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# IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE  
HAMILTON COUNTY COURT OF APPEALS,  
FIRST APPELLATE DISTRICT,  
CASE NO. C-1400398

STATE OF OHIO,  
*Plaintiff-Appellee,*

v.

ERIC LONG,  
*Defendant-Appellant.*

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## MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ERIC LONG

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**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION  
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

This case involves a question left open by this Court’s initial review of this case and by Justice Breyer’s concurring opinion in *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S.Ct. 2455 (2012). Specifically, does the ban on sentencing a child to life without parole apply to children convicted of murder only as accomplices and who therefore did not kill or intend to kill. *Id.* at 2475 (Breyer, J., concurring). In *Miller*, Justice Breyer explained that when the state trial court resentenced Kuntrell Jackson (the companion case decided with *Miller*), there would “have to be a determination whether Jackson ‘kill[ed] or intend[ed] to kill’ the robbery victim.” *Id.*, quoting *Graham v. Florida*, 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

On its initial review of this case, this Court left open the “threshold issue” of whether Appellant Eric Long was eligible for life without because Eric “did not raise this issue in the court of appeals or argue it in his memorandum seeking jurisdiction in this court[.]” *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 9. But on remand, Eric raised the issue below, and the First District decided it on the merits after rejecting the State’s claim of procedural default. Opinion at ¶ 20-25. Specifically, the First District ruled against this claim because the court found that the evidence “supported the finding that Long had an intent to kill as described in *Graham*.” Opinion at ¶ 25. But that misses the fact that the jury was required to convict Eric in the absence of such an intent. Further, the evidence does not show that Eric killed anyone because the testable bullet fragments recovered from the victims came from assault rifles, not the 9mm gun the State claims Eric had.

The distinction matters in this case because neither the jury nor the trial judge found that Eric killed and intended to kill. The complicity instruction permitted the jury to convict Eric if he knowingly or purposefully helped his adult co-defendants commit aggravated murder—but the

instruction did not require the jury to find that Eric intended the victims to die, and it certainly did not require a finding that he actually killed anyone. Further, the trial prosecutor expressly relied on a complicity theory to convict Eric of the shooting:

With regard to [the firearm specification]– let me go back to complicity one more time. I read part of the complicity instruction about how *complicity relates to these underlying offenses*, and where one person does one part and another does another. (Emphasis added.)

Other state supreme courts have acknowledged the importance of this issue. The Colorado Supreme Court has ordered briefing on this specific issue, directing parties to address “[w]hether a conviction for second degree murder under a complicity theory is a non-homicide offense within the meaning of *Graham*[.]” *Armstrong v. People*, Col.Sup.Ct. No. 13SC945, 2014 Colo. LEXIS 1121 (Dec. 22, 2014). The Nebraska Supreme Court noted that the issue would have to be addressed if, on remand, a trial court imposed life without parole on a child who had not killed or intended to kill. *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716, 731-32 (Neb. 2014). And an Indiana intermediate appellate judge noted in a concurring opinion that subjecting a child “who did not kill or intend to kill anyone to a murder prosecution in adult court based solely on the premise it was ‘foreseeable’ to the juvenile that someone might be killed is problematic because juveniles do not ‘foresee’ like adults do.” *Layman v. State*, 17 N.E.3d 957, 968 (Ind.Ct.App. 2014) (May, J., concurring).

This case also addresses the issue of whether the record must show merely that a trial court generally addressed the issue of youth, or whether the trial court must give at least some weight to youth as a mitigating factor as explained by the United States Supreme Court. Here, the trial court noted that it wanted to consider youth as a mitigating factor, but that it could not. Further, the trial court made findings inconsistent with what the United States Supreme Court

found were the mitigating characteristics of youth—including alleged incorrigibility and lack of remorse.

Cases of juvenile life without parole are becoming more frequent in Ohio. It's true that Eric is one of only seven Ohio children with sentences labeled "life without parole," but the numbers are rising. The first life-without-parole sentence was imposed in 1998.<sup>1</sup> The second in 2007.<sup>2</sup> Eric was initially sentenced 2011 sentencing. But the remaining four have been sentenced since 2012.<sup>3</sup> In the same time, eleven adults have been added to Death Row.<sup>4</sup> So over the past few years, one child is being sentenced to die in prison for about every three adults sentenced to death. These cases are important, and their numbers are growing.

