In the Supreme Court of Ohio

STATE OF OHIO,	
	Case № 2019-0655
Appellee	
	On Appeal from the Mahoning
-vs-	County Court of Appeals,
	Seventh Appellate District
KYLE PATRICK,	Case № 2017 MA 0091
Appellant	

MERIT BRIEF OF APPELLANT KYLE PATRICK

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STATEMENT OF THE CASE AND FACTS

This case involves what the trial judge termed an "easy" sentencing call that the Constitution says should be anything but easy. This constitutional error springs from the fact that the Appellant, KYLE PATRICK ("Kyle"), though 17 years old when the offenses were committed, was bound over as an adult, tried as an adult, and sentenced as an adult.

On April 27, 2012, Michael ("Big Mike") Abighanem was shot and killed during a robbery at a home on Silliman Street on the west side of Youngstown, in Mahoning County, Ohio. (T.p. Vol. I, p. 188; Vol. III, p. 419.) Youngstown Police were summoned, and learned that Big Mike, his friend, Michael Nakoneczny ("Little Mike"), and four others were at a house on Silliman Street. (T.p. Vol. I, p. 188; Vol. II, p. 319.) The others were JuJuan Jones, Aric Longcoy, Reginald Whitfield, and Kyle.

Big Mike and Little Mike went to Silliman Street to sell a Playstation gaming system. Big Mike and Whitfield went upstairs so that Big Mike could demonstrate to Whitfield that the PlayStation was actually operable. Little Mike testified that while Big Mike went upstairs, Little Mike was detained by someone, probably JuJuan Jones, who was asking Little Mike to look at some jewelry. (T.p. Vol. I, p. 158.) Kyle was upstairs hiding in a closet. He later told the police that he was hiding, and

that Big Mike and Whitfield got into a fight in the upstairs room. Big Mike was shot during that fight, and died from a gunshot would that pierced his aorta and liver. (T.p. Vol. II, p. 387.) Kyle told police that he did not shoot Big Mike. (T.p. Vol. III, p. 470.)

A juvenile complaint was filed, charging Kyle with aggravated murder and aggravated robbery. (T.d. 1.) Kyle later waived his "right" to a bind-over hearing, and the Juvenile Division, finding that the bind-over was mandatory, transferred the case to the General Division of the Court of Common Pleas of Mahoning County. The grand jury indicted Kyle for aggravated murder, aggravated robbery, and tampering with evidence.

Kyle at one point pled guilty to amended charges. Days after entering that plea, however, Kyle filed a *pro se* motion to withdraw his plea. The trial court denied the motion, and Kyle appealed. The Seventh District reversed the case and remanded it to the trial court. See, *State v. Patrick*, 2016-Ohio-3283, 2016 Ohio App. LEXIS 2144, 66 N.E.3d 169 (7th Dist.).

The case then went to trial, and a trial jury found Kyle guilty of the 3 indicted offenses. Sentencing was held on May 1, 2017. It was not clear from the evidence at trial, and the trial judge recognized at sentencing that it could not be determined if

Kyle was the person who pulled the trigger or, if Kyle was, as he said he was, the person "hiding in the closet to set it up." (Sentencing Transcript, T.d. 114, at 15.) Nonetheless, the trial judge declared sentencing Kyle to be "an easy call for me given what I now know from the evidence introduced at trial and given the verdict of the jury," (Sentencing Transcript, T.d. 114, at 16). Citing the "senseless loss of life," (Sentencing Transcript, 15), and wondering aloud if "[i]n all of the years that I have done this if there has ever been a case that to me seemed as senseless as this one" (*id.*), the Judge sentenced Kyle to life imprisonment with parole eligibility after 30 full years, which was 33 full years to life because of the 3 year firearm specification.

The State warned the judge that he ought not impose a life without parole sentence, so the State asked the judge for the next harshest sentence.

> Your Honor, as you know, the defendant is eligible on this count for aggravated murder for 20 to life, 25 to life, 30 to life, or life without parole. Because of the state of the law right now with the Court of Appeals coming back with Brandon Moore, the Brandon Moore case, because the defendant was a juvenile, I'm not going to recommend life without parole on the aggravated murder because the Court of Appeals and the Supreme Court have said that we should give them—juveniles—some chance at having a life somewhere out there.
>
> But because of the sheer brutality in this case and the fact that the defendant and his friends lured the victim over to the house, I'm going to ask for 30 to life on the count of aggravated murder.

(Sentencing transcript, T.d. 114, p. 5.) The Judge complied.

The record is devoid of any evidence that the trial judge even considered

Kyle's youth, or that the Judge considered anything other than the adult sentencing factors, and a statute that required a life-tail sentence. The sentencing entry, Appendix, *post*, provides in part:

> The Court considered the record, oral statements, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12.

Before the trial Judge imposed that sentence, Kyle's lawyer explained to the Judge that:

> the idea of a murder was not really contemplated inside the brain of Kyle Patrick that day. There was certainly some reckless behavior and foolish behavior, and it was in fact intended to be a robbery, and then ill-prepared group to commit this robbery which then gave rise to the shooting death. For what it's worth, Judge, today Kyle Patrick denies that he was the shooter. So he does acknowledge the idea of a robbery. He does acknowledge that it was his weapon. Certainly acknowledges, and he did from the beginning, that he tried to clean up the situation when he went back, got the bag with whatever it was.
>
> We had a deal worked out years ago in this case which I thought was appropriate under the circumstances. However, I could not convince Kyle, I could not explain to him—I wish I could do a better job in my job, in my work—the idea of the felony murder or the accomplice liability. Because he was adamant that he did not shoot Big Mike, because he was adamant that he did not mean to shoot Big Mike, he had a very difficult time understanding how our system of justice could convict him of the murder of Big Mike under the circumstances. So our deal that we had prior to trial I thought was appropriate. And I think that, Judge, on the issue as far as how you want to start this sentence, I do think that this is a case that would be appropriate for mercy for a chance for life.

Also before the Judge imposed sentence, Kyle's mother addressed the Judge. She

spoke in part of Kyle's humanity, of his tendency to be gullible, of his tendency to make bad decisions.

> Kyle wasn't the ringleader. He's not a street kid with no family or no home and bouncing from place to place. When this began, he was a sheltered 17-year-old boy. He was a wannabe gangster who thought by hanging around with these 20-year-old street thugs would make him cool, and he made a bad decision. I'm not saying that he shouldn't be punished. I'm sorry.
>
> * * *
>
> Kyle isn't a monster. He's a human being capable of remorse. He smiles when he's anxious and nervous. He wears his heart on his sleeve. He's too trusting of the wrong people, and he's loyal to a fault. He wasn't the ringleader.
>
> * * *
>
> Kyle was never a leader. He was a follower of the wrong people, and he's my son, and he's a grandson, and he's a brother, and he's a nephew, and no matter how strong we are as a family, we are going to get through this.

(Sentencing transcript, T.d. 114, at 12-14.)

The trial judge, it was argued to the Court of Appeals, failed to recognize or at least take into account that, compared to adults, juveniles are less culpable, morally and legally than adults, and juveniles are more capable of rehabilitation than adults. While the trial judge did not impose the most severe sentence that he could have, it is equally true and constitutionally more significant that the Judge did not compare Kyle's case with other juvenile cases, but with adult cases. Kyle's adult co-defendant, quite arguably the actual killer had been sentenced to 13 years after

pleading guilty to involuntary manslaughter. *State v. Patrick*, 7th Dist. Mahoning № 17 MA 0091, 2019-Ohio-1189, 2019 Ohio App. LEXIS 1288, 2019 WL 1453495, ¶17.

Kyle appealed, challenging the constitutionality of his 33 year sentence that while it included a chance of parole, also included a chance of no parole. Kyle claimed that the trial court failed to consider his youth and the incomplete development attendant to that youth as mitigating factors, and that the trial court failed to consider or apply recent United State Supreme Court precedent when imposing sentence.

The Seventh District Court of Appeals found that Kyle's sentence was within applicable statutory ranges under R.C. 2929.03(A) and 2941.145(A). *Id.*, at ¶12. The Court said that *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), was inapposite to Kyle's case because Kyle "was not sentenced to death." *Id.* at ¶13, citing *Roper v. Simmons, supra.* Additionally, the Seventh District court said that *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), did not apply because *Graham* involved a life without parole sentence for a juvenile convicted of non-homicide offenses. *State v. Patrick, supra*, 2019-Ohio-1189, at ¶¶14-15.

The Court of Appeals went on to say that under the general sentencing statutes of this State, namely R.C. 2929.12, a trial court was not required to consider

the age of a defendant when imposing a felony sentence. The appellate court observed that R.C. 2929.12(C) and (E) provide that "any other relevant factors" should be considered, the statute itself does not *mandate* the sentencing court to consider the defendant's age." *Id.* at ¶16. (Emphasis added.) The appellate court thus rejected Kyle's challenge and found that his sentence was not otherwise contrary to law. *Id.*, at ¶¶18-19.

