IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	:	
	:	
v.		**Case No. 102675-C**
	:	
LEE BOYD MALVO	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

This case came before the court on June 15, 2017, for a hearing on Defendant's Motion to Correct Illegal Sentence. The court heard oral argument from both parties and victim representative's attorney Russell P. Butler, Esq. In reaching its decision, the court has considered those arguments, memoranda submitted, and applicable case law.

The facts of the underlying case are best described by Judge Charles E. Moylan, Jr., in *Muhammad v. State,* 177 Md. App. 188, 198 (2007), who compared it to that of the notorious Jack the Ripper:

> For 22 days in October of 2002, Montgomery County, Maryland was gripped by a paroxysm of fear, a fear as paralyzing as that which froze the London district of Whitechapel in 1888. In Whitechapel, however, the terror came only at night. In Montgomery County, it struck at any hour of the day or night.... In Montgomery County, every man, woman, and child was a likely target. The body count in Whitechapel was five; in Montgomery County the death toll reached six. The name of the Whitechapel terrorist has never been discovered. In Montgomery County, their names are John Allen Muhammad and Lee Boyd Malvo.

Judge Moylan continued:

> Although the reign of terror perpetrated by Muhammad and Malvo ultimately spread over seven separate jurisdictions and involved 10 murders and 3 attempted murders, the epicenter was unquestionably Montgomery County. Six of the ten murders were committed in Montgomery County. The terror began in Montgomery County on Wednesday evening, October 2, 2002. The terror ended in Montgomery County on Tuesday evening, October 22, 2002....
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> Seized with epidemic apprehension of random and sudden violence, people were afraid to stop for gasoline, because a number of 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. A multi-jurisdictional state and federal task force was formed to cope with the crisis. "Hot lines" to receive tips were created by both the Montgomery County Police Department and the Federal Bureau of Investigation. Over 60,000 tips were ultimately received. The sense of dread that hovered over the entire community was immeasurable. The six lives that were taken were but a part of an incalculable toll. *Id.* at 200.

Ultimately, Malvo and Muhammad were located and arrested near Frederick, Maryland. It was discovered that the automobile in which the two had traveled had been fashioned into a mobile sniper's nest, with a hole carved out of the trunk through which the muzzle of a Bushmaster .223 rifle, the murder weapon in each of the homicides, could protrude. The trunk was large enough to accommodate either of the co-defendants, who could lie prone and wreak their havoc. Testimony at trial showed that the Bushmaster .223 propels a shell at a speed of 300 feet per second, causing devastating injury. According to the state's proffer at the time of Defendant's guilty plea on October 10, 2006, there were at least six other shootings in the District of Columbia, Louisiana, Arizona, and Alabama, resulting in at least four deaths for which Malvo and Muhammad were also responsible.

Muhammad was convicted of first degree murder in both Maryland and Virginia. During Muhammad's trial in Montgomery County, Malvo provided testimony against his accomplice. He also admitted to lying during his testimony in Virginia in order to potentially spare Muhammad from the death penalty. On November 9, 2009, Muhammad was executed via lethal injection for the murders he committed in Virginia.

Malvo was convicted by a Chesapeake County, Virginia, jury on two counts of capital murder and one count of using a firearm during the commission of a felony. Under Virginia law, he was not eligible for parole. He also pled guilty in Spotsylvania County to one count of capital murder, one count of attempted murder, and two counts of using a firearm in the commission of a felony. He received life-without-parole on the murder charges.

In the instant case, Defendant entered a plea of guilty to six counts of first degree murder. During his sentencing hearing in Montgomery County, on November 9, 2006, the Assistant State's Attorney acknowledged that the "defendant has changed," and that he had "grown tremendously since [the time of the murders]."

Sentencing Judge James L. Ryan had previously been provided with Victim Impact Statements from the decedents' families; a Pre-Sentence Investigation report, prepared by an

agent of the Maryland Department of Parole and Probation, to which was attached a letter from Malvo's attorneys; a psychiatric forensic evaluation report by Neil Blumberg, M.D.; and a report prepared by Carmeta Albarus, a licensed social worker, and Denese Shervington, M.D., a forensic psychiatrist. These reports discussed in detail Malvo's upbringing, family life, and how he became associated with co-defendant Muhammad. Judge Ryan was informed that Malvo had earned a high school diploma while in prison; was enrolled in college courses; had a family history of mental disorders; and needed therapy to prevent his suffering from a range of mental disorders while incarcerated. Finally, a pre-sentence report from Virginia, dated March 1, 2004, was also included among the documents for the sentencing judge's review. In that report, Malvo expressed no remorse for the victims or their families.

In addition to the materials provided to Judge Ryan for sentencing, he had the opportunity to hear Malvo's testimony and observe his demeanor at the trial of his co-defendant Muhammad. Malvo's testimony at that trial, with Judge Ryan presiding, described in detail the plot to kill innocent persons in Montgomery County, took up 468 pages of the trial transcript and lasted for most of two days. *Muhammad, supra,* at 218.

