

NO. 2022-0056

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 103428

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STATE OF OHIO,  
Plaintiff-Appellee

-vs-

DESHAWN T. TERRELL,  
Defendant-Appellant

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**MEMORANDUM IN RESPONSE TO JURISDICTION**

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## **TABLE OF CONTENTS**

THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS.....	2
LAW AND ARGUMENT .....	4
<b><u>Appellant's Proposition of Law I:</u></b> In light of this Court's decision in <i>State v. Patrick</i> , the mandatory sentencing provision under R.C. 2929.02(B)(1) is unconstitutional because it requires the trial court to impose a sentence of 15 years to life imprisonment and does not permit the sentencing court to consider the offender's youth as a separate factor.	
<b><u>Appellant's Proposition of Law II:</u></b> A sentence that is categorically cruel and unusual based on the explicit findings of this court creates extraordinary circumstances sufficient to justify an extension to file a motion for reconsideration	
CONCLUSION .....	15
CERTIFICATE OF SERVICE .....	15

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

This case fails to raise a substantial constitutional question and as such, there is no need for this Court to accept jurisdiction. Deshawn Terrell presents two issues for the Court's consideration: 1) whether the mandatory sentencing provision under R.C. 2929.02(B)(1) is unconstitutional because it requires the trial court to impose a sentence of 15 years to life and does not permit the sentencing court to consider the offender's youth as a separate factor and 2) whether there were extraordinary circumstances sufficient to justify an extension to file an application for reconsideration.

Recently, this Court decided *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803. In *Patrick*, this Court held that before imposing a life sentence under R.C. 2929.03, a trial court must separately consider the youth of the juvenile offender as a mitigating factor. Terrell attempts to apply this to his own sentence, arguing that it is unconstitutional because the trial court was unable to consider his youth as a mitigating factor; however, he reads this Court's decision too broadly. In *Patrick*, this Court's focus was on R.C. 2929.03, which governs sentencing for aggravated murder and includes a range of options including life without parole. Instead, the penalty set forth in 2929.02(B)(1) is a mandatory minimum sentence of fifteen years with a life tail. This Court had previously found that mandatory minimum sentences are constitutional as applied to juveniles. *State v. Anderson*, 151 Ohio St.3d 212, 221, 2017-Ohio-5656, 87 N.E.3d 1203. Like the case in *Anderson*, the sentence here serves a legitimate penological goal, is proportional to the crime committed, and is not one of the harshest possible penalties for a juvenile. See *Id.*, at ¶43.

Furthermore, the General Assembly has addressed previous concerns about the parole eligibility of juvenile offenders with SB 256, codified as R.C. 2967.132. R.C. 2967.132(C) specifies when certain classes of juvenile offenders are eligible for a parole hearing, regardless of the sentence imposed by the trial court. In addition, it specifically requires the parole board to

provide a meaningful opportunity for release and that the parole board consider the offender's youth and its attendant characteristics. R.C.2967.132(E). These additional protections were enacted after this Court's decision in *Patrick* and address many of the concerns that this Court expressed in that opinion.

Terrell's sentence under R.C. 2929.02(B)(1) does not violate the Eighth Amendment simply because it imposes a mandatory minimum of fifteen years. Mandatory minimum sentences have been upheld by this Court, and parole eligibility with the additional protections afforded under R.C. 2967.132 provides a meaningful opportunity for release with demonstrated maturity and rehabilitation. There is no further need for this Court to intervene. Therefore, this Court should decline jurisdiction over Terrell's first proposition of law.

As to Terrell's second proposition, the appellate court acted well within its discretion when it denied his delayed application for reconsideration. To grant a delayed application for reconsideration, App. R. 14(A) requires a showing of "extraordinary circumstances." Although subsequent decisions of this Court can certainly provide the necessary extraordinary circumstances, Terrell's reliance on *Patrick* is misplaced. *Patrick* concerned itself with sentencing under R.C. 2929.03, where life without parole is among the options available to trial courts. Because *Patrick* is not directly on point to Terrell's sentence, it cannot be said that the appeals court should have been alerted to an obvious error or a decision unsupported by law. Therefore, it is unnecessary for this Court to consider Terrell's second proposition of law.

