IN THE
COURT OF APPEALS OF MARYLAND

September

September ~~August~~ Term 2021

No. 29

LEE BOYD MALVO,

Petitioner

v.

STATE OF MARYLAND,

Respondent.

BRIEF OF RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER LEE BOYD MALVO

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**Motion for Special Admission Pending*

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Amicus Curiae The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have participated in civil rights campaigns involving the criminal legal system in areas that include police misconduct, compensation for the wrongfully convicted, and the treatment of incarcerated people.

STATEMENT OF THE CASE

Amicus Curiae incorporates Petitioner's Statement of the Case by reference.

STATEMENT OF THE QUESTIONS PRESENTED

Amicus Curiae incorporates Petitioner's Statement of the Questions Presented by reference.

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

Amicus Curiae incorporates Petitioner's Statement of the Applicable Standard of Review by reference.

STATEMENT OF THE FACTS

Amicus Curiae incorporates Petitioner's Statement of Facts by reference.

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[1] Pursuant to Md. R. 8-511(a)(1), *Amicus Curiae* have obtained written consent of all parties to file this brief. Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Separate from the federal Eighth Amendment issues at stake, this case presents two important issues of state constitutional law: Whether Article 25 of the Maryland Declaration of Rights prohibits sentencing a juvenile to life without parole absent a finding of permanent incorrigibility; and whether Article 25 categorically bars life-without-parole sentences for juveniles. The answer to both questions is yes. The Court should hold that Article 25 categorically forbids life without parole for juveniles. Barring that, the Court should hold under Article 25 that a sentencing judge must find a juvenile permanently incorrigible before imposing life without parole.

This brief is about why the Court should reach above the minimum required by the Eighth Amendment in interpreting Maryland's own Declaration of Rights. Article 25 forbids "cruel *or* unusual" punishment imposed by courts—a broader rule than the Eighth Amendment's prohibition of "cruel *and* unusual" punishment. The framers of Maryland's Declaration of Rights could easily have copied the narrower rule against judicially-imposed "cruel and unusual" punishment from any number of well-known foundational documents, including the English Bill of Rights or the Virginia Declaration of Rights. But instead, Maryland went its own way by adopting a broader rule against "cruel or unusual punishment" imposed by courts in its 1776 Declaration of Rights. Even though the framers of the federal Eighth Amendment later adopted the Virginia formulation, Maryland carried forward the distinctive language of its own Declaration of Rights, which this State has maintained across four state constitutions and for nearly 250 years.

In fact, the Maryland Declaration of Rights contains two punishment clauses—a rule against "cruel and unusual" punishments imposed by the legislature (Article 16) and a rule against "cruel or unusual punishments" imposed through the exercise of judicial discretion (Article 25). The contrasting use of the conjunctive and disjunctive in different provisions of the same document regulating different branches of state government makes it all the more clear that "cruel or unusual" and "cruel and unusual" must have different meanings. Article 25's more sweeping limitation on sentences meted out through a judge's discretion clearly applies to this case because the sentencing court exercised discretion in sentencing Mr. Malvo to life without parole.

This Court itself "has acknowledged that there is some textual support for finding greater protection in the Maryland provisions" limiting harsh punishment based on the use of the disjunctive "cruel *or* unusual." *Carter v. State*, 461 Md. 295, 308 n.6, 192 A.3d 695, 702 n.6 (2018) (citing *Thomas v. State*, 333 Md. 84, 103 n.5, 634 A.2d 1, 10 n.5 (1993)). Other high courts in states that prohibit "cruel or unusual" punishment have decided the issue squarely, finding, for example that "the set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.'" *People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992).

This Court should hold that Article 25's ban on "cruel or unusual" punishment meted out through judicial discretion is broader than the Eighth Amendment's rule against "cruel and unusual" punishment. In doing so, the Court should join with other state high courts. More and more state courts across the nation are providing protections for young

people facing harsh sentences—ones grounded in their own constitutions, and not the Eighth Amendment. As this Court recently underscored:

> State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Leidig v. Maryland, 475 Md. 181, 256 A.3d 870, 904 (2021) (quoting Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977)).

