In the
Supreme Court of Ohio

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

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

The United States and Ohio constitutions both forbid "cruel and unusual punishments." Eighth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 9. These cruel-and-unusual-punishment clauses both ban barbarous forms of punishment. Do they also contain a procedural element, under which trial courts must expressly consider a juvenile murderer's age before sentencing him to life *with* the possibility of parole after thirty-three years? That is the question this case presents. The answer is no—but there are good reasons to dismiss the case as improvidently accepted without providing an answer.

Start with the merits. Binding precedent rests on the premise that juvenile offenders differ from their adult counterparts in their capability for reform. Thus, unless a murderer who commits his crime before turning eighteen is "the rare juvenile offender whose crime reflects irreparable corruption," *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (citation omitted), his sentence must leave him with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, ¶44 (citation omitted). According to these precedents, denying such an opportunity to a murderer who is not irreparably corrupt constitutes cruel and unusual punishment.

To keep the non-incorrigible from being denied a meaningful opportunity to obtain release, the courts have adopted a prophylactic requirement: sentencing courts

must consider a juvenile murderer's "age and age-related characteristics" before imposing a sentence of life without the possibility of parole. *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *accord State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, ¶1. This ensures that every juvenile murderer denied "some meaningful opportunity to obtain release" at the back end of his sentence, *Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted), is adjudicated incapable of reform on the front end.

This prophylactic requirement has no bearing outside the context of sentences that deny the defendant "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. (citation omitted). Thus, if the sentence itself will allow the defendant to secure release based on demonstrated maturity and rehabilitation, there is no reason to make courts consider the defendant's age and age-related characteristics—unlike the murderer sentenced to life without the possibility of parole, the murderer sentenced to life *with* the possibility of parole during his lifetime is not being deprived of his chance to reform himself and win release.

It follows that the Seventh District Court of Appeals properly affirmed Kyle Patrick's sentence. At seventeen, Patrick and a group of friends lured an innocent man to a home, laid in wait, and then murdered him. The group committed the murder because they wanted the PlayStation the man was selling, but they did not want to pay. Given the cold-blooded, heinous nature of the crime—ending a life to save a few bucks on a video-game console—the sentencing court could almost surely have considered Pat-

rick's age-related characteristics, deemed him incorrigible, and sentenced him to life without the possibility of parole. But it did not do that. Instead, it showed Patrick the mercy that Patrick denied to his victim: the court sentenced Patrick for his aggravated murder to life *with* the possibility of parole after just thirty-three years, when Patrick will still have much of his life before him. Because that sentence leaves Patrick with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," it violates neither the Eighth Amendment nor Article I, Section 9 of Ohio's Constitution. *See Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted).

All this establishes that the Court should rule for the State if it reaches the merits. But the better course would be to dismiss the appeal as improvidently accepted. The most glaring problem (though not the only problem) with this vehicle is that Patrick has not briefed the threshold jurisdictional question whether the Court even has authority to hear this case. And that is an important question because some appellate districts—including the Eighth District, in an opinion by then-Judge Stewart—have held that life sentences for aggravated murder are not appealable under Ohio law. *State v. Campbell*, 8th Dist. Cuyahoga No. 103982, 2016-Ohio-7613, ¶16 (per Stewart, J.) (quoting *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶17); *State v. Weaver*, 5th Dist. Muskingum No. CT2016-0033, 2017-Ohio-4374, ¶¶17–20; *State v. Hawkins*, 4th Dist. Gallia No. 13CA3, 2014-Ohio-1224, ¶¶13–15; *State v. Burke*, 2d Montgomery No. 26812, 2016-Ohio-8185, ¶¶13–28; *State v. Jones*, 2d Dist. Clark No. 2012 CA 61, 2013-Ohio-4820, ¶¶22–26;

State v. Kinney, 7th Dist. Belmont No. 18 BE 0011, 2019-Ohio-2704, ¶¶134–38, *discretionary appeal pending*, Case. No. 2019-1103; *see also State v. Roark*, 3d Dist. Mercer No. 10-14-11, 2015-Ohio-3811, ¶13. The Court must answer this jurisdictional issue before reaching the merits. Rather than resolving the jurisdictional issue here in the first instance, the Court should wait for a case where the issue was addressed below and briefed by the appellant.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in ensuring that Ohio's juvenile sentencing structure is properly construed and applied. The Attorney General is also interested in protecting Ohio's Constitution against misconstruction. Because the Seventh District Court of Appeals correctly determined that a juvenile who commits a homicide offense may constitutionally receive a sentence of life with parole eligibility within the offender's lifetime, the Attorney General is filing this amicus brief.

STATEMENT OF THE CASE AND FACTS

A. How many seventeen-year-olds want a PlayStation and a laptop? Probably many. But how many want a PlayStation and laptop badly enough to kill a man? One, at least.

Michael Abighanem posted his PlayStation and laptop for sale on Craigslist. Kyle Patrick and two others decided to rob Abighanem of those items—by force, if necessary. *State v. Patrick*, 7th Dist. No. 17 MA 0091, 2019-Ohio-1189 ("App. Op."), ¶¶6, 30–31. Patrick (or one of his co-conspirators) called Abighanem and invited him to a home on the west side of Youngstown, where Patrick would purchase Abighanem's electronics. *See* App. Op. ¶30. Patrick's two co-conspirators were already at the house when he arrived with a third friend, Aric Longcoy, who learned from Patrick of the plan to rob Abighanem. App. Op. ¶31. Longcoy pleaded with Patrick not to go through with the robbery. To no avail. And once the group arrived, Patrick and the others put Longcoy in the basement to keep him from warning anyone. App. Op. ¶31. Not content to merely confine the friend, Patrick threatened to kill him if he attempted to escape or tell anyone about the planned robbery. App. Op. ¶33. Longcoy saw that Patrick had a small black gun. App. Op. ¶31.

