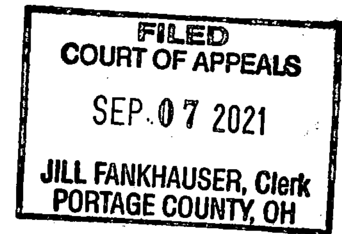

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	
		Trial Court Case No. 2016 CR 107E
Plaintiff-Appellee,	:	
vs.	:	Court of Appeals No. 2021 PA 0035
DAMANTAE D. GRAHAM,	:	
Defendant-Appellant.	:	ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

MERIT BRIEF OF DEFENDANT-APPELLANT D'AMANTAE GRAHAM

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STATEMENT OF THE CASE

PROCEDURAL POSTURE

On November 3, 2016, D'Amantae Graham was convicted of aggravated murder with capital specifications and related felony charges, stemming from a drug-related robbery turned fatal. *Verdict Forms,* T.d. 341-355. On November 8, the mitigation phase of his capital trial was conducted, and the jury recommended a sentence of death. *Verdict From*, T.d. 360. The trial court ultimately imposed a sentence of death plus 61 years on November 15. *Finding of Facts and Conclusions of Law Regarding Imposition of Death Penalty,* T.d. 368. Graham appealed his convictions and sentence to the Supreme Court of Ohio. *Notice of Appeal*, T.d. 394.

On December 17, 2020, the Supreme Court of Ohio vacated Graham's death sentence, finding that "there is strong and compelling mitigating evidence regarding Graham's history and background and other mitigating factors * * * that have significant weight." *State v. Graham*, Slip Opinion No. 2020-Ohio-6700, ¶ 206. "Therefore, a sentence of death is not appropriate in this case." *Id.* at ¶ 216. Pursuant to R.C. 2929.06, Graham's case was sent back to the original trial judge in Portage County for a resentencing hearing.

In the interim, on January 21, 2021, the Supreme Court appointed Assistant State Public Defenders Michelle Umaña and Randall Porter to prepare and file an application for reopening of Graham's direct appeal on his behalf. *State v. Graham*, Case No. 2016-1882. On February 26, 2021, pursuant to S.Ct.Prac.R. 11.06, Graham timely filed his application to reopen his direct appeal with the Supreme Court of Ohio. *See Id.* He asserted that direct appeal counsel were ineffective for not raising four propositions of law in his direct appeal:

Proposition of Law No. 1

> Trial Counsel Failed to Provide Effective Assistance of Counsel and the Accused is Prejudiced When They Fail to Object to the Conducting of Individual Voir Dire in the Jury Room and not in Open Court.

Proposition of Law No. 2

> A Trial Court Commits Prejudicial Error When It Precludes Relevant Questions Concerning Race on a Jury Questionnaire When the Victim is White And the Accused is Black.

Proposition of Law No. 3

> Trial Counsel's Performance is Deficient, and the Accused is Prejudiced, When Trial Counsel Fails to Voir Dire About Race and the Facts of the Case Involve a Violent Crime Where the Victim is a Different Race Than the Accused.

Proposition of Law No. 4

> Trial Counsel's Performance is Deficient, And The Accused is Prejudiced When Trial Counsel Fails to Object to the Admission of Inflammatory Testimony and Exhibits.

Id.

While Graham's application to reopen was still pending before the Supreme Court of Ohio, a resentencing hearing was conducted on March 8, 2021. The trial judge imposed a sentence of Life Without the Possibility of Parole, consecutive to a three-year gun specification on the aggravated murder, all consecutive to the previously imposed sentence of 61 years on the other felony charges. *Order and Judgment Entry*, T.d. 510. This timely appeal follows. *Notice of Appeal*, T.d. 519.

STATEMENT OF FACTS

Graham's Motion to Continue the Resentencing Hearing

On January 6, 2021, three weeks after the Supreme Court of Ohio's decision vacating Graham's sentence, counsel for Graham filed for appointment to represent him at the resentencing hearing. *Damantae Graham's Motion for Appointment of Counsel at Resentencing*, T.d. 491. The next day, without ruling on the motion for appointment, the trial court scheduled the resentencing for March 8. *Notice of Hearing*, T.d. 493. On January 26, after being served with the notice of the hearing, counsel for Graham filed a motion to continue the hearing. *Damantae Graham's Motion*

to Continue the March 8, 2021, Resentencing, T.d. 497. The motion indicated that Graham was filing a petition for writ of certiorari to the Supreme Court of the United States, challenging the Supreme Court of Ohio's decision affirming his convictions. *Id.* The State opposed the continuance on the basis of Graham's motion offering "an intention of the course the defense maybe taking at some future date." *State of Ohio's Response to Graham's Motion for Continuance*, T.d. 498. On February 10, the trial court denied the motion to continue without explanation. *Order and Journal Entry*, T.d. 499.

On February 26, Graham renewed his motion to continue the resentencing and requested a status conference. *Damantae Graham's Combined Renewed Motion to Continue March 8, 2021, Resentencing Hearing and Motion to Request a Status Conference*, T.d. 500. That renewed motion requested a few months continuance based on several recent events that had made proceeding with the March 8 date severely problematic. *Id.* First, Graham had filed an application to reopen his direct appeal with the Supreme Court of Ohio, calling into question whether the trial court even had jurisdiction. *Id.* at p. 1-4. Second, counsel for Graham was scheduled to have a major surgery on March 1, making her unable to travel from her residence in Columbus, Ohio, for at least two months. *Id.* at p. 4. And, the psychologist who evaluated Graham, who would have provided significant testimony relevant to sentencing, was unable to attend the hearing on March 8. *Id.*

In response, the State filed a motion in opposition that was identical to its first motion. *State of Ohio's Response to Graham's Motion for Continuance*, T.d. 501. The State's motion failed to address any of the three additional justifications for rescheduling the hearing and instead was a word for word repeat of its previous motion. *See id.* The next day, the court denied Graham's second motion for a continuance, again without explanation. *Order and Journal Entry*, T.d. 502.