Kyle timely appealed to this Court, which accepted review on Kyle's first proposition. In this case, the issue is whether a trial court violates the Eighth Amendment by imposing a sentence of life imprisonment with parole eligibility for an aggravated murder committed by a juvenile without considering mitigation evidence. In *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, this Court held that a trial court, in exercising its discretion under R.C. 2929.03(A), must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole ("LWOP") in light of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The question now before this Court is whether a life sentence with the possibility of parole after a term of years, may be constitutionally imposed without consideration of a juvenile's youth.

ARGUMENT

Proposition of Law No. 1: Imposition of Any Life Imprisonment Sentence Upon a Juvenile Offender Without Taking Into Consideration Factors Commanded by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of Ohio violates those provisions.

I

The trial court impermissibly overlooked Kyle's youth, focused only on the case facts, and sentenced Kyle as if he were an adult.

A defendant's youth matters in criminal cases, because the "most important attribute of the juvenile offender is the potential for change." *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶42. Minors differ categorically from adults when it comes to imposing a criminal sentence. Discussed herein is the evolution of jurisprudence that has grown up around advancements in knowledge about human emotional and character development. This "most important" attribute was completely ignored here. It "remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed," *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), citing and quoting *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). However, Kyle was the subject of such a "misguided" sentencing that equate his

failings of a minor with those of an adult. Because there is no principled reason for a sentencing court to be required to consider mitigating evidence on some aggravated murders but not others, there is no principled way to distinguish whether a juvenile "deserves" a particular sentence, and no principled way for courts to review whether mitigation was considered in every case. Because the Eighth and Fourteenth Amendments will not suffer imposition of any life imprisonment sentence upon a juvenile offender without taking into consideration evidence that those Amendments command courts to consider.

Kyle was sentenced by the trial court under R.C. 2929.02 and 2929.03. There are two significant things about these statutes in relation to this case. First, the statutes impose a mandatory life sentence ("*shall* suffer death or be imprisoned for life;" "the trial court *shall impose* sentence on the offender as follows"). (Emphasis added.) Second, the trial judge here, in applying the statutes, gave no indication of consideration of Kyle's youth. Instead the Judge looked solely to the facts of the *case*, but not the facts about the Defendant before imposing sentence. Those statutes provide in pertinent part:

> §2929.02. Penalties for aggravated murder or murder.
> (A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03,

> and 2929.04 of the Revised Code, * * * In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
>
> §2929.03 Imposing sentence for aggravated murder.
> (A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:
> (1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:
> (a) Life imprisonment without parole;
> (b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
> (c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
> (d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
> * * * .

Without explaining the interrelation between the mandatory aggravated murder sentencing statute and the general felony sentencing statute, the Court of Appeals concluded that the trial judge was not *required* to consider the defendant's age when choosing from the sentencing alternatives in the statute.

> Pursuant to R.C. 2929.12, a trial court *is not required to consider the age* of a defendant when issuing a felony sentence. While R.C. 2929.12(C) and (E) provide that "any other relevant factors" should be considered, *the statute itself does not mandate the sentencing court to consider the defendant's age.*

(Emphasis added.) *State v. Patrick*, 7th Dist. Mahoning № 17 MA 0091, 2019-Ohio-1189, 2019 Ohio App. LEXIS 1288, 2019 WL 1453495, at ¶16. With all deference, the

ruling casts aside 15 years of jurisprudence concerning sentencing juvenile offenders for serious offenses when tried as adults.

The statute itself may not, as the Court of Appeals said, *require* a trial court to consider age of the defendant. But there is something that *does* require the trial court to consider the age of the defendant when the defendant was a juvenile at the time of the commission of the offense. That something supersedes any statute under our system: it is the *Constitution*.

This Court must correct that error, for the fact that the Eighth Amendment requires a trial court to take account of a defendant's youth in criminal sentencing is, to borrow a phrase from the late Justice Stevens, "pellucidly clear." The appellate court's wholly unjustified and cramped reading of the Constitution was explained by one of the nation's ablest of Justices, Justice Felix Frankfurter. In a word, *approach*. Justice Frankfurter insisted that where a judge comes out on a case depends upon where he or she goes into the case. Dissenting, along with Justice Robert H. Jackson, in a Fourth Amendment case, the point made by these two great Justices applies to *any* constitutional case, not just one involving the Fourth Amendment.

> The old saw that hard cases make bad law has its basis in experience.
> * * *.
> It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.

* * *.

> It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd v. United States*, 116 U.S. 616 (other citations omitted) or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.
>
> These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words.

United States v. Rabinowitz, 339 U.S. 56, 68-69, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (FRANKFURTER, J., joined by JACKSON, J., dissenting).[1]

In light of all that man has learned about a juvenile's physical, emotional and intellectual development, and in light of constitutional law recognizing that fund of knowledge and applying it to the Eighth Amendment, the Court of Appeals, with due deference, came out on the wrong end of the case. That Court approached the statutes and the way that the trial judge applied them: not with Eighth Amendment jurisprudence in the forefront of their minds; not regarding the Eighth Amendment as the safeguard against abuses so deeply felt by the Colonies as to be one of the

[1] Sometimes dissents are just that. But the Supreme Court relied heavily upon Justice Frankfurter's dissent when it later overruled *Rabinowitz* in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

potent causes of the Revolution. Instead, the appellate court failed to consider fully the Eighth Amendment, its impact on the statutes cited above, and treated the Eighth Amendment, as Justice Frankfurter put it, "merely a requirement for a piece of paper," a way to affirm a lengthy prison sentence for a "senseless" crime.

The United States Supreme Court has chronicled the "great difficulty" in "distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Roper v. Simmons*, 543 U.S., at 573; *Graham v. Florida*, 560 U.S., at 68. With all due deference, the trial judge did not hurdle the great difficulty; he skirted around it by pretending it did not exist. The Court of Appeals, again with due respect, found ways not to apply the law to this case.

II

A. Development of The Eighth and Fourteenth Amendment Jurisprudence Related to Juvenile Sentencing.

The Eighth Amendment to the United States Constitution, standing alone, has no application to state proceedings. However, if a failure to "incorporate" the Amendment's guarantees into state criminal proceedings amounts to a denial of due process, then the Eighth Amendment does apply to state proceedings. The Fourteenth Amendment requires the States to enforce any of the immunities of the

first eight amendments that "have been found to be implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 324-325, 58 S.Ct. 149, 82 L.Ed. 288 (1937).[2] The Cruel and Unusual Punishments Clause is undeniably among such liberties. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Louisiana, ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). Thus, what was denied Kyle here was the fair treatment that is the heart of the Due Process Clause. See, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 7929 L.Ed.2d 799 (1963); and *State v. Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979). *Robinson* relied specifically on the Due Process Clause, and struck a California statute that authorized imprisonment of addicts as "a cruel and unusual punishment in violation of the *Fourteenth Amendment*." (Emphasis added.)

B. The Eighth Amendment Demands that Advances in Knowledge Be Applied to Sentencing So That Sentencing Reflects Evolving Standards of Decency That Mark the Progress of a Maturing Society.

The Eighth Amendment is not static, and was never intended to be so. In his concurring opinion in *Robinson, supra,* Justice William O. Douglas wrote:

> In Sixteenth Century England one prescription for insanity was to beat the subject "until he had regained his reason." Deutsch, *The Mentally Ill in America* (1937), p. 13. In America "the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were

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[2] Overruled by *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

> burned at the stake or hanged"; and "the pauper insane often roamed the countryside as wild men and from time to time were pilloried, whipped, and jailed." *Action for Mental Health* (1961), p. 26.

)*Robinson v. California*, 370 U.S., at 668 (DOUGLAS, J., concurring. In *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), Chief Justice Earl Warren, as a prelude to the now-famous language, reminded us that simply because we have the death penalty in America does not mean that capital punishment is the benchmark against which we should measure all other punishments.

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment— and they are forceful— the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.
>
> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment *is nothing less than the dignity of man*. While the State has the power to punish, the Amendment stands to assure that this power be *exercised within the limits of civilized standards*. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. * * * The Court recognized in [*Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910)] that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its*

> *meaning from the evolving standards of decency that mark the progress of a maturing society.*

(Emphasis added.) *Trop v. Dulles*, 356 U.S., at 99-101.

Fashionable as it appears to be that history and civics are disappearing from student curricula, any earnest review of the proper office of the Eighth Amendment or indeed any constitutional provision, requires at least a brief look into history. This most certainly is not "originalism."[3] In 1791, larceny, burglary, and even forgery could in some cases result in hanging. James Madison, Thomas Jefferson, George Mason, Patrick Henry, and a number of the Founding Fathers were civil libertarians, men who had lived through the Revolution, who had lived through the colonial excesses of the Crown. They and their fellow citizens wanted to live in peace, prosperity, and social harmony, with as much liberty as possible and as little

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[3] If there is such a thing as originalism, it is interpreting the Constitution to limit the power and authority of the government and to maximize individual freedoms and protections from abusive governmental powers.