Abighanem arrived to sell the PlayStation and laptop. He brought a friend of his own: Mike Nakoneczny. App. Op. ¶30. One of the would-be robbers invited Abighanem upstairs alone, leaving Nakoneczny downstairs, supposedly so Abighanem could attach the PlayStation to a TV to show them that it worked. App. Op. ¶30. But as soon as they got upstairs, Nakoneczny heard a gunshot and then heard Abighanem crying out "Mike!" App. Op. ¶30. Then a second gunshot. Then silence. App. Op. ¶30. At no point did Nakoneczny hear anything suggestive of a scuffle or fight. App. Op.

¶¶30, 36. Patrick's friend (Longcoy) had just escaped the basement when he too heard a gunshot. App. Op. ¶32. Longcoy returned to Patrick's home to retrieve some items he had left there, but Patrick and the other co-defendants were already there when Longcoy arrived. Longcoy accepted a ride home from Patrick's grandmother, but because Patrick and the other co-defendants were in the car, Longcoy went to another friend's house to avoid having Patrick and the others follow him home. App. Op. ¶32.

The other friend was Chelsea Daviduk. Soon enough, Patrick and Longcoy showed up at her home. Daviduk would later testify that, when Patrick arrived, "he looked 'pale' and had fresh clothes, 'like he just took a shower.'" App. Op. ¶34. And according to Daviduk, Patrick said that "he had a 'lick,' a robbery" earlier, and Daviduk heard from Longcoy that Patrick shot the person he robbed. App. Op. ¶34. Longcoy had testified that Patrick said he only shot the victim after they "got into a struggle." App. Op. ¶32. At Daviduk's house, Patrick cleaned blood off several items, including a PlayStation and a laptop, with bleach. App. Op. ¶¶6, 34.

B. The police eventually linked Patrick to the murder and questioned him about his involvement. At first, Patrick told police that he was not at the home where Abighanem was murdered. App. Op. ¶35. Then, he changed his story and admitted he was there, hiding in a closet while waiting for Abighanem to come upstairs. Patrick also admitted that he had a gun. App. Op. ¶35. Patrick admitted that he had the stolen items and had cleaned them off after the incident. App. Op. ¶35. Still, he insisted that

one of his accomplices actually fired the fatal shot. App. Op. ¶35. Patrick further insisted that, in the course of the tussle, he heard six or seven gunshots (not the one or two that the others claimed to have heard). App. Op. ¶35.

Because Patrick was seventeen at the time that he murdered Abighanem, authorities initially charged him in Mahoning County Juvenile Court. App. Op. ¶2. After appointing counsel, the court bound Patrick over to Mahoning County Common Pleas Court, where the State charged him with aggravated murder, aggravated robbery, tampering with evidence, and two firearm specifications. App. Op. ¶2. On the eve of trial, Patrick struck a deal with the prosecutors, agreeing to plead guilty in exchange for a reduction of his aggravated-murder charge to a murder charge under R.C. 2903.02(A)(D). App. Op. ¶3. However, before sentencing, Patrick filed a motion to withdraw his guilty plea. App. Op. ¶4. At the change of plea hearing, Patrick expressed his willingness to risk going to trial and facing significant jail time to clear his name. R. 61, Tr. 11.

The trial court denied the motion to withdraw and imposed a sentence of sixteen years to life. App. Op. ¶4. Patrick appealed to the Seventh District Court of Appeals, asserting that the trial court had abused its discretion when it denied his motion. App. Op. ¶5. The appellate court agreed with Patrick, vacating his guilty plea and remanding the case back to the trial court for further proceedings. *See State v. Patrick*, 7th Dist. No. 14 MA 93, 2016-Ohio-3283, ¶62.

After successfully withdrawing his guilty plea, Patrick exercised his right to a jury trial in Mahoning County Common Pleas Court. App. Op. ¶6. At trial, Patrick's lawyers acknowledged his guilt in the tampering-with-evidence charge, but argued the State could not meet its burden to prove Patrick was the actual triggerman who killed Abighanem. R. 116, Tr. 127–29 (opening statement of defense counsel). The jury convicted Patrick on all counts. App. Op. ¶7.

At the sentencing hearing following Patrick's conviction, both defense counsel and the State addressed the judge directly regarding Patrick's age. Defense counsel and Patrick's mother implored the court to grant a lenient sentence based on Patrick's age at the time of the crime. R. 113, Tr. 7, 12–13. Even the prosecutor acknowledged Patrick's age, citing his age and this Court's decision in *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, as her reason to recommend a sentence below the statutory maximum. R. 113, Tr. 5.

The judge did not specifically discuss Patrick's age in his comments at the sentencing hearing, though it appears that the judge took Patrick's youth into account: the court opted against imposing the maximum sentence available—life without the possibility of parole—and imposed the lesser sentence of life with parole eligibility after thirty years, at which point Patrick would still have many years ahead of him. *See* App. Op. ¶12; R. 106, Sentencing Entry at 1. Patrick also received a three-year sentence on the felony tampering-with-evidence charge and a three-year consecutive sentence for

the firearm specification for the aggravated-murder charge, per R.C. 2941.145(A). App. Op. ¶12. Because Patrick would have to serve the entirety of the three-year firearm specification before being released, his total sentence amounted to life with the possibility of parole after thirty-three years. R. 106, Sentencing Entry at 1. Each sentence complied with the applicable statute. App. Op. ¶12.