This Court should accept this case and set a uniform standard for how trial courts should handle the most serious offenses committed by children.

### **STATEMENT OF THE CASE AND THE FACTS**

*Even after a remand, a sparse record on which to sentence a child, who "wasn't nothing but 17[,] " to life without parole.*

As a State's witnesses explained, Eric "wasn't nothing but 17" when the incidents in this case happened. And the record tells us very little about the path that led this 17 year-old to be in the back seats of a car and a van, both of which were involved in shootings in March 2009.

By then, Eric had "complet[ed]" the 12<sup>th</sup> grade, but it isn't clear what education level he had actually achieved. He lived with his uncle, possibly because of domestic violence at home and parental substance abuse. Eric had a history of juvenile adjudications, including marijuana

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<sup>1</sup> Ian Duran, Hancock C.P. No. 1997CR63.

<sup>2</sup> Willie Evans, Lorain C.P. No. 06CR071596.

<sup>3</sup> Brogan Rafferty, Summit C.P. No. CR2012-01-0169(B); Thomas Lane, Geauga C.P. No. 12C000058; Trevin Roark, Mercer C.P. No. Case No. 13-CRM-092; Devonere Simmonds, Franklin C.P. No. 14CR232.

<sup>4</sup> Office of the Ohio Public Defender, *Death Row Current Residents*, [http://www.opd.ohio.gov/DP\\_ResidentInfo/dp\\_CurrentResidents.pdf](http://www.opd.ohio.gov/DP_ResidentInfo/dp_CurrentResidents.pdf) (July 2015) (viewed July 17, 2015).

possession, cocaine possession, obstructing official business and receiving stolen property, along with time on home monitoring and at the Department of Youth Services. But the record doesn't say whether Eric correctly self-reported that he had no problem with drugs or alcohol. Based on this sparse record, the trial court sentenced Eric to life without parole.

At his initial sentencing hearing, the record did not show that the trial court considered Eric's youth, and the trial court made no meaningful distinction between Eric and his two adult co-defendants. At the resentencing hearing, the trial court expressly stated that it gave no weight to youth as a mitigating factor.

\* \* \*

***The freeway shooting: An SUV chases down the car that carried Eric in the back seat.***

In March 2009 at about 2:30 in the morning, William Grey was driving his pickup truck south on I-75 to his job as a driver for the postal service in Cincinnati. As he passed Sharon Road, a silver Dodge Caliber raced off the entrance ramp and swerved across three lanes in front of him—so close that he had to slam on his brakes to avoid hitting it. A red Chevy Blazer raced by next. As the First District explained in Eric's original appeal, the Blazer was "in hot pursuit" of the Dodge Caliber. *State v. Long*, 1st Dist. Hamilton No. C-110160, 2012-Ohio-3052, ¶ 5.

The Blazer caught up with the Caliber and pulled next to it as both were speeding along. Grey heard about three to five shots and saw muzzle-flashes from the Caliber. The Blazer then veered off and rolled over three times. The Caliber quickly got off the freeway at the Lincoln Heights exit, only a mile from where it got on.

The Blazer left a trail of debris that included a semiautomatic handgun and a bag of crack cocaine. Both occupants, Scott Neblett and Keith Cobb, died from the gunfire. Both were 25 years old. Both had recently smoked marijuana. Both were legally drunk. The State's expert

explained that Cobb had gunpowder on his hand and chest, which was consistent with him shooting at the Caliber from the Blazer.

The driver of the pursued car, the Caliber, was Fonta Whipple. Jayshawn Clark was in the front passenger seat. Eric was in the back seat, as was Jackie Thomas. Jackie Thomas did not testify and was never charged in relation to this case.

***The bullets found in the victims were not linked to the gun the State said was Eric's.***

Along the freeway, police collected assault-rifle and 9mm caliber casings, but the bullet fragments recovered from the bodies of the victims were either unidentifiable or came from the assault rifles. A firearms examiner said that the 9mm casings found on the road matched the handgun the State claimed belonged to Eric.

