ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
PLAINTIFF-APPELLEE,	:	Case No. 2012-1410
	:	
V.	:	On Discretionary Appeal from the
	:	Hamilton County Court of Appeals
ERIC LONG, A MINOR CHILD	:	First Appellate District, No. C-110160
	:	
DEFENDANT-APPELLANT.	:	

REPLY BRIEF OF APPELLANT ERIC LONG, A MINOR CHILD

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ARGUMENT

I. Introduction.

> [Courts have a] great difficulty . . . of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Although we do not foreclose a sentencer's ability to make that judgment 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.

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012). (Emphasis added) (internal quotation marks and citations omitted).

When interpreting *Miller*, the State and its amicus make the same general mistake—they change the US Supreme Court's holding that trial courts are "required to take into account" the deficiencies of youth into a suggestion that trial courts need only be *able* to take youth into account. But the mere availability of arguments from counsel and general information related to youth does not show that the trial court fulfilled its duty to take youth into account, especially when the instructions concerning how to consider youth had not been announced at the time of sentencing.

The trial court sentenced Eric Long to life without parole, but nothing in the record demonstrates that the court took "into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* This deficiency is not surprising, because the trial court did not have *Miller*

to guide its decision. This Court should vacate Eric's sentence and remand this case for resentencing consistent with *Miller*.

II. Concessions and uncontested issues.

The State does not contest that, absent a jury finding that he killed and intended to kill, Eric is ineligible for the sentence of life without parole. As the Court held in *Miller, Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), "recognized that lack of intent normally diminishes the 'moral culpability' that attaches to the crime in question, making those that do not intend to kill 'categorically less deserving of the most serious forms of punishment than are murderers.'" *Miller* at 2475 (Breyer, J., concurring), quoting *Graham* at 2027. And factually, the State concedes that the Blazer the victims were driving caught up with and moved next to the Caliber that Eric was in. Brief at 2. This is important because the victims were not innocent bystanders—they were armed, carrying drugs, and had recently used drugs. At a minimum, they escalated an already dangerous dispute when they could have ended the conflict without violence.

Perhaps most importantly, the State raises no issue of waiver, forfeiture or other procedural default.[1] So the arguments in Eric's merit brief are squarely before the Court.

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[1] The Ohio Attorney General, participating only as amicus curiae, raises issues of waiver and plain error, but as this Court has explained, "[a]mici curiae are not parties to an action and may not, therefore, interject issues and claims not raised by the parties."

III. Standard of review: this Court should review this case de novo.

Amicus Curiae Attorney General argues that Eric needs to prove that the trial court clearly and convincingly violated *Miller*. The State does not join this argument.[2] Perhaps the State refrained because the argument is not supported by this Court's case law—as this Court has held, "[d]e novo review is appropriate 'where a trial court's order is based on an erroneous standard or a misconstruction of the law .... In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court ....'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407 ¶ 16, 972 N.E.2d 528, quoting *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (1992), and citing *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 47. Eric raises a constitutional question—whether trial courts are required to consider youth as a mitigating factor for children. The standard of review is de novo.

Wellington v. Mahoning Cty. Bd. of Elections, 117 Ohio St.3d 143, 2008-Ohio-554, ¶ 53, quoting *Lakewood v. State Emp. Relations Bd.*, 66 Ohio App.3d 387, 394 (1990); *see also State ex rel. Toledo Blade Co. v. Henry County Court of Common Pleas*, 125 Ohio St. 3d 149, 2010-Ohio-1533, ¶19) ("the argument is not raised by the parties and will not be considered").

[2] *Compare Wellington* at ¶ 53 (holding that arguments presented by amici but not by the parties are not properly raised to the Court).

IV. Discussion.

A. The trial court did not consider youth as a mitigating factor as directed by the United States Supreme Court.

1. Sentencing courts must both 1) have the ability to consider youth as a mitigating factor, and 2) use that ability.

a) The Arkansas Supreme Court demonstrates the error in the State's logic.

