BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO PLAINTIFF-APPELLEE **-vs-** **KYLE PATRICK** DEFENDANT-APPELLANT	**CASE NO.: 2019-0655** ON APPEAL FROM **MAHONING COUNTY** COURT OF APPEALS, **SEVENTH APPELLATE DISTRICT.** COURT OF APPEALS Case No. **17 MA 91**

STATE OF OHIO-APPELLEE'S ANSWER BRIEF

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Statement of Case, Facts, and Introduction

On February 10, 2014, Defendant-Appellant Kyle Patrick pleaded guilty as follows: Count One, Murder, in violation of R.C. 2903.01(A)(D); Count Two, Aggravated Robbery, in violation of R.C. 2911.01(A)(1)(C), a felony of the first degree; Tampering with Evidence, in violation of R.C. 2921.12(A)(1)(B), a felony of the third degree; and two Firearm Specification (attached to Counts One and Two), in violation of R.C. 2941.141. The State recommended a 16-Years-to-Life prison term. (Plea Hearing Transcript, February 10, 2014, before the Honorable John M. Durkin, at 2-3.)

On February 18, 2014, Defendant filed a pro se Notice of Withdraw of Guilty Plea. Defense counsel filed a formal motion on March 7, 2014. The trial court denied Defendant's motion to withdraw his plea. (Sentencing Hearing Transcript, June 17, 2014, before the Honorable John M. Durkin, at 17.)

The trial court then sentenced Defendant to a 16-Years to Life stated prison term: 15-Years-to-Life for Count One, Murder, in violation of R.C. 2903.01(A)(D); 11 Years for Count Two, Aggravated Robbery, in violation of R.C. 2911.01(A)(1)(C), a felony of the first degree; 36 Months for Tampering with Evidence, in violation of R.C. 2921.12(A)(1)(B), a felony of the third degree; and 1 Year for the Firearm Specifications (attached to Counts One and Two), in violation of R.C. 2941.141. The court ran Counts Two and Three concurrent to Count One.

On appeal, the Seventh District concluded that the trial court abused its discretion when it denied Defendant's motion to withdraw his plea, and remanded the case back to the trial court. *See State v. Patrick*, 2016 Ohio 3283, 66 N.E.3d 169 (7th Dist.), *appeal denied, State v. Patrick*, 147 Ohio St.3d 1474, 2016 Ohio 8438, 65 N.E.3d 777.

At trial, the State established that on April 27, 2018, Michael Abighanem suffered a gunshot wound to the torso region of his body, abrasions to his head, and a cut to his head ("caused by a sharp object"). (Trial Tr., at 381.) Dr. Jospeh Felo, M.D. concluded that Michael Abighanem died from a gunshot wound to his abdomen. (Trial Tr., at 389.)

Michael Nakoneczny testified that on April 27, 2012, he and Abighanem drove to 1754 Silliman Street on Youngstown's west side, because Abighanem was selling a PlayStation and a laptop to an individual. (Trial Tr., at 154.) Abighanem went into the house while Nakoneczny parked his vehicle; Nakoneczny made his way inside a few minutes later. (Trial Tr., at 157.)

Abighanem showed two black males inside that the PlayStation functioned properly. (Trial Tr., at 157.) Abighanem and the taller black male then went upstairs to hook the PlayStation up to a television. (Trial Tr., at 157.) As Nakoneczny proceeded upstairs, the other black male (later identified as Jujuan Jones) stopped him and asked Nakoneczny to look at some jewelry that he had. (Trial Tr., at 158, 421.) Nakoneczny did not hear any type of "scuffle or people pushing around stuff, [or] any kind of tussling going on upstairs[.]" (Trial Tr., at 162.)

Nakoneczny stated that when Abighanem reached the tops of the steps, he heard a gunshot, heard an unknown individual yell, "Get on the floor." (Trial Tr., at 158-159.) Abighanem then yelled, "Mike." (Trial Tr., at 159.) "And then immediately after that there was another gunshot." (Trial Tr., at 159.) Nakoneczny fled the house.

Aric Longcoy was present at the Silliman Street residence when Abighanem was shot. (Trial Tr., at 321.) Earlier that day, Longcoy learned that Defendant planned to rob Michael Abighanem that afternoon. (Trial Tr., at 318.) Longcoy stated that he was upset

about the plan to rob Abighanem, because he was friends with Abighanem. (Trial Tr., at 319.) While at the Silliman Street residence, Defendant threatened Longcoy with a "small back gun;" Defendant told Longcoy that if he tried to leave or tell anyone, "that [Longcoy] would get [his] head blown off." (Trial Tr., at 322-323, 346-347.)

