Nos. 17-6746(L), 17-6758

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEE BOYD MALVO,

Petitioner-Appellee,

v.

RANDALL MATHENA,
Warden, Red Onion State Prison,

Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia,
The Hon. Raymond A. Jackson (2:12-cv-375; 2:12-cv-376)

MOTION TO STAY ISSUANCE OF THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Local Rule 41, Appellant Randall Mathena (Warden) respectfully moves this Court to stay issuance of its mandate pending the filing of a petition for a writ of certiorari. The Warden has consulted with counsel for Appellee Lee Boyd Malvo, who represents that he neither opposes nor joins the motion.

REASONS FOR GRANTING THE MOTION

Under Rule 41(d)(2), this Court may stay the mandate where a party "show[s] that the certiorari petition would present a substantial question and that there is good cause for a stay." Because both requirements are met here, the mandate should be stayed pending the filing of a forthcoming petition for a writ of certiorari.

I. This case presents a substantial question for which a writ of certiorari is warranted.

Rule 10 of the Supreme Court of the United States sets forth three situations where the Court will generally entertain a petition for a writ of certiorari. Two apply here:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a

> decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; [and] . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Rule 10(a) factors are easily satisfied here. The panel's decision squarely conflicts with the Supreme Court of Virginia's decision in *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017), *cert. denied*, 138 S. Ct. 81 (2017). Additionally, the panel's decision conflicts with decisions of other state and federal courts.

1. The panel's decision creates a direct split between this Court and the Supreme Court of Virginia.

a. In *Jones*, the Supreme Court of Virginia squarely held that the new rule of constitutional law announced in *Miller v. Alabama*, 567 U.S. 460 (2012), was limited to mandatory sentencing schemes. *Jones*, 795 S.E.2d at 721 ("As [the Supreme Court of Virginia] recently stated, *Miller* 'held that mandatory life-without-parole sentences for juveniles

violate the Eighth Amendment.'") (internal quotation marks and citation omitted). *Jones* also squarely rejected the argument that the Supreme Court's subsequent decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), had altered or expanded the scope of *Miller*'s holding stating that "[t]he main 'question' for decision in *Montgomery* was . . . 'whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders' should be applied retroactively,'" and concluding that any discussion in *Montgomery* beyond mandatory sentences was "dicta." *Jones*, 795 S.E. 2d at 721. The Supreme Court of Virginia therefore held that, because Virginia does not impose *mandatory* life-without-parole sentences for homicide offenses, *id.* at 712-13, *Miller*'s new rule does not require juvenile homicide offenders to be resentenced in Virginia, *id.* at 723 ("reinstat[ing the court's] holding in" *Jones v. Commonwealth (Jones I)*, 763 S.E.2d 823 (Va. 2014)); accord *Jones I*, 763 S.E.2d at 477 (holding "that because the trial court has the ability . . . to suspend part or all of the life sentence imposed for a Class 1 felony conviction, the sentencing scheme . . . was not a mandatory life without the possibility of parole scheme. Therefore, even if *Miller* applied

retroactively, it would not apply to the Virginia sentencing statutes relevant here.").

b. The panel in this case reached the exact opposite conclusion. Instead, it read *Montgomery* as "confirm[ing] . . . that a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from the 'transient immaturity of youth.'" Slip op. 18. Based on that understanding of *Montgomery*, the panel "reject[ed] the Warden's argument that . . . *Miller* applies only to mandatory life-without-parole sentences and instead conclude[d] that *Miller*'s holding potentially applies to any case where a juvenile homicide offender was sentenced to life imprisonment without the possibility of parole." *Id.* at 19.

Just as in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), this panel's decision has created a direct conflict between this Court and the Supreme Court of Virginia about what the Eighth Amendment requires. And, as in *LeBlanc*, the Warden's forthcoming certiorari petition will "present a substantial question," Local R. 41, because Virginia courts

will remain bound by *Jones*, "while federal courts presented with the same fact pattern [will be] required to grant habeas relief." *LeBlanc*, 137 S. Ct. at 1729.