#### **STATEMENT OF THE CASE AND FACTS**

Deshawn Terrell, the Defendant-Appellant herein, was charged in a series of juvenile complaints with four separate armed robberies of stores on the east side of Cleveland in July 2013. Terrell was 17 years old at the time of the robberies, and less than four months from his 18<sup>th</sup> birthday when the last of these four robberies resulted in the shooting death of an innocent store clerk.

At approximately 3:50 a.m. on July 30, 2013, Terrell, along with 16-year-old Shawntez Giles and 19-year-old Victor Flournoy, attempted to rob Biggie's Food Mart, a store located at a gas station in Cleveland. All three were wearing blue surgical-style gloves and carrying their own handguns. At the store, Terrell put a gun to the head of employee Mohammed Ismail. He struggled with Ismail over the gun. Ismail broke free from Terrell and ran back behind the counter in the store. Shawntez Giles, on his way out of the store, fatally shot Ismail in the abdomen. Giles also shot and wounded the store owner, Esmeil Ayad. Terrell, Giles, and Flourny then fled the store together.

Terrell's cases were initially filed in the juvenile division. Of the cases filed, two were bound over to the general division. In the case involving the shooting death of Mohammed Ismail, Terrell was subject to a mandatory bindover. In the case involving the aggravated robbery of Danzey's Discount Drug store, Terrell was subject to discretionary bindover. In the Danzey's case, the Juvenile Court considered Terrell's amenability to rehabilitation in the juvenile system and determined that his second case should also be transferred to the general division. On January 8, 2014, the Cuyahoga County Grand Jury indicted Terrell on 18 counts related to Ismail's murder and on additional six counts in the case related to the aggravated robbery of Danzey's Discount Drug store.

Pursuant to a plea agreement with the State, Terrell pleaded no contest to murder, an unclassified felony, in violation of R.C. 2903.02(A) with one-and three-year firearm specifications and to aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1) with respect to the murder case and he entered a no contest plea to aggravated robbery, in violation of R.C. 2911.01(A)(1) with respect to the Danzey's Discount Drug Store case. All other charges against him were dismissed. As part of the plea agreement, the State agreed to recommend a sentence of 21 years to life, which included the fifteen to life sentence for the murder, the three-year firearm specification and a three-year sentence for aggravated robbery imposed

consecutively. At sentencing, both the State and Terrell's counsel requested that this sentence be imposed pursuant to their agreement. The trial court imposed the requested sentence on August 4, 2015.

The court of appeals unanimously affirmed Terrell's convictions and sentence. Terrell filed a memorandum in support of jurisdiction with this Court on July 28, 2016. Initially, this Court declined jurisdiction, but accepted it upon reconsideration. On January 30, 2018, this Court dismissed Terrell's appeal as improvidently granted. Terrell's subsequent petition to the United States Supreme Court was denied. Terrell filed a delayed application for reconsideration with the court of appeals on November 8, 2021. The court of appeals denied it on December 2, 2021. This discretionary appeal follows.

#### **LAW AND ARGUMENT**

**Appellant's Proposition of Law I:** In light of this Court's decision in *State v. Patrick*, the mandatory sentencing provision under R.C. 2929.02(B)(1) is unconstitutional because it requires the trial court to impose a sentence of 15 years to life imprisonment and does not permit the sentencing court to consider the offender's youth as a separate factor.

The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. "A key component of the Constitution's prohibition against cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to the offense.'" *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶31, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793. To constitute cruel and unusual punishment, "the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Anderson*, 151 Ohio St.3d 212, 2017-Ohio-5656, 87 N.E.3d 1203, ¶ 27, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70, 203 N.E.2d 334 (1964). There have been several recent decisions from the Supreme Court and from this Court that examine these issues as they pertain to juvenile offenders.

In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Supreme Court held that the Eighth and Fourteenth amendments prohibit the imposition of the death penalty upon offenders who were under the age of 18 at the time of their offenses. Later, in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), the Supreme Court held that the Eighth Amendment prohibits the imposition of a life sentence without the possibility of a parole for non-homicide offenders who were under 18 at the time of their offenses. The Court required states to give juveniles convicted of non-homicide offenses “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Id.*, at 75.