Longcoy stated that he was in the process of leaving the Silliman Street residence when he heard the gunshots; he was walking away from the house. (Trial Tr., at 321.) Later that afternoon, Defendant and Longcoy made their way to Chelsea Daviduk's house in Struthers. (Trial Tr., at 280.) Daviduk stated that Defendant "was pale, and fresh clothes. * * * looked like he just took a shower." (Trial Tr., at 281.) Defendant "looked like he was out of it[.]" (Trial Tr., at 281.) Defendant "mentioned that he had a lick somewhere in Campbell, east side Campbell." (Trial Tr., at 281.) "Lick" referred to a robbery. (Trial Tr., at 281.) Daviduk saw Defendant holding a black gun. (Trial Tr., at 287.)

Longcoy later asked to use Daviduk's phone; Longcoy referenced "Mike's number" in her phone and stated, "this was the guy that Kyle shot." (Trial Tr., at 282.) Longcoy was referring to Mike Abighanem's phone number. (Trial Tr., at 282.)

Daviduk observed a backpack at her house that she initially thought belonged to her friend Alyssa. (Trial Tr., at 284.) Inside the backpack was a gold chain, a laptop, and a Sony PlayStation. (Trial Tr., at 285.) Defendant asked Daviduk for cleaning supplies to clean the stuff. (Trial Tr., at 285.) Daviduk stated that "there was blood on the stuff. I kept opening the door, and my brother kept slamming it because he didn't want me to see anything." (Trial Tr., at 285.) She referred to blood being on the items in the backpack.

(Trial Tr., at 285.) Longcoy stated that Defendant cleaned the items in the backpack with bleach before they were disposed of in a nearby dumpster. (Trial Tr., at 286, 327.)

Youngstown Crime Lab Officer Mark Crissman responded to the dumpster on Fifth Street in Struthers. (Trial Tr., at 264.) In the dumpster, Crissman located a gun, some clothing, an Apple laptop computer in a backpack, and a bleach bottle. (Trial Tr., at 265.) Crissman stated that "[a]ll the items smelled heavily of bleach. There was a T-shirt that was especially soaked in it. All the items stunk of bleach." (Trial Tr., at 266.)

Youngstown Crime Lab Officer Mark Crissman also responded to 1754 Silliman Street on the day in question. (Trial Tr., at 256.) Crissman located a .22 caliber shell casing in the living room. (Trial Tr., at 258; State's Exhibit No. 37.)

On April 27, 2012, Wes Skeels was the Chief Probation Officer for the Mahoning County Juvenile Court. (Trial Tr., at 366.) Skeels assisted Youngstown police in locating Defendant after he was wanted for questioning. (Trial Tr., at 367.) Skeels made contact with Defendant's parents; Defendant's parents gave Skeels permission to search the house and his bedroom. (Trial Tr., at 367.)

At Defendant's residence (1703 Midland Avenue), Skeels collected two .22 caliber bullets from Defendant's bedroom dresser, and turned them over to Youngstown police. (Trial Tr., at 368-369; State's Exhibit No. 46.)

Andrew Chappell analyzed a firearm, three cartridges, a fired cartridge case, and a fired bullet that he received from Youngstown police. (Trial Tr., at 401.)

Chappell found that the Jennings .22 long rifle caliber semi-automatic pistol (State's Exhibit No. 56) was operable. (Trial Tr., at 405.) The Jennings .22 caliber pistol had ten lands and grooves with a right direction of twist. (Trial Tr., at 407.)

Chappell compared the test-fired cartridges with the cartridge casing found at the scene, and found that the fired cartridge found at the scene (State's Exhibit No. 37) was fired from the Jennings .22 long rifle caliber semi-automatic pistol (State's Exhibit No. 56) that was found in the dumpster in Struthers. (Trial Tr., at 407.)

Chappell found that the fired bullet recovered from Michael Abighanem (State's Exhibit No. 129) was .22 caliber. (Trial Tr., at 409.) Chappell compared the "test-fired bullets to the bullet recovered at the autopsy. And they have the same class characteristics, meaning the same number of lands and grooves, same direction of twist, the same widths. However, they didn't -- the evidence bullet didn't have enough of those individual microscopic markings for [Chappell] to be able to say it was or was not fired from this particular pistol." (Trial Tr., at 407.)

Chappell found that the test-fired cartridges (State's Exhibit No. 36) recovered at the scene were Remington .22 long rifle caliber cartridges. (Trial Tr., at 409.)

Youngstown Detective-Sergeant Ron Rodway led the investigation, and later interviewed Defendant. (Trial Tr., at 468.) Defendant told Rodway several different versions of events that occurred on or about April 27, 2012.

Defendant first told Rodway that he and Longcoy were at the basketball courts, while Reginald Whitfield and Jujuan Jones were at the house on Silliman; Defendant then received a call that something bad happened. (Trial Tr., at 468-469.)

Defendant later admitted to being at the Silliman residence with Longcoy, Jones, and Whitfield; he stated that Jones and Whitfield were buying the game system from some individual. (Trial Tr., at 470.) Defendant "kept going back and forth with different stories about who came upstairs, who hit the victim with a bottle." (Trial Tr., at 475.)

