IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. 2014-0120
	:	
v.	:	ON DISCRETIONARY APPEAL
	:	FROM THE MAHONING
BRANDON MOORE,	:	COUNTY COURT OF APPEAL,
	:	SEVENTH APPELLATE DISTRICT,
Defendant-Appellant.	:	CASE NO. 08MA20

MERIT BRIEF OF APPELLANT BRANDON MOORE

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INTRODUCTION

The United States Supreme Court's decision in *Graham v. Florida* categorically prohibits sentencing juvenile nonhomicide offenders to spend the rest of their lives in prison. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Because juveniles are physiologically underdeveloped and immature, the Court concluded that the Eighth Amendment prohibits sentencing a juvenile to life without the possibility of parole in the absence of a homicide conviction, and even in the case of homicide such a drastic sentence must be "uncommon." *Id.* at 68-70; *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012). Instead, what the "State must do . . . is give defendants [with juvenile nonhomicide convictions] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham* at 75. Critically, *Graham* does not require a State to release a juvenile nonhomicide offender if he does not mature and rehabilitate, but the Constitution "forbid[s] States from making the judgment at the outset that [these] offenders never will be fit to reenter society." *Id.*

The constitutional rule set forth in *Graham* does not turn on the particular label given to a sentence. Whether the State imposes a "life without parole" sentence or a term of years that is so long it ensures death in prison (a "de facto" life sentence), the result is the same—a juvenile nonhomicide offender is denied the "meaningful opportunity [for] release" that *Graham* requires. *Id.* Thus, "the unconstitutional imposition of a . . . life-without-parole sentence is not fixed by substituting it with a [term-of-years sentence] that is the practical equivalent of a life sentence without parole." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013).

Graham turned on the fact that a juvenile who has not committed murder "has a twice diminished moral culpability." *Graham* at 69; *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849 8 N.E.3d 890, ¶ 9 (same). *First*, as this Court has repeatedly recognized, juveniles are inherently

less culpable because of their physiological immaturity and capacity for reform. *Long* at ¶ 12. *Second*, a juvenile who "did not kill" is "categorically less deserving of the most serious forms of punishment." *Graham* at 69. Based on these two factors, *Graham* held that juveniles who did not commit the most severe crime (homicide) could not be sentenced to the harshest juvenile penalty (life without parole). *Id.* *Graham* thus forbids sentencing any juvenile nonhomicide offender to "remain behind bars for life," whether his sentence is called "life without parole" or is based on consecutive term-of-years sentences that ensure he will die in prison. But that is exactly what happened here.

Brandon Moore's sentence, imposed and affirmed prior to *Graham*, violates this clear constitutional rule. Brandon is currently serving a 112-year sentence for nonhomicide offenses he committed when he was only 15 years old. He has no possibility of release until age 107, so he undoubtedly will die in prison. Indeed, the trial court told Brandon during sentencing that "it is the intention of this court that you should never be released from the penitentiary." ((Emphasis added.) Tr. Third Sentencing at 33.[1]) Brandon deserves to serve a significant sentence for the horrible crimes he committed, and if he does not demonstrate maturation and rehabilitation, he may indeed deserve to spend the rest of his life in prison. *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825. But the State cannot make that determination at the outset and deny Brandon his constitutionally protected "meaningful opportunity" to obtain release. *Id.*

STATEMENT OF CASE AND FACTS

Brandon is serving a 112-year sentence for nonhomicide offenses he committed when he was only 15 years old. On October 2, 2002, a jury found Brandon guilty on twelve counts: three

[1] The "Third Sentencing" refers to the January 24, 2008 resentencing of Brandon in Case No. 02-CR-525.

counts of aggravated robbery, three counts of rape, three counts of complicity to rape, one count of kidnapping, one count of conspiracy to robbery, and one count of aggravated menacing. *State v. Moore* ("*Moore I*"), 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶ 12 (7th Dist.).

The trial judge ignored Brandon's juvenile status. Instead, referring to him and his codefendants, the judge said: "They are adults," properly bound over from the Juvenile Court, and are "to be considered and dealt with as adults." (Tr. First Sentencing at 41-42.[2]) The judge also concluded that Brandon, at age 15, "[could not] be rehabilitated, that it would be a waste of time and money and common sense to even give it a try." (*Id.* at 49.) So he announced to Brandon: "I want to make sure that you never get out of the penitentiary." (*Id.* at 50.) The trial court sentenced Brandon to 112 years. *Moore I* at ¶ 115.

