In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2021-1158
	:	
Appellee,	:	On Appeal from the
	:	Ashland County
v.	:	Court of Appeals,
	:	Fifth Appellate District
TYLER MORRIS,	:	
	:	Court of Appeals
Appellant.	:	Case No. 20-COA-015

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

BRIAN A. SMITH (0083620)
Brian A. Smith Law Firm, LLC
123 South Miller Road, Suite 250
Fairlawn, OH 44333
(t) 330-701-1750
(f) 330-247-2191
attybsmith@gmail.com

Counsel for Appellant
Tyler Morris

CHRISTOPHER R. TUNNELL (0072036)
Ashland County Prosecutor's Office
NADINE HAUPTMAN (0070810)
Assistant Prosecuting Attorney
110 Cottage Street, Third Floor
Ashland, OH 44805
(t) 419-289-8857
(f) 419-281-3865
ctunnell@ashlandcounty.gov

Counsel for Appellee
State of Ohio

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
DIANE R. BREY (0040328)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

This case presents the following question: Does the Eighth Amendment to the United States Constitution require courts to expressly consider a juvenile murderer's age before sentencing him to life with the possibility of parole? The answer to that question is "no." The Supreme Court of the United States has interpreted the Eighth Amendment as requiring courts to observe certain procedural protections before sentencing juvenile offenders to life *without* the possibility of parole. In particular, before imposing such a sentence, courts must hold a "hearing where youth and its attendant characteristics are considered as sentencing factors." *Jones v. Mississippi*, 141 S. Ct. 1307, 1317 (2021) (citation and quotation omitted). But it recently clarified that sentencing courts need not *expressly* consider an offender's age even in the life-without-parole context—it is enough to hold a hearing where age can be considered. *Id.* That decision overrules *State v. Patrick*, 164 Ohio St. 3d 309, 2020-Ohio-6803—which held that courts must make an "on the record," *id.* at 320 ¶3, consideration of a juvenile's age before imposing a life sentence—to the extent *Patrick* rests on the Eighth Amendment.

In this case, the trial court sentenced Tyler Morris to life with the possibility of parole. And it did so after holding a hearing at which youth and its attendant characteristics were considered. Thus, as the Fifth District correctly recognized, Morris's sentence comported with the Eighth Amendment. This Court should affirm.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in maintaining the correct construction and application of Ohio's sentencing structure for juveniles who commit crimes, and in defending that system against constitutional challenges.

STATEMENT OF THE CASE AND FACTS

1. In June 2019, seventeen-year-old Tyler Morris packed a Ruger .22 firearm in his bookbag. Gun in tote, he and Michael Watson went to a motel in Ashland, Ohio. They intended to deal drugs. *State v. Morris*, 5th Dist. Ashland App. No. 20-COA-015, 2021-Ohio-2646, ¶3 ("App.Op."). Upon arriving, Morris entered a motel room and sold half a gram of methamphetamine to Timothy Maust and Elizabeth Bunnell. Maust and Bunnell agreed to pay $50. But Bunnell took the drugs without paying, pushed Morris out of the room, and slammed the door. Morris called his supplier, who told Morris to go back and get his drugs or his money. *Id.*; *see id.* at ¶65.

The next day, Morris and four of his associates went back to the motel, hoping to take back either the money or the drugs. But the group aborted the plan, because they thought they heard Bunnell calling the police. *Id.* at ¶¶5–6. Undeterred, Morris met the next day with three of his associates, including Watson. He told them to go back to the

motel, kick in the door, and retrieve the drugs. *Id.* at ¶7. But this second effort at recoupment fared no better than the first: once the group arrived, a friend of Maust chased them away. *Id.* at ¶8. Watson and the others returned to Morris's house, and the group discussed shooting "the house up" if Maust and Bunnell did not have the drugs or the money. The group also discussed collecting the shell casings. *Id.* (quotation omitted). Later that evening, Morris gave the Ruger to Watson and told him to "shoot at least four times" when he went back to the motel to try to collect Morris's money or drugs. *Id.* at ¶10 (quotation omitted). Watson testified that he understood that he was to shoot four times, and understood that Morris wanted him to shoot Maust and Bunnell. *Id.*

Watson and two others returned to the motel. Watson kicked in the door to the room. *Id.* at ¶11. Bunnell yelled at Watson. Watson then shot at Maust and Bunnell six times. He fled only once the gun jammed after the sixth shot. At that point, the damage was done: while Bunnell survived a gunshot to the neck, Maust died of shots to the head and chest. *Id.* at ¶11–12. Police located and arrested Morris, who eventually admitted that he gave Watson the gun and that, after the shooting, he disassembled the gun and hid it in his room. *Id.* at ¶14. After initially being charged with delinquency for complicity to aggravated murder and complicity to attempted aggravated murder, both with firearm specifications, Morris's case was bound over to the Ashland County Court of Common Pleas. *Id.* at ¶15.

2. A grand jury indicted Morris for numerous felonies, including complicity to aggravated murder and complicity to attempted aggravated murder. *Id.* at ¶16. A jury convicted him of those and several other felonies, while acquitting him of several other counts. *Id.* at ¶20.

At the sentencing hearing, Morris's counsel urged the court to sentence him to the "lower range [of] what is available to the court" based on Morris's age, and other factors, including the prospect of rehabilitation. *See* April 20, 2020 Sentencing Transcript, at 5. The prosecutor acknowledged Morris's age in his own sentencing argument, too. *Id.* at 14.

The trial court imposed a sentence of life with the possibility of parole. The court stated that it had reviewed the documents submitted by Morris's counsel. Further, it had considered and weighed the "purposes and principles of Ohio sentencing statutes," *id.* at 15, along with "the various factors the Court must consider and weigh," *id.* at 16. In light of all that, and after merging some of the offenses, the trial court imposed the following individual sentences: (1) life with parole eligibility after twenty-five years for complicity to aggravated murder; (2) an indefinite term of ten to fifteen years for complicity to attempted aggravated murder, with a three-year prison term on the gun specification, all to be served consecutively to each other; and (3) various other sentences relating to complicity to aggravated robbery, unlawful transaction in weapons, and aggravated trafficking in drugs, all to be served concurrently with the

murder sentence. *Id.* at 20. All told, Morris would be eligible for parole in thirty-eight to forty-three years. *Id.*

3. The Fifth District Court of Appeals affirmed Morris's sentence. App.Op., ¶¶1, 108. Relevant here, it rejected Morris's argument that the trial court's imposition of the sentence violated *State v. Patrick*, 164 Ohio St. 3d 309. App.Op., ¶¶80–86. The court acknowledged that *Patrick* had interpreted the Eighth Amendment as requiring trial courts "to consider and articulate [their] consideration of the offender's youth as a mitigating factor" when imposing a sentence that includes the possibility of life imprisonment for a juvenile offender. *Id.* at ¶81 (citing *Patrick*, 164 Ohio St. 3d 309, ¶2). But a later-decided case by the Supreme Court of the United States—*Jones v. Mississippi*, 141 S. Ct. 1307—effectively overruled that portion of *Patrick*. App.Op., ¶¶84–85. *Jones* "clarified that although the Eighth Amendment requires that, before sentencing a juvenile murderer to" life without parole "a trial court must hold a sentencing hearing where the defendant's age and characteristics of children are *considered*," the Eighth Amendment *does not* "require[] a sentencer to say anything on the record about youth and its attendant characteristics before imposing" a life-without-parole sentence. App.Op., ¶85. Based on *Jones*, the Fifth District rejected Morris's challenge to his sentence. *Id.* at ¶86.

4. Morris filed a discretionary appeal, and this Court granted review on the following proposition of law:

> A trial court that sentences a defendant to life in prison, for an offense committed when the defendant was a juvenile, violates Article I, Section 9 of the Ohio Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution, when the trial court fails to consider the defendant's youth as a factor in sentencing.

See 12/14/2021 Case Announcements, 2021-Ohio-4289.

ARGUMENT

<u>*Amicus* Attorney General's Proposition of Law:</u>

> *Neither the Eighth Amendment to the United States Constitution nor Article I, Section 9 of the Ohio Constitution requires a trial court, before sentencing a juvenile homicide offender to life with the possibility of parole, to make an on-the-record determination about the significance of the offender's age.*

Both the United States and Ohio constitutions forbid the imposition of "cruel and unusual punishments." *See* U.S. Const., amend. VIII; Ohio Const., art. I, §9. The high courts of this State and the United States have interpreted this language to guarantee special protections for juvenile offenders. Consider *Miller v. Alabama*, 567 U.S. 460 (2012). That case held that trial courts may sentence a juvenile murderer to life without the possibility of parole, "but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." *Jones*, 141 S. Ct. at 1311. Consider also *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, which interpreted *Miller* as requiring that courts "separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole." *Id*. at ¶1. Finally, consider *State v. Patrick*, 164 Ohio St. 3d 309. *Patrick* held that the same rules governed

the imposition of a sentence of life *with* the possibility of parole after thirty-three years. And, of particular importance to this case, *Patrick* held that courts must "articulate on the record whether, and how, [they] considered" an offender's youth before imposing such a sentence. *Id*. at ¶42.

This latter aspect of *Patrick* was called into question by *Jones v. Mississippi*, 141 S. Ct. 1307, which held that *Miller* does not require sentencing courts to make on-the-record considerations about an offender's youth. Instead, *Miller* requires only that sentencing courts have an opportunity to consider the offender's youth and to impose a sentence less severe than life without the possibility of parole. *Id*. at 1314.

In this case, the trial court sentenced Morris to life *with* the possibility of parole. While it held a hearing at which Morris's age was discussed, it did not articulate on the record its consideration of Morris's age. This case thus presents the question whether, by failing to make such a finding, the trial court violated the Eighth Amendment to the federal constitution or Article I, Section 9 of the Ohio Constitution. The answer is "no." As an original matter, neither the Eighth Amendment nor Article I, Section 9 forbade such a sentence. Precedent leads to the same conclusion. While *Patrick* required an on-the-record consideration, *Jones* overruled *Patrick*'s Eighth Amendment holding. Morris does not argue that Article I, Section 9 guarantees protection over and above the Eighth Amendment. *See* Morris Br. at 6. Regardless, in light of *Jones*, there is no sound basis

for reading the Ohio Constitution as requiring trial courts, before imposing a life sentence, to make an on-the-record consideration of a juvenile offender's age.

A. Neither the Eighth Amendment nor Article I, Section 9 requires courts to articulate, on the record, consideration of a juvenile offender's age before imposing a life sentence.

The Eighth Amendment and Article I, Section 9 both prohibit "cruel and unusual punishments." The text of these provisions does not require courts to expressly consider a juvenile murderer's age before imposing a life sentence. Neither do the United States Supreme Court's Eighth Amendment cases or this Court's decisions discussing Article I, Section 9.

A note for the reader: The Attorney General already addressed many of these issues in briefs filed in other cases. *See* Br. of *Amicus Curiae* Ohio Attorney General Dave Yost, *State v. Patrick*, No. 2019-655 (Nov. 21, 2019); Br. of *Amicus Curiae* Ohio Attorney General Dave Yost, *State v. Gwynne*, No. 2021-1033 (Mar. 11, 2022). This brief borrows substantially from those briefs.

1. As originally understood, the "cruel and unusual punishments" clauses permit the sentence imposed on Morris.

Constitutional language must be interpreted according to the "common understanding of the people who framed and adopted" it. *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). So before considering the meaning of judicial precedents, it makes sense to consider first the meaning of the constitutional text itself. After all, courts must read binding precedents "in light of and in the direction of the constitutional text and

constitutional history." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part and rev'd in part by* 561 U.S. 477 (2010). In recent years, the United States Supreme Court seemingly has embraced this principle in its Eighth Amendment cases, refusing to extend past decisions any further beyond the Amendment's original meaning. *See, e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123–25 (2019).

With that in mind, this brief examines the original meaning of the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution.

The Eighth Amendment. The Eighth Amendment, which applies to the States through the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The ban on "cruel and unusual punishments," as originally understood, prohibited certain "*methods*" of corporal punishment. *Bucklew*, 139 S. Ct. at 1123, 1124 (emphasis added). Specifically, it banned "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Id.* at 1124 (alterations, citations, and internal quotation marks omitted).

That is as far as the Eighth Amendment went. Thus, the Eighth Amendment's prohibition on cruel and unusual punishments, as originally understood, "relates" only "to the character of the punishment, and not the process by which it is imposed." *See*

United States v. Tsarnaev, 142 S. Ct. 1024, 1037 n.2 (2022) (quotation omitted). What is more, because the Eighth Amendment's prohibition relates only to the *character* of the punishment imposed, it was not originally understood to require sentences proportionate to the severity of the crime committed. *See id*.; *Graham v. Florida*, 560 U.S. 48, 98–102 (2010) (Thomas, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 974–85 (1991) (opinion of Scalia, J.).