Jurisdictional Issue

Graham timely filed an application to reopen his direct appeal in the Supreme Court of Ohio on February 26. *State v. Graham,* Case No. 2016-1882. *See supra,* p. 1-2. After the trial court denied Graham's renewed motion for a continuance, Graham filed a writ of prohibition to this Court on March 4, arguing that the trial court lacked jurisdiction based on the recent filing. *State ex rel. Graham v. Pittman,* Slip Opinion, 2021-Ohio-665, ¶ 7. This Court concluded that "without direct legal authority indicating a subsequent application for reopening filed in the Supreme Court of Ohio is the functional equivalent of an appeal or deprives a trial court or jurisdiction, we cannot say respondent's lack of jurisdiction is patent and unambiguous." *Id.* at ¶ 8.

Resentencing Hearing

Ultimately, Graham's resentencing went forward as scheduled on March 8. During the resentencing, Counsel for Graham renewed their objections to proceeding on that date. T.p. 5-6. Graham presented testimony from Dr. Laurence Steinberg, a well-known expert in the field of juvenile development and criminal law. *Id.* at 9. Dr. Steinberg explained the different behavioral characteristics of juveniles as compared to adults, noting that juveniles are more impulsive, more likely to consider only the immediate circumstances of their actions, more focused on potential rewards of risky behavior, more susceptible to peer pressure, and that their personalities are less hardened and fixed than adults. *Id.* at 10-11. Dr. Steinberg testified that the brain science of juveniles expanded in 2010, as researchers began to look at brain development beyond the age of 18. *Id.* at 15. By 2015, there was "broad consensus along neuroscientists that there was significant brain maturation going on past age 18 and up until the – into the early 20s." *Id.* at 16.

In addition to presenting mitigating evidence of Graham's youth, defense counsel also presented mitigating evidence of "generational abuse, generation dysfunction, generational violence and substance abuse" that was prevalent in Graham's upbringing and throughout his life.

Id. at 23. Statements from Graham's family members were presented in a 15-minute video, discussing the environment Graham grew up in: "You're also going to hear about the environment that Damantae was raised in with ten kids in the house, limited income, getting bounced from place to place, raising family members, other extended family members, and starting to run away." *Id.* at 24; Def. Ex. I. Defense counsel offered eight additional exhibits, including Dr. Steinberg's report, the report by Dr. Rivera—the psychologist who was unable to testify due to scheduling—and several affidavits from family members regarding Graham and his life. *See* Defendant's Exhibits (hereinafter "Def. Ex") A-H.

There were seven factors which the defense offered in mitigation. T.p. 27-38; *see also Damantae Graham's Resentencing Memorandum*, T.d. 504. The first factor was Graham's age. T.p. at 27-28. *See also* Def. Ex. A, ¶¶ 10-43.

Second was the dysfunction that Graham was raised in. T.p. 28-29. *See also See also* Def. Ex. C; Def. Ex. D, ¶¶ 29, 36-37; Def. Ex. E, ¶¶ 22-24, 26-28; Def. Ex. G, ¶¶ 6-14. Third was the lack of a father figure, (Def. Ex. D, ¶ 14; Def. Ex. E, ¶¶ 13-17; Def. Ex. F, ¶ 6; Def. Ex. G, ¶ 5; Def. Ex. H, ¶ 3) and the inadequate parenting skills of his mother. T.p. 29-31. *See also* Def. Ex. D, ¶¶ 29, 36-37; Def. Ex. E, ¶¶ 22-24, 26-28; Def. Ex. G, ¶¶ 6-14. Ultimately, "[i]n order to thrive, children need love, predictability, nurturing, consistency, and limit setting. Emotionally, D'Amantae's needs were not met." Def. Ex. C, p. 10. His father was "absent during D'Amantae's formative years," and his mother was not equipped to adequately support Graham's needs on her own. *Id.* at p. 7. Specifically, while growing up Graham's mother "ran a twenty-four-hour daycare center out of her home, which incrementally challenged her capacity to parent her own children." *Id.* at p 9. She "'always cared for other kids' but she was emotionally unavailable to him. D'Amantae *** did not know what it meant to have someone emotionally present in his life. While his physical needs were met *** his mother never told him she loved him." *Id.* at p. 8. While his

mother recognized that Graham had issues with anger and perhaps depression, she never took the time to discuss with him any possible concerns he harbored. *Id.* at p. 10. Instead, "[d]uring times of parent-child conflict, his mother punished him by not speaking to him; hence the message he got was that parental love, affection and attention were conditional." *Id.*

Fourth, defense offered evidence of Graham's substance abuse and mental health issues. T.p. 32-33. *See* Def. Ex. E, ¶42; Def. Ex. F, ¶¶ 18-20; Def. Ex. G, ¶ 27; *see also* Def. Ex. C, p. 13. ("D'Amantae abused marijuana, alcohol and benzodiazepines. D'Amantae admitted that as a seventh grader he had started smoking marijuana *** he initially smoked marijuana daily and eventually started abusing Xanax."). According to Graham, using drugs gave him a sense of "'normal and calm.'" *Id.* For Graham, "[d]rugs served as the elixir that normalized the interpersonal and institutional racism, he perceived including his lack of connection at home. [He] abused drugs to cope with anger, depression, anxiety and feeling alienated." *Id.* at p. 12-13.

Fifth, defense counsel presented Graham's potential for rehabilitation, supported by the research on the potential for growth and maturity. T.p. 33-35. *See* Def. Ex. A, ¶¶ 17, 32 ("In *Graham*, the United States Supreme Court recognized that adolescents' brains were not fully developed, [which led to] the Court's holding that youth who commit serious crimes must have an opportunity for release based on demonstrated maturity and rehabilitation ***[T]he Court noted that because psychological and neurobiological development were still ongoing in adolescence, those individuals were still amenable to change and able to profit from rehabilitation."). In addition,

> Research in developmental psychology has produced a growing understanding of the ways in which normative psychological maturation contributes to desistance from crime. My colleagues and I have shown that normal and expected improvements in self-control, resistance to peer pressure, and future orientation, which occur in most individuals, are related to desistance from crime during the late adolescent and young adult years. ***Very few individuals who have committed crimes as juveniles continue offending beyond their mid-20s. My colleagues and I have found, as have other researchers, that approximately 90

> percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.

Id. at ¶¶ 31, 33.