Defendant eventually admitted being upstairs when Abighanem was shot. (Trial Tr., at 508.)

Defendant also told Rodway several different versions of events regarding the backpack, where it was found, what was found in it, Brandon Daviduk's (Chelsea's brother) idea to sell the items, and why the blood was cleaned off the items. (Trial Tr., at 472-473.) Defendant admitted to handling the backpack at Chelsea Daviduk's house, and to cleaning the blood off the items. (Trial Tr., at 474.)

Defense counsel asked about what Defendant told Chelsea Daviduk (via Daviduk's statement to police); Defendant told her that the "lick" occurred on the west side rather than Campbell. (Trial Tr., at 496.)

The jury found Defendant guilty of the following offenses: Count One, Aggravated Murder, in violation of R.C. 2903.01(B)(F); Count Two, Aggravated Robbery, in violation of R.C. 2911.01(A)(1)(C), a felony of the first degree; Count Three, Tampering with Evidence, in violation of R.C. 2921.12(A)(1)(B), a felony of the third degree; and two Firearm Specification (attached to Counts One and Two), in violation of R.C. 2941.141.

The trial court sentenced Defendant to 33-Years-to-Life: 30-Years-to-Life for Count One, Aggravated Murder; 3 Years for the Firearm Specification attached to Count One; and 3 Years for Count Three, Tampering with Evidence (ran concurrent).

Defendant timely appealed. The State now responds with its Answer Brief and requests this Honorable Court to Overrule Defendant-Appellant Kyle Patrick's Proposition of Law and Deny his request for relief.

Law and Argument

I. **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.

State's Response to Proposition of Law No. 1: The Eighth Amendment and the Ohio Constitution Do Not Require a Trial to Explicitly Consider, On the Record, a Juvenile Offender's Age If His Sentence Affords Him the Opportunity for Parole.

As for Defendant's first proposition of law, he contends that the trial court's 33-years-to-life sentence is contrary to law because the trial court did not *explicitly* consider, on the record, his age at sentencing. To the contrary, both the Eighth Amendment and the Ohio Constitution do not require the trial court to explicitly consider, on the record, a juvenile offender's age at sentencing unless the court imposes life without parole. Therefore, Defendant's 33-years-to-life sentence is not clearly and convincingly contrary to law.

A. R.C. 2953.08(D)(3) PROHIBITS THIS COURT FROM REVIEWING DEFENDANT'S LIFE SENTENCE FOR AGGRAVATED MURDER.

As a threshold matter, R.C. 2953.08(D)(3) prohibits this Court to review Defendant's sentence for aggravated murder. *See State v. Austin*, 7th Dist. No. 16 MA 68, 2019 Ohio 1185, ¶ 65, *appeal denied, State v. Austin*, 156 Ohio St.3d 1447, 2019 Ohio 2498, 125 N.E.3d 917; *see also State v. Kinney*, 7th Dist. No. 18 BE 11, 2019 Ohio 2704, ¶¶ 134-152, *discretionary appeal pending*, Case. No. 2019-1103.

In *State v. Porterfield*, this Court previously found that "R.C. 2953.08(D)(3) is unambiguous. 'A sentence imposed for aggravated murder or murder pursuant to section

2929.02 to 2929.06 of the Revised Code is not subject to review under this section' clearly means what it says: such a sentence cannot be reviewed." *State v. Porterfield*, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690, ¶ 17. This Court recognized in *Porterfield* that while *consecutive* life sentences pursuant to R.C. 2929.14 are reviewable, "R.C. 2953.08(D) clearly precludes review of *individual* murder sentences imposed pursuant to R.C. 2929.02 to 2929.06." (Emphasis added.) *See id*. at ¶¶ 19-24; *accord State v. Geran*, 12th Dist. No. CA 2019-01-016, 2019 Ohio 3421, ¶¶ 6-7; *State v. Conrad*, 4th Dist. No. 18CA4, 2019 Ohio 263, ¶ 41; *State v. McCarley*, 9th Dist. No. 28657, 2018 Ohio 4685, ¶¶ 37-38; *State v. Weaver*, 2017 Ohio 4374, 93 N.E.3d 178, ¶¶ 19-20 (5th Dist.); *State v. Johnson*, 1st Dist. No. C-160242, 2017 Ohio 1148, ¶¶ 12-15; *State v. Burke*, 2016 Ohio 8185, 69 N.E.3d 774, ¶¶ 13-28 (2nd Dist.); *State v. Campbell*, 8th Dist. No. 103982, 2016 Ohio 7613, ¶ 16; *State v. Hawkins*, 4th Dist. No. 13CA3, 2014 Ohio 1224, ¶¶ 13-15; *State v. Jones*, 2nd Dist. No. 2012 CA 61, 2013 Ohio 4820, ¶¶ 22-26; *State v. McDowell*, 10th Dist. No. 03AP-1187, 2005 Ohio 6959, ¶ 73; *State v. Brown*, 6th Dist. No. WD-00-033, 2001 Ohio App. LEXIS 447, at *11 (Feb. 9, 2001); *cf. State v. Roark*, 3rd Dist. No. 10-14-11, 2015 Ohio 3811, ¶ 13.