C. Patrick timely appealed from the decision of the trial court. App. Op. ¶7. He challenged, among other things, the trial court's alleged failure to explicitly consider his age during sentencing. App. Op. ¶¶8–9. The Seventh District Court of Appeals unanimously rejected Patrick's assignments of error and affirmed his sentence. App. Op. ¶59. Patrick's arguments relied chiefly on *Thompson v. Oklahoma*, 487 U.S. 815 (1988), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). App. Op. ¶¶13–15. Each of these cases addressed the Eighth Amendment's application to juvenile offenders: *Thompson* held that the Eighth Amendment bars executing anyone for a murder he committed before turning sixteen, 487 U.S. at 838; *Roper* extended *Thompson*'s rule to bar the execution of anyone who was under eighteen at the time of his crime, 543 U.S. at 578; and *Graham* extended *Roper* to cover sentences of life without parole imposed for juvenile non-homicide offenses, 560 U.S. at 52, 79.

The Seventh District distinguished these cases on their facts. It recognized that *Roper* and *Thompson* applied strictly to cases involving death sentences. App. Op. ¶¶13, 15. As for *Graham*, that case prohibited only sentences of life *without the possibility of pa-*

role for non-homicide offenses—and life without the possibility of parole is a sentence significantly more severe than the one Patrick received, under which he is eligible for parole at just over fifty years old. App. Op. ¶¶14–15. The appellate panel noted that no Ohio statute required the lower court to expressly consider Patrick's age. True, R.C. 2929.12(C) and (E) allow courts to consider "any … relevant factors" in imposing a sentence, but neither requires any express finding as to the defendant's age. App. Op. ¶16.

D. Patrick sought discretionary review in this Court. More precisely, he asked the Court to decide (among other things) whether the federal or state constitutions require sentencing judges to expressly consider a juvenile's age before imposing a sentence of life with the possibility of parole. The Court accepted his appeal on that issue alone. *State v. Patrick*, 156 Ohio St. 3d 1463, 2019-Ohio-2892.

ARGUMENT

<u>*Amicus* Attorney General's Proposition of Law:</u>

> *A trial court does not violate the United States or Ohio constitutions when it imposes a sentence of life imprisonment, with the possibility of parole after thirty-three years, on a juvenile who committed a homicide offense—and that is true even if the court does not explicitly consider, on the record, the juvenile's age.*

This case presents the question whether the federal and state prohibitions on "cruel and unusual punishments" require trial courts to expressly consider a juvenile murderer's age before sentencing him to life *with* the possibility of parole after thirty-three years. The answer is no. As an original matter, neither the Eighth Amendment to the federal constitution, nor Article I, Section 9 of the Ohio Constitution, forbids such

sentences. And while federal and state case law has strayed beyond the text of these provisions, none of it justifies the express-consideration rule that Patrick suggests. Those cases suggest that, because juvenile murderers are more capable of being reformed than adult murderers, they may not be sentenced to death. For the same reasons, courts must consider a juvenile offender's age, and deem him to be "incorrigible," before sentencing him to life *without* the possibility of parole. Those cases do not apply to sentences of life *with* the possibility of parole after thirty-three years—such sentences permit early release, and thus allow for the offender to be released if, after paying his debt to society, he proves to be a reformed person. Simply put, the cases from this Court and the United States Supreme Court are concerned with preserving an opportunity for a juvenile to be released back into society at some point in the future. That concern is not implicated in the case of a sentence that affords the juvenile offender parole eligibility during adulthood.

All that is enough to resolve the case. But for three reasons, the Court should consider declining to resolve it at all, and instead dismissing the appeal as improvidently accepted.

First, this case implicates a significant jurisdictional question that Patrick has not addressed, and that this Court did not agree to hear: whether there is jurisdiction to hear an appeal of a life sentence imposed for aggravated murder, pursuant to R.C. 2953.08(D)(3). The jurisdictional question arises because of two statutes:

R.C. 2953.02 and R.C. 2953.08. The first provides a right to an appeal of a judgment or final order in a capital case in which a sentence of death is imposed or "in any other criminal case." The second creates a "right to appeal" certain *felony* sentences, as specified in that statute. But it then makes an exception for sentences for murder: "A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." R.C. 2953.08(D)(3).

How do these provisions interact? Some of the District Courts of Appeals have held that the second provision "means what it says," and that life sentences for murder or aggravated murder "cannot be reviewed." *State v. Campbell*, 8th Dist. Cuyahoga No. 103982, 2016-Ohio-7613, ¶16 (per Stewart, J.) (quoting *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶17); *see also State v. Weaver*, 5th Dist. Muskingum No. CT2016-0033, 2017-Ohio-4374, ¶¶17–20; *State v. Hawkins*, 4th Dist. Gallia No. 13CA3, 2014-Ohio-1224, ¶¶13–15; *State v. Burke*, 2d Montgomery No. 26812, 2016-Ohio-8185, ¶¶13–28; *State v. Jones*, 2d Dist. Clark No. 2012 CA 61, 2013-Ohio-4820, ¶¶22–26; *State v. Kinney*, 7th Dist. Belmont No. 18 BE 0011, 2019-Ohio-2704, ¶¶134–38, *discretionary appeal pending*, Case. No. 2019-1103; *State v. McCarley*, 9th Dist. Summit No. 28657, 2018-Ohio-4685, ¶¶37–38; *State v. Johnson*, 1st Dist. Hamilton No. C-160242, 2017-Ohio-1148, ¶¶12–15 (citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶21); *State v. Geran*, 12th Dist. Butler No. CA 2019-01-016, 2019-Ohio-3421, ¶¶6–7; *State v. Brown*, 6th Dist. Wood No. WD-00-033, 2001 Ohio App. LEXIS 447, at *10–11 (Feb. 9, 2001); *State v. McDowell*, 10th Dist. Franklin

No. 03AP-1187, 2005-Ohio-6959, ¶73, *vacated and remanded by on different grounds by In re Ohio Crim. Sentencing Statutes Cases*, 109 Ohio St.3d 411, 2006-Ohio-2394; *cf. State v. Roark*, 3d Dist. Mercer No. 10-14-11, 2015-Ohio-3811, ¶13 (juvenile's life without parole sentence is not subject to appeal under R.C. 2953.08(D)(3), but noting that "courts … do sometimes address these sentences regardless of the statute"). Whatever the right answer is, this is a critically important, difficult question that this Court should not resolve in the first instance. It should instead wait for a case in which the issue is fleshed out below and in the parties' briefs. Because there is no way to reach the merits question without first establishing the Court's jurisdiction, *see State v. Wilson*, 73 Ohio St. 3d 40, 46 (1995), and because this is not a good vehicle for answering the jurisdictional question, the Court should dismiss this case as improvidently accepted.

Second, assuming this Court has jurisdiction, this case does not squarely present the question whether the Eighth Amendment or Article I, Section 9, require consideration of a juvenile's age and age-related characteristics before imposing a sentence of life *with* the opportunity for parole. Instead, it presents only the narrower question whether any such consideration must be made expressly. Why? Because the trial court *did* consider Patrick's age in imposing the sentence of life with the possibility of parole—at least, there is no reason to doubt whether it did. True, the court did not *expressly* describe the relevance of Patrick's age in imposing the sentence. But both the prosecution and the defense addressed the issue, and trial courts should be presumed to consider

the arguments raised before them. *See State v. Rahab*, 150 Ohio St. 3d 152, 2017-Ohio-1401, ¶19,; *Miranda v. Saratoga Diagnostics*, 8th Dist. Cuyahoga No. 97591, 2012-Ohio-2633, ¶26.

What is more, even in the context of life-*without*-parole sentences, the Supreme Court of the United States has made clear that the trial court's consideration of age *need not* be expressed as findings on the record. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016). (This Court had previously held that required consideration must be made expressly. *See State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, ¶7. But because *Long* rested on the Eighth Amendment—not the Ohio Constitution—the later-in-time decision in *Montgomery* implicitly overrules *Long*'s express-consideration requirement.)

If a court need not make findings on the record regarding its consideration of the juvenile's age before sentencing the juvenile to life *without* the possibility of parole, then surely the same is true of sentence of life *with* the possibility of parole. And since the trial court must be presumed to have considered Patrick's age, the Court may wish to wait for a case that presents the question whether any such consideration is even required for a life-with-the-possibility-of-parole sentence, before weighing in on the logically subsequent question whether any such consideration must be made expressly.

Finally, there is one other problem with this case, which is that Patrick's brief fails to present any argument about, or even cite, Article I, Section 9 of the Ohio Constitution. Thus, any arguments resting on that provision are abandoned. *See State v. Quar-*

terman, 140 Ohio St. 3d 464, 2014-Ohio-4034, ¶17 (citing S.Ct.Prac.R. 16.02(B)(4) and *State v. Carter*, 27 Ohio St.2d 135, 139 (1971)). Regardless, declaring that a section of the Ohio Constitution grants more protection than the federal Constitution is a "formidable step" that requires thorough analysis of both the text and history of the provision in question. *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124, ¶82 (Kennedy, J., dissenting). Yet Patrick has not offered any analysis of the "unique language and historical background" of the Ohio Constitution that would justify such a departure. *Stolz v. J&B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088, ¶28 (Fischer, J., concurring). So the question about Article I, Section 9's independent meaning is not fairly presented. Instead of deciding in a piecemeal fashion whether (and how) courts must consider a juvenile murderer's age when imposing a sentence, the Court should wait for a case that raises the issue under both the federal and state constitutions.

A. Courts need not consider a juvenile murderer's age before imposing a sentence of life with the possibility of parole in thirty-three years.

The Eighth Amendment and Article I, Section 9, both prohibit the imposition of "cruel and unusual punishments." Neither the text of these provisions, nor the cases interpreting them, require courts to expressly consider a juvenile murderer's age before sentencing him to life with the possibility of parole after thirty-three years. This brief considers the original meaning of the text and the binding precedent, in that order.

1. As originally understood, the "cruel and unusual punishment" clauses permit the sentence imposed on Patrick.

This case asks whether the federal and state prohibitions of "cruel and unusual punishments" require courts to expressly consider a juvenile murderer's age before sentencing him to life with the possibility of parole after thirty-three years. In answering that question, the Court cannot ignore the relevant precedents. Still, it makes sense to begin by considering the meaning of the constitutional text itself. As this brief will show, much of the case law in this area ignores "the common understanding of the people who framed and adopted" the cruel-and-unusual-punishment clauses—even though that "common understanding" is supposed to prevail. *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 194 n.16 (1999) (quoting Robert Bork, *The Tempting of America: The Political Seduction of the Law* 169 (1990)). Original meaning can be one important factor in deciding where to hit the brakes. *See, e.g.*, *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, ¶97; *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶146; *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 212 (1994) (Scalia, J., concurring in judgment).

With that in mind, this brief begins with the original meaning of the Eighth Amendment to the United States Constitution and Article I, Section 9 of Ohio's Constitution.

Eighth Amendment. The Eighth Amendment, which applies to the States through the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted." The ban on "cruel and unusual punishments," as originally understood, prohibited certain "*methods*" of corporal punishment. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123, 1124 (2019) (emphasis added). Specifically, it banned "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Id*. at 1124 (alterations, citations, and internal quotation marks omitted). In essence, the clause banned only those punishments designed to add terror, pain, or disgrace over and above that which was necessary to carry out the sentence.

