ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLANT ERIC LONG, A MINOR CHILD

Joseph T. Deters, 0012084
Hamilton County Prosecutor

Ronald W. Springman, 0041413
Chief Assistant Prosecuting Attorney
(Counsel of Record)

Hamilton County Prosecutor's Office
230 E. 9th Street - Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
(513) 946-3105 – Fax

Counsel for Appellee
State of Ohio

Office of the Ohio Public Defender

Stephen P. Hardwick, 0062932
Assistant Public Defender

250 E. Broad Street- Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
stephen.hardwick@opd.ohio.gov

Counsel for Appellant
Eric Long, a minor child

FILED
MAR 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

Page No.

Statement of the Case and the Facts 1

A nearly empty record on which to sentence a child, who "wasn't nothing but 17[,]" to life without parole. 1

The house shooting, Eric was "in the back seat, where he always is." 1

The freeway shooting, again with Eric in the back seat. 3

Eric is taken into custody. 5

Eric prohibits his attorney from completing a negotiated sentence for flat time. 6

Eric is tried and convicted with his adult co-defendants. 6

The complicity instruction required the jury to convict Eric of aggravated murder even if he did not kill and had no intent to kill. 6

A short, joint sentencing hearing results in a sentence of life without parole for a child. 7

The appeal—a decision issued 8 days after Miller *without any additional briefing.* 9

Argument 10

Proposition of Law:

The Eighth Amendment requires trial courts to consider youth as a mitigating factor when sentencing a child to life without parole for a homicide. 10

I. Threshold question: Did Eric "kill or intend to kill"? 10

II. Even if Eric killed or intended to kill, he is entitled to a new sentencing hearing because the trial court did not consider youth as a mitigating factor before sentencing him to life without parole. 11

Table of Contents

Page No.

A. The science behind *Miller* 11

1. Children are impulsive, reckless, easily influenced, and less able to get out of a crime-producing setting, so their crimes are less likely to be evidence that they are irredeemable. 11

2. Life without parole is a more severe sentence for a child. 13

3. Deterrence doesn't work for children. 14

B. Application of *Miller* to this case. 14

1. The trial court treated Eric just like his adult co-defendants. 14

2. The trial court did not treat youth as a mitigating factor 15

a) The record must show that the trial court fully considered youth as a mitigating factor. 15

b) The record in this case does not show that the trial court considered youth as a mitigating factor. 17

c) The trial court's reasoning conflicts with the scientific holdings of *Graham* and *Miller*. 19

d) Under *Miller*, Eric should not receive a sentence of life without parole. 20

III. The Ohio Constitution prohibits sentencing a child to life without parole for any offense. 23

IV. Remedy: This Court should vacate all of Eric's sentences and remand this case for a new sentencing hearing. 24

Conclusion 25

Certificate of Service 26

Table of Contents

Page No.

Appendix:

Notice of Appeal A-1

Opinion A-4

Eighth Amendment, United States Constitution A-23

Article I, Section 9, Ohio Constitution A-24

R.C. 2903.01 ..... A-25

R.C. 2923.23 ..... A-27

R.C. 2929.12 ..... A-28

Table of Authorities

Page No.

Cases:

Bear Cloud v. State, 2013 WY 18, 294 P.3d 36 (2013) 17

Conley v. State, 972 N.E.2d 864 (Ind. 2012) 19

Graham v. Florida, 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) ..... *passim*

In re C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729 13,14,23

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) ..... *passim*

Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) 15,18,19

Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) 15,18

People v. Siackasorn, 211 Cal. App. 4th 909, 149 Cal. Rptr. 3d 918, (Calf. Dist. 3 2012) 19

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005) 11,21

State v. Beuke, 38 Ohio St.3d 29, 526 N.E.2d 274 (1988) 16

State v. Davis, 4th Dist. No. 09CA28, 2010-Ohio-555 22

State v. Long, 1st Dist. No. C-110160, 2012-Ohio-3052 17

State v. Penix, 2d Dist. No. 1835, 1986 WL 9094 (Aug. 18, 1986), *affirmed* at 32 Ohio St.3d 369 (1987) 16

State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824 (2006) 24

State v. Schlecht, 2d Dist. No. 2003-CA-3, 2003 Ohio 5336 22

State v. Sims, 4th Dist. No. 10CA17, 2012-Ohio-238 22

State v. Smith, 8th Dist. No. 85245, 2005-Ohio-3836 22

Table of Authorities

Page No.

Cases:

State v. Stroud, 7th Dist. No. 07MA91, 2008-Ohio-3187 22

State v. Wogenstahl, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996) 16

Constitutional Provisions:

Eighth Amendment, United States Constitution 7,9,10,23

Article I, Section 9, Ohio Constitution 23

Statutes:

R.C. 2903.01 7,22

R.C. 2923.23 7

R.C. 2929.12 21,22

Other Provisions:

Ohio Jury Instructions, CR 523.03(10) 7

Ohio Department of Rehabilitation and Correction, Offender Search, http://www.drc.state.oh.us/OffenderSearch/Search.aspx (accessed Mar. 6, 2013) 2

STATEMENT OF THE CASE AND THE FACTS

A nearly empty record on which to sentence a child, who "wasn't nothing but 17[,]" to life without parole.

As one of the State's witnesses testified, Eric "wasn't nothing but 17" when the incidents in this case happened. T.p. 1116. And the record tells us almost nothing about the path that led this 17 year-old to be in the back seats of a car and a van, both of which were involved in shootings in March 2010.

By then, Eric had "complet[ed]" the 12th grade, but it is not clear what education level he had actually achieved. *See*, Presentence Investigation Report. He lived with his uncle, but no reason is given why he couldn't live with his mother or father. *Id.* Eric had a history of juvenile adjudications, including marijuana possession, cocaine possession, obstructing official business and receiving stolen property, along with time on home monitoring and at the Department of Youth Services. *Id.* But no testing was done to determine Eric's mental health, or whether he correctly self-reported that he had no problem with drugs or alcohol. Based on this sparse record, the trial court sentenced Eric to life without parole. The trial court did not consider Eric's youth and made no meaningful distinction between Eric and his two adult co-defendants. *Id.*

* * *

The house shooting, Eric was "in the back seat, where he always is."

In early March 2010, Mark Keeling, 26 years old, T.p. 1023, Kyrie Maxberry, 23 years old, T.p. 1117, Keyonni Stinson, 27 years old, T.p. 943 and Carrie Barns, age

unknown, went to the Garage Bar in Sharonville, Ohio. T.p. 945. Ms. Stinson and Mr. Keeling lived together in a Lincoln Heights house, along with Stinson's son and Keeling's younger brother. T.p. 1024. Keeling, Maxberry, Stinson testified that after they exited I-75, they saw a van with Fonta Whipple driving, Jayshawn Clark in the passenger seat, and Eric in the back. T.p. 951, 1038. 1122. Whipple was 26 years old.[1] Clark was 25 years old.[2] Eric was 17 years old. T.p. 1116. Stinson said that Eric was "[i]n the back, where he always is." T.p. 951. Keeling believed only three people were in the van, but Stinson could not say whether a fourth person was in the van. T.p. 1039, 1122.

They saw the van again as they got home and walked toward their house. T.p. 1047. After they were in the house for about 15-20 seconds, gunfire began, and Keeling was shot in the spine. T.p. 1050. He was hospitalized, and has not regained feeling in one of his hands. T.p. 1055. Kyrie was shot in the face, but survived. T.p. 965. Keeling testified that bullets were flying for about three minutes, but Stinson believed it lasted for only a few seconds. T.p. 1006, 1051. Police collected a total of 28 cartridge casings, 13 bullets, one live round, one unspent round, as well as some bullet fragments. T.p. 1203-1211. A firearms examiner testified that the 28 cartridge casings were fired from three separate assault-style weapons. T.p. 2282-2283. Keeling said that he again saw Eric in

---

[1]Ohio Department of Rehabilitation and Correction, Offender Search, http://www.drc.state.oh.us/OffenderSearch/Search.aspx (accessed Mar. 6, 2013).
[2] *Id.*

the back seat of the van the following day, when the van drove past the house. T.p. 1016.

The motive for the shooting is unclear, but it may have been motivated by an incident a couple days earlier at a club where witnesses saw Eric, Whipple, and Clark. 1075-6. A security guard testified that Scott Neblett , who later died in the freeway shooting, got in a fight and was ejected at that club, but the guard did not know with whom Neblett was fighting. T.p. 2406, 2409. Another witness testified that he had seen Eric in that bar, noting that "Eric had to get a fake i.d. (sic) or use somebody (sic) i.d. (sic) to get him in, because he wasn't nothing but 17." T.p. 1116.

The freeway shooting, again with Eric in the back seat.

Two weeks later, at about 2:30 in the morning, William Grey was driving his pickup truck south on I-75 to his job as a driver for the postal service in Cincinnati. T.p. 1440. As he passed Sharon Road, a silver Dodge Caliber raced off the entrance ramp and swerved across three lanes in front of him—so close that he had to slam on his brakes to avoid hitting it. T.p. 1441-44. A red Chevy Blazer raced by next. T.p. 1445. The Blazer caught up with the Caliber and pulled next to it as both were speeding along. T.p. 1446. Grey heard about three to five shots and saw muzzle-flashes from the Caliber. *Id.* The Blazer then veered off and rolled over three times. *Id.* The Caliber quickly got off the freeway at the Lincoln Heights exit, only a mile from where it got on. *Id.*

The Blazer left a trail of debris that included a semiautomatic handgun and a bag of crack cocaine. T.p. 1727. Both occupants, Scott Neblett and Keith Cobb, died from the gunfire. T.p. 2050, 2074. Both were 25 years old. T.p. 2049, 2073. Both had recently smoked marijuana. T.p. 2084. Both were legally drunk. T.p. 2083-84. Cobb had gunpowder on his hand and chest, which was consistent with him shooting at the Caliber from the Blazer. T.p. 1983, 2061, 2071.

Along the freeway, police collected .762 and .233 caliber casings, both from assault-style firearms, as well as 9mm casings. T.p. 1645-1646, 1729, 1762-1763. A firearms examiner testified that the .762 and .233 casings were fired from two of the assault rifles used in the house attack. T.p. 2302. He also said that the 9mm casings matched the handgun that police say Eric had shortly before his capture five days later. T.p. 2299-2300.

The driver of the pursued car was Fonta Whipple. Jayshawn Clark was in the front passenger seat. T.p. 1520-21. Eric was again in the back seat, as was Jackie Thomas. T.p. 2111.

The problems began less than an hour earlier when the Garage bar closed. As patrons left the club, Scott Neblett had an "altercation" with Trenton Evans, Michael Williams, and one other man. T.p. 1510, 1517- 22. Evans displayed a gun, Neblett spit on one of them, and the parties walked away from each other. T.p. 1517-18, 1540.

Michael Williams' brother, Jackie Thomas, was nearby with Whipple, Clark, and Eric. T.p. 1586-7. Thomas, Whipple, Clark and Eric got in a rented Dodge Caliber and drove to a gas station a few hundred feet away. T.p. 1519-20. Whipple was driving, Clark was in the front passenger seat, and Thomas and Eric were in the back seat. T.p. 1520. Neblett's Blazer followed soon after. T.p. 1536-7. At the gas station, Williams told the four about the argument. T.p. 1522-23.

When the Blazer and Caliber left the gas station, it appeared that the Caliber was following the Blazer. T.p. 2112. Whipple drove the Caliber, with Eric again in the back seat. T.p. 2111. The cars headed toward I-75. T.p. 2168-69. Moments later, the two cars entered I-75 going south. The Caliber quickly got in front of the Blazer, and that's when William Gray saw the Blazer catch up with the Caliber and the gunfire that followed.

Eric is taken into custody.

A police officer testified that five days after the freeway shooting, he saw Eric with a gun, and that Eric ran off when directed to stop. Eric was apprehended after a brief foot chase, but an extensive search by the police turned up no gun. T.p. 2185-90, T.p. 1215-23. A couple of days later, a homeowner in the area went out to mow his lawn, and found a gun in the mud. When he picked it up, it fired. T.p. 2230-32. A ballistics expert testified that the gun was used in the freeway shooting. T.p. 2299-2300.

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

Although no formal plea offers were made in this case, Eric's lawyer talked to the prosecutor about a possible deal that would have resulted in 18 to 50 years of flat time. T.p. 1892. Discussions with a co-defendant's lawyers were slightly more advanced—the prosecutor said he would be willing to consider an offer of 21-22 years of flat time. T.p. 1910. Any offer to any defendant would have been conditioned on testifying against the other co-defendants. T.p. 1892-3. But Eric ordered his attorney to stop negotiating, and the attorney complied. T.p. 2.

Eric is tried and convicted with his adult co-defendants.

Over objection, Eric was tried jointly with his adult co-defendants. Entry denying motion to sever charges, Dec. 12, 2009, Doc. 34. For reasons undisclosed in the record, Jackie Thomas was never charged and did not testify. Eric was convicted of three counts of felonious assault, one count of improper discharge of a firearm into a habitation, two counts of aggravated murder, two counts of having a weapon while under a disability, and one count of carrying a concealed weapon, as well as firearm specifications. Sentencing Entry, Mar. 9, 2011, Doc. 236.

The complicity instruction required the jury to convict Eric of aggravated murder even if he did not kill and had no intent to kill.

The trial court should have instructed the jury that Eric was guilty of complicity only if he was "acting with the kind of culpability required for the commission of an

offense." R.C. 2923.23(A). *See also* Ohio Jury Instructions, CR 523.03(10), Comment ("Instructions must cover the elements of the principal offense together with the meaning of the words and phrases"). But instead of instructing the jury that Eric had to act with prior calculation and design, as required by R.C. 2903.01(A), the trial court instructed the jury that Eric must be convicted if he knowingly or purposely helped someone who committed aggravated murder:

> Complicity: Complicity in an offense means the conduct of one who *knowingly* aids and abets another for the purposes of committing such an act.
>
> If you find beyond a reasonable doubt Fonta Whipple, Jashawn Clark and/or Eric Long *purposely* aided, helped, assisted, encouraged or directed himself with another in the commission of an offense, he is to be regarded as if he were the principal offender, and is just as guilty as if he had personally performed every act constituting the offense.
>
> When two or more persons have a common purpose to commit a crime, and one does one part and a second performs another, those acting together are equally guilty of the crime.

T.p. 2651-2 (emphasis added).

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

At sentencing, defense counsel filed a sentencing memorandum and argued that the trial court should consider youth as a mitigating factor, and that failure to do so would violate the Eighth Amendment to the United States Constitution. Doc. 233. By contrast, the prosecutor argued that youth was an aggravating factor—a reason to

impose a lengthier sentence:

> 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? I ask the Court to make sure they stay where they are, and stay where they cannot hurt anybody else, and give them a sentence of life without parole.

T.p. 2802-3. The prosecutor noted that all three had significant criminal records. T.p. 2800-1. Further, the prosecutor pointed out that during the victims' testimony at that hearing, Clark and Whipple were both "smirking and laughing as though that's funny. It's the same thing they did to (sic) shooting up Matthews. They stand before this Court and smirk and laugh like this is some sort of joke." T.p. 2801-2. There is no suggestion in the record that Eric acted inappropriately during the sentencing hearing.

The trial court imposed a sentence of life without parole on Eric and his adult co-defendants—considering them as a group, not individually, and without mentioning youth as a mitigating or aggravating factor. The court explained its sentence at the hearing:

> THE COURT: Having tried this case and heard this case for four weeks, having had experience with Mr. Whipple and Mr. Clark [the adult co-defendants], 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, senseless, just indiscriminate violence absolutely, as everyone has said here, absolutely no remorse. It's chilling. It's chilling to see you three stand 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'll will (sic) commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court (sic) finds that prison sentences are required.

T.p. 2803-4.

The appeal—a decision issued 8 days after* Miller *without any additional briefing.

On appeal, Eric again argued that Eric's sentence of life without parole violated the Eighth Amendment. After briefing, but 8 days before the First District's decision, the United States Supreme Court released *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), which held that trial courts must consider youth as a mitigating circumstance. The court of appeals did not order additional briefing, but still cited to *Miller* in its opinion. The First District held that the trial court did consider youth as a mitigating factor because defense counsel argued that it should and because the trial court explained the sentence. Opinion at ¶ 53-54. The First District quoted from the portion of the sentencing hearing excerpted above, but did not specify which of the quoted words showed that the trial court had actually considered youth as a mitigating factor. *Id.* at ¶ 54.

This case is now pending before this Court as a discretionary appeal.

ARGUMENT

Proposition of Law:

The Eighth Amendment requires trial courts to consider youth as a mitigating factor when sentencing a child to life without parole for a homicide.

I. Threshold question: Did Eric "kill or intend to kill"?

The threshold question is whether Eric committed a "homicide" offense as the United States Supreme Court used that term in *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In *Graham*, the Court held that juvenile non-homicide offenders could not be given a sentence of life without parole because, "when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." (emphasis added). *Graham*, 130 S.Ct. at 2027, 176 L.Ed.2d at 842.

Here, the jury was not instructed that it needed to find that Eric killed and intended to kill in order to convict him. The trial court used a complicity instruction that permitted Eric's conviction for aggravated murder even without proof that he acted with prior calculation or with a specific intent to kill. The complicity instruction required a conviction if the assistance Eric gave was purposeful and if that assistance helped another commit a crime:

> If you find beyond a reasonable doubt [that] Eric Long purposely aided, helped, assisted, encouraged or directed himself with another in the

> commission of an offense, he is to be regarded as if he were the principal offender, and is just as guilty as if he had personally performed every act constituting the offense.

T.p. 2651-2. That instruction does not require that the jury find that Eric either actually killed someone or even intend to kill someone. As a result, he is subject to *Graham's* ban on sentences of life without parole for children who have not committed a "homicide" offense, as that term is defined in *Graham*. This Court should vacate Eric's sentence and remand this case to the trial court with directions to impose a sentence that provides Eric a "meaningful opportunity for release" as required by *Graham*. *Id.*, 130 S.Ct. at 2030, 176 L.Ed.2 at 846.

II. Even if Eric killed or intended to kill, he is entitled to a new sentencing hearing because the trial court did not consider youth as a mitigating factor before sentencing him to life without parole.

A. The science behind *Miller*

1. Children are impulsive, reckless, easily influenced, and less able to get out of a crime-producing setting, so their crimes are less likely to be evidence that they are irredeemable.

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), is one of a trio of recent cases in which the United States Supreme Court found that children are less responsible for their actions and more amenable to rehabilitation. The Court's conclusions are based on three facts:[3]

---

[3] The other two cases are *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005); and *Graham v. Florida*, 560 U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569, 125 S.Ct. 1183, 161 L. Ed. 2d 1. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Id.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.* at 570.

Miller, 132 S.Ct. at 2464. *Miller*'s holding rests not simply on common sense, but "on science and social science as well"[:]

> In *Roper*, we cited studies showing that "'[o]nly a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior.'" *Id.* at 570 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." 130 S.Ct. at 2026. We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'"

Miller, 132 S.Ct. at 2026-7 (quoting *Roper*, 543 U.S. at 570). For these reasons, the Constitution establishes that it is essential to consider the youth of a child when deciding whether a sentence of life without parole is appropriate:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds

> him—and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he 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) or his incapacity to assist his own attorneys. See, e.g., *Graham*, 560 U.S. at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B. v. North Carolina*, 564 U.S. ___, ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 132 S.Ct. at 2468.

2. Life without parole is a more severe sentence for a child.

As this Court noted in *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, "a life sentence for a juvenile is different from such a sentence for an adult; the juvenile will spend a greater percentage of his life in jail than the adult." *Id.* at ¶ 44 (citing *Graham*). And the prosecutor acknowledged that Eric would serve a longer prison term than adults convicted of aggravated murder when he argued that a longer sentence was needed to keep Eric in prison forever:

> 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? I ask the Court to make sure they stay where they are, and stay where they cannot hurt anybody else, and give them a sentence of life without parole.

T.p. 2802-3.

3. Deterrence doesn't work for children.

As this Court has acknowledged, *Graham* "discounted the penological goal of deterrence":

> Because juveniles' "lack of maturity and underdeveloped sense of responsibility * * * often result in impetuous and ill-considered actions and decisions," *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), they are less likely to take a possible punishment into consideration when making decisions.

In re C.P., 2012-Ohio-1446 at ¶52, quoting *Graham*, 560 U.S. at ___, 130 S.Ct. at 2028-2029, 176 L.Ed.2d 825. This Court agreed that it is inappropriate to rest on deterrence when sentencing children, because "the significance of the particular punishment and its effects are less likely to be understood by the juvenile than the threat of time in a jail cell. Juveniles are less likely to appreciate the concept of loss of future reputation." *Id.*

B. Application of *Miller* to this case.

Miller "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics--before imposing a particular penalty." *Miller*, 132 S.Ct. at 2471. Given that *Miller* had not been released when the trial court sentenced Eric, it is not surprising that the judge did not follow the process that *Miller* required. Instead, the trial court erroneously treated this case like any other.

1. The trial court treated Eric just like his adult co-defendants.

Miller requires a sentencing judge "to take into account the differences among defendants and crimes." *Id.* at 2469, n.8. But at the sentencing of Eric and his adult co-

defendants, the trial judge made no effort to distinguish Eric's culpability from that of his adult co-defendants. The only differences that the trial court noted were Eric's juvenile record and the inappropriate courtroom behavior of his co-defendants. T.p. 2803. But the court did not distinguish Eric on the one constitutionally critical factor—his youth.

2. The trial court did not treat youth as a mitigating factor

Before sentencing children to life without parole for a homicide, the trial court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. The trial court did not even mention youth as a factor that it considered.

a) The record must show that the trial court fully considered youth as a mitigating factor.

When the United States Supreme Court requires that a sentencer consider a mitigating factor, it is not sufficient that the issue be "potentially relevant" to a factor the sentence considered. *Penry v. Johnson*, 532 U.S. 782, 787, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (concerning mental illness). Instead, the reviewing court must "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 322-3, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989)).

Further, a mitigating factor cannot be "relevant only as an aggravating factor." *Johnson*, 782 U.S. at 787 (citing *Lynaugh*, 492 U.S. at 323). This Court and at least one

lower court have repeatedly ruled that it is improper to consider mitigating factors as aggravating factors. *State v. Wogenstahl*, 75 Ohio St.3d 344, 356, 662 N.E.2d 311 (1996) ("the nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation"); *State v. Penix*, 2d Dist. No. 1835, 1986 WL 9094 (Aug. 18, 1986), *affirmed* at 32 Ohio St.3d 369 (1987) ("The court may not turn absence of mitigating factors into aggravating factors."); *State v. Beuke*, 38 Ohio St.3d 29, 32, 526 N.E.2d 274 (1988) (contrasting arguments that "transform mitigating factors into aggravating circumstances" with arguments that "fall within the permissible bounds of closing argument").

The Wyoming Supreme Court recently gave clear guidance to its trial courts, and this Court should do the same:

> To fulfill *Miller's* requirements, Wyoming's district courts must consider the factors of youth and the nature of the homicide at an individualized sentencing hearing when determining whether to sentence the juvenile offender to life without the possibility of parole or to life according to law. While not exhaustive, the *Miller* Court specifically indicated some factors for a trial court to consider at sentencing include:
>
> (a) "the character and record of the individual offender [and] the circumstances of the offense,"
>
> (b) "the background and mental and emotional development of a youthful defendant," (c) a juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate the risks and consequences,"
>
> (d) "the family and home environment that surrounds" the juvenile, "no matter how brutal or dysfunctional,"

(e) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected" the juvenile,

(f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," *e.g.*, the juvenile's relative inability to deal with police and prosecutors or to assist his own attorney, and

(g) the juvenile's potential for rehabilitation

Bear Cloud v. State, 2013 WY 18, 294 P.3d 36, ¶ 42 (2013) (internal citations omitted). The Wyoming Supreme Court's sentencing analysis is clear and protective of constitutional values. Ohio trial courts would benefit from a similarly precise ruling.

b) The record in this case does not show that the trial court considered youth as a mitigating factor.

Here, the trial judge explained her sentence, but none of her reasons included a consideration of youth as a mitigating factor. T.p. 2803 – 4. That is not surprising—the United States Supreme Court had not yet ruled that trial courts must consider youth a mitigating factor. In an opinion released a week after *Miller* was decided, the court of appeals held that the trial court had in fact considered youth as a mitigating factor, because defense counsel argued that the trial court should. *State v. Long*, 1st Dist. No. C-110160, 2012-Ohio-3052, ¶ 53. But the court of appeals' decision overlooks the fact that the State argued that youth was an *aggravating* factor, because a longer prison term was needed to keep someone of Eric's young age in prison long enough to protect the public. T.p. 2802-3. It is hard to believe that the trial court accepted the defense view of youth as a mitigating factor, particularly when the trial court imposed the sentence

suggested by the State, which was based on an argument that Eric's youth was an aggravating factor.

Nothing in the trial court's colloquy indicates that it considered youth as a mitigating factor. And certainly nothing in this record allows this Court to "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Johnson*, 532 U.S. at 787 (citing *Lynaugh*, 492 U.S. at 322-3). The trial court stated that Eric had a long juvenile record, that his two adult co-defendants showed no remorse, and that Eric and his adult co-defendants posed a threat to public safety at that time. T.p. 2803. The trial court then made the generic statement, "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." T.p. 2803-4.

A California appeals court reviewing a record that was less sparse than the one in Eric's case reversed and remanded for a new sentencing hearing. That court acknowledged that defense counsel made some arguments regarding youth as a mitigating factor and that some evidence touched on that issue, but then ruled that "the trial court did not consider, as *Miller* requires to the extent relevant, defendant's background and upbringing, and his mental and emotional development, and how these factors also affected the possibility of his rehabilitation; nor was any such

information to be found in the probation report." *People v. Siackasorn*, 211 Cal. App. 4th 909, 917, 149 Cal. Rptr. 3d 918, (Calf. Dist. 3 2012).

The trial court's brief explanation of Eric's sentence pales in comparison with the record in a case in which the Indiana Supreme Court held that a trial court's sentence complied with *Miller*. In that case, the trial judge issued a 30-page sentencing statement that "was detailed and explained its rationale for awarding weight, or affording no weight, to each and every mitigating circumstance proffered by [the child]." *Conley v. State*, 972 N.E.2d 864, 875 (Ind. 2012). But here, the trial judge's explanation covered less than a page of double-spaced transcript with wide margins. T.p. 2803, line 4 to T.p. 2804, line 1. And the explanation does not even mention counsel's argument that Eric's youth was a mitigating factor. T.p. 2802. Based on such a sparse record, this Court cannot "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Johnson*, 532 U.S. at 787.

c) The trial court's reasoning conflicts with the scientific holdings of *Graham* and *Miller*.

Upon review of the trial court's sentencing colloquy, it seems clear that the basis for her choice of sentence stands in stark contrast to the analysis approved in *Graham* and *Miller:*

Trial Court's Explanation of Eric's Life Without Parole Sentence	Holding of *Miller v. Alabama*
"[I]t'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. . . ." T.p. 2803.	"[L]ife without parole for a juvenile precludes consideration of [a child's] immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S.Ct. at 2468.
"absolutely no remorse" *Id.*	"Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Graham*, 130 S.Ct. at 2032.
"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. After considering the risks that You'll will (sic) commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court (sic) finds that prison sentences are required." *Id.*	"Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'--but 'incorrigibility is inconsistent with youth.'" *Graham*, 130 S. Ct. at 2029 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968)).

d) Under *Miller*, Eric should not receive a sentence of life without parole.

The facts of this case demonstrate that *Miller* is especially applicable. First, Eric literally took a back seat to his adult co-defendants; second, the homicide victims, both of whom were drunk and one of whom possibly fired a gun shortly before his death, pursued and caught the car Eric was in before the fatal shots were fired; third, Eric showed bad judgment typical of children in terminating plea negotiations; and finally, these crimes clearly demonstrate "immaturity, impetuosity, and failure to appreciate

risks and consequences"—Eric demonstrated a child's lack of judgment when he got in the back seat of a car even though his armed, adult companions had a grudge against another armed, drunk, and possibly high adult in another vehicle headed the same way.

Eric's back-seat role in this case illustrates one of the key deficiencies of childhood: "[C]hildren 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S.Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). Here, in both incidents, Eric was in the back seat every time he was with his two adult co-defendants—who always sat in front. *See, e.g.*, T.p. 951, 1016, 1038, 1122, 1842, 2008, 2111. Eric also showed the deficiencies of youth in terminating plea discussions that would likely have resulted in a jointly recommended sentence of approximately 20 flat years. T.p. 1892-3. But Eric ordered his attorney to stop negotiating, and the attorney complied. T.p. 2. As the *Miller* Court explained, the accused 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). . . ." *Miller*, 132 S.Ct. at 2468.

Eric's crimes, although serious, were not the "worst of the worst" of aggravated murders under the criteria set by the General Assembly in R.C. 2929.12(B) and (C). This case contains none of the factors that the General Assembly has determined aggravate

an offense under R.C. 2929.12(B). The State could argue that the "victim[s] of the offense suffered serious physical . . . harm as a result of the offense[,]" but that is an element of homicide. R.C. 2903.01. And as the lower courts have correctly and consistently found, a factor inherent to an offense cannot make one act worse than any other.[4]

This case also contains two statutory mitigating factors. First, the victims "facilitated the offense" by engaging in an armed car chase while drunk and possibly high. R.C. 2929.12(C)(1). T.p. 2083-84. During that chase, the victims had a gun, which they possibly fired at the car Eric was in. T.p. 1983, 2061, 2071. The victims also had a bag of crack cocaine. T.p. 1727. A drunk man with crack cocaine and a gun who pursues, catches, and pulls up next to someone on the freeway creates a "strong provocation" for violence and mitigates the offense. R.C. 2929.12(C)(2) and (3). Had the trial court considered Eric's youth as an additional mitigating factor, he would have received a somewhat shorter sentence--certainly shorter than the sentences of his adult codefendants.