The Attorney General's citation to *Murry v. Hobbs*, 2013 Ark. 64, at 3, 2013 WL 593365, demonstrates the difference between the Eric's position and the State's misreading of *Miller*. In order to reach its holding, that Arkansas Supreme Court had to clip a quote from *Miller* and add a misleading prequel that turns the decision on its head[3]:

Arkansas Supreme Court *Murry v. Hobbs*, 2013 Ark. at 3	**United States Supreme Court** *Miller*, 132 S.Ct. at 2469
Miller is only applicable in Arkansas when a mandatory life sentence is imposed without the sentencer's *being able to* "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."	Although we do not foreclose a sentencer's ability to make that judgment 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.

Of course, the State is correct that the trial court must have the opportunity to consider youth. The first part of the sentence from *Miller* quoted above explains that sentencers must have the "ability" to consider youth as a mitigating factor. But the second part of the sentence is also binding law, and it requires sentencers *to use* that ability. There is a

[3] Emphasis added in both quotations.

difference between knowing that a factor exists and using it when imposing sentence. The difference between being *able* to take into account and being *required* to take into account is the difference between the State's suggested rule and the United States Supreme Court's law. This Court should follow the law, not the contradictory rule advocated by the State and the Arkansas Supreme Court in *Murry*.

The State's citation to the Appellate Court of Connecticut's decision in *State v. Riley*, 58 A.3d 304 (Conn. App. Ct. 2013), is equally helpful to Eric, because the majority opinion has to engage in obviously flawed logic to reach its holding:

> There may be some ambiguity as to whether such sentencing procedures must simply afford juvenile defendants the opportunity to present mitigating evidence, or whether sentencing authorities are "require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

Id. at 313, quoting *Miller* at 2469. The two-member *Riley* majority held that there was "some ambiguity" between its paraphrase of the *Miller* and *the actual language of the opinion*. That is tantamount to an admission that the opinion is not an accurate application of *Miller*. As the dissent in *Riley* correctly explains, the majority opinion is based on a "gross misreading of *Miller*." *Riley* at 320 (Borden , J., dissenting). He points out that in *Miller* United States Supreme Court "made four significant points—none of which the majority recognizes":

> First, the court reiterated the scientific findings about the juvenile brain that served as the underpinning of *Graham*. Specifically, the court stated that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. . . .

> Second, the court stated that, although *Graham's* categorical ban related only to nonhomicide offenses, its reasoning based on the science of the juvenile brain applies to homicide offenses as well. . . .
>
> Third, the court emphasized the similarity between a sentence of life without the possibility of parole on a juvenile offender to the death penalty. . . .
>
> Fourth, although the court did not categorically ban a sentence of life without the possibility of parole for a juvenile convicted of murder, it ruled that such a sentence would be permissible only so long as the sentencing court *took into account all the scientifically proven factors regarding the juvenile brain.*

Id. at 323-26 (Emphasis sic), internal citations omitted. Not surprisingly, the Connecticut Supreme Court has agreed to hear this case. *State v. Riley*, 61 A.3d 531 (Conn. 2013) (discretionary review granted).

b) "Youth" means something very specific.

When the United States Supreme Court speaks of "youth" as a mitigating factor, it does not refer merely to general mitigation. It means that the trial court must consider some very specific disabilities of youth, such as:

- "a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking[;]"
- the "vulerab[ility] to negative influences and outside pressures, including from their family and peers[;]"
- the "fundamental differences between juvenile and adult minds--for example, in parts of the brain involved in behavior control[;]"
- "the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."

Miller, 123 S.Ct. at 2465-6 (internal quotation marks and citations omitted).

2. The trial court did not use its ability to consider youth as a mitigating factor.

Eric does not dispute that the trial court *could have* considered youth as a mitigating factor, although based on this record it could only have done so only very poorly. The relevant questions are whether it in fact did so, and whether it somehow managed to follow a rule that no court had yet announced.

