September Term, 2021
No. 45

IN THE
COURT OF APPEALS OF MARYLAND

DAWNTA HARRIS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER

MEGAN E. COLEMAN, ESQUIRE
MARCUSBONSIB, LLC
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
(301) 441-3003 (fax)
megancoleman@marcusbonsib.com
CPF # 0812170011

Counsel for Petitioner

Table of Contents

Table of Authorities

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REPLY ARGUMENT

I. COMMON LAW FELONY-MURDER HAS BEEN PREEMPTED BY THE MANSLAUGHTER-BY-VEHICLE STATUTE AND THERE IS NO EXEMPTION IN THIS CASE

A. Conflict preemption was not the only holding of *State v. Gibson*.

Respondent argues "that the General Assembly did not intend to displace the felony-murder doctrine because the offenses are not in conflict." (Respondent's Br. at 9).

In *State v.* Gibson, 4 Md. App. 236 (1968), the Court discussed how common law involuntary manslaughter with a ten-year maximum sentence either required no proof of gross negligence (unlawful act manslaughter) or proof of gross negligence (gross negligence manslaughter), as compared to the manslaughter-by-vehicle statute which required proof of gross negligence and only had a three-year maximum sentence. *Id.* at 246. The *Gibson* Court rendered a two-part holding, one of which was specific to the unlawful act manslaughter charge in question and mentioned a "conflict": "the common law crime of involuntary manslaughter, when based on homicides so occurring, is in conflict with the statute and must yield to it to the extent of the inconsistency." *Id*. at 247.

Respondent argues that "the conflict between penalty and conduct that supported a conclusion of preemption in *Gibson* does not exist in the case of felony murder" because the manslaughter-by-vehicle statute "requires proof of death caused by the operation of a vehicle in a grossly negligent manner," whereas, felony-murder "require[s] proof of other felonious conduct[,]" (Respondent's Br. at 17-18), and the "higher penalties for felony murder (life if in the first degree; up to 40 years if in the second degree)…contemplate the

greater degree of culpability" than for the manslaughter-by-vehicle statute. (Respondent's Br. at 19).

The necessity of a "conflict" both in conduct and in penalty, does not support the holding in *Blackwell v. State*, 34 Md. App. 547 (1977). Nine years after *Gibson*, the Court held that a depraved-heart murder, when perpetrated by an automobile, is pre-empted by the manslaughter-by-vehicle statute. Depraved-heart murder is not "in conflict" with the manslaughter-by-vehicle statute either in conduct or in penalty. Depraved-heart murder requires more than just gross negligence. It requires proof of malice which is demonstrated by "the willful doing of a dangerous and reckless act with wanton indifference to the consequences and perils involved" where "the act in question be committed under circumstances manifesting extreme indifference to the value of human life." *Beckwitt v. State*, ___ Md. ___, No. 16, Sept. Term 2021 (filed Jan. 28, 2022) (slip op. at 66-67) (citing *Robinson v. State*, 307 Md. 738, 744-45 (1986) (cleaned up)).

Moreover, the statutory maximum for depraved-heart murder, at the time of *Blackwell* was 30 years' imprisonment, and in 2017, was increased to 40 years' imprisonment. Md. Code Ann., Crim. Law § 2-204(b) (*compare* Acts 2002, c. 26, § 2, eff. Oct. 1, 2002, *with* Acts 2016, c. 515, § 2, eff. Oct. 1, 2017). Thus, the greater penalty for the greater conduct in depraved-heart murder was not in conflict with the lesser penalty for the lesser conduct in the manslaughter-by-vehicle statute.

Indeed, conflict preemption was not the sole root of the preemption holding in *Gibson*, it was just "one ground for [the Court's] holding[.]" *Dill v. State*, 24 Md. App. 695, 696 (1975).

B. The *Gibson* Court rendered an additional holding on field preemption that applies to all types of unintended homicides by motor vehicle.

The *Gibson* Court also held that "in enacting Section 388, the Legislature *intended to deal with* ***an entire subject matter*** *– unintended homicides resulting from the operation of a motor vehicle*," *Gibson*, 4 Md. App. at 247 (emphasis added); *see also State v. Gibson*, 254 Md. 399, 401 (1969) (same). *Accord Blackwell*, 34 Md. App. at 554-55; *State v. North*, 356 Md. 308, 318 (1999).

