

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 SUPPLEMENTAL ANSWER BRIEF

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Statement of Case, Facts, and Introduction

The State of Ohio will incorporate its Statement of the Case and Facts set forth in its Answer Brief.

The State now responds with its Supplemental Answer Brief and requests this Honorable Court to Dismiss Defendant-Appellant **Kyle Patrick's** Discretionary Appeal as Improvidently Accepted.

Law and Argument

- I. **Proposition of Law No. 1:** R.C. 2953.08 bars review of sentences imposed for murder or aggravated murder only when a defendant appeals his sentence under the separate appeal provided by R.C. 2953.08(A), but not otherwise in appeals under other legal avenues.

State's Response to Proposition of Law No. 1: R.C. 2953.08(D)(3) bars review of sentences imposed for murder or aggravated murder, and the Revised Code offers no other avenue to appeal a life sentence for murder or aggravated murder.

As for this Court's supplemental proposition of law, this Court ordered the parties to brief: "[t]he effect, if any, of R.C. 2953.08(D)(3) on this court's and the court of appeals' ability to review appellant's sentence. [And] * * * whether that provision denies either court of subject-matter jurisdiction and, if not, whether it otherwise limits the scope of the appeal here or in the court of appeals."

Defendant contends that R.C. 2953.08 bars review of sentences imposed for murder or aggravated murder only when a defendant appeals his sentence under the separate appeal provided by R.C. 2953.08(A), but not otherwise in appeals under other legal avenues. This begs the question; under what section of the Revised Code did Defendant-Appellant Kyle Patrick appeal his life sentence for aggravated murder?

Neither R.C. 2505.03 nor R.C. 2953.02 grants Defendant a right to appeal his sentence for aggravated murder. And to say those statutes allow him to appeal the *sentencing process* while simultaneously recognizing that R.C. 2953.08 prohibits the review of his *actual sentence* is a distinction without a difference.

Therefore, R.C. 2953.08(D)(3) unambiguously divests this Court and the court of appeal of subject-matter jurisdiction to review Defendant-Appellant's life sentence for aggravated murder, and this case should be dismissed as improvidently accepted.

A. **A COURT’S SUBJECT-MATTER JURISDICTION MAY BE CONSIDERED AT ANY TIME.**

In *State v. Gwynne*, this Court recently recognized that “R.C. 2953.08(A) grants a court of appeals subject-matter jurisdiction to hear a defendant’s appeal of a felony sentence as a matter of right. *Only the legislature* may grant or divest the court of appeals of that jurisdiction[.]” (Emphasis added.) *State v. Gwynne*, 158 Ohio St.3d 279, 281-282, 2019 Ohio 4761, 141 N.E.3d 169. Thus, the ability for any reviewing court to review a defendant’s sentence for aggravated murder must be granted to it *by the legislature*.

Though the issue was not raised below, a reviewing court’s subject-matter jurisdiction may be challenged at *any time*; this Court “may consider a challenge to the court’s subject-matter jurisdiction for the first time on appeal, *Jenkins v. Keller*, 6 Ohio St.2d 122, 216 N.E.2d 379 (1966), paragraph five of the syllabus, either at the parties’ suggestion or sua sponte, *State ex rel. Bond v. Velotta Co.*, 91 Ohio St.3d 418, 419, 2001 Ohio 91, 746 N.E.2d 1071 (2001)[.]” *Lycan v. City of Cleveland*, 146 Ohio St.3d 29, 2016 Ohio 422, 51 N.E.3d 593, ¶ 27.

Furthermore, even “[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue.” *State v. Castagnola*, 145 Ohio St.3d 1, 16-17, 2015 Ohio 1565, 46 N.E.3d 638, quoting *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274, 279, 1993 Ohio 119, 617 N.E.2d 1075. A reviewing court’s authority to review a particular sentence is implicit in the challenge itself.

Thus, this Court may properly determine the effect of R.C. 2953.08(D)(3) on this Court’s and the court of appeals’ jurisdiction to review Defendant’s sentence for aggravated murder.

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

To begin, Defendant-Appellant Kyle Patrick concedes that R.C. 2953.08(D)(3) prohibits this Court and courts of appeal to review Defendant’s sentence for aggravated murder. (Defendant’s Supplemental Brief, at 10-11, 18-19.) *See* R.C. 2953.08(D)(3) (stating, “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.”); *see State v. Porterfield*, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690, ¶ 17; *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 concluded 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.” (Emphasis added.) *Porterfield*, 106 Ohio St.3d at 8.