That is as far as the Eighth Amendment went. It did not, for example, require sentences proportionate to the crime committed. *See Graham v. Florida*, 560 U.S. 48, 98–102 (2010) (Thomas, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 974–85 (1991) (opinion of Scalia, J.). Neither did it take account of age; at the time of the Eighth and Fourteenth Amendments' ratifications, no one understood the prohibition on "cruel and unusual punishments" as requiring any unique treatment of seventeen-year-old criminals. States subjected juveniles to the same severe penalties as adults, including death. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (opinion of Scalia, J.); *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring, joined by Ginsburg, J.); *id.* at

589 (O'Connor, J., dissenting); *see also* Stuart Banner, *The Death Penalty: An American History* 1–2 (2002).

Article I, Section 9. As originally understood, Article I, Section 9 meant the very same thing as the Eighth Amendment. The People of Ohio ratified their own cruel-and-unusual-punishments clause in 1803, and retained it verbatim in the 1851 Constitution. They used the exact same words as those in the Eighth Amendment: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Ohio Constitution, Article I, Section 9. Given that the People ratified this provision barely a decade after the Eighth Amendment's ratification, it is reasonable to assume, absent historical evidence to the contrary, that Ohioans meant their guarantee to provide the very same protections. There is no contrary historical evidence.

The fact that Ohio decided to adopt its own version of the Eighth Amendment should come as no surprise. Before the Fourteenth Amendment's ratification in 1868, the Bill of Rights applied *only* against the federal government. *See Barron v. Baltimore*, 32 U.S. 243, 250 (1833). Thus, the People of Ohio, in 1803 and 1851, would have been without any protection against cruel and unusual punishments imposed by the State had they not ratified a cruel-and-unusual-punishments clause of their own. All this is perfectly consistent with the recognition that Article I, Section 9 of the Ohio Constitution provides "unique protection for Ohioans." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, ¶59. Those protections are not necessarily any broader than their federal ana-

logues. Indeed, while "[s]tate constitutions create independent limits on state and local power, [those] limits … may do more *or less* than their counterpart guarantees" in the United States Constitution. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 173 (2018) (emphasis supplied).

This Court's case law confirms that Article I, Section 9's original meaning mirrors that of the Eighth Amendment. One case, for example, recognizes that the identically worded provisions were *both* originally understood as applying only in "extremely rare cases" to protect individuals from "inhumane punishment such as torture or other barbarous acts." *State v. Weitbrecht*, 86 Ohio St. 3d 368, 370 (1999). Another case closer in time to the 1851 ratification provides further evidence of Section 9's original meaning. The Court, looking to cases interpreting the Eighth Amendment, explained that Article I, Section 9 similarly prohibited "punishments of torture, such as those … where the prisoner was drawn and dragged to the place of execution," "disemboweled alive, beheaded and quartered," burned alive, or subjected to other execution methods "in the same line of unnecessary cruelty." *Holt v. State*, 107 Ohio St. 307, 314 (1923) (quoting *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878)).

Whatever Article I, Section 9 meant originally, it is beyond serious debate that the provision *did not* prohibit long terms of incarceration for juveniles convicted of homicide offenses. As a matter of original public meaning, the Ohio Constitution even allowed for the execution of juvenile murders who were at least fifteen at the time of their

crimes. For example, in 1879 through 1880, the State sentenced to death and then later executed three juveniles in Canton aged fifteen to seventeen for their role in two homicides. Victor L. Streib, *Death Penalty for Juveniles* 132–34 (1987). This trend continued: From 1880 through 1956, Ohio executed nineteen individuals for murders committed while they were less than eighteen years of age. *Id.* at 131, 202–03. And before *Roper* and *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court had upheld the application of the death penalty to juvenile murderers, concluding that the punishment did not violate the Ohio Constitution. *See State v. Harris*, 48 Ohio St. 2d 351, 359 (1976), *vacated*, 438 U.S. 911 (1978).

None of the cases upholding these sentences for a homicide even gestured toward a constitutional requirement to consider the offender's age—expressly or otherwise—as a mitigating factor. As such, there is no evidence to believe that anyone alive at the time of Article I, Section 9's ratification understood it as requiring courts to account for a juvenile's age in the manner Patrick suggests.

*

In sum, the Eighth Amendment and Article I, Section 9 were originally understood as permitting the execution of juvenile murderers, without regard to whether the sentencing judge considered (expressly or otherwise) the offender's age. It follows that neither provision, as originally understood, would have required the sentencing judge

to expressly consider the offender's age before imposing a sentence of life with the possibility of parole. Neither Patrick nor the *amicus* supporting him contends otherwise.

2. Binding precedent establishes the constitutionality of sentencing a juvenile murderer to life with the possibility of parole after thirty-three years.

Excessiveness and juveniles. This Court, and the Supreme Court of the United States, have read into the Eighth Amendment and Article I, Section 9 a ban on sentences that are "disproportionate to the crime." *In re C.P.*, 131 Ohio St. 3d 513, ¶25. Thus, while neither provision *originally* spoke to the excessiveness of a sentence, courts today interpret both as guaranteeing "the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper*, 543 U.S. at 560); *accord In re C.P.*, 131 Ohio St. 3d 513, ¶25.

Applying this anti-excessiveness principle, both courts have held that certain otherwise-permissible sentences are unconstitutional as applied to juveniles. For example, juveniles may not be sentenced to death. *See Roper*, 543 U.S. at 578. They may not be sentenced to life without the possibility of parole for non-homicide offenses, *Graham*, 560 U.S. at 69, 75, or to "a term-of-years prison sentence that exceeds [the] defendant's life expectancy," *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, ¶1. Nor may juvenile sex offenders be "automatically subject to mandatory, lifetime sex-offender registration and notification requirements." *In re C.P.*, 131 Ohio St. 3d 513, ¶1. And while courts *may* sentence juvenile murderers to life without the possibility of parole, they

may do so only after individualized consideration of mitigating circumstances, including the offender's "age and age-related characteristics." *Miller*, 567 U.S. at 489; *accord Long*, 138 Ohio St. 3d 478, ¶1. More precisely, courts may sentence a juvenile murderer to life without parole only if they first determine, after accounting for the defendant's age and age-related characteristics, that he is so "incorrigibl[e]" that he is unlikely to be rehabilitated. *See Montgomery*, 136 S. Ct. at 734.