***An earlier house shooting, Eric was "in the back seat, where he always is."***

Two weeks earlier, three witnesses said they saw a van with Fonta Whipple driving, Jayshawn Clark in the passenger seat, and Eric in the back, follow them home in the evening. One of those witnesses said that the back seat was where Eric "always is." After they were in the house for about 15-20 seconds, gunfire began, and one of them was shot in the spine and another in the face. Both were severely injured, but survived. Police collected a total of 28 cartridge casings, 13 bullets, one live round, one unspent round, as well as some bullet fragments from three separate assault-rifle-style weapons, two of which were involved in the freeway shooting.

***Eric is taken into custody.***

Former Lincoln Heights Police Officer LaRoy Smith testified that five days after the freeway shooting, he saw Eric with a gun, and that Eric ran off when directed to stop. He arrested Eric was after a brief foot chase, but an extensive police search turned up no gun. A person living in the area said he found the gun in his grass about three weeks later, accidentally



fired a shot, and called the police to turn it over.<sup>5</sup> A ballistics expert testified that bullets from the gun were found along and near the roadway of the freeway shooting.

***Eric prohibits his attorney from completing a negotiated sentence for flat time.***

Although no formal plea offers were made in this case, Eric’s lawyer talked to the prosecutor about a possible deal that would have resulted in 18 to 50 years of flat time. Discussions with a co-defendant’s lawyers were slightly more advanced—the prosecutor said he would be willing to consider an offer of 21-22 years of flat time. Eric ordered his attorney to stop negotiating, and the attorney complied.

***Eric is tried jointly with his adult co-defendants, and the trial court gives a complicity instruction requiring the jury to convict him of aggravated murder even if he did not kill or intend to kill.***

Over objection, Eric was tried jointly with his adult co-defendants. And while the typical jury instruction permits a guilty verdict only when the defendant was “acting with the kind of culpability required for the commission of an offense.” R.C. 2923.23(A); *see also* Ohio Jury Instructions, CR 523.03(10), Comment. But instead of instructing the jury that Eric had to act with prior calculation and design, as required by R.C. 2903.01(A), the trial court instructed the jury that Eric must be convicted if he knowingly or purposely helped someone who committed aggravated murder:

Complicity: Complicity in an offense means the conduct of one who *knowingly* aids and abets another for the purposes of committing such an act.

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<sup>5</sup> Former Officer Smith had previously pled guilty to falsification and later pled guilty to misdemeanor theft. *State v. Smith*, Hamilton C.P. No. B1404623 (Judgment Entry, Nov. 5, 2014); Maxim Alter, Bryce Anslinger, WCPO, *Hamilton County deputies officially replace Lincoln Heights police after “corruption” claims* (Jan. 26, 2015), <http://www.wcpo.com/news/local-news/hamilton-county/lincoln-heights/hamilton-county-deputies-officially-replace-lincoln-heights-police-after-corruption-claims> (viewed July 17, 2015). The Lincoln Heights Police Department was recently disbanded because of rampant corruption. *Id.* The trial court prohibited defense counsel from telling the jury about the falsification conviction because it was from 1996.

If you find beyond a reasonable doubt Fonta Whipple, Jashawn Clark and/or Eric Long *purposefully* aided, helped, assisted, encouraged or directed himself with another in the commission of an offense, he is to be regarded as if he were the principal offender, and is just as guilty as if he had personally performed every act constituting the offense.

When two or more persons have a common purpose to commit a crime, and one does one part and a second performs another, those acting together are equally guilty of the crime. (Emphasis added.)

The verdict forms do not distinguish between guilt as a principal offender or as a complicitor, and the trial prosecutor specifically used the complicity instruction to ask the jury to hold Eric responsible for the use of firearms in this case.

Eric was convicted 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, and one count of carrying a concealed weapon, as well as firearm specifications.

***Initial sentencing: A short joint sentencing hearing results in a sentence of life without parole for a child.***

At the initial sentencing, defense counsel filed a sentencing memorandum and argued that the trial court should consider youth as a mitigating factor, and that failure to do so would violate the Eighth Amendment to the United States Constitution. By contrast, the prosecutor argued that youth was an aggravating factor. The prosecutor also noted that all three had significant criminal records. Further, the prosecutor pointed out that during the victims' testimony at that hearing, Clark and Whipple were both "smirking and laughing as though that's funny. It's the same thing they did to (sic) shooting up Matthews. They stand before this Court and smirk and laugh like this is some sort of joke." There is no suggestion in the record that Eric acted inappropriately during the sentencing hearing. In contrast to his adult co-defendants, Eric has consistently treated the trial court with respect.