ARGUMENT

I. This Court Regularly Interprets the Maryland Declaration of Rights to Exceed the Floor Set by the Federal Constitution.

This Court has consistently raised the protections of the Maryland Declaration of Rights above the floor established by the federal Constitution when a compelling reason exists to do so. Generally, provisions of the Maryland Constitution are considered *in pari materia* with any federal counterparts. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002). However, that does not mean such provisions are always interpreted in the same manner. *Id*. Rather, "in many contexts, the protections provided by the Maryland Declaration of Rights are broader than the protections provided by the parallel federal provision." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 549, 62 A.3d 123, 131 (2013). In particular, these contexts include confrontation of witnesses, protections against self-incrimination, *ex post facto* laws, and illegal search and seizure. *Id*.

In a recent decision, this Court flatly refused to apply the U.S. Supreme Court's approach to the Sixth Amendment Confrontation Clause to Article 21 of the Maryland Declaration of Rights. This Court declared: "We no longer are content to allow Justice Thomas's formality requirement to control a subset of Maryland confrontation challenges." *Leidig*, 256 A.3d at 905. As the Court explained, "[t]here is a fundamental tension between Justice Thomas's demand for formality and the substantive right to confrontation. Simply put, we respectfully believe that Justice Thomas's approach places form over substance to the detriment of the rights afforded under Article 21." *Id.*

Similarly, the protection against self-incrimination provided by Article 22 of the Maryland Declaration of Rights has been held broader than the protection of the federal Fifth Amendment in multiple ways. *See Choi v. State*, 316 Md. 529, 545, 560 A.2d 1108, 1115 (1989). Maryland has rejected the Fifth Amendment's waiver rule, instead ruling that "a witness's testifying about a matter does not preclude invocation of the privilege for other questions relating to the same matter." *Id*. (quoting *Chesapeake Club v. State*, 63 Md. 446, 457 (1885)). Maryland has also gone beyond the scope of the Fifth Amendment in holding that Article 22 prohibits asking a defendant at trial to try on an article of clothing in order to establish ownership. *Id*. at 535 n.3 (citing *Allen v. State*, 183 Md. 603 (1944)). Finally, this Court directly contradicted the Supreme Court's Fifth Amendment decision in *Lakeside v. Oregon*, 435 U.S. 333 (1978), to hold that issuing a "no adverse inference" instruction over the defendant's objection violates the protections of Article 22. *Hardaway v. State*, 317 Md. 160, 166-67, 169, 562 A.2d 1234, 1237-38 (1989).

Along similar lines, this Court holds that the *ex post facto* prohibitions in Article 17 of the Maryland Declaration of rights provide broader protection than those in the federal Constitution. *Doe,* 430 Md. at 537. In *Doe,* the Court held that the retroactive application of a sex offender registration statute to a person convicted before its enactment violates Article 17. *Id*. Maryland declined to follow the Supreme Court in rejecting the "disadvantage" standard for *ex post facto* cases. *Id*. at 551-52 (citing *Collins v. Youngblood*, 497 U.S. 37, 50 (1990)). The Court maintained that retroactivity and disadvantage are the only critical elements in the *ex post facto* analysis under Maryland law, explaining that "[a]lthough the Supreme Court appears to have narrowed the scope of the federal Constitution's protection against *ex post facto* laws, we …. continue to interpret Article 17 as offering broader protection. *Id*.

This Court also established broader protections against the use of illegally obtained evidence in *Parker v. State*, 402 Md. 372, 936 A.2d 862 (2007). In *Parker,* the issue was whether certain evidence collected in violation of Maryland's common law "knock and announce" principle was admissible under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights. *Id* at 388-89. Despite assuming *arguendo* that the Fourth Amendment's exclusionary principle did not apply to violations of the "knock and announce" principle, the Court held that such evidence could be excludable under Maryland law. *Id*. at 406.