Respondent is quick to cast aside "the court's 'entire subject matter' language." (Respondent's Br. at 16). However, "entire subject matter" has a discrete meaning establishing exclusivity when referring to a field for purposes of preemption. *See*, *e.g. Holmes v. Maryland Reclamation Assocs.*, *Inc*., 90 Md. App. 120, 155, n.18 (1992) ("Courts here and elsewhere use a variety of terms in referring to 'field.' Some opinions…suggest exclusivity by using words such as 'entire[.]'"); *Robinson v. State*, 353 Md. 683, 693 (1999) (A finding that "a statute deals with an entire subject-matter…is generally construed as abrogating the common law as to that subject"); *Hardy v. State*, 301 Md. 124, 132 (1984) (The presumption against statutory preemption of the common law is easily dissipated if "a statute deal[s] with an entire subject-matter"); *Christian v. State*, 405 Md. 306, 319 (2008) (The common law will be repealed "where the statute deal[s] with an entire subject-matter").

Leaving no doubt about the meaning of "entire subject matter," the *Gibson* Court defined it in its holding as "unintended homicides resulting from the operation of a motor vehicle." *Gibson*, 4 Md. App. at 247.

The Court of Appeals embraced the breadth of this holding, affirming that "the legislature in enacting [the manslaughter-by-vehicle statute], intended *to encompass* ***the entire field*** *of unintentional criminal homicides resulting from the operation of a motor vehicle*[.]" *Gibson*, 254 Md. at 401 (emphasis added).

In *Blackwell v. State*, the Court of Special Appeals not only reaffirmed that "the legislature intended to preempt the subject matter of unintended homicides resulting from the operation of a motor vehicle[;]" but the *Blackwell* Court applied preemption to a different, and more serious, homicide offense. 34 Md. App. at 554-55.

Decades later, in *State v. North*, this Court used the manslaughter-by-vehicle statute as an example of a statute that occupied the entire field, finding that "unlike the situation in *Gibson* and *Forbes*, we find no evidence of a legislative intent for § 287B to occupy the field – to be the comprehensive and exclusive treatment of the conduct in question." 356 Md. at 318.

C. Felony-murder is included in the entire field of unintended homicides when death results from the operation of a motor vehicle.

Respondent argues that if "the legislature intended to preempt an entire subject matter, that field does not encompass felony murder," (Respondent's Br. at 21), arguing again that "[g]ross negligence is not an element of felony murder." (Respondent's Br. at 22).

Yet, gross negligence is not an element of second-degree murder. It may be a lesser-included offense of depraved-heart murder, but it is not the *mens rea* required for the offense. Respondent attempts to align *Blackwell* with *Gibson*, arguing that depraved-heart

murder is "practically the same[] offense" as gross negligence manslaughter. (Respondent's Br. at 25). While the line between gross negligence manslaughter and depraved-heart murder is "simply one of degree," (Respondent's Br. at 25), the offenses are vastly different in both conduct and penalty. As discussed, *supra*, the latter requires malice, extreme recklessness, likelihood of death, and a current 40-year penalty, while the former only requires a wanton and reckless disregard with a current 10-year penalty.

Second, gross negligence is not an element of unlawful act manslaughter, yet unlawful act manslaughter was the offense that was preempted in *Gibson*. The *Gibson* Court explicitly considered whether the charge of unlawful act manslaughter would come within the purview of a statute that only addressed gross negligence. *Gibson*, 4 Md. App. at 244-46. The *Gibson* Court declined to limit its holding to only manslaughter committed with gross negligence.

Thus, Respondent's reliance on *dicta* from *Anderson v. State*, 61 Md. App. 436, *cert. denied*, 303 Md. 295 (1985), that the manslaughter-by-vehicle statute only covered killings where the vehicle had been operated "in a grossly negligent manner," does not overcome the holdings in *Blackwell* and *Gibson*. (Respondent's Br. at 23).

The Courts could have provided the narrow holdings that Respondent seeks to establish, that the manslaughter-by-vehicle statute only preempts common law involuntary manslaughter committed with gross negligence, or murders inclusive of gross negligence. Instead, the Courts utilized broad language encompassing an entire subject matter of unintended homicides committed by motor vehicle. These interpretations have been controlling law for more than 50 years, and have not been undone by the Legislature. In

such instances, this Court has been "most reluctant to overrule its prior interpretation of that statutory language[.]" *Forbes v. State*, 324 Md. 335, 342 (1991).

This Court has said that *stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *DRD Pool Serv.*, *Inc*. *v. Freed*, 416 Md. 46, 63 (2010) (internal citations omitted).

Respondent has failed to assert that this Court's precedent regarding field preemption by the manslaughter-by-vehicle statute should be struck down. This Court should continue to uphold its prior interpretations of the manslaughter-by-vehicle statute, and leave it for the Legislature to address if it disagrees with such interpretations.

If this Court now decides to abrogate its prior holdings, thereby effectively re-instating the common law offense of an unintended homicide committed by a motor vehicle, such a change to the common law of Maryland should only apply to causes of action that accrue after the date of the new decision, and not to the current case, based upon fundamental fairness and reliance on this Court's prior interpretations.

D. Felony-murder is an unintended homicide.

Respondent attempts to side-step field preemption by arguing that felony-murder is not an "unintended homicide." Respondent relies on the findings of the Court of Special Appeals that "[a] defendant's intent to commit an underlying felony is transferred to, and stands in the place of, the intent to kill" and therefore, does not fall within the scope of an "unintended homicide" as contemplated by *Gibson*. (Respondent's Br. at 26; E. 48).

Respondent mistakenly asserts that "depraved-heart murder as addressed in *Blackwell*,…contains a *mens rea* element that falls below the level of criminal intent" and therefore "*Blackwell* is distinguishable." (Respondent's Br. at 29). Depraved-heart murder does contain a *mens rea* element that, like felony-murder, substitutes criminal intent with a level of moral blameworthiness that is equal to establish the malice required for murder. Recently, in *Beckwitt v. State*, this Court "described depraved heart murder as 'one of the unintentional murders that is punishable as murder because another element of blameworthiness fills the place of intent to kill.'" ___ Md.___, No. 16, Sept. Term 2021 (filed Jan. 28, 2022) (slip op. at 66) (citing *Robinson*, 307 Md. at 744) (cleaned up). Thus, Respondent fails at its attempt to distinguish depraved-heart murder from felony-murder based upon a substitute form of malice that stands in the place of intent to kill. (Respondent's Br. at 28).

Respondent also argues that a prosecution for felony-murder does not necessarily mean that the homicide is unintentional. (Respondent's Br. at 27). The same has been said about depraved-heart murder. *See Robinson*, 307 Md. at 745 (That depraved-heart murder "may be committed absent intent to injure" does not mean "that the crime is not committed if there is an intent to injure.").

The Court's classification of felony-murder and depraved-heart murder as "unintentional" is not "a fundamental mischaracterization of the offense." (Respondent's Br. at 28). Rather, it is the way courts describe whether or not a homicide contains an element of intent to kill that the State must prove beyond a reasonable doubt. The relevancy of such a classification in a case like this, is that because felony-murder does not contain

an element of intent to kill, this Court cannot rely on the jury's verdict to make an appellate finding that this was an intended homicide.

E. Evidence of an intentional homicide must be determined by the jury.

Relying on *Blackwell v. State*, Respondent argues that "there was *evidence* of intentional homicide;" thus, the statutory preemption would not apply. (Respondent's Br. at 30-31) (emphasis in original). Respondent misconstrues *Blackwell*.

The *Blackwell* Court did not suggest that arguments by the prosecutor, or even prima facie proof would establish "evidence of intentional homicide" sufficient to overcome preemption. Rather, the *Blackwell* Court said that "in a proper case where there is evidence of intentional homicide by use of an automobile, it is not improper to charge both crimes, and, if the evidence is sufficient, to submit both to the jury for its determination of which, if either, is applicable." 34 Md. App. at 555.

This important passage must be broken down into three parts. First, the level of proof of "evidence of intentional homicide by use of an automobile" that would be sufficient "to charge both crimes" is probable cause. Second, the evidence sufficient at trial "to submit…to the jury for its determination" requires an assessment by the trial court of the legal sufficiency of the State's evidence, not whether the State has proven its case beyond a reasonable doubt. *State v. Payton*, 461 Md. 540 (2018). At that phase, there is no inquiry into the credibility of the witnesses, or the weight to be given to the evidence, nor is there a finding that "the State has proven their case beyond a reasonable doubt; that is the responsibility given to the trier of fact." *Briggs v. State*, 348 Md. 470, 475 (1998). Third, the *Blackwell* Court said that if the evidence is sufficient to be charged, and then at

trial, sufficient to be submitted to the jury, the evidence still must be "submit[ted]…to the jury for its determination" of proof beyond a reasonable doubt. 34 Md. App. at 555.

This requirement that a jury determine whether there was "evidence of intentional homicide" was also imposed by this Court in *Forbes*. Respondent asserts that Harris's reliance on *Forbes* "is misplaced" because the jury's verdict in that case excluded intentional murder. (Respondent's Br. at 32-33). But *Forbes* clearly stated that the "issue is not one of sufficiency of the evidence. The State's evidence was fully sufficient to have convicted the defendant of murder or voluntary manslaughter." 324 Md. at 343, n.4. Rather, it was for the jury to determine what the appropriate offense was, and they did not return a verdict for an intentional homicide, despite the sufficiency of the evidence presented to them. *Id*. at 343.

Just as a "defendant's *mens rea* cannot be characterized on appeal in a manner that is directly contrary to the jury's verdicts[,]" (Respondent's Br. at 32-33), neither can Harris's *mens rea* be recharacterized on appeal in a manner never submitted to the jury, in a manner denied by the State at the trial level, and in a manner directly contrary to the traditional classification of felony-murder as "an unintentional killing." *Christian*, 405 Md. at 332 (citing *State v. Allen*, 387 Md. 389, 401 (2005)).