In analyzing statutory provisions, this Court’s “paramount concern is to ascertain and give effect to the intention of the General Assembly.” *State v. Vanzandt*, 142 Ohio St.3d 223, 225, 2015 Ohio 236, 28 N.E.3d 1267, citing *Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16, 242 N.E.2d 342, paragraph two of the syllabus (1968). “If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” *Vanzandt*, 142 Ohio St.3d at 225, quoting *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 1996 Ohio 291, 660 N.E.2d 463. “Unambiguous statutes are to be applied according to the plain

meaning of the words used, and courts are not free to * * * insert other words.” (Citation omitted.) *Stewart v. Vivian*, 151 Ohio St.3d 574, 2017 Ohio 7526, 91 N.E.3d 716, ¶ 29, quoting *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 1997 Ohio 310, 676 N.E.2d 519.

This Court recognized in *Porterfield* that while *individual* life sentences are *unreviewable*, 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 *Porterfield*, 106 Ohio St.3d at 8-9; accord *State v. Geran*, 12th Dist. No. CA 2019-01-016, 2019 Ohio 3421, ¶¶ 6-7; *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; *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.

More recently, this Court continued to recognize that *Porterfield* remained controlling, and a sentence that involves a *discretionary* decision remains *unreviewable*: “*Underwood* acknowledges that an agreed sentence that involves a *discretionary* decision

to impose consecutive sentences, as in *Porterfield*, is ‘authorized by law’ and unreviewable on appeal even if the trial court fails to make the consecutive-sentence findings.” *State v. Sargent*, 148 Ohio St.3d 94, 2016 Ohio 2696, 69 N.E.3d 627, ¶ 29.

“The General Assembly’s practice of treating sentencing for aggravated murder and murder convictions differently from other felonies is longstanding. Before the 1996 Senate Bill 2 felony sentencing amendments, the courts likewise held that the general felony sentencing requirements did not apply in aggravated murder cases.” *State v. Hollingsworth*, 143 Ohio App.3d 562, 569, 758 N.E.2d 713 (8th Dist. 2001).

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 life sentence for Aggravated Murder is unreviewable. *See* R.C. 2953.08(D)(3).

1. **R.C. 2505.03 AND R.C. 2953.02 DO NOT GRANT DEFENDANT A RIGHT TO APPEAL HIS SENTENCE FOR AGGRAVATED MURDER.**

First, Defendant contends that he did not appeal his sentence pursuant to R.C. 2953.08, but rather appealed the *sentencing process* pursuant to R.C. 2505.03 and R.C. 2953.02. (Defendant’s Supplemental Brief, at 20-21.)

But neither R.C. 2505.03 nor R.C. 2953.02 grant Defendant a right to appeal his sentence for aggravated murder. And to say those statutes allow him to appeal the *sentencing process* while simultaneously recognizing that R.C. 2953.08 prohibits the review of his *actual sentence* is a distinction without a difference.

Revised Code 2505.03(A) provides that “Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.” R.C. 2505.03(A).

And R.C. 2953.02 similarly provides a right to appeal ones *conviction*:

In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which a sentence of death is imposed for an offense committed before January 1, 1995, and in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except that, in cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, and in which the question of the weight of the evidence to support the judgment has been raised on appeal, the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death as provided in section 2929.05 of the Revised Code.

R.C. 2953.02. While a defendant can challenge the finding upon which his conviction for aggravated murder was based, he cannot challenge the sentence for aggravated murder.

Neither R.C. 2505.03 nor R.C. 2953.02 grant Defendant a right to appeal his sentence for aggravated murder. This follows from the rule that no part of a statute “should be treated as superfluous unless that is manifestly required.” *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 2012 Ohio 1484, 967 N.E.2d 193, ¶19, quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917).

If R.C. 2505.03 and R.C. 2953.02 allowed aggravated murderers to appeal their sentences, both R.C. 2953.08 and R.C. 2953.08(D)(3) would be superfluous. After all, if R.C. 2505.03 and R.C. 2953.02’s broad language allowing an appeal of “any” criminal “judgment or final order” permitted felons to appeal their sentences, then neither R.C. 2953.08 (which specifies in exacting detail the circumstances in which one may appeal a felony sentence), nor R.C. 2953.08(D)(3) (which prohibits certain murderers from appealing) would serve any purpose.

Revised Code 2953.08(A)’s language that it applies “[i]n addition to any other right to appeal,” means only that defendants retain their ability to appeal issues *not covered by* R.C. 2953.08. But if an issue *is* covered by R.C. 2953.08, the issue can be appealed only under that law. This reading is consistent with the interpretive principle that a specific statute should trump a general one when the two conflict. *See* R.C. 1.51.