II. Compared to the Federal Eighth Amendment, the Text of Article 25 Requires Greater Limits on Criminal Punishment Imposed by Courts.

Just as this Court has read the Maryland Declaration of Rights more broadly than the federal Constitution in several other contexts, it should recognize that the Maryland Declaration of Rights provides greater protection against excessive criminal punishment than the federal Eighth Amendment. Specifically, whereas the federal Eighth Amendment limits only "cruel *and* unusual" punishment, U.S. Const. amend. VIII, the Maryland Declaration of Rights prohibits "cruel *or* unusual" punishment imposed by a court, Maryland Dec. of Rights Art. 25. The framers of the Maryland Declaration of Rights deliberately adopted the broader provision—a disjunctive "or" that requires only one condition to be satisfied, as opposed to a conjunctive "and" that requires two conditions to be satisfied. To give effect to this key textual difference between the two provisions, this Court should interpret Article 25 more broadly than the federal Eighth Amendment.

A. As a Restraint on Judicial Discretion in Sentencing, the Framers of the Maryland Declaration of Rights Adopted a Rule Against "Cruel *or* Unusual" Punishment Rather than a Rule Against "Cruel *and* Unusual Punishment."

Had the framers of the Maryland Declaration of rights wanted to prohibit only "cruel *and* unusual punishment," they easily could have done so. They had textual models readily at hand. Just two months before the delegates to the Maryland Constitutional Convention gathered in Annapolis in August of 1776, Virginia adopted its own Declaration of Rights in June. Virginia followed the narrow model of the 1689 English Declaration of Rights by prohibiting only "cruel and unusual" punishment. "Virginia's prohibition of 'cruel *and* unusual punishments,' …. closely followed the English provision …. which

provided '[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'" *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (plurality opinion of Scalia, J.).

Unlike neighboring Virginia, this State refused to copy the English Declaration of Rights. Instead, Maryland adopted a broader rule against "cruel or unusual" punishment imposed by courts. Article 22 of Maryland's 1776 Declaration of Rights provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law." 1776 Maryland Dec. of Rights, Art. 22. The same provision has been reenacted verbatim by every subsequent Maryland constitutional convention and currently appears as Article 25 of the Maryland Declaration of Rights.

In *Leidig*, this Court held that Article 21 provides greater confrontation rights than the Sixth Amendment, explaining that at the 1776 convention, "Maryland chose to add a separate right to examine witnesses, whereas the other states and the federal Constitution did not do so." *Leidig*, 475 Md. at 256. The same is true here—Maryland chose a broader provision to restrict punishment imposed by courts. Moreover, *Leidig* notes that "the assembly of freemen surely understood that they had included additional language regarding examination of witnesses that was not contained in the Virginia and Pennsylvania declarations of rights." *Id.* Again, the same is true here—the Maryland delegates surely knew of the model used by the Virginia Declaration of Rights and the English Declaration of Rights. But for this State, they chose a more protective formulation to guard against excessive punishment imposed by courts.

Indeed, the delegates to the 1776 Maryland Convention opted to include a rule against "cruel and unusual" punishment in a wholly separate provision of the Maryland Declaration of Rights, Article 14 (now Article 16). In 1776, Article 14 provided: "That sanguinary laws ought to be avoided, as far as is Consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter." The provision has been amended slightly, and Article 16 now provides: "That sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter."

Unlike Article 25's "cruel or unusual" rule for sentences imposed in the exercise of judicial discretion by Courts, Article 16 prohibits "cruel and unusual" sentences prescribed by the legislature. *See also Thomas v. State,* 333 Md. 84, 92, 634 A.2d 1, 5 (1993) (stating that Article 16 is "directed toward legislative action," while Article 25 is "directed at action by the courts"). "[T]he prohibition of Article 25 is directed to the courts, is unique to Maryland, and was deliberately added to distinguish it from Article 16." Dan Friedman, The Maryland State Constitution (herein after "Friedman") at 61 (2011).