In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Court held that the Eighth Amendment prohibits any sentencing scheme that mandates life in prison without the possibility of parole for offenders who were juveniles when they committed the offense. The Court noted that its decision in *Graham* had “likened life without parole for juveniles to the death penalty” *Id.*, at 462. Because life without parole is effectively the juvenile equivalent of the death penalty, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles” *Id.*, at 489. In *Miller*, the Court noted that it did not “categorically bar a penalty” but rather, it “mandate[d] only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.*, at 483. Subsequently in *Montgomery v. Louisiana*, 577 U.S. 190, 212, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), the Court held that *Miller* announced a substantive rule of constitutional law that had retroactive effect; however, it did not require states to relitigate sentences or even convictions. States were instead permitted to remedy *Miller* violations by permitting juvenile homicide offenders to be considered for parole, instead of resentencing them. *Id.*

This Court has also considered several issues with respect to juvenile life sentences. In *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, this Court, following the Supreme

Court’s decision in *Miller*, held that a trial court must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole. *Id.*, at paragraph one of the syllabus. “For juveniles, like Long, a sentence of life without parole is the equivalent of the death penalty. As such, it is not to be imposed lightly for as the juvenile matures into adulthood and may become amenable to rehabilitation, the sentence completely forecloses that possibility. *Id.*, at ¶27 (citation omitted). *Long* specifically found that R.C. 2929.03(A), Ohio’s aggravated murder sentencing statute to be in line with *Miller* because the sentence of life without parole is discretionary. *Id.*, at ¶19. Although *Long* expressly held that youth is a mitigating factor to be considered when sentencing a juvenile, it did not mean that a juvenile must only be sentenced to the minimum term. *Id.* Indeed, it is “beyond question” that murder deserves “severe punishment” *Miller*, 567 U.S. at 479.

In *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, this Court again considered the aggravated murder sentencing statute, R.C. 2929.03. The Court in *Patrick* recognized that Kyle Patrick was subject to the same sentencing options as the appellant in *Long*, including life without the possibility of parole. *Id.*, at ¶31. For that reason, this Court determined that the “individualized sentencing consideration...differed little from the sentencing court’s individualized sentencing consideration in *Long*.” This Court took issue with the failure of the trial court to account for Kyle Patrick’s youth when imposing a sentence of thirty-three years to life, affording Kyle Patrick his first opportunity for parole in his 50s. *Id.*, at ¶35. This Court expressed its concern that parole eligibility does not guarantee an offender’s release from prison, so “spending one’s life in prison is a real possibility under all the sentencing options in R.C. 2929.03(A)(1).” *Id.*, at ¶33. Given this possibility, this Court emphasized that “the need for an individualized sentencing decision that considers the offender’s youth and its attendant characteristics is critical when life without parole is a potential sentence.” *Id.*, at ¶36. It is important to note that based on the reasoning in *Patrick*, the defect in the sentence was the trial court’s failure to consider Kyle Patrick’s youth, rather than the length of the minimum term or the

life tail itself. Had the trial court in Patrick considered his youth, it would have been permitted to impose the same sentence. *See Long*, ¶ 37 (O'Connor, C.J., concurring) (“I caution that our law requires only that youth be considered as factor. It does not mandate any particular result from that consideration”)

A. Terrell’s prison sentence is constitutional because it provides him a meaningful opportunity for release based on maturity and rehabilitation

i. Mandatory minimum sentences for juveniles are constitutional under *Anderson*

R.C. 2929.02(B)(1) requires that a trial court impose a sentence of fifteen years to life for murder, in effect creating a mandatory minimum sentence of fifteen years before an offender is eligible for parole. This Court has considered the imposition of mandatory minimum sentences of juvenile offenders in *State v. Anderson*, 151 Ohio St.3d 212, 2017-Ohio-5656, 87 N.E.3d 1203. In *Anderson*, this Court held that a mandatory three-year prison sentence imposed on a juvenile offender tried as an adult for a firearm specification does not violate the Eighth Amendment because it serves a legitimate penological goal, is proportional to the crimes committed, and is not one of the harshest possible penalties for a juvenile offender. *Id.*, at ¶43. Following *Graham*, this Court considered first “whether there is a national consensus against the sentencing practice at issue” and second, “in the exercise of its own independent judgment whether the punishment in question violates the Constitution” *Id.*, at ¶28, quoting *Graham*, 560 U.S. at 61. According to *Graham*, “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures” *Id.*, at ¶29, quoting *Graham*, 560 U.S. at 62. Internal quotations omitted. Although this is not “itself determinative of whether a punishment is cruel and unusual,” it is “entitled to great weight.” *Id.*, quoting *Graham*, 560 U.S. at 67. Internal quotations omitted.

This Court acknowledged that “most states permit or require some or all juvenile offenders to be given mandatory minimum sentences.” *Id.*, at ¶30 quoting *State v. Lyle*, 854 N.W.2d 378,

386 (Iowa 2014). In concluding that a mandatory three-year prison sentence imposed on a juvenile offender following conviction for a firearm specification does not violate the Eighth Amendment, this Court considered opinions from several other states. Among these was *State v. Brown*, 300 Kan. 542, 564, 331 P.3d 781 (2014) ("A hard 20 life sentence does not irrevocably adjudge a juvenile offender unfit for society. Rather, in line with the concerns expressed in *Graham*, it gives the offender a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" by permitting parole after the mandatory 20-year minimum prison term is served), quoting *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Ouk v. Minnesota*, 847 N.W.2d 698, 701 (Minn.2014) ("a mandatory sentence of life imprisonment with the possibility of release after 30 years is not encompassed within the rule in *Miller* \* \* \* because it does not require the imposition of the harshest term of imprisonment: life without the possibility of release"); *Commonwealth v. Okoro*, 471 Mass. 51, 59, 26 N.E.3d 1092 (2015) ("we do not read *Miller* as a whole to indicate that the proportionality principle at the core of the Eighth Amendment would bar a mandatory sentence of life with parole eligibility after fifteen years for a juvenile convicted of murder in the second degree").

Based on the reasoning of *Anderson*, a fifteen-year mandatory minimum term does not violate the Eighth Amendment. This Court noted that these types of sentences, some requiring a longer mandatory minimum term than fifteen years, are routinely upheld nationally. *See Anderson* at ¶42. As to an independent review, there is no question that juveniles convicted of murder deserve "severe punishment" *Miller*, 567 U.S. at 479. A minimum sentence of fifteen years for a homicide offense is far less severe than the sentences at issue in *Graham*, *Miller* or even *Patrick*. As such, a mandatory minimum of fifteen years survives both national consensus and independent review. Although Terrell appears in part to take issue with his life tail, the life tail itself was never at issue in any of the *Graham* line of cases. Neither the Supreme Court, nor this Court, nor any of the cases that this Court cited in *Anderson*, *Long*, or *Patrick* have held that a life tail is unconstitutional for a juvenile offender or that it is disproportionate for murder.

- ii. The General Assembly and the Ohio Public Defender agree that release after fifteen years permits a meaningful opportunity to obtain release based on maturity and rehabilitation

The Office of the Ohio Public Defender has recently recognized that a prison term of fifteen years to life provides a juvenile with a meaningful opportunity to obtain release. In its amicus brief filed in *Patrick*, the Ohio Public Defender stated the following:

In fact, following Graham, Ohio’s Criminal Sentencing Commission, chaired by Supreme Court of Ohio Chief Justice, Maureen O’Connor, recommended changes to Ohio’s sentencing scheme in a 2015 proposal to the Ohio General Assembly. The commission proposed that the legislature craft a sentencing scheme for juvenile offenders that would give them the opportunity to spend a substantial proportion of their lives outside prison, which meant that juvenile offenders needed to be given a first opportunity for parole after serving 15 years. Ohio Criminal Sentencing Commission, Memorandum of Jo E. Cline to Sara Andrews (Nov. 23, 2015), available at <https://perma.cc/6J7N-62GT>. (Accessed February 27, 2019). And, for youth who were eligible for life-without-parole sentences, the commission recommended parole at age 40. *Id.*

*State v. Patrick*, 2019-065, Brief of Amicus Curiae, Office of the Ohio Public Defender, Juvenile Law Center, et. al., pp. 23-25 (filed Oct. 7, 2019) (available at <http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2019/0655>). In the Ohio Public Defender’s brief, the quote above appears beneath a caption that states “For juvenile offenders, a ‘meaningful opportunity’ should include an opportunity to go before the parole board after 15 years of incarceration.” *Id.* It seems that the Ohio Public Defender would agree with the State of Ohio that an opportunity to appear before the parole board after 15 years of incarceration, as R.C. 2929.02(B)(1) dictates, permits a meaningful opportunity to obtain release.

The Ohio General Assembly similarly appears to agree that fifteen years to life would provide a meaningful opportunity to obtain release. If this Court were to consider legislation as “objective evidence of contemporary values”, it can begin with Ohio’s General Assembly. *Anderson*, ¶29 quoting *Graham*, 560 U.S. at 62. The General Assembly enacted new reforms in April 2021 that specifically consider a juvenile’s age, but nonetheless left life sentences in place.

In so doing, the General Assembly did exactly what the Supreme Court invited it to do in *Montgomery*: remedy any potential *Miller* violations by specifying when juvenile homicide offenders may be considered for parole. Under R.C. 2967.132, the earliest a juvenile is entitled to parole is eighteen years. R.C. 2967.132(C)(1). There are two exceptions to this. The first is that if the juvenile is serving a sentence for two or more homicide offenses, they are eligible for parole after thirty years. R.C. 2967.132(C)(3). The second exception is if the juvenile is serving a sentence for one or more homicide offenses, none of which are aggravated homicides, the juvenile is eligible for parole after serving twenty-five years. R.C. 2967.132(C)(2). If the juvenile's sentence permits parole prior to the eligibility dates set forth in R.C. 2967.132(C), they are eligible for parole on the date specified in their sentence. R.C. 2967.132(C)(4). When it enacted this statute, the General Assembly specifically considered the age of a juvenile when it determined that even eighteen years in prison affords the juvenile some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

The enactment of SB 256 alleviates many of this Court's concerns about parole that it discussed in *Patrick*. *See Patrick*, ¶33. In *Patrick*, the Court noted that "parole eligibility does not guarantee a defendant's release from prison," so in this Court's view "Patrick's sentence varies little from the state's harshest punishment for a juvenile offender who is tried as an adult." *Id.* SB 256 was enacted approximately four months after this Court issued its opinion in *Patrick*. Now, although it remains true that parole eligibility does not guarantee release, the parole board is required under R.C. 2967.132(E)(2) to ensure that the parole review process provides the prisoner a meaningful opportunity to obtain release and requires it to consider the "chronological age of the prisoner at the time of the offense and that age's hallmark features, including intellectual capacity, immaturity, impetuosity, and a failure to appreciate risks and consequences." R.C. 2967.132(E)(2)(a). It further requires the parole board to consider "[t]he family and home environment of the prisoner at the time of the offense, the prisoner's inability to control the prisoner's surroundings, a history of trauma regarding the prisoner, and the prisoner's school and

special education history,” as well as “the circumstances of the offense, including the extent of the prisoner’s participation in the conduct and the way familial or peer pressures may have impacted the prisoner’s conduct.” R.C. 2967.132(E)(2)(b)-(c). Finally, the parole board is required to consider “[w]hether the prisoner might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth such as the prisoner’s inability to deal with police officers and prosecutors during the prisoner’s interrogation or possible plea agreement, or the prisoner’s inability to assist the prisoner’s own attorney” and, importantly, “[e]xamples of the prisoner’s rehabilitation, including any subsequent growth or increase in maturity during imprisonment.”

R.C. 2967.132(d)-(e).

The intent of the General Assembly seems clear: to provide most categories of juvenile homicide offenders a meaningful chance for release in front of a parole board that considers their youth and personal circumstances at the time of the offenses. Terrell will have his first parole hearing when he is 38 years old. This is far different than a first opportunity for release well into middle or even old age. The parole board will be required to consider Terrell’s youth and the circumstances of his crime, including his childhood and whether he was the principal offender. As such, he finds himself in substantially different circumstances to Kyle Patrick, who, at the time of this Court’s opinion in his case, was not eligible for release until well into his 50s.

iii. Terrell, an accomplice who was found guilty of purposely causing the death of the victim, is equally liable for the victim’s death

In *Long*, this Court acknowledged that a “juvenile offender who did not kill or intend to kill has twice diminished moral culpability” *Long* at ¶19 quoting *Graham*, 560 U.S. at 69. Although Shawntez Giles actually shot and killed the victim in this case, there is no doubt that Terrell acted together with Giles and Flourny to plan and execute the robbery. He brought a firearm of his own to the store. He wore blue surgical gloves to avoid leaving fingerprints or DNA. Rather than fleeing at the first sign of resistance, Terrell was first to point his gun at the victim’s head and

fought with him. Terrell's involvement in the robbery was the proximate cause of the victim's death, for which he should be held equally responsible, regardless of who pulled the trigger.

While a 'mere' accomplice may not have had the specific intent to kill the victim, where he was a major participant in a violent felony under circumstances likely to result in the loss of innocent human life, he is equally culpable. To argue that the resulting murder is not foreseeable or that the accomplice did not act with reckless indifference to human life is specious, particularly where, as here, the accomplice's involvement in the crime is substantial. \*\*\*This concept holds particularly true where the actors planned the crime in advance and armed themselves in order to have the ability to inflict death or serious injury during the course of the crime. Such was the case here.

*Bear Cloud v. State*, 334 P.3d 132, 2014 WY 114, ¶60.

When the trial court found that State set forth sufficient facts to find him guilty of murder, Terrell was guilty of "purposely caus[ing] the death of another[.]" R.C. 2903.02(A). This removes any ambiguity and places Terrell squarely in the category of defendants who "kill, intend to kill, or foresee that a life will be taken" who are "deserving of the most serious forms of punishment[.]" *Graham* at 69. Shawntez Giles, the shooter, pleaded guilty to aggravated murder and received a sentence of 33 years to life. Terrell negotiated a recommended sentence with the State that took into account that he was not the principal offender. Nonetheless, he pleaded 'no contest' to purposeful murder and cannot reasonably claim that he is not a homicide offender or that he has the "twice diminished moral culpability" that this Court discussed in *Long*.

iv. Terrell received exactly the sentence he requested at his sentencing hearing and the trial court considered his potential for rehabilitation.

Although Terrell claims that his sentence is unconstitutional because the trial court could not consider his youth, his sentence was a product of negotiations between himself and the state. Tr.53. At sentencing, Terrell's counsel stated:

I do believe that the resolution that was reached is appropriate in this case given the age of Deshawn at the time, as well as the issues that we indicated in our original motion challenging the sentencing guidelines. Given that, I do believe that the 21 years to life as agreed upon in the no-contest plea would be appropriate, and I would ask the court to follow that recommendation.

Tr. 94. Terrell was sentenced on the same day for the robbery of Danzey's Discount Drug Store.

With respect to that case, his counsel stated:

I think the fact that DeShawn is 19 years old, won't be 20 until November, and the life that he was subjected to prior to getting involved with these other two young men, the Court would consider the recommended sentence of 21 to life, Your Honor.

Tr. 95. In imposing its sentence, the trial court implicitly considered that Terrell may be amenable to rehabilitation and the possibility that his crime represented "unfortunate yet transient immaturity" rather than "irreparable corruption" when it stated the following:

Now, the only thing I can say for you is that at one point I hope that you grow up to be as strong as men as these two young fellas here today, that you can take their example—they came here and spoke to the Court—and realize what they lost and what they have to go through now and be half the men that they are right now. You don't have to be—to be a man, you don't have to beat the crap out of people to be a man. You don't have to be the toughest guy in the world to be a man. You got to do what's right, and maybe one day you will learn that, that you can be as good people as Yasir and Mohammed are here today.

The Court reviewed everything and the Court finds that the recommended agreed sentence is appropriate[.]

*Miller*, 567 U.S. at 479-480. Internal quotations omitted. ;Tr. 93.

**Appellant's Proposition of Law II:** A sentence that is categorically cruel and unusual based on the explicit findings of this court creates extraordinary circumstances sufficient to justify an extension to file a motion for reconsideration

- A. Terrell has failed show the extraordinary circumstances necessary to justify an enlargement of the deadline for his motion for reconsideration

Applications for reconsideration in the appellate courts are governed by App. R. 26. App. R. 26 "provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law" *Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 10th Dist. Franklin No. 03AP-269, 2004-Ohio-2715, ¶ 2, quoting *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). App. R. 26(A)(1) sets forth a deadline of "no later than ten days after the clerk has

mailed to the parties the judgment or order in question” for applications for reconsideration. Extensions or enlargement of this deadline are addressed in App. R. 14(B), which states that enlargement of time for an application for reconsideration “shall not be granted except on a showing of extraordinary circumstances.” Although the rule does not define “extraordinary circumstances,” they may be demonstrated by a subsequent decision of this Court. *State v. Campbell*, 8<sup>th</sup> Dist. Cuyahoga No. 105622, 2019-Ohio-5112, ¶18 citing *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶90. In *Moore*, this Court explained that appellate courts have the authority to grant applications for reconsideration well over a year after their original decision, finding that subsequent decisions of this Court provided the necessary “extraordinary circumstances”. *Moore*, ¶90. With that said, it is important to note that “when appellate courts have found extraordinary circumstances based on binding decisions from higher courts, they have done so when the higher court’s case is directly on point.” *Moore*, ¶95 quoting *State v. Bunch*, 7<sup>th</sup> Dist. Mahoning No. 06 MA 106 (Aug. 8, 2013). This Court reviews an appellate court’s decision regarding an application for reconsideration under an abuse of discretion standard. *Moore*, ¶99 citing *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 224, 18 Ohio B. 281, 480 N.E.2d 802 (1985).

Terrell relies heavily on this Court’s decision in *Patrick* to justify his delayed application for reconsideration. His reliance is misplaced. One of this Court’s concerns in *Patrick* was that under the statute that controlled his sentence, R.C. 2929.03(A)(1), life without parole was a potential sentence. *Patrick*, ¶31. The analysis is focused on the options presented to the sentencing court under R.C. 2929.03(A)(1). Because one of those options is life without parole, this Court determined that “the court’s individualized sentencing consideration here differed little from the sentencing court’s individualized sentencing consideration in *Long*.” *Id.* Even when discussing the difference between life sentences with and without parole eligibility, this Court continued to focus its analysis on the life-sentencing options in R.C. 2929.03(A)(1). See *Id.*, at ¶33. Terrell was sentenced in part under R.C. 2929.02(B)(1), a statute that was never considered in *Patrick*. It can

hardly be said that a case focused on a different statute that includes life without parole as a sentencing option is “directly on point” to a sentence with parole eligibility after fifteen years. *See Moore*, ¶95. This Court itself tacitly acknowledged that when it accepted Austin Fuell’s appeal on the same proposition presented here, rather than applying *Patrick*. *See 08/31/2021 Case Announcements*, 2021-Ohio-2923. As *Patrick* is not directly on point to sentences imposed under R.C. 2929.02(B)(1), the appellate court had no reason to suspect an obvious error or a decision unsupported by law. Therefore, it did not abuse its discretion in rejecting his delayed application for reconsideration.

### **CONCLUSION**

Based on the foregoing reasons, the State submits that this case is not worthy of this Court’s review. The State respectfully requests that this Honorable Court decline jurisdiction in this case.

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### **CERTIFICATE OF SERVICE**

A copy of the foregoing Motion for Extension of Time was mailed or electronically sent this February 17, 2022, to:

Erika Cunliffe, Esq.  
Assistant Public Defender  
310 Lakeside Avenue, Suite 200  
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/s/ Kristen Hatcher

**KRISTEN HATCHER (0093864)**

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