Here, Defendant was sentenced to a 33-Years-to-Life stated prison term: 30-Years-to Life for Count One, Aggravated Murder, in violation of R.C. 2903.01(B)(F); 3 Years for the Firearm Specification attached to Count One, in violation of R.C. 2941.141; and a concurrent 3 Years for Count Three, Tampering with Evidence.

Thus, Defendant's sentence for Aggravated Murder is unreviewable, and review need not proceed any further. *See State v. Castagnola*, 145 Ohio St.3d 1, 16-17, 2015 Ohio 1565, 46 N.E.3d 638.

B. OHIO'S FELONY-SENTENCING SCHEME GRANTS BROAD DISCRETION TO THE SENTENCING COURT.

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *State v. Long*, 138 Ohio St.3d 478, 480, 8 N.E.3d 890 (2014), quoting the Eighth Amendment; *accord* Ohio Constitution, Article I, Section 9. It is well recognized that "[c]entral to the Constitution's prohibition against cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Long*, 138 Ohio St.3d at 480, quoting *In re C.P.*, 131 Ohio St.3d 513, 2012 Ohio 1446, 967 N.E.2d 729, ¶ 25, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544 (1910).

Prior to July 1, 1996, "Ohio had a predominantly indeterminate felony-sentencing structure in which a sentence was expressed in the form of a minimum and maximum prison term with the release decision in the hands of a parole board." *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, ¶ 34. Senate Bill 2's enactment recognized the importance of "truth in sentencing[,]" that would establish certainty and proportionality with Ohio's felony-sentencing statutes. *See id.*

Ohio's felony-sentencing structure resulted in some aspects of indeterminate sentencing continuing for certain offenses. *See Foster*, supra at ¶ 35, citing R.C. 2971.03 (authorizing indefinite sentences for certain sexually violent offenses); *see also* R.C. 2929.02 (authorizing indefinite sentences for certain homicide offense). But trial courts were now granted discretion to impose a definite sentence for the vast majority of offenses based on the statutory range for the felony level charged. *See Foster*, supra at ¶ 35; R.C. 2929.14. For those offenders sentenced to a definite term, the trial court

determines if an offender is entitled to early release rather than the parole board. *See id*.; R.C. 2929.20.

To guide trial courts in fashioning an appropriate sentence, R.C. 2929.11 and R.C. 2929.12 were contemporaneously enacted. *See Foster*, supra at ¶¶ 36-37, citing R.C. 2929.11, and R.C. 2929.12; *see also State v. Gwynne*, Slip Opinion No. 2019 Ohio 4761, ¶ 17 (stating, "R.C. 2929.11 and R.C. 2929.12 both clearly apply only to *individual* sentences.").

Revised Code 2929.11 is a general judicial guide that applies to every sentencing hearing. Revised Code 2929.11 states that the purposes of felony sentencing are "to protect the public from future crime by the offender and others and to punish the offender." *See Foster*, supra at ¶ 36, quoting R.C. 2929.11(A).

Revised Code 2929.12 grants trial courts the "discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code." R.C. 2929.12(A).

Accordingly, this Court recognized in *Foster* "that there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ***'consider'*** the statutory factors." (Emphasis added.) *Foster*, supra at ¶ 42. Accordingly, this Court held that "[t]rial courts have ***full discretion*** to impose a prison sentence within the statutory range[.]" (Emphasis added.) *Foster*, paragraph seven of the syllabus.

1. JUVENILE SENTENCING POST *ROPER* IN OHIO.

Undoubtedly, the treatment of juveniles in American jurisprudence has changed dramatically in the past 15 years. *See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (prohibiting capital punishment for those under the age of 18 at the time of the offense); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting life imprisonment without parole for a non-homicide offense); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (prohibiting mandatory life without parole for juvenile homicide offenders).

This change resulted from the understanding that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S.Ct. at 2464, citing *Roper*, 543 U.S. at 569-570, and *Graham*, 560 U.S. at 68. The U.S. Supreme most recently summarized these differences in *Montgomery v. Louisiana*:

> First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, 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 irretrievable depravity.'

Montgomery v. Louisiana, __ U.S. __, 136 S.Ct. 718, 733, 193 L.Ed.2d 599 (2016), quoting *Miller*, 132 S.Ct. at 2464, quoting *Roper*, 543 U.S. at 569-570.

a.) ***Graham v. Florida***

In *Graham v. Florida*, the U.S. Supreme Court addressed whether the Eighth Amendment permitted a juvenile offender to be sentenced to life imprisonment without parole for a non-homicide offense. *See Graham*, 560 U.S. at 52-53.

In *Graham*, the Court specifically held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *See id.* at 74. While the state is not required to guarantee a juvenile's release, the state must afford juvenile offenders sentenced to life imprisonment "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See id.* at 75.