Each of these decisions rests on the same fundamental insight: "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. Specifically, there are "three significant gaps between juveniles and adults," all of which suggest juveniles are "less deserving of the most severe punishments." *Id*. (quoting *Graham*, 560 U.S. at 68). *First*, "children"—the word courts now use to describe any murderer who was at least "one day short of voting" at the time of his crime, *Montgomery*, 136 S. Ct. at 744 n.2 (Scalia, J., dissenting)—"have a lack of maturity and an underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking." *Long*, 138 Ohio St. 3d 478, ¶12 (quoting *Miller*, 567 U.S. at 471). "*Second*, children are more vulnerable … to negative influences and outside pressures." *Id*. (quoting *Miller*, 567 U.S. at 471) (emphasis added). *Finally*, "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be evidence of irretrievabl[e] deprav[ity]." *Id*. (quoting *Miller*, 567 U.S. at 471).

Together, these traits leave open the question whether a juvenile's "commission of a crime is the result of immaturity or of irredeemable corruption." *Moore*, 149 Ohio St. 3d 557, ¶42. Together, they suggest that the principal purposes of criminal law—deterrence, retribution, and rehabilitation—are not generally well served by sentencing juveniles to the "harshest possible penalty." *Miller*, 567 U.S. at 472–73, 479. And together, they give rise to the "most important attribute of the juvenile offender": the "potential for change." *Moore*, 149 Ohio St. 3d 557, ¶42. This potential for change, the courts have concluded, requires protecting juveniles from a categorical, "final determination while they are still in their youths that they are irreparably corrupt and undeserving of a chance to reenter society." *Id.* Thus, while neither the State nor federal constitution "foreclose[s] the possibility that a defendant who commits a heinous crime as a youth will indeed spend his entire remaining lifetime in prison," the State must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. ¶44 (quoting *Graham*, 560 U.S. at 75.); *see also Long*, 138 Ohio St. 3d 478, ¶34 (O'Connor, C.J., concurring).

Life with the possibility of parole satisfies the foregoing requirements. Courts provide a meaningful opportunity for obtaining release when they sentence a juvenile offender to life *with* the possibility of parole after thirty-three years. If the defendant becomes parole eligible well within his expected lifetime, he will have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Moore, 149 Ohio St. 3d 557, ¶44 (quoting *Graham*, 560 U.S. at 75). Indeed, the Supreme Court of the United States just recently observed that allowing juvenile offenders to be considered for parole ensures that juvenile offenders whose crimes "reflected only transient immaturity" will not be forced to serve a constitutionally "disproportionate" sentence. *Montgomery*, 136 S. Ct. at 736. The same cannot be said about a death sentence, a mandatory life-without-parole sentence, or a life-without-parole sentence imposed without consideration of the juvenile's incorrigibility. *See Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 69, 75; *Miller*, 567 U.S. at 489; *accord State v. Long*, 138 Ohio St. 3d 478, ¶1. Each of those sentences shares a trait that makes them excessive: each denies the juvenile murderer any "chance to reenter society," *Moore*, 149 Ohio St. 3d 557, ¶42, without considering whether that juvenile is capable of rehabilitation in the future. Life with the possibility of parole does not share this trait; so long as the defendant is eligible for parole within his expected lifetime, he *is* given a chance to reenter society. Accordingly, the foregoing cases have no bearing on sentences like the one Patrick received.

Other States' courts have held that the constitutional bans on cruel and unusual punishments permit courts to impose life sentences on juvenile murderers, as long as the defendant will be eligible for parole within his lifetime. *See Johnson v. Commonwealth*, 292 Va. 772, 781 (2016) (concluding *Miller* inapplicable to a life sentence with "geriatric release" available at age sixty); *State v. Michel*, 257 So. 3d 3, 4 (Fla. 2018) (sentence of life with possibility of release after twenty-five years for juvenile murderer does

not violate *Graham*), *cert. denied Michel v. Fla*, 139 S.Ct. 1401 (2019); *Johnson v. State*, 546 S.W. 3d 470, 472 (Ark. 2018) (*Miller* inapplicable to discretionary life sentence). In addition, some States impose life sentences with mandatory terms of incarceration before parole eligibility on juvenile homicide offenders. That is true even in States that have outlawed juvenile life-without-parole sentences. Such sentences range from life with a chance of parole after fifteen years, *see* W. Va. Code §61-11-23(b), to life with a chance of parole after forty years, *see* Tex. Gov't Code Ann. §508.145(b). *See also* Ark. Code Ann. §§5-10-102(c) & 16-93-621(a)(2) (life with parole eligibility at twenty-five or thirty years, depending on the level of homicide); Wyo. Stat. Ann. §6-10-301(c) (life with possibility of parole at twenty-five years). In sum, Ohio's argument would not make Ohio an outlier when it comes to the sentencing of juvenile murderers.

One final point. In the foregoing arguments, Ohio does not mean to dismiss the significance of the word "meaningful" in the requirement that juvenile offenders must receive some "*meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation." *Moore*, 149 Ohio St. 3d 557, ¶44 (quoting *Graham*, 560 U.S. at 75) (emphasis added). Thus, the Attorney General is not asking this Court to overrule *Moore*, which held that "a term-of-years prison sentence that exceeds a" juvenile offender's "life expectancy violates the Eighth Amendment." *Id*. ¶1. After all, the chance to seek parole after death is not a "meaningful" opportunity for release based on maturity and rehabilitation.