B. Maryland's Rule Against "Cruel *or* Unusual Punishment" Imposed by Courts Provides More Protection than the Federal Eighth Amendment's Rule Against "Cruel *and* Unusual" Punishment.

A rule against "cruel or unusual" punishment imposed by courts is substantially broader than a formulation that prohibits only "cruel and unusual" punishment. *See Harmelin,* 501 U.S. at 966 (plurality opinion of Scalia, J.). Citing to the Maryland Declaration of Rights, Justice Scalia observed in *Harmelin* that "[i]n 1791, five State

Constitutions prohibited 'cruel or unusual punishments,'" thereby departing from the Virginia model. *Id*. Likewise, the 1787 Northwest Ordinance followed the Maryland model rather than the Virginia model: "[N]o cruel *or* unusual punishments shall be inflicted." Northwest Ordinance, Section 14, Art. 2 (1787) (emphasis added). Ultimately, the framers of the federal Eighth Amendment chose the Virginia model over the model Maryland used to restrict judicial punishments, opting to prohibit only "cruel and unusual" punishment. U.S. Const. amend. VIII.

Some 250 years after first adopting a Declaration of Rights, Maryland has always held to its own course. All four iterations of Maryland's constitution have carried forward the broad rule against "cruel or unusual" punishment imposed by courts contained in the original Maryland Declaration of Rights. While the framers of the federal Eighth Amendment adopted Virginia's narrow formulation, this Court must give effect to Maryland's broad rule against "cruel or unusual" punishment inflicted by the judicial branch. In appropriate cases, fidelity to the Maryland text therefore requires this Court to go beyond the federal prohibition against "cruel and unusual" punishment.

As one scholar recently explained, if a state constitution prohibits "cruel or unusual punishment," then it "bars a punishment that meets one of the parameters of cruelty and unusualness. A cruel punishment violates the state constitution irrespective of whether it is also unusual; an unusual punishment violates the state constitution irrespective of whether it is also cruel." William W. Berry III, *Unusual State Capital Punishments*, 72 Fla. L. Rev. 1, 18 (2020). After all, the difference between a conjunctive ("and") rule and a disjunctive ("or") rule is one of the most elementary and fundamental rules of legal drafting. "Under

the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives . . . With a conjunctive list, *all . . . things are required*—while with the disjunctive list, at least one of the [things] is required, but *any one . . . satisfies the requirement*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 12, at 116 (2002) (emphases added). Therefore, "the set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.'" *People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992).

Moreover, the internal textual difference in the Maryland Declaration of Rights—Article 16's prohibition of "cruel and unusual" punishment prescribed by the legislature versus Article 25's broader rule against "cruel or unusual" punishment imposed by the courts—makes it all the more important to interpret the rule applicable to the courts more expansively than the narrow rule applicable to the legislature. Courts presume that when a legislative body "use[s] two terms" in the same enactment, "it intend[s] each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995).

As this Court has explained, "[t]he plain language of these two Articles informs us that Article 14 [now Article 16] was a restriction on legislative action while Article 22 [now Article 25] was a restriction on judicial action." *Miles v. State*, 435 Md. 540, 566, 80 A.3d 242, 257 (2013). In addition, "this view is reinforced by the fact that between the August 27, 1776 draft and the September 17, 1776 draft, Article 22 was changed to emphasize the fact that that article was directed specifically to the judiciary." *Id.* at 566-67 (quoting Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary–Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33

Rutgers L.J. 929, 1018-19 (2002)). The independence of the two provisions "was confirmed by the proceedings of the 1864 Maryland Constitutional Convention." *Miles*, 435 Md. at 566. At the 1864 convention, "Delegate Oliver Miller of Anne Arundel County (later a Judge of the Court of Appeals of Maryland (1867–1892)) persuaded the convention that the provisions were different in that this article is directed to the legislature in adopting penalties, while the other is directed exclusively to the judiciary in imposing sentences." *Id.* (quoting Friedman, *Tracing the Lineage*, at 1018-19).

