No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL MATHENA,

Applicant,

v.

LEE BOYD MALVO,

Respondent.

Application for Stay Pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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**Admission pending to the Virginia bar*

July 31, 2018

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The respondent (petitioner-appellee below) is Lee Boyd Malvo.

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(f) and this Court's Rule 23, Warden Randall Mathena (Warden) respectfully requests a stay of the judgment of the United States Court of Appeals for the Fourth Circuit pending the preparation, filing, and this Court's resolution of his petition for a writ of certiorari. Such a stay was previously sought from and refused by the Fourth Circuit.

This case involves one of the most notorious serial murderers in recent history, Lee Boyd Malvo, one of the two D.C. snipers. Relying on this Court's 2016 decision in *Montgomery* v. *Louisiana*, 136 S. Ct. 718, the Fourth Circuit recently held that Virginia must resentence Malvo for crimes for which he was sentenced in 2004. The issue presented by this stay application is whether Virginia will be required to commence (and potentially conclude) the process of resentencing Malvo—risking additional trauma to his numerous victims and their families and exposing the Commonwealth to significant cost—before this Court resolves the Warden's forthcoming petition for a writ of certiorari. Because there is a reasonable possibility that the Court will grant the petition, a fair prospect that the Court will reverse the Fourth Circuit,

and the Commonwealth will be irreparably injured absent a stay, the Court should grant this application.

The petition for a writ of certiorari will present an important question that amply warrants this Court's consideration: May a decision about whether a new constitutional rule announced in an earlier decision applies retroactively on collateral review properly be interpreted as both modifying and substantially expanding the very rule whose retroactivity was in question? Specifically, the question will be whether this Court's decision in *Montgomery* is properly understood as expanding the prohibition against "*mandatory* life without parole for those under the age of 18 at the time of their crimes" announced in *Miller* v. *Alabama*, 567 U.S. 460, 465 (2012) (emphasis added), to include *discretionary* life-without-parole sentences as well.

According to the Supreme Court of Virginia, the answer to that question is no. See *Jones* v. *Commonwealth (Jones II)*, 795 S.E.2d 705, 721, 723 (Va.), cert. denied, 138 S. Ct. 81 (2017). But in the decision under review, the circuit court whose territory encompasses Virginia concluded the answer is yes. App. 18-19.

The disagreement between the Fourth Circuit and Virginia's highest court about how to interpret this Court's recent Eighth Amendment jurisprudence is the same direct split that warranted this Court's review—and unanimous summary reversal—in *Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam). The same justifications also support granting certiorari here:

> The federalism interest implicated in [federal habeas] cases is of central relevance in this case, for the Court of Appeals for the Fourth Circuit's holding created the potential for significant discord in the Virginia sentencing process. Before today, Virginia courts were permitted to impose—and required to affirm—a sentence like respondent's, while federal courts presented with the same fact pattern were required to grant habeas relief. Reversing the Court of Appeals' decision in this case—rather than waiting until a more substantial split of authority develops—spares Virginia courts from having to confront this legal quagmire.

Id. at 1729-30. (This Court's review also would resolve a broader and deeper split among the lower courts about how to interpret *Miller* and *Montgomery*. See *infra* Part I.2.)

We address in detail below why there is a fair prospect that the Court will grant certiorari and reverse the Fourth Circuit's decision. See *infra* Part II. But it is also noteworthy that, notwithstanding the clear split of authority and the more-than-plausible arguments that the

court of appeals' decision is wrong, the Fourth Circuit denied the Warden's *unopposed* motion to stay its mandate pending the Warden's request for this Court's review. App. 30. The court offered no explanation for that decision and the mandate has now issued. App. 32. Thus, even though neither the district court nor the court of appeals prescribed a specific time frame, the Commonwealth is now under an active federal court order to resentence Malvo. There is a very real possibility that, absent a stay, Malvo will be resentenced before this Court can complete its review, which could potentially moot this case (if Malvo again received a life-without-parole sentence). Such an outcome would cause irreparable harm to the Commonwealth by depriving it of its right to seek review of one of the most "intrusive" actions taken by federal courts in criminal cases. *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion).