At sentencing, Malvo's counsel pointed out that his client had assisted Maryland and Virginia prosecutors, as well as authorities in Arizona, where another shooting victim resided. His co-counsel requested the court to impose concurrent sentences for the six murders, conceding that Malvo would be "locked in a cell for the rest of his life," but that "he has a future, and he'll have to do it from a prison cell in Virginia." Defendant himself described the "stark difference between who I am today and who and what I was in October of 2002," and expressed remorse for his actions.

Judge Ryan noted the assistance Malvo had provided to authorities, saying: "It appears you've changed since you were first taken into custody in 2002." Nevertheless, in his concluding remarks, Judge Ryan observed: "You've shown remorse and you've asked for forgiveness. Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. This community, represented by its people and the laws, does not forgive you." Shortly thereafter, Defendant, then 21 years old (although 17 years and eight months at the end of his criminal rampage), was sentenced to six consecutive life-without-parole sentences, consecutive to any other sentences (namely, those in Virginia) then being served.

After sentence was pronounced, Defendant signed a "Notice to the Defendant," informing him that he had the right to file a written request to have his sentence reviewed by a three-judge panel, and also the right to ask the trial court to reconsider his sentence (DE 61). Since he received the maximum sentence, a three-judge panel could only reduce his sentence or keep it the same. Judge Ryan, on a motion for reconsideration, could likewise only reduce the sentence or uphold it. No three-judge panel sentence review was ever requested, and no such hearing was held.

On November 27, 2006, Defendant filed a Motion for Modification or Reduction of Sentence under MD. R. 4-345. That rule permits the trial court to reconsider its sentence for a period of five years. He requested that the motion be held in abeyance until such time as a hearing was requested, and averred that the motion would be supplemented "with information regarding his current status and the basis...to modify and/or reduce the sentence of six consecutive sentences of life imprisonment without parole...." (DE 66).

By order docketed on December 20, 2006, the court agreed to hold the motion in abeyance. No supplements were ever filed by Defendant, however, nor was there a request for hearing. Therefore, on September 18, 2012, the court denied the Motion for Modification or Reduction of Sentence, as it no longer had jurisdiction to grant relief because of the passage of more than five years.

On June 25, 2012, the Supreme Court issued its opinion in *Miller v. Alabama*, 567 U.S. 460 (2012), holding that mandatory life imprisonment without parole for juveniles in most cases violates the Eighth Amendment's prohibition on cruel and unusual punishment. The court ruled that such a penalty is acceptable only in the most uncommon of cases after the sentencing court has determined that the juvenile is "irreparably corrupt[ed]." *Id.* at 479-80. Then, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), the Court provided that this substantive right applies retroactively.

In *Malvo v. Mathena,* 2017 WL 2462188, decided on May 26 of this year, the United States District Court for the Eastern District of Virginia vacated and remanded Malvo's Virginia state sentences, asserting *inter alia* under Note 5 of the slip opinion: "This Court need not determine whether Virginia's penalty scheme is mandatory or discretionary because this Court finds that the rule announced in *Miller*... applies to all situations in which juveniles receive a life-without-parole sentence." The court is informed that the case is now on appeal to the Fourth Circuit.

In light of the holdings in *Miller* and *Montgomery*, Defendant asks this court to correct an illegal sentence pursuant to Eighth Amendment jurisprudence and Article 25 of Maryland's Declaration of Rights ("Article 25"). For the reasons articulated below, Defendant's motion is denied.

Defendant's Motion to Correct Illegal Sentence

Defendant raises three allegations that he believes entitle him to be resentenced. First, he argues that *Miller* and *Montgomery* apply to Maryland's *discretionary* life-without-parole sentencing scheme. Second, it is contended that the provisions of Maryland law requiring a life sentence for homicide offenders violates the Eighth Amendment of the United States Constitution ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). and Article 25 of the Maryland Declaration of Rights ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."). Finally, Defendant contends that the Declaration of Rights provides an alternative state law grounds upon which a court must conclude that his sentences are invalid and illegal.

a. Miller/Montgomery Applies to Maryland's Discretionary Sentencing Scheme and Mandates a New Sentencing Hearing.

Despite Maryland's discretionary life-without-parole sentencing scheme, Defendant avers that his sentences are illegal under *Miller* and *Montgomery*, because the Supreme Court has specifically stated that such a sentence is not permitted by the Constitution unless the juvenile offender has been found to be "irreparably corrupt." *See also Williams v. State*, 220 Md. App. 27, 43, *cert. denied*, 441 Md. 219 (2015) (enhanced penalty improperly imposed is an illegal sentence and may be corrected at any time). He essentially argues that *all* pre-*Miller* life-without-parole sentencings for juveniles fail to meet the standard later announced by *Montgomery*. This is because the Eighth Amendment requires specific consideration of whether the juvenile's crime reflects transient immaturity. *Montgomery, supra,* 136 S. Ct. at 734. *See also McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (even discretionary life sentences must be guided by consideration of age-relevant factors).

That Maryland has a discretionary sentencing scheme is of no consequence, argues Defendant; the substantive rights of children are to be procedurally protected in all states. Defendant posits that the Supreme Court has recently attempted to further explain its holdings in *Miller* on this point. In *Adams v. Alabama,* 136 S. Ct. 1796 (2016), the court vacated and remanded the defendant's case for reconsideration in light of *Montgomery.* In a concurring opinion, Justice Sotomayor emphasized that pre-*Miller* courts, even when handing down discretionary sentences, have "not [had] the benefit of [the Supreme Court's] guidance regarding the diminished culpability of juveniles; and the ways that penological justifications apply to juveniles with lesser force than to adults." *Adams, supra,* 136 S. Ct. at 1800.

Further, Defendant notes that more states are finding that *Miller* applies to discretionary sentencing schemes and invalidating existing life without parole sentences. *See Veal v. State,* 784 S.E. 2d 403 (Ga. 2016) (discretionary life without parole sentence for a minor was illegal because the court did not make a "specific determination that he is irreparably corrupt"); *State v. Valencia,* 370 P. 3d 124 (Ariz. 2016) (discerning that the key feature of *Miller* and *Montgomery* was whether the court took into account how children are different and how those differences counsel against irrevocably sentencing them to lifetime in prison); *Luna v. State,* 2016 OK CR 27, ¶ 14 (applying *Montgomery* and *Miller* to Oklahoma's discretionary sentencing scheme). Like the defendant in *Montgomery,* Malvo requests that he be given the opportunity to show that his crime "did not reflect irreparable corruption." *Montgomery, supra,* at 736-37.

b. Maryland's Homicide Sentencing Scheme is Illegal

Defendant additionally complains that the State's sentencing scheme for juvenile homicide offenders is illegal because a sentencing judge is required to impose a life sentence upon conviction for murder in the first degree, regardless of age or circumstances. *See* MD. CODE ANN., CRIM. LAW§ 2-201. He notes that no statutory guidance exists to assist the sentencing court when imposing a life sentence. The Governor has discretion to deny parole to an inmate serving a life sentence, and there are no established standards taking into account the special circumstances of a juvenile. Accordingly, Defendant characterizes Maryland's sentencing scheme as mandatory, in violation of *Miller* and *Montgomery.*

c. Alternative State Grounds

Defendant believes that *Miller* leaves open the question of whether the Eighth Amendment requires a categorical ban on juvenile life without parole in all cases, as evidenced by its statement that "[b]ecause our holding is sufficient to decide these cases, we do not consider . . . [the] alternative argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles, or at least for those 14 and younger." 567 U.S. at 479. Accordingly, he concludes that consideration of Article 25 of the Declaration of Rights demonstrates that Defendant's sentences constitute cruel and unusual punishment. *But see Dua v. Comcast Cable*, 370 Md. 604, 621 (2002) (holding that a Maryland constitutional provision will not always be interpreted or applied in the same manner as its federal counterpart).

d. Rule 4-345 Motion for Reconsideration of Sentence

Defendant asserts that his six life-without-parole sentences are illegal pursuant to the Eighth Amendment prohibition on cruel or unusual punishment as explicated in *Miller* and *Montgomery,* and that the court may correct an illegal sentence at any time. MD. RULE 4-345(a). Such a correction can occur even if : "(1) no objection was made when the sentence was imposed; (2) the defendant purported to consent to it; or (3) the sentence was not challenged in a timely-filed direct appeal." *Chaney v. State*, 397 Md. 460, 466 (2007). An illegal sentence is one that is "not permitted by law" or otherwise "constitutionally invalid in any other respect." *State v. Wilkins*, 393 Md. 269, 273-75 (2006).

State's Response

Because the Supreme Court's holding in *Miller* explicitly referred to mandatory juvenile life-without-parole sentences, the state avers that the case does not apply where such a penalty is discretionary. Alternatively, the state asserts that even if the analysis is the same for mandatory and discretionary life-without-parole sentence, the trial court fully complied with the current standard for sentencing juvenile offenders.

a. Miller and Montgomery Apply Only to Mandatory Sentencing Schemes

The state objects to the suggestion that *Miller* and *Montgomery*, which are cases involving mandatory life-without-parole sentencing schemes, apply to the discretionary sentencing permitted in Maryland. It avers that it was the mandatory nature of the sentence that violated the Eighth Amendment in *Miller* and *Montgomery*, because such a procedure eliminates the opportunity for the defendant to present, and for the court to consider, mitigating evidence. *Miller*, 567 U.S. at 490. Because judges in Maryland have the discretion to impose a sentence of life with the possibility of parole, the state contends that Defendant's case does not raise the same concerns articulated by the Supreme Court. Additionally, the state notes that in Maryland a judge has the ability to suspend all or part of a defendant's sentence. *See Cathcart v. State*, 397 Md. 320, 327 (2007).

Furthermore, the state reasons that Maryland law already provides that, in every sentencing hearing, a court is required to "tailor the criminal sentence to fit the 'facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background.'" *Jones v. State*, 414 Md. 686, 693-97 (2010); MD. RULE 4-342(f). To that end, the state posits that Defendant already had the opportunity to "face the sentencing body . . . and to explain in his own words the circumstances of the crime as well as his feelings regarding his conduct, culpability, and sentencing." *Shifflett v. State*, 315 Md. 382, 386 (1989) (citations omitted). Thus, the state asserts that Defendant's case is materially different from the mandatory, life-without-parole sentencing regimes discussed in *Miller* and *Montgomery*.

b. *The Sentencing Court Complied with Miller/Montgomery*

The state notes the Supreme Court found in *Montgomery* that *Miller* does not require a specific finding regarding a child's incorrigibility or irrevocable corruption. In reaching this conclusion, the court was "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary" upon State sovereignty. *Montgomery, supra,* at 735. Thus, the state proffers that the only step a court needs to take to comply with *Miller*'s procedural component is to "consider a juvenile offender's youth and attendant characteristics" before determining that life without parole is a proportionate sentence. *Id.*

In this case, the state avers that the sentencing court properly considered all relevant factors when it sentenced Defendant to life without parole.[1] It asserts that there is no doubt that Defendant represents that "rare juvenile offender whose crime reflects irreparable corruption." *Montgomery, supra,* at 734. The court found that Defendant "knowingly, willfully, and voluntarily" committed six "cowardly murders of innocent, defenseless human beings." T. 11/8/06 at 17. It considered mitigating evidence such as the possible influence of Muhammad over Defendant and took into account his age, but nevertheless found that the life-without-parole sentences were just and proportionate.

c. Alternative State Grounds

In opposing Defendant's argument that Article 25 should be read more expansively than the Eighth Amendment, the state asserts that it is to be read *in pari materia* with the Eighth Amendment because they both "were taken virtually verbatim from the English Bill of Rights of 1689." *Walker v. State*, 53 Md. App. 171, 183 (1982). The state notes that Defendant offers no rationale for departing from this precedent nor provides legal support for his assertions. Accordingly, the state maintains that Defendant's sentence violates neither the Eighth Amendment nor Article 25.

Victim Representative's Response

The principal argument advanced by the victim representative Nelson Rivera, husband of the fifth person murdered, Lori Ann Lewis-Rivera, is that the life-without-parole sentence is not illegal. That being the case, the use of a Rule 4-345 motion – which can be filed at any time – to attack a facially valid sentence is improper.

Furthermore, it is contended that expanding the definition of "illegal sentence" would render nugatory the remedies provided to a criminal defendant in the Uniform Post Conviction Procedure Act, codified at MD. CODE ANN., CRIM. PROC. §7-101, *et seq.*, and would encourage incarcerated litigants to challenge their sentences *ad infinitum*, with the ability to file a direct appeal from any adverse judgment. Such a procedure, it is argued, re-victimizes family members

[1] The state notes that the court received evidence including: the facts of the case, a Presentence Investigation Report, Victim-Impact Statements, the defendant's allocution, and the arguments of counsel.

and violates the statutory policy in MD. CODE ANN., CRIM. PROC. §11-1002 (b)(13) that victims are entitled to a speedy disposition of criminal cases, to minimize anxiety and stress.

It is emphasized that Defendant had a number of post-sentencing options available to him, only some of which he has utilized. He has a pending federal *habeas corpus* case in the United States District Court for the District of Maryland, which has been stayed pending exhaustion of his state remedies. He could have, but did not, file a request for sentence review by a three-judge panel, under MD. RULE 4-344. He filed a motion for reconsideration of sentence under MD. RULE 4-345, which was ultimately denied by the court because no request for hearing or disposition was made, and more than five years had elapsed since the filing. He did not seek leave to appeal his plea to the Court of Special Appeals.

Law & Analysis

a. Legality of the Sentence

Before undertaking analysis of the constitutional issues raised by Defendant, the court must decide whether the sentence imposed in this case is illegal, so as to give rise to a motion under Rule 4-345. That rule permits the court to correct an illegal sentence at any time. Historically, motions to correct illegal sentences have been granted only where the illegality inheres in the sentence itself, or the sentence should never have been imposed. *Baker v. State,* 389 Md. 127, 133 (2005).

Thus, the sentence in *Jones v. State,* 384 Md. 669 (2005) was illegal because no verdict was announced in court by the jury, so that it could be hearkened and polled. *State v. Griffiths,* 338 Md. 485 (1995) held that sentences imposed for an offense and its lesser-included crime were prohibited by double jeopardy principles, and thus illegal and subject to a Rule 4-345 motion. *Walczak v. State,* 302 Md. 422 (1985) involved the award of restitution to a victim of a crime for which defendant was not convicted, and thus was illegal. In *Roberts v. Warden of Maryland Penitentiary,* 206 Md. 246 (1955), the court stated, albeit in *dicta,* that a sentence exceeding that permitted by law is illegal.

It is true that in *Evans v. State,* 382 Md. 248 (2004) and *Oken v. State,* 378 Md. 179 (2003), the Court of Appeals reviewed death sentences under Rule 4-345 where, subsequent to the imposition of sentence, a United States Supreme Court decision "might support an argument

that an alleged error of constitutional dimension may have contributed *to the imposition of the death sentence." Baker, supra,* at 134 (emphasis supplied). In this case, of course, Defendant did not receive the death penalty.

Nor is a life-without-parole sentence the functional equivalent of a death sentence. In rejecting a similar claim advanced by the appellant in *Woods v. State,* 315 Md. 591 (1989), the Court of Appeals has stated its disagreement "with the notion that a life sentence without the possibility of parole is, even relatively, the equivalent of death itself." *Id.* at 606-07.

There was nothing inherently illegal about Defendant's sentence. There was no jury trial, and thus no problem as arose in *Jones.* There were no merger issues as presented in *Griffiths,* nor issues of restitution like that in *Walczak.* There was also nothing illegal about the length of the sentence as in *Roberts.*

This court is cognizant of the rule laid down in *Montgomery v. Louisiana* that a state court collaterally reviewing a sentence must give retroactive effect to the pronunciation of a new substantive rule of constitutional law. That new substantive rule, however, is that *mandatory* life-without-parole sentences for juveniles are disproportionate sentences which violate the Eighth Amendment. This is so because they deprive the sentencing judge of the ability to consider *any* mitigating circumstances that might otherwise ameliorate the harshest sentence, a case which most assuredly is not present here.

Accordingly, this court rules that Defendant is not entitled to seek review of his sentence under Rule 4-345. It does not opine whether he has another state law remedy. Because it is a virtual certainty that this case will be appealed, the court will address other relevant issues raised by the parties.

b. A Judge is Presumed to Know the Law

Trial judges in Maryland are presumed to know the law and apply it correctly. Failure to recite a particular incantation or mere imprecision of words does not necessarily render a judge's decision erroneous. The judge is not required "to spell out in words every thought and step of logic" taken to reach a particular conclusion. *Dickens v. State,* 175 Md. App. 231, 241 (2007). Numerous appellate decisions of this state reaffirm that maxim.

In *State v. Chaney,* 375 Md. 168 (2003), the failure of a trial judge to acknowledge the existence of a statute permitting suspension of a life sentence for murder was insufficient to infer that he was unaware of his ability to suspend that sentence.

In *Gilliam v. State,* 331 Md. 651, 673 (1993), the trial judge's failure to state the correct standard of proof required to show the voluntariness of a confession was held to not constitute error. *See also Ball v. State,* 347 Md. 156 (1997) (judge presumed to know proper use of victim impact evidence); *Whittlesey v. State,* 340 Md. 30 (1995) (no error by trial judge in failure to state his reasons for overruling a *Batson* challenge); *Dickens v. State, supra* (no error by judge in failing to discuss authentication of text messages that were admitted at trial).

In the case at bar, Judge Ryan was an experienced jurist who served on the Circuit Court bench for 15 years, and would have been well-aware of the options presented to him at sentencing. They ranged from a suspended sentence to life-without-parole. Furthermore, it is presumed that he was aware of the Supreme Court pronouncements on the issue of punishment for juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), which was established law when Malvo's sentence was imposed, the Supreme Court held that capital punishment of individuals under the age of 18 is cruel and unusual punishment and therefore violative of the Eighth Amendment, overruling *Stanford v. Kentucky,* 492 U.S. 361 (1989). The *Roper* court pointed out that juvenile offenders, because of immaturity, are likely to engage in "impetuous and ill-considered actions and decisions;" are more susceptible to negative influences and peer pressure; and that their character is not well-formed, resulting in "transitory" personality traits. As a result, "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 569-70.[2]

While *Roper* was not a life-without-parole case, it is not insignificant that the term "irretrievably depraved character" presages *Miller*'s requirement that the court find "irreparable corruption" before imposing such sentence. Judge Ryan would have been well-aware that a juvenile (albeit one four months from majority) ought to be beyond rehabilitation before life-without-parole could be imposed.

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[2] The court respectfully suggests that Justice Sotomayor's suggestion in her *Adams v. Alabama* concurrence (upon which Malvo relies) that pre-*Miller* courts did not have the benefit of the Supreme Court's guidance regarding the diminished culpability of juveniles is belied by this statement, penned by Justice Kennedy more than a year before sentencing took place in the case at bar. It should also be noted that there were other concurring opinions filed in *Adams*, including that of Justice Thomas, joined by Justice Alito, who wrote that by granting the decision to vacate, the court was not addressing "whether petitioner's sentence actually qualifies as a mandatory life without parole sentence." 136 S. Ct. at 1797.

Judge Ryan is also presumed to have knowledge of the Maryland statutory law regarding life-without-parole, and the case law which did not require him to utter any particular phraseology before pronouncing sentence.

c. Were the Life-Without-Parole Sentences in this Case Cruel and Unusual In Light of the Decision in Miller?