The trial court imposed a sentence of life without parole on Eric and his adult co-defendants as a group and without mentioning youth as a mitigating or aggravating factor.

***An appeal, and an offense committed in prison.***

Eric timely appealed his conviction and sentence, and while his case was before the First District on initial direct appeal, prison officials determined that he had worked with his girlfriend to attempt to bring marijuana into the prison. As a result, he was moved to a new prison.

***A reversal on appeal.***

After the First District affirmed Eric's conviction and sentence, this Court reversed, holding that *Miller* required the trial court to consider youth as a mitigating factor. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, reversing *State v. Long*, 1st Dist. Hamilton No. C-110160, 2012-Ohio-3052.

***On remand, the court-appointed psychologist gets angry that Eric saw another visitor an hour and a half after she began the interview in the jail.***

The trial court ordered Eric to be evaluated by the local court clinic, but Eric did not complete the evaluation because he had another jail visitor an hour and a half after the interview began. Nothing in the record shows that the Court Clinic scheduled the visit with Eric in advance or provided Eric with any advance notice. As a result of this scheduling issue, the trial court declared that Eric had given up "a chance to change [his] sentence." Based on the incomplete and potentially unannounced evaluation, the Court Clinic said that Eric had "anger problems[,]"" disregarded the rights of others, displayed "apparent psychopathic traits and narcissism[,]"" and was deceitful and impulsive. The report speculated that these traits would not change over time.

***The trial court holds that it cannot consider youth as a mitigating factor.***

At the sentencing hearing, trial counsel pointed out that it was impossible to determine whether Eric would pose a risk of reoffending if he were ever paroled. *Miller*, 132 S.Ct. at 2465

(“Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth”). Nevertheless, the trial court found that Eric posed a high likelihood of recidivism:

It is noted that the defendant has significant risk factors associated with future violence, although he has the absence of other factors. and imposed a sentence of life without parole.

As the Court is aware, it is difficult to specifically quantify the risk of violence, however, details about the defendant's individual risk factors have been provided by the Court to assist with his sentencing.

It also noted that the defendant appears to be a high risk for future violent offending, and it is not clear that any future intervention aside from incarceration will manage this task.

The trial court then explained that it did not consider youth to be a mitigating factor:

I desperately wanted youth to be your mitigating factor, but there is zero evidence before this Court, either at the time of the original sentencing or now, given the opportunity four years later to show me that youth is a mitigating factor.

The trial court then imposed consecutive terms of life without parole for the two aggravated murder counts, plus three years for the firearm specifications. The trial court also sentenced Eric to a total of eleven years for the remaining counts, to be served consecutively to his two life sentences.

***The First District again affirms a sentence of life without parole.***

On appeal, Eric argued that 1) he was ineligible for life without parole because the jury instructions did not allege that he killed or intended to kill; 2) his trial attorney was ineffective for failing to argue that Eric was ineligible for life without parole; 3) that the trial court did not consider youth as a mitigating factor; and 4) the trial court made findings that contradicted *Graham* and *Miller*. The court of appeals rejected the claims on the merits with no finding of procedural default or waiver. This timely discretionary appeal follows.

## ARGUMENT

### Proposition of Law No. I:

**A trial court may not impose a sentence of life without parole on a child who did not kill or intend to kill.**

The threshold question in this case is whether Eric committed a “homicide” offense as the United States Supreme Court used that term in *Graham* and *Miller*. In *Graham*, the Court held that juvenile non-homicide offenders could not be given a sentence of life without parole because, “when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability.” (Emphasis added.) *Graham*, 560 U.S. at 50.<sup>6</sup> *Graham* didn’t ban the sanction only when the child *both* killed *and* intended to kill—*Graham* bans life without parole when the child “did not kill *or* intend to kill.” (Emphasis added.) *Id.*

Here, the jury could convict Eric without finding that he killed or intended to kill. The trial court used a complicity instruction that permitted Eric’s conviction for aggravated murder even without proof that he acted with prior calculation or with a specific intent to kill.