Four years later, after this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, which struck down several Ohio sentencing laws that required judicial fact-finding in violation of the Confrontation Clause, the trial court resentenced Brandon. *State v. Moore* ("*Moore III*"), 7th Dist. Mahoning No. 08 MA 20, 2009-Ohio-1505, ¶ 3. But the sentence was the same. *Id.* The judge again told Brandon: "[I]t is the intention of this court that you should never be released from the penitentiary." ((Emphasis added.) Tr. Third Sentencing at 33.) Next, upon this Court's decision in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, the trial court entered a nunc pro tunc order correcting a Rule 32(C) error in Brandon's judgment entry. *State ex rel. Moore v. Krichbaum* ("*Moore IV*"), 7th Dist. Mahoning No. 09 MA 201, 2010-Ohio-1541, ¶ 1; *State v. Moore*, Mahoning C.P. No. 02 CR 525 (Apr. 20, 2010).

[2] The "First Sentencing" refers to the October 23, 2002 sentencing of Brandon in Case No. 02-CR-525.

A month later, on May 17, 2010, the United States Supreme Court decided *Graham v. Florida*, holding that the Eighth Amendment forbids sentences that deny a juvenile defendant "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law." 560 U.S. at 79, 130 S.Ct. 2011, 176 L.Ed.2d 825. On the same day *Graham* was handed down, Brandon filed a pro se notice of appeal from the trial court's nunc pro tunc judgment. The Seventh Appellate District appointed him counsel for only that appeal, in which Brandon challenged his 112-year sentence as a violation of the Eighth Amendment under the United States Supreme Court's interpretation in *Graham*. *State v. Moore* ("*Moore V*"), 7th Dist. Mahoning No. 10 MA 85, 2011-Ohio-6220 (brief filed Dec. 9, 2010).

The Court of Appeals, however, did not reach the *Graham* claim on the merits. After Brandon's appointed counsel filed its brief, this Court decided *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, holding that "a nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission . . . is not a new final order from which a new appeal may be taken." *Id.* at ¶ 20. In accordance with *Lester*, the court held that Brandon's nunc pro tunc judgment was not a final appealable order so it could not reach the *Graham* claim. *Moore V* at ¶ 31.[3]

Less than a month after gaining new representation, on September 16, 2013, Brandon filed a Motion for Delayed Reconsideration of his last direct appeal. He argued that the retroactively applicable decision in *Graham* merited reconsideration under Appellate Rules 26(A)

[3] It also stated, without explanation, that the *Graham* claim was barred by res judicata, and suggested that the claim would be "more properly raised in a petition for postconviction relief." *Moore V* at ¶ 33. This reasoning was clearly erroneous. Brandon's *Graham* claim was not available before that case was decided (making res judicata inapplicable) and post-conviction relief was improper. This ruling thwarted Brandon's pro se efforts to pursue his *Graham* claim.

and 14(B). The Seventh Appellate District denied his motion for delayed reconsideration in a split decision. The court did not offer any individualized reasoning. Instead, the court relied on its decisions in two previous cases where juveniles with lengthy term-of-years sentences sought the benefit of *Graham* on reconsideration. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2013-Ohio-5868, ¶ 2 (citing *State v. Bunch*, 7th Dist Mahoning No. 06 MA 106, JE, Aug. 8, 2013 ("*Bunch JE*") (89-year sentence); and *State v. Barnette*, 7th Dist. Mahoning No. 06 MA 135, JE, Sept. 16, 2013 ("*Barnette JE*") (84-year sentence)).

In those two cases, the Seventh Appellate District held that extraordinary circumstances did not exist for delayed reconsideration because *Graham* is not "directly on point." *Bunch JE* at 4; *Barnette JE* at 4. The court decided that *Graham* did not apply because the juvenile defendants were not "specifically sentenced to life in prison without parole," even though their sentences would not expire until they are at least 100 years old. *Barnette JE* at 4; *see also Bunch JE* at 4. The court explained: "Admittedly, appellant's sentence may be considered a 'de facto' life sentence. . . . However, the United States Supreme Court's decision [was] based specifically on life sentences without the possibility of parole." *Barnette JE* at 4. The court also noted that those defendants delayed in filing their *Graham* claims; an issue not relevant to Brandon because, as noted above, Brandon "promptly raised his claim." *Moore*, 2013-Ohio-5868, at ¶ 13 (DeGenaro, J., dissenting).