Beginning in 2005 the Supreme Court, in a trilogy of cases, held that the Eighth and Fourteenth Amendments forbid imposition of disproportionate sentences on juveniles, which the court seems to define as persons under 18 years of age. First, in *Roper,* discussed above, the court found that the death penalty for a juvenile offender is unconstitutional. In *Graham v. Florida*, 560 U.S. 48 (2010), the court held that the Eighth Amendment prohibits imposition of life without parole for juvenile offenders who committed non-homicide criminal offenses.

Finally, in *Miller v. Alabama, supra*, the Court considered the cases of two 14-year-old offenders who were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. Ultimately, the Court held 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." 567 U.S. at 465. In *Montgomery v. Louisiana, supra,* the court concluded that its holding in *Miller* "announced a substantive rule of constitutional law," giving *Miller* retroactive effect. 136 S. Ct. at 736.

While it is understandable that those heartened by the decision believe that *Miller* may someday be extended to *discretionary* life-without-parole sentence, that issue was simply not presented therein for decision, and *Miller*'s explicit holding applies only to *mandatory* life-without-parole sentencing schemes. 567 U.S. at 4650. The suggestion that the ruling applies to discretionary sentences is *dicta.*

In a concurring and dissenting opinion in *Baby v. State,* 404 Md. 220, 276-77, Judge Irma Raker wrote: "Most lawyers recall learning in law school that the term 'holding' refers 'to a rule or principle that decides the case,' the *ratio decidendi* of the case, whereas *dicta* 'typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court [citation omitted].'" The *ratio decidendi* of *Miller* and *Montgomery* was that a *mandatory* life-without-parole requirement for juveniles robbed a trial judge of his or her ability to exercise discretion.

Clearly, Maryland employs a discretionary sentencing scheme. To the extent that Defendant characterizes his life-without-parole sentence as mandatory, his arguments are unconvincing. That the Governor of Maryland has the ability to deny him parole without consideration of the *Miller* factors does not make the judicially-imposed sentence any less discretionary. *See Lomax v. Warden, Maryland Correctional Training Ctr.*, 356 Md. 569, 577 (1999). As required by *Miller*, judges in this state are still able to consider youth and attendant circumstances and can sentence juvenile offenders being tried as adults to sentences that are more lenient than life-without-parole.

There is currently no reported Maryland appellate decision that has passed upon the applicability of *Miller* to Maryland's discretionary life-without-parole for juveniles sentencing scheme. In *State v. Lawson*, 2016 WL 3612773, in the Circuit Court for Baltimore County, a Motion to Correct Illegal Sentence was decided by Judge Robert E. Cahill, Jr., 15 years after the juvenile defendant was convicted of first degree murder. Judge Cahill upheld the life-without-parole sentence imposed by then-Circuit Court Judge Alexander Wright. In denying the defendant's motion, the court found that Judge Wright considered the *Miller* factors in imposing sentence, without discussion of the mandatory v. discretionary aspect of the sentence. That case was appealed to the Court of Special Appeals, where it was submitted on brief in April, 2017. It has not been decided as of the date of this Memorandum Opinion and Order.

Federal and state courts from around the country have considered *Miller* and its applicability to discretionary life-without-parole sentences. Counsel have cited several of them in their memoranda, but not all. Cases finding *Miller* inapplicable to juvenile discretionary life-without-parole sentences include *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (observing that federal circuit courts have "uniformly declined to apply *Miller's* categorical ban to discretionary life sentences"); *Davis v. McCollum*, 798 F.3d 1317 (10th Cir. 2015); *Croft v. Williams*, 773 F.3d 170 (7th Cir. 2014) (ample justification for life-without-parole sentence where defendant's crimes were described by the judge as among the most brutal he had ever seen); *Evans-Garcia v. United States*, 744 F.3d 235 (1st Cir. 2014); *Bell v. Uribe*, 748 F.3d 857 (9th Cir. 2013), *cert. denied*, 135 S.Ct. 1545 (2015); *State v. Houston*, 353 P.3d 55 (Utah 2015); and *Conley v. State*, 972 N.E. 2d 864 (Ind. 2012).

Representative cases holding that *Miller* applies even to discretionary life-without-parole sentences include *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (*but see Croft v. Williams, supra)*; *State v. Valencia*, 2016 WL 1203414 (Ariz.); *Veal v. State*, 784 S.E. 2d 403 (Ga. 2016);

State v. Seats, 865 N.W. 2d 545 (Iowa 2015); and *Commonwealth v. Batts,* 2017 WL 2735411 (Pa.).