“It is a well-settled principle of statutory construction that when an irreconcilable conflict exists between two statutes that address the same subject matter, one general and the other special, the special provision prevails as an exception to the general statute.” *State v. Pribble*, Slip Opinion No. 2019 Ohio 4808, ¶ 13, quoting *State v. Conyers*, 87 Ohio St.3d 246, 248, 1999 Ohio 60, 719 N.E.2d 535. The rationale is that “the particular

provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction.’ Or think of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.” *Pribble*, supra at ¶ 13, quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012), quoting Jeremy Bentham, *General View of a Complete Code of Laws*, reprinted in 3 *The Works of Jeremy Bentham* 210 (John Bowring Ed. 1843).

Here, R.C. 2953.08 is the more-specific statute because it regulates *only* appeals of felony sentences, while R.C. 2505.03 and R.C. 2953.02 regulate appeals generally. Accordingly, it is possible to read R.C. 2953.08, R.C. 2505.03, and R.C. 2953.02 collectively that gives effect to all three statutes, avoiding the superfluity problem. Under this reading, R.C. 2953.08 delineates the *only* circumstances in which “a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed,” *unless* some even-more-specific statute (like a statute governing the appeal of a particular felony) confers a right to appeal. R.C. 2953.08(A); *see, e.g.*, R.C. 2929.05 (providing for appeals in cases in which a sentence of death is imposed).

Because Defendant was convicted of a felony that R.C. 2953.08(D)(3) prohibits him from appealing, and since he has not identified another more-specific statute that entitles him to challenge his sentence, he simply has no right to challenge his sentence.

This Court recently suggested in both *Marcum* and *Gwynne* that R.C. 2953.08 has been consistently understood as providing the *only* route to appeal. *See State v. Marcum*, 146 Ohio St.3d 516, 2016 Ohio 1002, 59 N.E.3d 1231, ¶ 21 (stating “R.C. 2953.08 specifically and comprehensively defines the parameters and standards—

including the standard of review—for felony-sentencing appeals. We need look no further.”), and *Gwynne*, 158 Ohio St.3d at 281-282 (stating, “R.C. 2953.08(A) grants a court of appeals subject-matter jurisdiction to hear a defendant’s appeal of a felony sentence as a matter of right. Only the legislature may grant or divest the court of appeals of that jurisdiction.”).

Thus, R.C. 2953.08(D)(3) unambiguously prohibits defendants convicted of aggravated murder (like Defendant-Appellant Kyle Patrick) from appealing their sentences, and neither R.C. 2505.03 nor R.C. 2953.02 grant Defendant a right to appeal his sentence for aggravated murder.

2. R.C. 2953.08 IS CONSTITUTIONAL.

Second, Defendant contends that even if R.C. 2953.08 precludes the review of his sentence, then R.C. 2953.08(D)(3) is unconstitutional.

Given the strong presumption of constitutionality that must be afforded Ohio statutes, a statute may be invalidated only if the challenger shows that it is unconstitutional beyond a reasonable doubt. *See generally State v. Weitbrecht*, 86 Ohio St.3d 368, 370, 1999 Ohio 113, 715 N.E.2d 167; *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996 Ohio 264, 664 N.E.2d 926; *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus (1955).

The Eighth Amendment provides: “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).

Neither the Ohio Constitution nor the United States Constitution affords a right to appeal life sentences. That is why numerous cases recognize “that there is no constitutional right to an appellate review of a criminal sentence.” *State v. Smith*, 80 Ohio St. 3d 89, 97, 1997 Ohio 355, 684 N.E.2d 668; *see also Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80, 50 S.Ct. 228, 74 L.Ed. 710 (1930); *Ross v. Moffitt*, 417 U.S. 600, 610-611, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); *Abney v. U.S.*, 431 U.S. 651, 656, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S.Ct. 913, 38 L.Ed. 867 (1894).

Regarding equal protection, several Ohio appellate districts have rejected similar claims that R.C. 2953.08(D)(3) violated the Equal Protection Clause. *See State v. Burke*, 2016 Ohio 8185, 90 Ohio App. 3d 27, 69 N.E.3d 774, ¶ 27 (2nd Dist.) (concluding, “we find nothing irrational or arbitrary in the legislature’s decision to view aggravated murder or murder as a more serious offense such that it warrants a separate statutory scheme from classified felonies. A statute withstands rational-basis scrutiny if it is neither irrational nor arbitrary under any set of facts that reasonably might be conceived to justify it.”); *State v. Wilson*, 4th Dist. Lawrence No. 16CA12, 2018 Ohio 2700, ¶ 69 (concluding, “[t]he statute provides a rational means by which the state can impose a statutory scheme that differentiates: (1) his offense as more serious than other general felony offenders and (2) his sentence as less serious than capital murder offenders. R.C. 2953.08(D)(3) does

not violate the Equal Protection Clause.”); *Weaver*, supra at ¶ 20, appeal not allowed, 151 Ohio St.3d 1510, 2018 Ohio 365, 90 N.E.3d 950, ¶ 20 (2018).