The Commonwealth should not be forced to resentence one of the most heinous murderers in its history before having a chance to have its claims heard by this Court. Accordingly, we respectfully ask this Court to stay the Fourth Circuit's mandate pending resolution of the Warden's forthcoming petition for a writ of certiorari.

STATEMENT

Along with John Allen Muhammad (who was executed in 2009), Malvo committed one of the most notorious strings of terrorist acts in modern American history. Between September 5, 2002, and October 22, 2002, Muhammad and Malvo killed ten people and wounded numerous others in Virginia, Maryland, and Washington, D.C. while their victims went about their daily business. "Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of the shootings had occurred at gas stations. Schools were placed on lock-down status. On one occasion, Interstate 95 was closed in an effort to apprehend the sniper." *Muhammad* v. *State*, 934 A.2d 1059, 1066 (Md. Ct. Spec. App. 2007). Malvo admitted he was the triggerman in ten of the shootings. CA4 JA 33.

1. Malvo was indicted in two separate Virginia jurisdictions for the murders of Linda Franklin and Kenneth Bridges and the attempted murder of Caroline Seawell. CA4 JA33-34. Malvo was first tried for the murder of Ms. Franklin. The trial was held in Chesapeake, Virginia (having been moved from Fairfax, Virginia due to concerns about an impartial jury pool), where Malvo was convicted by a jury but spared a

death sentence. See CA4 Opening Br. 11-17. The jury recommended a life-without-parole sentence, and Malvo did not ask the judge to depart from that recommendation in any respect. See *id.* at 17. After being convicted of Ms. Franklin's murder, Malvo plead guilty with agreed life-without-parole sentences to the murder of Mr. Bridges and the attempted murder of Ms. Seawell. CA4 JA 34. Malvo did not appeal any of those convictions or sentences.

2. On June 25, 2013, Malvo filed two petitions for a writ of habeas corpus in federal court, arguing that the life sentences he received in Virginia violated the Eighth Amendment in light of this Court's then-recent decision in *Miller*. CA4 JA 9-23, 204-13. The district court dismissed Malvo's petitions as time-barred, concluding that *Miller*'s prohibition on mandatory life-without-parole sentences did not apply retroactively to cases in which direct review had concluded when *Miller* was decided. CA4 JA 126-30, 225-30. Malvo appealed, and, after this Court's January 2016 decision in *Montgomery*, the Fourth Circuit remanded the case for further proceedings before the district court. CA4 JA 132-33.

On remand, the Warden argued that *Montgomery* did not change the outcome because Virginia does not impose mandatory life-without-parole sentences like those prohibited by *Miller* and the new constitutional rule announced in *Miller* does not extend to discretionary sentencing schemes. The district court disagreed, concluding that, after *Montgomery*, it "need not determine whether Virginia's penalty scheme is mandatory or discretionary because [it concluded] that the rule announced in *Miller* applies to *all situations* in which a juvenile *receives* a life-without-parole sentence." CA4 JA 142 (emphasis added). The district court determined that judges have an affirmative duty to "consider the factors articulated in *Miller* and *Montgomery* every time a juvenile is sentenced to life imprisonment without parole," even if the sentence is discretionary and the defendant does not ask for such consideration. CA4 JA 148. Consequently, the district court vacated all of Malvo's life sentences in Virginia and ordered him resentenced. CA4 JA 157-58. The district court stayed its judgment pending the Warden's appeal to the Fourth Circuit. CA4 JA 7.

3. The Warden timely appealed to the Fourth Circuit, which had jurisdiction under 28 U.S.C. § 1291. CA4 JA 160, 259. After full

briefing and oral argument, the court of appeals affirmed the district court's order on June 21, 2018. App. 27. Like the district court, the Fourth Circuit determined that it "need not . . . 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." App. 17-18. And, also like the district court, the Fourth Circuit read *Montgomery* as "confirm[ing] that . . . 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.'" App. 18 (citation omitted).