Contrary to the State's argument, it is insufficient merely to say that the trial court considered the collective "history, character and condition" of Eric and his adult co-defendants. T.p. 2803. Nothing in those words shows that the trial court understood the deficiencies of youth as defined by the United States Supreme Court. Compare *Miller*, 123 S.Ct. at 2465-6. Worse, what little the trial court did say shows that it did not understand the mitigating qualities of youth as explained in *Miller*. For example, the trial court criticized the collective lack of remorse of Eric and his adult co-defendants, *id.*, but as *Graham* specifically explains, lack of remorse is one of the deficiencies of youth that frequently changes with age. *Id.* at 2032 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation"). More importantly, *every single thing* the trial court said applies equally to Eric and his adult co-defendants. The only arguable distinction is that the trial judge concluded that all three co-defendants "don't value human life" based on the court's "experience with" the adult co-defendants on the one hand and on Eric's "violent history and record" on

the other.[4] And that equivalence is exactly what *Miller* prohibits. *See, e.g., Miller* at 2464 ("children are constitutionally different from adults for purposes of sentencing").

The State is simply wrong that it "acknowledged" that Eric's youth was a "***mitigating*** factor" in this case. Brief at 11 (Emphasis sic). The trial prosecutor's only reference to youth as applied in this case was as a factor that required a longer sentence in order to ensure that he never be released. T.p. 2802.[5] A factor that requires a longer sentence is, by definition, an aggravating factor. Illustratively, one reason the United States Supreme Court has restricted the imposition of life without parole is that the sanction punishes children more than it punishes adults:

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.

Graham, 130 S. Ct. at 2028. And while the State argues that it is relevant that Eric was "three months shy of turning 18-years-old," State's Brief at 9, the United States Supreme

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[4] The trial court's lack of "experience with" Eric should also have mitigated in his favor, but it does not appear that the trial court considered it that way. At the sentencing hearing, the prosecutor argued that when the "two mothers [were] standing at the microphone and talking about the pain they feel, a pain that hasn't lessened in two years, of having lost a son, I think Fonta Whipple and Jashawn Clark were smirking and laughing as though that's funny. It's the same thing they did to shooting up Matthews. They stand before this Court and smirk and 1augh like this is some sort of joke." T.p. 2801-2. The prosecutor made no similar reference to Eric.

[5] "I know that youth is usually a mitigating factor. In this case, we have people, despite their youth, that, as they stand before the Court, have shown no inclination to change, or to show that they recognize the terrible damage they've done. Why would you give a sentence that's going to let them out, even at some date in the future?"

Court has recognized a bright line drawn at age 18—tellingly, Terrance Graham was only *one* month shy of his 18th birthday, and he obviously received the benefit of *Graham*. *Id.* at 2043 (Thomas, J., dissenting).

3. Federal constitutional law requires the record to demonstrate that the trial court considered a constitutionally required factor.

The State and the Attorney General have both misread *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), in addressing whether a trial court had demonstrated that it considered a required mitigating factor. It is true that the decision does not require the trial court to speak any magic words, but it does require that the record be sufficient so that the reviewing court can be "sure that the jurors fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Id.* at 787. In *Penry*, the sentencer had "extensive evidence that [Penry] was mentally retarded and had been severely abused as a child." *Id.* But while the record in *Penry* might have allowed a reviewing court to *guess* that the trial court had properly considered a mitigating factor, it certainly couldn't be "sure." *Id.* Given the lack of attention by the trial court, the assumption that the trial court considered Eric's youth as a mitigatory factor would be an awfully poor guess, and if anything, such consideration is far less "sure" than it was in *Penry*.

