

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2012-1410
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
ERIC LONG	:	Court of Appeals Case Number C-110160
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

Joseph T. Deters (0012084P)
Prosecuting Attorney

Ronald W. Springman (0041413P)
Chief Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3052
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

Timothy J. McKenna (0075027)
Attorney at Law
125 E. Court Street, Suite 950
Cincinnati, Ohio 45202
(513) 381-7111

COUNSEL FOR DEFENDANT-APPELLANT, ERIC LONG

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PROPOSITION OF LAW NO. 1: BECAUSE LONG’S LIFE SENTENCE WAS NOT MANDATED BY OPERATION OF LAW, IT DID NOT VIOLATE THE EIGHTH AMENDMENT OR THE U.S. SUPREME COURT’S OPINION IN MILLER V. ALABAMA. 8

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Defendant-appellant Eric Long engaged in a pattern of serious criminal conduct, along with two co-defendants. Long and his cohorts followed three individuals to their home from a bar. Once these individuals went inside their home, Long and his cohorts fired multiple shots at the house for a prolonged period of time, seriously injuring two people.

Long and his cohorts also followed two men leaving that same bar on another night. This time they fired at these individuals from their car while the two groups were driving on Interstate 75. Both men were killed.

In both shootings, high caliber assault rifles were used. The trial court conducted a lengthy sentencing hearing and after considering all the factors, including Long's youth as a mitigating factor, imposed a sentence of life without parole.

Long cites to *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 that was recently decided by the United States Supreme Court. In *Miller*, the court held that a mandatory term of life imprisonment without the possibility of parole that was imposed on 14-year old Miller violated the Eighth Amendment's cruel and unusual punishment provision. Long argues that *Miller* applies to render his life sentence unconstitutional.

Long badly misreads *Miller*. *Miller* invalidated an Alabama statute that mandated a life sentence without the trial court being able to consider youth as a mitigating factor.

Here, the trial court was not mandated to impose a life sentence. Under Ohio's statutory scheme, the trial court has discretion whether to impose life without parole or a lesser sentence. Unlike *Miller*, the trial court was able to consider mitigating factors, including Long's youth, before imposing a range of statutory sentencing options. Ohio's statute, unlike Alabama's, allows for judicial discretion. *Miller* is not applicable to the case at bar.

STATEMENT OF THE CASE AND FACTS

A jury convicted defendant-appellant Eric Long of three counts of felonious assault, one count of improper discharge of a firearm into a habitation, two counts of aggravated murder, two counts of having a weapon while under a disability, one count of carrying a concealed weapon, and various gun specifications. Long was sentenced to a prison term of life without parole on the aggravated murder counts, and to aggregate prison terms of 19 years on the remaining counts and specifications. The court of appeals affirmed on July 3, 2012.

Facts:

Long and Cohorts Shoot at House in Lincoln Heights (March 4, 2009)

In the early morning hours of March 4, 2009, Keyonni Stinson, her boyfriend Mark Keeling, and their friend Kyrie Maxberry returned to Stinson's home in Lincoln Heights in a green van after a night out at the Garage Bar in Sharonville where they celebrated a friend's birthday. Stinson lived in a house on Matthews Street with Keeling and her two children. Keeling drove, Stinson sat in the front passenger seat and Maxberry sat in the back passenger seat. (T.p. 944-948)

On the way home, Keeling's group approached an intersection where they saw a grey van being driven by Fonta Whipple. Stinson, Keeling and Maxberry saw two other people in the van with Whipple: Jayshawn Clark, who was seated in the front passenger seat and defendant-appellant Eric Long, who was seated in the back. The grey van containing Whipple, Clark and Long followed Keeling's group to the house on Matthews Street. (T.p. 949-954)

A few days prior, Keeling had some type of altercation with Whipple, Clark and Long at a bar called Annie's. Because of this prior altercation, Stinson, Keeling, and Maxberry feared Whipple's group. Because the grey van was on Matthews Street just outside the house, Stinson,