4. On June 29, 2018, the Warden filed an unopposed motion asking the Fourth Circuit to stay the issuance of its mandate pending the filing of a petition for a writ of certiorari with this Court. CA4 Docket No. 36. Seventeen days later, on July 16, 2018, the Fourth Circuit denied that motion without explanation. The court of appeals' mandate issued seven days ago, on July 24, 2018. App. 32-33.

ARGUMENT

This Court applies a three-factor test when deciding whether to stay a court of appeals' judgment pending the disposition of a petition for a writ of certiorari: whether there is "(1) 'a reasonable probability' that th[e] Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland* v. *King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (alteration in original) (quoting *Conkwright* v. *Frommer*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)).

All three factors are satisfied here. There is at least a "reasonable probability" that this Court will grant review because it did so just over a year ago in a case involving directly analogous circumstances. See *LeBlanc*, 137 S. Ct. 1726. There is also at least a "fair prospect" that this Court will reverse the Fourth Circuit's decision about how *Montgomery* should be interpreted. See *infra* Part II. And the Commonwealth will be irreparably injured if it is required to resentence a mass murderer and potentially moot this case before the Court has an

opportunity to fully consider the important question presented. See *infra* Part III.

I. There is a reasonable probability that this Court will grant the Warden's petition for a writ of certiorari.

The petition for a writ of certiorari will ask this Court to resolve a direct split between the Supreme Court of Virginia and the Fourth Circuit, as well as a wider circuit split about how to interpret *Miller* and *Montgomery*. Either of those splits would independently warrant this Court's review under Rule 10(a).

1. The Court's 2017 decision in *LeBlanc* shows that there is at least a reasonable probability that the Court will grant certiorari here. In *LeBlanc*, this Court granted the Commonwealth's petition for a writ of certiorari and summarily reversed the Fourth Circuit in a habeas case where the court of appeals had reached a conclusion about sentencing juvenile nonhomicide offenders that was directly contrary to a decision by the Supreme Court of Virginia. See *LeBlanc*, 137 S. Ct. at 1728. Due to the "central relevance" of "[t]he federalism interest implicated in [federal habeas] cases" and the fact that a decision denying review would have created a situation where Virginia state courts would be required to affirm sentences that federal district courts

would then be compelled to set aside on federal habeas review, this Court granted certiorari "rather than waiting until a more substantial split of authority develop[ed]." *Id.* at 1729-30.

The Fourth Circuit's decision in Malvo's case has now created precisely the same conflict in the context of juvenile homicide offenders.

a. In *Jones II*—a case that had been GVRed by this Court in light of *Montgomery*, see *Jones* v. *Virginia*, 136 S. Ct. 1358 (2016)—Virginia's highest court reconsidered and reaffirmed its pre-*Montgomery* precedent that the new rule of constitutional law announced in *Miller* is limited to "*mandatory* life sentences without the possibility of parole," *Jones II*, 795 S.E.2d at 721, and that Virginia law does not provide for such sentences "because Virginia law does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else," *id.* at 708. The court squarely rejected the argument that *Montgomery* had substantively modified *Miller*'s holding, stating that "[t]he main 'question' for decision in *Montgomery* was . . . 'whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders' should be applied retroactively." *Id.* at 721. The court thus "reinstate[d]," *id.* at 707, its earlier holding in

Jones v. *Commonwealth*, that "even if *Miller* applied retroactively, it would not apply to the Virginia sentencing statutes relevant here." 763 S.E.2d 823, 823 (2014) (*Jones I*); accord *Jones II*, 795 S.E.2d at 708.

b. In this case, the Fourth Circuit reached precisely the opposite conclusion. The court of appeals determined that it "need not . . . 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." App. 17-18. In the Fourth Circuit's view, "a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence" without first making a finding of permanent incorrigibility. App. 18 (slip op. 18). According to the Fourth Circuit, "*Miller*'s holding potentially applies to *any* case where a juvenile homicide offender *was sentenced to* life imprisonment without the possibility of parole." App. 19 (emphasis added).

