ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO, Plaintiff-Appellee, v. ERIC LONG, Defendant-Appellant.	Case No. 2012-1410 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-110160

AMENDED MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

Ninety-seven days before Eric Long's eighteenth birthday, he and two companions murdered Scott Neblett and Keith Cobb. The aggravated murders were part of a run of criminal behavior that would also result in three felonious-assault charges and several weapons charges for Long. Given the seriousness of the offenses and the likelihood that Long would commit future crimes, the trial court exercised its discretion to sentence Long to life imprisonment without the possibility of parole. After his sentencing, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), which held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464. Long believes that *Miller* renders his sentence unconstitutional and entitles him to a new sentencing hearing. He is wrong for three reasons.

First, Long did not receive his life-without-parole sentence under a mandatory scheme. Instead, Ohio law vested the trial court with discretion to sentence Long either to life without the possibility of parole or to life with the possibility of parole after a definite term. The fact that the trial court had discretion in sentencing Long—and that a life sentence was not mandatory—takes Long's sentence outside the scope of *Miller*, which "h[e]ld that *mandatory* life without parole for those under the age of 18 at the time of their crimes" violates the Eighth Amendment. *Id.* at 2460 (emphasis added). *Miller* simply does not govern here.

Second, Long misreads *Miller* as additionally requiring a trial court to discuss a juvenile offender's youth on the record before sentencing him to life without parole. *Miller* requires sentencers to "consider[] an offender's youth and attendant characteristics" before imposing a life-without-parole sentence, at least where the offender raises the issue. *Id.* at 2471. But it does not require—nor does any other United States Supreme Court case require—consideration on the record. What is more, *Miller* drew much of its reasoning from the Supreme Court's capital

sentencing cases. Those cases, too, establish no requirement of on-the-record consideration. In brief, Long has absolutely no authority for his theory that sentencers must address juvenile homicide offenders' youth explicitly on the record.

Third, in any event, the record in this case plainly shows that the trial court did consider the mitigating effects of Long's youth before imposing sentence. For starters, Ohio law presumes that sentencers have considered all relevant arguments unless the defendant presents clear evidence to the contrary. Here, Long offers no indication that the trial court misapprehended his argument or misunderstood its relevance. Furthermore, the record is full of evidence that the court considered his youth. Long's sentencing came after the trial judge had presided over his trial for four weeks, which itself suggests that she knew Long was 17 when he committed the two aggravated murders. In case his age was somehow lost on the trial court, Long devoted every word of his sentencing memorandum to the mitigating effects of youth. The memorandum contained no other mitigating arguments. The State, for its part, also acknowledged Long's youth in its sentencing memorandum, arguing that although Long was a juvenile at the time of the murders, the seriousness of his crimes and his likelihood of recidivism outweighed the mitigating force of his youth. At the sentencing hearing, both Long's counsel and the State orally discussed Long's youth as a mitigating factor. And the trial judge said that she had considered Long's "history, character and condition" before imposing a life-without-parole sentence. Beyond any doubt, the trial court considered Long's youth before sentencing him.

Because Long's sentence does not violate the Eighth Amendment, the Court should affirm.

STATEMENT OF AMICUS INTEREST

This case presents the question whether the Eighth Amendment requires a sentencer to state its consideration of a juvenile homicide offender's youth on the record before sentencing him to life without parole. Holding that the Eighth Amendment imposes such a requirement would alter longstanding Ohio law. As the chief law officer of Ohio, R.C. 109.02, the Attorney General has a substantial interest in the correct interpretation of Ohio's criminal laws and procedure, and in defending the legislative actions of the General Assembly from constitutional attack.

STATEMENT OF THE CASE AND FACTS

Following a jury trial in the Hamilton County Common Pleas Court, Eric Long was convicted of two counts of aggravated murder, three counts of felonious assault, four counts of various weapons charges, and several related firearm specifications. The court sentenced Long to consecutive terms of life imprisonment without the possibility of parole on the aggravated murder charges, plus an aggregate sentence of 19 years' imprisonment on the remaining charges. The court of appeals affirmed.

A. A Hamilton County jury convicted Long of multiple charges, including aggravated murder and felonious assault, arising out of three criminal incidents.

On March 4, 2009, Keyonni Stinson, Mark Keeling, and Kyrie Maxberry arrived at Stinson's home after a night out. *State v. Long*, No. C-110160, 2012-Ohio-3052 ¶ 3 (1st Dist.) ("App. Op."). Upon arriving, they saw Eric Long and his two co-defendants in the trial below, Jayshawn Clark and Fonta Whipple, stopped outside Stinson's home in a van. *Id.* Because Keeling had previously tussled with Long and the other two men, he and his companions "hurried inside." *Id.* Within seconds of stepping in the door, "a hail of gunfire engulfed the house." *Id.* Long, Clark, and Whipple had each repeatedly fired assault rifles into the house, and

Keeling and Maxberry suffered severe injuries in the shooting. *Id.* ¶¶ 3, 44. Shell casings from 7.62-millimeter and .223-inch caliber bullets littered the street outside Stinson's home. *Id.* ¶ 44.

Thirteen days later, Long was involved in another shooting, this time with fatal results. Following an altercation at a bar, Long, Clark, and Whipple engaged in a high-speed chase with Scott Neblett and Keith Cobb. *Id.* ¶ 5. As the vehicles pulled alongside one another on Interstate 75, Long, Clark, and Whipple shot Neblett and Cobb with assault rifles. *Id.* Neblett and Cobb's vehicle "spun out of control, hit the guardrail, and rolled several times." *Id.* Both men had died from multiple gunshot wounds. *Id.* Police recovered 9-millimeter shell casings, as well as shell casings of the same calibers as those used in the March 4 shooting. *Id.* ¶ 7. A ballistics expert testified at trial that the same weapons had been used in both shootings. *Id.*

Five days after Neblett's and Cobb's murders, a police officer saw Eric Long carrying a handgun on the streets of Lincoln Heights, Ohio. *Id.* ¶ 8. Long ran, and the officer pursued on foot. *Id.* Long was ultimately captured without a gun, but a homeowner found a 9-millimeter pistol in his yard near the location of Long's arrest. *Id.* A ballistics expert later testified that the pistol had been used in Neblett's and Cobb's murders. *Id.*

Long was indicted on several charges arising out of these incidents. He pleaded not guilty and went to trial with his co-defendants in January 2011. *Id.* ¶ 9. The jury found Long guilty of two counts of aggravated murder, three counts of felonious assault, two counts of unlawful possession of a firearm, one count of carrying a concealed weapon without a license, one count of improperly discharging a firearm at or into a home, and several firearm specifications. Long Judgment Entry at 1, *State v. Long*, B-0903962-C (Ham. Cnty. Ct. Com. Pl. Mar. 9, 2011).

B. Long was sentenced to life imprisonment without the possibility of parole for his aggravated murder charges.

In sentencing Long for his aggravated murders, the trial court had four options. It could have sentenced him to life imprisonment without the possibility of parole. R.C. 2929.03(A)(1)(a). Or it could have sentenced him to life imprisonment with the possibility of parole after a definite term of 20, 25, or 30 years in prison. R.C. 2929.02(A)(1)(b)-(d). Long's counsel, in a sentencing memorandum and at the sentencing hearing, noted that Long was a juvenile at the time of the offenses and argued that Long therefore should receive a lighter sentence. Long Sentencing Memorandum at 3, *State v. Long*, B-0903962-C (Ham. Cnty. Ct. Com. Pl. Mar. 2, 2011) ("Long Sent. Mem."); Sentencing Transcript at 2784, *State v. Long*, B-0903962-C (Ham. Cnty. Ct. Com. Pl. Mar. 3, 2011) ("Sent. Tr.").

The State also recognized Long's youth in its sentencing memorandum and oral presentation, but argued that the severity of his crimes and the length of his criminal record outweighed the mitigating force of his youth. *See* State Sentencing Memorandum at 1, *State v. Long*, B-0903962-C (Ham. Cnty. Ct. Com. Pl. Feb. 23, 2011) ("State Sent. Mem."); Sent. Tr. at 2802. Accordingly, the State recommended a life-without-parole sentence.

Having heard arguments from both sides and having offered Long the opportunity to speak on his own behalf, the trial court sentenced Long to consecutive terms of life imprisonment without the possibility of parole for his aggravated murders. The court made plain that it had "consider[ed] the risks that [Long] will commit another offense, the need for protecting the public, [the] nature and circumstances of these offenses, [and Long's] history, character and condition." Sent. Tr. at 2803. The court then asked Long's counsel whether there was "Anything further?", and counsel raised no objections. *Id.* at 2812.

C. The court of appeals affirmed Long's conviction and sentence.

Long appealed his conviction and sentence to the First District Court of Appeals. As relevant here, he argued that his life-without-parole sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. More particularly, he argued that "it must be evident from the record that the principles of sentencing were considered." Long Br. at 18-19, *State v. Long*, No. 1100160 (1st Dist. Nov. 28, 2011). In his view, the trial court erred when it "failed to consider Mr. Long's youth as a mitigating factor on the record." *Id.* at 19.

After appellate briefing but before the First District issued its decision, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). In that case, the Court held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464. The First District distinguished *Miller*, noting that Long's sentence, "unlike that in *Miller*, was not mandated by operation of law." App. Op. ¶ 52. Because Long's life-without-parole sentence was discretionary, the trial 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.'" *Id.* (quoting *Miller*, 132 S. Ct. at 2460). Long's sentence thus satisfied the Eighth Amendment.

Not only was the trial court *able* to consider Long's youth, the First District held, but "[t]he record [also] reflects that the trial court *did* consider those factors before imposing sentence." *Id.* ¶ 53 (emphasis added). Even though the sentencing court did not "specifically state" that it had considered Long's youth, Ohio law "presume[s] that the court properly considered [it]." *Id.* ¶ 59. The trial court "reviewed the parties' sentencing memoranda," heard oral argument at the sentencing hearing, and stated that it had "consider[ed] . . . [Long's] history, character and condition" before imposing sentence. *Id.* ¶¶ 53-54 (quoting Sent. Tr. at 2803). These statements "demonstrate that the court engaged in a particularized consideration of the

purposes and principles of felony sentencing before imposing sentence." *Id.* ¶ 59. Because "the record simply does not reflect Long's contention that the trial court failed to consider Long's youth as a mitigating factor," the court of appeals affirmed the sentence. *Id.* Long appealed, and this Court accepted review to decide whether Long's sentence violates the Federal Constitution. *Case Announcements*, 2012-Ohio-5693 at 7 (Dec. 6, 2012).

STANDARD OF REVIEW

In mounting a constitutional challenge to his sentence, Long faces an uphill climb. As an initial matter, the Court may not order resentencing on constitutional grounds unless Long "clearly and convincingly" shows that his sentence is "contrary to law." R.C. 2953.08(G)(2); *see State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912 ¶ 4 (plurality opinion).

Long's climb is even steeper because he never raised in the trial court that the judge failed to discuss his youth on the record. After the trial judge made the sentencing statement that Long challenges here, she asked Long's counsel whether there was "Anything further?" Sent. Tr. at 2812. Long raised no objections.

Long's failure to bring his claim to the trial court's attention limits the Court's review to plain error. Ordinarily, the Court will not grant relief for a trial error unless the defendant objected at trial. *See* Ohio Crim. R. 51. Ohio's Rules of Criminal Procedure, however, create an exception to that general rule for "[p]lain errors or defects affecting substantial rights." Ohio Crim. R. 52(B). In order to obtain appellate relief for a plain error Long must show (1) "an error" (2) that is "plain" and (3) that has "affected 'substantial rights.'" *State v. Barnes*, 94 Ohio St. 3d 21, 27 (2002). Even if he satisfies all of that, the Court will grant relief only "under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, syll. ¶ 3 (1978). The question whether Long can "clearly and convincingly" show that his sentence is "contrary to law" must be viewed through the lens of plain error, and he

cannot meet this high standard. His claim here fails because no error occurred, let alone a plain one.

Long resists the conclusion that his argument is subject to plain-error review, noting that he "filed a sentencing memorandum arguing that the Eighth Amendment prohibited a sentence of life without parole." Long Reconsideration Motion at 5. But his argument here is not that he does not deserve a life-without-parole sentence; his argument here instead is that the trial court inadequately considered such an argument. Although he pressed the former, he did not press the latter. His claim is subject to plain-error review.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

> *The Eighth Amendment does not require a sentencer to state on the record that it considered an offender's youth before imposing a sentence of life without parole.*

Long makes no effort to show that the central holding of *Miller v. Alabama* renders his sentencing unconstitutional. *Miller* "h[e]ld that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2460 (2012) (emphasis added). But Long did not receive his life-without-parole sentence under a mandatory scheme. And he does not dispute the court of appeals' conclusion that the trial court had discretion to impose either life without the possibility of parole or life with the possibility of parole after a definite term. *See* App. Op. ¶ 52; R.C. 2929.03(A)(1)(a)-(d).

Long instead argues that the trial court did not consider his youth when it exercised its sentencing discretion. His reasoning is simple, but erroneous. Because the trial court did not state on the record that it considered his youth, he reasons, it necessarily "did not consider youth as a mitigating factor," Long Br. at 11, and therefore violated the Eighth Amendment as

interpreted by *Miller*. This reasoning fails on two fronts. First, *Miller* does not require a sentencer to discuss a juvenile offender's youth on the record before imposing life without parole. In fact, *no* case from the United States Supreme Court or this Court imposes such a requirement. Second, the sentencing judge below plainly considered Long's youth before imposing sentence; she simply decided that the seriousness of his crimes and the likelihood that he would reoffend trumped the mitigating force of his youth. At bottom, neither his interpretation of *Miller* nor his interpretation of the record withstands scrutiny.

A. Long's discretionary life-without-parole sentence does not violate the rule of *Miller v. Alabama* because *Miller* forbids only mandatory life-without-parole sentences.

The Eighth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, *see Robinson v. California*, 370 U.S. 660 (1962), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Miller v. Alabama*, the United States Supreme Court interpreted this text as forbidding "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. The operative word is *mandates*. The Court made clear that it did not establish a "categorical bar on life without parole for juveniles." *Id.* Instead, its holding addressed only "mandatory life without parole." *Id.* at 2460.

The opinion in *Miller* decided two similar cases: the Arkansas sentencing of Kuntrell Jackson for felony murder and the Alabama sentencing of Evan Miller for murder in the course of arson. *Id.* at 2461-63. Both Jackson and Miller were fourteen-year-olds whose crimes carried mandatory life-without-parole prison terms. *Id.* at 2462. In reviewing their sentences, the Supreme Court drew on "two strands of precedent reflecting [the Supreme Court's] concern with proportionate punishment." *Id.* at 2463. The first strand involves "categorical bans on

sentencing practices" for a certain class of offenders or a certain class of crimes. *Id.* For example, the Court has disapproved of life-without-parole sentences for juveniles convicted of nonhomicide crimes. *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010). The second strand involves the requirement that sentencers "consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2463-64. For example, the Court has disapproved of state sentencing systems that make the death penalty mandatory for certain offenses. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Tying those two strands together, *Miller* held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller*, 132 S. Ct. at 2464. In light of the "distinctive attributes of youth" and the severity of life-without-parole sentences, mandatory life-without-parole schemes "pose[] too great a risk of disproportionate punishment." *Id.* at 2465, 2469.

Miller therefore concerns proportionality. Following the decision in that case, a sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475. On one side of the constitutional line lie sentencing schemes that preclude sentencers from considering youth before sentencing juveniles to life without parole. And on the other side of the constitutional line lie sentencing schemes that permit sentencers to do so.

As *Miller* recognized, *id.* at 2467, this rule tracks the Supreme Court's individualized sentencing rules in the capital context. In 1972, the United States Supreme Court imposed a nationwide moratorium on capital punishment. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). Four years later, the Court lifted the moratorium and went about the task of establishing rules for when capital punishment may be imposed consistent with the Eighth Amendment. *See*

Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). Two primary guideposts emerged. First, the discretion that States vest in sentencers must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. Second (and more relevant to this case), States must not "'preclude[] [sentencers] from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)). Together these two principles ensure that capital punishment fits the crime.

It is this second principle—that sentencers not be precluded from considering relevant mitigating evidence—that *Miller* invoked in striking down mandatory life-without-parole schemes. The "constitutional defect" of the capital sentencing procedures that the Court has struck down based on this second principle "lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer." *Graham v. Collins*, 506 U.S. 461, 475 (1993). In the cases where the Court has disapproved such a sentence, "the sentencer was precluded from even considering certain types of mitigating evidence." *Id.* Because mandatory capital punishment schemes preclude sentencers from considering *any* mitigating evidence, they are unconstitutional. *See Woodson*, 428 U.S. at 305 (plurality opinion).

By importing this principle into the juvenile life-without-parole sentencing context, the United States Supreme Court established that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment" and that sentencers "must have the opportunity to consider mitigating circumstances before imposing" life without parole on a juvenile. *Miller*, 132 S. Ct. at 2464, 2475. Noting *Miller*'s limited reach, at least two state supreme courts have approved discretionary life-without-parole sentences where the sentencer had the opportunity to

consider an offender's youth. *See, e.g.*, *Murry v. Hobbs*, 2013 Ark. 64 at *3-4 (Ark. Feb. 14, 2013) (per curiam); *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012); *see also State v. Riley*, 58 A.3d 304, 307 (Conn. App. Ct. 2013), *discretionary review granted*, 61 A.3d 531 (Conn. Feb. 20, 2013) (No. SC 19109).

In this case, Long does not dispute that the trial court had discretion to impose either life imprisonment without the possibility of parole or a lesser sentence. *See* R.C. 2929.03(A)(1)(a)-(d). Nor does Long argue that Ohio law "prevent[ed] the sentencer from taking account of the[] central considerations" of Long's youth and its attendant characteristics. *Miller*, 132 S. Ct. at 2466. His sentence therefore does not violate the principle of individualized sentencing and easily satisfies the requirements of *Miller* and the Eighth Amendment.

B. *Miller* does not require a sentencer to discuss its consideration of a juvenile homicide offender's youth explicitly on the record before sentencing him to life without parole.

Long argues that *Miller* also prohibits a sentencer from imposing life without parole on a juvenile unless it first discusses the offender's youth explicitly on the record. That is not the law. Notably, Long cites nothing in *Miller* for this proposition, which makes sense because *Miller* does not require any specific verbal formulations. *Miller* addressed only mandatory life without parole. *See Miller*, 132 S. Ct. at 2464. To the extent the decision spoke more broadly, it was only to require that sentencers "have the *opportunity to consider* mitigating circumstances before imposing" life without parole on a juvenile. *Id.* at 2475 (emphasis added). But not one word of *Miller* requires an explicit, articulated analysis of a juvenile offender's youth.

That *Miller* did not involve a sentencer's on-the-record statements is also evident in its reasoning. As established above, *Miller* explicitly drew on the Supreme Court's individualized sentencing cases in the capital context to establish its life-without-parole rule. *See id.* at 2467. It is therefore significant—indeed *decisive*—that in the 37 years since *Gregg* lifted the nationwide

moratorium on capital punishment, the United States Supreme Court has never required sentencers to march through capital defendants' mitigation arguments on the record. Instead, the Court has held only that "a sentencer may not be *precluded* from considering, and may not *refuse* to consider, any relevant mitigating evidence offered by the defendant." *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (emphases added). The "individualized sentencing" protections of the Eighth Amendment are therefore "satisfied by allowing the [sentencer] to consider all relevant mitigating evidence." *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990). Drawing on these precedents, at least one other court has rejected a claim that *Miller* "impose[s] a sentencing practice for juveniles that would require express, on-the-record consideration of the defendant's age." *Riley*, 58 A.3d at 314 n.9, 315.

Relatedly, this Court has held in capital cases that the Federal Constitution does not require sentencers to give particular weight—or indeed any weight at all—to all of an offender's mitigating arguments. Although the General Assembly has given capital defendants "wide latitude to introduce any evidence" in mitigation, that "does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted." *State v. Steffen*, 31 Ohio St. 3d 111, 129 (1987); *see also Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."). Even if evidence offered in mitigation is relevant and admissible, the sentencer "may properly choose to assign absolutely no weight to this evidence if it considers it to be non-mitigating." *Steffen*, 31 Ohio St. 3d at 129. It follows that, from the perspective of the Eighth Amendment, some arguments in mitigation deserve more discussion than others. In the "subjective weighing process" that all sentencing involves, the emphasis given to a defendant's mitigating arguments

"must of necessity vary in order to account for the particular circumstances of each case." *Harris*, 513 U.S. at 515. Weighed against the severity of certain crimes and the character of certain defendants, some mitigating arguments warrant little discussion.

Ohio judges do not seem to be struggling with how to exercise their discretion in juvenile life-without-parole sentencing. As Long conceded, at the time of his memorandum seeking discretionary jurisdiction, only two juveniles (including Long) had received life without parole in Ohio. Long Jur. Mem. at 2. Since that time, Ohio trial judges have imposed life-without-parole sentences on only two additional juvenile offenders: the perpetrator of the Chardon High School shooting and the juvenile perpetrator of the Craigslist murders. *See* Sentencing Entry in *State v. Lane*, No. 12C000058 (Geauga Cnty. Ct. Com. Pl. Mar. 19, 2013); Sentencing Entry in *State v. Rafferty*, No. CR-2012-01-0169 B (Summit Cnty. Ct. Com. Pl. Nov. 13, 2012). Exercising their professional judgment, Ohio trial judges have reserved life-without-parole sentences for the most serious crimes. No intervention by this Court is necessary to ensure they will follow *Miller*'s charge that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 132 S. Ct. at 2469.

Finally, a constitutional requirement of on-the-record consideration would radically alter some States' life-without-parole sentencing schemes. Although judges are exclusively responsible for sentencing noncapital offenders in Ohio, *see* R.C. 2929.19, some States allow juries to sentence certain noncapital offenders. For example, Texas permits noncapital defendants to choose whether to be sentenced by a judge or a jury. *See* Tex. Code Crim. Proc. art. 37.07 §§ 1(b), 2(b); *id.* art. 26.14. When a defendant chooses jury sentencing, the trial judge has no authority to veto or alter that sentence. *Smith v. State*, 479 S.W.2d 680, 681 (Tex. Crim. App. 1972). Needless to say, when a jury sentences a juvenile homicide offender to life without

parole, it will not state its reasons on the record. The same is true of Ohio's capital sentencing system. No one would say that *Miller* renders jury sentencing schemes or Ohio's capital sentencing scheme unconstitutional, yet accepting Long's theory would jeopardize these longstanding sentencing practices. In the final analysis, Long is incorrect that *Miller* requires on-the-record consideration.

C. The sentencing judge below properly considered Long's youth.

Even though *Miller* does not require on-the-record discussion, the record demonstrates beyond a shadow of a doubt that the trial judge below did consider Long's youth before sentencing him. The wealth of evidence on this score precludes Long from "clearly and convincingly" showing that his sentence is "contrary to law." R.C. 2953.08(G)(2).

1. Ohio law presumes that sentencers have considered all relevant sentencing factors unless the defendant presents clear evidence to the contrary.

To understand what the trial court considered, it is helpful to understand how Ohio sentences noncapital felony offenders. In 1996, Ohio adopted broad reforms of its felony sentencing system. *See* Am. Sub. S.B. No. 2, 146 Ohio Laws, Part IV, 7136 (effective July 1, 1996). The General Assembly enacted a predominantly determinate sentencing system, designed in part to decrease sentencing disparities between similar offenders. *See State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856 ¶ 34. With this interest in mind, the Legislature enacted two guides for judicial discretion in sentencing. The first, R.C. 2929.11, directs sentencing courts to consider the "overriding purposes of felony sentencing," which are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). The second, R.C. 2929.12, directs sentencing courts to consider several statutory factors that either aggravate or mitigate the seriousness of a particular offense, several statutory factors indicating

that the offender will or will not reoffend, and "any other relevant factors" on those scores. R.C. 2929.12. Given the breadth of R.C. 2929.12, an offender's youth is a relevant mitigating factor.

Although the Revised Code requires sentencing authorities to take into account these considerations, Ohio law presumes that trial courts have done so absent clear evidence to the contrary. It does not require trial courts to give lengthy explanations for their rulings. In cases "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12," the Court will "presume[] that the trial court gave proper consideration" to those statutes. *Kalish*, 2008-Ohio-4912 ¶ 18 n.4 (plurality opinion); *cf. State v. Adams*, 37 Ohio St. 3d 295, syll. ¶ 3 (1988) ("A silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12."). Put another way, Ohio sentencing is not a check-the-box kind of exercise. Indeed, the Court has explicitly rejected such an approach, holding that sentencing courts need not "give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, 2006-Ohio-856 syll. ¶ 7.

The presumption that trial judges have considered all relevant mitigating arguments squares with Ohio's longstanding "presumption of regularity" that "attaches to all judicial proceedings." *State v. Raber*, 134 Ohio St. 3d 350, 2012-Ohio-5636 ¶ 19. For at least 160 years, the Court has recognized that "[t]he law will presume all to have been rightly done, unless the circumstances of the case overturn this presumption." *Ward v. Barrows*, 2 Ohio St. 241, 246 (1853). Absent clear evidence to the contrary, judges must be presumed to have complied with their legal obligations. *Cf. State v. White*, 15 Ohio St. 2d 146, 151 (1968) (invoking "the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary."). Given Ohio law's presumption of regularity and the fact that R.C. 2929.11 and

2929.12 do not require on-the-record consideration, even a silent record shows that the sentencer engaged in the proper considerations.

2. The record in this case shows that the trial court properly considered the mitigating effects of Long's youth before imposing sentence.

Buttressed by Ohio's presumption of regularity in sentencing, the record in this case shows that the trial judge properly considered the mitigating effects of Long's youth. For starters, the sentencing hearing came after the judge had presided over Long's trial for four weeks, making it exceedingly unlikely that she did not know that Long was 17 years old when he committed his crimes. *See* Sent. Tr. at 2803.

Any doubt on that score was removed by the arguments presented at sentencing. On four separate occasions, either Long or the State discussed the mitigating effects of youth. *First*, Long presented a sentencing memorandum pressing a single argument in favor of a shorter sentence: that Long's youth mitigated the seriousness of his crimes. *See* Long Sent. Mem. It noted that Long "was a juvenile at the time of the offenses" and therefore less culpable than his adult co-defendants. *Id.* at 3. The theme of his entire memorandum was that youths generally are "more vulnerable, more impulsive, and less self-disciplined" than adults. *Id.* When every word of the memorandum went to his youth, how can he say that the trial court missed the point?

Second, the State also addressed Long's youth in its sentencing memorandum. It noted that "[a]lthough Long was a juvenile at the time he participated in these violent crimes," other characteristics outweighed the mitigating effect of his youth. State Sent. Mem. at 1. Long "had already accumulated a long juvenile record for drug and weapons charges" and had spent time in Department of Youth Services custody. *Id.* The State requested a life-without-parole sentence for Long's aggravated murder charge in light of his "long criminal histor[y] and the senseless and indiscriminate violence perpetrated in this case." *Id.*

Third, at the sentencing hearing, Long's counsel again raised his youth as a mitigating factor, noting that "[a]s this Court is aware, he was 17 when this happened. He was a juvenile." Sent. Tr. at 2784. Counsel later repeated that "[h]e was a juvenile when this happened," which in counsel's view "put[] him in a different light than the other two individuals [Long's co-defendants]." *Id.* The trial court offered Long the opportunity to speak on his own behalf, but he chose not to do so. *Id.* at 2785.

Fourth, the presentations to the court concluded with argument from the prosecutor. On the subject of Long's age, the State acknowledged "that youth is usually a mitigating factor." *Id.* at 2802. But here "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." *Id.* To protect the public, the State asked the court to make them "stay where they cannot hurt anybody else, and give them a sentence of life without parole." *Id.* at 2803.

The trial court agreed with the prosecutor. The judge discussed Long's "violent history and record," *id.*, which Ohio law treats as relevant to whether an "offender is likely to commit future crimes." R.C. 2929.12(D). The court also discussed that Long does not "value human life" and shows "absolutely no remorse," Sent. Tr. at 2803, which goes to whether he showed "genuine remorse for the offense" and to Long's likelihood of recidivating. R.C. 2929.12(D)(5). Given all the evidence pointing toward the likelihood that Long would reoffend, the court concluded that there was "no doubt in [its] mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you." Sent. Tr. at 2803. To summarize the scope of her consideration, the trial judge said that she had "consider[ed] the risks that you[] will commit another offense, the need for protecting the public, [the] nature and circumstances of these offenses, [and] your history, character and condition." *Id.* The court therefore sentenced

Long to consecutive terms of life imprisonment without the possibility of parole on the aggravated murders. *Id.* at 2806-07.

As a matter of Ohio law, these statements reveal that the trial court properly considered Long's youth. The judge's entire sentencing statement echoes the factors laid out in Ohio's sentencing statutes. More particularly, having heard arguments regarding his youth on four distinct occasions, the judge's statement that she "consider[ed]" Long's "history, character and condition" shows that she considered the mitigating effects of his youth. That statement also tracks language that the United States Supreme Court has used in cases involving an offender's age. In *Eddings*, the Court spoke of youth as a "*condition* of life." *Eddings*, 455 U.S. at 115 (emphasis added). And in *Miller*, the Court discussed ways in which a juvenile's "*character* is not as 'well formed' as an adult's." *Miller*, 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)) (emphasis added); *cf. id.* at 2465 (discussing "the characteristics of youth"). Having used the same words that the Supreme Court has used repeatedly, the trial court below did not need to say more to prove that it had considered Long's youth.

What is more, Long's youth did not warrant a detailed statement given the content of the arguments Long offered on that score. His sentencing memorandum argued only that youth makes juveniles categorically less culpable than adults. Long Sent. Mem. at 1-3. Long did not argue, however, that anything particular to *him* and *his* childhood mitigated the seriousness of his crimes. *Miller* teaches us not only that juveniles differ from adults, but also that juveniles differ from one another. *See Miller*, 132 S. Ct. at 2467-69. Yet Long did not raise any particulars of his background that make him less culpable than other juveniles. He did not argue, for example, that his "family and home environment" reinforced the diminished culpability of youth. *Id.* at 2468. He did not argue that he could not "extricate himself" from a "brutal or dysfunctional"

family environment. *Id.* He did not argue that "incompetencies associated with youth" affected his "inability to deal with police officers or prosecutors" or his "incapacity to assist his own attorneys." *Id.* In short, Long's counsel raised Long's youth in the abstract, but offered nothing about the "wealth of characteristics and circumstances attendant to" youth that might make Long in particular less culpable. *Id.* at 2467. His conceptually straightforward argument did not call for a lengthy response. And given the severity of Long's crimes and the length of his criminal record, the trial court reasonably gave little mitigating weight to the fact that Long was 97 days shy of his eighteenth birthday when he killed Scott Neblett and Keith Cobb.

Against the weight of all this record evidence, Long responds only that when the trial judge announced her sentence, "none of her reasons included a consideration of youth as a mitigating factor." Long. Br. at 17. Although the court below omitted the word "youth" from its statement, trial judges need not utter a shibboleth to avoid reversal on appeal. Focusing on the magic word "youth" in a vacuum ignores the context of the arguments presented to the judge. No court could hear arguments about an offender's age on four separate occasions and fail to consider how youth played a role in the offenses. To argue otherwise diminishes the judgment of experienced trial judges.

To be sure, a sentencer could always give a longer and more detailed explanation for a sentence, and thorough explanations serve important interests. They inform appellate courts seeking to review the sentence, educate legislators seeking to improve sentencing statutes, and—perhaps most importantly—inform offenders seeking to understand the reasons behind the punishment they received. But those interests tell us only that thorough explanations are recommended as good public policy, not required by the Constitution.

That is why, when Long's *amicus* lays out a six-part test that it believes the Constitution requires, it cites not a decision of any court but statutes enacted by legislatures. *See* Juvenile Law Center Br. at 8 & n.2 (citing Pennsylvania and North Carolina statutes). Citing statutes to argue for a constitutionally compelled rule goes nowhere. Perhaps a judge would do well to consider all six factors that the organization cites. Perhaps the General Assembly will even require such consideration someday. But nothing in the case law of this Court or the United States Supreme Court imposes such exhaustive, on-the-record discussion. The sentencing below was constitutionally adequate.

D. Long's arguments to the contrary lack merit.

Long offers several arguments challenging the constitutionality of his sentence. None of them alters the reality that the sentencing judge complied with the Eighth Amendment.

To start with what Long describes as a "threshold question": He believes the Court must analyze the jury instructions below to decide first whether Long committed a "homicide" offense within the meaning of *Miller*. Long Br. at 10-11. In his view, if the jury instructions were improper, this Court must remand for resentencing. But any jury-instruction issue is not properly before the Court because Long has waived it in at least three ways. First, he failed to object to the jury instructions in the trial court. *See* Sent. Tr. at 2446, 2452; *State v. Underwood*, 3 Ohio St. 3d 12, 13 (1983) (failure to object to jury instructions waives all but plain error). Second, he did not raise a jury-instruction claim in the court of appeals, and "[t]hus, the issue has been waived." *State v. Scudder*, 71 Ohio St. 3d 263, 272 (1994). And third, he did not include such an argument in his memorandum seeking jurisdiction in this Court. *See State v. Chappell*, 127 Ohio St. 3d 376, 2010-Ohio-5991 ¶ 26 (Because the defendant "did not seek this court's discretionary jurisdiction over these issues," this Court "will not consider them."). Because

Long failed to preserve a jury-instruction argument, this issue lies beyond the scope of the Court's review.

The same problem afflicts Long's argument relying on the Ohio Constitution. An argument based on Article I, Section 9 of the Ohio Constitution was absent from Long's trial court presentation. It was missing from his appellate briefing. And it is nowhere to be found in his memorandum in support of discretionary jurisdiction here. Long cannot raise this novel argument at such a late hour.

That leaves Long's arguments addressing the only issue he *did* preserve: whether the Eighth Amendment requires a sentencing judge to recite on the record that she considered a juvenile offender's youth before sentencing him to life without parole. On that score, he relies on *Penry v. Johnson*, 532 U.S. 782 (2001), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), for the argument that "[t]he record must show that the trial court fully considered youth as a mitigating factor." Long Br. at 15. The *Penry* cases do not establish that sentencers must state their consideration on the record. Instead those cases involve a sentencer that was utterly unable to consider a defendant's mitigating evidence. Penry offered evidence of his mental disability and of childhood abuse, but the "jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." *Lynaugh*, 492 U.S. at 320. Penry's sentencing violated the Federal Constitution not because the sentencer failed to state on the record that it had considered the evidence; it violated the Federal Constitution because the sentencer was precluded by Texas law from considering the evidence at all.

Long further objects to his sentence on the ground that "the State argued that youth was an *aggravating* factor." Long Br. at 17. A careful reading of the State's arguments proves

otherwise. The State first raised the issue of Long's youth in its sentencing memorandum, where it argued that "[a]lthough Long was a juvenile at the time he participated in these violent crimes, he had already accumulated a long juvenile record for drug and weapons charges." State Sent. Mem. at 1. In other words, the State acknowledged that Long's youth was a mitigating factor, but argued that Long's criminal history outweighed the mitigating force of youth. In its oral presentation, the State explicitly recognized "that youth is usually a mitigating factor," but argued that Long and his co-defendants are "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." Sent. Tr. at 2802. Again, that amounts to an argument that Long's lack of remorse outweighs the mitigating effect of youth. Long correctly recognizes that the State also argued that the defendants' youth "means that even after thirty years they could still pose a danger to society," State Sent. Mem. at 4, but in the broad context of all of the State's sentencing arguments, the State's overall theme was that the seriousness of Long's offenses and the likelihood that he would reoffend trumped the mitigating force of youth.

Moreover, Long gains no support from the decisions of other state supreme courts. Start with *Bear Cloud v. State*, 294 P.3d 36 (Wyo. 2013), which Long reads as supporting his constitutional attack on Ohio's sentencing statutes. Like the defendant here, the defendant in *Bear Cloud* was a juvenile convicted of felony murder. *Id.* at 39. But unlike the defendant here, the defendant in *Bear Cloud* received a life-without-parole sentence *under a mandatory sentencing scheme*. *Id.* at 40, 45. The mandatory nature of Bear Cloud's sentence distinguishes it from the sentence at issue here. Long was not sentenced to life without parole under a mandatory scheme. Instead, the trial court could—and, as explained above, did—consider the mitigating effects of his youth before imposing sentence. Because the sentencer in *Bear Cloud*

could not do so, its holding does not support Long's argument, and the constitutional problems with Wyoming's statutes do not afflict Ohio's statutes.

Long also seeks support from *Conley v. State*, 972 N.E.2d 864 (Ind. 2012), where the Indiana Supreme Court upheld that State's juvenile life-without-parole sentencing scheme against a *Miller* challenge. Long holds up the "30-page sentencing statement" in that case as the standard this Court should apply in Ohio. Long Br. at 19. Yet *Conley* hurts rather than helps Long. The court in that case concluded that in Indiana "life without parole for juveniles was discretionary, and therefore not unconstitutional in violation of the Eighth Amendment." *Conley*, 972 N.E.2d at 876. Long's life-without-parole sentence was discretionary, too, and likewise not in violation of the Federal Constitution. As for *Conley*'s sentencing statement: Nothing in that case suggests that such detail is required by the Constitution, and in fact the Indiana Supreme Court mentioned the trial court's thoroughness only in evaluating whether the sentencing violated state law, not whether it violated the Eighth Amendment. *See id.* at 875.

Finally, the markedly different sentencing schemes in Ohio and California reveal why Long's reliance on *People v. Siackasorn*, 149 Cal. Rptr. 3d 918 (Cal. Ct. App. 2012), is misplaced. *See* Long Br. at 18-19. In California, life without parole is the "presumptive punishment" for juveniles convicted of homicide. *People v. Guinn*, 33 Cal. Rptr. 2d 791, 797 (Cal. Ct. App. 1994). Although sentencers have discretion to impose a lesser sentence, they must overcome the presumption to do so. *See* Cal. Penal Code § 190.5(b). Ohio law has no such presumption. Because *Siackasorn*'s constitutional analysis was based primarily on the role of the life-without-parole presumption in California law, that case is irrelevant to the question here. And in any event, the California Supreme Court has agreed to review the judgment in

Siackasorn. *See* Order in *People v. Siackasorn*, No. S207973 (Cal. Mar. 20, 2013). So the appellate court's decision soon may not represent California's view of the law.

All of this proves that nothing from the record, nothing from United States Supreme Court precedent, and nothing from the case law of this Court or any other state supreme court supports Long's argument. He would have the Court impose, as a constitutional imperative, a rigorous requirement of on-the-record consideration that would alter longstanding Ohio law. Absent a clear indication from *Miller* that the Eighth Amendment imposes such a requirement, the Court should reject Long's attack on his sentence.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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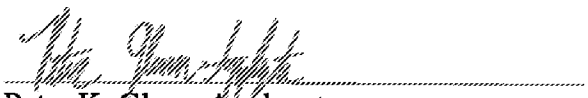

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