As Judge DeGenaro wrote in her thorough dissent, Brandon made the requisite showing of extraordinary circumstances because he raised "an arguably valid extension of a constitutional argument" based on "a United States Supreme Court retroactive holding" that "was not available to [him] when his case was before the trial court" or during his direct appeal. *Id.* at ¶ 3. *Graham*, Judge DeGenaro explained, "held that, *categorically*, nonhomicide juvenile offenders cannot be

sentenced to life without parole." (Emphasis sic.) *Id.* at ¶ 17. And "[a]n explicit versus de facto life sentence is a distinction without a difference." *Id.* at ¶ 29 (DeGenaro, J., dissenting). For example, she reasoned: "What is clear from *Graham* is that if a juvenile offender is sentenced to, say, 200 years for multiple offenses, including mandatory and nonmandatory sentences, pursuant to R.C. 2929.20 [(Ohio's judicial release statute)] he would have to serve 100 years before being eligible for parole, this would not be constitutional under *Graham*." *Id.*[4] As Judge DeGenaro explained, the *Graham* Court explicitly left open how many years would constitute a "de facto" life sentence, *id.* at ¶ 19, 21, but "[n]onetheless, the Supreme Court has held that juvenile [nonhomicide] offenders, consistent with the heinous nature of their crimes, must be given a 'meaningful opportunity' at some point during the course of their sentence, to establish they have rehabilitated." *Id.* at ¶ 23.

Brandon sought jurisdiction in this Court, raising the persuasive dissent of Judge DeGenaro and the decisions of other State Supreme Courts that have held that "de facto" life sentences, based on aggregate consecutive sentences that exceed a juvenile's life expectancy, violate *Graham*. *See, e.g.*, *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (imposition of "life-

[4] Judge DeGenaro approximated that Brandon would have to serve 60 years of his sentence before he could seek judicial release under R.C. 2929.20; she did not state that this opportunity for release would be constitutional, but instead suggested that such a determination would be left to the trial court in the first instance. *Moore*, 2013-Ohio-5868, at ¶ 30. Brandon respectfully notes that Judge DeGenaro's dissent incorrectly calculates his possibility for judicial release under R.C. 2929.20. As she recognized, that statute allows for Brandon to apply for release after he has served his entire mandatory prison term and at least half of his nonmandatory term. *See* R.C. 2929.20. Brandon's mandatory sentence includes: 12 years for firearm specifications, R.C. 2941.145(A); 30 years for three counts of rape, R.C. 2929.13(F); and 30 years for three counts of complicity to rape, *id.*; R.C. 2023.03(F). Brandon has 40 years of nonmandatory sentence for one count of kidnapping (10 years) and three counts of aggravated robbery (10 years each). Accordingly, he must serve 72 mandatory years and at least 20 years of his nonmandatory sentence. Because he was 15 when sentenced, Brandon is thus unable to apply for judicial release until he is 107.

without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole."); *People v. Caballero*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 295 (2012) (bar on life without parole sentences in *Graham* applied to term of years sentence that amounted "to the functional equivalent of a life without parole sentence"). This Court accepted jurisdiction.

ARGUMENT

Proposition of Law: 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.

I. *Graham* Imposed a Categorical Ban on Sentencing a Juvenile Nonhomicide Offender to "Die in Prison" Without a "Meaningful Opportunity" to Obtain Release.

"De facto" life without parole sentences for juvenile nonhomicide offenders violate the Eighth Amendment, as set forth in the United States Supreme Court's decision in *Graham v. Florida*, and as reaffirmed in its decision only two years ago in *Miller v. Alabama*. *Graham*, 560 U.S. at 74, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Miller*, 132 S.Ct. at 2469, 183 L.Ed.2d 407. *Graham* states that a juvenile nonhomicide offender cannot be given a sentence that, as here:

> "guarantees [that] he will die in prison without any meaningful opportunity to obtain [his] release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes."

560 U.S. at 79. *See also Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.2d 890 at ¶ 8 ("[T]he Eighth Amendment prohibits . . . the imposition of life without the possibility of parole for [juvenile] nonhomicide offenses.").