In light of all this, there is no plausible argument that the Eighth Amendment, as originally understood, required courts to consider offenders' ages before imposing a sentence. Such a restriction would go to the process, not the method of punishment. And to the extent proportionality concerns justify the special treatment of juveniles, the Eighth Amendment contained no proportionality restrictions. Further, at the time of the Eighth and Fourteenth Amendments' ratifications, States subjected juveniles to the same severe penalties as adults, including death. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (opinion of Scalia, J.); *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring, joined by Ginsburg, J.); *id.* at 589 (O'Connor, J., dissenting); *see also* Stuart Banner, *The Death Penalty: An American History* 1–2 (2002). That forecloses any argument that the Eighth Amendment was understood as requiring special treatment of juvenile offenders—let alone on-the-record findings about the significance of the offender's age.

Article I, Section 9. Article I, Section 9 of the Ohio Constitution was originally understood the same way. The People of Ohio ratified their own cruel-and-unusual-punishments clause in 1803, and retained it largely verbatim in the 1851 Constitution. They used the same words as the Eighth Amendment: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Ohio Const., art. I, §9*; see also State v. Weitbrecht*, 86 Ohio St. 3d 368, 370 (1999). Given that the People ratified this provision barely a decade after the Eighth Amendment's ratification, it is reasonable to assume, absent historical evidence to the contrary, that Ohioans meant their guarantee to provide the very same protections.

There is no contrary historical evidence. What is more, there is affirmative evidence that Article I, Section 9 does not require proportionate sentences. Ohio's 1803 Constitution included, in addition to the precursor to Article I, Section 9, a separate provision that specifically required the legislature to adopt "penalties … proportioned to the nature of the offence." Ohio Constitution of 1803, art. VIII, §14. The full text of that provision read:

> Punishment to be proportioned to offense.
>
> > All penalties shall be proportioned to the nature of the offense. No wise Legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the slightest offenses. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust;

> the true design of all punishments being to reform, not to exterminate mankind.

The fact that the 1803 Ohio Constitution included this provision *in addition to* the cruel-and-unusual-punishments language shows that the prohibition on cruel-and-unusual punishments language *was not* understood to ban disproportionate sentences. If it were, the proportionality requirement in Section 14 would have been superfluous.

The inclusion of this proportionality language matters because, at the 1851 constitutional convention, the People of Ohio dropped the proportionality requirement while retaining the prohibition on cruel and unusual punishments. The records of the debates on the 1851 Constitution do not discuss the proportionality provision or explain why it was not continued in the 1851 Constitution. *See* Ohio Convention Debates (1851) vol.2 at 328 (discussing art. I, §9). But because the cruel-and-unusual-punishments clause would not have been understood to require proportionate sentences, and because the People dropped the proportionality requirement while retaining the cruel-and-unusual-punishments clause, the only logical conclusion is that the Constitution today contains no right to proportionate sentences. This provides further evidence that the language of Article I, Section 9 of the Ohio Constitution does not require unique treatment of seventeen-year-old homicide offenders.

Although Article I, Section 9 and the Eighth Amendment mean roughly the same thing, both served an independent and important purpose. Before the Fourteenth Amendment's ratification in 1868, the Bill of Rights applied only against the federal

government. *See Barron v. Baltimore*, 32 U.S. 243, 250 (1833). Thus, the People of Ohio, in 1803 and 1851, would have been without any protection against cruel and unusual punishments imposed by the State had they not ratified a cruel-and-unusual-punishments clause of their own.

This Court's caselaw confirms that Article I, Section 9's original meaning mirrors that of the Eighth Amendment. One case, for example, recognizes that the identically worded provisions were both originally understood as applying only in "extremely rare cases" to protect individuals from "inhumane punishment such as torture or other barbarous acts." *Weitbrecht*, 86 Ohio St. 3d at 370. Another case, closer in time to the 1851 ratification, provides further evidence of Section 9's original meaning. The Court, looking to cases interpreting the Eighth Amendment, explained that Article I, Section 9 prohibited "punishments of torture, such as those … where the prisoner was drawn and dragged to the place of execution," "emboweled alive; beheaded and quartered," burned alive, or subjected to other execution methods "in the same line of unnecessary cruelty." *Holt v. State*, 107 Ohio St. 307, 314 (1923) (quoting *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878)). So, as with the Eighth Amendment, Section 9 prohibited only unconstitutional *forms* of punishment.

Whatever Article I, Section 9 meant originally, the provision did not prohibit long terms of incarceration for juveniles convicted of homicide offenses. As a matter of original public meaning, the Ohio Constitution even allowed for the execution of

juvenile murderers who were at least fifteen at the time of their crimes. For example, in 1880, the State sentenced to death and executed three juvenile offenders in Canton for their role in two homicides. Victor L. Streib, *Death Penalty for Juveniles* 132–34 (1987). This trend continued. From 1880 through 1956, Ohio executed nineteen individuals for murders committed while they were less than eighteen years of age. *Id.* at 131, 202–03. And before *Roper* and *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court had upheld the application of the death penalty to juvenile murderers, concluding that the punishment did not violate the Ohio Constitution. *See State v. Harris*, 48 Ohio St. 2d 351, 359 (1976), *vacated*, 438 U.S. 911 (1978).

None of these cases upholding these sentences even hinted at a constitutional requirement to consider the offender's age—expressly or otherwise—as a mitigating factor. As such, there is no evidence that anyone alive at the time of Article I, Section 9's ratification—or for many decades thereafter—understood it as requiring courts to account for a juvenile's age in the manner Morris suggests.

*

In sum, the Eighth Amendment and Article I, Section 9 were originally understood as permitting the execution of juvenile murderers, without regard to whether the sentencing judge considered (expressly or otherwise) the offender's age. It follows that neither provision, as originally understood, would have required the

sentencing judge to expressly consider the offender's age before imposing a sentence of life with the possibility of parole. Morris does not contend otherwise.

2. Precedent does not require on-the-record consideration of age before the imposition of a life sentence.

Excessiveness and juveniles. Courts have read into the Eighth Amendment and Article I, Section 9 a ban on sentences that are "disproportionate to the crime." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, ¶25. Thus, even though neither provision speaks to the excessiveness of a sentence, courts today interpret both as guaranteeing "the right not to be subjected to excessive sanctions." *Miller*, 567 U.S. at 469 (quoting *Roper*, 543 U.S. at 560); *accord In re C.P.*, 131 Ohio St. 3d 513, ¶25.

Applying this anti-excessiveness principle, the United States Supreme Court has held that certain otherwise-permissible sentences are unconstitutional as applied to juveniles. For example, juveniles may not be sentenced to death. *See Roper*, 543 U.S. at 578. They may not be sentenced to life without the possibility of parole for non-homicide offenses. *Graham*, 560 U.S. at 69, 75. After *Graham*, this Court has held that juveniles may not be sentenced to "a term-of-years prison sentence that exceeds [the] defendant's life expectancy." *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, ¶1. Nor may juvenile sex offenders be "automatically subject to mandatory, lifetime sex-offender registration and notification requirements." *In re C.P.*, 131 Ohio St. 3d 513, ¶1. And while courts *may* sentence juvenile murderers to life without the possibility of parole, they may do so only if the law leaves the sentencing court free to impose a lesser

sentence based on the offender's "age and age-related characteristics." *Miller*, 567 U.S. at 489; *see also Long*, 138 Ohio St. 3d 478, ¶1.

Each of these decisions rests on the same fundamental insight: "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. Specifically, there are "three significant gaps between juveniles and adults," all of which suggest juveniles are "less deserving of the most severe punishments." *Id*. (quoting *Graham*, 560 U.S. at 68). *First*, "children"—an admittedly odd word to describe any murderer who was at least "one day short of voting" at the time of his crime, *Montgomery v. Louisiana*, 577 U.S. 190, 225 n.2 (2016) (Scalia, J., dissenting)—"have a lack of maturity and an underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking." *Long*, 138 Ohio St. 3d 478, ¶12 (quoting *Miller*, 567 U.S. at 471). "*Second*, children 'are more vulnerable … to negative influences and outside pressures.'" *Id*. (quoting *Miller*, 567 U.S. at 471) (emphasis added). *Finally*, "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*. (quoting *Miller*, 567 U.S. at 471).

Together, these traits leave open the question whether a juvenile's "commission of a crime is the result of immaturity or of irredeemable corruption." *Moore*, 149 Ohio St. 3d 557, ¶42. Together, they suggest that the principal purposes of criminal law—deterrence, retribution, and rehabilitation—are not always well served by sentencing

juveniles to the "harshest possible penalty." *Miller*, 567 U.S. at 472–73, 479. And together, they give rise to the "most important attribute of the juvenile offender": the "potential for change." *Moore*, 149 Ohio St. 3d 557, ¶42. This potential for change, the courts have decreed, requires protecting juveniles from a categorical, "final determination while they are still youths that they are irreparably corrupt and undeserving of a chance to reenter society." *Id.* Thus, while neither the state nor the federal constitution "foreclose[s] the possibility that a defendant who commits a heinous crime as a youth will indeed spend his entire remaining lifetime in prison," the State must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. ¶44 (quoting *Graham*, 560 U.S. at 75); *see also Long*, 138 Ohio St. 3d 478, ¶34 (O'Connor, C.J., concurring).

This Court, in *State v. Patrick*, 164 Ohio St. 3d 309, held that the Eighth Amendment requires a sentencing court, before sentencing a juvenile to a sentence of life with the possibility of parole after thirty-three years, to expressly consider the offender's age "on the record." *Id*., ¶¶31, 36, 42, 48. *Patrick* thus extended the decision in *Long*, which held that "[a] court, in exercising its discretion under R.C. 2929.03(A), must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole." 138 Ohio St. 3d 478, syllabus ¶¶1, 2. *Patrick*, like *Long* itself, rested on this Court's reading of the Eighth Amendment to the United States Constitution. *See Patrick*, 164 Ohio St. 3d 309, ¶¶29–30, 33, 36–37; *Long*,

138 Ohio St. 3d 478, ¶¶1, 7, 29. Despite this Court's brief citation of Article I, Section 9 of the Ohio Constitution in *Patrick*, *see* 164 Ohio St. 3d 309, ¶2, the decision itself discusses only the Eighth Amendment—and cases construing it—as the basis for its decision.

Several months after *Patrick* was decided, the nation's high court issued its decision in *Jones v. Mississippi*. It held that the Eighth Amendment *does not* require a trial court's consideration of youth to be expressed on the record. 141 S. Ct. at 1318–19; *id.* at 1314–15. *Jones* thus squarely rejected a proposition that *State v. Patrick* (and *State v. Long*) adopted—namely, that the Eighth Amendment forbids imposing life sentences on juveniles unless the "'record … reflect[s] that the court specifically considered the juvenile offender's youth as a mitigating factor at sentencing.'" *Patrick*, 164 Ohio St. 3d 309, ¶42 (quoting *Long*, 138 Ohio St. 3d 478, ¶27). *Jones* thus effectively overruled *Patrick* in this regard.

B. The sentence imposed in this case accords with the Eighth Amendment's original meaning and with precedent.

1. Because the Eighth Amendment (like Article I, Section 9) speaks only to methods of punishment, not procedures for imposing punishment, the trial court in this case could not have violated the Amendment by failing to make an express, on-the-record finding about the relevance of Morris's age. So as an original matter, the sentence comports with both the Eighth Amendment and with Article I, Section 9.

It comports with precedent, too. *Jones*'s interpretation of the Eighth Amendment binds this Court. *See generally Kansas v. Carr*, 577 U.S. 108 (2016); *see also Am. Ass'n of Univ. Professors v. Central State Univ.*, 83 Ohio St. 3d 229 (1998), *rev'd*, 526 U.S. 124 (1999), *appeal after remand*, 87 Ohio St. 3d 55 (1999). And *Jones* held that the Eighth Amendment imposes no obligation to either make a separate factual finding of permanent incorrigibility of a juvenile defendant, or to provide an on-the-record sentencing explanation of the court's consideration of a juvenile defendant's age, before imposing a life sentence. *See* 141 S. Ct. at 1318–19. Therefore, the trial court below could not have violated the Eighth Amendment by failing to make an on-the-record finding of this sort.

The Court should not evade *Jones* by holding that Article I, Section 9 requires the sort of express consideration the Eighth Amendment does not. For one thing, Morris has not argued that Article I, Section 9 means something different than the Eighth Amendment. So the question is not properly before the Court. *See* Morris Br. at 6. More fundamentally, no such interpretation of Section 9 would be justified. As discussed above, it would be inconsistent with Section 9's original meaning.

2. Morris's contrary arguments all fail.

As an initial matter, Morris has failed to show that the trial court ignored his youth before sentencing him to life imprisonment. The trial court stated that it considered the purposes and principles of sentencing (under R.C. 2929.11 and 2929.12) before sentencing Morris. Sentencing Transcript at 15–16. After *State v. Long*, 138 Ohio

St. 3d 478, ¶18, the purposes and principles of sentencing under those statutes include consideration of a juvenile's youth and its attendant factors. Additionally, Morris's counsel argued for a more lenient sentence because of Morris's youth. Sentencing Transcript at 5. Accordingly, Morris's claim that the trial court failed to consider his youth and attendant characteristics before imposing his sentence, Morris Br. at 13, is hard to square with the record.

The fact that the trial court never expressed its consideration of Morris's age *on the record* gets Morris nowhere. Again, *Jones* rejected the proposition that courts must make any such express consideration. Morris tries to distinguish *Jones* in a way that would preserve *Patrick*'s Eighth Amendment ruling, but to no avail. Morris Br. at 15–16. Thus, the argument goes, *Jones* and *Patrick* are wholly consistent. According to Morris, *Patrick* did not require trial courts to make a "specific finding" that a juvenile was "permanent[ly] incorrigib[le]." Morris Br. at 15–16 (citing *Jones*, 141 S. Ct. at 1313). This argument has two rather serious problems. First, it would not help Morris if it were true—even if *Patrick* did not require an on-the-record explanation with an implicit finding of permanent incorrigibility, *cf.* Morris Br. at 16, then the trial court could not have violated *Patrick* by (allegedly) failing to make such a finding or on-the-record explanation. Second, Morris's argument rests on a blatant misreading of *Patrick*. That decision held that life sentences violate the Eighth Amendment unless the "record … reflect[s] that the court specifically considered the juvenile offender's youth as a

mitigating factor at sentencing" before imposing a prison term that may extend to the juvenile's life. 164 Ohio St. 3d 309, ¶42 (quoting *Long*, 138 Ohio St. 3d 478, syllabus ¶2). And this Court reversed Patrick's sentence of life with parole eligibility after thirty-three years because the Court determined that the "sentencing court failed to *articulate on the record* whether, and how, it considered Patrick's youth in sentencing." 164 Ohio St. 3d 309, ¶42 (emphasis added). That on-the-record consideration is exactly what *Jones* held was not constitutionally required.

The inconsistency of *Jones* and *Patrick* is even more obvious given *Jones*'s explanation for why "an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth." *Id.* at 1319. *Jones* explained that, "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if the defense counsel advances an argument based on the defendant's youth." *Id.* These observations in *Jones* cannot be squared with *Patrick*'s pronouncement that "[i]t is not enough to assume that the trial court must have considered Patrick's youth in determining the sentence because the prosecution and defense counsel addressed his youth in their statements to the court during the sentencing hearing." 164 Ohio St. 3d 309, ¶48.

Morris errs in suggesting that *Jones* permits state courts to adopt an overbroad reading of the Eighth Amendment. Morris Br. at 16–17. While *Jones* recognized that States can impose additional limits on juvenile sentencing *as a matter of state law*, *see* 141

S. Ct. at 1323, it never suggested that courts can impose such limitations *as a matter of the Eighth Amendment*. Morris Br. at 17. Indeed, the Supreme Court has reversed state courts for misapplying the Eighth Amendment in a too-defendant-friendly manner. *See, e.g.*, *Carr*, 577 U.S. at 117–18.

* * *

At the sentencing hearing, Morris's counsel argued for a lighter sentence based on Morris's youth, and the trial court affirmed that it had considered the purposes and principles of sentencing under R.C. 2929.11 and 2929.12. Sentencing Transcript at 5, 15–16. Accordingly, the trial court had before it Morris's youth and its attendant characteristics. The court necessarily considered those characteristics before imposing a life sentence. That is all that *Jones* required.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth District's decision.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
DIANE R. BREY (0040328)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 3rd day of May, 2022, by e-mail on the following:

Brian A. Smith
Brian A. Smith Law Firm, LLC
123 South Miller Road, Suite 250
Fairlawn, OH 44333
attybsmith@gmail.com

Christopher R. Tunnell
Ashland County Prosecutor's Office
110 Cottage Street, Third Floor
Ashland, OH 44805
ctunnell@ashlandcounty.gov

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General