2. The panel's decision also conflicts with decisions of other state and federal courts. There is currently a deep split between state courts of last resort and federal courts of appeals about whether *Miller*'s new rule applies to discretionary sentencing schemes. The courts of last resort in Arkansas, Colorado, Georgia, Indiana, Missouri, New Mexico, South Dakota, and Texas[1] as well as the First, Fifth, and Eighth Circuits,[2] agree with the Supreme Court of Virginia that *Miller* does not apply to discretionary life-without-parole sentences. By contrast, the courts of last resort in Montana, Ohio, Wyoming, Utah,

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[1] *Murry v. Hobbs*, Case No. 12-880, 2013 Ark. 64, *4 (Ark. Feb. 14, 2013); *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017); *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014); *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012); *State v. Nathan*, 522 S.W.3d 881, 891 (Mo. 2017); *State v. Gutierrez*, Case No. 33,354, 2013 WL 6230078, *2 (N.M. Dec. 2, 2013); *State v. Charles*, 892 N.W.2d 915, 919 (S.D. 2017); *Turner v. State*, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014).

[2] *Evans-Garcia v. United States*, 744 F.3d 235, 240-41 (1st Cir. 2014); *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016); see also *Davis v. McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015) ("*Miller* said nothing about non-mandatory life-without-parole sentencing schemes.").

and Connecticut agree with the panel that *Miller*'s new rule applies to all life-without parole sentences.[3]

Put simply, there is a well-established split in authority that warrants the Supreme Court's review.

3. The Rule 10(c) considerations also provide a substantial basis for certiorari because the panel decided an important federal question that should be decided by the Supreme Court. The panel's decision extended the explicit holding in *Miller*—"[The Court] *therefore hold[s]* 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,'" *Miller*, 567 U.S. at 465 (emphases added)—to include discretionary sentences of life-without-parole based on a decision about whether *Miller*'s new rule applies retroactivity on collateral review. The panel's interpretation has far-reaching implications for Virginia and other States. Whether *Miller*, and by extension the Eighth Amendment, should be expanded that far is a decision properly left to the Supreme Court.

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[3] *Steilman v. Michael*, 407 P.3d 313, 318-19 (Mont. 2017); *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Bear Cloud v. State*, 334 P.3d 132, 141-43 (Wyo. 2014); *State v. Houston*, 353 P.3d 55, 75 (Utah 2015); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1043 (Conn. 2015).

II. Good cause exists for granting the stay.

Good cause supports staying the mandate. Without a stay, the Commonwealth will be forced to resentence Malvo—a person who committed "the most heinous, random acts of premeditated violence conceivable," slip op. 25—which would likely moot the appeal from this panel's decision. By contrast, if the panel's decision is vacated or reversed by the Supreme Court, a stay will avoid the costs and burdens on the parties, their counsel, and witnesses necessitated by a resentencing.

What is more, without a stay, the Commonwealth may be forced to resentence numerous other inmates, whose cases are awaiting the outcome of Malvo's case. Accordingly, considerations of judicial economy warrant waiting to see if the Supreme Court of the United States resolves the split between Virginia and this Court, which also implicates at least three other federal courts of appeals and 13 state courts of last resort.

Malvo will suffer no prejudice from a stay. At this point, Malvo has served only approximately 16 years of his sentences for murdering Linda Franklin and Kenneth Bridges and for the attempted murder of

Caroline Seawell. Because it is exceedingly unlikely that a Virginia court would reduce Malvo's sentence to the time he has already served, any delay occasioned by a stay pending a petition for a writ of certiorari will not prejudice him.

CONCLUSION

The Court should grant this motion and stay the issuance of the mandate pending the filing by the Warden of his petition for a writ of certiorari.

Respectfully submitted,

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By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

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