The First District is correct that the specific aggravated murder instruction required proof of prior calculation and design. Opinion at ¶¶ 24-25. But the complicity instruction created an exception that required the jury to convict Eric of aggravated murder if it found that 1) *the assistance Eric gave was purposeful* and 2) the assistance helped others commit this crime. The instruction included no requirement that Eric intend for his assistance to lead to anyone’s death:

If you find beyond a reasonable doubt [that] Eric Long purposely aided, helped, assisted, encouraged or directed himself with another in the commission of an offense, he is to be regarded as if he were the principal offender, and is just as guilty as if he had personally performed every act constituting the offense.

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<sup>6</sup> Eric does not ask for relief because the jury instruction was erroneous, so this claim is not barred by res judicata. In fact, whether the instruction was correct or incorrect is irrelevant to this argument. The only relevant question is whether the jury convicted him of killing or intending to kill, and the jury did not do either.

Because the instruction did not require that the jury find that Eric either killed or even intended to kill, he is subject to *Graham*'s ban on sentences of life without parole for children who have not committed a "homicide" offense.

The instruction mattered in this case because the State relied on it to persuade the jury that Eric was responsible for the use of guns in this crime. At closing, the prosecutor expressly argued to the jury that the complicity instruction applied to the homicide offenses:

There's no question these vehicles were traveling side-by-side, that the shots were fired from a moving vehicle, that silver or grey Dodge caliber, at the red SUV that contained Scott Neblett and Keith Cobb. There's no question what the answer is to that specification, that it was fired from a vehicle.

*With regard to that* – let me go back to complicity one more time. I read part of the complicity instruction about how *complicity relates to these underlying offenses*, and where one person does one part and another does another. (Emphasis added.)

Well, there's a part of this complicity instruction that refers specifically to firearm specifications.

The First District held that the facts in this case show that Eric both killed and intended to kill. Opinion at ¶ 25. But the only weapon tying Eric to this case was a 9mm handgun, and bullets from that gun were found only on the ground on or near the freeway. According to the State's witnesses, all of the identifiable bullet fragments retrieved from the victims came from assault rifles. Accordingly, the evidence does not show that Eric actually killed anyone. Further, because of how the trial court defined complicity, the jury was required to convict Eric even if it did not make that finding. *See Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (trial court must impose a sentence "solely on the basis of the facts reflected in the jury verdict") (Emphasis omitted.).

As a result, this Court should vacate Eric's sentence and remand this case to the trial court with directions to impose a sentence that provides Eric a "meaningful opportunity for release" as required by *Graham*. *Id.* 560 U.S. at 50.

**Proposition of Law No. II:**

**A trial court must not make factual findings that are inconsistent with *Graham v. Florida* and *Miller v. Alabama*.**

<i>Miller v. Alabama</i> , 132 S. Ct. at 2465 <sup>7</sup>	Resentencing, T.p. 23
Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth.	It also noted that the defendant appears to be a high risk for future violent offending, and it is not clear that any future intervention aside from incarceration will manage this task.

The trial court’s sentencing opinion is based on a finding of fact that is wrong as a matter of law. The United States Supreme Court has held that children are not incorrigible because they have the capacity to mature and change. As *Miller* explained, “incorrigibility is inconsistent with youth[.]” *Miller* at 2465. But here, even though trial counsel explained that it was “impossible” to assess Eric’s future dangerousness, the trial court found the Eric “appears to be a high risk for future violent offending[.]” Several decades from now, the Parole Board can assess Eric’s rehabilitation or lack of the same. But the trial court cannot accurately make such a predication decades in advance.

The trial court also improperly used a lack of remorse as an aggravating factor. But *Graham* held that lack of remorse is a deficiency of youth and that “[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.” *Graham* at 79. So any lack of remorse is a sign of youth that can change over time. Again, the Parole Board will be in a better place to determine how remorseful Eric is decades from now.

It’s also true that soon after arriving in prison, Eric committed an additional crime while in prison—attempting to smuggle in marijuana. But a “young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible

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<sup>7</sup> Internal brackets, as well as quotation marks and citations to *Graham* and *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968), omitted.

individual.” *Graham* at 79. Eric, facing a sentence of life without parole, had no incentive to grow and mature. So the trial court erred by considering against Eric an offense he committed while under a sentence of life without parole.