Keeling and Maxberry quickly entered the house where they believed they found safety. (T.p. 1038-1043)

They were wrong. Within seconds, bullets were flying through the house. Stinson flung herself to the floor amidst the dust and the smoke billowing throughout the house caused by the bullets. Though a bullet almost struck her in the head, neither she nor her children were shot. (T.p. 961-963)

Keeling and Maxberry were not as lucky. Keeling suffered a gun shot wound to his back at the base of his neck. After being shot, Keeling fell to the ground where bullets whizzed across his head. (T.p. 1050-1051) Maxberry heard the first bullets hit the house before he was struck with one in the face. (T.p. 1127)

After a few minutes, the gunfire subsided. Stinson called 911 and the police and paramedics arrived. Keeling and Maxberry were rushed to the hospital by ambulance where they were treated for serious gunshot wounds. (T.p. 1053-1055, 1132, 1157-1160, 1171-1179)

When police arrived on the scene, they observed that the house was riddled with bullets. Cartridge casings were found outside on the street, sidewalk, and front yard. (T.p. 1192) Police collected a total of 28 cartridge casings, one live round and one unspent round. (T.p. 1203-1205) In addition, police also recovered 13 bullets as well as flattened out metal pieces determined to be bullet fragments from inside the home. (T.p. 1210-1211) A firearms examiner determined that the 28 cartridge casings were fired from three separate high caliber weapons. (T.p. 2282-2283)

A day or two after the shooting, Stinson went back to her house on Matthews to clean it and gather a few belongings. While she was there, Whipple, Clark and Long drove slowly by the house in the same grey van. (T.p. 972-974)

14 Days Later (March 18th) Long and Cohorts Shoot at Car Travelling on I-75

A mere 14 days later, Long, Whipple and Clark used their same high caliber weapons to shoot at a car travelling on I-75.

On the afternoon of March 17, 2009, Whipple contacted Alisha Kloth, the mother of one of his children, and asked her to rent a car for him. Kloth went to Enterprise Car Rental in Tri-County and rented a silver Dodge Caliber. Kloth met Whipple and turned the car over to him. (T.p. 1297-1302, 1338-1341)

In the early morning hours of March 18, 2009, a fight broke out on the dance floor at the Garage Bar in Sharonville. Security ordered people to leave. People then began to gather at a Cracker Barrel parking lot across the street. There, Trenton Evans got into an argument with some guys that included Scott Neblett. After words were exchanged, Evans pulled out a gun but the argument ended without incident. (T.p. 1365-1367, 1515-1519, 2107)

Evans left the Cracker Barrel and went to the Thorton's Gas station next door. There Evans saw Whipple, Clark, Long, and someone named Jiggy J sitting in a silver Dodge Caliber [Jiggy J was identified as Jackie Thomas] (T.p. 1827). Whipple was in the driver's seat, Clark was in the front passenger seat, Long was in the rear passenger seat behind Clark, and Jiggy J was in the rear passenger seat behind Whipple. Evans approached the group and they were talking about the altercation between Evans and Neblett. Neblett arrived and went inside the gas station. (T.p. 1368-1370, 1520-1522)

At about 2:30 or 2:45 a.m., on March 18, 2009, William Gray was driving to work in his pick-up truck on southbound I-75. Gray was in the center lane when he saw three vehicles approaching the exit ramp to Sharon Road. Gray identified one of the vehicles as a red Chevy Blazer and the other as a silver Dodge Caliber, but could not identify the third vehicle. The

Caliber went by him fast and almost clipped the front end of his truck. The Blazer also cut in front of Gray's truck and sped on by. The Blazer was trailing the Caliber. (T.p. 1440-1448)

While the two vehicles were in front of him, Gray saw the Caliber move to the center lane. As the Blazer moved beside the Caliber, Gray saw muzzle flash and heard the sound of multiple gun shots coming from the Caliber. After this, Gray saw the Caliber enter the Woodlawn/Evendale exit ramp, which goes to Lincoln Heights, while the Blazer spun out of control, hit the guardrail and rolled over several times. Gray stopped and called 911. (T.p. 1446-1448, 1450, 1732)

