than resentencing them.(Emphasis added.)⁶

In the *Miller* and *Montgomery* opinions, no presentence report or sentencing guideline was analyzed, discussed, or even discarded as an important sentencing tool. In addition, this Court's language rejecting the need for findings in those cases would be out of place and surplusage if specifically, worded findings were crucial. Furthermore, scientific hypotheses about juvenile killer's maturation have and will continue to evolve, and new questions will always appear regarding the general data about the class of juvenile offenders and its application to the small subclass of violent juvenile murderers. No such class

⁶ For example, Virginia could fix its geriatric release if it was constitutionally infirm, rather than be required to convene a new sentencing proceeding.

characteristic is ever *per se* determinative, except as a topic warranting attention when looking at sentencing guidelines and any individual's social disorders, e.g. the offender's psychopathology, because each juvenile offender is different, which is the very point *Miller* was making when it invalidated mandatory legislative sentencing provisions. Accepted generalizations and averages from the scientific community do not define individuals. *Williams v. New York*, 337 U.S. 241(1949)]; *Payne v. Tennessee*, 501 U.S. 808,820-21(1991)("Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material.").

For similar reasons, ruling that a particular "life without parole" sentence is "rare" is also not an objectively meaningful legal standard. "Rareness" concerns may be subjectively suitable as a rationale for doing away with mandatory life without parole sentences for juvenile killers. However, if employed as a legal standard, it is objectively problematic. It raises questions of "rare" compared to what? -- to the overall domestic population?

- to the national population of juveniles?
- to the national population of juvenile offenders sentenced as adults?
- to the number of life without parole murders of any age incarcerated in each state?
- to the number of such sentences a particular judge meets out to juvenile homicide offenders in the course of that judge's career on the bench?
- to the number of times in their lifetime that this victim has been grievously harmed by a juvenile murderer?

Neither the record in *Miller, Montgomery*, nor the instant case provides any definitive underpinnings for utilizing this temporal frequency term, "rare", as a legal standard.

Moreover, imposing such sentences only in "rare" cases would not make such sentences any more or less proportional. If several equally culpable foreign terrorist juvenile offenders bomb a U.S. elementary school killing dozens of children, would a sentence of life without parole automatically be barred for more than one of the murderers? Finally, allowing such harsh sentences only for "rare

cases," assuming *arguendo* that those cases could somehow be reliably identified, is dubious since it could run afoul of the "unusual" prong of the Eighth Amendment "cruel and unusual punishment" prohibition, and that problem was not even addressed in *Miller* or *Montgomery*.

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

A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.
Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

And Virginia has adopted such a back end approach.

Nor did this Court in *Montgomery* empower the lower federal courts to demand a "finding" requirement that negates the rulings of state courts of last resort about the post-conviction relief available in each state to juvenile murders and concomitantly regarding a victims' state victims' rights. Citing federalism concerns, this Court confirmed in *Montgomery* that *Miller* upheld and approved the principles of federalism. 136 S.Ct. at 735. If a specifically worded formulation reflecting a perpetrator's rehabilitation potential were required by the Eighth Amendment in such sentencings, such a rule would impermissible intrude upon each state's sovereignty and upon an "important principle of federalism." *Montgomery, supra*, citing *Ford v. Wainwright*, 477 U.S. 399, at 416–417(1986)("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.")

States remain free to determine if the discretion to impose life sentences will occur at the time of sentencing, or instead at the time of post sentencing release consideration, and there is no

requirement that there be multiple consideration points.

No wholesale reopening nationwide of every juvenile murderer to life was ordered, but just the opposite, since states constitutionally had flexibility within their sovereignty to decide. This Court must consider the adverse impact upon victims by reopening every life sentence for a juvenile murderer nationwide and particularly by states within the Fourth Circuit.

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

Resentencing determinations are not a “no cost” event, or of only *de minimus* harm to victims. A victim’s interest in finality is an interest in fairness. As this Court has indicated:

Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. ... To unsettle these

expectations is to inflict a **profound injury** to the “powerful and legitimate interest in punishing the guilty,” ... **an interest shared by the State and the victims of crime** alike. (citations omitted; emphasis added.)

Calderon, supra. Reopening a sentence causes harm to victims because it unsettles the finality of sentences. The emotional exhaustion, depression, and horror for a victim, often never ending, is greatly amplified by resentencing proceedings. During each resentencing proceeding, the crime’s gruesome details committed against the victim’s loved one are re-raised and re-examined.