It makes sense that the framers of the Declaration of Rights would direct the narrower "cruel *and* unusual" language at the legislature. The democratic will of the state as a whole acts as a check on the legislature, but a sentencing judge exercising discretion acts largely alone. The drafters of the Declaration of Rights may have been reluctant to impose the more sweeping "cruel *or* unusual" restraint on the legislature, since legislative enactments bear the imprimatur of the public will.

The narrower "cruel *and* unusual" language directed at the legislature may be intended only to curtail its power to create illegal modes of punishment, particularly gruesome ones involving death by physical torture. This reading is supported by the fact that Article 16 specifically references "sanguinary laws," whereas the broader prohibition of Article 25 does not. Such an interpretation of Article 16 would also be consistent with Justice Scalia's view that the phrase "cruel *and* unusual punishment" refers to horrific types of punishment, such as being drawn and quartered, burned at the stake, or broken at the wheel. *See Harmelin*, 501 U.S. at 968 (plurality opinion of Scalia, J.). Compared to legislative enactments that apply across the board, the discretion of individual judges

sentencing individual defendants may require greater constitutional restriction because such discretion can invite disproportionality and disparity across cases if left unchecked.[2]

III. This Court has Signaled Its Willingness to go Beyond the Federal Eighth Amendment in Interpreting the Maryland Declaration of Rights, and Should do so Explicitly in this Case.

"[T]he Court of Appeals of Maryland has demonstrated an increased awareness of the potential for independent interpretation of Article 25." Friedman at 61. While this Court has not previously held that Article 25 provides broader protection than the federal Eighth Amendment, it "has acknowledged that there is some textual support for finding greater protection in the Maryland provisions" based on the use of the disjunctive "cruel *or* unusual." *Carter v. State*, 461 Md. 295, 308 n.6, 192 A.3d 695, 702 n.6 (2018) (citing *Thomas v. State*, 333 Md. 84, 103 n.5, 634 A.2d 1, 10 n.5 (1993)). In *Thomas*, this Court acknowledged Justice Scalia's argument in *Harmelin*, 501 U.S. at 966, that the use of the conjunctive "and" in the federal Eighth Amendment suggests that it contains no proportionality guarantee. *Thomas*, 333 Md. at 103 n.5. The Court ultimately declined to articulate any difference between the protections afforded by the Eight Amendment and Article 25 "because the prevailing view of the Supreme Court recognizes the existence of a proportionality component in the Eighth Amendment." *Id*.

[2] The point is underscored today by the wide racial disparities in life-without-parole sentences in Maryland created largely through the exercise of individual sentencing discretion. In Maryland, there are nine Black people serving juvenile life-without parole sentences, compared to only two white people, and there are 240 Black people serving non-juvenile life-without-parole sentences, compared to 86 white people serving such sentences. *See* Affidavit of Jay E. Miller at 8 (Table 1).

Of course, this implies that if a majority of this Court had agreed with Justice Scalia that the Eighth Amendment does not require any proportionality in sentencing, this Court *would* have seen a reason to declare the protections of Article 25 broader than those of the Eighth Amendment. That is, this Court was not really "following" the Supreme Court's interpretation of the Eighth Amendment; rather, it simply found that the Supreme Court's interpretation did not conflict with its own broad interpretation of Article 25 in that instance. The Court acknowledged that the textual difference between "cruel *and* unusual" and "cruel *or* unusual" is meaningful but was not convinced that this textual difference made a practical difference in the particular issues of that case.

IV. This Court Should Join Other State High Courts That Hold That Their Own Constitutions Go Beyond the Federal Eighth Amendment in Limiting Harsh Sentences for Young People.