Nor is the Attorney General seeking to overrule *In re C.P.*, 131 Ohio St. 3d 513. In that case, this Court held that the State is constitutionally prohibited from "automatically subject[ing]" juvenile sex offenders tried within the juvenile system "to mandatory, lifetime sex-offender registration and notification requirements." *Id*. ¶1. The Court struck down a law imposing such requirements *even though* it allowed the juvenile to petition for the suspension of his registration requirements after twenty-five years. *See id.* ¶23. That case turned on the Court's determination that a juvenile released from custody but required to register as a sex offender for up to his entire life stood no chance of obtaining *meaningful* release. So despised are sex offenders, the Court reasoned, that the registration requirement would deny the juvenile any "chance to establish a good character in the community." *Id*. ¶45. The requirement would irrevocably "define his adult life before it ha[d] a chance to truly begin," meaning his "entire life" would be "evaluated through the prism of his juvenile adjudication." *Id*. Because being released on such terms provides no *meaningful* opportunity for reentry into society, the Court held that juveniles may not be *automatically* subjected to a lifetime of registering as a sex offender. (To be clear, *C.P*. was wrongly decided. But this brief assumes the correctness of that decision for purposes of this case, because it does not change the outcome.)

This case does not present circumstances comparable to those in *Moore* or *In re C.P.* Patrick, unlike the defendant in *Moore*, is eligible for parole well within his life expectancy, and thus *will* receive a "meaningful opportunity to obtain release based on

demonstrated maturity and rehabilitation." *Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted). And this is not a case like *In re C.P.*, where automatically imposed postrelease requirements are so likely to impose an everlasting stigma that they deny the defendant a meaningful chance at rehabilitation. Indeed, Patrick does not challenge any postrelease requirements at all. And any everlasting stigma will result not from postrelease requirements but from the fact that Patrick committed a heinous murder—a crime for which a lengthy sentence is, "beyond question," appropriate and constitutional. *Long*, 138 Ohio St. 3d 478, ¶34 (O'Connor, C.J., concurring) (quoting *Miller*, 567 U.S. at 479).

In sum, Patrick's sentence fully accords with *Moore*, *In re C.P.*, and every other binding precedent. The Court can and should rule for the State without second guessing any of its past decisions.

B. The contrary arguments pressed by Patrick and his supporting *amici* are unpersuasive.

Neither Patrick nor his *amici* give any good reason for coming out the other way.

1. Patrick's arguments rest largely on policy, and ought to be rejected.

Patrick makes no serious attempt to engage with the text or the case law. With respect to the text, Patrick dismisses the very concept of original meaning. He suggests anyone purporting to rely on it is engaged in a sort of intellectual fraud; a "feigned attempt[]" or "mindless search" for "the original meaning of the Framers." Patrick Br. 17.

Patrick spends a bit more time on the case law, but to no avail. Much of his brief is spent emphasizing that, according to Supreme Court precedent, juveniles are different from adults for Eighth Amendment purposes. Patrick Br. 20–34. But Patrick never explains why those differences, or the Supreme Court's reliance on those differences, require courts to expressly consider a defendant's age before imposing a sentence of life *with* the possibility of parole after thirty-three years. To be sure, Patrick repeatedly asserts that 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." Patrick Br. 31; *accord* Patrick Br. 28, 33. But as noted above, there is a perfectly valid reason for distinguishing between the two types of sentences: a sentence of life *with* the possibility of parole offers "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted), while a sentence of life *without* parole does not.

Patrick, perhaps anticipating this argument, suggests that 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." Patrick Br. 28. But a sentence of life with parole eligibility *does* ameliorate the constitutional problems stemming from the features of youth, because it allows a juvenile murderer a chance to reform himself and rejoin society.

Patrick's stressing of these "features of youth" highlights another problem with his argument: his inability to formulate a rule that does not set the Court on a slippery slope to imposing a requirement to consider age and age-related characteristics in *every* case involving a juvenile, no matter how minor the sentence. The same "features of youth" apply to *every* crime, and so could be brought to bear on *every* sentence. Is it Patrick's position that courts must, as a matter of constitutional law, *always* expressly consider the age and maturity of a juvenile offender before imposing a punishment? *See* Patrick Br. 31 ("[A]ll 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 …"). If not, how serious must the sentence be before it implicates a constitutional obligation to consider age? Fifty years? Forty? Twenty? Fifteen? Ten? Five? One? There is no principled cut-off point, except for the one laid out above: a court must account for a juvenile offender's age *only* before imposing a sentence that will deny the offender any "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted).

At bottom, Patrick argues that the Court should adopt his rule because it makes good policy sense. That argument should receive no audience in this Court; with "the wisdom of the law the courts have no concern." *State ex rel. Bowman v. Bd. of Comm'rs*, 124 Ohio St. 174, 196 (1931). It is true enough that "institutions must advance also to keep pace with the times." Patrick Br. 18 (quoting Thomas Jefferson). But free

societies do that by passing laws and amending their constitutions. Patrick's contrary suggestion amounts to an embrace of "rule by judicial fiat." *Baze v. Rees*, 553 U.S. 35, 93 (2008) (Scalia, J., concurring).

2. The *amici curiae* who filed a brief supporting Patrick provide no sound basis for reversing the Seventh District.

Several *amici* filed a brief supporting Patrick. But their arguments fare no better than his.