> The Constitution of the United States is the first instance in all history of the creation of a government possessing only limited powers. The Magna Charta, the Petition of Right, the English Bill of Rights, and all other previous efforts to restrain government had merely imposed restrictions on the otherwise unlimited power of government. The framers of the Constitution, however, created a new government which would possess only the powers delegated to it.

Charles Rice, "The Bill of Rights and the Doctrine of Incorporation," reproduced in Eugene Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville, Va.: University Press of Virginia, copyright © 1991), 11.

government as necessary. Out of that mind-set came our present constitutional government, replete with the Bill of Rights.

Thomas Jefferson showed us that our Constitution is a living document, and that, whether it be cruel and unusual punishments, due process, the assistance of counsel, or any other secured freedom, the meaning and application of the Constitution's protections were to keep pace with the advancements of society. Thus, we may be faithful to the Constitution without engaging feigned attempts to divine the original meaning of the Framers. We need not engage in a mindless search to determine if we can sentence an emotionally and mentally un-developed male to serve the rest of his life in prison because in colonial times children as young as 7 years old could be tried in criminal court and, if convicted, could be sentenced to prison or even to death. Indeed, such stringent adherence to "originalism" would not allow lethal injection, electrocution, and the gas chamber—all now or at one time constitutional—as they were all introduced long after the Framers drafted and the States ratified the Eighth Amendment.

The Framers did not make a finite listing of "Cruel and Unusual" punishments to be outlawed, any more than they attempted to describe what process was "due." Jefferson explained why. Carved into the Southeast Portico of the Jefferson Memorial

in Washington, D.C. is an excerpt from a letter that Thomas Jefferson wrote to Samuel Kercheval on July 12, 1816. Jefferson assured us that we need neither amend nor discard the Constitution as our learning advances and our treatment of persons by the government may permit human liberty to flourish and the dignity of man to be protected. Jefferson said:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors.

Where does all of this leave us? No one wants Kyle Patrick drawn and quartered, burned at the stake, crucified, or broken on the wheel. See, *Robinson v. California, supra,* 370 U.S., at 675, citing *In re Kemmler,* 136 U.S. 436, 446, 10 S.Ct. 930, 34 L.Ed. 519 (1890), and *Chambers v. Florida,* 309 U.S. 227, 237, 60 S.Ct. 472, 84 L.Ed. 716 (1940). The State, however, claims that the present sentence, imposed without even *considering* Kyle's youth, is acceptable. In fact, the State argued to the Court of Appeals that the trial court is not required to consider a juvenile offender's age prior to the imposition of sentence—*unless* the court intends to impose a life-without-parole sentence. This non-sequitur only adds to the confusion. Taken literally, the State's

argument would be that a judge is not required to consider a sentencing factor to arrive at a sentence unless he first pre-determines the sentence without considering the sentencing factor. Then, depending upon the results that pre-determination, the judge may—or may not— be forced to review a sentencing factor that he had not reviewed to pre-determine his original sentence. In another setting, the Ninth District rightly called this type of a circular argument "dizzying." *State v. South*, 162 Ohio App.3d 123, 2005-Ohio-2152, 832 N.E.2d 1222, ¶13 (9th Dist.).

Again, where does this leave us? Kyle asks for himself and for every juvenile tried as an adult who is given a non-LWOP life sentence, that the Eighth Amendment be read in a way to protect citizens like Kyle—so long as it is objectively reasonable to do so. Is it objectively reasonable to do so? If juveniles sentenced to life without parole are entitled to have mitigating evidence considered; if juveniles sentenced to a term of years are entitled to have mitigating evidence considered, how can it be anything but reasonable that a juvenile sentenced to life be entitled to have mitigating evidence considered when sentence is imposed?

What happened below is a flagrant disregard of the Eighth Amendment. Nothing about the fact that there is a possibility of parole excuses consideration of the most important sentencing factor there is in determining a prison sentence for a

juvenile. With regard to the emotional and character development of youth, the human mind has become more developed, more enlightened. New discoveries have been made, new truths have been discovered. The United States Supreme Court has charted out a relatively clear path concerning juvenile sentencing that reflects these discoveries and enlightenments. The United States Supreme Court and this Court having set an Eighth Amendment jurisprudence that has advanced to keep pace with the times, the trial court ignored that jurisprudence. Kyle's lawyer argued Kyle's immaturity and poor decision-making, but counsel did nothing to remind the trial court that the Constitution demands that the judge take account of Kyle's youth and potential for change.

III

Advancements in Juvenile Justice and Learning About Juvenile Development Have Been Integrated Into the Justice System.

What have we learned that our "barbarous ancestors" to which Jefferson referred did not know about juveniles? In a sentence, we have learned a mountain of information about youth and its emotional and character development. We have long treated juveniles differently when it comes to crime and punishment. The idea of a separate juvenile justice system took root in the United States about 100 years ago. The goal was to divert juvenile offenders from the harsh and destructive

punishments of criminal courts, to avoid the stigma of being a "criminal," and to encourage rehabilitation based on the individual child's needs. This system was designed to differ from adult criminal court in a number of ways, most notably to focus more on the child as a person needing help, and less on the conduct that brought the child before the court in the first place.

But a shift occurred in the 1980s and 1990s. Many states "reformed" juvenile justice, particularly honing in on those accused of serious offenses. Focus shifted away from the needs of the child for rehabilitation, and shifted to punishment for serious offenses. Despite evidence that juveniles were not responsible for most violent crimes; despite evidence that juveniles do not commit more acts of violence than did members of the previous generation, though modern juveniles were more violent in their crimes, at least 17 states redefined the purpose clause of their juvenile courts to emphasize public safety, certainty of sanctions, and offender accountability. See, Patricia Torbet and Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996–97 Update* (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, November 1998). As the pendulum swung away from rehabilitation of juveniles to accountability, what was once known as "juvenile life," incarceration until age 21, gave way to more

frequent and in many cases mandatory prosecutions of juveniles as adults.

While the prosecution of juveniles as adults for serious offenses remains part of the landscape, advancements in learning, applied through the Eighth Amendment, have tempered the "accountability" aspect of such prosecutions that resulted in harsh sentences. Using the Eighth and Fourteenth Amendments, in 2005, the United States Supreme Court barred the imposition of the death penalty for juvenile offenders. *Roper v. Simmons, supra.* Mindful of Justice Frankfurter's assertion that the safeguards of liberty have frequently been forged in controversies involving not very nice people, Christopher Simmons did not leave one feeling warm and fuzzy after learning about his crime. Simmons, aged 17, talked about killing someone, committing a burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons also claimed they could "get away with it" because they were minors.

After 2:00 a.m. on the night of the crimes, Simmons and another juvenile entered the home of the victim, Shirley Crook, reaching through an open window and unlocking the back door. Simmons turned on a hallway light, and doing so awakened Mrs. Crook. Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Bound and

blindfolded by Simmons and his accomplice, Mrs. Crook was put into her minivan and driven to a state park. The juveniles reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning a river. They then tied her hands and feet together with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge, drowning her in the waters below.

Even in light of these chilling facts, the Supreme Court reminded us that the Eighth Amendment categorically protects child offenders, as this Court aptly put it, "from a final determination while they are still youths that they are irreparably corrupt and undeserving of a chance to reenter society." *State v. Moore, supra,* 149 Ohio St.3d, at ¶42.

This safeguard is not a kindly expression of grace by the judiciary, but is grounded in fact, experience, and logic. The Court in *Roper* referred to its decision in *Thompson v. Oklahoma,* 487 U.S. 815, 101 L.Ed.2d 702, 108 S.Ct. 2687 (1988) (plurality opinion). The *Thompson* plurality observed that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*, 487 U.S., at 835. The Court also noted the finding that there was a low likelihood that youthful offenders engaged in "the kind of cost-benefit analysis that

attaches any weight to the possibility of execution," which made the death penalty ineffective as a means of deterrence. *Id.*, 487 U.S., at 836-838. Kyle fit this mold, still after conviction unable to assimilate that he could be convicted of aggravated murder even if he had killed no one and even if he did not intend anyone to die.