Absent this Court's intervention, courts in Virginia will be placed in the same untenable situation that existed before the Court resolved *LeBlanc.* Virginia state courts will remain bound by the Supreme Court

of Virginia's decision in *Jones II*, and thus be compelled to reject claims like those Malvo pressed here. In contrast, federal courts will remain bound by the Fourth Circuit's published decision and thus will be required to grant habeas relief except in cases where the Virginia trial court happens to make a permanent-incorrigibility finding—a finding that the Supreme Court of Virginia has disclaimed any need to make.

2. It also is reasonably probable that the Court will grant certiorari here because of a deeper and broader split on these issues between state courts of last resort and federal courts of appeals. State high courts in Arkansas, Colorado, Georgia, Indiana, Missouri, New Mexico, South Dakota, and Texas[1] as well as the First, Fifth, and Eighth Circuits,[2] agree with the Supreme Court of Virginia that *Miller*

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[1] *State* v. *Nathan*, 522 S.W.3d 881, 891 (Mo. 2017) (en banc); *Lucero* v. *People*, 394 P.3d 1128, 1133 (Colo. 2017), cert. denied, 138 S. Ct. 641 (2018); *State* v. *Charles*, 892 N.W.2d 915, 919 (S.D.), cert. denied, 138 S. Ct. 407 (2017); *Foster* v. *State*, 754 S.E.2d 33, 37 (Ga. 2014); *Conley* v. *State*, 972 N.E.2d 864, 876 (Ind. 2012); *Murry* v. *Hobbs*, 2013 Ark. 64, at 4, 2013 WL 593365, at *4 (Ark. Feb. 14, 2013); *State* v. *Gutierrez*, No. 33,354, 2013 WL 6230078, at *2 (N.M. Dec. 2, 2013); *Turner* v. *State*, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014).

[2] *United States* v. *Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016), cert. denied, 137 S. Ct. 2290 (2017); *Evans-Garcia* v. *United States*, 744 F.3d 235, 240-41 (1st Cir. 2014); *United States* v. *Walton*, 537 F. App'x 430, 437 (5th Cir. 2013); see also *Davis* v. *McCollum*, 798 F.3d 1317,

does not apply to discretionary life-without-parole sentences. By contrast, the courts of last resort in Connecticut, Montana, Ohio, Utah, and Wyoming agree with the Fourth Circuit that *Miller* announced a new rule that applies to all life-without-parole sentences, both mandatory and discretionary.[3] Granting certiorari and deciding this case will resolve that entrenched circuit split.

II. There is a fair prospect that this Court will reverse the Fourth Circuit's decision.

There is at least a fair prospect that the Court will reverse the Fourth Circuit's decision. At this preliminary stage, the Court need not conclude that the Fourth Circuit was wrong. Rather, all that is required are "plausible arguments . . . for reversing the decision below" and the determination "that a majority of the Court *may* vote to do so." *California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers) (emphasis added).

1321 (10th Cir. 2015) ("*Miller* said nothing about non-mandatory life-without-parole sentencing schemes.").

[3] *Steilman* v. *Michael*, 407 P.3d 313, 315 (Mont. 2017) ("hold[ing] that *Miller* and *Montgomery* apply to discretionary sentences in Montana"), cert. denied, 138 S. Ct. 1999 (2018); see also *Casiano* v. *Comm'r of Corr.*, 115 A.3d 1031, 1043 (Conn. 2015); *State* v. *Houston*, 353 P.3d 55, 75 (Utah 2015); *State* v. *Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Bear Cloud* v. *State*, 334 P.3d 132, 141-43 (Wyo. 2014).

