

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2015-1180
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
ERIC LONG	:	Court of Appeals Case Number C-1400398
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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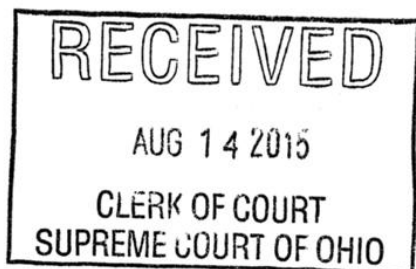
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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This Court's decision in *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.2d 890, ¶ 27 succinctly states, "[b]ecause the trial court did not separately mention that Long was a juvenile when he committed the offense, we cannot be sure how the trial court applied this factor. Although [*Miller v. Alabama*, 132 S.Ct. 2455 (2012)] does not require that specific findings be made on the record, it does mandate that a trial court *consider as mitigating* the offender's youth and its attendant characteristics before imposing a sentence of life without parole."

Long's primary argument is that the trial judge once again committed error when she failed to consider Long's youth and its attendant characteristics *as a mitigating factor* at his resentencing hearing. The record demonstrates otherwise. The trial judge bent over backwards to comply with this Court's mandate, and there is overwhelming evidence in the record to show that Long's youth was a dominant consideration at the resentencing hearing. Unfortunately for Long, while incarcerated pending his appeals, he continued his criminal ways, committing serious and substantial crimes in prison. His psychopathic personality features did little to help his mitigation case.

More importantly, the entire resentencing hearing was focused on youth as a mitigating factor. At the outset of the resentencing hearing the trial judge noted that this Court remanded the case so she could separately consider Long's youth as a mitigating factor. (T.p. 2) The trial judge considered a PSI, victim impact statements, resubmitted sentencing memoranda of the parties, institutional behavior records from the Southern Ohio Correctional Facility where Long was confined pending his appeal to this Court, and a mitigation report prepared by Dr. Carla Dreyer. (T.p. 3, 18-22)

The trial judge was well aware that Long was just shy of 18 when he committed the crimes. (T.p. 3-4) Long's attorney addressed the judge and immediately noted the differences in age and maturity between an adult and a juvenile. Long's attorney implored the judge to consider the this Court's opinion recognizing the diminished culpability of children due to their lack of maturity, underdeveloped sense of responsibility and greater prospects to be reformed. (T.p. 4, 7) The prosecutor acknowledged youth as a mitigating factor but argued that when weighed against the substantial aggravating circumstances, it should not be given much weight. (T.p. 8-9)

Against this backdrop, the trial judge said that Long's youth gave her great pause before she sentenced him the first time. The trial judge also said that the resentencing has given her a chance to review everything "with fresh eyes." (T.p. 19)

In addition to everything she considered before, the trial judge had additional information. First, was the mitigation report prepared by Dr. Dreyer. That report was ordered for the specific purpose of evaluating Long for mitigation purposes. Unfortunately, there was little, if any, mitigation to be found. Dr. Dreyer's report showed that Long continued to have no remorse for his crimes and had underlying psychopathic personality features. (T.p. 18-22, Court's Exhibit #2)

Second, was Long's institutional report detailing his behavior while in prison. (Court's Exhibit #1) Long's report showed that he engaged in serious crimes while in prison, including fighting and drug offenses, that required institutional segregation. (T.p. 20)

After reviewing all the information before her, the trial judge informed Long that she "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." (T.p. 23)

In *Long* this Court did not preclude a sentence of life without parole for a juvenile homicide offender. It simply required that a trial court separately address youth as a mitigating factor to “be weighed against any statutory consideration that might make an offense more serious or an offender more likely to recidivate.” *Id.*, at ¶ 19.

At bar, the record undoubtedly shows that the trial judge considered Long’s youth and its attendant characteristics as *a mitigating factor* and weighed that against all the aggravating circumstances before she re-imposed life imprisonment without parole.

The trial judge complied with this Court’s mandate on remand. This case, therefore, does not involve a substantial constitutional question or is of public or great general interest.

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.

Long appealed to the First District Court of Appeals, which affirmed his convictions and sentence on July 3, 2012. *State v. Long*, 1st Dist. No. C-110160, 2012-Ohio-3052. On March 12, 2014, this Court reversed Long’s life without parole sentence on the murders and remanded for resentencing only on those counts. This Court held that because Long was a juvenile at the time he committed the murders, the trial judge was required to separately consider Long’s youth *as a mitigating factor* before imposing the severe penalty of life without parole. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.2d 890, ¶ 29.

At the resentencing hearing held on May 29, 2014, the trial judge separately considered Long's youth as a mitigating factor, determined that it was outweighed by other aggravating factors and again sentenced Long to life without parole. On June 3, 2015, the First District Court of Appeals affirmed.

Facts:

The facts of the horrific crimes committed by Long were set forth in detail in the First District's opinion in *State v. Long*, 1st Dist. No. C-110160, 2012-Ohio-3052.

To summarize, Long and his cohorts Fonta Whipple and Jayshawn Clark followed a green van home in the early morning hours of March 4, 2009. Apparently, the three men were in some kind of altercation with the three occupants of that van a few days earlier. When the occupants of the van returned to their residential house and went inside, Long, Whipple and Clark, each armed with high caliber assault rifles, opened fire on the house. Two of the occupants were struck by bullets and seriously injured.

In a second unrelated incident that occurred two weeks later, Long, Whipple and Clark followed a car occupied by Keith Cobb and Scott Neblett as it travelled on Interstate 75. Long, Whipple and Clark opened fire on this vehicle, again using high powered weapons. Cobb and Neblett were killed by the gunfire before their vehicle crashed.

Following the trial on the charges related to these incidents, the trial judge sentenced Long, a juvenile, to life imprisonment without parole. At the original sentencing hearing, the trial judge indicated on the record that she tried and heard this case for four weeks, considered the violent history and record of Long. The trial judge discussed the senseless indiscriminate violence committed by Long and his cohorts, describing it as "chilling." The trial judge said she had no doubt in her mind that if Long walked out of the courtroom he would kill again. The trial

judge then said that she balanced the risks that Long will commit another offense and the need to protect the public with his history, character, and condition. (T.p. 2803)

The information about Long's history, character, and condition was laid out in detail before the trial judge in a presentence investigation report (PSI) and a sentencing memorandum prepared by Long's attorney. *Id.* ¶ 53 (T.p. 2774, T.d. 233)

The PSI references Long's June 22, 1991, date of birth, which again made him only three months shy of eighteen when the two murders occurred.

Long's lengthy sentencing memorandum is particularly revealing because it focused *solely* on his youth as a mitigating factor. (T.d. 233) The memorandum described in considerable detail the special protections afforded juveniles, their relative lack of maturity, and their diminished criminal capacity compared to adults. In the memorandum, Long argued that the importance of "youth as a mitigating factor cannot be understated." (T.d. 233) Long's memorandum was supported with citations to case law and contained an emotional plea that Long should not be given a prison sentence of life without parole but the minimum sentence to provide him a glimmer of hope that someday he may be granted parole. (T.d. 233)

At the original sentencing hearing, Long's attorney re-iterated much of the information contained in his sentencing memorandum, and specifically noted Long's youth. (T.p. 2784) Long's attorney asked for the minimum sentence and differentiated Long from his two older co-defendants when he said, "I think the Court can also glean from watching him throughout this whole process in a different situation. His demeanor, the way that he's dealt with this situation shows that he is dissimilar to his co-defendants." (T.p. 2784)

"I think you can describe him sort of a deer in headlights through this last portion of this court trial. I'd ask the Court to take that into consideration and give him some glimmer of hope,

give him a chance that some day he can return to society, hopefully a changed and rehabilitated man.” (T.p. 2784-2785)

The trial prosecutor also referenced Long’s youth at the sentencing hearing and acknowledged it is a *mitigating* factor, though he argued that it should not carry much weight in this case. (T.p. 2802)

This Court accepted jurisdiction over Long’s appeal on the sole proposition of law of whether under the Eighth Amendment trial courts must consider youth as a mitigating factor before sentencing a juvenile homicide offender to life imprisonment without parole. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.2d 890, ¶ 7. In its opinion, this Court concluded that while the trial judge did consider Long’s youth, it could not be sure, based on the record of the sentencing hearing, whether the trial judge properly weighed youth *as a mitigating factor*. This Court vacated Long’s sentence and remanded the case for resentencing. *Id.* at ¶ 27.

At the resentencing hearing, the trial judge again reviewed a PSI and victim impact statements. Further, she reviewed institutional summary reports from Southern Ohio Correctional Facility where Long had been confined (Court’s Exhibit #1), and a report by Dr. Carla Dreyer from the Court Clinic that was prepared in mitigation of sentence. (Court’s Exhibit #2) In addition, the trial judge reviewed the resubmitted sentencing memoranda of the parties. (Resentencing Hearing, T.p. 3, 18-20)

The trial judge said that she seriously considered Long’s youth before sentencing him to life without parole the first time and weighed that against the brutality of the crimes he committed. The trial judge said that she looked at everything with a “fresh set of eyes” hoping that there would be something in Long’s history over the four years since the last sentencing that would indicate that Long is on the right path. But because Long continued his criminal ways

while in prison, showed signs of psychopathic personality features and continued to lack remorse, she believed that weighing Long's youth with these aggravating circumstances and the brutality of the crimes, warranted the same sentence of life imprisonment without parole. (Resentencing Hearing, T.p. 18-23)

The trial judge therefore resentenced Long to life imprisonment without parole. The court of appeals affirmed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW: THE EVIDENCE OVERWHELMINGLY DEMONSTRATES THAT LONG COMMITTED INTENTIONAL HOMICIDE.

Long argues that he should not have been sentenced to life without parole because the jury did not convict him of intentional homicide. Long relies on *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011, (2010), which precludes a life sentence for juvenile offenders who commit non-intentional homicide.

Long raised this issue in his original appeal to this Court and it was rejected because Long did not raise it in his original direct appeal and did not argue it in his memorandum in support of jurisdiction to this Court. *State v. Long*, 2014-Ohio-849, at ¶ 9. Res judicata and the law of the case doctrine therefore bar Long from raising it again in his successive appeal to this court. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶'s 33-35.

In support of his argument, Long contends that the jury was only given an instruction on complicity, which prevented it from finding that Long actually participated in the killings of Cobb and Neblett or that he had the intent to kill them, i.e. that he acted purposely with prior calculation and design, the requisite *mens rea* for the crime of aggravated murder. R.C. 2903.01(A)(1) and (2).

Long's argument is factually incorrect. The jury was not given a complicity instruction on the aggravated murders. Long cites to pages 2651-2652 of the trial record. There the trial judge provided the jury with a complicity instruction on the crimes related to the Lincoln Heights house shooting. The offenses related to that event involve separate crimes that occurred on a different date, and did not include the offenses of homicide.

On pages 2682-2685 and 2694-2695 of the trial record, the trial judge instructed the jury on the charges related to the I-75 killings of Cobb and Neblett. The jury was specifically instructed that the state was required to prove beyond a reasonable doubt that Long "purposely, and with prior calculation and design" caused the deaths of Cobb and Neblett. The trial judge defined those terms in her jury instructions. Since the jury was properly instructed that it had to find that Long participated in the killings of Cobb and Neblett and had to have the intent to kill them, this issue is negated.

Moreover, the evidence does not support Long's contention that he was merely an accomplice who did not intend to kill his victims. In convicting Long in killing Cobb and Neblett, the jury found beyond a reasonable doubt that Long acted purposely and with prior calculation and design, i.e. he had the intent to kill Cobb and Neblett. The court of appeals found that the weight and sufficiency of the evidence supported the jury's finding that Long intended to kill his victims. *State v. Long*, 1st Dist. No. C-110160, 2012-Ohio-3052, ¶s 40, 45-49.

Long seems to suggest that he was merely an accomplice in the killings of Cobb and Neblett and in the Lincoln Heights house shooting because in both incidents he simply sat in the back seat of a motor vehicle. Under the existing evidence it is perplexing to comprehend how sitting in the back seat of a motor vehicle somehow lessens Long's criminal culpability.

In the Lincoln Heights house shooting, a firearms examiner examined the 28 cartridge casings fired into the house and determined they were fired from *three* separate high caliber weapons. (T.p. 2282-2283) Long and his two cohorts were identified following the victims to the house just before the gunfire erupted. This evidence certainly suggests that Long was one of three participants who fired one of the three high caliber weapons at the house.

More importantly, in the murders of Cobb and Neblett, many shots were fired, many shell casings and bullets were recovered and, because the crime scene was so vast, police believe many more bullets and casings were fired but not found. (T.p. 1645-1646, 1729, 1762-1763) A firearms expert determined that two of the weapons used in the murders of Cobb and Neblett were also used in the Lincoln Heights house shooting, and that the third weapon could not be ruled out as having been used in both shootings. (T.p. 2296-2297, 2302-2311) Again *three* weapons were used which is highly probative that there were *three* shooters. Substantial evidence showed that the three shooters were Long and his two cohorts Whipple and Clark.

Moreover, Long's arrest involved a police foot chase. During the chase, Long was seen carrying a gun, which he discarded before his arrest. The gun was recovered and ballistics tests determined that it was fired in the I-75 incident that resulted in the murders of Cobb and Neblett. (T.p. 2299-3000)

The evidence shows that Long was a principal offender, not an accomplice, in *all* his crimes, including the killings of Cobb and Neblett.

In sum, Long's first proposition of law is properly overruled.

SECOND PROPOSITION OF LAW: A TRIAL COURT CAN FACTOR IN FUTURE DANGEROUSNESS, LACK OF REMORSE, AND AN OFFENDER'S PRISON RECORD BEFORE IMPOSING SENTENCE ON A JUVENILE OFFENDER.

Long argues that the trial judge erred when she considered several factual findings to support her life without parole sentence that are inconsistent with *Miller v. California*, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed. 407 (2012) and *Graham v. Florida*, supra. These findings include (1) Long's risk of future dangerousness, (2) his lack of remorse and (3) the fact that he committed a crime while in prison. Long reads *Miller* as to preclude a trial court from taking these aggravating circumstances into consideration when sentencing a juvenile offender.

Miller does not stand for the proposition that a trial judge cannot factor in future dangerousness, lack of remorse, and an offender's criminal record while in prison before imposing a sentence on a juvenile homicide offender. Though *Miller* recognized that juvenile offenders are less culpable than adults it did not categorically bar a life without parole sentence for juvenile offenders. In *Ninham v. Wisconsin*, 333 Wis.2d 335, 797 N.E.2d 451 (2011), certiorari denied 133 S.Ct. 59, 183 L.Ed.2d (2012), the Wisconsin Supreme Court upheld a life without parole sentence imposed on a 14-year-old homicide offender. In *Ninham*, the Court wrote two instructive paragraphs discussing the social science research on the culpability of juvenile offenders:

“We do not disagree that, typically, juvenile offenders are less culpable than adult offenders and are therefore generally less deserving of the most severe punishments. *See Graham*, 130 S.Ct. at 2026 (citing *Roper*, 543 U.S. at 569–70, 125 S.Ct. 1183). Furthermore, we do not dispute *Ninham*'s argument that, on average, the younger the juvenile offender, the more his or her culpability diminishes. However, the constitutional question before us does not concern only the typical 14-year-old offender. Rather, the question before us concerns all 14-year-old offenders, typical or atypical, who commit intentional homicide. **Given these facts, we disagree with *Ninham* that *Roper* and *Graham* lead to the conclusion that 14-year-olds who commit intentional homicide are categorically less deserving of life imprisonment without parole.**” (Emphasis added) *State v. Ninham*, 333 Wis.2d 335, 376, 797 N.W.2d 451, 472, ¶ 74.

“Furthermore, contrary to Ninham’s contention, we are not convinced that juveniles 14 years old and younger are a distinct group of juveniles such that a different constitutional analysis applies. Ninham directs us to developments in psychology and brain science tending to show that 14-year-olds, in comparison to older teenagers, are generally less capable of responsible decision-making, [footnote omitted] generally possess a heightened vulnerability to risk-taking and peer pressure, [footnote omitted] and generally have a less mature sense of self and a decreased ability to imagine their futures.[footnote omitted] Even assuming that such psychological and scientific research is constitutionally relevant, the generalizations concluded therein are insufficient to support a determination that 14-year-olds who commit homicide are never culpable enough to deserve life imprisonment without parole. Case in point, **in other contexts, psychologists have promoted scientific evidence that arrives at the precise opposite conclusions about 14-year-olds, namely, that they understand social rules and laws and possess the ability to take moral responsibility for their actions.** See *Roper*, 543 U.S. at 617–18, 125 S.Ct. 1183 (Scalia, J., dissenting) (explaining that in an amicus brief filed in *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the American Psychological Association cited numerous psychological treatises and studies tending to demonstrate that 14 and 15-year-old juveniles are mature enough to decide whether to obtain an abortion without parental involvement). In summary, **Ninham has failed to demonstrate that 14-year-olds who commit intentional homicide cannot reliably be classified among those offenders deserving of life imprisonment without parole.**” (Emphasis added) *State v. Ninham*, 333 Wis.2d 335, 377-378, 797 N.W.2d 451, 472-473, ¶ 78

In sum, the trial judge did not violate *Miller* or *Graham*, or commit constitutional error when she factored in Long’s future dangerousness, lack of remorse and prior prison record when she sentenced Long to life without parole. After all, under Ohio law, these are appropriate circumstances a trial judge must weigh before imposing sentence. R.C. 2929.12(D) and (E).

This proposition of law is without merit.

THIRD PROPOSITION OF LAW: THE RECORD SHOWS THAT THE TRIAL COURT SEPARATELY CONSIDERED YOUTH AS A MITIGATING FACTOR AT LONG'S RESENTENCING HEARING.

This Court's decision in *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.2d 890, ¶ 27 succinctly states, "[b]ecause the trial court did not separately mention that Long was a juvenile when he committed the offense, we cannot be sure how the trial court applied this factor. Although [*Miller v. Alabama*, 132 S.Ct. 2455 (2012)] does not require that specific findings be made on the record, it does mandate that a trial court *consider as mitigating* the offender's youth and its attendant characteristics before imposing a sentence of life without parole."

Long argues that the trial judge once again committed error when she failed to consider Long's youth and its attendant characteristics *as a mitigating factor* at his resentencing hearing. The record demonstrates otherwise.

The entire resentencing hearing was focused on youth as a mitigating factor. At the outset of the resentencing hearing the trial judge noted that this Court remanded the case so she could separately consider Long's youth as a mitigating factor. (T.p. 2) The trial judge considered a PSI, victim impact statements, resubmitted sentencing memoranda of the parties, institutional behavior records from the Southern Ohio Correctional Facility where Long was confined pending his appeal to this Court, and a mitigation report prepared by Dr. Carla Dreyer. (T.p. 3, 18-22)

The trial judge was well aware that Long was just shy of 18 when he committed the crimes. (T.p. 3-4) Long's attorney addressed the judge and immediately noted the differences in age and maturity between an adult and a juvenile. Long's attorney implored the judge to consider this Court's opinion recognizing the diminished culpability of children due to their lack of maturity, underdeveloped sense of responsibility and greater prospects to be reformed. (T.p. 4, 7)

The prosecutor acknowledged youth as a mitigating factor but argued that when weighed against the substantial aggravating circumstances, it should not be given much weight. (T.p. 8-9)

Against this backdrop, the trial judge said that Long's youth gave her great pause before she sentenced him the first time. The trial judge also said that the resentencing has given her a chance to review everything "with fresh eyes." (T.p. 19)

In addition to everything she considered before, the trial judge had additional information. First, was the mitigation report prepared by Dr. Dreyer. That report was ordered for the specific purpose of evaluating Long for mitigation purposes. Unfortunately, there was little, if any, mitigation to be found. Dr. Dreyer's report showed that Long continued to have no remorse for his crimes and had underlying psychopathic personality features. (T.p. 18-22, Court's Exhibit #2)

Second, was Long's institutional report detailing his behavior while in prison. (Court's Exhibit #1) Long's report showed that he engaged in serious crimes while in prison, including fighting and drug offenses, that required institutional segregation. (T.p. 20)

After reviewing all the information before her, the trial judge informed Long that she "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." (T.p. 23)

In *Long* this Court did not preclude a sentence of life without parole for a juvenile homicide offender. It simply required that a trial court separately address youth as a mitigating factor to "be weighed against any statutory consideration that might make an offense more serious or an offender more likely to recidivate." *Id.*, at ¶ 19.

At bar, the record undoubtedly shows that the trial judge considered Long's youth and its attendant characteristics as *a mitigating factor* and weighed that against all the aggravating circumstances before she imposed life imprisonment without parole.

The trial judge complied with this Court's mandate on remand. Long's third proposition of law is properly overruled.

FOURTH PROPOSITION OF LAW: LONG FAILED TO DEMONSTRATE COUNSEL WAS INEFFECTIVE FOR NOT ARGUING THAT HE COMMITTED NON-INTENTIONAL HOMICIDE PRECLUDING A LIFE WITHOUT PAROLE SENTENCE UNDER GRAHAM V. FLORIDA.

Long never raised the issue at trial that he committed non-intentional homicide, which under *Graham v. Florida*, supra would preclude a sentence of life without parole for a juvenile offender. Long made this argument under his first proposition of law.

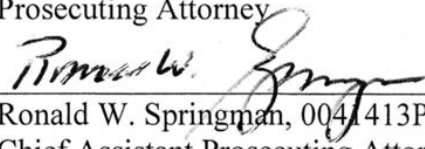
Because the evidence overwhelmingly supports the conclusion that Long committed intentional murder against two separate victims, he has failed to meet the test for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052.

CONCLUSION

Jurisdiction must be denied.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney

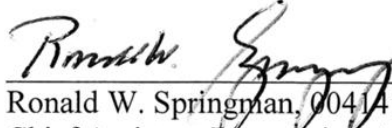


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I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Stephen P. Hardwick (0062932), Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel of record, this 13th day of August, 2015.



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