The State is partially correct when it argues that "[i]n addition to Long's relative youth the trial judge considered other factors. The PSI report included Long's extensive

juvenile adjudications, *which the judge specifically noted at the sentencing hearing.*" (Emphasis sic.) Brief at 13. But the trial judge did not specifically mention the presentence investigation report itself. And while the trial court did note Eric's juvenile history (without mentioning any particular adjudication or dismissal), the trial court never clearly stated whether it considered Eric's youth as a mitigating factor (as later required by *Miller* and argued by defense counsel) or—as the prosecutor argued at sentencing—as an aggravating factor.

4. The presumption of correctness does not include a presumption that trial courts have followed constitutional rules that have not yet been announced.

The Attorney General exaggerates a bit when he writes that "Ohio law presumes that sentencers have considered *all relevant arguments* unless the defendant presents clear evidence to the contrary." (Emphasis added) Amicus Brief at 2. As the cases cited in the amicus brief demonstrate, the presumption is that trial courts properly apply existing statutory law—not "all relevant arguments," and certainly not future constitutional rulings. For example, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the plurality ruled that "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." *Id.* at ¶ 18, n.4, citing *State v. Adams*, 37 Ohio St. 3d 295, 404 N.E.2d 144, paragraph three of the syllabus (1988) ("A silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12").

Here, Eric does not argue that the trial court failed to consider existing statutory law; instead, he argues that the trial court did not apply a United States Supreme Court decision that had not yet been issued. The "presumption" relied upon by the Attorney General simply does not apply to Eric's case.

B. Eric was "in the back seat, where he always was."

The State is "perplex[ed]" as to why it matters that Eric was "always" in the back seat. State's Brief at 8. Quite obviously, it matters because Eric was literally being driven around by his adult co-defendants. And following bad examples is one of the deficiencies of youth recognized in *Miller*. "[C]hildren 'are more vulnerable . . . to negative influences and outside pressures,' including from their family *and peers*; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." (Emphasis added.) *Id.* at 2464, quoting *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005). Eric certainly chose to get in the car with two or three other adults, but he was not in control of where that car went, or of how the driver would react when the armed, drug-using victims pulled up next to his car as both were speeding down I-75.

C. Eric was convicted only of conspiracy to commit aggravated murder with no requirement that he intended to kill.

The State is simply wrong when it asserts that the complicity instruction in this case applies only to the felonious assault charges. State's Brief at 7.[6] The State is correct that the instruction immediately preceded the felonious assault instructions, but it was part of the general instructions that apply to all the charges.

Other general instructions given with the complicity instruction define the role of the jury as the finder of fact, T.p. 2641; explain that the indictment contains allegations and is not evidence, *id.*; explain that the State must prove all elements beyond a reasonable doubt, *id.*; define "reasonable doubt[,]" *id.* at 2642; explain evidence, inferences, direct evidence and circumstantial evidence, *id.* at 2642-3; explain that evidence does not include opening statements or closing arguments, *id.* at 2644; explain that evidence may be admissible as to one defendant but no the others, *id.* at 2644-5; explain how to weigh eyewitness testimony, *id.* at 2646-8; explain how to use exhibits and stipulations, *id.* at 2648-51; and explain the right of defendants not to testify. *Id.* at 2651. Immediately following the discussion of the defendants' right not to testify, the

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[6] The Attorney General claims that Eric waived this issue by not objecting to the instruction. That argument is not in the State's brief, so, as explained above, it is not properly before this Court. *See infra* text and notes at 1-2. But the argument is also wrong—Eric does not seek a new trial based on a "faulty" instruction. He merely points to the instruction to show what the jury actually decided. Under the instruction as given, Eric is guilty of aggravated murder if one of his adult co-defendants killed with prior calculation and design, and Eric merely purposefully aided, helped, assisted, or encouraged that adult.

trial court provides the complicity instruction. *Id. at* 2651-3. If the complicity instruction applied only to the felonious assault charge, then so did all instructions immediately preceding it. Accordingly, under the State's theory, the trial court provided no reasonable doubt instruction for the aggravated murder count, an absurd construction. Adopting the State's theory would require reversal of the jury's verdict and a new trial with different jury instructions—that is far beyond what Eric argues to this Court.