The State made the conscious decision not to submit any charge of an intentional killing to the jury, agreeing with defense counsel that the State was "not indicating an intention to kill her[.]" (T. 4/29/2019 at 91). The prosecutor then doubled-down at sentencing when she "need[ed] to make the record clear" that she "did not say [Harris had] specific intent[,]" she did not say he possessed "the intent to kill." (E. 398).

Respondent should be precluded from asking this Court to make an appellate finding that Harris possessed an intent to kill Officer Caprio when such "evidence" was not determined as fact by the jury, nor even believed by the State prosecuting the case.

Respondent's argument that "defense should have requested a jury instruction" on "intent to kill" is illogical. It was everyone's belief at the trial level that this was not an intent to kill offense being submitted to the jury. (T. 4/29/2019 at 91).

Respondent then says that Harris "could have done what the defense attempted but was precluded from doing in *Forbes*: argue to the jury that if Harris was guilty of anything he was guilty of an offense that was not charged." (Respondent's Br. at 34) (citing *Forbes*, 324 Md. at 338). This would have been futile as no trial court would have permitted defense counsel to argue the jury could only convict Harris of an uncharged crime, just as defense counsel was precluded from doing in *Forbes*. *See Turner v. New York*, 386 U.S. 773, 775 (1967) ("[A] conviction upon a charge not made is not consistent with due process."); *Landaker v. State*, 327 Md. 138, 140 (1992) (same)).

Lastly, Respondent suggests that defense counsel could have moved for judgment of acquittal on the ground that this was not an intent to kill offense. (Respondent's Br. at 34). But it was the State who pointed out during the renewed motion for judgment of acquittal that the State and defense counsel "had numerous conversations about this case where it was clearly discussed that the State was proceeding on felony murder," not premeditated intent to kill murder, and "that [the State's] opening" told the jury "that a felony murder happened when the killing occurred." (T. 4/30/19 at 11).

This Court should hold that the jury was required to make a finding of intent to kill before a homicide committed by a motor vehicle, that does not contain an element of intent to kill, can be exempted from preemption by the manslaughter-by-vehicle statute.

This Court should vacate Harris's felony-murder conviction and decline Respondent's invitation to remand the case for a new trial on the first-degree murder count. (Respondent's Br. at 35, n.5).

First, a remand for a new trial to establish intent to kill would run contrary to all of the statements the prosecutor made about Harris's lack of an intent to kill Officer Caprio.

Second, a remand for a new trial would violate Harris's right not to be placed in jeopardy twice. The State had its opportunity to ask the jury to find intent to kill murder and it consciously abandoned that pursuit, instead making a tactical decision to only pursue felony-murder at trial. The State should not be permitted to have a second chance. "The Double Jeopardy Clause is no less offended because the Government here seeks to try petitioner twice for this single offense, instead of seeking to punish him twice[.]" *Sanabria v. United States*, 437 U.S. 54, 71 (1978) (treating alternate theories of the same offense as a single offense for double jeopardy purposes).

II. HARRIS WAS ENTITLED TO A CONSTITUTIONALLY-HEIGHTENED SENTENCING PROCEDURE

A. Harris is entitled to consideration of youth and attendant circumstances under the Eighth Amendment.

Respondent avers that *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) makes clear that the Eighth Amendment does not entitle Harris to an individualized sentencing hearing, but rather, that the Eighth Amendment only requires that a sentencing court have discretion to

impose a sentence that is less than life without the possibility of parole for juvenile homicide offenders. (Respondent's Br. at 36).

The holding of the *Jones* Court was that the Eighth Amendment does not require a sentencing court to 1) make an explicit factual finding that an offender is permanently incorrigible, or 2) provide an on-the-record sentencing explanation with an implicit finding that an offender is permanently incorrigible. 141 S. Ct. at 1308.

Harris argued that the sentencing court must "consider" youth and its attendant circumstances before sentencing a juvenile offender to a life sentence, in order to be compliant with the Eighth Amendment. (Petitioner's Br. at 41 (citing *Jones*, 141 S. Ct. at 1314, 1320)). *Jones* did not say otherwise.

Jones explained that *Miller v. Alabama*, 567 U.S. 460 (2012) mandated "that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing" a life-without-parole sentence. *Id*. at 1314 (citing *Miller*, 567 U.S. at 483).

Respondent incorrectly contends that juvenile offenders sentenced to anything other than "life *without* parole" are due no constitutional protections at sentencing such as consideration of the youth's diminished culpability and heightened capacity for change, along with the chronological age and hallmark features. (Respondent's Br. at 45) (emphasis in original). Neither *Jones* nor *Miller* say that these special constitutional considerations are inapplicable when a juvenile faces a sentence of life with parole. Respondent's position is inconsistent with the *Jones* Court's foundational determinations that "sentencing an offender who was under 18 at the time of the crime raises special constitutional

considerations." *Jones*, 141 S. Ct. at 1314, and that "youth matters in sentencing." *Id*. at 1316. Respondent's position is inconsistent with the bedrock principle announced in *Miller*, that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471.

Respondent's position is also inconsistent with the Eighth Amendment values underlying this Court's decision in *Carter v. State*, 461 Md. 295 (2018), an opinion that likewise recognized that "well accepted differences between juveniles and adults" mandate "[c]onstitutional limits on the punishment of juvenile offenders." *Id*. at 308-09. Importantly, in *Carter*, this Court was not reviewing the constitutional limits for life-*without*-parole sentences, but rather, was considering the constitutional limits of sentences of life *with* the possibility of parole for juvenile offenders.

In *Carter*, a juvenile offender serving a sentence of life with the possibility of parole had an opportunity for release on parole, subject to the Governor's approval. *Carter*, 461 Md. at 320. In 2016, the Parole Commission adopted additional *Miller*-type factors for consideration of juvenile offenders in light of Supreme Court decisions. *Id*. at 321, n.14. However, at that time, the Governor was not required to take these special considerations into account before making his parole decision for juvenile offenders serving a life sentence. *Id*. at 322.

Though this was a discretionary system that provided an opportunity for release, which Respondent argues is, "[a]ll that the Eighth Amendment requires with respect to juvenile homicide offenders," Respondent's Br. at 36, the *Carter* Court found that the Eighth Amendment required more than just a discretionary sentencing scheme, in order for

a juvenile's life sentence to withstand constitutional scrutiny. Only when the Parole Commission *and* the Governor were required to consider youth and attendant circumstances were the sentences of juvenile offenders brought "into compliance with the Constitution and once again legal[.]" *Carter*, 461 Md. at 344.

The *Carter* Court made such a finding despite the Supreme Court never issuing an opinion requiring that a state parole commission, or a Governor, consider *Miller*-type factors in order to make a discretionary life sentence constitutional.

The *Carter* Court made such a finding despite the fact that the juveniles in *Carter* were sentenced under the same discretionary sentencing scheme as Harris, where the sentencing courts had the discretion to suspend any portion of the life sentence – an argument relied upon by Respondent in this case. (Respondent's Br. at 57, n.15).

Although "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient," *Jones*, 141 S. Ct. at 1313, it is only sufficient when the sentencing court knows that youth and its attendant circumstances should be considered in fashioning a constitutionally appropriate sentence.

The *Jones* Court was careful to point out that "consideration" of a child's youth and attendant circumstances is only "the degree of procedure *Miller* mandated in order to implement its substantive guarantee" so as not to "intrud[e] more than necessary upon the States' sovereign administration of their criminal justice systems" which permits "'the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Jones*, 141 S. Ct. at 1315, n.2 (citing *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)).

How to properly provide guidance to the sentencing courts to exercise that discretion is a matter better left for the States to implement their own procedural safeguards to effectuate substantive guarantees under their own constitutions and criminal procedure laws. *See Jones*, 141 S. Ct. at 1315 n.2; *id.* at 1321; *id*. at 1323.

"[C]riminal procedure laws that fail to take defendants' youthfulness into account…would be flawed." *Miller*, 567 U.S. at 478 (quoting *Graham v. Florida*, 560 U.S. 48, 76 (2010)). Until the enactment of the Juvenile Restoration Act ("JUVRA"), 2021 Md. Laws, Ch. 61 (SB 494), which codified Criminal Procedure Article §§ 6-325 and 8-110, Maryland's criminal procedure laws did not require sentencing courts to take a juvenile defendant's youthfulness into account when sentencing a juvenile convicted as an adult, nor did the criminal procedure laws set forth any criteria for consideration.

The *Carter* Court recognized the importance of a "process that complies with *Graham* and *Miller*" that contains "criteria for the exercise of the discretion of the decision makers" in making a life sentence for a juvenile offender compliant with the Eighth Amendment. *Carter*, 461 Md. at 317. The Supreme Court did not have to dictate that process in order for this Court to determine the factors that were essential in bringing a sentence into compliance with the Constitution.

This Court should likewise hold that the absence of a process at sentencing that complies with *Miller*, containing the criteria for the exercise of the discretion of the sentencing judge before imposing a life sentence on a juvenile fails to comply with the Eighth Amendment.