The sixth factor was proportionality to his co-defendant's sentences, and the sentences of other similarly situated defendants. T.p. 35-36. And, finally, Graham's upbringing lacked the indicators of what kids need to be successful and well-adjusted, as measured by the literature. T.p. 36-37. *See also* Def. Ex. C, p. 13 ("Because of the circumstances D'Amantae experienced throughout his life, including his neglected upbringing, he was unable to develop adequate coping skills. His need for support, attention from his parents, and structure drove him to seek out role models who were horrible influences but accepted him.").

The State presented testimony from the victim's family members and argued for a sentence of life without the possibility of parole consecutive to Graham's sentence of incarceration on his other felony offenses. T.p. at 39-49. Ultimately, the trial court agreed with the State's sentencing recommendation. T.p. 51-52.

ARGUMENT

ASSIGNMENT OF ERROR I

The Eighth and Fourteenth Amendments prohibit a sentence of life without the possibility of parole for offenders who were 21 years old and younger at the time of the offense. (T.d. 510, T.p. 50-52).

Issue Presented for Review and Argument

Do the categorical protections afforded to juveniles under the age 18 also apply to adolescents ages 18-21, making life without the possibility of parole cruel and unusual for Graham and offenders ages 21 and younger?

The Supreme Court of the United States has recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012). Juveniles are "'less deserving of the most severe punishments'" due to their "diminished culpability and greater prospects for reform." *Id.*, quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Because of the differences between juveniles and adults, categorical bans protecting juvenile offenders have been adopted, based on the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.3d 1 (2005) (prohibiting the death penalty for youth under 18), *Graham* at 82 (prohibiting life without the possible of parole sentences for non-homicide offenses committed by youth under 18), *Miller* at 465 (prohibiting mandatory life without the possibility to parole sentences for those under the age of 18 at the time of the offense).

That line of cases relied on the scientific community's assessment that the brains of adolescents under 18 are still very much developing. Particularly, there are significant gaps between juveniles and adults in three areas: (1) juveniles lack maturity and have an underdeveloped sense of responsibility; (2) juveniles are "'more vulnerable * * * to negative influences and outside pressures,'" particularly from family and peers; and (3) juveniles' "character is not as 'well formed' as an adult's; his traits are 'less fixed.'" *Miller* at 471, quoting *Roper* at 569-70. Notably,

given their cognitive deficits and the still evolving nature of their brains, adolescents are both less culpable for their crimes and less susceptible to the deterrent effects of punishment.

It is well-established that an adolescent's brain is fundamentally different from the adult brain it will become. Since *Miller* was decided (less than ten years ago), science has continued to evolve and has confirmed that the characteristics of an adolescent brain extend beyond the age of 18. In fact, "[t]he features of youth identified in *Roper* and *Graham* simply do not magically disappear at age seventeen – or eighteen for that matter." *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016). The concerns that the Supreme Court had about punishing youth under 18 are equally applicable to individuals through at least age 21.[1] It is now known that the brain does not reach maturity until "somewhere around 22 or 23. Although, there are some scientists who would say it's even later than that. * * * [N]o one believes that the brain is fully mature by the time people are 19 years old." T.p. 14. By 2015, "there was broad consensus along neuroscientists that there was significant brain maturation going on past age 19 and up until the – into the early 20s." T.p. 16.

Due to the developments in brain science that indicate there is no bright line cut off of brain maturation at age 18, and the trends in the law toward considering these developments, a sentence

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[1] *See, e.g.*, A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 Psychological Science 549-562, 559-560a (2016) ("[T]hese findings suggest that young adulthood is a time when cognitive control is still vulnerable to negative emotional influences, in part as a result of continued development of lateral and medial prefrontal circuitry."); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, Dev. Rev. Vol. 28(1) 78-106 (Mar. 2008) (noting that "rates of risk-taking are high among 18- to 21-year-olds" and explaining that adolescents and young adults are more likely than adults over 25 to engage in risky behaviors); *Commonwealth v. Bredhold*, No. 14-CR-161, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, at *6-*10 (Fayette Circuit Court, 7th Div. Aug. 1, 2017) (Scorsone, J.) at *7-*9 (and sources cited therein); *State v. O'Dell*, 358 P.3d 359, 364 (Wash. 2015) ("[S]tudies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.") (citing sources)).

of life without the possibility of parole (LWOP) for offenders 21 years old and younger is unconstitutional under the Eighth Amendment, both facially and as applied to Graham.

I. The Eighth Amendment requires courts look to the scientific community for guidance, which now teaches that the brain is not fully developed until at least age 21.

To determine whether a punishment is constitutionally excessive, courts first must look to "objective indicia of society's standards." *Roper* at 563. To make this assessment, courts generally consider "the historical development of the punishment at issue, legislative judgments, international opinion, and sentencing decisions juries have made * * *." *Enmund v. Florida*, 458 U.S. 782, 788, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). After the objective indicia, courts consider proportionality in light of the "standards elaborated by controlling precedents" and an "understanding and interpretation of the Eighth Amendment's text, meaning, and purpose." *Kennedy v. Louisiana*, 554 U.S. 407, 421, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). It is now clear that this calculus must take into account the consensus of the relevant scientific and medical communities.

For example, Supreme Court precedent dictates that in determining the contours of the Eighth Amendment and whether a defendant is ineligible for a death sentence, courts may not ignore the consensus of the scientific community. The Court recently relied heavily on the standards of the scientific community surrounding the issue of intellectual disability. *Hall v. Florida*, 572 U.S. 701, 709-710, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). There, the Court ruled that the bright-line test used in Florida, which precluded anyone with an IQ score of over 70 from presenting evidence of intellectual disability, ignored the medical consensus that an IQ score is not dispositive of a person's intellectual capacity. The reliance on the scientific community continued when the Court required the analysis of intellectual disability to be determined under current medical diagnostic standards, rather than judicially created non-clinical standards based on lay stereotypes of intellectual disability. *Moore v. Texas*, __ U.S. __, 137 S.Ct. 1039, 1051-1053, 197

L.Ed.2d 416 (2017). Based on *Hall* and *Moore*, it is evident that the Eighth Amendment requires a court to consider the relevant scientific consensus when determining whether a punishment is excessive.

Today's scientific consensus recognizes that the same three concepts discussed in *Miller* apply to older adolescents, aged 18 to 21. *Miller* at 569-70. These differences demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders, because:

> (1) a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young;
>
> (2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and
>
> (3) that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Id.