The court finds *State v. Houston, supra,* instructive. There, a 17 year-old was convicted of aggravated murder and the jury voted a sentence of life-without-parole. His sentence was challenged on several grounds. In upholding the discretionary sentencing scheme in Utah for juvenile life-without-parole offenders, the Supreme Court of Utah remarked:

> "[T]hough the penological justifications for [life-without-parole] may be diminished for a juvenile compared to an adult, such a sentence is not without justification in our criminal sentencing scheme....[O]ur statutory scheme enables the kind of individualized sentencing determination that the Supreme Court has deemed necessary for serious offenses. Utah [law] permits the sentencer to consider any and all relevant factors which would affect the sentencing determination....[A] great majority of states as well as the federal system permit [life-without parole] sentences for juveniles while only six jurisdictions affirmatively prohibit them. In looking to these as an indication of society's standards, we cannot conclude that the 'national consensus' favors the prohibition of [life-without-parole] for juveniles convicted of homicide." *Id.* at 75-76.
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> [W]here, as here, we find no constitutional violation, we may not "substitute our judgment for that of the legislature regarding the wisdom of a particular punishment [citation omitted]." *Id.* at 77.

State v. Houston is in accord with the law of this state, as represented by the following language from *Phipps v. State,* 39 Md. App. 206, 212 (1978):

> The validity of legislatively determined punishment is presumed [citation omitted] and courts "may not require" that "a democratically elected legislature" enact the least severe possible penalty as the sanction for a crime. As long as the punishment that is decreed conforms "with the basic concept of human dignity [citation omitted] and is neither "cruelly inhumane [n]or disproportionate [citation omitted] to the offense, there is no violation of the Eighth Amendment [citation omitted], nor of the Maryland Declaration of Rights, Articles 16 and 25.

In reaching its decision in *Miller,* the Supreme Court heavily relied upon its decisions in *Roper* and *Graham.* Summarizing those two cases, the court found five factors that a mandatory sentencing scheme prevents a court from considering. Those factors are:

1. A defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."

2. A defendant's "family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."

3. "[T]he circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him."

4. Whether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys."

5. "[T]he possibility of rehabilitation . . ."

567 U.S. at 477.

Miller mandates an inquiry into whether the sentencing court availed itself of the opportunity to consider those factors and determine "how those differences counsel against irrevocably sentencing [the particular juvenile offender] to a lifetime in prison." *Id.* at 480. The holding does not "categorically bar a penalty for a class of offenders or a type of crime." *Id.* at 483. "Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attending characteristics—before imposing a particular penalty." *Id.*

"*Miller*'s substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735. A court must consider the "penological justifications for life without parole . . . in light of the distinctive attributes of youth." *Id.* at 734. In other words, when evaluating the considerations outlined in *Miller*, a court cannot sentence a juvenile homicide offender to a life-without-parole sentence unless then defendant is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (citing *Miller*, 567 U.S. at 479-80).

Miller does not mandate that a judge make a specific factual finding that adopts the verbiage of *Miller* or *Montgomery*. Rather, the judge needs to only consider "the [child's] diminished culpability and heightened capacity for change." *Montgomery*, 136 S. Ct. at 733. An examination of the record considered by Judge Ryan is appropriate to determine if the requirements of *Miller* and *Montgomery* were met.

The first factor Judge Ryan considered was Defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. At the time of the last murder in this case, Defendant was 17 years old, roughly four months shy of turning 18. The sister of one of the victims spoke

at the sentencing hearing, telling Defendant "I say to you, Mr. Malvo, you were old enough to know right from wrong." T. 11/8/06, at 5-6. Judge Ryan stated that he was aware of the apparent influence that John Allen Muhammad had over Defendant as a youth. *Id.* at 17. Defendant's actions were not the result of a 14 year-old's lesser-crime-gone-wrong as was seen in *Miller*. Instead, the facts of the case showed ample evidence of planning and premeditation, and the court expressly found that Defendant "knowingly, willingly, and voluntarily participated in the cowardly murders of innocent, defenseless human beings." *Id.* Thus, the court expressly considered Defendant's youth in sentencing him, finding that it did not absolve him from the utmost culpability for his crimes.

The second factor considered was defendant's "family and home environment that surround[ed] him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Miller*, 567 U.S. at 477. The court received a Presentence Investigation Report and acknowledged that "as a child, [Defendant] had no one to establish values or foundations" for him. T. 11/8/06, at 17. Attached to that Presentence Investigation Report was a letter from Defendant's attorneys, a Virginia Presentence Investigation Report, and reports of two medical doctors and a licensed social worker totaling nearly 30 pages. In their letter to the court, Malvo's attorneys described the medical reports as "incredibly germane to Lee's development, culpability, and future." As stated above, Judge Ryan was completely aware of the influence that Muhammad had over Defendant and that his "chances for a successful life became worse than they already were." T. 11/8/06, at 17. Despite these considerations, Judge Ryan determined that life without parole on each count was the appropriate sentence for Defendant.

Third, Judge Ryan had to consider "the circumstances of the homicide offense, including the extent of [Defendant's] participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 567 U.S. at 477. There is no doubt that the court appreciated the circumstances surrounding commission of Defendant's crimes. From the state's proffer at the time of Defendant's plea hearing, and Defendant's testimony at the Muhammad trial, the judge knew that Defendant and Muhammad had devised an elaborate plan to terrorize the citizens of Montgomery County and surrounding jurisdictions. Judge Ryan described Defendant's actions as "cowardly murders of innocent, defenseless human beings." T. 11/8/06, at 17. The court understood that Defendant had willfully participated in what many have characterized as the most heinous acts ever committed in the county.