B. Article 25 of the Maryland Declaration of Rights provides greater protection than the Eighth Amendment.

This *Carter* Court recognized "textual support for finding greater protection" in the Maryland Declaration of Rights than the U.S. Constitution. *Carter,* 461 Md. at n.6 (citing *Thomas v. State,* 333 Md. 84, 103 n.5). Respondent acknowledged that as well, but says that this Court has never rendered a holding to that effect, and should not do so now. (Respondent's Br. at 60).

The *Thomas* case did not consider instances of sentencing adults versus juveniles. Thomas was an adult, sentenced to 50 years' imprisonment for batteries which involved taking an iron pole to strike his girlfriend over the head and back, resulted in the victim's hospitalization. 333 Md. at 89. Thus, *Thomas* was not the case for rendering a holding that Thomas's sentence was either cruel *or* unusual, or that anything in his case justified an analysis different from that under the Eighth Amendment.

By contrast, the Supreme Court in *Jones* expressly invited the States to read distinctions into their own laws and procedures, to provide protections to juveniles that are greater than those required under the Eighth Amendment. 141 S. Ct. at 1315 n.2; *id.* at 1321; *id*. at 1323 ("Importantly, like *Miller* and *Montgomery,* our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."); *id.* ("States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole."); *id*. ("All of those options, and others, remain available to the States.").

Although this Court has previously held Article 25 to be *in pari materia* with the Eighth Amendment, there may be a compelling reason to depart from that tradition now, especially in the context of sentencing juveniles.

In urging that essentially no greater sentencing protections are owed to juvenile offenders in Maryland, Respondent attempts to apply non-juvenile sentencing precedent to argue that in order to be deemed unconstitutional, Harris's sentence would have to meet an extremely high bar and be found "grossly disproportionate." (Respondent's Brief at 67). This argument is simply not applicable to this case because the standards for assessing the proportionality of a juvenile's sentence are not the same as those that had been previously espoused for adults in *Harmelin v. Michigan,* 501 U.S. 957 (1991).

Respondent tries to minimize any protections sought by juvenile offenders, by positing that a juvenile's sentence is constitutional by the mere "threshold comparison of the crime committed to the sentence imposed." Respondent's Brief at 67. That contention flies in the face of this Court's opinion in *Carter* and the other juvenile-specific sentencing cases. *Carter,* 461 Md. at 356-57 (Courts "measure proportionality not by comparing the sentence with the label of the crime [ ] but by comparing the sentence with the behavior of the criminal."). A "sentencer misses too much if he treats every child as an adult." *Miller,* 567 U.S. at 477.

At least one other state has explicitly interpreted the prohibition against cruel and unusual punishment in its state constitution more broadly than the United States Supreme Court has interpreted the Eighth Amendment in order to ensure sentencing proportionality for its juvenile offenders. *See Commonwealth v. Perez,* 80 N.E.3d 967, 973 (Mass. 2017)

(determining that the "unique characteristics of juvenile offenders" should weigh more heavily in the proportionality calculus than the Supreme Court required under the Eighth Amendment because "[t]he essence of proportionality is that 'punishment for crime should be graduated and proportioned to both the offender and the offense.'") (citing *Miller,* 567 U.S. at 469)).

Respondent avers that unlike *Leidig v. State*, 475 Md. 181, 235-36 (2021), which recognized instances in which a divergence between the state and federal constitution is necessary and appropriate to give full effect to the rights afforded under Maryland law, this Court should not diverge from the Eighth Amendment because there is no "gridlock" surrounding whether the Eighth Amendment demands consideration of youth and its attendant circumstances before sentencing a juvenile to life. (Respondent's Br. at 62).

Yet, courts around the country have explicitly noted the confusion they have experienced based on the Supreme Court's ever-changing Eighth Amendment jurisprudence as to juveniles. *See*, *e.g.*, *State v. Soto-Fong,* 474 P.3d 34, 43 (Ariz. 2020) (Arizona court describing its difficulty with interpreting the Supreme Court decisions due to the "shifting and confusing reasoning embodied in *Graham, Miller,* and *Montgomery*"); *Hill v. Snyder,* 821 F.3d 763, 766 (6th Cir. 2016) (explaining that after *Miller,* the "landscape" had "shifted"); *Perez v. Cain,* 473 P.3d 540, 548 (Or. 2020) ("*Miller* represented the culmination of a dramatic and rapid shift in the Supreme Court's treatment of Eighth Amendment claims by juvenile defendants.").

The constitutionality of juvenile sentencing continues to evolve. *See State v. Lyle*, 854 N.W.2d 378, 400, 402 (Iowa 2014), (the first court to conclude that *all* mandatory

sentences imposed on juveniles, absent an individualized sentencing hearing consistent with *Miller*, violate Iowa's constitutional provisions against cruel and unusual punishment); *State v. Houston-Sconiers*, 391 P.3d 409, 420-21 (Wash. 2017) ("trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements"); *Commonwealth v. Perez*, 477 Mass. 677, 685 (Mass. 2017) (rejecting lengthy mandatory minimums in cases involving children who "did not kill, intend to kill, or foresee that life will be taken" because "unique characteristics of juvenile offenders should weigh more heavily in the proportionality calculus than the United States Supreme Court required under the Eighth Amendment.").