State courts have not confined the protections of *Miller* to the applications identified by the Supreme Court under the Eighth Amendment. When interpreting state Eighth Amendment analogues, state courts have not hesitated to apply *Miller* more broadly. Indeed, the U.S. Supreme Court has affirmatively passed the baton to the state courts. This Court should rise to the occasion by prohibiting life-without-parole sentences for juveniles or, at the bare minimum, insisting on a finding of permanent incorrigibility as a prerequisite to such a sentence.

In *Jones v. Mississippi*, the U.S. Supreme Court denied relief to a juvenile sentenced to life without parole, but the decision explicitly points to state courts as a potential source of new protections in this area: "[O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of

murder." *Jones v. Mississippi*, 141 S.Ct. 1307, 1322-23 (2021). In fact, *Jones* specifically lists the very two rules Mr. Malvo is advocating as examples of the sort of protections that state law can provide: "States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole." *Id.*

Both before and after *Jones*, courts in states that have broader constitutional provisions that restrict punishment have seized the initiative to recognize new protections for young people facing extreme sentences. This Court should do the same in this case by extending its prohibition on cruel or unusual punishment to forbid courts from imposing life without parole sentences on juveniles or, at minimum, to prohibit such sentences absent a finding of permanent incorrigibility.

Washington: The Washington Supreme Court recently interpreted its Eighth Amendment analogue to extend the protections of *Miller* to criminal defendants under age 21, prohibiting mandatory life-without-parole sentences for this age group. *See Matter of Monschke*, 482 P.3d 276 (Wash. 2021). In *Monschke*, the two petitioners had received mandatory life-without-parole sentences for offenses committed at ages 19 and 20. *Id.* at 277. They challenged the mandatory sentences as "unconstitutionally cruel when applied to youthful defendants like themselves." *Id.* at 308.

Like the Maryland Constitution, the Washington Constitution prohibits cruel punishments, whether or not they are unusual. *See* Wash. Const., Art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). In *Monschke*, the Washington Supreme Court noted that "'the Washington State

Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.'" 482 P.3d at 279 n.6 (quoting *State v. Bassett*, 192 Wash.2d 67, 78, 428 P.3d 343 (2018) (alterations in original). Applying this greater protection under state constitutional law, the court concluded that the petitioners "were essentially juveniles in all but name at the time of their crimes" and were thus entitled to the protections of *Miller* under the Washington Constitution. *Id.* at 280.

Earlier, in *State v. Bassett*, Basset, a sixteen-year-old, had received a life without the possibility of parole sentence for the aggravated first-degree murder of his mother, father, and brother. 428 P.3d 343, 345-46 (Wash. 2018). Basset challenged his sentence by arguing that the Washington Constitution prohibits sentencing juveniles to life without parole. *Id.* at 347. The Washington Supreme Court noted that the state Eighth Amendment analogue "often provides greater protection than the Eight Amendment." *Id.* at 348. The Court concluded that because the characteristics of youth do not align with the penological goals of life without parole sentences, the diminished criminal culpability of children, and the trend of states rapidly abandoning juvenile life without parole sentences, such sentences are categorically unconstitutional under the Washington Constitution. *Id.* at 354.

California: The California Supreme Court has gone beyond the protections of the federal Eighth Amendment in limiting felony murder sentences for juveniles. Like the Maryland Constitution, the California Constitution prohibits "cruel or unusual" punishment. CA Const. Art.1, §17. In *People v. Dillon*, the court reasoned that because of the defendant's youth and lack of prior history with the law, a sentence of life imprisonment violates article 1, section 17 of the Constitution. 34 Cal.3d 441, 488-489 (1983).