---

[4] *State v. Sims*, 4th Dist. No. 10CA17, 2012-Ohio-238, ¶ 16 "(a trial court may not elevate the seriousness of an offense by pointing to a fact that is also an element of the offense itself")(quoting *State v. Davis*, 4th Dist. No. 09CA28, 2010-Ohio-555, ¶ 24 and citing *State v. Schlecht*, 2d Dist. No. 2003-CA-3, 2003 Ohio 5336, ¶ 52, *State v. Stroud*, 7th Dist. No. 07MA91, 2008-Ohio-3187, and *State v. Smith*, 8th Dist. No. 85245, 2005-Ohio-3836, ¶ 17-18.

III. The Ohio Constitution prohibits sentencing a child to life without parole for any offense.

While *Miller* avoids a categorical rule barring life without parole for children who commit homicides, this Court should hold that the Ohio Constitution, Article I, Section 9, requires that all children have the right to a meaningful opportunity for release regardless of the crimes they have committed. As this Court held, the Ohio Constitution "provides protection independent of the protection provided by the Eighth Amendment." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 59.

In *C.P.*, this Court held that lifetime registration with public notice, *with the possibility of termination after 25 years*, violated Ohio's ban on "cruel and unusual punishments[.]" *Id.* at ¶ 44. The child in *C.P.* was 15 at the time of his offense—only two years younger than Eric. *Id.* at ¶ 2. And C.P.'s offense was extraordinarily serious—the rape and kidnapping of a six-year-old nephew. *Id.* at ¶ 2, 92.

Citing to *Graham*, this Court held that Ohio statute "assumes that children are not as culpable for their acts as adults." *Id.* at ¶ 39, citing *Graham*, 130 S.Ct. at 2026. This Court also held that "[n]ot only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness. *C.P.* at ¶ 40, citing *Graham*, S.Ct. at 2026-7. Eric was also a child at the time of his offense, and the same logic applies to him.

Further, this Court held that the "punishment of lifetime exposure for a wrong committed in childhood runs counter to the private nature of our juvenile court system." *C.P.* at 62. Eric's sentence does more than create a "lifetime exposure" to

punishment—it guarantees lifetime punishment in prison. And while Eric does not seek relief from the stigma of his conviction, a sentence with *no* chance of release from *prison*, even more then as lifetime sex offender registration (with review after 25 years), "frustrate[s] . . . juvenile rehabilitation[.]" *Id.* at ¶ 67.

IV. Remedy: This Court should vacate all of Eric's sentences and remand this case for a new sentencing hearing.

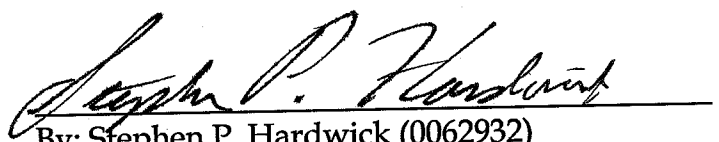
This Court should remand this case to hold a resentencing hearing that complies with *Graham* and *Miller*. It is true that Ohio has eschewed the sentencing package doctrine. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824 (2006). But *Graham* and *Miller* require the "meaningful opportunity to obtain release" for any child who is not eligible for life without parole under *Miller*. *Miller*, 132 S.Ct. at 2469, quoting *Graham*, 130 S.Ct. at 2030. As a result, Eric's total sentence may not him Eric the meaningful opportunity for release. Because this aspect of federal constitutional law looks at the full sentence, Eric's entire sentence should be vacated and this case remanded for a de novo resentencing hearing pursuant to *Miller*.

CONCLUSION

In both shootings, Eric literally took a back seat to his adult co-defendants. He was a child living without parents who found two very bad role models. The trial court never considered as mitigating factors the deficiencies of Eric's youth: poor judgment, an inability to extract himself from a bad situation, or his inability to thoughtfully decide whether to permit his attorney to negotiate a plea. This Court should remand this case for a sentencing hearing compliant with *Graham*, *Miller*, and the Ohio Constitution.

Respectfully submitted,

Office of the Ohio Public Defender



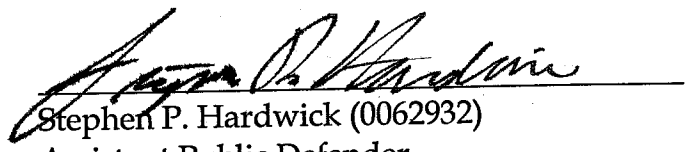
By: Stephen P. Hardwick (0062932)
Assistant Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellant Eric Long

Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Ronald W. Springman, ron.springman@hcpros.org, on this 8th of March, 2013.



Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant Eric Long

#387941

IN THE SUPREME COURT OF OHIO

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

APPENDIX TO

MERIT BRIEF OF APPELLANT ERIC LONG, A MINOR CHILD

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 12-1410
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.	:	

Notice of Appeal of Appellant Eric Long

Joseph T. Deters, #0012084
Hamilton County Prosecutor

Ronald W. Springman, #0041413
Assistant Prosecuting Attorney
(Counsel of Record)

Hamilton County Prosecutor's Office
230 E. 9th Street - Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
(513) 946-3105 - Fax

Counsel for Plaintiff-Appellee

Office of the Ohio Public Defender

By: Stephen P. Hardwick, 0062932
Assistant Public Defender
(Counsel of Record)

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
stephen.hardwick@opd.ohio.gov

Counsel for Defendant-Appellant

FILED
AUG 17 2012
CLERK OF COURT
SUPREME COURT OF OHIO

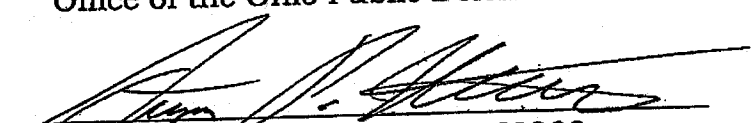
Notice of Appeal of Appellant Eric Long

Appellant Eric Long, hereby gives notice of appeal to the Supreme Court of Ohio from the Decision and Journal Entry of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-110160 on July 3, 2012.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender



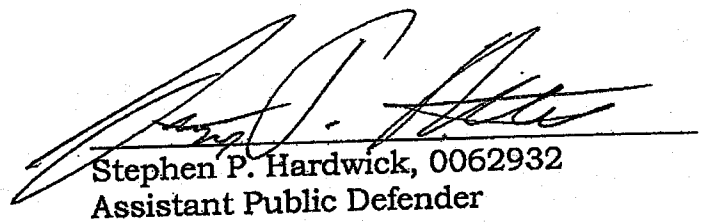
By: Stephen P. Hardwick, 0062932
Assistant Public Defender

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
stephen.hardwick@opd.ohio.gov

Counsel for Eric Long

Certification of Service

This is to certify that a copy of the foregoing **Notice of Appeal of Appellant Eric Long** was forwarded by regular U.S. Mail, 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 17th day of August, 2012.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Eric Long

#374855

[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.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

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

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I. BILL OF RIGHTS

§ 9 BAIL; CRUEL AND UNUSUAL PUNISHMENTS

All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 201
*** Annotations current through November 5, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.01 (2013)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in *section 2929.02 of the Revised Code.*

(G) As used in this section:

(1) "Detention" has the same meaning as in *section 2921.01 of the Revised Code.*

(2) "Law enforcement officer" has the same meaning as in *section 2911.01 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 239 (Eff 9-6-96); 147 v S 32 (Eff 8-6-97); 147 v H 5 (Eff 6-30-98); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 201
*** Annotations current through November 5, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT ACTIVITY
MISCELLANEOUS

Go to the Ohio Code Archive Directory

ORC Ann. 2923.23 (2013)

§ 2923.23. Immunity from prosecution

(A) No person who acquires, possesses, or carries a firearm or dangerous ordnance in violation of *section 2923.13* or *2923.17 of the Revised Code* shall be prosecuted for such violation, if he reports his possession of firearms or dangerous ordnance to any law enforcement authority, describes the firearms of [or] dangerous ordnance in his possession and where they may be found, and voluntarily surrenders the firearms or dangerous ordnance to the law enforcement authority. A surrender is not voluntary if it occurs when the person is taken into custody or during a pursuit or attempt to take the person into custody under circumstances indicating that the surrender is made under threat of force.

(B) No person in violation of *section 2923.13 of the Revised Code* solely by reason of his being under indictment shall be prosecuted for such violation if, within ten days after service of the indictment, he voluntarily surrenders the firearms and dangerous ordnance in his possession to any law enforcement authority pursuant to division (A) of this section, for safekeeping pending disposition of the indictment or of an application for relief under *section 2923.14 of the Revised Code*.

(C) Evidence obtained from or by reason of an application or proceeding under *section 2923.14 of the Revised Code* for relief from disability, shall not be used in a prosecution of the applicant for any violation of *section 2923.13 of the Revised Code*.

(D) Evidence obtained from or by reason of an application under *section 2923.18 of the Revised Code* for a permit to possess dangerous ordnance, shall not be used in a prosecution of the applicant for any violation of *section 2923.13* or *2923.17 of the Revised Code*.

HISTORY:

134 v H 511. Eff 1-1-74.

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 201
*** Annotations current through November 5, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.12 (2013)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 2929.12. Seriousness and recidivism factors [Effective until March 22, 2013]

(A) Unless otherwise required by *section 2929.13* or *2929.14 of the Revised Code*, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of *section 2903.11*, *2903.12*, or *2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to *section 2929.16*, *2929.17*, or *2929.18 of the Revised Code*, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of *section 2967.16* or *section 2929.141 [2929.14.1] of the Revised Code*.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.