Under the instructions (and under Ohio law), the jury need not have found that Eric was one of the shooters in order to convict him. As the State concedes, only three guns appear to have been shot from the car Eric was in, but the car contained four people, Eric, his two adult co-defendants, and Jackie Thomas, who was not charged and did not testify in this case. Brief at 2.

D. The State's reliance on the Wisconsin Supreme Court's decision in *State v. Ninham* is misplaced.

The State's Brief suggests that this Court should follow the decision of the Wisconsin Supreme Court in *State v. Ninham*, 333 Wis.2d 335, 2011 WI 33, 797 N.W.2d 451. State's Brief at 14-17. But *Ninham* is not directly relevant to the issue in this case—it involved a purely categorical challenge to a sentence for a homicide offense, and it did not speak to whether the trial court sufficiently considered youth as a mitigating factor in a non-mandatory life-without-parole case. *See, e.g., id.* at ¶ 43 ("Ninham argues that sentencing a 14-year-old to life imprisonment without parole is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and Article I,

Section 6 of the Wisconsin Constitution.") That also may explain why the United States Supreme Court did not vacate it in light of *Miller*—the result of the decision was consistent with *Miller*, to the extent that *Miller* did not categorically ban sentences of life without parole in homicide cases.[7] In short, *Miller* announced a rule to be applied in individual cases, while *Ninham* was a facial challenge to a Wisconsin statute. Eric has not presented a facial challenge like *Ninham*, he has presented an as-applied argument that the trial court failed to sentence him in accordance with *Miller* by crediting youth as a mitigatory factor.

CONCLUSION

Neither the State nor amicus curiae have been able to challenge the fundamental issue in this case—by treating Eric Long exactly the same as his adult co-defendants, the trial court sentenced Eric without the special regard to his youth required by the Eighth Amendment. For this reason, this Court should reject the appellee's arguments, adopt Eric's proposition of law, and remand this case for a new sentencing hearing where Eric's youth will be properly taken into account.

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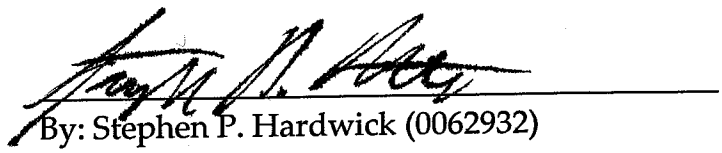
[7] The State's claim that the denial of certiorari in *Ninham* means that the United States "Supreme Court agreed with the rationale of the Wisconsin Supreme Court" is frivolous. State's Brief at 15. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85, 115 S. Ct. 2038, 132 L.Ed.2d 63 (1995), quoting *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923).

Respectfully submitted,

Office of the Ohio Public Defender



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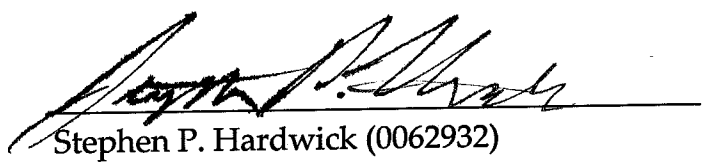
Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Ronald W. Springman, ron.springman@hcpros.org, on this 2nd of May, 2013.



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	:	
DEFENDANT-APPELLANT.	:	

APPENDIX TO

REPLY BRIEF OF APPELLANT ERIC LONG, A MINOR CHILD

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1 of 1 DOCUMENT

LEXISNEXIS (R) WISCONSIN ANNOTATED CONSTITUTION

*** This document is current through Act 286, dated April 12, 2012 ***
*** The most current Annotation is dated February 21, 2013 ***

WISCONSIN CONSTITUTION
ARTICLE I DECLARATION OF RIGHTS

Go to the Wisconsin Code Archive Directory

Wis. Const. Art. I, § 6 (2012)

Section 6. Excessive bail; cruel punishments.

Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted.