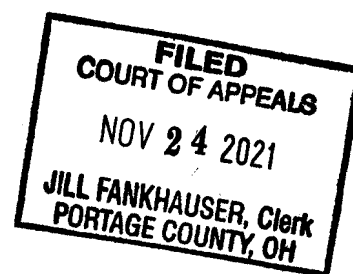


IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO



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

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

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APPELLANT D'AMANTAE GRAHAM'S REPLY BRIEF

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Portage County Prosecutor's Office

Victor V. Vigluicci [0012579]  
Portage County Prosecutor  
*prosecutor@portageco.com*

Pamela Holder [0072427]  
Assistant Prosecuting Attorney  
*pholder@portageco.com*

241 S. Chestnut St #2  
Ravenna, Ohio 44266  
(330) 297-3850  
(330) 297-3856 – Fax

**COUNSEL FOR STATE OF OHIO**

Office of the Ohio Public Defender

Michelle Umaña (0093518)  
Assistant State Public Defender  
*Michelle.Umana@opd.ohio.gov*

Erika M. LaHote (0092256)  
Assistant State Public Defender  
*Erika.LaHote@opd.ohio.gov*

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – Fax

**COUNSEL FOR D'AMANTAE GRAHAM**

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## PREFACE

Appellant D'Amantae Graham has chosen not to respond to all the detailed arguments or assertions contained in the Appellee's Brief. However, the failure to respond to an argument or assertion within the brief should in no way imply any concession on Graham's part. Rather, Graham stands on the facts, law, and arguments as originally presented in his Merit Brief.

## 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?*

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. As outlined in his Merit Brief, as the developing brain has been studied more, the consensus among the scientific community is that the 19-year-old brain is fundamentally the same as the 18-year-old brain. The Eighth Amendment requires a court to consider the relevant scientific consensus when determining whether a punishment is excessive. The evolving standards of decency teach that not providing a meaningful opportunity for release for offenders under the age of 21 violates the Constitution.

The State's only response to Graham's First Assignment of Error is “[o]n the authority of *State v. Larosa*, (sic) 11th Dist. No 2018-T-0097, 2020-Ohio-160, ¶ 84., (sic) Graham's constitutional challenge fails.” (State's Brief at 6-8). Problematic to the State's argument that LaRosa's life without the possibility of parole sentence is constitutional is that LaRosa, pursuant to R.C. 2967.132(C), now has parole eligibility. LaRosa's life without the possibility of parole

sentence no longer stands. R.C. 2967.132(C). Nor does any life without the possibility of parole sentence for offenders who were under age 18 at the time of their offenses. *See id.* Accordingly, *LaRosa* supports Graham's argument that the evolving standards of decency "regarding juvenile offenders following the trilogy of Supreme Court cases" (State's Brief at 8) support Graham's Eighth Amendment challenge. Indeed, contrary to the State's assertion that Graham has "no basis to argue for an extension of those protections to a 19-year-old homicide offender" (State's Brief at 8), *LaRosa* is precisely that basis.

### 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 discretion 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?*

As detailed in his Merit Brief, Graham's Motion for a Continuance of the March 8 resentencing hearing was both reasonable and necessary. *See* Merit Brief at 18-23. The State agrees that *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981) and *State v. Landrum*, 53 Ohio St.3d 107, 115, 559 N.E.2d 710 (1990) guide this Court's review of the trial court's denial of Graham's continuance motion. State's Brief at 9-10. Yet the State fails to specifically address the *Unger* factors and how they are applied in this case. *See* State's Brief at 9-12.

Instead, the State goes through the timeline of the case, which indeed supports Graham's argument that there was significant support for the trial court to grant Graham's continuance motion. The State fails to allege any inconvenience, prejudice, or reason that would have justified the trial court's denial beyond the "efficient administration of justice" (State's Brief at 12), which does not stand against the prejudice suffered by Graham due to the denial. Also absent from the

State's Brief is evidence to the contrary that the trial court failing to conduct a sufficient inquiry, failing to address the *Unger* factors, and failing to provide a reason for the denial is, on its own, an abuse of discretion. *See In re Zak*, 11th Dist. Lake Nos. 2001-L-216, 2001-L-217, 2001-L-218, 2003-Ohio-1974; *State v. Wenzlick*, 164 Ohio App.3d 155, 2005-Ohio-5741, 841 N.E.2d 408, ¶¶ 26-28 (6th Dist.).

The State's arguments further contradict each other. For example, the State continues to take issue with Graham's first motion for a continuance because it was "based on a hypothetical timeline for filing \* \* \* that was a mere intention when the motion was filed." State's Brief at 10. Yet, the State complains that Graham did not update his continuance motion when counsel was appointed to represent him to file an Application for Reopening but had not yet filed the actual pleading triggering the jurisdictional issue. State's Brief at 11. The State cannot have it both ways. It cannot base its opposition to the first motion for continuance because the support for such a motion was based on a future filing and then also argue that it was wrong for Graham to not further support the same motion with another future filing.

It is disingenuous for the State to allege that Graham "wait[ed] till (sic) the last possible moment to raise the Supreme Court of Ohio action as the leading reason for the continuance." (State's Brief at 11). First, Graham filed his Application for Reopening in the Supreme Court of Ohio on February 26, 2021—the *same day* counsel for Graham filed a renewed motion to continue the resentencing. Indeed, Graham did not wait a single moment in arguing the jurisdictional issue.