Important here because all were overlooked by the courts below, the Supreme Court in *Roper* found 3 general differences between juveniles under 18 and adults, each of which the Court said "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper, supra,* 543 U.S., 569. First, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults, qualities that often result in impetuous and ill-considered actions and decisions." *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). The Court also observed what everyone knows: in recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits persons under 18 years of age from voting, serving on juries, or marrying without parental consent. Though some might view it as an improvement on what we see in Washington these days, we do not let the fictional character Doogie Houser, M.D., now matter how seemingly brilliant, run for President until he reaches at least age 35. He cannot run for the Senate until age 30; he cannot run for the House

of Representatives until age 25; and he cannot vote for anyone who does run for these offices until he is 18 years old. This is a clear nod to the immutable fact that intelligence and maturity are two different things.

The second difference between juveniles and adults that the Court found in *Roper* was that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Kyle fit this pattern as well. His mother told the trial judge that Kyle wasn't the ringleader, that he was a sheltered 17-year-old boy who was a "wannabe gangster" and who thought that "hanging around with these 20-year-old street thugs would make him cool."

The third broad difference between adults and juveniles found by the Supreme Court is that the character of a juvenile is not as well formed as that of an adult, and the personality traits of juveniles are more transitory and less fixed. Kyle fit this mold as well. His mother spoke of the fact that "[h]e's too trusting of the wrong people, and he's loyal to a fault." (T.p. Sentencing Hearing, T.d. 114, p. 13.) These three differences, the Supreme Court found in *Roper*, "render suspect any conclusion that a juvenile falls among the worst offenders." *Roper, supra*, 543 U.S., at 570. While it is possible that this suspicion can be cured, see, *e.g., State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶¶30 *et seq.* (O'CONNOR, Ch. J., concurring),

consideration of mitigation is the first step in the analysis, something that did not occur here.

The Supreme Court also cited the vulnerability and comparative lack of control over their immediate surroundings of juveniles. Accordingly, "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.*

> The 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. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson, supra,* at 368; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Roper v. Simmons, supra, 543 U.S., at 570. The Court went on in *Roper* to observe that it is difficult even for psychologists to differentiate between the juvenile offender "whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Though *Roper* was a death penalty case, all of what was said and the analysis applies with equal force to a

juvenile life sentence such as exists here, highlighted by the fact that the Judge did not even consider the youth of the defendant. Difficult as that differentiation is, it was not even attempted by the trial court in this case.

In 2010, the Supreme Court barred the imposition of life-without-parole sentences for juveniles convicted of non-homicide offenses. *Graham v. Florida, supra.* *Graham* pointed out that while the Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances, for the most part, the Court's precedents consider punishments challenged not as inherently barbaric, but as *disproportionate* to the crime. This Court of course has held that a term of years so long as to be a *de facto* life without parole sentence violates the Eighth Amendment because it denies a juvenile some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. See, *State v. Moore, supra,* 149 Ohio St.3d, at ¶47.

The concept of proportionality, said the Court in *Graham,* "is central to the Eighth Amendment." *Graham v. Florida,* 560 U.S., at 59. The judicial exercise of independent judgment requires consideration of the *culpability of the offenders* at issue in light of their crimes *and characteristics,* along with the severity of the punishment in question. *Graham, supra,* 560 U.S.., at 75, citing *Roper, supra,* 543 U.S., at 568;

Kennedy v. Louisiana, 554 U.S. 407, 418, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). In this analysis, the Court also considers whether the challenged sentencing practice serves legitimate penological goals. *Kennedy, supra*, 554 U.S., at 443. Again, though this is a homicide offense, everything that the Court had to say in *Graham* about proportionality, about the differences between juveniles and adults, and about delayed character development applies with equal force to the life sentence imposed upon Kyle here. Put another way, there is nothing constitutionally distinguishable about this case that warrants a court in failing to account for youth as a mitigating factor in its sentencing decision. The features of youth—delayed development, lessened moral culpability, all the things addressed in the cases—are not ameliorated because a trial judge decides to select a life sentence that does not have an LWOP component. To fail to require the same Eighth Amendment analysis in this case and cases like it because a judge gave less than the most serious version of life imprisonment would invite capricious sentencing, something else not well tolerated by the Eighth and Fourteenth Amendments.

The United States Supreme Court has also prohibited the mandatory imposition of life without parole for juvenile *homicide* offenders. See, *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 183 L.Ed.2d 407 (2012). In *Miller*, Justice Elena

Kagan in her opinion for the Court succinctly the issues and holding. In *Miller*, two 14-year-old offenders were convicted of murder and sentenced to life imprisonment without the possibility of parole. The sentencing authority had no discretion to impose a different punishment.

> State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold 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 v. Alabama, 567 U.S., at 465. The Eighth Amendment under *Graham, Miller*, and *Moore* applies to any life sentence, not just those where there is no chance of parole.

Amici has argued ably that the future possibility of discretionary parole is not an adequate substitute for individualized sentencing. Awaiting an act of executive branch discretion=, that may or may not occur, but if it does, will occur when the judge and the lawyers on the case are retired or dead, is reason enough why the law must catch pace with the learning. Parole may never occur no matter Kyle's behavior in prison. This makes his sentence every bit as serious as life without parole, for at the time of sentencing there is no way to meaningfully distinguish between the two.

Absent that future decision, as *amici* argues, Kyle may never see his family or friends outside of prison, go on a date, have children, or travel to another city—absent a prison transfer. *Amici* argues quite effectively that the presumption is that none of these things will ever happen. Whether they will or not, the fact remains that the single most important factor in determining the length of Kyle's sentence was not considered at the only time it could be. Sentencing courts cannot evade the Eighth Amendment by consciously imposing a sentence one tick below the "maximum" (LWOP), thereby evading the clear duty to consider youth. Thus any life sentence requires consideration of youth and the potential for change.

IV

Though this Is a Homicide Offense That Does Not Involve Life Without Parole, this Case Is Constitutionally No Different from Life Without Parole Cases in Terms of the Requirement to Consider as Part of Sentencing Youth and the Potential for Change.

The changes in juvenile justice described herein of course has application to Kyle, and indeed explain why the sentencing procedure below was constitutionally deficient. "[N]one of what [*Graham*] said about children" about their distinctive (and transitory) mental traits and environmental vulnerabilities "is crime-specific." *State v. Moore*, 149 Ohio St.3d, ¶73, citing *Miller*, 567 U.S. at 473. Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a

juvenile who committed the one offense or several offenses, and it was a juvenile who has diminished moral culpability. There is no reason to distinguish a homicide case with a life sentence that is *not* life without parole (LWOP) from a homicide case where LWOP is imposed. In all such cases the Eighth and Fourteenth Amendment requirements to consider youth and the potential for change are extant.

The Chief Justice has noted that all members of this Court (or all in 2014) agreed that a trial court must consider youth as a mitigating factor when formulating a sentence for a crime committed by a juvenile, but the court retains its broad discretion to determine how much weight to give that factor. *State v. Long, supra,* at ¶31 (O'CONNOR, Ch.J., concurring). "There is nothing novel about the fact that our youth commit murders and mayhem. But the legal lens through which we view their sentencing has changed." *Id.* at ¶32. "The United States Supreme Court has made clear that courts must treat youths who commit murders and other serious crimes differently from adults who commit those same crimes." *Id.,* at 33. There's no distinction between murders with an LWOP sentence and murders with a life sentence but no LWOP. Are we to believe that the Eighth Amendment does not require consideration of mitigation in the latter? Failure to account for mitigating factors is the same as invoking a standardless sentencing power that violates the

Eighth and Fourteenth Amendments. Mandatory statutes without consideration of youth and the potential for change is a myopic way of nodding at unbridled sentencing decisions. *Woodson v. North Carolina*, 428 U.S. 280, 302, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

The Court also has expressed concerns for the protection of the rights of juveniles that often goes a step beyond what we think is reasonable for adults. Drawing on *J. D. B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), this Court in *State v. Barker*, 149 Ohio St.3d 1, 2016-Ohio-2708, 73 N.E.3d 365 observed what any parent knows—indeed, what any person knows—about children generally. The Court held that the totality-of-the-circumstances test takes on even greater importance when applied to a juvenile because a 14-or 15-year-old "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." *State v. Barker*, 149 Ohio St.3d ¶39, quoting *Gallegos v. Colorado*, 370 U.S. 49, 53-54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962).

Both *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. The courts have found that the "heart of the retribution rationale," which might otherwise be called

"accountability," relates to an offender's blameworthiness. Given all that we know about juveniles, "'the case for retribution is not as strong with a minor as with an adult'" *Graham*, 560 U.S., at 71, quoting *Tison v. Arizona*, 481 U.S. 137, 149, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). See, also, *Roper*, 543 U.S., at 571, and *State v. Moore*, 149 Ohio St.3d, at ¶39. Thus, even though the offense for which Kyle was found guilty was "senseless," and even though the sentence imposed carries a *possibility*, however remote, for future release, the Judge in imposing it failed to consider Kyle's potential for rehabilitation and change. No sound constitutional reason can be given for singling out homicide offenses where no LWOP is imposed from homicide offenses where LWOP is imposed. No such reason exists. Conversely, everything about Eighth Amendment compels the conclusion that in every case where a juvenile is tried as an adult, youth, delayed development, and the potential for change must be considered, whether the sentence is life with a chance for parole or life with no chance for parole, for two such defendants standing side by side cannot be assured that both will not leave the prison in a coffin.

