ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2012-1410
Plaintiff-Appellee,	:	On Appeal from the Hamilton County Court of Appeals First Appellate District
v.	:	
Eric Long,	:	Court of Appeals Case No. C-110160
Defendant-Appellant.	:	

Motion for Reconsideration of Appellant Eric Long, a Minor Child

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SUPREME COURT OF OHIO

Motion for Reconsideration of
Appellant Eric Long, a Minor Child

I. Introduction.

This Court should reconsider its decision not to hear this case, *State v. Eric Long*, __ Ohio St.3d __, 2012-Ohio-5149 (Lanzinger and Cupp, JJ., dissenting), because case law from other jurisdictions issued after Mr. Long filed his jurisdictional memorandum unanimously rejects the State's theory in this case. Every other court has held that *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012),[1] requires trial courts to consider youth as a mitigating factor before sentencing a child to life without parole for a homicide. As a result, according to the State, there is one law for children in Hamilton County, and another law for children in the rest of the country.

Eric could not have made this argument in his jurisdictional memorandum, because it is based on case law issued after he filed. Eric did file supplementary authority with the new law, but a list of authorities is no substitute for briefing.

II. Procedural History.

Eric Long was 17 when he joined a 24-year old and 25-year old in two shootings—one from a van into a house, the other from a car into another car on a Cincinnati freeway. Both incidents involved large numbers of shots from high caliber weapons. And in both incidents Eric literally took a back seat to his adult co-defendants.

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[1] A copy of the opinion is attached. Apx. 82.

Plea negotiations centered on a sentence of roughly 20 years, but Eric directed his attorney to cease negotiations. Decisions like this are one reason the United States Supreme Court issued the *Miller* opinion—the Court held that a child "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (*including on a plea agreement*). . . ." *Id.* at 2468. (Emphasis added.)

Eric paid for his "incompetencies associated with youth" when he was convicted of aggravated murder and sentenced to life without parole.

III. Discussion.

A. The court of appeals makes two fundamental errors.

The State rested its rejection of Eric's claim on two objectively wrong holdings. First, the court wrongly adopted the State's theory that *Miller* applies only to mandatory sentences of life without parole. *State v. Eric Long*, 1st Dist. No. C-110160, 2012-Ohio-3052, ¶ 52, Apx. 15 ("the trial court's sentence, unlike that in Miller, was not mandated by operation of law"); *see also State's Memorandum in Response*, p. 1 ("[Eric] 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."). Second, the court of appeals incorrectly held that the trial court considered youth as a mitigating factor—it did not. Compare *id.* at ¶ 53 ("The record reflects that the trial court did consider those factors before imposing sentence") with Transcript, Apx. 20.

1. The State stands alone.

After Eric filed his jurisdictional memorandum, three courts, including the United States Supreme Court, have applied *Miller* to discretionary sentences of life without parole. For example, Florida's Fourth District Court of Appeals expressly rejected the argument that *Miller* applied only to mandatory sentences of life without parole.

> *Unlike the juvenile defendant in* Miller, *however, appellant was not sentenced to a statutorily mandated sentence of life imprisonment without the possibility of parole. Rather, the trial judge in his case had discretion to impose a different punishment.* Nevertheless, *Miller* contains language suggesting that sentencing juveniles to life-without-parole prison terms should be "uncommon" in light of the "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." Id. at 2469 (citations and internal quotation marks omitted). *Thus, under* Miller, *judges must take an individualized approach to sentencing juveniles in homicide cases and consider factors which predict whether a juvenile is amenable to reform or beyond salvation.*)

Daugherty v. State, Fla. Dist. App. 4, No. 4D08-4624, 2012 WL 38822108, *2 (Sept. 5, 2012) (Emphasis added.). Apx. 59. A California Court of appeals also reversed a sentence of life without parole imposed on a child for murder even though the trial court had the discretion to impose a parole-eligible sentence. *People v. Moffett*, 209 Cal.App.4th 1465 (2012). Apx. 63.

More importantly, the United States Supreme Court has vacated a California decision that affirmed the imposition of discretionary life without parole on a child convicted of a homicide offense. In *Mauricio v. California*, U.S. Sup. Ct. Case No. 11-10139, --- U.S. ---, --- S.Ct ---, 81 U.S.L.W. 3228 (Oct. 29, 2012), the Court vacated *People v.*

Mauricio, Calf. 2d Dist. No. B224505, 2011 Cal. App. Unpub. LEXIS 9073 (Nov. 28, 2011),[2] which affirmed a discretionary sentence of life without parole for a homicide offense. It is true that life without parole was the presumed sentence in *Mauricio* and *Moffett*, but the *Mauricio* opinion make it clear that the trial court retained discretion to impose life without parole. *Id.* at *25, Apx. 79 ("The record shows the trial court understood it had discretion to impose a term of 25 years to life, rather than LWOP.") If the United States Supreme Court had accepted the State's theory in this case, the United States Supreme Court would have had no reason to vacate *Mauricio* for further consideration.

2. The court of appeals got the facts objectively wrong.

It is not surprising that the court of appeals got the facts of the case wrong. It addressed *Miller* sua sponte, without any briefing, in an opinion released only eight days after the *Miller* decision. The court incorrectly held that the trial court considered youth as a mitigating factor based on the following portion of the sentencing transcript:

> Having tried this case and heard this case for four weeks, * * * having observed also the violent history and record of Mr. Long, it's clear to me that all three defendants, for whatever reason, don't value human life. I mean, the violence, the senseless, just indiscriminate violence absolutely, as everyone has said here, absolutely no remorse. It's chilling. It's chilling to see you three standing here, and I have no doubt in my mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you. And that's sad, but it's true.
>
> After considering the risks that [you] will commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court finds that prison sentences are required.

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[2] Copy attached, Apx. 72.

T.p. 2803, Apx. 37, cited in *State v. Eric Long*, at ¶ 54.

But *not a single word* in that quotation even hints that the trial court considered youth as a mitigating factor. Further, not a single word in the rest of the transcript shows that the trial court considered youth as a mitigating factor. The sentencing transcript is attached. Apx. 20.

The court of appeals asserts that the trial court must have considered youth as a mitigating factor because defense counsel asked the trial court to do so.

> At the sentencing hearing, Long's counsel argued that Long's youth "puts him in a different light than the other two individuals" and asked the court to impose a minimum term of 30 years in prison that would "give [Long] a glimmer of hope, give him a chance that some day he [could] return to society, hopefully a changed and rehabilitated man."

Opinion at ¶ 53. It is absurd to assert that a trial court considered a factor simply because a criminal defendant argued that the trial court should consider that factor, especially when the State argued that the trial court should *not* consider youth as a mitigating factor. T.p. 2802, Apx. 19.[3]

B. Eric has properly preserved the issue.

Trial counsel filed a sentencing memorandum arguing that the Eighth Amendment prohibited a sentence of life without parole, and the court of appeals ruled that counsel correctly presented the argument to the trial court. *State v. Eric Long*, ¶ 51-56, Apx. 15-17. The State has not argued that Eric has procedurally defaulted this claim.

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[3] "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?"

IV. Conclusion: Eric wants one chance to make his *Miller* argument on the merits.

Eric is a child who has been sentenced to die in prison, and he has never had the opportunity to brief how *Miller* applies to his case. If this Court does not wish to hear this case on the merits, Eric asks that this Court summarily vacate the decision of the court of appeals and remand for further briefing.

Respectfully submitted,

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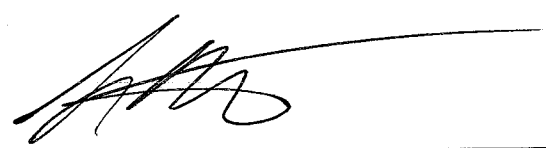
Certification of Service

This is to certify that a copy of the foregoing was forwarded by regular U.S. Mail, postage prepaid to the office of Ronald W. Springman, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. 9th Street - Suite 4000, Cincinnati, Ohio 45202, this 11th day of November, 2012.



Stephen P. Hardwick
Assistant Public Defender

#380934

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2012-1410
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[Cite as *State v. Long*, 2012-Ohio-3052.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-110160 TRIAL NO. B-0903962-C
Plaintiff-Appellee,	:	
vs.	:	
ERIC LONG,	:	*OPINION.*
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 3, 2012

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman*, Chief Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Presiding Judge.

{¶1} Defendant-appellant Eric Long appeals from his convictions, following a jury trial. In July 2009, the Hamilton County Grand Jury returned a 13-count indictment charging the then 17-year-old Eric Long with offenses arising out of three separate incidents that had occurred over a three-week span in and near Lincoln Heights. The charges set forth in the indictment accused Long and his codefendants, Fonta Whipple and Jayshawn Clark, with the felonious assaults of Keyonni Stinson, Mark Keeling, and Kyrie Maxberry; the aggravated murders of Keith Cobb and Scott Neblett with prior calculation and design; and various weapons charges including carrying a concealed weapon, having a weapon under a legal disability, and discharging a firearm at or into a habitation.

{¶2} Long argues in his eight assignments of error that (1) his convictions were contrary to the manifest weight of the evidence and were based upon insufficient evidence, (2) he was denied the effective assistance of trial counsel, (3) the trial court erred in imposing an excessive sentence, (4) the trial court failed to keep evidence of prior bad acts from the jury, and (5) the trial court erroneously permitted joinder of the offenses in a single trial proceeding. We find none of the assignments to have merit and affirm the trial court's judgment.

I. The Matthews Avenue Shooting

{¶3} In the early morning hours of March 4, 2009, Keyonni Stinson, her boyfriend, Mark Keeling, and Kyrie Maxberry returned to Stinson's Matthews Avenue[1] home in Lincoln Heights after an evening at the Garage Bar in Sharonville. Keeling had had a previous altercation with Whipple, Clark, and Long. Therefore, when he spotted the

[1] The various witnesses and parties also refer to Matthews Street and Matthews Drive. Stinson refers to her home as being on Matthews Avenue, and so shall we.

three codefendants sitting in a gray van outside Stinson's house, he and his friends hurried inside. Within seconds, a hail of gunfire engulfed the house. The rounds penetrated the windows and walls and severely injured Keeling and Maxberry.

{¶4} Police investigators recovered nearly 30 spent rifle cartridges in 7.62 mm and .223-caliber outside the residence. A ballistics expert determined the rounds had come from three different assault rifles.

II. The I-75 Murders

{¶5} Two weeks later, an altercation occurred outside the Garage Bar between Scott Neblett and Trenton Evans. At a nearby gas station, Evans found Whipple, Clark, Long, and another person sitting in a silver Dodge Caliber rented for Whipple by Alisha Kloth, the mother of one of his children. They discussed Evans's altercation with Neblett. Neblett arrived at the gas station. Moments later, at about 2:30 a.m., William Gray was heading for work on southbound I-75. Gray spotted Neblett's red Chevy Blazer in hot pursuit of a silver Caliber. The two vehicles pulled next to each other, and Gray saw muzzle flashes and heard multiple gunshots coming from the Caliber. The Caliber exited from the highway at the Woodlawn/Evendale exit toward Lincoln Heights. The Blazer spun out of control, hit the guardrail, and rolled several times. Both Neblett and his passenger, Keith Cobb, were dead from multiple gunshot wounds.

{¶6} Police recovered the Caliber rented for Whipple in a Lincoln Heights parking lot. Inside the vehicle were hospital discharge papers for Whipple. Whipple's and Clark's DNA was found inside the vehicle. A third DNA sample was found to be not inconsistent with Long's DNA.

{¶7} Police recovered three .223-caliber casings, one 7.62 mm casing, and six 9 mm pistol cartridge casings from the highway. A ballistics expert testified at trial that by comparing marks on the casings, he had determined that two of the assault rifles used in the Matthews Avenue shooting had also been used to attack Neblett and Cobb on I-75.

III. Long's Capture on Steffen Street

{¶8} Five days later, Lincoln Heights police officer Michael Lowe spotted Long. Officer Lowe chased Long down Steffen Street and through the yards of a number of homes. Officer Lowe noted that Long was brandishing a silverish or gray handgun in his right hand when he fled. Long was ultimately captured hiding in a pickup truck bed. He did not have the handgun on his person when captured. Two weeks later, Keith Harris, a Steffen Street homeowner, found a loaded 9 mm Smith & Wesson semiautomatic pistol in his yard. The ballistics expert testified at trial that the 9 mm pistol was one of the weapons used in the I-75 attack.

IV. Trial

{¶9} Before trial, Long moved the trial court to separate the trial of the three incidents. The court denied the motion, and in January 2011, the three codefendants were tried together for each indicted offense. Twenty-five witnesses testified at trial, and dozens of pieces of physical evidence were introduced. At the conclusion of the trial, the jury returned guilty verdicts on each offense lodged against Long and many of the accompanying firearm specifications. After reviewing sentencing memoranda, a presentence investigation report, victim-impact statements, and the statement of Long's grandfather, the trial court sentenced Long to two terms of imprisonment for life without possibility of parole for the aggravated murders of Neblett and Cobb. It also imposed an aggregate prison term of 19 years on the remaining charges and firearm specifications. This appeal ensued.

V. No Prejudicial Joinder

{¶10} For clarity, we will address Long's assignments of error in temporal order.

{¶11} Long first asserts that his right to a fair trial was compromised by the trial court's decision to permit the I-75 murders and Matthews Avenue shooting to be tried together. Long argues the trial court erred when it permitted the state to join the incidents

for trial in a single proceeding, even though they had been presented in a single indictment.

{¶12} In most cases, a criminal trial revolves around one discrete incident—a single assault or a single theft. But the state may join separate incidents for trial in a single proceeding. The joinder of multiple offenses for trial is encouraged to conserve judicial resources, to reduce the chance of incongruous results in successive trials, and to diminish inconvenience to victims and witnesses. *See State v. Clifford*, 135 Ohio App.3d 207, 211, 733 N.E.2d 621 (1st Dist.1999), citing *State v. Thomas*, 61 Ohio St. 2d 223, 400 N.E.2d 401 (1980).

{¶13} Long argues that the evidence of the two offenses was not interwoven and did not demonstrate a common modus operandi or behavioral fingerprint. He argues that little evidence links Long to these offenses. Thus, he asserts that joinder of the offenses permitted the jury to hear cumulative evidence of Long's "criminal disposition," and that the jury acted on that evidence to find him guilty of the two offenses.

{¶14} Two or more offenses may be charged in the same indictment if the charged offenses are (1) of "the same or similar character," (2) "based on the same act or transaction," (3) "based on two or more acts or transactions connected together or constituting parts of a common scheme or plan," or (4) "part of a course of criminal conduct." Crim.R. 8(A).

{¶15} Crim.R. 14 provides for relief from prejudicial joinder: "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment * * * the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶16} The state can negate claims of prejudice by showing either (1) that the evidence for each count will be admissible in a trial of the other counts under Evid.R. 404(B) or (2) that the evidence for each count is sufficiently separate and distinct so

as not to lead the jury into treating it as evidence of another. *See State v. Echols*, 128 Ohio App.3d 677, 692, 716 N.E.2d 728 (1st Dist.1998), citing *State v. Wiles*, 59 Ohio St.3d 71, 77, 571 N.E.2d 97 (1991). We note that the satisfaction of one test "negates the defendant's claim of prejudice without the need to consider the other." *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, 937 N.E.2d 136, ¶ 38 (10th Dist.); *see also State v. Garrett*, 1st Dist. No. C-090592, 2010-Ohio-5431.

{¶17} Where, as here, a defendant has moved for severance and has renewed the motion at trial, we review the trial court's decision to join offenses for trial under an abuse-of-discretion standard. *See State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 197, citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus; *compare State v. Echols*, 146 Ohio App.3d 81, 88, 765 N.E.2d 379 (1st Dist.2001) (failure to renew objection to joinder waives the issue on appeal).

{¶18} Thus, to succeed on this assignment of error, Long must demonstrate that, in making its decision, the trial court exhibited an attitude that was "unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In applying this standard, a reviewing court "is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990); *see also State v. Morris*, __ Ohio St.3d __, 2012-Ohio-2407, __ N.E.2d __, ¶ 14. Rather, if the trial court's exercise of its discretion exhibited a "sound reasoning process" that would support its decision, a reviewing court will not disturb that determination. *Morris* at ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶19} Here, we find no prejudice from the trial court's failure to sever the charges for the I-75 murders and the Matthews Avenue shooting. The proof presented as to each of the charges was direct and uncomplicated, thus enabling the jury to

segregate the relevant proof for each offense. *See Echols*, 128 Ohio App.3d at 692, 716 N.E.2d 728. Long conceded as much in his trial motion, noting that evidence of the crimes was "separate and distinct." The two incidents occurred in separate locations, two weeks apart. The state's ballistics expert tied the assault rifles used in the Matthews Avenue shooting to those used in the I-75 murders and also tied the spent 9 mm casings found at the I-75 scene with the semiautomatic pistol found along the route that Long had taken when fleeing from Officer Lowe. The state's evidence was presented chronologically by incident, and the trial court instructed the jury to consider each count separately.

{¶20} Since the trial court exhibited a sound reasoning process supporting the conclusion that evidence of the two offenses was sufficiently separate and distinct, the court did not abuse its discretion in denying Long's motion for separate trials for offenses arising out of these incidents. The eighth assignment of error is overruled.

VI. Effective Assistance of Counsel

{¶21} In his third assignment of error, Long claims he was denied the constitutionally guaranteed effective assistance of trial counsel when his counsel failed to give Long all the "trial paperwork" that he had requested. At the commencement of trial, Long complained to the court that his counsel had failed to share all the state's discovery with him.

{¶22} To prevail on a claim of ineffective assistance of trial counsel, an appellant must show, first, that trial counsel's performance was deficient and, second, that the deficient performance was so prejudicial that he was denied a reliable and fundamentally fair proceeding. *See Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *see also Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. A reviewing court must indulge a strong presumption that

counsel's conduct fell within the wide range of reasonable professional assistance. *See State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998).

{¶23} Here, experienced trial counsel explained in open court that he had provided Long with all discovery material that had not been designated "counsel only" under Crim.R. 16(C) and 16(F). After reviewing the entire record, we hold that counsel's efforts were not deficient and that Long was not prejudiced in any way. The third assignment of error is overruled.

VII. Other-Acts Challenges

{¶24} In his sixth and seventh assignments of error, Long argues that the trial court erred in not declaring a mistrial on grounds that the jury had repeatedly heard improper evidence of the defendants' prior bad acts.

{¶25} Generally, Evid.R. 404(B) provides that evidence of prior crimes, wrongs, or bad acts committed by a defendant are inadmissible at trial to prove that the defendant is a criminal. *See Morris*, __ Ohio St.3d __, 2012-Ohio-2407, __ N.E.2d __, ¶ 12. The rule prohibits the state from arguing that because a person acted in a particular way on a distinct occasion in the past, he likely acted in the same way with regard to the facts raised in this trial. *E.g., State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). Other-acts evidence is often excluded because the jury might punish the defendant for his past conduct rather than weighing only the evidence produced at trial and relating to the charged crimes. The challenged acts, however, do not have to be like or similar to the crimes raised at trial. Other-acts evidence is admissible to show the defendant's motive, opportunity, intent, or identity. *See* Evid.R. 404(B). Or the prior acts may be admissible where they form the immediate background of the charged crimes and are inextricably related to those crimes. *See Morris* at ¶ 13.

{¶26} The trial court's rulings "regarding the admissibility of other-acts evidence under Evid.R. 404(B) are evidentiary determinations that rest within the

sound discretion of the trial court. Appeals of such decisions are considered by an appellate court under an abuse-of-discretion standard of review." *Morris* at syllabus.

{¶27} The decision to grant or deny a motion for mistrial is also consigned to the sound discretion of the trial court. *See State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 92; *see also State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 42. A mistrial "need be declared only when the ends of justice so require and a fair trial is no longer possible." *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). The Ohio Supreme Court has repeatedly noted that the trial court is in the best position to reach this determination and to decide whether the situation warrants the declaration of a mistrial. *E.g., Ahmed* at ¶ 92.

{¶28} The gravamen of Long's argument is that, at six points in the trial, various witnesses made inadmissible statements informing the jury that the defendants had committed violent or other illegal acts in the past. He argues that the trial court erred either in admitting that testimony or in denying his motions for mistrial. We disagree.

{¶29} Long begins his argument addressing Keyonni Stinson's statement that two nights before the Matthews Avenue attack, the three codefendants had "shot up the highway coming from Annie's" bar. We note that Long objected to the statement. The trial court sustained the objection and issued a curative instruction to the jury that it should disregard it. The jury can be presumed to have followed the court's instructions, including instructions to disregard testimony. *See Ahmed* at ¶ 93. In light of the curative instruction and the fact that Stinson's statement was corroborative of Keeling's unobjected-to testimony about incidents with the defendants at Annie's, the trial court's decision to deny the mistrial motion exhibited a sound reasoning process and will not be disturbed. *See Ahmed* at ¶ 92; *see also Morris*, ___ Ohio St.3d ___, 2012-Ohio-2407, ___ N.E.2d ___, at ¶ 14.

{¶30} Long next contests Mark Keeling's statement that he had not wanted to visit the Garage Bar on the night of the Matthews Avenue shooting "because we had just got shot at Sunday night." We find no error because when Long objected to the statement, the trial court again sustained the objection and issued a curative instruction. *See Ahmed* at ¶ 92.

{¶31} Long also contests the more problematic statements made by Evendale Police Officer Steve Niehauser. Officer Niehauser testified that Trenton Evans had identified the individuals in the silver Dodge Caliber and Neblett in the Chevy Blazer after viewing various surveillance videos from the gas station and a restaurant near the Garage Bar. Upon the vigorous objection of each defendant, the trial court struck Officer Niehauser's statement and issued a curative instruction. Officer Niehauser ultimately corrected his statement when he testified that Evans had not identified any of the codefendants from the video. The trial court took an active role in resolving this matter and did not abuse its discretion in denying the mistrial motion. *See Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶ 92. We note that in this appeal Long has not raised the issue of whether the surveillance videotape had been properly authenticated under Evid.R. 901.

{¶32} Long's next contention concerns the statement of Derryl Anderson, a Garage Bar patron, that he had seen Whipple and Clark, but not Long, together and armed with an assault rifle days before the Matthews Avenue shooting. We note that the testimony referred only to Whipple and Clark. The trial court's decision to admit Anderson's statement because it described the immediate background of one of the charged crimes, and because it identified an unusual weapon that was inextricably related to that crime, exhibited a sound reasoning process and will not be disturbed on appeal. *See Morris* at ¶ 13.

{¶33} Next, Long argues that a mistrial should have been granted based on Officer Niehauser's trial testimony that he had told Evans, during questioning, that Long

was in custody, was crying, and was telling the whole story to the authorities to cut a favorable deal. The trial court again took an active role in clarifying the issue. A stipulation by the parties was read to the jury stating that there had been no discussions about any of the defendants becoming witnesses for the state, that neither the state nor the defendants had engaged in negotiations for plea bargains, and that the defendants had maintained their innocence throughout the proceedings. In light of this unusual and complete repudiation of Officer Niehauser's testimony, the trial court did not abuse its discretion.

{¶34} Finally, Long argues that police officer LaRoy Smith improperly commented on Long's bind-over proceeding in juvenile court. Again, trial counsel objected. And again, the trial court sustained the objection and issued a curative instruction that the jury was to disregard any reference to juvenile court proceedings. In light of the curative instruction, the trial court's decision to deny the mistrial motion exhibited a sound reasoning process and will not be disturbed. *See Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶ 92; *see also Morris*, __ Ohio St.3d __, 2012-Ohio-2407, __ N.E.2d __, at ¶ 14.

{¶35} In addition to these arguments, Long contends that the cumulative effect of the trial court's evidentiary errors denied him a fair trial. Under the doctrine of cumulative error, even though "violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{¶36} But the doctrine is not applicable where the trial court did not commit multiple errors. *See State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132. We have reviewed the entire transcript of the trial and the related evidence. We are convinced that Long received a fair trial. None of the trial court's

rulings on other-acts evidence individually or cumulatively support any demonstration that the outcome of the trial would have been different but for those rulings. *See State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, ¶ 38.

{¶37} The sixth and seventh assignments of error are overruled.

VIII. Sufficiency and Weight-of-the-Evidence Claims

{¶38} In two interrelated assignments of error, Long challenges the weight and sufficiency of the evidence adduced at trial to support his convictions. He argues that the state failed to identify him as one of the perpetrators of the Matthews Avenue assault, failed to identify him as one of the I-75 attackers, and failed to produce evidence that he had possessed a firearm when he was chased and arrested near Steffen Street.

{¶39} For his role in the Matthews Avenue shootings, Long was convicted of felonious assault under R.C. 2903.11(A)(2), which proscribes knowingly causing or attempting to cause physical harm to another by means of a deadly weapon. He was also convicted of knowingly discharging a firearm into an occupied habitation without privilege to do so. *See* R.C. 2923.161.

{¶40} The aggravated-murder charges against Long for the I-75 murders were governed by R.C. 2903.01(A). Under this statute, the state was required to prove that Long or his accomplices had purposely and with prior calculation or design caused the deaths of Cobb and Neblett.

{¶41} The remaining convictions, related to Long's capture on Steffen Street, required proof beyond a reasonable doubt that Long had knowingly carried a concealed firearm, and that he had done so under the disability of a prior juvenile adjudication for drug trafficking. *See* R.C. 2923.12 and 2923.13.

{¶42} Our review of the entire record fails to persuade us that the jury, acting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. *State v. Thompkins*, 78

Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We can find no basis in this record to conclude that this is "an exceptional case" in which the jury lost its way. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶43} The jury was entitled to reject Long's theory that he simply had not participated in the Matthews Avenue shooting and the I-75 murders, and that the state had failed to prove he had possessed a firearm. Long's theory of defense rested largely on the circumstantial nature of the state's evidence and on the trial testimony of three defense witnesses who questioned the veracity of the Matthews Avenue victims and denied seeing the codefendants at the Garage Bar before the I-75 murders. And Long's experienced trial counsel highlighted the inconsistencies in the testimony of the state's witnesses.

{¶44} But it is abundantly clear that the state presented ample evidence to support the convictions. The state introduced substantial physical and testimonial evidence tying Long to both shootings. The Matthews Avenue victims each testified that they had seen Long in the gray van immediately before they entered the house. Keeling testified that he had been involved in a recent incident with the three perpetrators at a bar. The evidence was undisputed that moments after entering Stinson's home, the victims were the target of multiple rounds of assault-weapons fire. Keeling and Maxberry sustained serious injuries in that fusillade. The state's ballistics expert testified that the spent 7.62 mm and .223-caliber shell casings outside the home had come from three different assault rifles.

{¶45} Witnesses also identified Long and his codefendants sitting in the silver Caliber rented by Kloth for Whipple after the Neblett-Evans altercation at the Garage Bar and just before the I-75 murders. Witnesses described the horrific scene on I-75 of the Caliber occupants shooting into the vehicle occupied by Neblett and Cobb. The rented Caliber was later found abandoned with numerous bullet holes in

the roof and body. Police recovered Whipple's hospital discharge papers and the DNA of Whipple and Clark from inside the vehicle. Officers also recovered three .223-caliber casings, one 7.62 mm casing, and six 9 mm pistol cartridge casings from the highway. A ballistics expert testified that two of the assault rifles used in the Matthews Avenue shooting had also been used on I-75.

{¶46} Finally, Officer Lowe reported that Long had brandished a silverish or gray handgun when he fled capture on Steffen Street. When Long was found and arrested, the firearm was gone. The state's ballistics expert testified the stainless steel 9 mm semiautomatic pistol found in Keith Harris's Steffen Street yard was used in the I-75 murders.

{¶47} While there were inconsistencies in some witnesses' testimony, these inconsistencies did not significantly discredit the testimony and were to be expected when ordinary citizens observed rapidly occurring and shocking events such as bar fights, a drive-by shooting, and a moving gunfight on a public highway. As the weight to be given the evidence and the credibility of the witnesses were for the jury, sitting as the trier of fact, to determine in resolving conflicts and limitations in the testimony, the jury could have found that Long had committed, with the requisite mens rea, each of the charged offenses. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶48} When reviewing the legal sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the prosecution and determine whether the evidence could have convinced any rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *See State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 36; *see also Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560

(1979). In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of the witnesses, as both are functions reserved for the trier of fact. *See State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, __ N.E.2d __, ¶ 25 (1st Dist.2011).

{¶49} Here, the record reflects substantial, credible evidence from which the triers of fact could reasonably have concluded that all elements of the charged crimes had been proved beyond a reasonable doubt, including that Long had feloniously assaulted the Matthews Avenue victims by firing into an occupied habitation, had purposely caused the deaths of Neblett and Cobb, and had knowingly carried a concealed firearm while under a disability. *See Conway* at ¶ 36.

{¶50} The first and second assignments of error are overruled.

IX. The Sentences Were Neither Excessive Nor Cruel and Unusual

{¶51} In his fourth and fifth assignments of error, Long argues that the trial court erred in imposing an excessive sentence.

{¶52} First, he asserts that the trial court's imposition of two sentences of life imprisonment without parole eligibility constituted a cruel and unusual punishment proscribed by the Eighth Amendment to the United States Constitution. We note that the United States Supreme Court has recently held that a mandatory life-without-parole sentence for juvenile offenders is cruel and unusual punishment. *See Miller v. Alabama*, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __, 2012 U.S. LEXIS 4873. While Long was under age 18 when he committed aggravated murder, the trial court's sentence, unlike that in *Miller*, was not mandated by operation of law. The trial court had discretion to impose either life without parole eligibility or a lesser sentence of life with parole eligibility after serving a definite period of incarceration. *See* R.C. 2929.03(A)(1); *compare* R.C. 2929.03(E)(2) (mandatory life term without parole

eligibility for juvenile convicted of aggravated murder and an aggravating circumstance). The court was able to consider whether Long's "youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." *Miller* at ___, 2012 U.S. LEXIS 4873, *9.

{¶53} The record reflects that the trial court did consider those factors before imposing sentence. The trial court, which had supervised the trial and had heard all the evidence, reviewed the parties' sentencing memoranda, the presentence investigation report reflecting Long's record of juvenile adjudications, victim-impact statements, and a plea for mercy from Long's grandfather. At the sentencing hearing, Long's counsel argued that Long's youth "puts him in a different light than the other two individuals" and asked the court to impose a minimum term of 30 years in prison that would "give [Long] a glimmer of hope, give him a chance that some day he [could] return to society, hopefully a changed and rehabilitated man."

{¶54} At the conclusion of the sentencing hearing, the court stated that:

> Having tried this case and heard this case for four weeks, * * * having observed also the violent history and record of Mr. Long, it's clear to me that all three defendants, for whatever reason, don't value human life.
>
> I mean, the violence, the senseless, just indiscriminate violence absolutely, as everyone has said here, absolutely no remorse. It's chilling. It's chilling to see you three standing here, and I have no doubt in my mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you. And that's sad, but it's true.

> After considering the risks that [you] will commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court finds that prison sentences are required.

{¶55} The court then imposed life-without-parole-eligibility sentences for the killing of Keith Cobb and Scott Neblett. Long's sentence did not run afoul of the Eighth Amendment's proscriptions affecting juvenile offenders.

{¶56} Otherwise, a sentence such as this one that falls within the range provided by statute cannot amount to cruel and unusual punishment. *See McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). In light of the facts revealed at trial and in the sentencing proceedings, Long's sentence of life without parole eligibility was not so grossly disproportionate to the offenses that it "shock[s] the sense of justice of the community." *State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 715 N.E.2d 167 (1999), quoting *McDougle* at 70; *see also State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 14.

{¶57} Long next argues that the trial court erred in imposing an excessive sentence and in failing "to even consider" the purposes and principles of felony sentencing and the other statutory sentencing factors before imposing sentence. Since Long's sentence was imposed before the effective date of Am.Sub.H.B. 86, we conduct a two-part review of the sentences of imprisonment. *See State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, we must determine whether the sentences were contrary to law. *See id.* at ¶ 14. Then, if the sentences were not contrary to law, we must review each sentence to determine whether the trial court abused its discretion in imposing it. *See id.* at ¶ 17.

{¶58} Here, the sentences imposed were not contrary to law. Long concedes that the sentences were within the ranges provided by statute for aggravated murder, a

special felony, and for the other felony offenses and specifications. *See* R.C. 2929.03(A) and 2929.14(A); *see also State v. Phelps*, 1st Dist. No. C-100096, 2011-Ohio-3144, ¶ 40. In light of the seriousness of the offenses—which include killing two human beings during a moving gunfight on an interstate highway, spraying an occupied home with assault-rifle fire, seriously injuring two persons, and carrying a concealed weapon—we cannot say that the trial court abused its discretion in imposing life sentences and the other sentences of set length, many of which were ordered to be served concurrently. *See Kalish* at ¶ 17.

{¶59} And although the trial court did not specifically state that it had considered the R.C. 2929.11 and 2929.12 factors, its statements made before imposing sentence demonstrate that the court engaged in a particularized consideration of the purposes and principles of felony sentencing before imposing sentence. To the limited extent that the trial court record is silent on any other statutory factors, we presume that the court properly considered them. *See State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31; *see also State v. Love*, 194 Ohio App.3d 16, 2011-Ohio-2224, 954 N.E.2d 202, ¶ 14 (1st Dist.). Moreover, the record simply does not reflect Long's contention that the trial court failed to consider Long's youth as a mitigating factor. Having presided over Long's trial, the court was well acquainted with the facts surrounding the crimes. The court was also aware of Long's extensive juvenile record. On the state of this record, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in imposing the sentences.

{¶60} Finally, we note that in his separate appeal, Long's co-defendant Whipple assigned as error the imposition of multiple punishments by the trial court. *See State v. Whipple*, 1st Dist. No. C-110184, 2012-Ohio-2938. Whipple argued that felonious assault and discharging a firearm into a habitation are allied offenses of similar import. We rejected that argument. *Id.*

{¶61} But Long's experienced appellate counsel has not raised this matter for review in this appeal. And we will not review the matter of our own volition. *See* App.R. 12(A)(1)(b) and 16(A).

{¶62} After our review of Long's sentences for these offenses, we conclude that the fourth and fifth assignments of error are meritless, and we overrule them.

{¶63} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

DINKELACKER, J., concurs.
FISCHER, J., concurring separately.

FISCHER, J., concurring separately.

{¶64} In his direct appeal from the same trial, Long's co-defendant Fonta Whipple argued that the trial court erred under R.C. 2941.25 in convicting him of both improperly discharging a firearm and felonious assault in connection with the Matthews Avenue shooting. *State v. Whipple*, 1st Dist. No. C-110184, 2012-Ohio-2938, ¶ 35. Although, despite Whipple's deplorable conduct, I would have held that his assertion had merit, the majority disagreed. *See id.* at ¶ 47-55 (Fischer, J., concurring in part and dissenting in part). Thus, even if Long had raised the issue of merger in this appeal, I am now bound by the holding in *Whipple*.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

1 THE COURT: All right.
2 FAMILY MEMBER: Your Honor, my name
3 is Herbert Hillman. I'm the grandfather
4 of Eric long. Herbert Hillman,
5 H-I-L-L-M-A-N. I'm the grandfather of
6 Eric Long, and I come before you really
7 probably not saying anything you haven't
8 already heard before from people in this
9 position.
10 The situation is tragic. It's
11 tragic for both families. We certainly
12 feel the pain of the victims loss all of
13 a sudden in this tragic act. I know how
14 that pain is.
15 But I'm also an older man today,
16 and certainly haven't lived a perfect
17 life, and I'm sure that there are other
18 men in this courtroom that can say the
19 same thing. We've had a few dings in our
20 lives.
21 I guess what I'm assuming is that
22 the Court has the discretion to show some
23 compassion. Had I not been shown some
24 compassion, I probably wouldn't have been
25 able to agree more. I spent 30 years as

1 an educator, that was only because
2 someone showed some compassion. Thank
3 you.
4 THE COURT: Thank you, sir. All
5 right. I'm sorry. I didn't ask Ms.
6 Donovan or Mr. Rosenwald, do you have
7 anyone else that you would like to have
8 speak on your clients' behalf?
9 MS. DONOVAN: No, Your Honor.
10 MR. ROSENWALD: No, Judge.
11 THE COURT: Mr. Gibson, for the
12 State?
13 MR. GIBSON: If I might, before I
14 say anything there were some family that
15 would like to speak, if they could
16 address the Court, I would appreciate it.
17 First, Linda Whitehead. She's the
18 mother of Keith Cobb.
19 THE COURT: Could you state your
20 full name, please?
21 FAMILY MEMBER: Linda Whitehead.
22 THE COURT: All right.
23 FAMILY MEMBER: First of all,
24 Judge, I would like to say -- and this
25 goes out to these three guys' families,

1 from the way that they come down here and
2 conducted themselves, the man get up here
3 and say, please, have compassion, they
4 had no compassion for my son. They never
5 once out of these almost two years
6 ever -- had one of these lawyers to come
7 and say, the families send their
8 condolences, they're sorry for what
9 happened.
10 All of the whole trial, all these
11 two years, they have uphold this, this is
12 a game. It's four more of them out here
13 that you needs to go. This is a gang.
14 This is not the first two murders that
15 they have done.
16 When their names came through my
17 phone that they were the murderers,
18 people saying, they killed four more
19 people, guilty of, they done murdered
20 your son.
21 My son Keith, Keith never parted
22 his lips to anybody in that club. He
23 didn't fight with anybody. Keith was a
24 respectful person to others, always had
25 respect for other people. He was not

1 violent. Keith was 25 years old. Keith
2 never had a physical fight, no kind of
3 fight in his life.
4 Only thing Keith did was to ride
5 Scott to that club, and give Scott a ride
6 back, and they chose to shoot him up and
7 kill him the way they did, and they have
8 no remorse.
9 And these people here, you have
10 been in trouble all they life. All they
11 life. It was a cowardly act, and it's
12 four more of them out there. They got
13 one in the penitentiary now, two sitting
14 in the Justice Center to go to jail on
15 some other stupid stuff. And you gonna
16 stand here before the Court and say, oh,
17 I did not do it. Yes, you did. Oh, yes,
18 you did.
19 And the ones that arbitrated this
20 murder, it's four of them still out here,
21 and believe me, I'm not going to rest
22 until they go behind bars.
23 I want to see you lay with the
24 needle in your arm, and I want to look in
25 your eyes and see you take your last damn

1 breath. That's what I want.
2 You showed no remorse for our
3 families, never showed any remorse about
4 anything. They come down here with an
5 attitude like me and the courts is doing
6 y'all wrong. This is the very reason why
7 a whole bunch of you standing before
8 courts today, because of poor parenting.
9 They go along with everything that ya'll
10 do.
11 They never made you stand up and
12 admit to things that you do. You in and
13 out of juvenile all your life. And it's
14 sad that the Courts is full of this kind
15 of stupidness, because that's exactly
16 what it is.
17 And the only thing I got to say is,
18 Keith favorite color is blue, and you
19 will spend the rest of your life wearing
20 Keith's colors.
21 And also, believe me, as ya'll call
22 it fag, that's what you spend the rest of
23 your life being a fag, because, you're a
24 fag whether you on the giving or
25 receiving end.

1 And that's all I have to say here
2 today, Judge. Thank you.
3 THE COURT: Thank you.
4 MR. GIBSON: Judge, I would ask the
5 Court if you would hear from Alison
6 Williams, she's the mom of Scott Neblett,
7 she also asked to address the Court.
8 THE COURT: Ms. Williams.
9 FAMILY MEMBER: Good morning, Judge
10 Cooper.
11 THE COURT: Good morning.
12 FAMILY MEMBER: First, I would like
13 to start by saying, thank you to
14 prosecutor Rick Gibson, Sergeant
15 Niehauser and Sergeant Abrams for all of
16 their hard work involved in this case.
17 These past two years have been very
18 painful for me and my family. As a
19 mother, you want to protect your child at
20 whatever costs. But my son Scotty always
21 felt that he had to protect me. He was a
22 son that knew me well. He wasn't just my
23 son, he was my friend.
24 He would just show up at my door,
25 mom, I just wanted to check on you to

1 make sure that you're feeling okay. So
2 now that these murderers have taken my
3 child from me, I have to stand tall and
4 make sure that they pay for killing them.
5 Personally, I would choose the sentence
6 for them to die the same way that they
7 killed my son.
8 It hurt me so much to look into my
9 eight-year-old granddaughter's eyes and
10 answer the question, grandma, why did
11 they hurt my daddy? What do you say to
12 that?
13 Those guys were a bunch of cowards.
14 Now my son Scotty won't be here to see
15 his four children grow up, or all of the
16 special moments of their lives.
17 His beautiful little niece Journey,
18 who she sees his photograph and says,
19 that's Uncle Scotty. I have to look into
20 my other son's Alex's eyes and see the
21 sorrow and pain of losing his brother.
22 They were so close.
23 How do I comfort him when I feel
24 that same pain? It's always been us
25 three for a very long time.

1 These murders have destroyed me and
2 my family, and I want them to suffer for
3 the rest of their lives. To me they have
4 the actions for serial killers, and
5 prison may be too good for them
6 considering they will still be able to
7 have visits from their families. I can't
8 visit with or interact with my son
9 Scotty. They should have been put to
10 death. But for them to spend the rest of
11 their lives in prison, and never be able
12 to walk the streets and to hurt anyone
13 else, will have to be acceptable.
14 I do know that, because of what
15 they did to my son Scotty, my life will
16 never be the same, and I hope they will
17 burn in hell after they have suffered
18 tremendously here on earth.
19 Sincerely, Scotty's mother. Thank
20 you.
21 MR. GIBSON: Judge, Terrance
22 Whitehead is the brother of Keith Cobb,
23 if you will hear from him.
24 THE COURT: Mr. Whitehead.
25 FAMILY MEMBER: How you doing, Your

1 Honor. I first like to say, Your Honor,
2 the type of institution I would like for
3 three men go to and spend their time
4 with, is it's no institution. I wish it
5 was a way we could have instead of big
6 jail houses, be church houses that still
7 houses inmates and held them in because
8 what need to happen at this point is
9 young men and young woman, or how you
10 need to start renewing their own mind,
11 you know. Looking at myself, I teach
12 Sunday school at the church, I tend to
13 children. And I've learned over the past
14 six years that I've been teaching Sunday
15 school that I pretty much have to
16 practice what I teach.
17 I've prayed for these guys from day
18 one, when I found out about it. And
19 they've been in my prayers, and they
20 family been in my prayers ever since
21 then. And I'm here to basically to
22 testify that God answers prayers. My
23 prayers was, they was brought to justice
24 safely unharmed in a sound manner.
25 And during the three weeks of the

1 trial, I witnessed three sound minds on
2 trial. And with them having sound minds,
3 I think if they really look at their
4 lives, it's still opportunity for change.
5 There is also time for change. And if
6 these three young men take the rest of
7 their lives and reflect and renew their
8 mind, they can change. Their family can
9 change. Their family can change by
10 making sure, and my family, as well. I'm
11 not just speaking to their family. I'm
12 speaking to my family. We can ensure
13 that this won't happen again by being
14 better parents.
15 We always hear about the statements
16 about it takes a village to raise a
17 child, well, that saying still true today
18 but the village is weak. We need the
19 village to be strengthened, and it's not
20 going to be strengthened with hate. So I
21 stand here today, already in a
22 forgiving -- I've forgiven these guys
23 from day one. I know I can't carry hate
24 in my heart. It can only kill me. Hate
25 can cause a lot of illness, stress. I

1 don't hate anyone.
2 I stand here today, actually I love
3 them, their family, my family. The
4 prosecutors, their lawyers. And I just
5 ask that they family members stay in
6 touch with them and try to lead them the
7 right way, and also if they family
8 members want to get with me afterwards,
9 there's other programs my church has at
10 the prison ministry program. I'd be
11 willing to pass on information for you,
12 Your Honor, or to their lawyers to give
13 to them so they can have an opportunity
14 to renew their mind.
15 They may not get to walk the
16 streets ever again, they can still have a
17 renewed mind and be a soldier for Christ.
18 That's the best thing a person can do at
19 this point is give they life to Christ,
20 and look to him for everything they need.
21 He is possible for all things, if
22 any one of you guys ever want to get out,
23 go to God. Without God, nothing is going
24 to be capable of achieving. So my thing
25 is, I tell you if you have not found God,

1 find God, and that goes out to anyone
2 that can hear my voice at this time in
3 this courtroom. God can take care of it
4 all. And what happens is, a lot of us
5 don't cast our cares on him. I just ask
6 everybody to cast their cares on God, and
7 let him take care of it.
8 That's all, Judge.
9 THE COURT: Thank you, sir.
10 MR. GIBSON: Judge, I did have one
11 last person I think wanted to speak,
12 that's Scott Neblett, Sr., the father of
13 Scott Neblett.
14 THE COURT: Mr. Nelett.
15 FAMILY MEMBER: How do you do, Your
16 Honor. I also like to thank the
17 detectives and the prosecution for taking
18 this case, handling this matter. I'm not
19 going to make this long.
20 My son Scott was everything to me,
21 and his momma and his family, he didn't
22 deserve to die. Don't nobody deserve to
23 die.
24 And the way we hurting and in pain,
25 I would like to see these individuals

1 hurt and be in pain the same way that we
2 are.
3 My grandkids, they're going to miss
4 their father dearly, and for these young
5 guys to stand up here, I don't know if
6 they have children or not -- it's not
7 really my concern if they do. But their
8 kids is going to hurt just as well as my
9 grandkids that's missing they father.
10 So for what they put my family
11 through, I want them to do the same
12 thing. Life in prison without parole,
13 and just let them suffer the way they got
14 to suffer.
15 That's all I can say. Thank you.
16 THE COURT: Thank you, sir.
17 MR. GIBSON: Thank you, Judge. I
18 know they appreciate the opportunity to
19 address the Court prior to sentencing.
20 I submitted a sentencing memorandum
21 to the Court on February the 23rd, and I
22 think I've pretty much outlined the
23 State's request for sentencing in that
24 memorandum.
25 A couple things I would like to

1 address. First off, regarding these
2 three defendants standing before the
3 Court and protesting their innocence.
4 This Court heard the evidence, and
5 I think it's pretty clear that the
6 evidence convincingly proved their guilt
7 in this matter.
8 We talked to jurors afterwards, and
9 it's pretty clear that they didn't have
10 any problems with the evidence, and they
11 didn't have any difficulty finding these
12 defendants guilty.
13 With regard to Fonta Whipple and
14 Jashawn Clark, we've now had 24 jurors
15 who have heard evidence about them, and
16 convicted them beyond a reasonable doubt
17 of the crimes that they stand convicted
18 of. So, I would address that.
19 I would also indicate that these
20 defendants had more than fair trials. In
21 fact, they have three of the best
22 attorneys that this county has to offer,
23 and got the best defense they could
24 possibly get. Let's get beyond that to
25 what the sentence ought to be.

1 You've been asked as a judge to
2 show compassion, and I think, Judge, in
3 order to do that, I think what you're
4 being asked to do is disregard what these
5 defendants stand convicted of, would be a
6 simple matter to show compassion by
7 giving lenient or light sentences to
8 these defendants, but why is this? On
9 what basis do they deserve that?
10 I would ask the Court, rather to
11 consider the defendants' records, and
12 their complete and utter lack of remorse,
13 and hand down a sentence that adequately
14 punishes these defendants for what
15 they've done, and adequately protects the
16 public.
17 I don't think there's any doubt
18 when you look at their records as a
19 prediction of future behaviors. If you
20 look at their lack of remorse, if they
21 got out today, they would commit crimes
22 similar to this again.
23 There was some talk about Eric
24 Long's lack of record. He doesn't have a
25 lack of record. It's just that he was

1 bound over first on this case. When you
2 look at his juvenile record, it was
3 horrendous.
4 He'd been to DYS if I'm not
5 mistaken. In this case, the Juvenile
6 Court bound him over, they looked at him
7 and said, we can't do anything with you,
8 they sent him over for trial.
9 And Jashawn Clark has an horrendous
10 record, both having convictions in this
11 courthouse, in front of this Court. In
12 fact, Fonta Whipple had been scheduled to
13 appear in front of this Court and
14 capiased, had just not shown up, and was
15 on the run from this very Court when he
16 committed the crimes that are here today
17 for sentencing.
18 Remorse, you know, have they shown
19 any scintilla of remorse or regret? From
20 what I listened to, two mothers standing
21 at the microphone and talking about the
22 pain they feel, a pain that hasn't
23 lessened in two years, of having lost a
24 son, I think Fonta Whipple and Jashawn
25 Clark were smirking and laughing as

1 though that's funny. It's the same thing
2 they did to shooting up Matthews. They
3 stand before this Court and smirk and
4 laugh like this is some sort of joke.
5 Why would you give them anything
6 less than everything you can give them,
7 given that, knowing if they got out
8 tomorrow, they would do this again?
9 That's why I did ask on the
10 sentencing, I asked for, with regard to
11 the murder sentence, I ask the Court to
12 impose a sentence of life without parole
13 on each of these defendants, because I
14 think that's the only thing that will
15 protect the public.
16 I know that youth is usually a
17 mitigating factor. In this case, we have
18 people, despite their youth, that, as
19 they stand before the Court, have shown
20 no inclination to change, or to show that
21 they recognize the terrible damage
22 they've done. Why would you give a
23 sentence that's going to let them out,
24 even at some date in the future? I ask
25 the Court to make sure they stay where

1 they are, and stay where they cannot hurt
2 anybody else, and give them a sentence of
3 life without parole.
4 THE COURT: Having tried this case
5 and heard this case for four weeks,
6 having had experience with Mr. Whipple
7 and Mr. Clark, having observed also the
8 violent history and record of Mr. Long,
9 it's clear to me that all three
10 defendants, for whatever reason, don't
11 value human life.
12 I mean, the violence, senseless,
13 just indiscriminate violence absolutely,
14 as everyone has said here, absolutely no
15 remorse. It's chilling. It's chilling
16 to see you three stand here, and I have
17 no doubt in my mind that if you walked
18 out the door of this courtroom, you would
19 kill again, and it wouldn't bother you.
20 And that's sad, but it's true.
21 After considering the risks that
22 you'll will commit another offense, the
23 need for protecting the public, nature
24 and circumstances of these offenses, your
25 history, character and condition, Court

1 finds that prison sentences are required.
2 We'll start with Count 1, is
3 felonious assault with a 3-year firearm
4 specification, which you were found
5 guilty by the jury. On that Count, I
6 will sentence all three defendants to 8
7 years in the Ohio Department of
8 Corrections, plus 3 years on the firearm
9 specifications. That's a total of 11
10 years.
11 On Count 2, felonious assault, with
12 the 3-year firearm specification, which
13 applies to all three defendants, sentence
14 you to 8 years on the underlying charge,
15 the felonious assault, plus 3 years on
16 the firearm specification, which must be
17 served consecutively. That's a total of
18 11 years.
19 On Count 3, felonious assault with
20 firearm specification, 3-year firearm
21 specification, which applies to all three
22 defendants, sentence you to 8 years on
23 the underlying charge, plus 3 years on
24 the firearm specification. That a total
25 of 11 years.

1 All those three charges will be run
2 concurrently. So on those three charges,
3 it's a total of 11 years.
4 Count 4, discharging a firearm into
5 a residence with a 3-year firearm
6 specification, Felony of the Second
7 Degree, again, applies to all three
8 defendants, sentence you to 8 years in
9 the Ohio Department of Corrections on
10 that, plus the 3 year firearm
11 specification. That is a total of 11
12 years. That will be concurrent with
13 Counts 1, 2 and 3.
14 With respect to Count 5, which
15 applies to all three defendants.
16 MR. GIBSON: That's only to Fonta
17 Whipple.
18 THE COURT: Count 5 applies to
19 Fonta Whipple, weapons under disability,
20 that's a Felony of the Third Degree.
21 That will be 5 years, which will run
22 consecutive. That's a total of 16 years
23 with respect to Mr. Whipple.
24 Now, with respect to Count 6, which
25 is a weapons under disability, that

1 applies I believe to Mr. Clark?
2 MR. GIBSON: That's correct.
3 THE COURT: That will be 5 years
4 for Mr. Clark. That will run consecutive
5 to the Counts 1 through 4. So that's a
6 total of 16 years for Mr. Clark.
7 We then move -- I'm just going to
8 do it numerically -- Count 7. Count 7,
9 which applies to all three defendants, is
10 aggravated murder, with firearm
11 specifications, which is the 3-year, plus
12 a 5-year firearm specification.
13 Was that on that one, or was that
14 on Count 8?
15 MR. ROSENWALD: You're right. Mr.
16 Whipple only has the 3-year.
17 THE COURT: I'm sorry, Mr. Clark
18 and Mr. Long have the 5 plus the 3.
19 With respect to Count 7, as to all
20 three defendants, the sentence will be
21 life without parole. It will be the
22 3-year firearm specification, which will
23 run consecutive to Mr. Whipple. The 5
24 plus the 3, the total of the 8-year
25 firearm specification, will run

1 consecutive for Mr. Clark and Mr. Long.
2 With respect to Count 8, which is
3 aggravated murder with specifications --
4 only one specification, the 3-year
5 firearm specification applies to Mr.
6 Whipple only?
7 MR. GIBSON: That's correct.
8 THE COURT: With respect to Count
9 8, the 5 plus the 3-year specifications
10 apply to Mr. Clark and to Mr. Long.
11 With respect to those, the sentence
12 for all three defendants will be life
13 without parole. That will run
14 consecutive to Count 7, and will run
15 consecutive to Counts 1, 2, 3, 4, 5 and
16 6, which we've addressed thus far.
17 There will be the 3-year firearm
18 specification, which will run
19 consecutive, as well with respect to Mr.
20 Whipple. The 8-year firearm
21 specifications, the 5 plus the 3, run
22 consecutive for Mr. Clark and Mr. Long.
23 Then we move to Count 9. Count 9,
24 which is having weapons under disability,
25 I believe that applies only to Mr.

1 Whipple, that will be a 5-year sentence
2 in the Ohio Department of Corrections on
3 that count. That will run concurrent.
4 Count 10, I believe applies to Mr.
5 Clark, weapon under disability, that will
6 run concurrent with respect to Mr. Clark.
7 Then we address Count 11, which is
8 weapons under disability, which applies
9 to Mr. Long, which I believe applies to
10 the original Counts 1 and the --
11 MR. GIBSON: No, Judge. That only
12 has to do with Counts 7 and 8.
13 THE COURT: Counts 7 and 8 as well?
14 MR. GIBSON: Yes.
15 THE COURT: That will be 5 years,
16 that will run concurrent.
17 Count 12, which I believe applies
18 to Mr. Long only?
19 MR. GIBSON: Correct.
20 THE COURT: Weapon under
21 disability, which is the third incident.
22 MR. GIBSON: It's -- 12 is a CCW.
23 THE COURT: Twelve is the CCW, 13
24 is the weapon under disability. Twelve
25 is charged, I believe it's a Felony of

1 the Fourth Degree. That will be 18
2 months. It will run concurrent.
3 Count 13 is the weapon under
4 disability, Felony of the Third Degree,
5 that will be 5 years with respect to Mr.
6 Long. That will run concurrently as
7 well.
8 With respect to Mr. Whipple and Mr.
9 Clark, who are already serving 18 years
10 under Case Number B-0904410, sentenced by
11 this Court late last year, these
12 sentences imposed in this case will run
13 consecutive to that.
14 There will be credit for time
15 served thus far in this case. There will
16 be credit for the transport time. The
17 defendants will all be ordered to pay the
18 court costs of this prosecution.
19 You're advised not to take any
20 drugs except as may be prescribed by a
21 medical doctor, to submit to random drug
22 testing. Test results must by negative.
23 Prison term imposed will be the
24 term you all serve without good time
25 reduction.

1 I'm required to give these. You
2 will also need to be aware, if you would
3 be released, that you would be
4 supervised after you leave prison. That
5 is post-release control. That would be
6 for a period of five years.
7 Before you're released, the Parole
8 Board shall determine your post-release
9 control sanctions.
10 Part of those sanctions shall also
11 include as a condition of post-release
12 control, that you not leave the State
13 without permission of the Court or your
14 parole officer, and that you abide by
15 the law.
16 Parole Board can impose any other
17 conditions of post-release control
18 sanctions that the Board considers
19 appropriate.
20 Conditions of release can include
21 any community residential sanction,
22 community nonresidential sanction or
23 financial sanction that this Court was
24 authorized to impose.
25 If you're on post-release control,

1 you violate post-release control
2 supervision or condition, Parole Board
3 can impose a prison term as part of the
4 sentence for up to 9 months, with a
5 maximum for repeated violations for up
6 to 50 percent of the stated prison term.
7 If you commit a new felony while
8 on post-release control, you can be sent
9 to prison for the remaining post-release
10 control period or 12 months, whichever's
11 greater. The prison term must be served
12 consecutively to any new term imposed or
13 the new felony you're convicted of
14 committing.
15 Let me give you your appeal rights
16 as to all three defendants. You all
17 have the right to an appeal, and have a
18 timely notice of appeal filed on your
19 behalf.
20 If you're unable to pay the costs
21 of an appeal, you have the right to
22 appeal without payment.
23 If you're unable to obtain counsel
24 for an appeal, counsel will be appointed
25 without costs

1 If you're unable to pay the costs
2 of documents necessary to an appeal, the
3 documents will be provided without
4 costs.
5 I understand from counsel that all
6 three defendants are requesting that
7 appellate counsel be appointed?
8 MS. DONOVAN: That's correct.
9 MR. RUBENSTEIN: Yes, Your Honor.
10 MR. ROSENWALD: Yes.
11 THE COURT: Appellate counsel will
12 be appointed.
13 Anything further, Mr. Rubenstein?
14 MR. RUBENSTEIN: No. Thank you,
15 Judge.
16 THE COURT: Ms. Donovan?
17 MS. DONOVAN: No.
18 THE COURT: Mr. Rosenwald?
19 MR. ROSENWALD: With regard to
20 Counts 7 and 8, with regard to the 3 and
21 five years specification, I will object
22 to those running consecutively. I
23 understand what the statute might say, we
24 still object to that.
25 I think they should merge, even

1 though you have to sentence on both, they
2 should merge. I would also object to the
3 consecutive sentences on those two
4 counts, even though two victims, it was a
5 single animus, they should run
6 concurrently. Otherwise, I have nothing.
7 THE COURT: Anything further,
8 Mr. Gibson?
9 MR. GIBSON: Just the statute's
10 clear. The two firearm specifications
11 must be served, and must be served
12 consecutively to each other. And where
13 there are two victims, as in a case like
14 this, which is a separate animus, as to
15 this, I think the Court's consecutive
16 sentences are appropriate.
17 THE COURT: All right. Gentlemen,
18 I would hope, as Mr. Whitehead said, at
19 some point in your life, you'd have a
20 change of heart, but at this point, I
21 don't see that happening.
22 Thank you.
23 MR. GIBSON: Thanks, Judge.
24 (Proceedings concluded.)
25

1
2 C E R T I F I C A T E
3
4 I, Phyllis Walton, a Registered
5 Professional Reporter, do hereby certify that
6 at the time and place stated herein I was
7 authorized to and did transcribe the within
8 transcript, and that the foregoing transcript
9 of the proceedings is a true, complete and
10 accurate transcription of my stenographic
11 notes.
12
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14 Phyllis Walton, RPR
15 Official Court Reporter
Court of Common Pleas
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COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

FILED
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SEP -6 2011
CLERK OF COURTS
HAMILTON COUNTY

- - -

State of Ohio,	
Plaintiff,	
vs.	
Eric Long,	Case No. B-0903962-C Appeal No. C-1100160 Vol. 16 of 16
Defendant.	

- - -

TRANSCRIPT OF PROCEEDINGS

2011 SEP -6 P 1:53
FILED

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APPEARANCES:

Richard Gibson, Esq.,
On behalf of the Plaintiff

Scott Rubenstein, Esq.,
On behalf of the Defendant

- - -

BE IT REMEMBERED that upon the hearing of this matter on March 3, 2011, before the Honorable Ethna M. Cooper, one of the judges of the said Court of Common Pleas, the following proceedings were had.

- - -

1 MORNING SESSION, MARCH 3, 2011
2 THE COURT: This is the State of
3 Ohio versus Mr. Fonta Whipple,
4 Mr. Jashawn Clark and Mr. Eric Long.
5 This is Case Number B-0903962. We are
6 here today for sentencing. We first have
7 some preliminary motions, which were
8 filed on behalf of Mr. Clark.
9 What we have is a motion for
10 acquittal, and one is a motion for new
11 trial. Ms. Donovan.
12 MS. DONOVAN: It was on behalf of
13 Mr. Whipple, not Mr. Clark.
14 THE COURT: I apologize.
15 MS. DONOVAN: I set forth the
16 supporting memorandum on those motions,
17 acquittal and a new trial, we submit on
18 those.
19 THE COURT: State have a response?
20 MR. GIBSON: No. We submit as
21 well.
22 THE COURT: Anyone wish to join on
23 the motion?
24 MR. RUBENSTEIN: We will on behalf
25 of Eric Long.

1 MR. ROSENWALD: Judge, I did not
2 file any motion on behalf of Mr. Clark,
3 and I'll leave it to Court.
4 THE COURT: Those motions will be
5 overruled. We will now proceed with
6 sentencing.
7 I guess we'll start -- we'll go the
8 same order that we did.
9 Would you like to speak in
10 mitigation, Ms. Donovan, for Mr. Whipple?
11 MS. DONOVAN: Yes, Your Honor. I
12 have had an opportunity to review the
13 rather lengthy victim impact statements.
14 Court is well aware of what the victims'
15 position is on sentencing here as well.
16 And I know that the Court is very
17 familiar with Mr. Whipple, having now
18 conducted two trials. There was a
19 pre-sentence investigation that was
20 conducted in connection with his first
21 sentencing.
22 To that end, I would just like to
23 address the Court on behalf of Mr.
24 Whipple as to the specification on the
25 sentencing.

1 In this particular case, we do have
2 three separate felonious assaults that
3 arguably could be merged for purposes of
4 sentencing. And I believe that Mr.
5 Whipple stands different from the other
6 two defendants here today in that he was
7 not convicted of the motor vehicle gun
8 specification in relation to the
9 aggravated murder, which would reduce his
10 potential sentence by, as my
11 understanding, a five-year gun spec. Ask
12 the Court to take that into
13 consideration, apply the appropriate
14 merger.
15 If the Court is not inclined to
16 merge the offenses, we would ask the
17 Court consider running these sentencing
18 concurrent to each other rather than
19 consecutive.
20 THE COURT: Thank you.
21 Mr. Whipple, is there anything that
22 you would like to say on your own behalf
23 with respect to sentencing?
24 DEFENDANT WHIPPLE: Yes. I been in
25 your courtroom -- I had three trials in

1 here. I had not one fair trial. Not
2 one. There's nobody that came in here
3 and said I did nothing to him. As the
4 nights of the shooting, the murder, I
5 wasn't even at the club at all.
6 Everybody know, even the family even know
7 that. I just did not come forward and
8 tell them who did it, you know what I'm
9 saying. I was not there at all. I'm
10 charged with murder double homicide by my
11 life. I ain't had a fair trial once
12 since I been in here, and I got one more
13 thing to say.
14 If I would have had the witnesses
15 the State had, they would have been
16 charged with perjury because every
17 witness State had got up on that stand
18 and lied.
19 THE COURT: All right.
20 Mr. Rosenwald, would you like to
21 speak on behalf of Mr. Clark?
22 MR. ROSENWALD: Just briefly,
23 Judge. I think Jashawn understands what
24 the probable sentences would be in this
25 specific case. I do want to address

1 specific sentencing issuing, the same as
2 Ms. Donovan indicated, I believe that the
3 felonious assaults can be merged together
4 as a single animus situation.
5 Obviously, the three different
6 specs -- one for each count -- even
7 though the three years would run
8 consecutively, I would also take the
9 position that Count 4, which is the
10 discharging a firearm into a residence,
11 merges into the felonious assault.
12 I can't say the same for the weapon
13 under disability, but I ask the Court to
14 consider running all of those sentences
15 concurrently, so effectively we only have
16 one sentence with one firearm
17 specification that comes out of that.
18 With regard to the two aggravated
19 murder charges, the Court has basically
20 four options. Life/20, life/25, life/30,
21 life/without.
22 As I said in my sentencing
23 memorandum, if the Court determines to
24 run them consecutive and use life/20,
25 that's a minimum of 40 years just on

1 those two counts alone before Jashawn
2 would be eligible -- and I say the word
3 eligible -- for parole, because there's
4 no guarantee he would get out. And in
5 all candor based upon my understanding of
6 the adult Parole Board authority, the
7 odds are real strong, they'd flop him at
8 least once for any specific time, that's
9 not counting any specific number
10 involved. He's now 27. That would put
11 him at 67 years plus before he would even
12 be considered eligible for parole.
13 That's fairly adequate based upon the
14 offenses themselves, and based upon Mr.
15 Clark.
16 We're asking the Court to give that
17 consideration in passing sentence.
18 That's all I have to say.
19 THE COURT: Mr. Clark, is there
20 anything you'd like to say on your own
21 behalf before the Court passes sentence?
22 DEFENDANT CLARK: As I stand here
23 today, I'm an innocent man. I ain't did
24 nothing to nobody. I never seen these
25 guys in my life. If they guy was to walk

1 in the courtroom, I wouldn't know who
2 they was. I was not in no club. Three
3 guys come up here and told three
4 different stories, lying. Guys go up
5 here, was on camera with a gun out the
6 night guy got killed, so how I'm standing
7 here about to get sentenced to whatever
8 ya'll about to give me, and I feel like I
9 don't deserve to get life without parole
10 or none of that. I'm innocent.
11 THE COURT: Thank you.
12 Mr. Rubenstein, would you like to
13 speak on behalf of Mr. Long?
14 MR. RUBENSTEIN: I would. May I
15 have one moment, please?
16 THE COURT: Certainly.
17 MR. RUBENSTEIN: Thank you, Judge.
18 Your Honor, as Mr. Rosenwald said, and
19 you can -- the Court has a lot of
20 discretion in how it imposes sentence at
21 this time.
22 Doing the calculations, looks like
23 Eric's facing a minimum term of 28 years
24 to life, if everything that the Court
25 could run concurrent would be run

1 concurrent.
2 As the Court is aware, he was 17
3 when this happened. He was a juvenile.
4 He was not previously convicted like the
5 other two defendants. He doesn't have
6 time already. He starts with a clean
7 slate in front of this Court.
8 Your Honor, I would ask you to
9 consider imposing the minimum term,
10 because Eric won't even be eligible for
11 parole until he's 47, and a lot can
12 happen between now and that point, where
13 he's going to gain perspective, where he
14 will become more secure, after all, he
15 was a child. He was a juvenile when this
16 happened. I think that puts him in a
17 different light than the other two
18 individuals.
19 I think the Court can also glean
20 from watching him throughout this whole
21 process in a different situation. His
22 demeanor, the way that he's dealt with
23 this situation shows that he is
24 dissimilar to his co-defendants.
25 I think you can describe him sort

1 of as a deer in headlights through the
2 last portion of this court trial. I'd
3 ask the Court to take that into
4 consideration and give him a glimmer of
5 hope, give him a chance that some day he
6 can return to society, hopefully a
7 changed and rehabilitated man.
8 I'd like you to take that into
9 consideration. Judge, I'd ask you to
10 impose minimum sentences, even though the
11 minimum sentence in this case is very
12 significant, and I'll submit it.
13 THE COURT: Thank you.
14 MR. RUBENSTEIN: Thank you, Judge.
15 I appreciate it.
16 THE COURT: Mr. Long, sir, is there
17 anything that you would like to say on
18 your own behalf before the Court passes
19 sentence?
20 DEFENDANT LONG: No.
21 THE COURT: Is there anyone that
22 you wish to have speak on Mr. Long's
23 behalf, Mr. Rubenstein?
24 MR. RUBENSTEIN: I would like to
25 have one person come up, Your Honor.

H

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fourth District.
Thomas **DAUGHERTY**, Appellant,
v.
STATE of Florida, Appellee.

No. 4D08-4624.
Sept. 5, 2012.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Cynthia Imperato , Judge; L.T. Case No. 06-878 CF10B.
Donna Duncan and Steven Seliger of Sanders and Duncan, P.A., Apalachicola, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

ON AMENDED MOTION FOR REHEARING
TAYLOR, J.

***1** Upon consideration of appellant's amended motion for rehearing, we grant the motion, withdraw the opinion filed on May 23, 2012, and substitute the following opinion in its place.

Thomas Daugherty appeals his convictions for second-degree murder and two counts of attempted second-degree murder. The charges arose from a violent crime spree in which appellant and some friends randomly selected and severely beat three homeless men, one of whom died from the attack. Appellant raises five issues, arguing that (1) the trial court committed fundamental error in instructing the jury on the lesser included offenses of manslaughter and attempted voluntary manslaughter; (2) the trial court abused its discretion in denying appellant's motion to sever the murder counts from the attempted murder counts; (3) the trial court fundamentally erred in using the phrase "and/or" between the defendants' names in the jury instructions; (4) the trial court erred in denying appellant's motion to change venue due to pre-trial publicity, and (5) appellant's sentence to life without the possibility of parole as a juvenile violates the Eighth Amendment of the United States Constitution and Article I, Section 17, of the Florida Constitution. We affirm appellant's conviction for second-degree murder but remand for a new sentencing hearing in light of *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

Appellant and co-defendant Brian Hooks were tried together. In the appeal of Hooks' convictions for the same underlying crimes, we held that the trial court did not err in denying Hooks' motion for change of venue due to pre-trial publicity. *See Hooks v. State*, 82 So.3d 905 (Fla. 4th DCA 2011), *rev. denied*, 83 So.3d 707 (Fla.2012). Because appellant and the co-defendant were tried together, the *Hooks* decision compels an affirmance on the denial of appellant's motion to change venue.

As to appellant's contention that the trial judge committed fundamental error in instructing the jury on manslaughter and attempted voluntary manslaughter, we affirm.

We conclude that the trial court did not commit fundamental error in instructing the jury on manslaughter as a lesser included offense of Count I. In *Singh v. State*, 36 So.3d 848 (Fla. 4th DCA 2010), we held that the standard jury instruction on the lesser included offense of manslaughter was not fundamentally erroneous where the trial court gave an instruction on manslaughter by culpable negligence.

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The parties in this case disagree over whether the evidence supported a manslaughter by culpable negligence instruction. Appellant argues that the evidence did not, while the State argues that it did. However, we need not reach that issue. Our analysis is not dependent upon the fact that the culpable negligence instruction was given.[FN1] Even without considering that the jury received the manslaughter by culpable negligence instruction, we find that there is an independent reason why giving the manslaughter instruction, as a lesser included offense of the murder charge, was not fundamental error in this case. As our supreme court has explained, "When the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." *Pena v. State,* 901 So.2d 781, 787 (Fla.2005). Here, because the jury was also instructed on the lesser included offense of third-degree felony murder, manslaughter was actually two steps removed from second-degree murder under the facts of this case. *See Echols v. State,* 484 So.2d 568, 574 (Fla.1985) (holding that manslaughter was a lesser included offense that was three steps removed from first degree murder where the jury, if inclined to exercise its "pardon" power, could have returned verdicts of second-degree or third-degree murder). If the jury had been inclined to exercise its pardon power, it could have returned a verdict of third-degree felony murder, which was the next lower crime on the verdict form; the evidence in this case would have supported a conviction for third-degree felony murder. We conclude that the error in the manslaughter by act instruction was harmless and did not constitute fundamental error.

FN1. Accordingly, our resolution of this issue will not be affected by the Florida Supreme Court's ultimate determination regarding the certified question in *Haygood v. State,* 54 So.3d 1035 (Fla. 2d DCA 2011), *rev. granted,* 61 So.3d 410 (Fla.2011).

*2 We likewise conclude that the trial court did not commit fundamental error in instructing the jury on attempted voluntary manslaughter as a lesser included offense of Counts II and III. *See Williams v. State,* 40 So.3d 72 (Fla. 4th DCA 2010) (holding that standard jury instruction on attempted voluntary manslaughter was not fundamental error in a prosecution for attempted first degree murder in which the defendant was convicted of the lesser included offense of attempted second-degree murder), *rev. granted,* 64 So.3d 1262 (Fla.2011). Because the *Williams* case is under review in the Florida Supreme Court, we certify conflict with the contrary decisions of the other districts. *See Coriolan v. State,* 77 So.3d 840, 840 (Fla. 4th DCA 2012) (rejecting argument that trial court committed fundamental error in giving the standard jury instruction on attempted manslaughter, but certifying conflict with other district courts).

Without further discussion, we reject appellant's other arguments challenging his convictions and affirm on all points raised by appellant.

On the issue of sentencing, however, we reverse and remand for further proceedings in light of the recent decision by the United States Supreme Court in *Miller v. Alabama,* 132 S.Ct. 2455 (2012). Following a line of cases recognizing that juveniles may have less "moral culpability" because of their youth, the Supreme Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. Appellant, who was seventeen at the time he committed his crimes, argues that his sentence to life in prison without the possibility of parole constitutes cruel and unusual punishment. Unlike the juvenile defendant in *Miller,* however, appellant was not sentenced to a statutorily mandated sentence of life imprisonment without the possibility of parole. Rather, the trial judge in his case had discretion to impose a different punishment.[FN2]

FN2. The co-defendant, who was also con-

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victed of second degree murder, was sentenced to thirty years in prison.

Nevertheless, *Miller* contains language suggesting that sentencing juveniles to life-without-parole prison terms should be "uncommon" in light of the "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." *Id.* at 2469 (citations and internal quotation marks omitted). Thus, under *Miller,* judges must take an individualized approach to sentencing juveniles in homicide cases and consider factors which predict whether a juvenile is amenable to reform or beyond salvation.

In *Miller,* the Supreme Court reviewed its precedent in *Roper* and *Graham,* which established that "children are constitutionally different from adults for purposes of sentencing." FN3 *Id.* at 2464. Notable among these differences are "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468. Although the Court clarified that its decision does not foreclose a judge's ability to impose a life-without-parole sentence on a juvenile convicted of homicide, the Court stressed the sentencing judge's responsibility to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469.

FN3. *Roper v. Simmons,* 543 U.S. 551 (2005) (holding that the Eighth Amendment to the Constitution bars capital punishment for children); *Graham v. Florida,* 130 S.Ct. 2011, 2034 (2010) (holding that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide").

***3** Appellant argues that the trial court failed to adequately consider his age and culpability when sentencing him to life in prison without the possibility of parole. Although the record contains extensive testimony regarding appellant's difficult childhood and other factors that may have lessened his culpability, the trial court's comments when imposing the sentence were limited to the following:

> Mr. Daugherty, the Court does believe that your remorse is genuine, does understand you behaved in court the entire time. I've heard today what a horrible and unfortunate upbringing that you've had, and that you found religion and you may, in fact, be a good person now. However, on that night, the things that were done to those three individuals were horrific. They were senseless crimes.
>
> Mr. Pierre, I'll start with him, is being chased around while you and Mr. Hooks are beating him. He's a helpless old man. Then you go to Mr. Gaynor, not once, but once you hit him in the head, and then he sits up, and then you come back and kill him with a baseball bat. And then, if that wasn't enough, a third time, you go out, and you go get Mr. Perez, and you go after him. It shows a total disregard for human life. It's a waste of your life as well as theirs. And by your own words, you treated them like less than human, and it was demented and wrong what you did. So based on that, the Court sentences you to life.

Here, it appears that the trial court considered appellant's remorse and his "horrible and unfortunate upbringing" before sentencing appellant to a term of life without parole. However, based on *Miller,* we remand this case to the trial court to conduct further sentencing proceedings and expressly consider whether any of the numerous "distinctive attributes of youth" referenced in *Miller* apply in this case so as to diminish the "penological justifications" for imposing a life-without-parole sentence upon appellant. *Id.* at 2458. Our decision does not preclude the trial court from again imposing a life term without possibility of parole should the court upon reconsideration deem such sentence justified.

Affirmed in part; Reversed in part.

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MAY, C.J. and CONNER, J., concur.

Fla.App. 4 Dist.,2012.
Daugherty v. State
--- So.3d ----, 2012 WL 3822108 (Fla.App. 4 Dist.)

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THE PEOPLE, Plaintiff and Respondent, v. ANDREW LAWRENCE MOFFETT, Defendant and Appellant.

A133032

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

209 Cal. App. 4th 1465; 2012 Cal. App. LEXIS 1072

October 12, 2012, Opinion Filed

PRIOR HISTORY: [*1]

Superior Court of Contra Costa County, No. 051378-8, Laurel S. Brady, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant was 17 years old when he and an accomplice committed an armed robbery and his accomplice shot and killed a police officer during their attempt to escape. Defendant was convicted of, inter alia, first degree murder with felony-murder special circumstances. Defendant received a sentence of life imprisonment without the possibility of parole (LWOP) on the murder count. (Superior Court of Contra Costa County, No. 051378-8, Laurel S. Brady, Judge.)

The Court of Appeal vacated defendant's sentence and remanded for resentencing. The court concluded that this case had to be remanded for resentencing in light of the United States Supreme Court decision in *Miller v. Alabama*, which held that a mandatory LWOP sentence in a homicide case violates the *Eighth Amendment*'s prohibition of cruel and unusual punishment when applied to a defendant who was less than 18 years of age at the time of the offense. Remand was necessary so the sentencing court could consider the appropriate sentence on the murder count without reference to a presumption in favor of LWOP. While the court did not fault the sentencing court for applying a presumption that reflected the law as it stood at the time of the sentencing hearing, the sentencing court did not exercise its discretion under *Pen. Code, § 190.5, subd. (b)*, with the benefit of the *Miller* opinion. Though defendant's conduct during the robbery bore on whether he was an active participant in and instigator of the criminal conduct that led to the shooting, the psychological reactions of the robbery victims did not say much about defendant's maturity, prospects for reform, or mental state with respect to the homicide itself--the factors paramount under *Miller*. (Opinion by Needham, J., with Simons, Acting P. J., and Bruiniers, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Criminal Law § 518--Punishment--Cruel and Unusual--Juveniles--Life Imprisonment Without Possibility of Parole--Homicide.--A mandatory sentence of life imprisonment without the possibility of parole in a homicide case violates the *Eighth Amendment*'s prohibition of cruel and unusual punishment when applied to a defendant who was less than 18 years of age at the time of the offense.

(2) Criminal Law § 518--Punishment--Cruel and

Unusual--Proportionality.--*U.S. Const., 8th Amend.*, prohibits the infliction of cruel and unusual punishment. This provision guarantees individuals the right not to be subjected to excessive sanctions and flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offense and the offender. The concept of proportionality is central to *U.S. Const., 8th Amend.*

(3) Criminal Law § 518--Punishment--Cruel and Unusual--Proportionality--Juveniles.--Cases addressing the proportionality of sentences have fallen into two general classifications: challenges to the length of a term-of-years sentence as disproportionate in a particular case, and categorical challenges to the type of sentence imposed in certain types of cases, against a certain type of defendant. With respect to defendants who were juveniles at the time of the offense, the U.S. Supreme Court has found that the cruel and unusual punishment clause categorically bars the imposition of the death penalty, as well as the imposition of a life imprisonment without the possibility of parole term in cases where the crimes are nonhomicide offenses.

(4) Criminal Law § 514--Punishment--Juveniles--Life Imprisonment Without Possibility of Parole.--*Pen. Code, § 190.5*, allows the court to impose a sentence of life imprisonment without the possibility of parole (LWOP) or 25 years to life in cases where the defendant was 16 or 17 years old at the time of the offense; for defendants who were 15 years of age or younger, LWOP may not be imposed at all.

(5) Criminal Law § 514--Punishment--Juveniles--Life Imprisonment Without Possibility of Parole.--A presumption in favor of a sentence of life imprisonment without the possibility of parole (LWOP) is contrary to the spirit, if not the letter, of *Miller v. Alabama*, which cautions that LWOP sentences should be uncommon given the 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. Though *Miller* does not categorically bar LWOP sentences in juvenile homicide cases, it recognizes that juveniles are different from adults in ways that counsel against irrevocably sentencing them to a lifetime in prison. Treating LWOP as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head, instead placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole.

(6) Criminal Law § 514--Punishment--Life Imprisonment Without Possibility of Parole--Juveniles--Felony Murder--Remand for Resentencing.--In a felony murder case in which defendant was 17 years old when he and an accomplice committed an armed robbery and the accomplice shot and killed a police officer during their attempt to escape, remand for resentencing was necessary so the sentencing court, which imposed a sentence of life imprisonment without the possibility of parole (LWOP) on the murder count, could consider the appropriate sentence on the murder count without reference to a presumption in favor of a sentence of LWOP.

[Erwin et al., Cal. Criminal Defense Practice (2012) ch. 120, § 120.01.]

(7) Criminal Law § 514--Punishment--Life Imprisonment Without Possibility of Parole--Actual Killer--Intent to Kill--Twice Diminished Moral Culpability.--When a court is contemplating a sentence of life imprisonment without the possibility of parole for a juvenile defendant, it should consider whether the defendant was the actual killer or intended to kill. A juvenile who did not kill or intend to kill has a twice diminished moral culpability.

COUNSEL: Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Attorney General, René A. Chacón and David M. Baskind, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Needham, J., with Simons, Acting P. J., and Bruiniers, J., concurring.

OPINION BY: Needham, J.

OPINION

NEEDHAM, J.--Andrew Lawrence Moffett was 17 years old when he and an accomplice committed an armed robbery and his accomplice shot and killed a police officer during their attempt to escape. He appeals

from a judgment sentencing him to life without the possibility of parole (LWOP) for his conviction of first degree murder with felony-murder special circumstances, arguing that the sentence amounts to cruel and unusual punishment. (*Pen. Code, §§ 187, subd. (a), 189, 190.2, subd. (a)(17).*)[1] We conclude that the case must be remanded for resentencing in light of the recent United States Supreme Court decision in *Miller v. Alabama (2012) 567 U.S. ___ [183 L. Ed. 2d 407, 132 S.Ct. 2455]* (*Miller*).

1 Further [*2] statutory references are to the Penal Code unless otherwise indicated.

I. *BACKGROUND*

A. *Underlying Facts*

Elijah Moore stole a white Toyota Camry at appellant's request in exchange for some marijuana. On April 23, 2005, Moore delivered the Camry to appellant, who was with Alexander Hamilton. Later that same day, appellant and Hamilton drove the Camry to a Raley's supermarket in Pittsburg, which was having a grand reopening celebration. They entered the store shortly before 5:47 p.m., wearing facial coverings and carrying semiautomatic handguns. Appellant ran to a checkout stand manned by Rima Bosso, pointed the gun at her head and demanded that she give him the money. Bosso initially thought it was a joke by one of her coworkers, but when she realized the situation was serious, she became flustered and could not get the register drawer to open. Appellant put his gun up against her left ear and repeatedly demanded the money, telling her "Come on, bitch. Come on, bitch. You're taking too fucking long." The drawer finally opened and Bosso put about $800 in a bag. Bosso closed her eyes because she thought appellant was going to shoot her, but when she opened them he had run away.

As appellant [*3] was robbing Bosso, Hamilton approached a Wells Fargo bank counter inside the Raley's, where bankers Anjila Sanehi and Adrianna Beaman were sitting at the counter helping customers. Hamilton stood between the two customers (one of whom was with her 12-year-old daughter) and pointed the gun back and forth between Sanehi and Beaman. He focused on Beaman, telling her, "Bitch, give me the money or I will shoot you." Beaman and Sanehi both put money in a bag that Hamilton was carrying.

Appellant and Hamilton ran out of the store, dropping some money just outside the exit. They got inside the Camry, sped out of the parking lot, and drove through a nearby residential neighborhood. A few minutes later, the car crashed into the back of a pickup truck parked on the street. Appellant and Hamilton got out of the car and a neighbor saw appellant (the taller of the two) drop and pick up a gun. Another neighbor started to chase them as they ran through a cul-de-sac, but he was warned off by the neighbor who had seen the gun. Appellant told the neighbor who was chasing them, "Stop or I'll cap you, motherfucker." Appellant and Hamilton continued running through the yards of several homes near the Delta [*4] de Anza Regional Trail, scaling fences as they went.

Shortly after the robbery, police officers responded to the Raley's while others drove the likely escape routes. Information about the car crash and suspects running on foot near the Delta de Anza Regional Trail was broadcast over the police radio. Pittsburg Police Officers Larry Lasater and John Florance drove their patrol cars as far as they could and then got out and ran a couple of hundred yards down a path until they reached the trail. The officers surveyed the trail with their backs toward one another, with Officer Lasater looking east and Officer Florance looking west. Officer Lasater said, "Is that someone down there?" and Officer Florance turned around and saw a dark figure standing in some trees and greenery that was south of the trail. The figure disappeared into the greenery and Officer Lasater started running, calling out, "Black male, black sweatshirt." Officer Florance heard the sound of a fence being hopped and Officer Lasater quickly stopped and drew his weapon.

Officer Florance saw Officer Lasater walking heel to toe toward the area where the figure had disappeared, holding his gun out in front of him. Officer Lasater pointed his [*5] gun downward and shouted, "Show me your hands." Hamilton, who was lying down in the bushes, fired several shots at Officer Lasater, one of which shattered a vertebra in his neck, and another of which went through his calf. Officer Lasater collapsed and ultimately died of the neck wound. A number of other officers came to the scene to assist in capturing the shooter and moving Officer Lasater from the area where he had fallen. Hamilton fired shots at two other officers until his gun ran out of ammunition, at which point he dropped his gun, crawled out of the grass, and was taken

into custody.

Meanwhile, appellant had jumped the fence adjacent to the site of the shooting and had run through the backyard of Elizabeth Huyuck. Huyuck did not hear gunshots until after he ran through her yard. She noticed a dark sweatshirt caught on her backyard fence and some cash on the ground near the fence.

Another neighbor, Jerilynn Privratsky, heard the sound of a helicopter and started to go to her backyard via her garage to see what was happening. She saw a bare-chested young African-American man start to come into her garage and yelled, "No!" The man ran across the street. A number of other neighbors **[*6]** in the area also saw a young, shirtless African-American man running though the streets and backyards. Appellant, who is African-American, was eventually discovered lying shirtless in a backyard in a fetal position under a tree. When police apprehended him (about 50 minutes after the first robbery dispatch) he said "Don't kill me," and surrendered unarmed. At least one of his wrists was bleeding.

Larry Pitts lived in the neighborhood where appellant was apprehended but was out of town on the day of the robbery. When he returned home the following evening, he noticed that the gate to his yard was open and that some dirt had been pulled out of one of his flowerpots. The next morning he checked the flowerpot and discovered a handgun buried under about six inches of soil. The gun was a fully loaded automatic with a bullet in the chamber.

After the police recovered the gun from Pitts, they searched the backyard next door. Inside a garbage can they found a white plastic bag with $4,027 cash and a black shirt. Blood matching appellant's DNA was discovered on the plastic bag containing the cash and on top of the garbage can lid. The black shirt also had a mixed sample bloodstain consistent **[*7]** with appellant's DNA, although that match was to a much lower probability (one in 1,100 African-Americans versus one in 4.9 quadrillion African Americans) than the other bloodstains.

It had been raining on the day of the robbery, and muddy shoe prints consistent with the shoes worn by appellant when he was arrested were discovered in many of the backyards in the area. Shoe prints consistent with Hamilton's shoes were found as well. Those shoe prints, along with damaged and muddied fences, a bloody palm print on a gate, and discarded latex gloves similar to those used in the robbery enabled the police to trace appellant's path of flight from the car crash to the backyard where he was arrested. One of appellant's shoe prints was found about 10 feet from the gun that Officer Lasater had dropped when he was shot.

Forensic testing showed that gunshot residue was present on appellant's hands after his arrest, which indicated that he had fired a gun, was near a gun when it was fired, or had handled a gun or other object contaminated with gunshot residue.

A cell phone recovered a few feet away from where Officer Lasater was shot was traced to appellant and contained Elijah Moore's telephone number. **[*8]** A dark hooded sweatshirt with blood on the left sleeve cuff was found on or near the fence adjacent to the site of the shooting. The blood on the cuff of the sweatshirt appeared to correspond to a wound on appellant's wrist at the time of his arrest. No DNA type could be developed from the sample on the sweatshirt.

Appellant's teenage cousin, Brian Berry, was inside the Raley's when it was robbed. After he learned from his mother that appellant had been arrested for the robbery and shooting, he told police that he had heard one of the robbers saying, "Shut up, bitch," and thought the voice sounded like appellant's. Berry later denied that the robber's voice was familiar to him.

B. *Trial and Conviction*

The Contra Costa District Attorney charged appellant and Hamilton with first degree murder with special circumstances and other related charges, and sought the death penalty against Hamilton. Appellant was not eligible for the death penalty because he was under 18 at the time of the offenses. (See *§ 190.5, subds. (a)* & *(b).*)

Following a joint trial with Hamilton, appellant was convicted of one count of first degree murder, three counts of second degree robbery and one count of driving a stolen **[*9]** vehicle. (*§§ 187, 211*; *Veh. Code, § 10851.*) The jury also found true three felony-murder special-circumstance allegations, one killing of a peace officer special circumstance allegation, and firearm use allegations as to the murder and robbery counts. (*§§ 190.2, subd. (a)(7)* & *(17), 12022.53, subd. (b).*) The jury

returned the same verdict as to Hamilton and additionally found him guilty of two counts of attempted murder and found true a lying-in-wait special-circumstance allegation. Appellant received a sentence of LWOP on the murder count, plus a 10-year enhancement for the firearm use allegation attached to that count. The court also imposed a consecutive sentence for one of the robbery counts and the attached firearm use enhancement, along with concurrent sentences on the remaining two robbery counts and enhancements. Sentence on the stolen vehicle count was stayed. Hamilton received the death penalty.

C. *First Appeal*

Appellant filed an appeal from the judgment in his case, raising a number of claims of trial and sentencing error. In an unpublished opinion, this court reversed the peace officer special circumstance because, as the People conceded, there was **[*10]** no substantial evidence that appellant acted with an intent to kill. (*People v. Moffett* (Nov. 9, 2010, A122763) [nonpub. opn.].) We remanded the case to the superior court for resentencing so the court could consider whether an LWOP sentence was appropriate in light of the reversal of one of the special circumstances, and additionally directed the court to correct sentencing errors on the robbery counts. (*Ibid.*) In light of this remand, we found it unnecessary to reach a claim by appellant that an LWOP sentence amounts to cruel and unusual punishment when imposed on a defendant who was a juvenile at the time of the offense.

D. *Sentencing Hearing on Remand*

Defense counsel filed a written sentencing statement arguing that appellant would be subjected to cruel and unusual punishment if the court imposed an LWOP sentence on remand. At the resentencing hearing, counsel argued that the court should consider reducing the first degree murder conviction to second degree murder, or alternatively, should impose a sentence affording appellant the chance to obtain parole at some future date. Counsel emphasized appellant's youth and his lack of any intent to kill, arguing that those **[*11]** circumstances resulted in a "twice diminished moral culpability." (*Graham v. Florida (2010) 560 U.S. ___, ___ [176 L. Ed. 2d 825, 130 S.Ct. 2011, 2027]* (*Graham*) [describing culpability of juvenile convicted of nonhomicide offense].) The prosecution argued that the court should again sentence appellant to LWOP on the murder count, and statements urging the imposition of an LWOP sentence were made by Officer Lasater's mother, widow, and brother, as well as one of his police officer colleagues.

The court prefaced its imposition of sentence by noting, "One of the central issues today is whether or not the court will exercise discretion pursuant to *Penal Code section 190.5* and deviate from the statutory requirement of life without the possibility of parole and sentence Mr. Moffett to a determinate term of 25 years to life. We are not here today to debate the legality of the felony murder rule, nor can we engage in a philosophical discussion about its merits. It is the current state of the law in California. [¶] The law also provides discretion for the trial court in certain limited circumstances such as this where the defendant in a capital case was a juvenile tried as an adult."

After pronouncing sentence **[*12]** on the robbery and stolen vehicle counts, the court turned to the murder conviction: "As for Count 1, Mr. Moffett was under the age of eighteen by just a few months at the time of this incident, thus the court has discretion regarding sentencing. [¶] ... [¶] Sometimes with the passage of time, people tend to forget or minimize the impact of incidents such as this. But the impact is just as vivid and continues for the victims and the victims' families and that doesn't change. [¶] The testimony of Rima Bosso, the robbery victim in Count 2, was extremely profound. She testified that the individual who was later identified as Mr. Moffett, took his gun, put it to her head and threatened to kill her with it. Not only did she see her own death that day, but she said for years afterwards and up until and as of the day she testified in the trial, she lived in a house where the curtains were pulled shut, the doors were locked. She didn't go out. She was fearful day and night. The trauma damaged her relationship with her family. It has changed her life profoundly and forever. She will never be the same. The fact that she was not physically harmed does not mean that she was not profoundly **[*13]** affected. Her testimony was very compelling. [¶] The other two robbery victims described similar experiences. I take all of this into account in determining the appropriate sentence.

"As for Officer Lasater's family, there's probably no way to describe in words the traumatic effect of this event, nor on the larger community that he was a part of. Mr. Moffett was very actively--he very actively participated in a series of events, starting with the theft of

the car at his request by Elijah Moore; the takeover style robbery of the Raley's store and the bank window; the wild drive and crash in a nearby neighborhood; the confrontation of a resident where Mr. Moffett told him, 'Stop or I'll cap you'; and the shooting of Officer Lasater by Mr. Hamilton shortly thereafter. [¶] Mr. Moffett's role was not a passive role nor was he a peripheral player as compared with those factual scenarios described in the cases cited by the defense in their sentencing memorandum.

"I will note that although we don't know exactly where Mr. Moffett was when Mr. Hamilton shot Officer Lasater, the police found gun residue on Mr. Moffett's hands, meaning that even if he did not fire the weapon, he was close to it **[*14]** when it was fired; shoe prints matching Mr. Moffett's ten feet away from where Officer Lasater fell; and Mr. Moffett's cell phone a few feet away from Officer Lasater. [¶] The actions taken that day by Mr. Moffett are not those of someone who didn't know what was going on or who was led by others.

"I've also considered Mr. Moffett's juvenile criminal history. There were four entries, including a felony, *245(a)(1) Penal Code*, assault with a deadly weapon. It was noted that his performance on probation was marginal at best. The juvenile justice system has infinitely more resources than the adult system. And it appears those resources were not sufficiently taken advantage of to choose a different path.

"The actions taken by Mr. Moffett on the day of this event were not those of an irresponsible child. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victim in this case. I might add that his actions on that day also have had a profound effect and directly affected his own family and loved ones. Although Mr. Moffett was slightly under eighteen years old at the time, his actions on that day, coupled with his criminal history, **[*15]** do not support, in my opinion, this Court exercising [its] discretion and sentencing him to a determinate [*sic*] term of twenty-five years to life. I do not find that sentence appropriate in this particular case under the circumstances of this case, taking into account everything that is in front of me. [¶] On Count 1, I will sentence Mr. Moffett to life without the possibility of parole. I will impose the ten year enhancement for a weapon pursuant to *Penal Code section 12022.53(b)* to run consecutive to the other determinate sentences ... ."

As to the remaining convictions, the court imposed a consecutive four-year "midterm" for the robbery in count 2 (victim: Rima Bosso) along with a consecutive 10-year enhancement under *section 12022.53, subdivision (b)*. Four-year "middle" terms and 10-year enhancements were imposed for the robberies in counts 3 and 4 and ordered to run concurrently; sentence on the stolen vehicle count was stayed under *section 654*.

E. *Appeal from the Sentence on Remand*

In this appeal from the sentence imposed on remand, appellant filed an opening brief arguing that (1) the LWOP term amounted to cruel and unusual punishment under the state and federal Constitutions **[*16]** because he was a juvenile at the time, was not the actual shooter, and did not intend to kill (*U.S. Const., 8th & 14th Amends.*; *Cal. Const., art. I, § 17*); (2) the court abused its discretion when it declined to impose the lesser term of 25 years to life under *section 190.5, subdivision (b)*; and (3) the consecutive sentence imposed for the robbery conviction under count 2 was unauthorized because the court selected the "midterm of four years" whereas the sentencing range for second degree robbery is two, three, or five years.

(1) After briefing was complete, the United States Supreme Court issued its decision in *Miller, supra, 567 U.S. ___ [132 S.Ct. 2455]*, in which it held that a mandatory LWOP sentence in a homicide case violates the *Eighth Amendment's* prohibition of cruel and unusual punishment when applied to a defendant who was less than 18 years of age at the time of the offense. In a supplemental brief discussing the effect of the *Miller* decision, appellant argues that (1) he is not the "rare juvenile offender" suitable for an LWOP sentence under *Miller* and (2) the superior court employed an unconstitutional presumption in favor of LWOP when exercising its discretion under **[*17]** *section 190.5, subdivision (b)* at the resentencing.

II. *DISCUSSION*

(2) The *Eighth Amendment of the federal Constitution* (applicable to the states through the *14th Amend.*) prohibits the infliction of "cruel and unusual punishment." (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal.4th 707, 727 [36 Cal. Rptr. 3d 814, 124 P.3d 408]*.) This provision "guarantees individuals the right not to be subjected to excessive sanctions" (*Roper v. Simmons (2005) 543 U.S.*

551, 560 [161 L. Ed. 2d 1, 125 S. Ct. 1183] (*Roper*)) and "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offense and the offender (*ibid.*). "The concept of proportionality is central to the *Eighth Amendment.*" (*Graham, supra, 560 U.S. at p. ___ [130 S.Ct. at p. 2021*].)

(3) Cases addressing the proportionality of sentences have fallen into two general classifications: challenges to the length of a term-of-years sentence as disproportionate in a particular case, and categorical challenges to the type of sentence imposed in certain types of cases, against a certain type of defendant. (*Graham, supra, 560 U.S. at pp. ___-___ [130 S.Ct. at pp. 2021-2022*].) With respect to defendants who were juveniles at the time of the offense, **[*18]** the Supreme Court has found that the *cruel and unusual punishment clause* categorically bars the imposition of the death penalty (*Roper, supra, 543 U.S. at pp. 572-573*), as well as the imposition of an LWOP term in cases where the crimes are nonhomicide offenses (*Graham, supra, 560 U.S. at p. ___ [130 S.Ct. at p. 2033*]; see *People v. Caballero (2012) 55 Cal.4th 262 [145 Cal. Rptr. 3d 286, 282 P.3d 291]* [sentence of 110 years to life for nonhomicide offenses was equivalent of LWOP and violated *U.S. Const., 8th Amend.*]).

In *Miller, supra, 567 U.S. ___ [132 S.Ct. 2455]*, the high court considered the sentences of two murder defendants who were 14 years old when they committed their crimes and who were sentenced to LWOP terms that were mandatory under state law. It held: "[T]he *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. [Citation.] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." (*Miller, at p. ___ [132 S.Ct. at p. 2469]*.) The court discussed in great detail the reasons that juveniles are "constitutionally different" than adults for **[*19]** sentencing purposes, including their lack of maturity and undeveloped sense of responsibility; their vulnerability to outside pressure and negative influences; their limited control over their own environment and their inability to extricate themselves from crime-producing settings; and their greater ability to change due to their possession of a character that is not as "'well formed'" as an adult's. (*Id. at p. ___ [132 S.Ct. at p. 2464]*.)

(4) Appellant was 17 years old when he committed the crimes in this case. His sentence for special circumstance murder was governed by *section 190.5, subdivision (b)*, which provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances ... has been found to be true ... who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." *Section 190.5* allows the court to impose LWOP or 25 years to life in cases where the defendant was 16 or 17 years old at the time of the offense; for defendants who were 15 years of age or **[*20]** younger, LWOP may not be imposed at all. (*People v. Demirdjian (2006) 144 Cal.App.4th 10, 17 [50 Cal. Rptr. 3d 184]*.)

Section 190.5, subdivision (b) differs from the mandatory schemes found unconstitutional in *Miller*, because it gives the court the discretion to impose a term that affords the possibility of parole in lieu of an LWOP sentence. But, as appellant notes, the statute has been judicially construed to establish a presumption that LWOP is the appropriate term for a 16- or 17-year-old defendant. In *People v. Guinn (1994) 28 Cal.App.4th 1130 [33 Cal. Rptr. 2d 791]*, the court interpreted *section 190.5, subdivision (b)* to mean that "16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life" (*Guinn, at p. 1141*), and further describes the statute as making LWOP the "generally mandatory" punishment for a youthful special circumstance murderer (*id. at p. 1142*). Other decisions (including one by this district), have characterized LWOP as the "presumptive" sentence under *section 190.5, subdivision (b)*. (See *People v. Murray (2012) 203 Cal.App.4th 277, 282 [136 Cal. Rptr. 3d 820]*; *People v. Blackwell (2011) 202 Cal.App.4th 144, 159 [134 Cal. Rptr. 3d 608]* **[*21]** (*Blackwell*); *People v. Ybarra (2008) 166 Cal.App.4th 1069, 1089 [83 Cal. Rptr. 3d 340]*.)

The presumption in favor of LWOP was applied by the sentencing court in this case. The court prefaced the imposition of sentence by stating, "One of the central issues today is whether or not the court will exercise discretion pursuant to *Penal Code section 190.5* and deviate from the statutory requirement of life without the possibility of parole ... ." It concluded by explaining, "Although Mr. Moffett was slightly under eighteen years

old at the time, his actions on that day, coupled with his criminal history, do not support, in my opinion, this Court exercising discretion and sentencing him to a ... term of twenty-five years to life."

(5) A presumption in favor of LWOP, such as that applied in this case, is contrary to the spirit, if not the letter, of *Miller*, which cautions that LWOP sentences should be "uncommon" given the "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.'" (*Miller, supra, 567 U.S. at p. ___ [132 S.Ct. at p. 2469]*.) Though *Miller* does not **[*22]** categorically bar LWOP sentences in juvenile homicide cases, it recognizes that juveniles are different from adults in ways that "counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*) Treating LWOP as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head, instead placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole.

(6) We conclude remand is necessary so the court can consider the appropriate sentence on the murder count without reference to a presumption in favor of LWOP. While we do not fault the sentencing court for applying a presumption that reflected the law as it stood at the time of the sentencing hearing, the court did not exercise its discretion under *section 190.5, subdivision (b)* with the benefit of the *Miller* opinion.

Other comments by the court at the resentencing hearing convince us that remand is appropriate.

(7) In response to defense counsel's observation that appellant had been convicted under the felony-murder rule, the court stated, "We are not here today to debate the legality of the felony murder rule, nor can **[*23]** we engage in a philosophical discussion about its merits. It is the current state of the law in California." Though the court was correct that appellant was properly convicted of first degree felony murder under the law of this state, *Miller* makes clear that when a court is contemplating an LWOP sentence for a juvenile defendant, it should consider whether the defendant was the actual killer or intended to kill, noting that a juvenile who "'did not kill or intend to kill has a twice diminished moral culpability.'" (*Miller, supra. 567 U.S. at p. ___ [132 S.Ct. at p. 2468]*, quoting *Graham, supra, 560 U.S. at p. ___ [130 S.Ct. at p. 2027]*.) On remand, we are confident the court will give appropriate weight to the fact that appellant was a nonkiller convicted under the felony-murder rule.

We also note that the trial court placed great reliance on the trauma caused to the robbery victims in this case when determining the appropriate sentence for the murder count. Though appellant's conduct during the robbery bears on whether he was an active participant in and instigator of the criminal conduct that led to the shooting (which in turn bears on whether he was influenced by others), the psychological **[*24]** reactions of the robbery victims do not say much about appellant's maturity, prospects for reform, or mental state with respect to the homicide itself--the factors paramount under *Miller. (Miller, supra, 567 U.S. at p. ___ [132 S.Ct. at p. 2468]*.)

Finally, when considering appellant's previous criminal history, the trial court mistakenly characterized a juvenile adjudication for assault as a felony, when it was designated a misdemeanor. On remand, the court can consider appellant's record without this misapprehension.

Appellant argues that instead of a remand for resentencing, we should direct the court to impose a sentence of 25 years to life, because his is not that rare case suitable for an LWOP sentence. He emphasizes that he was convicted of murder under the felony-murder rule, and did not kill or intend to kill Officer Lasater. We disagree.

The *Miller* court disapproved of mandatory LWOP sentences for juvenile defendants convicted of homicide offenses, but it declined to consider the defendants' alternative argument that the *Eighth Amendment* categorically bars LWOP sentences for juveniles, even for those who were 14 years of age or younger at the time of their offenses. (*Miller, supra, 567 U.S. at p. ___ [132 S.Ct. at p. 2469]*.) **[*25]** "Our decision does not categorically bar a penalty for a class of offenders or type of crime--as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty." (*567 U.S. at p. ___ [132 S.Ct. at p. 2471]*.)

Appellant is correct that the evidence at trial was insufficient to establish that he intended to kill Officer Lasater.[2] But, by finding the felony-murder special

circumstances to be true, the jury necessarily determined that appellant was at least a major participant in the underlying robbery who acted with reckless indifference to human life. (*§ 190.2, subd. (d)*; *People v. Estrada (1995) 11 Cal.4th 568, 575 [46 Cal. Rptr. 2d 586, 904 P.2d 1197]*; see *Tison v. Arizona (1987) 481 U.S. 137 [95 L. Ed. 2d 127, 107 S. Ct. 1676]*.) "Such conduct, even when committed by a person who is 16 or 17 years of age, is highly culpable and may justify an LWOP sentence." (*Blackwell, supra, 202 Cal.App.4th at p. 157*.) Though two of the justices in *Miller* signed a concurring opinion indicating that an LWOP sentence would be unconstitutional if applied to a juvenile defendant who was not the actual killer and did not intend to kill, the majority did **[*26]** not adopt such a bright-line rule. (See *Miller, supra, 567 U.S. at pp. ___-___ [132 S.Ct. at pp. 2475-2477]* (conc. opn. of Breyer, J.).) Instead, it concluded that a sentencing court must consider this "'twice diminished moral culpability'" when making its sentencing decision. (*Id. at pp. ___-___ [132 S.Ct. at pp. 2468-2469]*.) We expect the court in this case will do so on remand, though we express no opinion as to what the ultimate sentence should be when this factor is taken into account.[3]

2 As previously noted, the Attorney General conceded as much and agreed that the killing of a peace officer special circumstance under *section 190.2, subdivision (a)(7)* had to be reversed based on the lack of intent to kill. (*§ 190.2, subds. (c)* & *(d)*.)

3 For the reasons stated in our previous opinion (*People v. Moffett, supra*, A122763), we deny appellant's request that the case be remanded to a different judge for resentencing.

As the People concede, the court imposed a four-year consecutive sentence as the purported middle term for the robbery charged in count 2, whereas the actual middle term for second degree robbery is three years. (*§ 213, subd. (a)(2)* ["Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or **[*27]** five years."].) The court also imposed four-year concurrent terms for the robberies in counts 3 and 4. On remand, any middle term sentence imposed for robbery must be three rather than four years.

III. *DISPOSITION*

The sentence is vacated and the case is remanded for resentencing consistent with the views expressed in *Miller* and in this opinion. Although the focus of this appeal has been the sentence on the murder conviction, the court on remand may reconsider the entire sentence so long as it does not impose a total term in excess of the original sentence. (*People v. Lai (2006) 138 Cal.App.4th 1227, 1235 [42 Cal. Rptr. 3d 444]*; *People v. Burns (1984) 158 Cal.App.3d 1178, 1184 [205 Cal. Rptr. 356]*.) Should the court again elect to impose the middle term on any of the robbery counts, that term must be three years as provided by statute.

Simons, Acting P. J., and Bruiniers, J., concurred.

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANGELO MAURICIO, Defendant and Appellant.

B224505

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

2011 Cal. App. Unpub. LEXIS 9073

November 28, 2011, Filed

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PRIOR HISTORY: [*1]
APPEAL from a judgment of the Superior Court of Los Angeles County. Los Angeles County Super. Ct. No. TA088962. Eleanor J. Hunter, Judge.

DISPOSITION: Affirmed as modified.

COUNSEL: Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: BIGELOW, P. J.; RUBIN, J., FLIER, J. concurred.

OPINION BY: BIGELOW

OPINION

A jury convicted Michael Angelo Mauricio of three counts of first degree murder (*Pen. Code, § 187, subd. (a)*)[1] arising from two separate driveby, gang-involved shootings. The jury's guilty verdicts included special circumstance findings as to each count that the murder was perpetrated by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)), and that Mauricio intentionally killed the victim while an active participant in a street gang (§ 190.2, subd. (a)(22)), and that he had committed multiple murders (§ 190.2, subd. (a)(3)). The jury further found as to each murder count that a principal had personally used a firearm (§ 12022.53, subds. [*2] (b) & (e)), and had personally discharged a firearm (§ 12022.53, subds. (c) & (e)) and had done so causing great bodily injury and death (§ 12022.53, subds. (d) & (e)), and that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced Mauricio to three consecutive terms of life without the possibility of parole (LWOP), plus three consecutive indeterminate of term of 25 years to life, one as to each murder count, for the attached findings that a principal had personally discharged a firearm causing death. We modify various fines and fees, and, as modified, affirm the judgment.

1 All further references are to the Penal Code unless otherwise indicated.

FACTS

1. The Murder Near Lueders Park

On November 6, 2006, murder victim Jeffrey Shade and others were sitting around in Lueders Park in Compton. Shade was in his mid-40's and had been affiliated with the Lueders Park Pirus, a "Bloods" street gang, throughout his adult life. He was wearing a red bandana on his head. At some point, Shade left on a bicycle to go to a liquor store near Rosecrans Avenue and Bradfield Avenue, about a block away. As Shade was riding on Rosecrans back **[*3]** to the park, a black Impala drove by slowly, and the front passenger in the car fired four to six shots at Shade. Shade died from a gunshot wound that entered his left side and lodged in his heart.

2. The Bus Bench Shooting

On November 19, 2006, a gray, four-door vehicle drove by a bus stop bench near Rosecrans Avenue and Bradfield Avenue, and multiple gunshots were fired in the direction of Shudray Jenkins and Deaundre Hunt. Both were killed. Deputies from the Los Angeles County Sheriff's Department (LACSD) responded to the crime scene where they recovered shotgun wadding from the bus stop bench and an adjacent planter. An eyewitness reported to deputies that the shooters were in a Taurus. At trial, the eyewitness testified the shooters had been in an "Oldsmobile Cutlass, something along the lines of that." Jenkins suffered three gunshot wounds and died from a fatal gunshot wound to her neck. A bullet was recovered from that wound. Hunt suffered seven gunshot wounds, most of which were fatal. Five bullets, along with shotgun pellets were recovered from his body.

3. Mauricio's Arrest and Interviews

On December 4, 2006, LACSD Deputy Albert Carrillo and his partner were driving on patrol **[*4]** in the area near Holly Avenue and Locust Circle in Compton when Deputy Carrillo's attention was caught by a black, four-door Chevy Impala with tinted windows stopped at the curb with only its parking lights on. As the deputies got nearer the Impala, Deputy Carrillo saw the vehicle was occupied "with quite a few people," and he saw that the front passenger, later identified as Daniel Riley, was holding a rifle.

Deputy Carrillo stopped near the Impala, exited his patrol car, drew his weapon, and ordered the occupants of the vehicle to show their hands. The driver, later identified as Mauricio, tried to start the car, but it shut down. Besides Mauricio and Riley in front, there were three passengers, Gerald Edwards, James Hicks, and Deonna Lewis, sitting in the back seat of the car. The deputies secured the rifle, a .223-caliber Ruger model Mini-14, and found that it was loaded. The letters "WLC" -- for the Ward Lane Crips gang -- was scratched into the stock. Mauricio was arrested.

On December 5, 2006, LACSD Detective Peter Hecht interviewed Mauricio about what he and his companions had been doing with a rifle in the car at Holly Avenue and Locust Circle. Mauricio waived his *Miranda*[2] rights **[*5]** and agreed to talk to the detective. Mauricio stated that he and the others, and Victor Preciado, were members of the Ward Lane Crips. He said that they had met earlier in the day and talked about a shooting that occurred a few days earlier in which Riley's girlfriend and M.B. were shot.[3] Mauricio and the others thought that someone from the Holly Hood Pirus gang did the earlier shooting, and so they formed a plan to retaliate by shooting any Holly Hood Pirus gang member they could find. Preciado stayed behind while the others had gone to the area near Holly and Locust to look for a Holly Hood Pirus gang member to shoot.[4]

2 *Miranda v. Arizona (1966) 384 U.S. 436* (*Miranda*).

3 On December 1, 2006, deputies responded to Ward Lane where they found three gunshot victims, one of whom was M.B.

4 Later in December 2006, Mauricio was charged with "conspiracy." At some point before February 5, 2007, Mauricio "took a deal" for "nine months."

Several days after interviewing Mauricio, Detective Hecht and other deputies executed a search warrant at Victor Preciado's residence. During the search, the deputies recovered .223-caliber bullets from Preciado's bedroom closet. When deputies searched a black Impala **[*6]** at the location, they recovered four spent .223-caliber bullet casings, one spent .380-caliber bullet casing, and two live .25-caliber bullets. The black Impala was registered to Preciado's mother.

Meanwhile, LACSD Detectives Brian Schoonmaker and Kevin Lowe were investigating the November 19, 2006 double murders at the bus bench. On February 5, 2007, as part of their investigation, Detectives

Schoonmaker and Lowe interviewed Mauricio at the Challenger Juvenile Camp.[5] A CD recording of the interview was played for the jury at trial. A transcript of the interview was marked as evidence and provided to the jurors to assist them in following the CD. The transcripts were collected after the CD was played, and the trial court told the jurors that "what really [was] in evidence [was] the CD itself." A detailed account of the circumstances surrounding, and the content of, Mauricio's interview on February 5, 2007, is set forth below in addressing his claim on appeal that the trial court erred in denying his objection to the interview. Reviewed under the substantial evidence test, Mauricio's final interview established that he was present at the bus bench shooting and the Lueders Park shooting, **[*7]** and that he had encouraged and helped in both shootings.

5 Between Mauricio's initial interview on December 5, 2006, shortly after his arrest, and his last interview on February 5, 2007, different deputies also interviewed Mauricio on December 21, 2006, and January 10, 2007, both times at Los Padrinos Juvenile Hall. Evidence of these two book-ended interviews was not presented at trial, and, thus, are not summarized here. The content of Mauricio's interviews on December 21, 2006, and on January 10, 2007, was developed and considered at a hearing on his objection to any use of statements from his final interview on February 5, 2007. We address the content of the in-between interviews below in addressing Mauricio's claim on appeal that his statements in his final interview on February 5, 2007, should have been excluded.

4. The Criminal Case

In September 2007, the People filed an information charging Mauricio and Victor Preciado with the murder of Shudray Jenkins (count 2; *§ 187, subd. (a)*), the murder of Deaundre Hunt (count 3; *§ 187, subd. (a)*), and the murder of Jeffrey Shade (count 4; *§ 187, subd. (a)*).[6] Each of the three murder counts included special circumstance allegations that the **[*8]** murder was perpetrated by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)), that Mauricio intentionally killed the victim while an active participant in a street gang (§ 190.2, subd. (a)(22)), and that he committed multiple murders (§ 190.2, subd. (a)(3)). Each of the three murder counts also included allegations that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)), that a principal personally discharged (§ 12022.53, subds. (c) & (e)), and that the discharge caused great bodily injury and death (§ 12022.53, subds. (d) & (e)), and that the offense was committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)).

6 The information originally included a count 1 alleging another murder. That count was dismissed as to Mauricio prior to trial and is not an issue on this appeal.

In January 2010, the charges against Mauricio were tried to a jury.[7] The testimony of a number of eyewitnesses to the two separate shootings provided general descriptions of the incidents, i.e., a vehicle drove by and shots were fired at victims. None of the eyewitnesses directly identified Mauricio. Ballistics evidence established that the four spent bullet **[*9]** casings found in the Impala during the search at Preciado's residence, and three bullet fragments recovered from the bus bench shooting victim Hunt were fired by the Mini-14 rifle found in the car being driven by Mauricio at the time of his arrest on December 4, 2006. Bullet fragments recovered from the other bus bench shooting victim, Jenkins, and from the body of the Lueders Park shooting victim, Shade, had similar rifling as bullets fired from the Mini-14 rifle.

7 Preciado was tried later in 2010, and convicted on all four murder counts. He has a separate appeal pending in our court. (Case No. B226362.)

Mauricio's interview of February 5, 2007, was played for the jury. Deputy Gail Durham testified as a gang expert. Mauricio did not present any defense evidence. His trial counsel argued to the jury that the case against Mauricio was "based entirely" on his February 5, 2007 interview, and that the statements that he made during that interview implicating himself in the two shootings resulted from suggestions by the interrogating officers.

On January 19, 2010, the jury returned verdicts finding Mauricio guilty on all three murder counts as charged, with the special circumstance and firearm **[*10]** findings noted at the outset of his opinion. On May 11, 2010, the trial court sentenced Mauricio as noted at the outset of his opinion. Various fines and fees were also imposed.

Mauricio filed a timely notice of appeal.

DISCUSSION

I. The Interview Issue

Mauricio contends his murder convictions must be reversed because the trial court erred in denying his objection to the prosecution's use of his February 5, 2007 interview. We disagree.

A. The Governing Law

Police may not interrogate a suspect who is in custody until the suspect is advised of his or her right to remain silent and right to an attorney, and the suspect knowingly and voluntarily waives those rights. (See *Miranda, supra, 384 US. at p. 444*; see, e.g., *People v. Bradford (1997) 14 Cal.4th 1005, 1033.*) A suspect who waives his or her *Miranda* rights retains the right to control the subjects to be discussed, and the length of the interrogation, by "cut[ting] off questioning" at any point. (See *Michigan v. Mosley (1975) 423 U.S. 96, 103-104*; see also *Berghuis v. Thompkins (2010) U.S. [130 S.Ct. 2250, 2260].*)

In addressing whether the trial court erred in denying an objection to the use of a defendant's statements as being obtained **[*11]** in violation of *Miranda*, a reviewing court must accept the trial court's resolution of disputed facts, and the reasonable inferences drawn from the facts, where supported by substantial evidence; a reviewing court independently determines from the historically fixed facts whether a challenged statement was obtained in violation of *Miranda. (People v. Bradford, supra, 14 Cal.4th at p. 1033.)*

B. The Hearing on the Use of the Interviews

Prior to trial, the prosecution signaled that it intended to introduce evidence of Mauricio's interviews of December 5, 2006, December 21, 2006, January 10, 2007, and February 5, 2007. When Mauricio's case was called for trial, the trial court took up the issue of Mauricio's objection to the interviews on December 21, 2006, January 10, 2007, and February 5, 2007. Mauricio's counsel argued: (1) at the time of the interviews on December 21, 2006, and January 10, 2007, Mauricio had been represented by counsel in his conspiracy case involving the Mini-14 rifle in the car he had been driving (the "conspiracy" case) and could not be interviewed in connection with that case without approval from his counsel; (2) the parallel murder investigation had a factual and **[*12]** contemporaneous relationship to the conspiracy case in that the rifle found in the car at the time of Mauricio's arrest was the rifle used in the two driveby shootings; (3) due to the nexus between the conspiracy and murder matters, police should not have talked to Mauricio on any subject without first obtaining approval from his counsel in the conspiracy case; (4) the police in any event did not *Mirandize* Mauricio before they interviewed him on December 21, 2006, or on January 10, 2007; and (5) the problems with the interviews on December 21, 2006, and January 10, 2007, caused a "fruit of the poisonous tree" taint for the final interview on February 5, 2007, defeating any conclusion that Mauricio gave a knowing and voluntary waiver of his *Miranda* rights for that final interview. The trial court found that Mauricio expressly waived his *Miranda* rights at the time of his final interview on February 5, 2007, which took place after his conspiracy case was ended, and that evidence of the final interview could be used at trial by the prosecution.

On appeal, Mauricio's claim is a bit different. He contends that he did not at the time of his final interview on February 5, 2007, waive his *Miranda* **[*13]** rights to talk insofar as his involvement in the murders was concerned, and that he only agreed to discuss other subjects. We now turn to that issue.

C. Forfeiture

Before taking up Mauricio's "selective *Miranda* waiver" claim of error, we must address the People's argument that Mauricio forfeited the issue he raises on appeal in that he did not assert such a ground for objection in the trial court. We agree with the People that Mauricio's claim is forfeited on his appeal. (*People v. Randle (2008) 43 Cal.4th 76, 116, 121*, disapproved on other grounds in *People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22.*) To avoid denial of review of his claim of error, Mauricio argues his trial counsel was ineffective in failing to argue that Mauricio only waived his *Miranda* right to remain on selective issues. In order to resolve his claim of ineffective assistance of counsel, we will address Mauricio's *Miranda* claim within the rubric governing claims for ineffective assistance of counsel. (See *Strickland v. Washington (1984) 466 U.S. 668*; see, e.g., *People v. Williams (1997) 16 Cal.4th 153, 215.*) Under this rubric, we consider whether trial counsel performed deficiently in failing to assert the ground **[*14]** for objection argued on appeal, and whether it is reasonably

probable that making such an objection would have resulted in different outcome at Mauricio's trial. We find no ineffective assistance of counsel because, if a "selective *Miranda* waiver" ground had been asserted below, the trial court would have properly denied the objection.

D. The Interviews

i. Mauricio's Initial Interview on December 5, 2006

As noted above, deputies arrested Mauricio on December 4, 2006, when they found him and fellow gang members, one of whom was holding a rifle, in a car near Holly and Locust. On December 5, 2006, Mauricio gave a statement implicating himself and the others in the car, along with Victor Preciado, in a conspiracy to shoot any Holly Hood Pirus gang member that he and his cohorts in the car had been able to find. There was no objection to this interview at trial, and no claim or showing on appeal that this interview was improperly admitted.

ii. Mauricio's Second Interview on December 21, 2006

As noted, Detectives Schoonmaker and Lowe were investigating the double murder at the bus bench while Mauricio's conspiracy case was pending. On December 21, 2006, Detective Schoonmaker interviewed Mauricio **[*15]** at Los Padrinos Juvenile Hall as a person who possibly had information about the murders. At the start of the interview, the detective explained to Mauricio that he was "working on a couple of cases in Compton," and that he was "wondering if [Mauricio] knew anything about one of 'em. [T]he two Bloods that were killed at the bus bench on Rosecrans?"

Mauricio said that he had overheard someone talking about the shooting. Detective Schoonmaker asked Mauricio if he was in the car when Preciado did the shooting. Mauricio denied any involvement. The detective then asked Mauricio if he ever heard "Tony Boy," i.e., Victor Preciado, bragging about the shooting. Mauricio told Detective Schoonmaker that Tony Boy had claimed credit for shooting "two Die-rus," "a girl and a boy," at a bus bench. Mauricio said Preciado used a "big gun" (a rifle) that was "[l]ike the one we . . . got caught with." In response to this comment, Detective Schoonmaker said, "I don't know about that and I'm not even here for that so, I'm not going to use anything against you." Detective Schoonmaker questioned Mauricio about what kind of weapon Preciado had used - whether a shotgun or an assault-type rifle had been employed. **[*16]** When the detective asked whether Preciado had mentioned anyone else's name as being involved, because there had to be "somebody driving and somebody shootin'," Mauricio said he did not recall. Detective Schoonmaker then asked Mauricio if he had been driving, and Mauricio again denied any involvement. At the end of the interview, Detective Schoonmaker told Mauricio that he was good friends with Detective Hecht who was working on Mauricio's conspiracy case arising from the stop in the car with the rifle. Detective Schoonmaker said that if what Mauricio had stated turned out to be true, and that, if Mauricio had any other information that would help solve a double murder, then he would put in a "good word" on Mauricio's behalf with Detective Hecht.

iii. Mauricio's Third Interview on January 10, 2007

On January 10, 2007, LACSD Detectives Michael Caouette, Karen Shonka, and Peter Hecht interviewed Mauricio at Los Padrinos Juvenile hall. The transcript which was reviewed by the trial court, and which is before us on appeal, suggests that the transcription began after the interview was already underway.[8] It does not show any *Miranda* warnings given to Mauricio.

8 The transcript jumps right in **[*17]** with questions that appear to be follow-up to earlier, nontranscribed questions.

During the interview, Mauricio admitted he had been the driver of the car used in the shooting at Lueders Park. Mauricio stated that Preciado was the shooter, and Daniel Riley ("Tilt") was in the front passenger seat. Mauricio continued to deny any involvement in the bus bench shootings. Mauricio said that on the day he was arrested while going out to shoot a Holly Hood Pirus gang member, it was Preciado's idea to do a shooting.

iv. Mauricio's Final Interview on February 5, 2007

On February 5, 2007, after Mauricio's conspiracy case had been resolved, he was interviewed by Detectives Brian Schoonmaker and Kevin Lowe. At the beginning of the interview, Detective Schoonmaker advised Mauricio of his *Miranda* rights, and asked Mauricio whether he knew those rights. Mauricio answered, "Yes, sir." Detective Schoonmaker then explained: "Basically, I wanted to ask you a couple of questions *about what we already talked about.* [Do you] want to answer my

questions *about that?*"[9] (Italics added.) Mauricio answered: "Yes." The detective explained that when "[d]oing an investigation, especially a double murder," it was common **[*18]** to talk to "a whole bunch of people," and then "circle around" and ask the same people more questions to get more information. Detective Lowe then added that Victor Preciado was "locked up," and had given "some information which [did not] match the information [Mauricio] gave . . . . So somebody's bullshittin'." Detective Schoonmaker continued: "Well, the problem what it is for you, is that Victor changed the story around a little bit and put you in the car. [¶] . . . [¶] . . . That's what we gotta get straightened out." Detective Lowe directly asked Mauricio: "You understand what case we're here on, right? 'Cause there's different shootings, we're here on the double. At the bus bench." And Mauricio answered: "I know."

9 When Detective Schoonmaker interviewed Mauricio on December 21, 2006, the detective had specifically explained to Mauricio that he (the detective) wanted to know whether Mauricio knew anything about the double murder at the bus bench in Compton.

Detective Schoonmaker then explained that Preciado was "putting himself in the car," and that he was also was putting Mauricio in the car. The detective asked Mauricio, "[W]hy is Victor putting you in the car . . .?" and asked **[*19]** Mauricio, "[W]hat's the real story?"

At that point, Mauricio said that he was not in the car with the shooters, but that he was in another car following the shooters' car. Mauricio explained that he was driving Preciado's Impala, and Riley was in the front passenger seat with Mauricio. There were no guns in the Impala. Gerald Edwards ("Man") was driving a gray Taurus that Mauricio believed had been stolen to be used in a shooting. Preciado was in the front passenger seat of the Taurus with a shotgun, and "Chris" was in the back seat of the Taurus with a rifle. Mauricio followed the Taurus. All of the sudden, the Taurus made a U-turn and approached the bus bench. Mauricio saw two people on the bus bench and knew they would be targets. Preciado and Chris fired. Mauricio sped away, followed by the Taurus. After both cars got back to Preciado's house, Preciado, Chris, and Edwards talked about how they thought they shot gang members from Lueders Park and Holly Hood. Preciado said he had wanted to retaliate against the Pirus for "hitting" up Preciado at his house. Before the shooting, Mauricio, Preciado, Riley, and Edwards had gone out in Preciado's Impala to steal the Taurus.

During the course **[*20]** of the interview, Mauricio also admitted his involvement in the Lueders Park driveby. Mauricio said that, for that shooting, he drove Preciado's Impala, and Preciado was in the front passenger seat. Riley was in the rear seat. Preciado had the rifle and was the shooter. Mauricio pulled up next to the victim, who was riding a bicycle, and slowed down so Preciado could get a shot. Mauricio heard three to four shots. Mauricio claimed that he had been a Ward Lane Crip for three years.

E. Analysis

Mauricio contends the record demonstrates that, at the time of his final interview on February 5, 2007, he "invoked his right to remain silent on all topics except what he previously discussed with [Detective] Schoonmaker in his first interview" on December 21, 2006, namely, "*Preciado*'s involvement in and motive for the bus bench shooting." Mauricio argues that, because he "had not agreed to talk about anything new" at the time of the interview on February 5, 2007, Detectives Schoonmaker and Lowe "should have ceased questioning" on the subject of *Mauricio*'s suspected involvement in the murders, "or obtained a valid waiver" which covered any questions concerning Mauricio's involvement in the murders. **[*21]** Mauricio argues the trial court erred in making a finding that Mauricio gave a valid waiver of his *Miranda* rights related to investigatory questions regarding *his* involvement in the murders. We disagree.

During the second interview on December 21, 2006, Detective Schoonmaker talked to Mauricio about the bus bench murders and particularly about Preciado's involvement in the shooting. The detective asked whether Mauricio had been involved, and he denied any involvement. Detective Schoonmaker told Mauricio that, if his information turned out to be true, then the detective would put a good word with the detectives working on Mauricio's conspiracy case. During the interview on February 5, 2007, Detectives Lowe and Schoonmaker told Mauricio they were there to talk to him "*about what we already talked about.*" (Italics added.) In other words, they wanted to talk about the bus bench murders. Moreover, the detectives told Mauricio that the information which he had given did not mesh with a

statement given by Preciado. The detectives said Preciado had put Mauricio in the car, and that they wanted to "straighten[] out" who was "bullshitting." Detective Lowe directly and specifically told Mauricio [*22] that the detectives were there to ask questions about the double murders at the bus bench. Mauricio expressly stated that he understood. We simply disagree with Mauricio that there is a factual basis for finding that he only waived his *Miranda* right as to subjects apart from his involvement in the bus bench murders, and that he had only agreed to talk about Preciado's involvement in the murders. In our view, there is only one reasonable conclusion to be drawn from the record, and that is that Mauricio agreed to talk the detectives about his involvement or his noninvolvement in the murders so that matters could be straightened out. That Mauricio implicated himself does not tend to suggest that he had not expressly agreed to talk about role in the murders.

We disagree with Mauricio that his case is like *United States v. Soliz (9th Cir. 1997) 129 F.3d 499,* and/or *United States v. Lopez-Diaz (9th Cir. 1980) 630 F.2d 661.* In *Soliz,* the defendant expressly agreed to make a statement "regarding [his] citizenship," and, when officers indicated they were going to ask questions about his "activities," he stated he "thought this was just about my citizenship." (*Soliz, at p. 501.*) The Ninth Circuit [*23] found the defendant gave a valid *Miranda* waiver only as to the issue of citizenship. (*Soliz, at pp. 501, 503.*) In *Lopez-Diaz,* the defendant made an express statement that he did not want to talk about drugs in a van in which he had been arrested, but officers asked about drugs anyway. (*Lopez-Diaz, at p. 663.*) The Ninth Circuit found the defendant had not given a valid *Miranda* waiver on the subject of drugs. In Mauricio's current case, he did not make any express statement that he only wanted to talk about Preciado's involvement in the murders, nor did he make any express statement that he did not want to discuss his own involvement.

Mauricio's argument that he made comments at the start of the February 5, 2007 interview that he did not want to talk about "new information," but only information on matters "previously discussed," is not persuasive for two reasons. First, there is no plain and unambiguous statement by Mauricio indicating that he wanted to limit the interview in any particular manner. (*Berghuis v. Thompkins, supra, 130 S.Ct. at p. 2260.*) Second, Mauricio had discussed the subject of his role in the murders during the first interview, albeit only to a limited extent. And [*24] Detective Schoonmaker, during the earlier interview, had indicated that Mauricio's information would be checked. He said that if it was accurate, then the detective would put in a good word for Mauricio on his conspiracy case. When Detectives Schoonmaker and Lowe returned later for the February 5, 2007 interview, we simply do not see that Mauricio attempted to frame only a selective scope of inquiry by the detectives, nor do we see that his answers suggested he wanted to limit the scope of the interview only to selected subjects.

We reject Mauricio's argument the record establishes that the detectives employed a deliberate "two-step" interrogation process that violated *Miranda. (Missouri v. Seibert (2004) 542 U.S. 600, 622.)* At the first interview by Detective Hecht on December 5, 2006, Mauricio was given and waived his *Miranda* rights and spoke about the conspiracy crime. At the second interview on December 21, 2006, Detective Schoonmaker talked to Mauricio as a potential witness in the bus bench shooting. The third interview on January 10, 2007, by different detectives, was problematic and cannot be reconciled with *Miranda,* but it was not used at trial in any event. That brings us [*25] to the final interview on February 5, 2007, by Detectives Schoonmaker and Lowe. This interview took place after Mauricio's conspiracy case was concluded; it was separate in time; the detectives gave proper *Miranda* advisements, and Mauricio waived his rights. The detectives specifically explained that they were there to talk to Mauricio about the bus bench shooting. The record shows an independent interview, with the proper *Miranda* procedures, not a second part of a two-step interrogation which followed a problematic first step.

II. The LWOP Issue

Mauricio contends the trial court erred in declining to exercise its discretion to sentence him to terms of 25 years to life, rather than LWOP. We disagree.

Under section 190.5, subdivision (b), the penalty for defendant convicted of first degree murder with one or more special circumstances found true, who was 16 years of age or older and under the age of 18 years at the time of the commission of the murder, "shall be [LWOP] or, at the discretion of the court, 25 years to life." In short, a term of LWOP is the presumptive punishment for a 16- or 17-year-old special circumstance murderer. As such, the trial court was required to impose an LWOP [*26] sentence unless the court, in its discretion, found good

reason for imposing the less severe sentence of 25 years to life. (*People v. Guinn (1994) 28 Cal.App.4th 1130, 1141-1142.*)

The record shows the trial court understood it had discretion to impose a term of 25 years to life, rather than LWOP. Accordingly, the properly focused question for the current appeal is whether the trial court abused its discretion in not choosing the less severe punishment. A trial court abuses its discretion when it renders a decision that is arbitrary, capricious or beyond the bounds of reason under the circumstances. (*People v. Ledesma (2006) 39 Cal.4th 641, 705.*) We do not find the trial court's decision in Mauricio's current case an abuse of discretion under this standard. The record shows that the trial court weighed a number of factors, including Mauricio's youth and lack of prior criminal history, before imposing the LWOP terms. In determining that the gravity of his crimes outweighed the mitigating factors, the court did not act in an arbitrary or unreasonable fashion. It is not unreasonable to sentence a defendant to an LWOP term when he or she has committed multiple premeditated murders in separate **[*27]** driveby incidents, to benefit a criminal street gang, even when the defendant was 17 years old at the time of the murders. The possibility that another reasonable judge may have opted for the less severe punishment does not establish, as a matter of law, that the decision to impose the more severe punishment was an abuse of judicial discretion.

Mauricio's claim that the trial court, while understanding it had discretion, "failed to properly balance all the relevant factors," is not supported by the record and appears to ask us to conduct an independent balancing of our own. The record shows the trial court looked at all relevant factors and then came down on the side of the more severe punishment based on the nature of the crimes. This was not an abuse of judicial discretion, and we may not substitute our own balancing of factors in place of the trial court's balancing. We understand that Mauricio was only 17 years old, that he did not have a prior criminal record, and that he was not an actual shooter. This does not mean that the nature of the crimes could not outweigh his circumstances.

III. Cruel and/or Unusual Punishment

Mauricio contends his sentence of three consecutive terms of **[*28]** LWOP, plus three consecutive terms of 25 years to life, violates the federal and state constitutional prohibitions against cruel and/or unusual punishment. We disagree.

First, Mauricio's reliance on *Graham v. Florida (2010) U.S. [130 S.Ct. 2011]* (*Graham*), is misplaced. In *Graham,* the Supreme Court held as a "categorical" rule that imposing an LWOP sentence on a juvenile defendant who is convicted of a *nonhomicide offense* violates the federal Constitution's prohibition against cruel and unusual punishment. (*Id. at pp. 2023, 2034.*) This rule is not helpful to Mauricio because he stands convicted of multiple, premeditated murders.

We are left then to examine Mauricio's punishment under a more general principle of proportionality. Under the *Eighth Amendment of the federal Constitution,* a court must assess three factors to determine whether a sentence is proportionate to the offense so that it does not constitute cruel and unusual punishment: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed for other crimes in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. (*Ewing v. California (2003) 538 U.S. 11, 22.*) **[*29]** Under this analysis, Mauricio's argument fails because he has not presented a comparison of *intrastate* and *interstate* punishments for multiple homicide perpetrators.

Under the California Constitution, a court assesses whether a punishment "shocks the conscience and offends fundamental notions of human dignity" based the a number of factors, including: (1) the nature of the offense and/or the offender; (2) a comparison of the sentence with punishments prescribed in California for different offenses; and (3) a comparison of the challenged sentence with punishments prescribed for the same offense in other jurisdictions. (*In re Lynch (1972) 8 Cal.3d 410, 424.*) Depending on the totality of the circumstances, any of these three factors may support a determination that a sentence is cruel or unusual under the state Constitution. (*People v. Mendez (2010) 188 Cal.App.4th 47, 67.*)

Mauricio recognizes that the crimes for which he is convicted -- three first degree murders committed under special circumstances -- are the most serious and violent of all crimes, but he argues his role in the crimes was "minimal" because he was not the actual shooter. Mauricio also cites his lack of a prior criminal **[*30]** record, and the likelihood, due to his age, that he was influenced by peer pressure. He argues the LWOP sentence rings more of retribution than deterrence.

We acknowledge, as did the trial court, all of the factors cited by Mauricio. But at the same time, we share the trial court's perspective that Mauricio's involvement in the crimes was an "integral" part of the shootings. Whatever weight may exist in Mauricio's lack of a criminal record is offset by the fact that he participated in the two driveby shootings involved in this case, the Lueders Park and bus bench shootings, and that he was later caught while engaged in a conspiracy to commit yet a third driveby shooting. We are amply satisfied that the public's need for deterrence outweighs its mere desire for retribution.

We find Mauricio's reliance on *People v. Mendez, supra, 188 Cal.App.4th 47* unpersuasive because that case did not involve homicides. (*Id. at p. 50.*) The same is true of *Graham, supra, 130 S.Ct. 2011.* In no case cited by Mauricio did a court declare an LWOP sentence to be cruel and unusual for a defendant who was convicted of multiple first degree murders with multiple special circumstances findings.

Mauricio's sentence **[*31]** here was not cruel and/or unusual, in light of the severity of the crimes he committed. (See *Harris v. Wright (9th Cir. 1996) 93 F.3d 581, 585* [an LWOP sentence "raises no inference of disproportionality" because it is imposed on a minor murderer]; see *People v. Guinn, supra, 28 Cal.App.4th at pp. 1146-1148* [an LWOP sentence is not disproportionate punishment for a minor with a limited criminal record who commits a first degree murder during robbery].)[10]

10 We understand the United States Supreme Court granted certiorari earlier this month to decide whether the imposition of an LWOP sentence on a minor convicted of homicide violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment, and whether such a sentence violates the Eighth and Fourteenth Amendments when it is imposed upon a minor who did not personally kill the homicide victim. (See *Jackson v. Hobbs,* cert. granted Nov. 7, 2011, S.Ct. [2011 WL 1060941].)

IV. The Parole Revocation Fine Issue

Mauricio contends, the People concede, and we agree that the trial court erred in imposing a parole revocation fine under section 1202.45 because he was sentenced to LWOP terms on all three murder counts. **[*32]** (*People v. Jenkins (2006) 140 Cal.App.4th 805, 819.*)

V. The Restitution Fine Issue

Mauricio contends, the People concede, and we agree that the trial court erred in imposing a restitution fine under section 1202.4 in the amount of $30,000. (See *People v. Blackburn (1999) 72 Cal.App.4th 1520, 1534* [the maximum restitution fine that may be imposed in a criminal prosecution is $10,000 regardless of the number of victims or the counts involved].)

VI. The DNA Fine Issue

Mauricio contends, the People concede, and we agree that the trial court erred in imposing a "DNA fine" under *Government Code section 76104.7* on each count. (*People v. Valencia (2008) 166 Cal.App.4th 1392, 1396.*)

VII. The Custody Credits Issue

Mauricio contends he is entitled to credits for an additional 38 days of presentence actual days in custody. We disagree.

Mauricio was arrested on December 4, 2006, when he was found in a car with other gang members and a rifle. A conspiracy case was initiated. He contends that his custody credits in his current triple murder prosecution case should have been calculated from December 4, 2006, even though he was not in custody for any murder offense at that time. We find Mauricio's argument **[*33]** is incorrect. "[C]redit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).) Mauricio's argument on appeal seeks custody credit for time spent as to an offense other than his murder offenses. The record does not disclose the date Mauricio was taken into custody for murder.[11] In any event, the 1,217 days of credit awarded by the trial court were applied in response to a calculation offered by Mauricio's counsel, and it does not appear to be erroneous.

11 Mauricio first implicated himself in the Lueders Park incident on January 10, 2007. Apparently, the court and counsel used that date as the first day Mauricio was in custody on the murder cases, given that 1,217 days passed

between January 10, 2007, and his sentencing on May 11, 2010.

DISPOSITION

The fines and fees included in the judgment are modified in accord with this opinion. In all other respects, the judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.