Further, Graham described additional reasons for the need for a continuance in his renewed motion on top of the jurisdictional issues. Those reasons were in fact "presented for the first time" (State's Brief at 11) as the State described because, as Graham stated in the motion, the reasons were "based on events that have transpired since the filing of the initial motion for a continuance."

*Damantae Graham's Combined Renewed Motion to Continue the March 8, 2021, Resentencing Hearing and Motion to Request a Status Conference*, T.d. 500 at 1 (Herein after "Renewed Motion"). First, undersigned counsel's presence was more than "additional counsel" as the State described. State's Brief at 11. Counsel was included in the motion for appointment as sitting third chair but noted she would not bill the trial court for her time, was an active member of the defense team, "more knowledgeable concerning the lengthy record," and had "a more solid relationship with Graham." *Damantae Graham's Motion for Appointment of Counsel at Resentencing*, T.d. 491 at 2, 4. Accordingly, it was prejudicial to Graham that counsel was unable to attend the hearing or "travel for at least two months following" her March 1 surgery.<sup>1</sup>

The second reason included in the Renewed Motion was that the defense psychologist, who would have offered relevant mitigation testimony in support of Graham, was unavailable for the March 8 hearing. Again, counsel for Graham alerted the trial court at the appropriate time—when they learned the information that supported the need for a continuance. Notably, the total time between the hearing being set and the hearing occurring was only two months, and those two months occurred during the global COVID-19 pandemic. As outlined in his Merit Brief, there was compelling information that the defense psychologist would have testified to on behalf of Graham, and the lack of her testimony prejudiced him. *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.).

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<sup>1</sup> Undersigned counsel brought the matter of an unplanned major surgery due to an injury to the trial court's attention at the appropriate time as the surgery was scheduled after the first motion to continue was filed. Further, the timing and scheduling of this matter was outside undersigned counsel's control.

Finally, the State alleges that there was “no potential prejudice such that it would outweigh other considerations.” State’s Brief at 12. Yet the State fails to address what those “other considerations” are. The only “concern” that the State cites is the “efficient administration of justice.” *Id.* Graham asked for a continuance until the Supreme Court of Ohio “rules on his application for reopening and Assistant Public Defender Umaña is again able to travel.” (Renewed Motion at 5). Undersigned counsel noted her ability to travel after two months (Renewed Motion at 4), and the Supreme Court of Ohio ruled on the application also about two months later on May 11, 2021 (05/11/2021 Case Announcements, 2021-Ohio-1606), which is a typical timeframe for those rulings. A continuance of a few months would not have hindered the “efficient administration of justice.” And “efficient administration of justice” must be weighed against the prejudice to the defendant, which far exceeded any risk to efficiency.

Significantly, the trial court failed to employ the balancing test required by *Unger* when ruling on a motion to continue and failed to provide any reason for the denial. 67 Ohio St.2d at 67-69. When a trial court denies a motion to continue “based on a blind and uncompromising adherence” to the scheduled date, it abuses its discretion. *Wenzlick*, 2005-Ohio-5741, at ¶¶ 26-28. The State has failed to address this issue.

Here the trial court “exercis[ed] its judgement, in an unwarranted way, in regard to a matter over which it ha[d] discretionary authority.” *Johnson v. Abdullah*, Slip Opinion No. 2020-0303, ¶ 35 (defining abuse of discretion). Accordingly, the trial court abused its discretion in denying Graham’s motion for a continuance of the resentencing 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?*

Graham is not arguing that the Portage County Court of Common Pleas has *no* jurisdiction or authority to resentence him—rather Graham contends that the filing of the application to reopen in the Supreme Court of Ohio divested the Common Pleas Court of jurisdiction while that case was pending.

Indeed, Graham provided ample support demonstrating that the filing of an application to reopen divests the Common Pleas Court of jurisdiction. Merit Brief at 25-28. Graham argued that because a motion to reopen a direct appeal has been determined to be a post-conviction proceeding, it should be treated the same as an appeal from a trial court's denial of a post-conviction appeal. As noted in his Merit Brief, this Court has twice ruled that a trial court loses jurisdiction when a 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. It follows that the Common Pleas Court was divested of jurisdiction when Graham filed his application to reopen in the Supreme Court of Ohio.

### **CONCLUSION**

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

Respectfully submitted,

Office of the Ohio Public Defender



Michelle Umaña (0093518)  
Assistant State Public Defender  
*Michelle.Umana@opd.ohio.gov*



Erika LaHote (0092256)  
Assistant State Public Defender  
*Erika.LaHote@opd.ohio.gov*

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 - Fax

**COUNSEL FOR APPELLANT  
D'AMANTAE GRAHAM**

**CERTIFICATE OF SERVICE**

I certify a copy of the foregoing APPELLANT D'AMANTAE GRAHAM'S REPLY BRIEF has been sent by electronic mail to Victor Viglucci, Portage County Prosecutor, and Pamela Holder via email at *prosecutor@portageco.com* and *pholder@portageco.com* on this 24th day of November, 2021.



Michelle Umaña (0093518)  
Assistant State Public Defender

**COUNSEL FOR APPELLANT  
D'AMANTAE GRAHAM**