At the time *Graham*, *Miller*, and *Roper* were decided, science had not yet reached a consensus regarding the brain development of youths in later adolescence. Today it has, and courts must keep up. *See, e.g.*, *State v. O'Dell*, 183 Wash.2d 680, 358 P.3d, 359, ¶¶27, 39 (Wash. 2015) (recognizing "fundamental differences between adolescent and mature brains" and requiring the court to consider effects of youthfulness as it pertains to culpability of an 18-year-old defendant). The medical community has now determined that adolescents in their late teens and early twenties are more comparable to their younger peers than they are to adults in their late-twenties or older. Indeed, recent studies show that certain brain systems and structures, including those involved in self-regulation and higher-order cognition, continue to develop, and mature well into the mid-twenties. *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science on Juvenile Justice*, 85 Notre Dame L. Rev. 89, 152 (2009) ("Though estimates vary, many scientists have opined that structural maturation is not complete until the mid-twenties.").

Although *Miller* draws a bright line of age 18 for precluding mandatory LWOP sentences, "[t]he Eighth Amendment 'is not fastened to the obsolete.'" *Hall* at 708, quoting *Weems v. United States*, 217 U.S. 349, 378, 30 S.Ct. 544, 54 L.Ed. 793 (1910). It "acquire [s its] meaning as public opinion becomes enlightened by a humane justice." *Id.* "It is proper to consider the psychiatric and professional studies," *Hall* at 709-10, and those studies now demonstrate that 18- to 21-year-olds are functionally adolescents in terms of brain development and the applicability of punishment rationales.

Today we know there is no meaningful difference between Graham, who was only 19 years old at the time of the crime, and a defendant under the age of 18. Both have brains that have not yet fully developed. Both are prone to immaturity, recklessness, and impulsivity; are still in the neurological development phase; and have transitory personality traits as they search for a stable, authentic identity. There is no distinction between an 18 and 19-year-old brain.

II. The Eighth Amendment requires sentences be in line with the evolving standards of decency, which dictate that age 21 is where the line for adulthood should be drawn.

A punishment's proportionality is determined by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 21 L.Ed.2d 630 (1958); *State v. Graham*, Slip Opinion 2020-Ohio-6700, ¶ 181, quoting *Trop*. "[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), citing *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, J., dissenting)).

By definition, "evolving standards of decency" accepts that benchmarks are modified over time. What may have been acceptable to the courts and society at large in both the distant and recent past may not prove acceptable as standards change. This evolution is clear in the Supreme

Court's Eighth Amendment jurisprudence as it relates to adults charged with non-homicide offenses,[2] defendants with intellectual disabilities charged with capital murder,[3] and juveniles charged with both homicide[4] and non-homicide crimes.[5]

"A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation." *Ewing v. California*, 538 U.S. 11, 25, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). However, the Supreme Court made clear in *Miller* that mandatory LWOP sentences for adolescents under 18 could not be justified by retribution and deterrence because they were less blameworthy and less likely to consider potential punishment when engaging in wrongdoing. *Miller* at 472. Indeed, the Court's decision in *Miller* was grounded in adolescents' reduced culpability and greater capacity for reform, an understanding gleaned in large part from "developments in psychology and brain science [showing] fundamental differences between juvenile and adult minds." *Id., citing Graham*, 560 U.S. at 68.

Even since *Miller*, the law has continued to evolve with regard to youth and LWOP sentences. Ohio recently enacted legislation that bans all LWOP sentences for offenders who were under the age of 18 at the time the crime was committed. R.C. 2929.07(A). The parole board is

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[2] *Compare, e.g., Maxwell v. Bishop*, 398 U.S. 262, 263 (1970) (accepting sentence of death for rape without murder before remanding on *Witherspoon* issue), *with Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (prohibiting execution of people for non-homicide offenses, including child rape).

[3] *Compare, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding constitutional the execution of intellectually disabled people), *with Atkins*, 536 U.S. at 319 (prohibiting the execution of intellectually disabled people).

[4] *Compare Stanford v. Kentucky*, 492 U.S. 361, (1989) (holding constitutional the execution of offenders under eighteen years), *with Roper v. Simmons*, 543 U.S. 551, 560 (2005) (prohibiting the execution of offenders under eighteen years).

[5] *Compare Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (holding that children convicted of nonhomicide offenses cannot be sentenced to life without parole and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation") *with Miller v. Alabama*, 560 U.S. 48, 74-75 (2010), and *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016), (establishing that children must have this meaningful opportunity for release even in homicide cases – except in the rarest of cases where the sentencer determines that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible").

statutorily required to provide a "*meaningful opportunity to obtain release*" after 18 years for non-homicide offenses, after 25 years for one or more homicide offenses, and after 30 years for two or more homicide offenses. (Emphasis added.) R.C. 2967.132(C) & (E). The parole board is further required to consider factors related to youth when determining release. R.C. 2967.132(E)(2). Had Graham been only 13 months younger at the time of the incident, he would have a meaningful opportunity to obtain release after 25 years based on R.C. 2967.132(C)(2).

Throughout the country, twenty-five states and the District of Columbia have completely banned LWOP sentences for juveniles.[6] In nine other states, no juveniles are serving LWOP sentences. *Id.* Other states, including the District of Columbia, have extended age preclusion to age 21 or 25. For example, in 2020, the District of Columbia passed legislation allowing offenders under the age of 25 at the time of their crime to receive parole eligibility after 15 years. *See* D.C. Law § 24-403.03. In 2019, Illinois enacted similar legislation, allowing offenders under the age of 21 at the time to the crime to apply for release after serving 10 or 20 years, depending on the crime. *See* 730 ILCS 5/5-4.5-115(b). California also allows most offenders who were 26 or younger at the time of the crime to be eligible for youth offender parole hearings. *See* Cali PEN § 3051. Washington State has also extended *Miller*'s protections to individuals under the age of 21 based on the same principles of youth as a mitigating factor. *Matter of Monschke*, 197 Wash.2d 305, 482 P.3d 276 (Wa. 2021). In 2017, a judge in Kentucky declared the death penalty unconstitutional for individuals under 21 at the time of the crime. *Commonwealth v. Bredhold*, Fayette Cir. Court, Case No. 14-CR-161 (Aug. 1, 2017) (declaring the current national consensus and scientific research supports precluding the death penalty for those under 21); *But see Commonwealth v. Bredhold*,

[6] *See* Juvenile Life Without Parole: An Overview, available electronically at https://www.sentencingproject.org/publications/juvenile-life-without-parole/ (last accessed Aug. 30, 2021).