The Seventh District reasoned “the severity of the crimes of murder and aggravated murder provide a rational basis for the separate statutory scheme, * * * ‘[t]he General Assembly’s practice of treating sentencing for aggravated murder and murder convictions differently from other felonies is longstanding.’” *Austin*, supra at ¶ 68, quoting *Hollingsworth*, 143 Ohio App.3d at 569; accord *Kinney*, supra at ¶ 151.

Regarding due process, the Seventh District likewise concluded that R.C. 2953.08(D)(3) did not violate the Due Process Clause, because “there is no constitutional right to an appellate review of a criminal sentence.” *Kinney*, supra at ¶ 151, quoting *Smith*, 80 Ohio St.3d at 89, citing *Estelle v. Dorough*, 420 U.S. 534, 536, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1970) (stating, “the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance”).

The Second District recognized that “a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.” (Internal citation omitted sic.) *Burke*, supra at ¶ 21, quoting *Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

Thus, Defendant failed to establish that R.C. 2953.08(D)(3) is unconstitutional beyond a reasonable doubt, because neither the Eighth Amendment, nor the Equal Protection or Due Process Clauses, nor the Ohio Constitution confers any right to appeal a life sentence. *See Kinney*, supra at ¶ 149.

Conclusion

Revised Code 2953.08(D)(3) is constitutional, and it precludes appellate review of Defendant-Appellant Kyle Patrick's life sentence for aggravated murder.

Defendant failed to advance any plausible *legal* arguments, but mostly stress that recognizing a right to appeal would be just and fair. Perhaps it is, and Defendant is free to make those arguments to the General Assembly. But such arguments are entirely irrelevant to the question of whether the prohibition of "cruel and unusual punishments" guarantees a right to appeal.

Defendant has shown nothing to indicate that the General Assembly intended to change this well-established sentencing practice and the comprehensive sentencing scheme in aggravated murder and murder cases.

Why is there a right to appeal sentences of death, but no right to appeal a life sentence? Why is there a right to appeal a maximum sentence, but no right to appeal other very long sentences? Why not extend the right to appeal to cover *all* sentences? To be sure, one can draw distinctions. But ultimately, those distinctions rest on policy determinations, not constitutional text or constitutional doctrine. Ohio's General Assembly is far better positioned to make those policy determinations than are its courts.

In *State v. Gwynne*, this Court recognized that "R.C. 2953.08(A) grants a court of appeals subject-matter jurisdiction to hear a defendant's appeal of a felony sentence as a matter of right. *Only the legislature* may grant or divest the court of appeals of that jurisdiction[.]" (Emphasis added.) *Gwynne*, 158 Ohio St.3d at 281-282.

While Defendant contends that he did not appeal his sentence pursuant to R.C. 2953.08, but rather appealed the *sentencing process* pursuant to R.C. 2505.03 and R.C.

2953.02, neither R.C. 2505.03 nor R.C. 2953.02 grant Defendant a right to appeal his sentence for aggravated murder. And to say those statutes allow him to appeal the *sentencing process* while simultaneously recognizing that R.C. 2953.08 prohibits the review of his *actual sentence* is a distinction without a difference.

Nevertheless, this Court concluded in *Long* 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.) *Long*, 138 Ohio St.3d at 484.

Furthermore, the United States Supreme Court likewise recognized that *Miller* did not impose a “formal factfinding requirement” before imposing life without parole on a juvenile offender. *See Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). In fact, *Montgomery* left no doubt that *any* sentence that affords juvenile offenders parole eligibility, satisfies the Eighth Amendment, regardless of the *sentencing process* (i.e., whether the trial court considered the offender’s youth at sentencing), because the remedy for a *Miller* violation is simply parole eligibility, rather than a new sentencing hearing. *See id.*

Thus, R.C. 2953.08(D)(3) unambiguously prohibits defendants convicted of aggravated murder from appealing their sentences, and neither R.C. 2505.03 nor R.C. 2953.02 grants Defendant a right to appeal his life sentence for aggravated murder.

Accordingly, the Seventh District Court of Appeals lacked jurisdiction to review Defendant’s life sentence, and the Court lacks jurisdiction to review the Seventh District’s decision regarding Defendant’s life sentence.

WHEREFORE, the State of Ohio-Appellee hereby requests this Honorable Court to Dismiss Defendant-Appellant Kyle Patrick's Discretionary Appeal as Improvidently Accepted, allowing his conviction and sentence to stand.

Respectfully Submitted,

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Certificate of Service

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