Finally, the First District is simply wrong when it held that proper consideration of the mitigating factors of youth would mean that “a life sentence without parole could never be imposed on a juvenile[.]” Opinion at ¶ 16. Under *Graham* makes clear that “the moral depravity and of the injury to the person and to the public” of homicide offenses distinguish them from non-homicides. *Graham*, 560 U.S. at 69, quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438, 128 S.Ct. 2641, 176 L.Ed.2d 825 (2008). Here, by making findings contrary to the holdings of *Graham* and *Miller*, the trial court failed to properly weigh the mitigating effects of youth against the aggravating factors of this offense.

**Proposition of Law No. III:**

**A trial court must give some weight to youth as a mitigating factor.**

<i>Miller v. Alabama</i> , 132 S.Ct., at 2467 <sup>8</sup>	<i>State v. Long</i> , 2014-Ohio-849, at ¶ 29	Trial Court, T.p. 23 (resentencing)
[T]he chronological age of a minor is itself a relevant mitigating factor of great weight[.]	In this case, the trial court must consider Long’s youth as mitigating before determining whether aggravating factors outweigh it.	I desperately wanted youth to be your mitigating factor, but there is zero evidence before this Court, either at the time of the original sentencing or now, given the opportunity four years later to show me that youth is a mitigating factor.

Both this Court and the United States Supreme Courts require that trial courts consider youth as a mitigating factor. But here, despite trial counsel’s request, the trial court merely considered whether to consider youth as a mitigating factor, and then decided not to. And trial

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<sup>8</sup> Quoting, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).



counsel correctly asked the court to “consider the fact that when these things happened, this young man was 17 years old running around with guys that were much older than him.”

Before imposing a sentence of life without parole on a child, a trial court must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 132 S.Ct. at 2469. And that factor is entitled to “great weight[.]” *Id.* at 2467, quoting *Eddings*, 455 U.S. at 116. Further, this Court has emphasized that a court “must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole.” *Long*, 138 Ohio St.3d 478, 2014-Ohio-849, at paragraph one of the syllabus. This Court also held that the “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.” *Id.*, at paragraph two of the syllabus. Such consideration is needed because a child “matures into adulthood and may become amenable to rehabilitation, [and] the sentence [of life without parole] completely forecloses that possibility.” *Id.* at ¶ 27.

The First District held that the trial court found that the trial court found that the aggravating factors outweighed the mitigating factors, Opinion at ¶ 14, but the trial court expressly stated that it gave no weight to youth as a mitigating factor. T.p. 23 (resentencing). And while the trial court “may exercise its discretion as to what weight it will give to that factor[.]” *Long*, 2014-Ohio-849, at ¶ 52, the United States Supreme Court requires that weight to be at least “great.” *Long* at ¶ 52; *Miller* at 2467.

**Proposition of Law No. IV:**

**Trial counsel is ineffective for failing to make an argument that would have prevented the trial court from imposing a sentence of life without parole.**

Eric raises this issue only in the alternative because the First District resolved the underlying claim on the merits with no finding of waiver or forfeiture. As explained in Proposition of Law No. I, a child cannot be sentenced to life without parole unless he killed and intended to kill. But here, trial counsel failed to raise this argument. If trial counsel had argued that Eric was not eligible for the sentence of life without parole, the trial court would not have imposed the sentence. As a result, trial counsel's deficient performance prejudiced Eric, and this Court should vacate the sentence and remand this case to the trial court for resentencing. *See Strickland v. Washington*, 466 U.S. 668, 671, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth and Fourteenth Amendments to the United States Constitution.

**CONCLUSION**

This Court should accept this case, vacate Eric's sentence, and remand this case to the trial court for resentencing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Eric Long** has been sent by email to Ronald Springman, ron.springman@hcpros.org, Chief Assistant Hamilton County Prosecutor on this 20th day of July, 2015.

/s/ Stephen P. Hardwick  
Stephen P. Hardwick (0062932)  
Assistant Public Defender

#446330

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IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE  
HAMILTON COUNTY COURT OF APPEALS,  
FIRST APPELLATE DISTRICT,  
CASE No. C-1400398

STATE OF OHIO,  
*Plaintiff-Appellee,*

v.

ERIC LONG,  
*Defendant-Appellant.*

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT ERIC LONG**

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