When Graham was 16 years old, he and three other juveniles robbed a barbeque restaurant in Jacksonville, Florida. *See id.* at 53. Graham was charged as an adult with armed burglary with assault or battery, which carried a maximum sentence of life imprisonment, and attempted armed robbery. *See id.* Graham pleaded guilty, and the trial court withheld adjudication of guilt as to both offenses and sentenced Graham to three years of probation. *See id.* at 54. Less than a year later, and 34 days short of his 18th birthday, Graham committed two separate robberies. The trial court found that Graham had violated his probation, and sentenced him to the maximum sentence of life imprisonment. *See id.* at 54-57.

The Court found that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability[,]" *id.* at 69, "[l]ife without parole is an especially harsh punishment for a juvenile[,]" *id.* at 70, and the "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.* at 74.

Thus, the Court held in *Graham* "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." While the state is not required to guarantee a juvenile's release, the state must afford juvenile offenders sentenced to life imprisonment "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See id.* at 74-75.

i.) ***State v. Moore*—Applying *Graham***

In *State v. Moore*, this Court addressed *Graham's* application in Ohio; "whether a term-of-years prison sentence that extends beyond an offender's life expectancy—a functional life sentence—falls under the *Graham* categorical bar." *State v. Moore*, 149 Ohio St.3d 557, 2016 Ohio 8288, 76 N.E.3d 1127, ¶ 15. This Court concluded that *Graham's* categorical rule prohibits a lengthy aggregate fixed-term sentence for multiple non-homicide offenses committed by juveniles, because it amounted to the functional equivalent of a life-without-parole sentence. *See Moore*, supra at ¶ 15.

This Court reasoned that although *Graham* specifically addressed a juvenile offender sentenced to life without parole for a *single* non-homicide offense, "the principles behind *Graham* apply equally to a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy." *See Moore*, supra at ¶ 48.

This Court found that "the lessened moral culpability of juvenile offenders, the severity of the sentence, and the inapplicability of penological justifications for life sentences for juveniles" applies equally to juveniles serving lengthy term-of-years sentences. *See Moore*, supra at ¶ 49.

After concluding that *Graham's* categorical prohibition applied to Moore's 112-year aggregate prison term, this Court found that Moore's sentence was the functional equivalent of a life sentence because it exceeded his life expectancy. *See Moore*, supra at ¶ 30. This Court utilized the U.S. Department of Health and Human Services to determine Moore's life expectancy. *See id.*, citing U.S. Department of Health and Human Services, *National Vital Statistics Reports*, Volume 52, Number 3, at 26 (2003),

http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_03.pdf (accessed Oct. 5, 2016)). According to those statistics, Moore's life expectancy fell between 70 and 75 years old. Thus, this Court determined that Moore's sentence was unconstitutional, because the opportunity for release at the age of 92 did not provide a meaningful opportunity to reenter society. *See Moore*, supra at ¶ 30.

In *Moore*, this Court, in a sharply divided 4-3 decision that contained five separate opinions, held "that pursuant to *Graham*, a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." *Moore*, supra at ¶ 1. The majority "conclude[d] that the Eighth Amendment prohibition of life imprisonment without parole or its practical equivalent for juvenile offenders is not limited to juveniles who commit a *single* nonhomicide offense." (Emphasis sic.) *See id.* at ¶ 74. Accordingly, the majority found that Moore's 112-year aggregate prison term for multiple offenses was unconstitutional, because he was not eligible for release until he was 92 years old. *See id*. at ¶¶ 30, 64; R.C. 2929.20(C)(4)-(5).

b.) *Miller v. Alabama*

In *Miller v. Alabama*, the U.S. Supreme Court addressed whether the Eighth Amendment required a trial court to consider a juvenile offender's age prior to imposing a life-without-parole sentence. *See Miller*, 132 S.Ct. at 2471.

The Court in *Miller* concluded that, "Although we do not foreclose a sentencer's ability to make that judgment [to impose life without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Long*, 138 Ohio

St.3d at 482, quoting *Miller*, 132 S.Ct. at 2469. The Court explained the distinction in *Miller* with that in *Graham* and *Roper*: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, *it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics*—before imposing a particular penalty." (Emphasis sic.) *Long*, 138 Ohio St.3d at 482, quoting *Miller*, 132 S.Ct. at 2471. *Miller*, however, did not lay out that "certain process" to follow. *See Long*, 138 Ohio St.3d at 482.

The Court later clarified that *Miller* did not require trial courts to state its findings of fact on the record regarding a juvenile offender's incorrigibility. *See State v. Brown*, 6th Dist. No. L-16-1181, 2018 Ohio 117, ¶ 52, citing *Montgomery*, 136 S.Ct. at 736-737.

i.) *State v. Long*—Applying *Miller*

In *Long*, this Court addressed whether "a trial court violates the Eighth Amendment by imposing a sentence of life imprisonment without parole for an aggravated murder committed by a juvenile." *Long*, 138 Ohio St.3d at 479. This Court 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***." (Emphasis added.) *Long*, at paragraph one of the syllabus. This Court went beyond *Miller's* requirements and further held that "[t]he ***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." (Emphasis added.) *Id*., at paragraph two of the syllabus.