A sentencer must have the ability to consider the mitigating qualities of youth, which is more than a chronological fact. "It is a time of immaturity, irresponsibility, impetuousness[,] and recklessness." Youth is a "condition of life when a person may

be most susceptible to influence and to psychological damage." *Miller v. Alabama, supra*, 567 U.S., at 476, citing and quoting *Johnson v. Texas, supra*, 509 U.S., at 368, and *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Whether the juvenile judge before whom Kyle appeared wanted to treat him like an adolescent was of no consequence for Kyle was subject to a mandatory bind-over. See, *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883; but see, *id.*, at ¶52, *et seq.* (O'CONNOR, Ch.J., dissenting). In the adult court, there was no evidence in this record that the trial judge even *thought* along such lines, given his words and given the sentence imposed. While the statute did not require the sentence that the Judge imposed, it did require him to impose a life sentence. But the Constitution required the Judge to consider Kyle's youth and potential for change. How can a sentencing process be fair under such circumstances? Justice Harry Blackmun, joined by Justice John Paul Stevens, reminded us all that the Due Process Clause is not the Some Process Clause. See, *Medina v. California*, 505 U.S. 437, 463, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (BLACKMUN, J., joined by STEVENS, J., dissenting). Imposition of sentence without such consideration, precisely what took place here, violates the Eighth and Fourteenth Amendments. Kyle was denied Due Process and his sentence is Cruel and Unusual.

V

Failure to Bring to the Sentencing Court's Attention its Obligation to Consider *Miller* Factors and the Need for Jury Findings is Not Counsel Acting as Counsel.

Though not a proposition of law we must be mindful that there is an ineffective assistance of counsel element to this case. It is mentioned here not only because of what did—and did not—happen in this case, but also because if the Court accepts Kyle's proposition of law, then part and parcel of the duty of counsel will be to insure that an evidentiary presentation is made and arguments are made on behalf of juvenile defendants who are bound over and tried as adults in homicide cases, just as the obligation would be upon counsel in non-homicide cases. In addition to the well-known Sixth Amendment guarantee of effective counsel, Ohio Constitution, Article I, Section 10 promises the assistance of counsel.

As argued elsewhere herein, there is nothing in *Graham, Miller,* or *Roper,* that categorically prohibits the reasoning of these cases to be fully applicable to juveniles who are bound over and tried as adults in homicide offenses. The premise of *Miller* and its predecessors is that juveniles are mentally and emotionally under-developed at the time that they commit their offenses.

In this case, Kyle was represented by incredibly able trial counsel; the trial

judge even complimented the "amazing" job that Kyle's trial counsel did at trial. (T.p., Sentencing Hearing, T.d. 114, p. 15.) With due deference, because counsel is a skilled trial lawyer, where Kyle's trial counsel fell short, however, was at sentencing. To be sure, he brought to the attention of the trial judge that he has been unable to explain to Kyle the potential for conviction and punishing for a homicide offense where Kyle steadfastly maintained that he did not kill Big Mike, nor did he intend that Big Mike be killed.

What of course leaps off the page here after reading *Graham*, *Miller*, and *Moore* is that Kyle may have been unable to grasp that concept because of his lack of maturity and complete intellectual and emotional development. It may well have been that the trial judge would have brushed aside the arguments, intent as he appeared to be on comparing Kyle's offense to among the most "senseless" that he had seen in his years on the bench. There certainly seemed little chance that the trial judge would consider the *Miller* factors on his own, and indeed he did not. It was, however, incumbent upon Kyle's counsel to bring those factors to the Judge's attention.

It is easy to see why the two-part *Strickland* test is met here. Plainly, the holdings in *Graham* and *Miller*, establish an obligation on the part of defense counsel

either to bring evidence of youth and the potential for change to the trial judge, or to be overruled by the trial judge when attempting to do so. Failure to do so is the breach of the standard of conduct element. See, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The "benchmark for judging any claim of ineffectiveness" is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S., at 686.

There are of course two components to ineffective assistance. First, there must be a showing that counsel's performance was deficient, that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687. Second, there must be a showing that the deficient performance prejudiced the defense, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

The Eighth Amendment jurisprudence furnishes the performance prong. Counsel was obliged here, and, this Court should so hold, is obliged in every such case to argue, or at least attempt to argue, the youth and potential for change of the Defendant. That did not occur here, and the second prong is the constitutionally deficient sentence itself. The prejudice is manifest. Kyle was sentenced not as a

juvenile, having been convicted, to be sure, of terrible offenses, but nonetheless subject to the possibility of rehabilitation and redemption. Instead, because Kyle's counsel failed to attempt to present the evidence and arguments, the trial judge moved on to what he called the "easy" step of sentencing Kyle as an adult offender, comparing Kyle's conduct with the most senseless of other adult offenders to have appeared before the Judge, without any consideration of the mitigation of youth.

If one accepts that the mandatory minimum in this case is life imprisonment with the possibility of parole after 20 years (23 with the firearm specification), we have no jury finding to demonstrate why the judge should have sentenced a juvenile, already presumed less culpable than an adult who committed the same offense, to more than the mandatory minimum and to one level less than the absolute maximum (which in any event is barred by *Miller v. Alabama, supra*). See, *State v. Hand,* 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶22, citing *Alleyne v. United States,* 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Trial counsel failed to argue this at sentencing.

VI

The Record Must Reveal Consideration by The Sentencing Court of Youth as a Mitigating Factor.

Finally, this Court in *State v. Long,* 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d

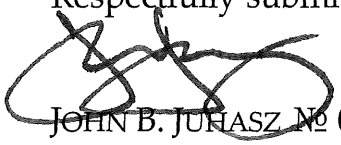
890 held that a court, in exercising its discretion under R.C. 2929.03(A), must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole; and that the record must reflect that the court specifically considered the juvenile offender's youth as a mitigating factor at sentencing when a prison term of life without parole is imposed. *Id.* syl. 1 and 2. As shown herein, there is no meaningful constitutional difference between the sentence imposed here and a life without parole sentence when it comes to the obligation to consider youth as a mitigating factor. There is no evidence of such consideration here, and in fact a fair reading of the record is that youth was ignored, while the senselessness of the crime was the sole sentencing factor. Thus, any ruling by this Court that the Eighth Amendment compels consideration of youth as a mitigating factor in a life with parole eligibility sentence must include a directive to the courts of this State that the record must affirmatively reflect such consideration.

CONCLUSION

The sentencing decision to sentence Kyle to life in prison with no meaningful opportunity for parole until at least age 50 and without so much as considering Kyle's youth and potential for change violates the Eighth and Fourteenth Amendments. Because there is no principled way to distinguish, nor has the Eighth

Amendment jurisprudence distinguished, any difference between life sentences with no chance for parole and life sentences with some hope of parole, this Court should declare that imposition of a any life imprisonment sentence upon a juvenile offender without taking into consideration factors commanded by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of Ohio violates those provisions. The Court should is so holding give clear guidance to sentencing judges and defense counsel as to how to comply with those constitutional provisions in the context of a juvenile tried and sentenced as an adult for homicide offenses.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. mail and by electronic mail on the 6th day of October, 2019 to: Mr. Ralph M. Rivera, Esq., 21 West Boardman Street, Youngstown, Ohio 44503; to Brooke M. Burns, Esq. Chief Counsel, Juvenile Department, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Amicus Curiae, Office of the Ohio Public Defender; and to Marsha L. Levick, Esq., and Andrew R. Keats, Esq., Juvenile Law Center, 1315 Walnut Street, 4th Floor, Philadelphia, PA 19107, Counsel for Amici Curiae, Juvenile Law Center.

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JOHN B. JUHASZ
COUNSEL FOR APPELLANT

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IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KYLE PATRICK,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0091

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 12-CR-969

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. Paul Gains, Prosecuting Attorney, *Atty. Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee, and

Atty. John Juhasz, 7081 West Boulevard, Suite 4, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated:
March 29, 2019

Donofrio, J.

{¶1} Defendant-appellant, Kyle Patrick, appeals his convictions and sentence in the Mahoning County Common Pleas Court for aggravated murder, aggravated robbery, tampering with evidence, and two firearm specifications following a jury trial.

{¶2} Appellant was initially charged in the Mahoning County Juvenile Court as he was 17 years old at the time the events occurred. On August 24, 2012, the juvenile court transferred the matter to the general division. On September 27, 2013, appellant was indicted and charged with: aggravated murder in violation of R.C. 2903.01(B)(F), an unclassified felony; aggravated robbery in violation of R.C. 2911.01(A)(1)(C), a first-degree felony; tampering with evidence in violation of R.C. 2921.12(A)(1)(B), a third-degree felony; and two firearm specifications pursuant to R.C. 2941.145(A).

