

ORIGINAL

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

BRANDON MOORE

DEFENDANT-APPELLANT

CASE NO.: 2014-0120

ON APPEAL FROM CASE NO. 08 MA 20  
BEFORE THE COURT OF APPEALS FOR  
THE SEVENTH APPELLATE DISTRICT

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APPELLEE-STATE OF OHIO'S RESPONSE TO DEFENDANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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**Statement of Why This is Not a Case of Great Public or General  
Interest, and Does Not Present a Substantial Constitutional Question**

This Honorable Court must deny Defendant-Appellant Brandon Moore's Request for Jurisdiction and dismiss his discretionary appeal, because this case does not involve any substantial constitutional questions and is of no public interest.

Defendant was previously sentenced to one-hundred and twelve (112) years after him and his codefendants "brutally gang raped M.K. They each took turns orally raping her as the other one pointed a gun at her. Additionally, one would vaginally rape her while the other one orally raped her." *State v. Bunch*, 7<sup>th</sup> Dist. No. 02 CA 196, 2005 Ohio 3309, ¶ 171; *see State v. Moore*, 7<sup>th</sup> Dist. No. 10 MA 85, 2011 Ohio 6220, ¶ 3.

Following numerous appeals, Defendant filed a Delayed Application for Reconsideration pursuant to Appellate Rule 26(A), in which he argued that the 112-year sentence deprived him of a meaningful opportunity to obtain release as contemplated by *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), because the trial court imposed a de facto life sentence. *See State v. Moore*, 7<sup>th</sup> Dist. No. 08 MA 20, 2013 Ohio 5868, ¶ 1.

The Seventh District denied Defendant's Application for Reconsideration, because his application did not justify such a delay, and the trial court's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment as stated in *Graham* and *Miller*: "We are unpersuaded by Moore's arguments. For the reasons articulated in *State v. Bunch*, 7<sup>th</sup> Dist. No. 06 MA 106, J.E. August 8, 2013 and *State v. Barnette*, 7<sup>th</sup> Dist. No. 06 MA 135, September 16, 2013, Appellant Brandon Moore's Delayed Application for Reconsideration is denied." *See id.* at ¶ 2.

Defendant is essentially advocating that no matter what cruel and heinous offenses that a juvenile commits, he should be rewarded with an *opportunity* for early release so that he may live out his days a free man. The facts in this case simply speak for themselves.

Defendant may die in prison, or he may live to see the day that he may seek judicial release (regardless of the likelihood). But the fact that Defendant has several more years to serve before he may seek such release is based upon his own actions, and his actions alone, rather than a deprivation of his constitutional rights.

**WHEREFORE**, Appellee-State of Ohio hereby requests this Honorable Court to Deny Defendant-Appellant Brandon Moore's Request for Jurisdiction and Dismiss this Discretionary Appeal, as this case does not involve any substantial constitutional questions and is of no public interest.

### **Statement of Case, Facts, and Introduction**

Defendant was sentenced to one-hundred and twelve (112) years after him and his codefendants “brutally gang raped M.K. They each took turns orally raping her as the other one pointed a gun at her. Additionally, one would vaginally rape her while the other one orally raped her.” *State v. Bunch*, 7<sup>th</sup> Dist. No. 02 CA 196, 2005 Ohio 3309, ¶ 171; see *State v. Moore*, 7<sup>th</sup> Dist. No. 10 MA 85, 2011 Ohio 6220, ¶ 3.

To provide a more specific background, the Seventh District previously summarized the facts in Defendant’s direct appeal:

On August 21, 2001, Jason Cosa pulled into his driveway and was confronted by appellant, who pushed a gun into Jason’s face and demanded money. Appellant was 15 years old at the time. The other two passengers in Jason’s car were Christine Hammond and Jason’s grandfather. After the victims handed over their possessions, appellant fled down the driveway and entered a dark, noisy, older-model automobile that was waiting for him.

That same evening, appellant approached M.K., a 21-year-old student at Youngstown State University. As she was opening the trunk of her car, appellant put a gun into her stomach and demanded money. Appellant was wearing a mask, but removed the mask during the robbery. He began telling M.K. how beautiful she was and forced her to the passenger side of her car. Appellant entered the driver’s seat and began following a dark, older-model vehicle. M.K. had noticed this vehicle stopping nearby prior to the attack.

As they drove, appellant continued commenting on M.K.’s beauty. He demanded that she turn over any jewelry, and she complied. M.K. asked to be released, but appellant refused. Soon afterward, appellant stopped the car and codefendant Chaz Bunch entered M.K.’s car through the back door. Bunch put a gun to M.K.’s head and demanded money. Throughout the ordeal M.K. pleaded with them not to kill her.

As they continued to follow the other vehicle, appellant inserted his fingers into M.K.’s vagina several times. At this point, M.K. tried to memorize the license plate of the dark vehicle they were following, which she remembered as CTJ 6423.

The cars turned down a dead-end street and stopped on a gravel lot. Bunch and appellant ordered M.K. to get out of the car and pointed their guns at her. They grabbed her by the hair and forced their penises into her mouth, taking turns holding her head and orally raping her. This was repeated two or three times. Again M.K. pleaded that they not kill her, and they then took M.K. to the trunk of her car.

Once at the trunk, codefendant Jamar Callier began going through M.K.'s possessions in the car. Some items taken were a green Nike bag, tennis shoes, clothes, a bag from Old Navy, jewelry, and a purse. As M.K. faced the trunk of her car, appellant and Bunch told her to pull her pants down and turn around. M.K. resisted, and told her attackers she was pregnant, in an attempt to avoid being raped again. Appellant and Bunch pushed her, face forward, against the car and one of them anally raped her. Bunch then put his gun into her back and forced her to the front of the car.

Bunch threw M.K. to the ground. While she was on the ground, appellant and Bunch took turns vaginally and orally raping her. While one was vaginally raping her, the other would perform an oral rape, and vice versa.

At some point, codefendant Callier came over and forced them to stop. Bunch stated that he wanted to kill her, but Callier would not let him. Appellant put his gun in M.K.'s mouth and told her, "Since you were so good, I won't kill you." Callier helped M.K. back into her car. They threatened to kill her and her family if she told anyone what had happened.

M.K. drove to the home of her boyfriend's uncle and began screaming out the license plate number of the car she had seen. It later was discovered that she had inverted two numbers; the license plate was actually CTJ6243. M.K. was immediately taken to the hospital, and the Youngstown Police Department was contacted. Officer Colleen Lynch was at the hospital on an unrelated call and followed M.K. into the emergency room. She observed bruises, scrapes, and swelling. A sexual-assault nurse completed a rape examination of M.K.'s mouth, vagina, and rectum and recorded several injuries including bruises, bite marks, scratches, and abrasions and injuries to her vagina and anus.

After leaving the scene of the crime, the assailants went to a Dairy Mart on Mahoning Avenue. Officer Anthony Vitullo had heard a broadcast of the license plate of the suspects' vehicle (with

two numbers transposed) and noticed a similar vehicle in the Dairy Mart parking lot. Officer Vitullo observed and followed the vehicle, which soon ran a stop sign and pulled into a driveway on Edwards Street in Youngstown. Codefendant Bunch, who was driving, stopped the car and ran. Officer Vitullo radioed for backup assistance and arrested the other occupants of the car. Items found in the car included M.K.'s bag from Old Navy, a stuffed animal, a leather purse, tennis shoes, female clothing, a vehicle-registration card, and a credit-union card belonging to victim Jason Cosa, a .38-caliber handgun, a black face mask, blue and black caps, bullets, and shotgun shells. Police also found a piece of paper in the pocket of appellant's pants that stated "Property of [M.K.]."

After the police took appellant into custody, juvenile proceedings were initiated against him in the Mahoning County Court of Common Pleas, Juvenile Division. The case was transferred to the general division, and a 12-count complaint, with 11 firearm specifications, was filed against appellant on May 16, 2002. The counts included three counts of aggravated robbery in violation of R.C. 2911.01(A)(1), three counts of rape in violation of R.C. 2907.02(A)(2), three counts of complicity to rape in violation of R.C. 2923.03(A)(2) and 2907.02(A)(2), one count of kidnapping in violation of R.C. 2905.01(A)(4), one count of conspiracy to commit aggravated robbery in violation of R.C. 2923.01(A)(1) and 2911.01(A)(1), and one count of aggravated menacing in violation of R.C. 2903.21(A). Counts one through 11 were first-degree felonies, count 12 was a first-degree misdemeanor.

On September 11, 2002, the trial court joined appellant's case with that of the other three codefendants. Trial began on September 23, 2002. The jury found appellant guilty on all 12 counts on October 2, 2002. Sentencing was scheduled for October 23, 2002.

On October 17, 2002, appellant's counsel filed a motion to continue the sentencing hearing due to personal matters. The court overruled the motion on October 21, 2002. Appellant was represented at the sentencing hearing by another attorney.

On October 29, 2002, the trial court filed its judgment. The court sentenced appellant to the maximum prison term for each count, to be served consecutively (except for the misdemeanor menacing charge, which was to be served concurrently with the other sentences). The court also sentenced appellant to 11 firearm-

specification penalties, also to be served consecutively. The aggregate sentence amounted to 141 years in prison.

*State v. Moore*, 161 Ohio App.3d 778, 782-785. (7<sup>th</sup> Dist. 2005). The Seventh District then affirmed in-part, reversed in-part, and vacated in-part Defendant's conviction and sentence, and remanded to the trial court for resentencing. *See id.* at 802. Defendant's subsequent application for reopening his direct appeal pursuant to Appellate Rule 26(B)(5) was denied. *See State v. Moore*, 7<sup>th</sup> Dist. No. 02 CA 216, 2005 Ohio 5630, ¶ 7.

On remand, Defendant's sentence was vacated pursuant to *State v. Foster*, and remanded to the trial court. *See State v. Moore*, 7<sup>th</sup> Dist. No. 05 MA 178, 2007 Ohio 7215, ¶ 25, citing *State v. Foster*, 109 Ohio St.3d 1 (2006). On February 5, 2008, the trial court resentenced Defendant to one-hundred and twelve (112) years for his above offenses, and an appeal of right followed. *See State v. Moore*, 7<sup>th</sup> Dist. No. 08 MA 20, 2009 Ohio 1505, ¶ 1. Defendant's third sentence was affirmed. *See id.*

Thereafter, Defendant filed a petition for writ of mandamus and/or procedendo, in which he sought to compel the trial court to issue a final appealable judgment entry of sentence in compliance with Criminal Rule 32(C) as explained in *State v. Baker*, 119 Ohio St.3d 197 (2008). The Seventh District agreed and ordered the trial court to issue a revised sentencing entry. *See State ex rel. Moore v. Krichbaum*, 7<sup>th</sup> Dist. No. 09 MA 201, 2010 Ohio 1541.

On April 20, 2010, the trial court issued a nunc pro tunc sentencing entry. Following the trial court's nunc pro tunc judgment entry of conviction, Defendant appealed and raised several issues regarding his conviction and sentence. *See State v. Moore*, 7<sup>th</sup> Dist. No. 10 MA 85, 2011 Ohio 6220. The Seventh District, however, dismissed Defendant's appeal pursuant to this Court's decision in *State v. Lester*, 130



Ohio St.3d 303, paragraph two of the syllabus (2011). *See id.* In *Lester*, this Court held that “[a] nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken.”

On March 30, 2012, Defendant filed a Motion to Correct Void Portion of Sentence, and a Motion for Re-sentence. The State responded to each motion with a Motion to Dismiss. The trial court granted both motions to dismiss. Defendant timely appealed.

On appeal, the Seventh District concluded that the trial court properly dismissed Defendant’s untimely postconviction petition regarding the firearm specifications, but found that the trial court erred when it classified Defendant as a Tier III sex offender under Ohio’s Adam Walsh Act—S.B. 10. *See State v. Moore*, 7<sup>th</sup> Dist. No. 12 MA 91, 2013 Ohio 1431, ¶ 2.

On April 8, 2013, the trial court classified Defendant pursuant to S.B. 5, which the trial court was ordered to do—“This matter is remanded to the trial court for the limited purpose of holding a sex offender classification hearing, and to classify Moore pursuant to S.B. 5.” *See Moore*, supra at ¶ 39. Defendant timely appealed the trial court’s classification pursuant to S.B. 5. This appeal is currently pending before the Seventh District—2013 MA 60.

On September 16, 2013, Defendant filed a Delayed Application for Reconsideration pursuant to Appellate Rule 26(A). The Seventh District denied Defendant’s Application for Reconsideration, because his application did not justify such a delay, and the trial court’s sentence did not violate the Eighth Amendment’s prohibition

against cruel and unusual punishment as stated in *Graham* and *Miller*: “We are unpersuaded by Moore’s arguments. For the reasons articulated in *State v. Bunch*, 7<sup>th</sup> Dist. No. 06 MA 106, J.E. August 8, 2013 and *State v. Barnette*, 7<sup>th</sup> Dist. No. 06 MA 135, September 16, 2013, Appellant Brandon Moore’s Delayed Application for Reconsideration is denied.” See *State v. Moore*, 7<sup>th</sup> Dist. No. 08 MA 20, 2013 Ohio 5868, ¶ 2.

Defendant timely filed his Memorandum in Support of Jurisdiction, and the State of Ohio now submits its response for this Court’s review. State of Ohio-Appellee hereby requests this Honorable Court to Deny Defendant-Appellant Brandon Moore’s Discretionary Appeal, because this case does not involve any substantial constitutional questions and is of little general or public interest.

## Law and Argument

- I. **Proposition of Law No. I:** The Eighth Amendment prohibits sentencing a juvenile to a term-of-years sentence that precludes any possibility of release during the juvenile's life expectancy.

In Defendant first proposition of law, he contends that *Graham* and *Miller* mandate that a juvenile be given a “meaningful opportunity” to obtain release following a conviction for a nonhomicide offense, regardless of the offense's gravity and effect.

Defendant's discretionary appeal follows the Seventh District's denial of his Delayed Application for Reconsideration pursuant to Appellate Rule 26(A). Defendant continues to disagree with the trial court's lengthy sentence that followed his convictions after Defendant and Chaz Bunch “brutally gang raped M.K. They each took turns orally raping her as the other one pointed a gun at her. Additionally, one would vaginally rape her while the other one orally raped her.” *State v. Bunch*, 7<sup>th</sup> Dist. No. 02 CA 196, 2005 Ohio 3309, ¶ 171. Because Defendant was 15 at the time that he committed these horrific crimes, he contends that he deserves the *opportunity* to live again a free man.

To begin, it is well established that “an application for reconsideration must call to the attention of the appellate court an obvious error in its decision or point to an issue that had been raised but was inadvertently not considered.” *State v. Himes*, 7<sup>th</sup> Dist. No. 08 MA 146, 2010 Ohio 332, ¶ 4, citing *Juhasz v. Costanzo*, 7<sup>th</sup> Dist. No. 99 CA 294, unreported (Feb. 7, 2002). “Reconsideration motions are rarely considered when the movant simply disagrees with the logic used and conclusions reached by an appellate court.” *Himes*, supra at ¶ 4, citing *Victory White Metal Co. v. N.P. Motel Syst.*, 7<sup>th</sup> Dist. No. 04 MA 245, 2005 Ohio 3828, ¶ 2, and *Hampton v. Ahmed*, 7<sup>th</sup> Dist. No. 02 BE 66, 2005 Ohio 1766, ¶ 16.

Further, the Seventh District has recognized that “[a] motion for reconsideration can be entertained even though it was filed beyond the ten-day limitation on motions for reconsideration if the motion raises an issue of sufficient importance to warrant entertaining it beyond the ten-day limit.” *State v. Boone*, 114 Ohio App.3d 275, 277 (7<sup>th</sup> Dist. 199), citing *Carroll v. Feiel*, 1 Ohio App.3d 145 (8<sup>th</sup> Dist. 1981).

First, Defendant’s application did not justify the delay of five (5) years after this Court affirmed his conviction and sentence following a remand pursuant to *Foster*. In support, Defendant cited to the U.S. Supreme Court’s recent decisions in *Graham v. Florida* and *Miller v. Alabama*. But *Graham* was decided on May 17, 2010, and *Miller* was decided on June 25, 2012. Defendant could have sought reconsideration several years ago after *Graham* was decided. See *Moore*, 2013 Ohio 5868, ¶ 2, citing *State v. Barnette*, 7<sup>th</sup> Dist. No. 06 MA 135 (Sept. 16, 2013 J.E.); accord *State v. Bunch*, 7<sup>th</sup> Dist. No. 06 MA 106 (Aug. 8, 2013 J.E.).

Further, Defendant is not similarly situated as the juveniles in *Graham* and *Miller*, because he was not sentenced to life in prison without the possibility parole for a homicide. Defendant, on the other hand, received a rather lengthy sentence after he and Chaz Bunch brutally gang raped their victim.

Furthermore, Defendant could have raised a similar argument that was raised in *Graham* and *Miller* but failed to do so.

Thus, the delay was not justified, and is not an extraordinary circumstance.

Second, Defendant’s argument is nevertheless meritless.

In *Graham v. Florida*, the juvenile was sentenced to life in prison without the possibility of parole under Florida law after he committed armed burglary and attempted

armed robbery. The Court concluded that due to “the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences \* \* \* the sentencing practice under consideration is cruel and unusual.” *Graham*, at 130 S.Ct. at 2030.

More recently in *Miller v. Alabama*, the Court concluded that a mandatory life in prison without the possibility of parole was cruel and unusual punishment under the Eighth Amendment. *See State v. Long*, 1<sup>st</sup> Dist. No. C-110160, 2012 Ohio 3052, ¶ 52, citing *Miller*, *supra*.

In *Long*, the First District applied *Miller* and concluded that a juvenile’s sentence of life in prison without the possibility of parole under Ohio law was not cruel and unusual, because Ohio’s sentencing statute allows the trial court wide discretion when imposing a sentence, and the life in prison without parole is not mandatory like it was in *Miller* and *Graham*. *See id.* Thus, even if Defendant was sentenced to life in prison without parole, Defendant’s sentence did not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.

Furthermore, the Seventh District recently recognized that “as of yet, no Ohio Supreme Court or United States Supreme Court decisions has extended the *Graham* or *Miller* holding to ‘de facto’ life sentences.” *State v. Barnette*, 7<sup>th</sup> Dist. No. 06 MA 135 (Sept. 16, 2013 J.E.), citing *Goins v. Smith*, N.D. Ohio No. 4:09-CV-1551, 2012 WL 3022206 (July 24, 2012), and *State v. Kasic*, 228 Ariz. 288, 265 P.3d 410, 415-416 (Ariz.Ct.App. 2011), *Henry v. State*, 82 So.3d 1084, 1089 (Fla.Dist.Ct.App. 2012), *Walle v. State*, 99 So. 967, 972-973 (Fla.Dist.Ct.App. 2012), *Adams v. State*, 288 Ga. 695, 707

S.E.2d 359, 365 (2011), *People v. Taylor*, 2013 IL App (3d) 110876, 984 N.E.2d 580 (Ill.App.Ct. 2013), and *Bunch v. Smith*, 685 F.3d 546, 550-551 (6<sup>th</sup> Cir., 2012).

Defendant may die in prison, or he may live to see the day that he may seek judicial release (regardless of the likelihood). But the fact that Defendant has several more years to serve before he may seek such release is based upon his own actions, and his actions alone, rather than a deprivation of his constitutional rights.

Defendant is essentially advocating that no matter what cruel and heinous offenses that a juvenile commits, he should be rewarded with an *opportunity* for early release so that he may live out his days a free man.

The facts in this case simply speak for themselves.

Defendant's first proposition of law is meritless, and there is no need for this Court to accept jurisdiction over this proposition of law.

**Conclusion**

**WHEREFORE**, State of Ohio-Appellee hereby requests this Honorable Court to Deny Defendant-Appellant Brandon Moore's Discretionary Appeal, because this case does not involve any substantial constitutional questions and is of little general or public interest.

Respectfully Submitted,

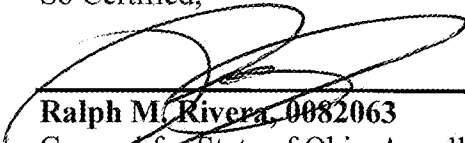
  
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**Certificate of Service**

I certify that a copy of the State of Ohio's Response was sent by ordinary U.S. mail to counsel for Defendant, **Rachel S. Bloomekatz, Esq.** and **Kimberly A. Jolson, Esq.**, at their above address, on February 11, 2014.

So Certified,

  
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