This Court, however, rejected the defendant's argument that Ohio should require consideration of several additional factors set forth by the Wyoming Supreme Court (as discussed in *Miller*), because Ohio trial courts were already guided by R.C. 2929.11 and R.C. 2929.12: "In imposing a prison sentence, the sentencing court has discretion to state its own reasons in choosing a sentence within a statutory range unless a mandatory prison term must be imposed." *Long,* 138 Ohio St.3d at 482-483.

For instance, this Court recognized that in considering R.C. 2929.11, "both the nature of the offender and the possibility of the offender's rehabilitation are already points for the court's sentencing deliberation." *Id.* at 483. Further, although youth is not specifically mentioned in R.C. 2929.12, the offender's conduct is considered less serious when there are "substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense." *Id.*, quoting R.C. 2929.12(C)(4). Likewise, "R.C. 2929.12(C) and (E) also permit a trial court to consider 'any other relevant factors' to determine that an offense is less serious or that an offender is less likely to recidivate." *Id.* at 483-484.

In *Long*, this Court concluded that "Ohio's sentencing scheme does not run afoul of *Miller*, because the sentence of life without parole is *discretionary*. Nor is our criminal procedure flawed under *Graham* and *Miller* by failing to take into account that a defendant is a youthful offender." (Emphasis added.) *Id.* at 484.

2. OHIO TRIAL COURTS ARE NOT REQUIRED TO EXPLICITLY CONSIDER, ON THE RECORD, A JUVENILE OFFENDER'S AGE AT SENTENCING WHEN THE OFFENDER IS AFFORDED THE POSSIBILITY OF PAROLE.

Here, Defendant contends that the trial court's 33-years-to-life sentence is contrary to law because the court did not *explicitly* consider, on the record, his age before the sentence was imposed.

To begin, *Long's* holding was strictly limited to life-without-parole sentences: "because a life-without-parole sentence implies that rehabilitation is impossible, when the court selects this *most serious sanction*, its reasoning for the choice ought to be clear on the record." (Emphasis added.) *Long*, 138 Ohio St.3d at 484; *accord id.*, paragraphs one and two of the syllabus; *see also id*., supra at ¶ 36 (O'Conner, C.J., concurring.) (stating, "we add to the sentencing calculus by holding that an offender's youth must be an articulated consideration in the sentencing analysis, at least in cases in which life without parole is a potential sanction.").

Accordingly, this Court requires the trial court to *explicitly* consider and articulate the juvenile offender's youth *only* before it imposes life without parole. *See id.*

Following *Miller*, *Montgomery*, and *Long*, Ohio appellate courts have consistently concluded that neither the Eighth Amendment nor Ohio's felony-sentencing statutes require a trial court to *explicitly* consider the age of a juvenile offender when imposing a sentence other than life without parole. *See Patrick*, supra at ¶ 16; *accord State v. Starling*, 2nd Dist. No. 2018-CA-34, 2019 Ohio 1478, ¶¶ 67-69; *State v. Alexander*, 8th Dist. No. 104281, 2017 Ohio 9011, ¶¶ 12-14; *State v. Terrell*, 8th Dist. No. 103428, 2016 Ohio 4563, ¶ 22 (refusing to extend the rationale in *Miller* to juvenile cases where the

offender is afforded the possibility of parole); *State v. Zimmerman*, 2nd Dist. Nos. 2015-CA-62 and 2015-CA-63, 2016 Ohio 1475, ¶¶ 16-24; *State v. Hawkins*, 2015 Ohio 5383, 55 N.E.3d 505, ¶ 16 (2nd Dist.) (concluding the trial court did not err when it failed to consider offender's youth at sentencing because he was sentenced to a term less than life without parole—i.e., 33 years to life); *State v. Jones*, 2nd Dist. No. 26333, 2015 Ohio 3506, ¶¶ 1-2; *State v. Hammond*, 8th Dist. No. 100656, 2014 Ohio 4673, ¶ 22; *see also State v. Serna*, 2nd Dist. No. 2018-CA-16, 2019 Ohio 4102 (concluding that the court was not obligated to consider the defendant's age as a mitigating factor when sentencing for first-degree felonies and firearm specifications).

The Seventh District previously recognized that "the Eighth Amendment stricture against cruel and unusual punishment does not apply[]" when the defendant is "not sentenced to life imprisonment without parole." *See State v. Franklin*, 7th Dist. No. 17 MA 127, 2018 Ohio 2490, ¶ 16, citing *Long*, 138 Ohio St.3d at 478. Accordingly, "[t]he Eighth Amendment violations applicable to the juvenile offenders in both *Graham* and *Miller* have no relevance to [defendants like Kyle Patrick], precluding his contention that his sentence constitutes cruel and unusual punishment." *Franklin*, supra at ¶ 16.