States are implementing procedural safeguards to enforce the substantive constitutional guarantees children deserve at the time of sentencing. *See*, *e.g.*, Va. Code § 16.1-272 (2020) (prior to imposing a sentence on a juvenile in adult court, the court shall consider *Miller*-type factors); W. Va. Code § 61-11-23 (2018) (requiring consideration of the *Miller* factors when sentencing a child convicted as an adult).

Yet not all courts interpret *Miller* and *Montgomery* in the same way. *Cf. Willibanks v. State Dep't of Corr.,* 522 S.W.3d 238, 246 (Mo. 2017) (stating that *Miller* does not apply to sentences in excess of an offender's life expectancy because "The Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life without parole. . . Without direction from the Supreme Court to the contrary, this Court should continue to enforce its current mandatory minimum parole statutes and regulations . . ."), *with Carter*, 461 Md. at 347-

348 (holding that a term of years can be a life without parole sentence and citing to the "vast majority of state supreme courts" that agree).

This Court should render a holding that Article 25 of the Maryland Declaration of Rights provides greater protections than the Eighth Amendment of the United States Constitution when imposing a life sentence on a juvenile offender.

C. A sentencing court is not relieved of its obligation to ensure a constitutionally sufficient sentence just because there are other ways to make a sentence compliant 15-20 years later.

Despite Respondent's contentions, the procedures imposed for down-the-road proceedings, which do not become ripe until 15[1] to 20[2] years after the life sentence is imposed on the juvenile, do not remedy the constitutional infirmity that exists at the time the life sentence is imposed. (Respondent's Br. at 49-51). *See Houston-Sconiers,* 391 P.3d at 420-21 (". . .sentencing courts must consider the mitigating qualities of youth and have absolute discretion 'at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line'.") (emphasis in original)); *see also Office of the Prosecuting Atty. v. Precythe,* Nos. 19-2910 & 19-3019, 2021 U.S. App. LEXIS 27991 (8th Cir. Sept. 17, 2021) (finding that Missouri's *Miller*-fix statute is insufficient to comport with the Eighth Amendment)).

[1] Md. Code Ann., Corr., Corr. Servs. § 7-301(d)(1).

[2] Md. Code Ann., Crim. Proc. § 8-110(b)(1), (f).

Although the Court in *Montgomery v. Louisiana* indicated that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," it did so in the context of giving *Miller* retroactive effect, and attempting to temper the tidal wave of re-sentencings that would occur after its opinion. 577 U.S. 190, 212 (2016). Harris was sentenced in 2019, post-*Montgomery*, and is on direct appeal where his opportunity for parole or reconsideration are still many years away.

D. Harris's youth and attendant circumstances were not adequately considered by the sentencing court.

Respondent argues that Harris received individualized sentencing hearing, even though he was not entitled to one. (Respondent's Br. at 37).

This Court cannot be satisfied on this record that the sentencing judge understood the importance of the *Miller*-type factors as it related to Harris's diminished culpability and the penological justifications of imposing a life sentence on a minor.

One the one hand Respondent argues that a sentencing court is presumed to know the law and apply it properly, including the factors discussed in *Miller* which were in effect before Harris was sentenced in 2019. (Respondent's Br. at 65-66). On the other hand, Respondent argues that the *Miller*-factors only apply to a life-with-parole sentence. (Respondent's Br. at 45-46). The confusion surrounding the application of *Miller*-type factors at sentencing, and whether they apply in a life with parole context, continues to be muddled even in this appeal.

What was clear at the time that Harris was sentenced was that Md. Code Ann., Crim. Proc. § 6-235 was not yet in existence, and thus there was no requirement that a sentencing

court consider a juvenile's status as a minor in deciding whether to exercise discretion to depart from a mandatory minimum sentence.

More importantly, what was also clear at the time Harris was sentenced was that the law in Maryland was that a "defendant [i]s not entitled to an individualized sentencing process that would have taken into account defendant's youth and attendant circumstances" for the crime of first-degree murder committed by a juvenile when the juvenile is imposed a sentence of life *with* the possibility of parole. *Hartless v. State*, 241 Md. App. 77 (2019). This Court cannot be sure that the sentencing court recognized the importance of considering youth and its attendant circumstances in light of this.