Resentencing proceedings subject victims presenting impact statements to having to recall and speak publicly about the impact upon them of murders that often the victims have, until then, chosen never to think about or discuss again in public or private, considering individuals they have lost, the terror that they felt when the crime was fresh, and the fear that likely still stalks them at night about the crime, which they endure only with

difficulty, counselling, and the passage of time. See, Jim Parsons & Tiffany Bergin, The Impact of Criminal Justice Involvement on Victims' Mental Health, 23 J. Traum. Stress 182-183(2010); see also, Judith Lewis Herman, The Mental Health of Crime Victims: Impact of Legal Intervention, 16 J. Traum. Stress 159(2003). Despite this revived pain, victims cannot resist being pulled into these resentencing proceedings. They do not turn a blind eye to such proceedings since victims typically are perhaps the only original crime participants still available, long after the original prosecutor, investigators and judicial officials have moved on, who can present a first-person account of ancient murders, in opposition to an offender's self-centered and self-serving or biased recollection.

Moreover, even when victims do not attend these proceedings, they are harmed and criticized for whatever they say or do not say. Because Respondent is a juvenile killer of notoriety, regardless of the victims' desires, judicial determinations regarding Respondent will be widely distributed, publicized, and commented on by mainstream and social media.

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

Victims are entitled to the legal and emotional finality provided by each state, absent constitutional violations. *United States v. MacDonald*, 435 U.S. 850,853-54 (1978) ("The rule of finality has particular force in criminal prosecutions"). Consequently, victims have a protectable fairness interest in the finality of judgments in criminal cases that must be considered. *Calderon. supra.*

The Fourth Circuit's expansive reading of this Court's *Miller* and *Montgomery* rulings negatively impacts the due process and equal protection rights of virtually every victim of a juvenile killer. The ruling below also conflicts with other federal courts of appeal and state courts of last resort. Therefore, this Court should issue a writ of certiorari for these reasons and because the Fifth Amendment interests of victims to finality must be considered and balanced, not ignored. This Court long ago decided that courts may not ignore victims. *Morris, supra*.

The court below extended *Montgomery's* retroactivity holding to every juvenile murderer sentenced to life by requiring specially worded findings which theoretically could have been routinely met by judges utilizing a check box with these "magic words" on a standardized form. The historical failure to use the correct magic words will adversely affect many victims a juvenile murderer by eliminating finality. The ruling below also ignores that release on the back end of a sentence is constitutionally sufficient. Furthermore, where the record of a plea bargained discretionary sentencing hearing on the

front end of a sentence utilized a comprehensive presentence report, and Malvo was represented by counsel, and the original record shows either implicitly or explicitly that the correct legal standards were observed, “magic words” were not required by *Miller* or *Montgomery*. As one court has stated, “There also seems to be an evolving standard of decency afforded to victims in the United States of America.” *Chandler v. State*, 2015 WL 13744176, at *2 (2015)(emphasis added), *aff’d* 242 So. 3d 65 (Miss. 2018), *cert. pending*, *Chandler v. Mississippi* (No. 18-203, U.S. Sup.Ct. 2018). Just as courts should protect the rights of juvenile murderers, they must also protect the rights of victims. Entirely failing to consider victims’ interests in finality violates their protected fairness rights. In *Montgomery*, this Court acknowledged the important role of finality but held that an exception to finality was warranted for the problem presented there. 136 S.Ct. 732. This Court's narrow "finality rule" exception neither addressed nor logically applies to the much broader ruling of the court below.

This Court should clarify the appropriate balance of the victim's Fifth Amendment rights vis-a-vis Respondent's Eight Amendment rights by limiting the application of *Miller/Montgomery* to the unconstitutional situation it was designed to redress.

CONCLUSION

The Court should grant the petition and reverse the decision below.

Respectfully submitted,

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

APPENDIX

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

(a) A crime victim has the following rights:

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

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) [1] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

(b)(1) In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) (A) In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) (i) These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) (1) Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection,

investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) (1) The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is

underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) For the purposes of this chapter:

- (1) The term “court of appeals” means—
- (A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or
 - (B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.
- (2) (A) The term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.
- (B) In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative.
- (3) The terms “district court” and “court” include the Superior Court of the District of Columbia.
- (f) (1) Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to

enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no

judicial review of the final decision of the Attorney
General by a complainant.