First, the *amici* argue that the "opportunity for parole is at best an illusory promise." *Amici* Br. 11. In other words, they deny that a sentence of life with the possibility of parole offers a *meaningful* chance at reentry into society. But they fail to back up this allegation. As a starting matter, the presumption of regularity requires this Court to presume that parole boards—part of a coordinate branch of government—properly carry out their duties. *Gaston v. Medina Cty. Bd. of Revision*, 133 Ohio St. 3d 18, 2012-Ohio-3872, ¶16. The *amici* fail to rebut this presumption. For example, they report that the American Law Institute "has been highly critical of the parole board system." *Amici* Br. 12. Vague allusions to flaws in parole systems *generally* do not speak to whether parole boards *in Ohio* suffer the same flaws. Anyway, the American Law Institute's discussion drafts to which the *amici* point approach the issue of parole from a particular viewpoint: the perspective that sentencing is too harsh and ought to be reformed. *See, e.g.*, Model Penal Code: Sentencing, Discussion Draft No. 3, at 14–15, 20–23 (March 29, 2010). That "view about crime and punishment" is "ascendant in some quarters today but is not re-

quired by the Constitution." *United States v. Haymond*, 139 S. Ct. 2369, 2400 (2019) (Alito, J., dissenting). And so, as is true of the American Law Institute's other policy-driven work, the Institute's work on sentencing is entitled to "no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar." *Kansas v. Nebraska*, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part).

With respect to Ohio's parole system in particular, the brief notes that Governor Mike DeWine "appointed Annette Chambers-Smith to lead the Ohio Department of Rehabilitation and Correction after a former Parole Board member publicly rebuked the Board as being dysfunctional and lacking transparency and accountability." *Amici* Br. 12. But the Governor's action seems to confirm that elected leaders *do* care about the efficient operation of parole boards, and will take swift action to improve any shortcomings. The brief also complains that only "dozens" of prisoners are paroled each year. *Amici* Br. 13. But perhaps that is because only "dozens" *ought to be* paroled. That hypothesis gains some support from the *amici*'s own statistics, which show that, in 2018, the "Parole Board granted release" for one out of every ten applicants—a rate that refutes the *amici*'s characterization of parole as "illusory." *Amici* Br. 11, 13.

Next, the *amici* argue that parole is insufficiently "meaningful," since "the decision of whether a child receives parole often just comes down to how the child behaved in prison." *Amici* Br. 14. Of course, the "child," by the time parole rolls around, is a ful-

ly formed adult. And while the decision to release or not may well depend largely on how that adult conducted himself in prison, that is fully consistent with the Eighth Amendment. The whole point of the juvenile-sentence case law is to ensure that those who commit crimes as minors have a chance "to obtain release based on demonstrated maturity and rehabilitation." *Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted). Maturity and rehabilitation happen over time. It thus makes sense that one would assess the child's "maturity and rehabilitation" after he or she grows up.

Moving on, the *amici* point to a "growing number of states" that "give[] judges discretion to consider the recognized characteristics of youth." *Amici* Br. 15. Of course, Ohio law does that too—its statutes permit judges to consider "any other relevant factors," *see Long*, 138 Ohio St. 3d 478, ¶18 (citing R.C. 2929.12), and trial courts may consider age in determining how many years juvenile murderers should serve before being eligible for parole. In any event, the *amici* point to *legislative* changes. These legislative changes confirm that the People of Ohio, acting through the initiative process or via their representatives, are more than capable of addressing such sentencing policies if they wish to. How bizarre, then, to interpret the exercise of the democratic process in some States as requiring the courts to remove the question of juvenile sentencing from the democratic process in Ohio.

The *amici* additionally argue that States do not give juvenile murderers a "meaningful opportunity" to obtain release based on demonstrated maturity and rehabilita-

tion, unless they permit them to go before the parole board within fifteen years. *Cf*. *Amici* Br. 18, 25; *Moore*, 149 Ohio St. 3d 557, ¶44. The argument is puzzling, given the *amici*'s insistence that parole boards offer only an "illusory" promise of actual release. *Amici* Br. 11. Putting that aside, the fifteen-year limit is a pure policy suggestion unmoored from constitutional doctrine. Why not sixteen years, or twenty, or ten, or one? The *amici* suggest the fifteen-year limit follows from the obligation to provide "*some* meaningful opportunity to obtain release." *Moore*, 149 Ohio St. 3d 557, ¶44 (quotation omitted, emphasis added). That cannot be right; a juvenile murderer need not face the prospect of release sometime in his thirties to have *some* meaningful opportunity to obtain release. To conclude otherwise would mean that every term of years that extends beyond a juvenile offender's fortieth birthday is unconstitutional unless he can seek parole. Thus, on the *amici*'s theory, a man (one cannot credibly say "child") who kills four people the day before his eighteenth birthday is subjected to "cruel and unusual punishment" if he is sentenced to a mere thirty years without any possibility of parole.

In the end, the sentence here satisfies any plausible understanding of the requirement that juvenile murderers receive "some meaningful opportunity to obtain release." *See Moore*, 149 Ohio St. 3d 557, ¶44 (citation omitted). Patrick killed a man in cold blood, in a planned attack. If he reforms himself, he can be released from prison at just over fifty, with a large chunk of his life still before him. That is not "cruel and unusual punishment." Surely Michael Abighanem would gladly have traded places.

Finally, in a footnote, the *amici* note that "the jury did not make an express finding as to whether [Patrick] or his co-defendant was the shooter." *Amici* Br. 5 n.1; *see also* *Amici* Br. 17 (suggesting implausibly that this means that Patrick's sentence was for a "nonhomicide offense."). If the *amici* mean to suggest that this gives an alternative basis for reversing Patrick's life sentence, they are incorrect. Patrick "did not raise this issue in the court of appeals or argue it in his memorandum seeking jurisdiction in this court." *Long*, 138 Ohio St. 3d 478, ¶9. As such, the issue "is not properly before the court" and this Court should "not consider the issue." *Id*.

CONCLUSION

The Court should affirm the decision below or dismiss the case as improvidently accepted.

Respectfully submitted,

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