To be clear: The petition for a writ of certiorari will neither ask the Court to overrule *Montgomery* nor turn a blind eye to large portions of the decision. Instead, this case is about how this Court's decisions are made retroactive to cases pending on collateral review (itself an exceedingly rare occurrence) and the consequences of the decisions that make those retroactivity determinations.

1. In recent years, the Court has held that various categories of punishment violate the Eighth Amendment's prohibition on cruel and unusual punishment based on "the evolving standards of decency that mark the progress of a maturing society." *Roper* v. *Simmons*, 543 U.S. 551, 561 (2005) (internal quotation marks and citation omitted). In 2005, the Court held that the Eighth Amendment precludes "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578. In 2010, the Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham* v. *Florida*, 560 U.S. 48, 82 (2010). And in 2012, the Court held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile

offenders." 567 U.S. at 479; see *id.* at 465 ("We . . . hold that mandatory life without parole for those under the age of 18 at the crime of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'").

The holdings in these cases were clear, direct, and specific: Each prohibited a particular category of punishment for a particular category of offenders.

2. This Court has long recognized that the question of whether a new constitutional rule should be adopted or a current constitutional rule should be modified or extended is analytically distinct from whether that newly adopted or expanded rule should be applied retroactively to cases that had become final on direct review before the new rule was announced. See generally *Teague* v. *Lane*, 489 U.S. 288 (1989). Although any new rule automatically "applies to all criminal cases still pending on direct review," such new rules only apply to "convictions that are already final . . . in limited circumstances." *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004). In fact, this Court applies a presumption that "new rule[s]"—defined as those "not *dictated* by precedent existing at the time the defendant's conviction became final,"

Saffle v. *Parks*, 494 U.S. 484, 488 (1990) (internal quotation marks and citation omitted)—*do not* apply to cases for which direct review has already concluded. See *Montgomery*, 136 S. Ct. at 729 (stating that, "[u]nder *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced").

This presumption against retroactivity for cases on collateral review rests on a number of bases. As this Court has explained, "the application of new rules to cases on collateral review . . . *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted). In addition, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Butler* v. *McKellar*, 494 U.S. 407, 413-14 (1990) (alterations in original) (citation omitted). *Teague*'s general rule of nonretroactivity thus respects "important interests of comity and

finality." *Wright* v. *West*, 505 U.S. 277, 311 (1992) (internal quotation marks and citation omitted).[4]

This Court has repeatedly been required to decide whether a new rule is retroactive under the *Teague* framework. See, *e.g.*, *Montgomery*, 136 S. Ct. at 725 (retroactivity of *Miller*); *Whorton* v. *Bockting*, 549 U.S. 406 (2007) (retroactivity of *Crawford* v. *Washington*, 541 U.S. 36 (2004)); *Beard*, 542 U.S. at 406 (retroactivity of *Mills* v. *Maryland*, 486 U.S. 367 (1988)); *Schriro*, 542 U.S. at 349 (retroactivity of *Ring* v. *Arizona*, 536 U.S. 584 (2002)). In other cases, the Court has declined to entertain a habeas petitioner's claim on the merits, concluding that any decision for the petitioner would itself necessarily constitute a forbidden "new rule." See, *e.g.*, *Saffle*, 494 U.S. at 486.

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[4] Congress has also indicated its strong preference for finality in criminal cases in enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Carey* v. *Saffold*, 536 U.S. 214, 220 (2002) (referencing "AEDPA's goal of promoting comity, finality, and federalism") (internal quotation marks and citation omitted); see also 142 Cong. Rec. H3605-06 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) (referring to "endless appeals" that were making a "mockery of the law"); *id.* at H3609 (statement of Rep. Buyer) (lamenting petitions that "delay[] endlessly the carrying out of sentences handed down by judges and juries"). Among other things, AEDPA further restricted the right of habeas petitioners to file second or successive petitions in light of new constitutional rules. See *Panetti* v. *Quarterman*, 551 U.S. 930, 966 (2007).