This Court has always encouraged sentencing courts to "explain its reasoning…because 'justice is better served when a judge…freely and openly discloses the factors he weighed in arriving at the final sentencing disposition.'" *Carter*, at 365 (citing *Johnson v. State*, 274 Md. 536, 544 (1975)). It also helps an appellate court review whether the sentence is constitutionally proportionate. *Thomas*, 333 Md. at 95-96. Thus, Maryland Courts have requested more of sentencing courts than the *Jones* Court demands. Whether the sentencing court in this case actually considered the impact of youth on Harris's culpability and diminished penological justifications for a life sentence is unclear.

E. The felony-murder conviction further compels the need for individualized consideration of *Miller*-type factors at the time of sentencing.

Respondent tries to dispel the clear divergence between a juvenile who commits a pre-meditated specific intent to kill murder, and a juvenile who has committed a felony-murder, especially in the context of imposing a life sentence in the latter scenario.

Respondent asserts that "only four" states "would offer a juvenile in Harris's position an advantage over Maryland's system." (Respondent's Br. at 56). Respondent fails to account for the eight states that amended their laws to require proof of independent mental states other than the implied malice form the commission of the underlying offense. (Respondent's Br. at 57) (Petitioner's Br. at 33-34), or the fact that Florida requires considering of *Miller*-type factors before a life sentence can be imposed. (Petitioner's Br. at 32), That brings the count to 13. In *Jones*, the Supreme Court relied on data from 15 States to determine the trends in sentencing juveniles to life-without-parole. 141 S. Ct. at 1320.

Respondent tries to assimilate Harris's arguments to "identical sentencing claims" raised in *State v. Harrison*, 914 N.W.2d 178 (Iowa 2018), where the *Harrison* Court failed to find a "national consensus" regarding felony-murder laws relating to juveniles. (Respondent's Br. at 58). However, the *Harrison* Court's purported failure to find a national consensus was in the context of searching for a distinction between accomplices and principles. *Id*. at 198.

More noteworthy from the *Harrison* case is that Iowa "provides juvenile offenders convicted of felony-murder 'with an individualized sentencing hearing that takes into account their youth and a number of other mitigating factors that provide juveniles with more leniency in the sentencing process.'" *Id*. at 201 (internal citations omitted). Because of this, Harrison never argued, like Harris does, that he was denied an individualized sentencing. *Harrison*, 914 N.W.2d at 204.

Further, although juveniles convicted of felony-murder in Iowa may be sentenced to life imprisonment, they have the possibility of *immediate parole*, and may only have to serve "a short term of guaranteed incarceration" to serve penological goals of deterrence, retribution, and incapacitation. *Id*. at 201. Harris, by contrast, only has the possibility of parole after 15 years.

Respondent also avers that Harris "miss[ed] the mark" with his argument that "a juvenile convicted of felony-murder has twice diminished culpability than an adult." (Respondent's Br. at 55). Respondent argues that the Supreme Court only found twice diminished culpability for a juvenile who did not kill. (Respondent's Br. at 55). That is not what the *Graham* Court found. Rather, the *Graham* Court, using the word "or," said that a juvenile has twice diminished culpability if the juvenile offender "did not kill *or* intend to kill" and that juveniles who "do not kill, intend to kill, *or* foresee that life will be taken are categorically less deserving of the most serious forms of punishment." 560 U.S. at 69 (emphasis added).

If this Court does not vacate Harris's conviction, this Court should remand this case for re-sentencing, and instruct the sentencing court to consider *Miller*-type factors in light of a child's culpability and the penological justifications for sentencing a juvenile on the crime of felony-murder.

Respectfully submitted,

Megan E. Coleman

Megan E. Coleman

Counsel for Petitioner

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I hereby certify that Petitioner's Reply Brief contains 6,474 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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

/s/ Megan E. Coleman

_____

Megan E. Coleman

MarcusBonsib, LLC
6411 Ivy Lane
Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
(301) 441-3003 (fax)
megancoleman@marcusbonsib.com
CPF # 0812170011

CERTIFICATE OF SERVICE

I hereby certify that two copies of Petitioner's Reply were mailed, postage prepaid, this 18th day of February, 2022 to: Office of the Attorney General, Criminal Appeals Division, 200 St. Paul Place, Baltimore, Maryland 21202;

I further certify that a copy was also delivered *via* MDEC.

/s/ Megan E. Coleman

Megan E. Coleman

MarcusBonsib, LLC
6411 Ivy Lane
Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
(301) 441-3003 (fax)
megancoleman@marcusbonsib.com
CPF # 0812170011

CERTIFICATE OF COMPLIANCE WITH RULE 20-201

I hereby certify that I have complied with Rule 20-201 regarding redacting restricted information.

/s/ Megan E. Coleman

Megan E. Coleman

MarcusBonsib, LLC
6411 Ivy Lane
Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
(301) 441-3003 (fax)
megancoleman@marcusbonsib.com
CPF # 0812170011