

Filed

FEB 06 2018

Bessie M. Decker, Clerk
Court of Appeals
of Maryland

LEE BOYD MALVO,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

IN THE

COURT OF APPEALS

OF MARYLAND

September Term 2017

Petition Docket No. 476

**ANSWER TO PRE-JUDGMENT PETITION FOR
A WRIT OF CERTIORARI**

The State of Maryland, Respondent, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Edward J. Kelley, Assistant Attorney General, pursuant to Maryland Rule 8-303(d), hereby opposes the Pre-judgment Petition for Writ of Certiorari filed by Petitioner Lee Boyd Malvo. By his petition, Petitioner seeks review in this Court, before judgment in the Court of Special Appeals, of the ruling of the Circuit Court for Montgomery County denying his motion to correct illegal sentences. Petitioner states no justification for review prior to a determination by the Court of Special Appeals. Accordingly, the petition should be denied.

QUESTION PRESENTED

Did the circuit court properly deny Petitioner's motion to correct illegal sentences?¹

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In October of 2002, Petitioner Malvo and John Allen Muhammad, commonly referred to as the "D.C. Snipers," perpetrated a reign of terror in Maryland, Virginia, and the District of Columbia, killing ten people and wounding three others. Six of the murders occurred in Montgomery County, where the victims were James Martin, James Buchanan, Premkumar Walekar, Maria Sarah Ramos, Lori Lewis Rivera, and Conrad Johnson.²

On October 10, 2006, Petitioner pleaded guilty to six counts of first-degree murder in the Circuit Court for Montgomery

¹ Respondent's question presented mirrors the question presented in Petitioner's opening brief in the Court of Special Appeals. (App. 46).

² The factual background of the crimes was developed in *Muhammad v. State*, 177 Md. App. 188 (2007), and *Muhammad v. Commonwealth*, 619 S.E.2d 16 (Va. 2005). Muhammad was convicted of capital murder in Virginia, sentenced to death, and executed on November 10, 2009.

County, Case No. 102675. Sentencing occurred on November 8, 2006. At the conclusion of the sentencing hearing, the court sentenced Petitioner within the terms of the plea agreement to serve six consecutive sentences of life imprisonment without the possibility of parole. Petitioner did not file an application for leave to appeal the entry of his guilty plea and sentences.

On November 27, 2006, Petitioner filed a motion for modification of sentence that the circuit court held in abeyance. The court denied the motion for modification of sentence on September 18, 2012. Petitioner did not seek post-conviction relief, and the time for doing so in the ordinary course expired on November 8, 2016.

On January 12, 2017, Petitioner filed a motion to correct illegal sentences. Petitioner claimed in his motion that, because he was seventeen at the time the murders were committed, his life-without-parole sentences were illegal pursuant to the Supreme Court's decisions in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), as well as Article 25 of the Maryland Constitution. The only relief Petitioner sought was a re-

sentencing. After the State filed a response, the court held a hearing on the motion on June 15, 2017. By Memorandum Opinion and Order filed on August 16, 2017, the circuit court denied the motion.

Petitioner filed a timely appeal of the circuit court's order on September 14, 2017. The case was docketed by the Court of Special Appeals as No. 1436 of the September 2017 Term. On January 8, 2018, Petitioner filed his opening brief, which raised only one question: "Did the trial court err in denying Mr. Malvo's motion to correct illegal sentences?" (App. 46).

On January 12, 2018, the Court of Special Appeals, on its own initiative, stayed Petitioner's appeal pending decisions of this Court in *Bowie v. State*, No. 55, Sept. Term 2017, *Carter v. State*, No. 54, Sept. Term 2017, *McCullough v. State*, No. 56, Sept. Term 2017, and *State v. Clements*, No. 57, Sept. Term 2017. These four cases are scheduled for oral argument on February 6, 2018.

On January 25, 2018, two weeks after the stay took effect, Petitioner filed the underlying pre-judgment petition for writ of certiorari, seeking to bypass review in the Court of Special Appeals altogether. The State opposes Petitioner's request.

REASONS FOR DENYING THE PETITION

Petitioner's request for pre-judgment certiorari review is premised on the notion that his case "is the ideal vehicle" to address (1) whether *Miller* applies to discretionary sentencing schemes, (2) if so, what safeguards are necessary to give effect to *Miller*; and (3) whether juvenile life without parole is categorically unconstitutional. (Petition at 8). The mere re-statement of the issues framed on appeal does not justify the extraordinary step of bypassing review by the Court of Special Appeals. Indeed, the notion that Petitioner's case, at this juncture, presents an ideal vehicle for resolution of the issues presented is both self-serving and speculative.

At bottom, this case is an appeal of the denial of a motion to correct an illegal sentence, a mundane subject frequently addressed by Maryland appellate courts. Furthermore, as indicated, there are already four cases scheduled in this Court this term, *Bowie*, *Carter*, *McCullough*, and *Clements*, that present circumstances — juveniles challenging the legality of their sentences following *Miller* and *Montgomery* — analogous to the circumstances Petitioner presents here. Indeed, Petitioner's case

is not unique, as the Court of Special Appeals stayed several cases, included Petitioner's, that also involve juveniles challenging the legality of their sentences following *Miller* and *Montgomery*. The Court of Special Appeals acted prudently staying these cases, given that this Court's analysis, reasoning, and judgment in *Bowie*, *Carter*, *McCullough*, and *Clements*, likely will impact the resolution of the cases pending in that court. In this regard, the judicial system is proceeding exactly how it is supposed to operate.

The Court of Special Appeals is well-positioned to address the single question raised in Petitioner's pending appeal. Following this Court's decisions in *Bowie*, *Carter*, *McCullough*, and *Clements*, the court will do just that. If the Court of Special Appeals' future decision presents "an ideal vehicle" for further review of any issue left unresolved by *Bowie*, *Carter*, *McCullough*, and *Clements*, Petitioner will have the opportunity to seek — and this Court will have the opportunity to grant — that review. No valid basis for circumventing the standard appellate process has been offered.

Finally, notwithstanding that the underlying request for pre-judgment review was prompted by the stay of the intermediate

appellate court proceedings, Petitioner notably has not cited delay as a factor supporting the extraordinary relief requested herein. Thus, there is neither proffer nor evidence that Petitioner will be prejudiced by the stay ordered by the Court of Special Appeals. For the foregoing reasons, the request for pre-judgment certiorari review should be denied.

CONCLUSION

The State of Maryland respectfully asks the Court to deny the pre-judgment petition for a writ of certiorari.

Dated: February 6, 2018

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland



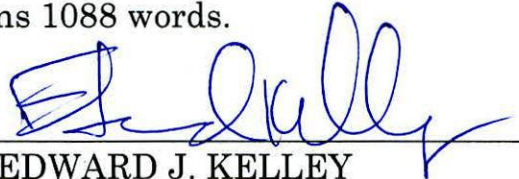
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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font;
complies with the font, line spacing, and margin requirements of
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CERTIFICATE OF SERVICE

I certify that on this day, February 6, 2018, a copy of the foregoing "Answer to Petition for a Writ of Certiorari" was hand-delivered to KIRAN IYER, Assistant Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Street, Suite 1302, Baltimore, Maryland 21202, and a copy was mailed by first-class U.S. Postal Service, postage prepaid, to Russell P. Butler, Victor Stone, and Kristin M. Nuss, Maryland Crime Victims' Resource Center, 1001 Prince George's Blvd., Suite 750, Upper Marlboro, MD 20774.



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