The concerns this Court had in *Long* with respect to culpability and the possibility of rehabilitation do not exist where the offender is afforded the possibility of parole, because those offenders (like Defendant here) have the opportunity to become amenable to rehabilitation as they mature into adulthood. *See Long*, 138 Ohio St.3d at 484.

Thus, Ohio trial courts are not required to *explicitly* consider, on the record, the age of a juvenile offender when imposing a sentence that affords the possibility of parole.

a.) Other States Do Not Require Explicit Findings, On the Record, Unless the Defendant is Sentenced to Life Without Parole.

Several other states have also taken the position that *Miller* and *Montgomery* do not require individualized sentencing or consideration of the juvenile offender's age, but only where a sentence of life imprisonment without parole is imposed on the juvenile offender. *See State v. Delgado*, 323 Conn. 801, 151 A.3d 345 (2016) (concluding that a trial court does not have a constitutionally-founded obligation to consider any specific youth-related factors when a juvenile offender's sentence provides an opportunity for parole); *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410, 459-460 (2017) (stating, "[i]n sentencing a juvenile offender to life with the possibility of parole, traditional sentencing considerations apply[,]" while the *Miller* factors need only be taken into account when the juvenile is sentenced to life without parole); *State v. Tran*, 138 Haw. 298, 378 P.3d 1014 (Ct. App. 2016) (concluding that "[t]he Supreme Court's statements in *Montgomery* make clear that *Miller* does not require individualized sentencing or consideration of the mitigating factors of youth in every case involving a juvenile offender, but only where a sentence of life imprisonment without parole is imposed on a juvenile offender."); *Turner v. State*, 443 S.W.3d 128 (Tex. Crim. App. 2014) (concluding "that *Miller* is limited to a prohibition on mandatory life without parole for juvenile offenders; thus, juvenile offenders sentenced to life with the possibility of parole are not entitled to individualized sentencing under the Eighth Amendment.").

3. OHIO LAW CLEARLY HOLDS THAT A TRIAL COURT IS PRESUMED TO HAVE IMPLICITLY CONSIDERED THE GENERAL FELONY-SENTENCING FACTORS SET FORTH IN R.C. 2929.11 AND R.C. 2929.12.

In *Long*, this Court recognized that R.C. 2929.11 and R.C. 2929.12 "serve as a general guide for every sentencing." *See Long*, 138 Ohio St.3d at 483. Accordingly, this Court has consistently recognized that trial courts are *presumed* to have considered the general felony-sentencing statutes set forth in R.C. 2929.11 and R.C. 2929.12, which include "both the nature of the offender and the possibility of the offender's rehabilitation are already points for the court's sentencing deliberation." *Id.*

Prior to Senate Bill 2, this Court held that "[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus (1988); *see also State v. Cyrus*, 63 Ohio St.3d 164, 166, 586 N.E.2d 94 (1992), citing *State v. O'Dell*, 45 Ohio St.3d 140, 147, 543 N.E.2d 1220, 1227 (1989).

Following Senate Bill 2, this Court "continued to hold that R.C. 2929.12 does not require that the sentencing court make specific findings on the record or use specific language to evidence its consideration of the seriousness and recidivism factors." *State v. Barnette*, 7th Dist. No. 06 MA 135, 2007 Ohio 7209, ¶ 25, citing *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000 Ohio 302, 724 N.E.2d 793.

Later in *Foster*, this Court continued to recognize "that there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to *'consider'* the statutory factors." (Emphasis added.) *Foster*, supra at ¶ 42; *accord State v. Kalish*, 120 Ohio St.3d 23, 2008 Ohio 4912, 896 N.E.2d 124, ¶ 18, fn. 4, *superseded by statute*

(stating "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.").

Ohio appellate courts have concluded the same in regards to a trial court's consideration of R.C. 2929.11 and R.C. 2929.12: "a silent record raises the rebuttable presumption that the sentencing court considered the proper factors." *State v. James*, 7th Dist. No. 07 CO 47, 2009 Ohio 4392, ¶ 50; *accord State v. Brooks*, 7th Dist. No. 15 MA 214, 2017 Ohio 7583, ¶ 17; *State v. White*, 7th Dist. No. 13 JE 33, 2014 Ohio 4153, ¶ 9 (recognizing "a silent record raises the rebuttable presumption that the sentencing court considered the statutory sentencing criteria."); *State v. Bollinger*, 5th Dist. No. CT2018-0067, 2019 Ohio 2292, ¶ 20 (concluding "a silent record raises the rebuttable presumption that the sentencing court considered the statutory sentencing criteria."); *State v. Demeo*, 11th Dist. No. 2013-A-0067, 2014 Ohio 2012, ¶ 29; *State v. Ruby*, 6th Dist. No. S-10-028, 2011 Ohio 4864, ¶ 24; *State v. Sloane*, 2nd Dist. Nos. 2005 CA 79, 2006 CA 75, 2007 Ohio 130, ¶ 20 (stating, "[i]f a trial court's sentence is within the statutory limits, it will be presumed that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so.").