The fourth factor is "[w]hether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller*, 567 U.S. at 477-78. The court acknowledged that Defendant took steps to aid authorities by offering to provide information and cooperation in Muhammad's trial and that his testimony "made these prosecutions worthwhile." T. 11/8/06, at 16. Judge Ryan went so far as to commend the Defendant for his "acceptance of guilt and voluntary assistance without any promise of leniency." *Id.* at 17. Further, there is no indication on the record or in Defendant's motion that he was unable to assist his own attorneys. The court simply felt that Defendant's assistance was not enough to mitigate his sentence.

Finally, the court was charged with inquiry into "the possibility of rehabilitation." *Miller*, 567 U.S. at 478. Judge Ryan acknowledged that Defendant "could have been somebody different," and that he had "shown remorse and . . . asked for forgiveness." T. 11/8/06, at 17. Nonetheless, he also concluded that "Forgiveness is between you and your God, and personally, between you and your victims, and the families of your victims. *This community, represented by its people and the laws, does not forgive you.*" *Id.* (emphasis supplied).

Unlike the situation presented in *Miller,* Defendant, his lawyers and experts had every reason and opportunity to present mitigating information to the court. While he did not employ the precise phrasing of the Supreme Court in *Miller* and *Montgomery*, Judge Ryan clearly concluded that Defendant was among the most uncommon of juvenile offenders, deserving of a lifetime of imprisonment without the possibility of parole. He expressly told Defendant that he wanted the sheriffs "to remove you from this County and State, and return you to where you came from." T. 11/8/06, at 17. Obviously, even taking into consideration Defendant's acceptance of responsibility, the court determined that it would be inappropriate for him ever to return to this community.

A juvenile convicted of murder in Maryland has numerous procedural remedies available to him after trial or plea. Defendant Malvo was afforded procedural and substantive due process throughout his proceedings in Maryland, and Judge Ryan had the discretion to impose what he considered to be the appropriate sentence, including authority to suspend all or part of the time imposed. Defendant Malvo had the right to appeal to the Maryland Court of Special Appeals if he had been convicted after trial and, if permitted, to the Court of Appeals. Even after the guilty

plea, he could have sought leave to appeal on limited issues, including competency of counsel, voluntariness, and the legality of the sentence imposed.

As previously discussed, Malvo could have asked three judges of the court to review the sentence which, in this case, could not have been increased. The trial judge also had the power to reduce or modify the sentence, for a period of five years, but that remedy was never pursued. Malvo may also seek relief under the Post-Conviction Procedure Act. He also has the ability to ask for a pardon or remission of sentence from the Governor. MD. CODE ANN., CORR. SERVS §7-601(a).

As a final matter, Defendant asserts that Article 25 provides him more expansive rights than those granted under the Eighth Amendment. He cites no authority for his contention and only baldly implies that there is a categorical ban on juvenile life-without-parole sentences. This is simply not the state of the law in Maryland, and Defendant offers no reasons to depart from judicial precedent that Article 25 should be interpreted *in pari materia* with the Eighth Amendment. *See Walker v. State*, 53 Md. App. 171, 183 (1982).

Conclusion

This court finds that Defendant is not entitled to seek review of his sentence under MD. R. 4-345, as the sentence imposed was substantively and procedurally legal under the law of this state. Whether a remedy exists under the Post-Conviction Procedure Act or by some other mode is not before the court.

The six consecutive life-without-parole sentences were imposed after a full consideration of Defendant's physical, mental, and emotional state. Two presentence investigations, reports of medical doctors and a licensed social worker, together with Victim Impact Statements were presented to the court for its consideration. Both sides allocuted for what they thought was an appropriate sentence, and defense counsel never requested imposition of any sentence other than life.

Judge Ryan is presumed to have known the law, including the juvenile/adult sentencing dichotomy described in *Roper v. Simmons* that "[juveniles struggling to find their identity make it] less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character", as well as Maryland statutory considerations, at the time he imposed the sentence. *Miller* and *Montgomery* applied only to mandatory life-without-parole

sentences, and statements suggesting an expansion of that rule to discretionary sentences are *dicta.*

Even if *Miller* and *Montgomery* apply to discretionary life-without-parole sentences, however, no specific *mantra* is required of the judge in rendering his sentence. In this case, Judge Ryan affirmatively considered all the relevant factors at play and the plain import of his words at the time of sentencing was that Defendant is "irreparably corrupted."

For these reasons, it is this 15th day of August, 2017, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that Defendant's Motion to Correct Illegal Sentence is **DENIED.**

Robert A. Greenberg

ROBERT A. GREENBERG, Judge
Circuit Court for Montgomery County, Maryland