599 S.W.3d 409 (Ky 2020) (remanding the cases back to the circuit court because the appellees did not have standing).

"It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The changes in state laws, providing extra protections for teenagers and extending those same protections to offenders in their early 20s, is "powerful evidence that today our society views" youthful offenders "categorically less culpable than the average criminal." *Id.* "Just as 'an individual's intellectual functioning cannot be reduced to a single numerical score,' neither can an individual's level of maturity." *Monschke* at ¶ 46.

Additionally, other areas of law have endorsed age 21 as the age of maturity, rather than age 18. For example, individuals must now be age 21 or older to purchase tobacco and tobacco products. R.C. 2927.02. The age was increased from age 18 to 21 in 2019. *See id.* Individuals must also be 21 or older to purchase alcohol. R.C. 4301.22(A). Ohio law also requires residents be 21 years of age or older to obtain a Concealed Handgun License. R.C. 2923.125(D)(1)(b). Society's general policy on the minimum age to rent a vehicle is 21, and sometimes 25, years of age.[7]

Eighth Amendment jurisprudence requires courts to consider the evolving standards of decency when determining if a punishment is cruel and unusual. The evolving standards of decency have validated those offenders under the age of 21 are equally less culpable as offenders under age 18. Accordingly, the meaningful opportunity for release now provided to youth under age 18 must be extended to those under 21.

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[7] *See e.g., Enterprise Requirements for Renting a Car*, available electronically at: https://traveltips.usatoday.com/enterprise-requirements-renting-car-62736.html (last accessed Aug. 31, 2021).

III. Graham's sentence of life without the possibility of parole is unconstitutional.

Because "[i]t just so happens that Damantae was on the wrong side of 18," he has been precluded from ever having the opportunity for release and redemption. T.p. 36. Graham, being barely 19 years old at the time of the offense, fits the psychological profile of the young offenders described above. His LWOP sentence is, therefore, violative of the Eighth Amendment.

Dr. Steinberg, a leading expert on the brain science of juveniles, explained in his report that "[d]evelopmental science therefore does not support the bright-line boundary that is observed in criminal law under which 18-year-olds are categorically deemed to be adults." Def. Ex. A at ¶ 13. He explained that the scientific evidence demonstrates that most juvenile offending is often due to developmental immaturity and linked to predictable patterns of brain development during adolescence; that brain maturation continues into the early 20s; that the adolescent brain is particularly "plastic" and more amendable to rehabilitation; and that the vast majority of juvenile offenders age out of committing crimes after their mid-20s. *Id.* at ¶ 36. Accordingly, "many of the same immaturities that characterize the brains of individuals younger than 18, and that have been found to mitigate their criminal culpability, are characteristic of the brains of individuals between 18 and 21." *Id.* at ¶ 38.

Based upon the record, Dr. Steinberg further concluded that it was his "professional opinion within a reasonable degree of psychological certainty that the findings of scientific studies of adolescent psychological and brain development apply to Mr. Graham's behavior and psychological functioning at the time of the offense." *Id.* at ¶ 39. "This young man when the offense was committed, he was still in a – in which he had an easily aroused limbic system, but still immature self-control." T.p. 12.

Consistent with Supreme Court precedent, the Eighth Amendment, and society's evolving standards of decency, Graham's sentence of LWOP is unconstitutional. His 19-and-one-month

year-old brain at the time of the offense had all the hallmarks of youth that *Miller*, *Roper*, and *Graham* relied on for categorical protections of young offenders. Accordingly, Graham should receive a meaningful opportunity for release.

ASSIGNMENT OF ERROR II

The trial court abused its discretion when it failed to grant Graham's request for a continuance. (T.d. 499, T.d. 502).

Issue Presented for Review and Argument

> *Did the trial court abuse its direction in denying the motion to continue when it failed to address the Unger factors, failed to provide a reason for the denials, and a review of the Unger factors demonstrate that the denial was unreasonable?*

Whether a trial court grants or denies a continuance request is within the trial judge's "broad, sound discretion." *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078, 1080 (1981). A reviewing court determines whether there has been an abuse of discretion. *Id.* A trial court abuses its discretion when the decision is "unreasonable, arbitrary, or unconscionable." *State v. Brown*, 163 Ohio App. 3d 222, 2005-Ohio-4590, 837 N.E.2d 429, ¶ 6 (1st Dist.), citing *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

The answer of whether a denial of a continuance violates due process "must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 821 (1964).

Ohio has employed a balancing test. *Unger*, 67 Ohio St.2d at 67-69. Specifically, "weighed against any potential prejudice to a defendant are concerns such as a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *Id.* at 67. When evaluating a motion for continuance, Ohio guides trial courts to note:

> the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory,

> purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67-68. *See also State v. Landrum*, 53 Ohio St.3d 107, 115, 559 N.E.2d 710 (1990) ("Several factors can be considered: the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors."). And this Court has specifically reviewed the *Unger* factors in determining whether the denial of a continuance was an abuse of discretion. *See e.g., In re Zak*, 11th Dist. Lake Nos. 2001-L-216, 2001-L-217, 2001-L-218, 2003-Ohio-1974, ¶¶ 29-30; *State v. Zemljic*, 11 Dist. Portage No. 2020-P-0073, 2021-Ohio-2181, ¶¶ 15-16.

I. A review of the *Unger* factors demonstrates that the trial court's denial of Graham's continuance request was unreasonable and arbitrary.