{¶3} On February 10, 2014, the date of trial, appellant and plaintiff-appellee, the State of Ohio, engaged in last-minute plea negotiations. The state agreed to amend the aggravated murder charge to murder in violation of R.C. 2903.02(A)(D), an unclassified felony. Appellant pled guilty to the amended murder charge and the other charges. The trial court accepted appellant's guilty plea and scheduled a sentencing hearing for March 10, 2014.

{¶4} On February 18, 2014, appellant filed a motion to withdraw his guilty plea. The trial court denied the motion and sentenced appellant to 16 years to life imprisonment.

{¶5} On July 16, 2014, appellant appealed to this court asserting one assignment of error; the trial court abused its discretion in denying his motion to withdraw his guilty plea. On June 1, 2016, we issued our opinion and judgment entry on appellant's first appeal. We found merit with appellant's assignment of error, vacated his guilty plea, and remanded the matter for further proceedings. *State v. Patrick*, 7th Dist. No. 14 MA 93, 2016-Ohio-3283, ¶ 62.

{¶6} On remand, the trial court scheduled a jury trial for April 24, 2017. Trial was held on all of the original charges, including aggravated murder. At trial, the state

called 15 witnesses and submitted numerous exhibits in its case-in-chief. The state's theory of the case was that appellant and two co-defendants planned to steal, using force, various items from Michael Abighanem. Appellant brought a gun with him for this purpose. During the planned robbery, appellant shot and killed Abighanem. Appellant then took the items from Abighanem and tried to clean Abighanem's blood off of them by using bleach.

{¶7} The jury convicted appellant on all counts. At sentencing, the trial court merged appellant's aggravated robbery conviction and its firearm specification with the aggravated murder conviction and its firearm specification. The trial court sentenced appellant to life imprisonment with parole possibility after 30 years for aggravated murder plus the mandatory three years of incarceration for the firearm specification. The trial court sentenced appellant to three years of incarceration for tampering with evidence. As the trial court did not make the statutory findings for consecutive sentences, appellant's total sentence was life imprisonment with parole possibility after 33 years. The trial court memorialized appellant's sentence in a judgment entry dated May 4, 2017. Appellant timely filed this appeal on May 15, 2017. Appellant now raises four assignments of error.

{¶8} Appellant's first assignment of error states:

> IMPOSING A LIFE IMPRISONMENT SENTENCE UPON A JUVENILE OFFENDER WITHOUT TAKING INTO CONSIDERATION FACTORS COMMANDED BY U.S. CONST., AMEND. VIII AND XIV AND OHIO CONST., ART. I §9 VIOLATES THOSE PROVISIONS.

{¶9} Appellant argues that it was unconstitutional for the trial court to sentence him to life imprisonment with parole possibility after 33 years without taking into consideration that he was a juvenile at the time the offenses occurred.

{¶10} When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231 ¶ 1.

{¶11} Appellant's aggravated robbery sentence and its firearm specification merged with his aggravated murder sentence and its firearm specification. Appellant's firearm specification sentence is to be served consecutive to his aggravated murder

sentence. Finally, appellant's tampering with evidence sentence is to be served concurrently with his aggravated murder sentence.

{¶12} Aggravated murder is an unclassified felony. The possible prison sentences for aggravated murder are life imprisonment without parole or life imprisonment with parole eligibility after 20 years, 25 years, or 30 years. R.C. 2929.03(A)(1)(a)-(d). The trial court sentenced appellant to life imprisonment with parole possibility after 30 years on this count. Tampering with evidence is a third-degree felony. The possible prison sentences for a third-degree felony are 9, 12, 18, 24, 30, or 36 months. R.C. 2929.14(A)(3)(b). The trial court sentenced appellant to three years, or 36 months, on this count. The trial court also sentenced appellant to three years for the firearm specification, which is mandatory pursuant to R.C. 2941.145(A). Thus, each of appellant's sentences complied with the applicable statute.

{¶13} Appellant cites three cases from the U.S. Supreme Court in support of his argument. The first is *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In *Roper*, the Court held that the Eighth and Fourteenth Amendments barred the imposition of the death penalty to offenders who were under the age of 18 when the offenses were committed. *Id.* at 578-59. *Roper* is inapplicable because appellant was not sentenced to death.

{¶14} Appellant also cites *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). In *Graham*, the Court reaffirmed *Roper* holding that "because juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham* at 68 citing *Roper*, 543 U.S. at 569. The *Graham* Court went on to hold that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* citing *Thompson*, 487 U.S. at 835. Appellant argues that these cases show that the age of juvenile defendants should be considered when they are sentenced, especially if the sentence is potentially life imprisonment.

{¶15} *Graham* specifically held that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit a homicide. *Graham* at 82. *Thompson* held that the imposition of the death penalty on a 16-year old

was unconstitutional. *Thompson* at 838. In this case, appellant was convicted of a homicide offense and was sentenced to life with parole possibility after 33 years. These facts make *Graham* and *Thompson* distinguishable to the extent that appellant can be paroled after 33 years.

{¶16} Pursuant to R.C. 2929.12, a trial court is not required to consider the age of a defendant when issuing a felony sentence. While R.C. 2929.12(C) and (E) provide that "any other relevant factors" should be considered, the statute itself does not mandate the sentencing court to consider the defendant's age.

{¶17} Appellant also argues that his sentence is disproportionate to the sentence of one of his co-defendants, Reginald Whitfield. Whitfield was sentenced to 13 years of incarceration after pleading guilty to involuntary manslaughter with a firearm specification and aggravated robbery. Whitfield's decision to plead guilty to the lesser offense of involuntary manslaughter explains the discrepancy between Whitfield's sentence and appellant's sentence. Moreover, arguments regarding proportionality and consistency of sentences must first be raised in the trial court. *State v. Williams*, 7th Dist. No. 11 MA 131, 2012-Ohio-6277, ¶ 77. Appellant did not raise a proportionality argument with the trial court during sentencing. Because appellant did not raise this argument with the trial court, this argument is waived.

{¶18} After a review of the record, appellant's sentence is not clearly and convincingly contrary to law.

{¶19} Accordingly, appellant's first assignment of error lacks merit and is overruled.

{¶20} Appellant's second assignment of error states:

> THE FAILURE OF THE TRIAL COURT TO GIVE INSTRUCTIONS ON LESSER INCLUDED OFFENSES DENIED APPELLANT DUE PROCESS IN THE FULL EXPOSITION OF HIS RIGHT TO TRIAL BY JURY. (T.P. VOLL. III, P. 525).

{¶21} Appellant argues that the jury should have been given an instruction on a lesser-included offense to aggravated murder, specifically involuntary manslaughter.

{¶22} When reviewing a trial court's jury instructions, the proper standard of review of the trial court's refusal to give a requested jury instruction is whether such refusal constituted an abuse of discretion under the facts and circumstances of the case. *State v. Everson*, 7th Dist. No. 12 MA 128, 2016-Ohio-87, ¶ 58. Abuse of discretion connotes more than an error in judgment; it implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶23} The Ohio Supreme Court has defined lesser-included offenses: "(i) [T]he offense is a crime of lesser degree than the other, (ii) the offense of the greater degree cannot be committed without the offense of the lesser degree also being committed and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987).

{¶24} The Ohio Supreme Court set forth the test for when the trial court is required to give the jury an instruction on a lesser-included offense: "[i]f the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state on the remaining elements, which by themselves would sustain a conviction on a lesser-included offense, then a charge on the lesser-included offense is required." *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 20 quoting *State v. Kilby*, 50 Ohio St.2d 21, 361 N.E.2d 1336 (1977). "Conversely, if the jury could not reasonably find against the state on an element of the crime, then a charge on a lesser-included offense is not only not required, but is also improper." *Id.*

{¶25} At trial, after the state rested, appellant moved to have the jury instructed on the lesser-included offense of involuntary manslaughter. (Tr. 519). The trial court denied appellant's motion on the basis that "the jury could not * * * reasonably find against the state on the element of purposefulness" of aggravated murder. (Tr. 526).

{¶26} This court has previously held that involuntary manslaughter is a lesser-included offense of aggravated murder. *State v. Adams*, 7th Dist. No. 08 MA 246, 2011-Ohio-5361 ¶ 331 *rev'd on other grounds*, *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 429. Thus, we must move on to consider whether the trial court should have given an instruction on involuntary manslaughter in this case.

{¶27} The elements of aggravated murder are: "[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *." R.C. 2903.01(A). The elements of involuntary manslaughter are: "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." R.C. 2903.04(A).