Furthermore, Ohio appellate courts found that the trial court's mere statement (either at sentencing or in its sentencing entry) that it considered the factors in R.C. 2929.12 was sufficient. *See Barnette*, supra at ¶ 25, citing *State v. Jones*, 7th Dist. No. 04 MA 76, 2005 Ohio 6937, ¶¶ 39-40, *State v. Gomez*, 7th Dist. No. 99 C.A. 10, 2000 Ohio App. LEXIS 2485 (May 23, 2000), *State v. Woods*, 5th Dist. No. 05CA46, 2006 Ohio 1342, ¶ 20.

In *Long*, this Court already rejected Defendant's argument that the Eighth Amendment requires Ohio trial courts to consider factors not contained in the Revised Code: "Although the Wyoming factors may prove helpful to courts as they select appropriate sentences for juveniles, we note that Ohio statutes do not require such findings. * * * In Ohio, two statutory sections serve as a general guide for every sentencing." *Long*, 138 Ohio St.3d at 483.

In *Long*, this Court further rejected the proposition that such considerations of R.C. 2929.11 and R.C. 2929.12 had to be *explicitly* stated on the record: "[a]n ***offender's youth*** and the attendant circumstances of youth ***may be considered*** under either of these provisions pursuant to *Miller* before the court imposes a sentence on a juvenile." (Emphasis added.) *Id*. at 483-484.

This Court specifically recognized that "*Miller* does not require that specific findings be made on the record, * * *." *Id*. at 487; *accord State v. Brown*, 6th Dist. No. L-16-1181, 2018 Ohio 117, ¶ 52, citing *Montgomery*, 136 S.Ct. at 736-737 (stating that *Montgomery* clarified that *Miller* does not require trial courts to state its findings of fact on the record regarding a juvenile offender's incorrigibility).

Miller, *Montgomery*, and *Long* all illustrate the distinction between a finding and a consideration. *Compare* R.C. 2929.14(C)(4) *with* R.C. 2929.11, and R.C. 2929.12.

As used in R.C. 2929.14, "the verb 'finds' means that the court 'must note that it engaged in the analysis' required by the statute." *State v. Marshall*, 12th Dist. No. CA2013-05-042, 2013 Ohio 5092, ¶ 10, citing *State v. Edmonson*, 86 Ohio St.3d 324, 326, 1999 Ohio 110, 715 N.E.2d 131 (1999).

"These consecutive sentence findings within R.C. 2929.14(C) must be made separate and apart from any consideration of the factors within R.C. 2929.11 and 2929.12, especially where the purpose and recidivism statutes require only *consideration* of factors but do not require the trial court to make any *findings*." (Emphasis sic.) *State v. Marshall*, 12th Dist. No. CA2013-05-042, 2013 Ohio 5092, ¶ 17.

"R.C. 2929.11 and 2929.12 do not require judicial fact-finding; rather, they direct trial courts to 'consider' the factors." *State v. Williams*, 8th Dist. No. 100042, 2014 Ohio 1618, ¶ 17. And "[a]lthough there is a mandatory duty to 'consider' the relevant statutory factors under R.C. 2929.11 and 2929.12, the trial court is not required to go through each factor on the record or to make specific findings, explaining its analysis of the relevant factors prior to imposing a sentence." *State v. Caffey*, 8th Dist. Nos. 101833, 101834, 2015 Ohio 1311, ¶ 15.

Thus, the trial court's consideration, if any, of a juvenile offender's age must be *presumed* to have occurred. *See Long*, supra at ¶¶ 52-53 (O'Donnell, J., dissenting.) (recognizing that "nothing in *Miller* prescribes the weight that the court must give this mitigating factor in imposing sentence; * * * Nor does *Miller* require the court to explicitly state that it has considered any particular mitigating factor.").

Graham, *Miller*, *Long*, and *Moore* all involved cases in which the defendants had no opportunity for release within their lifetimes, and the prevailing rationale focused on preserving an opportunity for juvenile offenders to demonstrate their maturity and amenability to rehabilitation. Those same concerns simply do not exist in cases, like Defendant here, that afford the juvenile offender the opportunity for parole.

Therefore, the trial court's 33-years-to-life sentence is not clearly and convincingly contrary to law, because the trial court is not required to *explicitly* consider, on the record, the age of a juvenile offender when imposing a sentence that affords the possibility of parole.

Defendant's first proposition of law of error is meritless and must be overruled.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests that this Honorable Court Overrule Defendant-Appellant Kyle Patrick's Proposition of Law and Deny his request for relief, allowing his conviction and sentence to stand.

Respectfully Submitted,

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Certificate of Service

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