3. Nothing in *Montgomery* questioned, undermined, or otherwise altered the well-established *Teague* framework. The question this Court granted certiorari to decide was "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review." Pet. i, *Montgomery* v. *Louisiana* (No. 14-280). The Court's opinion also framed the issue for decision and its holding in well-established, *Teague*-based terms. See *Montgomery*, 136 S. Ct. at 725 (describing issue before the Court as "whether [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided"); *id.* at 736 ("The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague*.").

To be sure, the Court's opinion in *Montgomery* also contains a lengthy analysis of the bases, premises, and justifications for the *Miller* rule. See *Montgomery*, 136 S. Ct. 732-34. But the role of that discussion in the Court's analysis of the question before it was clear: to explain *why* the new rule adopted in *Miller* "indeed did announce a new substantive rule that, under the Constitution, must be retroactive." *Id.*

at 732. At no point did *Montgomery* purport to expand the rule announced in *Miller*—a step that would have been irreconcilable with the premises of *Teague*'s entire approach to retroactivity.

4. Here, the Fourth Circuit's erred by treating a decision (*Montgomery*) that explained *why* the new rule of constitutional law announced in a previous decision (*Miller*) was retroactive—a rule that was, by its terms, limited to "*mandatory* life without parole" sentences, *Miller*, 567 U.S. at 465 (emphasis added)—as itself *expanding* the category of punishments prohibited by the Eighth Amendment. We are aware of no post-*Teague* decision by this Court endorsing such an approach. We also are unaware of any context except this one where lower courts have viewed this Court's post-*Teague* retroactivity decisions as addressing anything other than whether the rule in question was "retroactive" or "not retroactive."

But the problems with the Fourth Circuit's approach go beyond its novelty. Allowing new constitutional rules to be expanded as part of the retroactivity determination would allow the law to *develop* piecemeal while being *applied* retroactively, one of the very things *Teague* aims to prevent. See *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990) ("The principle

announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered.").

The Fourth Circuit's holding also violates another important goal of this Court's retroactivity jurisprudence by risking "disparate treatment of similarly situated defendants." *Danforth* v. *Minnesota*, 552 U.S. 264, 301 (2008) (citation omitted). It seems plausible that at least some juvenile offenders currently serving discretionary life sentences opted not to seek relief under *Miller* because *Miller*'s unequivocal statement of its own holding expressly stated that its holding did not apply to them. See *Miller*, 567 U.S. at 465 ("We . . . hold that mandatory life 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.'"); accord *id.* at 479. Because *Miller* was decided in 2012 and because an applicant for federal habeas corpus relief "has one year from the date on which the right he asserts was initially recognized by this Court," *Dodd* v. *United States*, 545 U.S. 353, 357 (2005), the time for seeking relief based on *Miller* has long since passed for those offenders. Unlike Malvo, those offenders will not benefit from

what was, in the Fourth Circuit's view, *Montgomery*'s substantial expansion of the underlying *Miller* right. It would thus be deeply inequitable both to the States and to criminal defendants who seek to file habeas petitions based on a good-faith understanding of current law to change substantive constitutional rules in a decision about retroactivity.

5. We recognize that *Montgomery* makes a number of powerful points about why juveniles should, or even must, be treated differently under the Eighth Amendment. If the Court believes that discretionary life-without-parole sentences for juveniles sometimes, often, or even always violate the Eighth Amendment, the Court should follow the path of *Roper*, *Graham*, and *Miller* and take a case that is pending on direct review. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). But unless the Court intends to revisit *Teague*'s "unifying theme" for "how the question of retroactivity should be resolved for cases on collateral review," *Teague*, 489 U.S. at 300 (plurality opinion), the only proper approach is to treat *Montgomery* as

what it is: a holding and explanation of why the particular constitutional rule actually announced in *Miller* is retroactive to cases on collateral review. Because the Fourth Circuit's decision departs substantially from that approach, there is more than a fair prospect that the decision below would be reversed by this Court.