{¶28} The key distinction between these two offenses is the requisite level of intent. Therefore, in order for an instruction on involuntary manslaughter to be warranted in this case, the jury must have been able to reasonably find in favor of appellant and against the state on the element of purposefulness.

{¶29} Appellant argues that there was no evidence as to how exactly the shooting occurred because the witnesses who testified at trial were not in the room when the shooting occurred. Appellant argues that this is sufficient to show that the jury could have reasonably concluded that appellant was guilty of involuntary manslaughter and not aggravated murder.

{¶30} Mike Nakoneczny, Abighanem's best friend, testified at trial. Nakoneczny and Abighanem drove to Jujuan Jones's house on the west side of Youngstown so Abighanem could sell a laptop and a PlayStation. (Tr. 154). When they got to the house, Nakoneczny noticed two men outside who followed Abighanem into the house. (Tr. 156-157). When Nakoneczny entered the house, he noticed Abighanem turning on the PlayStation to show the two men it worked. (Tr. 157). Abighanem and the "taller guy" then went to the upstairs of the house to connect the PlayStation to a TV on the second floor. (Tr. 157-158). Nakoneczny did not go upstairs. (Tr. 158). As soon as Abighanem reached the top of the stairs, Nakoneczny heard a gunshot. (Tr. 158). Nakoneczny then heard another man yell "[g]et on the floor," Abighanem yelled "Mike," and a second gunshot was fired. (Tr. 158-159). Nakoneczny then ran from the house. (Tr. 159-160). Nakoneczny did not hear anything that indicated a scuffle, people pushing things around, or "any kind of tussling" from the upstairs. (Tr. 162).

{¶31} Aric Longcoy also testified at trial. Longcoy met appellant at appellant's house on the date at issue. (Tr. 318). Appellant told Longcoy that he planned to rob Abighanem. (Tr. 318). Longcoy was opposed to appellant robbing Abighanem and an argument between the two ensued. (Tr. 318-319). Longcoy walked with appellant and

Reginald Whitfield to Jujuan Jones' house trying to convince appellant not to rob Abighanem. (Tr. 319). When everyone arrived at Jones' house, appellant, Whitfield, and Jones put Longcoy in the basement to prevent him from warning anyone about the robbery. (Tr. 319). Appellant was the one who arranged the meeting with Abighanem by phone. (Tr. 320). Longcoy saw appellant with a "small black gun" at some point (Tr. 322-323).

{¶32} Longcoy managed to get out of the basement via a patio doorway. (Tr. 322). Shortly after Longcoy escaped the house, he heard a gunshot. (Tr. 321). Longcoy then returned to appellant's home in order to retrieve some items he left there. (Tr. 323). Appellant, Whitfield, and Jones were already at appellant's home by the time Longcoy arrived. (Tr. 324). Appellant's grandmother was also present but Longcoy was afraid to tell her about what happened. (Tr. 324). Appellant's grandmother offered to give Longcoy a ride somewhere. (Tr. 324). Longcoy asked to be dropped off at another person's house so appellant, Whitfield, and Jones would not follow him home. (Tr. 325). Appellant, Whitfield, and Jones also got in the car with appellant's grandmother. (Tr. 325). Appellant and Longcoy ended up at Chelsea Daviduk's house in Struthers, Ohio. (Tr. 326). At Daviduk's house, appellant told Longcoy that he and Abighanem "got into a struggle" and that appellant shot Abighanem. (Tr. 328-329).

{¶33} On cross-examination, Longcoy testified that he knew Abighanem would "fight back" on any attempt to be robbed. (Tr. 346). Longcoy also testified that appellant threatened to kill him if he tried to leave or tell anyone about their plan. (Tr. 346). Longcoy was not in the house when Abighanem was shot. (Tr. 348). Longcoy was at least 1,000 feet away from the house when he heard a gunshot. (Tr. 350).

{¶34} Daviduk also testified. She said that when appellant came to her house, he looked "pale" and had fresh clothes, "like he just took a shower." (Tr. 281). Appellant also mentioned that he had a "lick," a robbery, "somewhere in Campbell, east side of Campbell." (Tr. 281). Daviduk heard from Longcoy that appellant shot Abighanem. (Tr. 282). Daviduk noticed appellant cleaning blood off of various items in a backpack. (Tr. 285).

{¶35} Detective Sergeant Ronald Rodway, the lead investigator into Abighanem's death, also testified. Detective Rodway interviewed appellant as part of his investigation.

(Tr. 468). At first, appellant denied being at the home where Abighanem was killed. (Tr. 469). Appellant later admitted he was there. (Tr. 469). Appellant told Detective Rodway that he was in an upstairs closet when Whitfield and Abighanem came upstairs. (Tr. 470). Appellant told Detective Rodway that Whitfield was the one who pulled a gun on Abighanem. (Tr. 470). Appellant admitted to Detective Rodway he had a gun. (Tr. 471). Appellant admitted to having the backpack with the items in it at Daviduk's house and cleaning them off. (Tr. 474). Appellant also claimed that there were six or seven gunshots fired, which was inconsistent with the other interviews Detective Rodway conducted. (Tr. 481-482). Detective Rodway's investigation led him to believe that appellant knew there was going to be a robbery on the day at issue. (Tr. 495-496).

{¶36} Nakoneczny was the only witness to testify at trial who was in the house when the gunshots were fired. His testimony indicated that a gunshot was fired as soon as Abighanem reached the top of the stairs followed by a second gunshot shortly afterwards. His testimony also indicated that there was no struggle or fight once Abighanem reached the top of the stairs. Thus, his testimony demonstrated to the jury that appellant acted purposefully in shooting Abighanem. Because of Nakoneczny's testimony, the jury could not reasonably find against the state on the element of purposefulness of aggravated murder and find for appellant on the lack of purposefulness for involuntary manslaughter. Therefore, the lack of an involuntary manslaughter instruction was not an abuse of discretion.

{¶37} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶38} Appellant's third assignment of error states:

> THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW, EQUAL PROTECTION AND BENEFIT OF THE LAWS, THE RIGHT TO JUSTICE WITHOUT DENIAL, AND THE PROHIBITION AGAINST MULTIPLE PUNISHMENTS WHEN IT SENTENCED APPELLANT TO MAXIMUM CONSECUTIVE TERMS TOTALING 30 YEARS TO LIFE, WHEN THERE WERE NO ADDITIONAL OR INTERVENING FACTS TO JUSTIFY THE DRASTIC SENTENCE ENHANCEMENT, THUS

TRIGGERING THE PRESUMPTION THAT THE RE-SENTENCING WAS VINDICTIVE.

{¶39} Appellant argues that the trial court issued a vindictive sentence at the conclusion of his trial. When appellant entered into the plea deal, the trial court sentenced him to 16 years to life. At the conclusion of appellant's trial, the trial court sentenced him to 33 years to life.

{¶40} Because this assignment of error challenges appellant's sentence, it is subject to same standard of review set forth in appellant's first assignment of error; the sentence will be upheld unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *Marcum*, 2016-Ohio-1002 at ¶ 1.

{¶41} Appellant argues that the trial court issued him a vindictive sentence because he exercised his right to have a trial after his successful appeal. "[P]enalizing those who choose to exercise constitutional rights [is] patently unconstitutional." *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) *quoting U.S. v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725. When a judge issues a defendant a harsher sentence after a new trial, the judge must affirmatively state the reasons for the harsher sentence. *Id.* at 726.

{¶42} The U.S. Supreme Court later limited the *Pearce* presumption of vindictiveness in *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). In *Smith*, the Court held that the *Pearce* presumption does not apply when a defendant who receives one sentence after entering a guilty plea successfully appeals to withdraw that plea, then receives a harsher sentence after a trial. *Id.* at 802-803. The Court explained that a trial generally affords the trial court more relevant sentencing information than a guilty plea. *Id.* The Ohio Supreme Court adopted the *Smith* ruling limiting the *Pearce* presumption of vindictiveness. *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431.

{¶43} Appellant cites two Ohio cases in support of his argument that the *Pearce* presumption of vindictiveness applies: *State v. Collins*, 8th Dist. Nos. 98575, 98595,

2013-Ohio-938, and *State v. Thrasher*, 178 Ohio App.3d 587, 2008-Ohio-5182, 899 N.E.2d 193 (2d Dist.). Both of these cases are distinguishable. In both cases, the appellants' original convictions and sentences were the result of trials, not guilty pleas. See *Collins* at ¶ 4; *Thrasher* at ¶ 2. In this case, appellant's original conviction and sentence prior to his first appeal were the result of a guilty plea.

{¶44} A similar issue to this case was addressed by this court in *State v. Adams*, 7th Dist. No. 13 MA 130, 2014-Ohio-5854. In *Adams*, Adams entered into an *Alford* plea to eight counts of rape. *Id.* at ¶ 2-3. Adams filed a pre-sentence motion to withdraw his plea which the trial court denied. *Id.* at ¶ 4. Adams was then sentenced to 15 years of incarceration. *Id.* This court reversed the trial court's ruling, vacated Adams' convictions, and remanded the matter for further proceedings. *Id.* at ¶ 5.