Police arrived on the scene and eventually shut down a stretch of I-75 near where the accident occurred. (T.p. 1711-1712) Savalas Kidd, an agent with the Ohio Bureau of Identification, was called to help process the crime scene. Keith Cobb and Scott Neblett were found dead inside the red Chevy Blazer. Though they both suffered injuries from the crash, the Deputy Coroner testified that both men suffered fatal bullet wounds that occurred before the crash. (T.p. 1619, 1630, 2047-2050, 2074)

Approximately 15 bullets struck the Blazer on the passenger side, and three went through the entire vehicle and exited the driver's side. Bullet fragments were also found inside the Blazer. Police discovered 10 shell casings that were shot from high powered assault weapons scattered along I-75. Six were 9-millimeter casings, three were .223 casings, and one was a 7.62 casing. Because of the nature and length of the crime scene, there were most likely bullets and casings unaccounted for. (T.p. 1645-1646, 1729, 1762-1763)

Evendale Police Officer Rick Vonderhaar searched for the Dodge Caliber, and found it abandoned in a lot off Van Buren Street in Lincoln Heights. The Caliber had what appeared to be

bullet holes in the roof. Police linked the vehicle to Enterprise Car Rental, which linked it to Alisha Kloth. (T.p. 1597-1601)

On March 18, 2009 Whipple called Kloth from Atlanta. Whipple instructed Kloth to inform Enterprise Car Rental that the Caliber had been stolen and that Kloth lost the keys. Kloth did as instructed and Enterprise told her to call the police but she did not. (T.p. 1310-1311) Police, however, linked the Caliber to Kloth, and interviewed her. Kloth told police that Whipple instructed her that “some shit just happened,” that she was to report the Caliber stolen and to leave the “street shit” to Whipple. (T.p. 1814)

Inside the Caliber, police found medical discharge papers from Bethesda North hospital with Fonta Whipple’s name on them indicating that he had been released after receiving treatment for a gunshot wound to the hand. (T.p. 1665-1666) Further, Whipple’s DNA was found on the steering wheel, Clark’s DNA was found on the right front passenger seat, and a mixture of DNA found in the rear passenger seat could not be excluded as belonging to Long. (Wojslaw depo. pp. 27-28-31)

A firearms expert compared the shell casings recovered from the Matthews house shootings with the shell casings recovered from the I-75 shootings and determined that two of the weapons used in the Matthews house shooting were also used in the I-75 shootings, and that the third weapon could not be ruled out as having been used in both shooting incidents. (T.p. 2296-2297, 2302-2311).

Long Arrested Five Days Later

On the evening of March 23, 2009, Lincoln Heights Police Officer Michael Lowe was dispatched to an address on Steffen Street in Lincoln Heights when he saw Eric Long. As soon as Long saw Officer Lowe, he fled. A chase ensued. During the chase Officer Lowe saw that Long

was carrying a firearm. The route of the chase included the yards of the homes located on Steffen Street where Officer Lowe lost sight of Long for a period of time. (T.p. 2185-2190)

Lincoln Heights Police Officer LaRoy Smith was monitoring the pursuit and responded to the area in an effort to assist Officer Lowe. An unidentified woman pointed Officer Smith in the direction of a parking lot where she saw a young man running. Officer Lowe responded to that area and found Long sitting in a hunched-up position in the back of a pick-up truck. Officer Lowe arrested Long. Police searched for the gun Long was carrying but could not find it. (T.p. 1215-1223)

On April 8, 2009, Keith Harris, who lives on Steffen Street, was taking his garbage cans out when he discovered a gun in his yard. As he was cleaning it off, it fired. Harris called Lincoln Heights Police and turned the gun over to them. (T.p. 2230-2232)

The gun was tested and determined to be a Smith and Wesson 9-millimeter semiautomatic handgun that was one of the weapons used in the I-75 shooting incident. (T.p. 2299-3000)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: BECAUSE LONG'S LIFE SENTENCE WAS NOT MANDATED BY OPERATION OF LAW, IT DID NOT VIOLATE THE EIGHTH AMENDMENT OR THE U.S. SUPREME COURT'S OPINION IN *MILLER V. ALABAMA*.