On January 6, 2021, defense counsel filed a motion for appointment of counsel to represent Graham at his R.C. 2929.05(A) resentencing hearing. *Damantae Graham's Motion for Appointment of Counsel at Resentencing*, T.d. 491. The next day, the trial court did not explicitly rule on the motion for appointment but scheduled the sentencing hearing for March 8, 2021. *Notice of Hearing*, T.d. 493. On January 26, 2021, defense counsel filed a motion to continue the sentencing hearing, indicating that Graham was filing a petition for writ of certiorari, appealing the Supreme Court of Ohio's decision affirming his convictions. *Damantae Graham's Motion to Continue the March 8, 2021, Resentencing Hearing*, T.d. 497. The State opposed the request for continuance, taking issue with the motion containing "intentions and suggestions." *State of Ohio's Response to Graham's Motion for Continuance*, T.d. 498. The trial court denied the motion for continuance without any explanation on February 10, 2021. *Order and Journal Entry*, T.d. 499.

Defense counsel filed a renewed motion to continue and a request for a status conference on February 26, 2021. *Damantae Graham's Combined Renewed Motion to Continue the March 8, 2021, Resentencing Hearing and Motion to Request a Status Conference*, T.d. 500. That motion

contained a request for "a shorter continuance based on events that have transpired since the filing of the initial motion for a continuance." *Id.* at 1. First, Graham filed an application to reopen his direct appeal with the Supreme Court of Ohio. *Id.* at 1-4. The filing of that application devested the trial court of jurisdiction pending the Supreme Court of Ohio's decision. *See id.*; *see also* Third Assignment of Error, *infra*. Second, counsel for Graham was scheduled for a major surgery, making her unable to travel or appear in court for two months. *Id.* at 4. And, the psychologist who evaluated Graham, who would have provided significant testimony relevant to sentencing, was unavailable on March 8. *Id.*

The State of Ohio filed a motion in opposition in response that was identical to their first motion in opposition. *State of Ohio's Response to Graham's Motion for Continuance*, T.d. 501. The State's motion was completely nonresponsive to Graham's renewed motion. It did not address the circumstances of the application to reopen, defense counsel's inability to attend the hearing, or the defense expert's inability to attend the hearing. *See id.* The State also failed to indicate how it would be prejudiced by a continuance. *See id.* The trial court denied the renewed motion for a continuance—again—without any explanation. *Order and Journal Entry*, T.d. 502.

A review of the *Unger* factors makes clear that the trial could abused its discretion in denying Graham's motion for a continuance. *Unger* at 67-68. First, the length of the delay requested was only a couple months, which was reasonable given the circumstances. *See id.* at 67. Graham's death sentence was vacated, but he remained convicted of aggravated murder, where the only sentencing options are life sentences. His 61-year sentence consecutive sentence to his prior death sentence also remained. Continuing the hearing would not have allowed Graham to delay serving his sentences, as he would remain incarcerated pending the hearing. Unlike in *Unger*, where the record was "totally devoid of any indication of what the potential delay might have been if appellant had successfully secured the second continuance," defense counsel here only asked for

a couple months continuance. *Unger* at 69. Given the reality of Graham's incarceration, his continuance request was reasonable.

Next, this was Graham's **only** request for a continuance. *Unger* at 67. And Graham requested the continuance as soon as possible. *Cf. Zemljic* at ¶ 16 (finding that defense counsel was aware of the issue with the evidence not being presentable for over two months but failed to alert the court and request a continuance until the day of trial). Also weighed against the appellant in *Zemljic* was that the matter had been pending for ten months and had been previously delayed by the appellant failing to appear. *Id.* Here, Graham had no prior continuance requests, which weighs heavily in his favor. Graham's resentencing hearing was determining whether or not Graham has an opportunity for potential release in his lifetime—it was not an ordinary felony sentencing hearing. Given the stakes, two months to prepare for such a hearing, particularly when lead counsel was not originally on the case, was not an extraordinarily long time at the offset. Requesting a continuance—when there is a question as to whether the trial court has jurisdiction, defense counsel was unable to attend the hearing, and the psychologist who evaluated Graham was unable to offer testimony that day—was entirely reasonable.

Third, a continuance would not have inconvenienced litigants, witnesses, opposing counsel, or the court. *Unger* at 67. For example, when a trial court determines there is prejudice to the state and other litigants, it is not an abuse of discretion to deny a continuance motion. *State v. Marine*, 141 Ohio App.3d 127, 2001-Ohio-2147, 750 N.E.2d 194 (3rd Dist.). In *Marine*, a two-day jury trial was set for Friday and Saturday because the courtroom was not available on the following Monday. *Id.* at 134. Before the commencement of the trial, the court informed counsel of the Saturday date, and even questioned the jury to confirm their availability for Saturday. *Id.* After the trial began, the defense requested a continuance to Monday because their expert was unable to testify on Saturday. *Id.* The trial court overruled the motion based on the courtroom's

unavailability and the jury's prior agreement to serve on Saturday. The reviewing court determined that the trial court "was required to balance the potential prejudices to all parties to the case that may arise if a continuance was granted. The trial court did so." *Id.*

Here, the State did not offer a single reason that indicated it would be inconvenienced. The continuance request was made by defense counsel with reasonable time for witnesses for the State to make plans to attend the hearing if desired. Further, due to Graham's convictions and remaining sentence, a delay of resentencing for a few months would not have prejudiced any involved parties. The trial court did not indicate any logistical or administrative reason for denying the continuance request, so there is no indication on the record that the trial court would have been inconvenienced. Instead, it was Graham who was ultimately the party that was prejudiced.

Finally, the request for the delay was legitimate and Graham did not contribute to the circumstances which gave rise to the continuance request. *Unger* at 67-68. As noted above, the jurisdictional question, counsel's major surgery and recovery time, and the unavailability of important expert testimony, are legitimate and compelling reasons for a first continuance request.

Notably, the prejudice to Graham from the lack of testimony by Dr. Rivera is apparent from the record. *State v. Brooks*, 44 Ohio St.3d 185, 195, 542 N.E.2d 636 (1989) (finding that appellant failed to demonstrate the testimony of the excluded witness would be "relevant and material" to the defense so the denial of the continuance request was not an abuse of discretion.). Dr. Rivera evaluated Graham for his post-conviction proceedings and drafted a report. Defense counsel included Dr. Rivera's report in Graham's sentencing memorandum and submitted it as an exhibit at the hearing. T.d. 504, pp. 37-60; Def. Ex. C; *supra* p. 4-7.[8] While Dr. Rivera's report offered a wealth of mitigating evidence, her testimony at his sentencing hearing would have

[8] Significant portions of the seven factors which the defense presented on in mitigation come almost exclusively from Dr. Rivera's report. Hearing testimony on these factors was critical to a thorough and robust mitigation presentation and necessary for accurate resentencing.

contextualized the evidence and explained it in terms of current scientific literature. For instance, while several witnesses spoke about Graham's lack of a father figure, only Dr. Rivera could have elaborated on the current findings that unequivocally demonstrate that "Children from two-parent homes do better than children from single-parent homes on a variety of social indicators." Def. Ex. C, p. 11. Specifically, Dr. Rivera's report stated:

> African American boys growing up in female-headed homes have a need for male role models. Consequently, African American boys' attempts to meet their need for a male role model usually leads them to an alliance of deviancy in which they seek unfit, deviant older male role who are criminally involved and exemplify poor behavior.

Id. at p. 11-12 (internal citations omitted). While stated as fact, she could have elaborated on the research that informed her conclusory statement and explained how this played out in Graham's life.

Another critical piece of mitigating evidence Dr. Rivera could have expanded upon was Graham's substance abuse. Substance abuse is a multifaceted and complex subject that is prone to being misunderstood but should be afforded significant weight in mitigation. While several witnesses corroborated Graham's substance abuse, only Dr. Rivera could have adequately explained why he sought out those substances as a coping mechanism and why it was mitigating. In her report Dr. Rivera stated that "Drugs served as the elixir that normalized the interpersonal and institutional racism, he perceived including his lack of connection at home. D'Amantae abused drugs to cope with anger, depression, anxiety and feeling alienated." *Id.* at 13-14. But if she had been able to testify, she could have developed this even further and presented a more comprehensive understanding of Graham's substance abuse, which would have offered greater insights into his behavior and choices.

This Court is now uniquely situated to find that Graham was prejudiced by not having Dr. Rivera's testimony at the sentencing hearing.

Weighing the interests of the public and court against the resulting prejudice to Graham demonstrates that Graham's continuance request should have been granted. The prejudice to Graham is apparent—significant mitigating evidence was unable to be presented, one of his defense counsel was unable to represent him at the hearing, and he was sentenced by a court where jurisdiction was in question. Weighed against that prejudice is the court's right to control its docket, which pales in comparison to Graham's prejudice. The public interest in the prompt and efficient dispatch of justice is similarly insignificant in comparison because Graham's 61-year sentence on the other felony counts was still imposed.

II. The trial court abused its discretion by failing to consider the *Unger* factors and failing to provide an explanation for denying the continuance.

The trial court "failed to conduct a sufficient inquiry concerning [the *Unger*] factors." *In re Zak* at ¶ 31. And failing to address the *Unger* factors has resulted in an abuse of discretion. *Id.* at ¶ 35. Indeed, the record is completely devoid of the trial court's reasoning for denying the continuance motion. There is no evidence that the trial court employed a balancing test at all, as required by *Unger*. "[W]ithout some indication in the record as to why a certain decision was made, we are left to speculate with respect to the reasons." *Id.* at ¶ 33, quoting *DeFranco v. DeFranco*, 11th Dist. Lake No. 2000-L-147, 2001-Ohio-4338, *3.

The trial court denied Graham's continuance request and renewed continuance request with the same single sentence: "The Court finds that based on the motion of the Defendant and the Response of the State, the motion is not well taken and is hereby denied." T.d. 499, 502. Trial courts are required by *Unger* to employ a balancing test when determining whether a continuance should be granted. 67 Ohio St.2d at 67-69. The trial court here failed to conduct that analysis, or at the bare minimum provide any reason for denying the continuance request.

Similarly, it is an abuse of discretion when a trial court fails to consider all the relevant *Unger* factors and denies a motion to continue "based on a blind and uncompromising adherence"

to the scheduled date. *State v. Wenzlick*, 164 Ohio App.3d 155, 2005-Ohio-5741, 841 N.E.2d 408, ¶¶ 26-28 (6th Dist.). In *Wenzlick*, there were two granted continuance requests, which weighed in favor of the trial court's decision to deny a third. *Id.* at ¶ 26. However, "there is nothing in the record to suggest that the trial court considered any other relevant factors that were known to it at the time the requests were denied." *Id.* Those factors in *Wenzlick* were (1) legitimate reasons for the continuance, (2) the appellant did not contribute to the circumstances giving rise to the need for the request, (3) there was no other competent counsel to represent appellant, and (4) there was no evidence to suggest the continuance would have inconvenienced the litigants, witnesses, counsel, or the court. *Id.*

Here, the record demonstrates that the trial court was uncompromisingly adhering to the March 8 resentencing date. Unlike in *Wenzlick*, there were no prior continuance requests that weighed in favor of the trial court's denial. *Id.* Identical to the factors in *Wenzlick*, (1) there were legitimate reasons for the continuance, as detailed above, (2) Graham did not contribute to the circumstances for the request and (3) there was no evidence to suggest inconvenience to the other parties. *Id.*

The one-sentence denial of the continuance and renewed continuance is further indicative of the trial court's uncompromising adherence to the March 8 date. The trial court failed to even grant a status conference regarding the circumstances of the request, as the defense had suggested in the renewed request. T.d. 502. It is apparent from the record that the trial court was uninterested in hearing from defense counsel, seriously considering its arguments, or complying with defense counsel's requests in any way. The trial court even failed to officially grant the appointment of counsel request until one month after the hearing, and only after further prompting by counsel. T.d. 520.

Because the trial court failed to address defense counsel's legitimate reasons for a single continuance request, "we are left to speculate with respect to the reasons." *In re Zak* at ¶ 33, quoting *DeFranco* at *3. Accordingly—as this Court has previously determined—failing to conduct a sufficient inquiry and address the *Unger* factors is an abuse of discretion, and Graham should be granted a new sentencing hearing.

ASSIGNMENT OF ERROR III

The trial court lacked jurisdiction to conduct Graham's resentencing hearing while his application for reopening was pending in the Supreme Court of Ohio.

Issue Presented for Review

Does filing an application for reopening a direct appeal divest a lower court of its jurisdiction to conduct a hearing pursuant to the decision of that direct appeal?