{¶45} On remand, Adams had a trial where he was found guilty on all eight counts of rape. *Id.* at ¶ 6. Adams was then sentenced to 80 years of incarceration. *Id.* Adams appealed again arguing, among other things, that his sentence was vindictive. *Id.* at ¶ 8. This court applied *Smith* and held that there was no presumption of vindictiveness and the burden rested on Adams to show actual vindictiveness. *Id.* at ¶ 16-18.

{¶46} Appellant does not point to anything in the record that indicates the trial court acted vindictively when it sentenced him after his trial. Appellant relies on the *Pearce* presumption, which is inapplicable because appellant's original conviction and sentence was the result of a guilty plea. Without any evidence of actual vindictiveness, we find no error with appellant's sentence.

{¶47} Accordingly, appellant's third assignment of error lacks merit and is overruled.

{¶48} Appellant's fourth assignment of error states:

> APPELLANT WAS DENIED DUE PROCESS WHEN THE STATE ADDUCED EVIDENCE THAT APPELLANT WAS A JUVENILE PROBATIONER, THUS UNDERCUTTING THE STATE'S OBLIGATION TO PROVE THE OFFENSES BEYOND A REASONABLE DOUBT WITH EVIDENCE ON THAT THE APPELLANT COMMITTED THE INDICTED OFFENSES, AND NOT WITH "OTHER ACT" EVIDENCE.

{¶49} Appellant argues that the state should not have been permitted to elicit evidence at trial that indicated he had a delinquency record.

{¶50} There are three instances at trial where appellant argues the state elicited testimony that he had a delinquency record. The first is from Wes Skeels who testified at trial that he was the chief probation officer for the Mahoning County Juvenile Court at the time of the investigation into Abighanem's death. (Tr. 366). The second is from Detective Rodway where he testified that when he learned appellant was a juvenile, he contacted Skeels, "the chief probation officer at the time * * *." (Tr. 463). The third is also from Detective Rodway where he testified that a "probation search" of appellant's home was conducted. (Tr. 475). Appellant did not object to any of these statements.

{¶51} Failure to object to trial testimony waives all but a plain error review. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 108. An alleged error is plain error only if the error is "obvious," *Id.* citing *State v. Barnes*, 94 Ohio St.2d 21, 27, 759 N.E.2d 1240, (2002), and "but for the error, the outcome of the trial would have been otherwise." *Id.* citing *State v. Long*, 53 Ohio St.3d 91, 372 N.E.2d 804 (1978).

{¶52} Appellant argues that the admission of any reference to his "probation" violates this court's ruling in *State v. Anderson*, 7th Dist. No. 03MA252, 2006-Ohio-4618. In *Anderson*, this court held that the state may not introduce evidence for the primary purpose of generally identifying the defendant as a criminal. *Id.* at ¶ 63.

{¶53} But we also held in *Anderson* that "a parole officer may testify in the guilt phase of trial without violating Evid.R. 404(A) if the parole officer's status as a parole officer is inextricably linked to the state's presentation of its case." *Id.* at ¶ 73 citing *State v. Cowans*, 87 Ohio St.3d 68, 717 N.E.2d 298 (1999). We went on to hold that a probation officer testifying at trial may identify himself as a probation officer in order to make sense of his testimony. *Id.* at ¶ 75.

{¶54} Skeels testified that he contacted appellant's parents, the parents gave Skeels permission to search appellant's room, and two .22 caliber bullets were discovered in appellant's dresser. (Tr. 367-368). As for Detective Rodway, he first testified that he contacted "Wes [Skeels], who was the chief probation officer at the time," after learning that appellant was a juvenile. (Tr. 463). Detective Rodway then testified "later that

afternoon is when we found out about the probation search of the house where they found the bullets." (Tr. 475).

{¶55} The references to "probation" by Skeels and Detective Rodway do not violate *Anderson*. They were used to lay a foundation as to how appellant's room was searched during the investigation into Abighanem's death. Moreover, neither Skeels nor Detective Rodway testified as to what, if any, prior crimes appellant may have committed. For these reasons, we find no plain error.

{¶56} Additionally, appellant argues that his trial counsel's failure to object to the probation references constitutes ineffective assistance of counsel. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *State v. Sanders*, 94 Ohio St. 3d 150, 2002-Ohio-350, 761 N.E.2d 18 citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

{¶57} Because we find no plain error with the references to probation, trial counsel's representation did not fall below an objective standard of reasonableness. Therefore, appellant's trial counsel was not ineffective.

{¶58} Accordingly, appellant's fourth assignment of error lacks merit and is overruled.

{¶59} For the reasons stated above, the trial court's judgment is hereby affirmed.

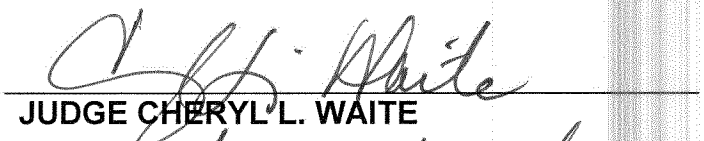
Waite, P. J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

JUDGE GENE DONOFRIO



JUDGE CHERYL L. WAITE

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

IN THE COURT OF COMMON PLEAS

MAHONING COUNTY, OHIO

STATE OF OHIO	)	***CASE NO. 12-CR-969***
	)	
PLAINTIFF	)	JUDGE JOHN M. DURKIN
	)	
VS.	)	
	)	***JUDGMENT ENTRY***
KYLE PATRICK	)	
	)	
DEFENDANT	)	

2012 CR
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CRJUD

On May 1, 2017, Defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defense Attorney, Mark Lavelle and Prosecuting Attorneys Dawn Cantalamessa and Meghan Brundege were present, as was Defendant who was afforded all rights pursuant to Criminal Rule 32.

The Court finds that the Defendant has been convicted following a Jury Trial in Count One to Aggravated Murder, a violation of Ohio Revised Code Section 2903.01(B)(F), with a firearm specification in violation of Ohio Revised Code Section 2941.145(A); in Count Two with Aggravated Robbery, a violation of Ohio Revised Code Section 2911.01(A)(1)(C), a felony of the first degree, with a firearm specification in violation of Ohio Revised Code Section 2941.145(A); and in Count Three with Tampering with Evidence, a violation of Ohio Revised Code Section 2921.12(A)(1)(B), a felony of the third degree.

The Court considered the record, oral statements, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12.

It is hereby ORDERED that Defendant serve a term of Life Imprisonment with parole eligibility after serving THIRTY (30) FULL YEARS of imprisonment. As to the firearm specification, the Defendant is ordered to serve THREE (3) YEARS actual incarceration to be served prior to and consecutive to the sentence imposed in Count One.

The conviction for Aggravated Robbery in Count Two, along with the firearm specification attached to Count Two, shall merge with Count One for purposes of sentencing.

As to Count Three, Tampering with Evidence, the Defendant shall serve a definite sentence of THREE (3) YEARS.

Defendant is ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections. Credit for one thousand, eight hundred, thirty (1830) days is granted as of this date along with future custody days while Defendant awaits transportation to the appropriate state institution.

In addition, as part of this sentence, post release control shall be imposed up to a maximum period of five (5) years. Any violation of post release control could result in the Defendant being returned to prison for a period of up to nine (9) months, with a maximum period for repeated violations that could equal up to fifty (50) percent of the stated term. If the violation is a new felony, the Defendant may be returned to prison for the remaining period of post release control, or twelve (12) months, whichever is greater, in addition to receiving a consecutive prison term for the new felony offense.

The fine and costs are suspended.

Defendant has been given notice of his appellate rights under R.C. 2953.08.

5/2/17

DATE:

JUDGE JOHN M. DURKIN

TO THE CLERK:
Please provide a time stamped copy of the foregoing Judgment Entry to the following:

Attorney Mark Lavelle
Mahoning County Prosecutor's Office - Box # 400

UNITED STATES CONSTITUTION, AMENDMENT VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CONSTITUTION, AMENDMENT XIV
§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION, Article I, Sec. 10
Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

R.C. 2929.02 Murder penalties.
(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the

Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B)

(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D)

(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

R.C. 2929.03 Imposition of sentence for aggravated murder.

(A) If the indictment or count in the indictment charging aggravated murder does

not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)

(1) If the indictment or count in the indictment charging aggravated murder

contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)

(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment,

count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)

(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the

aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the

indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this

section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)

(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall make and retain a copy of the entire record in the case, and shall deliver the original of the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall make and retain a copy of the entire record in the case, and shall deliver the original of the entire record in the case to the supreme court.