III. The absence of a stay will cause irreparable harm to the Commonwealth and its citizens.

Without a stay, Virginia will be forced to begin (and perhaps to conclude) resentencing a person who committed "the most heinous, random acts of premeditated violence conceivable," App. 25, before it learns whether it will succeed in its efforts to avoid that very result. If Malvo is resentenced to life without parole (as seems entirely plausible), the Commonwealth's efforts to overturn the Fourth Circuit's decision could be rendered moot. Moreover, absent a stay, the Commonwealth, its witnesses, and Malvo's victims will be forced to bear the substantial burden of preparing for a potentially unnecessary sentencing hearing. And if a sentencing hearing is actually held, Virginia corrections officials will be forced to take the substantial (and, again, potentially unnecessary) risks associated with transporting a serial murderer. Cf. *Morva v. Commonwealth*, 683 S.E.2d 553, 557 (Va. 2009) (detailing how

a Virginia inmate escaped during medical transport and murdered an unarmed security guard and a police officer who was searching for him).[5]

In contrast, it is nearly certain that Malvo will suffer no tangible prejudice if any resentencing is stayed pending resolution of the Warden's petition for a writ of certiorari. The proof is in the pudding. Malvo's counsel did not oppose the Warden's motion asking the Fourth Circuit to stay its mandate pending this Court's review. Nor is the reason hard to discern: At this point, Malvo has served only approximately 16 years of his three life sentences for the murders of Ms. Franklin and Mr. Bridges and the attempted murder of Ms. Seawell. Under the circumstances, it is almost inconceivable that a

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[5] The harms that the Commonwealth and its citizens will suffer absent a stay are not limited to Malvo. Because this case presents broader questions about how *Miller* and *Montgomery* impact Virginia's sentencing regime for juvenile homicide offenders, it has a direct impact on other cases as well, many of which were being held pending the Fourth Circuit's decision in this case. Without a stay, the Commonwealth will likely be forced to resentence many of those other inmates as well. See, *e.g.*, *Jones* v. *Ray*, No. 1:13-cv-775 (E.D. Va.); *Sneade* v. *Vargo*, No. 3:13-cv-00398 (E.D. Va.); *Landry* v. *Baskerville*, No. 3:13-cv-367 (E.D. Va.); *Dumas* v. *Clarke*, No. 2:13-cv-00398 (E.D. Va.); *Jackson* v. *Clarke*, No. 2:13-cv-00355 (E.D. Va.); *Widener* v. *Kanode*, No. 7:13-cv-00516 (W.D. Va.); *Sanchez* v. *Cabell*, No. 3:13-cv-00400 (E.D. Va.).

Virginia court would resentence Malvo only to the time he has already served.

* * *

As stated throughout, the Warden currently is under an obligation to begin the resentencing process. Although no deadline was imposed by the federal court in this case, other courts generally have imposed deadlines of approximately 90 days for resentencing following the grant of habeas relief. To avoid uncertainty and the potentially needless expenditure of resources preparing for resentencing, we respectfully ask the Court to act expeditiously on our request for a stay.

CONCLUSION

The highest state and federal courts in the Commonwealth of Virginia are, once again, in direct conflict about how this Court's recent Eighth Amendment decisions do (or do not) impact juvenile offenders in Virginia. Given the intolerable nature of that conflict (as well as a broader conflict involving other federal courts of appeals and courts of last resort in other states), there is at least a reasonable probability that this Court will grant certiorari. Because nothing in the Court's post-*Teague* precedent supports interpreting a decision about

retroactivity as creating or expanding a new rule of constitutional law, there is at least a fair prospect that the Fourth Circuit's decision will be reversed. The absence of a stay risks severe prejudice to the Commonwealth and the grant of one poses no meaningful risk of prejudice to Malvo, who, again, did not oppose a stay. For those reasons, the Court should grant the Warden's application to stay the Fourth Circuit's mandate pending the filing and disposition of a petition for writ of certiorari.

Respectfully submitted,

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**Admission pending to the Virginia bar*

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