A trial court loses jurisdiction when a party files a notice of appeal. *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, ¶¶ 16-17 (perfection of appeal from trial court to appellate court strips court of jurisdiction). Similarly, a trial court loses jurisdiction when one of the parties files a memorandum in support of jurisdiction with the Supreme Court of Ohio. *State v. Wogenstahl*, 75 Ohio St.3d 273, 1996-Ohio-57 (appellant's notice of appeal to the Ohio Supreme Court divested the court of appeals of jurisdiction); *see also State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, ¶ 8 ("the trial court in this case had no jurisdiction to resentence the defendant once the state had filed its notice of appeal."). By extension, it follows that Graham's pending application for reopening should have the same preclusive effect on the trial court's jurisdiction as a memorandum in support of jurisdiction.

This Court has twice ruled that a trial court loses jurisdiction when the defendant appeals the trial court's denial of a post-conviction petition. *State v. Gibbs*, 11th Dist. Geauga No. 2014-G-3232, 2015-Ohio-3215; *State v. Bozek*, 11th Dist. Portage No. 2015-P-055, 2016-Ohio-1365.

In *Gibbs*, the defendant filed a Civil Rule 60(B) motion which the trial court converted into a post-conviction petition. *Gibbs* at ¶ 8. In his petition, Gibbs asserted that his convictions were barred by the applicable statute of limitations. The trial court overruled the motion and Gibbs appealed. While that appeal was pending, Gibbs filed a motion "to vacate void sentence." *Id.* at ¶ 9. The trial court denied the motion while the converted post-conviction was still on appeal. *Id.* The defendant appealed from the trial court's denial of his motion to vacate the void sentence. *Id.* This Court dismissed that appeal because the defendant's post-conviction appeal was still pending when the trial court ruled on the void judgment motion:

> [C]ontrary to the state's assertion in its second motion, a court does not necessarily lack subject matter jurisdiction to enter judgment on a post-conviction motion simply because it was not ordered to do so by a superior court. Here, however, an appeal was actually pending in this court when the trial court denied appellant's "motion to vacate void sentence." The issue on appeal was whether the trial court erred in overruling appellant's Civ.R. 60(B) motion for relief from judgment. *See Gibbs*, IV. The substantive issue in that case was whether appellant's due process rights were violated when the state purportedly prosecuted him outside the statute of limitations. By ruling on appellant's "motion to vacate void sentence," the trial court acted in a manner inconsistent with this court's ability to affirm, reverse, or modify the underlying judgment of conviction at issue in the pending appeal. We therefore conclude the trial court lacked jurisdiction to rule on the "motion to vacate void sentence".

Id. at ¶ 13.

This Court in *Bozek* reaffirmed its decision in *Gibbs.* Bozek filed a post-conviction petition ("*Bozek I*") which he later withdrew. *Bozek*, 2016-Ohio-1365 at ¶ 8. Bozek then filed a second post-conviction petition ("*Bozek II*") which the trial court denied, and which he appealed. *Id.* While that appeal was pending, Bozek filed with the trial court "a motion for new trial/motion to vacate sentence." ("*Bozek III*"). The trial court denied that motion for a new trial/motion to vacate sentence while the appeal in *Bozek II* was still pending. Bozek again appealed. This Court granted the state's motion to dismiss the defendant's appeal in *Bozek III*:

> Here, appellant's motion for new trial/motion to vacate sentence was inconsistent with this court's jurisdiction in *Bozek II* because, if that motion was granted, it

> would conflict with this court's ability to vacate appellant's sentence. Therefore, since the trial court did not have jurisdiction to rule on appellant's motion for new trial/motion to vacate, the court's entry denying the motion was not a final, appealable order. *Nemeth, supra,* at P6.

Id. at ¶ 13

The Supreme Court of Ohio has ruled that a motion to reopen a direct appeal filed with a court of appeals pursuant to Appellate Rule 26(B), in which the appellant is asserting that appellate counsel was ineffective, is a post-conviction proceeding. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 26 ("Today, we continue to adhere to the position that the App.R. 26(B) process represents a collateral postconviction remedy and is not part of the original appeal."). The S.Ct.Prac.R. 11.06 procedure in the Supreme Court of Ohio is equivalent to App. R. 26(B). Both rules provide avenues for appellants to raise ineffective assistance of counsel claims. The only difference is that App. R. 26(B) applies to appellants in non-capital cases in their first direct appeals of right, while S.Ct.Prac.R. 11.06 applies to death-sentenced individuals in their first direct appeals of right.

For purposes of the trial court's jurisdiction, Graham's pending application to reopen – a collateral proceeding – should have been treated the same as an appeal from the trial court's denial of a post-conviction appeal.

While the trial court was resentencing Graham, his pending application to reopen had four propositions, relief on any of which would have entitled him to a new trial. This Court previously granted Respondent's Motion to Dismiss as it pertained to Graham's Writ of Prohibition and determined that S.Ct.Prac.R. 11.06(F)(2) indicates that the granting of an application – not the mere filing – is what implicates a trial court's jurisdiction. That is not always timely, however, as is the case here. While the trial court is unequivocally divested of jurisdiction when an application is granted, it should also be divested upon the filing of an application, for the reasons brought up by the precise scenario. Specifically, the trial court's imposition of a new sentence would have

been "inconsistent with" the Supreme Court of Ohio's "ability to affirm, reverse, or modify the underlying judgment of conviction[s] at issue" in Graham's post-conviction application to reopen his direct appeal. *Gibbs* at ¶ 13. And the Supreme Court's ability to "impose conditions, if any, necessary to preserve the status quo of the reopened appeal" is rendered meaningless when the trial court has already disturbed and fundamentally altered the status quo. S.Ct.Prac.R. 11.06(F)(2). Thus, it was improper for the trial court to proceed with Graham's sentencing hearing until which time the Supreme Court of Ohio had ruled on his pending application for reopening.

CONCLUSION

For all the foregoing reasons, this Court should reverse Graham's sentence and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing MERIT BRIEF OF DEFENDANT-APPELLANT D'AMANTAE GRAHAM has been sent by electronic mail to Victor Vigluicci, Portage County Prosecutor, and Pamela Holder via email at *prosecutor@portageco.com* and *pholder@portageco.com* on this 7th day of September, 2021.

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