Long argues that his sentence is contrary to law and that his sentence of life without parole violates the Eighth Amendment's cruel and unusual punishment provision and the U.S. Supreme Court's opinion in *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455. Long is incorrect.

This Court has held that an appellate court must apply a two-step approach when reviewing felony sentences. First, it must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard. See *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912.

Here, the trial court ordered a pre-sentence investigation and reviewed the sentencing memoranda of the parties. (T.p. 2774) The trial court heard from Long's attorney and grandfather. Long was given the opportunity to address the court but declined. (T.p. 2783-2787) The trial court sentenced Long to serve life without parole on the aggravated murder counts seven and eight, but ordered most of the sentences on the other counts to run concurrently. The sentence was within the applicable statutory range and, based on the egregious nature of Long's conduct, was not an abuse of the trial court's discretion.

Long also claims that his life sentences without parole were disproportionate. This Court discussed proportionality review in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338 at ¶ 20, 888 N.E.2d 1073, where it upheld an aggregate prison sentence of 134 years imposed upon

an offender who pled guilty to four counts of aggravated robbery, three counts of aggravated burglary, three counts of kidnapping, and one count of having a weapon while under disability:

“...we conclude for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than upon the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment.”

“[T]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *State v. Weitbrecht* (1999), 86 Ohio St.3d. 368, 373, 715 N.E.2d 167; *Harmelin v. Michigan* (1991), 501 U.S. 957, 997, 111 S.Ct. 2680.

A sentence is grossly disproportionate to the offense only if it shocks the sense of justice of the community or is considered shocking to a reasonable person. *Hairston*, 2008-Ohio-2338 at ¶ 14. A sentence that falls within the statutory range is not, as a general rule, disproportionate to the offense. *Hairston*, 2008-Ohio-2338 at ¶ 21.

This case involved shooting high caliber assault weapons at five people in the house on Matthews Street, which included two children who were asleep at the time. Two people were seriously injured. This case also involved the aggravated murders of two people who also were shot with high caliber assault rifles. Based on these facts, a sentence of life without parole is not disproportionate to convictions on multiple violent offenses that included two aggravated murders.

Long, a juvenile at the time of the crimes commission, argues that the United States Supreme Court’s recent decision in *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, which involved a 14 year old convicted of murder and sentenced to a mandatory life prison term without the possibility of parole, makes the life sentence imposed on Long cruel and unusual.

Long, however, misreads *Miller*. As the court of appeals clearly pointed out, Miller was sentenced to a mandatory term of life imprisonment. Here, the trial court had discretion to impose a lesser sentence. Unlike *Miller*, the trial court in this case could, and did, have discretion to consider Long's youth as a mitigating factor.

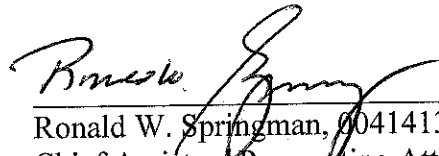
Miller does not apply. Long's proposition of law lacks merit.

CONCLUSION

Plaintiff-Appellee submits that jurisdiction should be denied.

Respectfully,

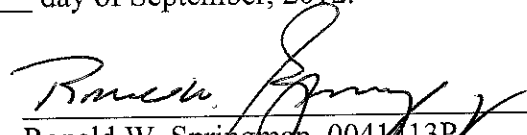
Joseph T. Deters, 0012084P
Prosecuting Attorney



Ronald W. Springman, 0041413P
Chief Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3052
Attorneys for Plaintiff-Appellee, State of
Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Timothy J. McKenna (0075027), 125 E. Court Street, Suite 950, Cincinnati, Ohio 45202, counsel of record, this 11th day of September, 2012.



Ronald W. Springman, 0041413P
Chief Assistant Prosecuting Attorney