Massachusetts: The Massachusetts Supreme Judicial Court held that any juvenile life-without-parole sentence, even a discretionary one, violates the state's Eighth Amendment analogue "because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 276 (Mass. 2013). Like the Michigan Constitution, Article 26 of the Massachusetts Declaration of Rights enjoins "cruel or unusual" punishment. Accordingly, the Supreme Judicial Court has "inherent authority 'to interpret [S]tate constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" *Id.* at 282 (alteration in original) (quoting *Libertarian Ass'n of Mass. v. Sec'y of the Commonwealth*, 969 N.E.2d 1095, 1111 (Mass. 2012)). As the court noted, "We often afford criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution." *Diatchenko,* 1 N.E.3d at 283 (citing *District Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980)).

Iowa: Some state supreme courts have extended sentencing protections for young people beyond the federal minimum even where the relevant state constitution prohibits only "cruel and unusual" punishment. Iowa is one such state. IA Const. art.1, § 17. The Iowa Supreme Court considered a juvenile offender's discretionary life-without-parole sentence in *State v. Seats*. 865 N.W.2d 545 (Iowa 2015), *holding modified by State v. Roby*, 897 N.W.2d 127 (Iowa 2017). The court held that the sentencing court had not considered proper factors when sentencing the juvenile to life without parole and had considered indicia of youth as an aggravating, rather than mitigating, factor. The court explained,

"[t]he question the court must answer at the time of sentencing is whether the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society, notwithstanding the juvenile's diminished responsibility and greater capacity for reform that ordinarily distinguishes juveniles from adults." *Seats*, 865 N.W.2d at 558. In contrast, the federal Eighth Amendment does not require such a finding. *See Jones*, 141 S. Ct. at 1311.

One year after *Seats*, the Iowa Supreme Court ruled that all juvenile life-without-parole sentences violate the state constitution's "cruel and unusual punishment" bar. *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016). The court reasoned that parole boards are better situated than courts to "discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available." *Id.* at 839.

The Iowa Supreme Court has also extended *Miller* protections under its state Eighth Amendment analogue to shorter sentences in a trilogy of cases all decided the same day: *State v. Ragland*, 836 N.W.2d 107, 109-10 (Iowa 2013) (applying *Miller* retroactively to a mandatory JLWOP sentence after the Governor commuted the juvenile defendant's sentence to a term of years); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (extending *Miller* under the state Eighth Amendment analogue and requiring "an individualized sentencing hearing to determine the issue of parole eligibility" for juveniles sentenced to lengthy, but less than life, sentences); *State v. Pearson*, 836 N.W.2d 88, 89 (Iowa 2013) (analyzing *Miller* and reversing imposition of consecutive sentences totaling a minimum of thirty-five years without the possibility of parole on a juvenile offender).

A year later, the Iowa Supreme Court found all mandatory minimum sentences for juveniles unconstitutional under the Eighth Amendment analogue. *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014). The court noted, "we cannot ignore that over the last decade, juvenile justice has seen remarkable, perhaps watershed, change." *Id.* at 390. The court held: "Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles." *Id.* at 400. In summary, the court explained, "Using our independent judgment under article I, section 17, we have applied the principles of the *Roper-Graham-Miller* trilogy outside the narrow factual confines of those cases, including cases involving de facto life sentences, very long sentences, and relatively short sentences." *Sweet*, 879 N.W.2d at 834.

As shown by the above-mentioned examples, state courts often exceed the federal minimum and provide greater protections for young people under state Eighth Amendment analogues, particularly in the context of extreme sentences for young people. This Court should do the same. It should hold that Article 25 categorically prohibits Maryland courts from imposing life-without-parole sentences on juveniles. At a minimum, the Court should hold that such sentences require a judicial finding of permanent incorrigibility. Either way, Mr. Malvo's life-without-parole sentences should be vacated under Article 25 of the Maryland Declaration of Rights.

CONCLUSION

Mr. Malvo must be resentenced because his current life-without-parole sentences violate Article 25 of the Maryland Declaration of Rights.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,200 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Andrew D. Levy
Andrew D. Levy

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Andrew D. Levy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December 2021, an electronic copy of the foregoing has been filed and served electronically via the Court's MDEC system and two hard copies were served via first-class mail, postage prepaid on each of the following:

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