In *Graham*, the Court addressed the constitutionality of a life without parole sentence for Terrance Graham, a juvenile who violated probation after having committed "armed burglary with assault or battery" and "attempted armed robbery." *Graham* at 53-54. Terrance pled guilty,

but the judge withheld adjudication of guilt and sentenced Terrance to probation—giving him a "second chance." *Id.* at 54. Less than six months later, and a few days short of his eighteenth birthday, Terrance was arrested for participating in a series of armed robberies. *Id.* at 55. After concluding that Terrance had violated his probation, the judge entered the maximum sentences for the earlier charges—"life imprisonment" for the armed burglary and 15 years for the attempted armed robbery. *Id.* at 57. The judge explained his sentencing decision to Terrence: "this is an escalating pattern of criminal conduct on your part" and "there is nothing that we can do for you." *Id.* Though the State had not labeled Terrance's sentence as "life without parole," the Supreme Court noted that "[b]ecause Florida has abolished its parole system . . . a life sentence gives a defendant no possibility of release unless he is granted executive clemency." *Id.* The Supreme Court concluded that Terrence's sentence was unconstitutional, drawing a "clear line" against sentencing a juvenile nonhomicide offender to "remain in prison for the rest of his days." *Id.* at 70, 74.

As described in greater detail below, *Graham*'s holding rests on three lines of reasoning. *First*, the Supreme Court explained that giving juveniles who do not commit homicide the harshest penalty available to juveniles would defy basic notions of proportionality required by the Eighth Amendment. *Graham* at 69; *see also In re C.P.*, 131 Ohio St.3d, 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 25, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910) ("Central to the Constitution's prohibition against cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"). Because of (1) their age, and (2) the fact that they did not commit murder, juvenile nonhomicide offenders have "twice diminished capacity," making life without parole an unconstitutionally excessive sentence.

Second, the Supreme Court analogized life without parole for juveniles to the death penalty for adults. *Graham*, 560 U.S. at 69-70, 130 S.Ct. 2011, 176 L.Ed.2d 825. Thus, the bar it adopted "mirrored a proscription first established in the death penalty context"—that the punishment "cannot be imposed for any nonhomicide crimes against individuals," irrespective of the particular facts or number of the nonhomicide crimes. *Miller*, 132 S.Ct. at 2467, 183 L.Ed.2d 407 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)). Just as the death penalty is reserved for adults who commit homicide, only juveniles who commit murder may be sentenced to life without parole; and even then, such a drastic sentence may be imposed only for the most depraved murders after considering the juvenile's youth and other mitigating factors. *Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890 at ¶ 8-19 citing *Miller* at 2471.

Third, the Supreme Court explained that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for sentencing juvenile nonhomicide offenders to die in prison. *Graham* at 71. Even for a juvenile like Terrance with an "escalating pattern of criminal conduct," the Supreme Court found that "penological theory is not adequate to justify" locking the cell and throwing away the key forever. *Id.* at 73-74.

Accordingly, the Supreme Court set forth a categorical rule barring "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id.* at 61, 75-80. The decision was unequivocal: "This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at 74. Instead, "[w]hat a State must do . . . is give [juvenile nonhomicide offenders] some

meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

A. *Graham* Held that Juveniles Who Commit Nonhomicide Crimes Have "Twice Diminished Moral Culpability" and Thus Cannot Receive the "Harshest" Juvenile Sentence.

Graham's holding rests upon the "basic precept of justice," protected by the Eighth Amendment, "that punishment for crime should be graduated and proportioned to both the offender and the offense." (Emphasis added.) *Miller*, 132 S.Ct. at 2463, 183 L.Ed.2d 407 (internal quotation marks and citation omitted); *Graham*, 560 U.S. at 59-60, 130 S.Ct. 2011, 176 L.Ed.2d 825. *Graham*'s proportionality analysis, therefore, focused on the characteristics of (1) juveniles and (2) nonhomicide offenses, and whether these factors justified the punishment of life without parole. *Graham* at 67.

The Supreme Court first considered the "characteristics of the offender," emphasizing that "children are constitutionally different from adults for purposes of sentencing" given their "diminished culpability and greater prospects for reform." *Id.* at 60; *Miller* at 2464. As compared to adults, juveniles have a "lack of maturity and [an] underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk-taking." *Graham* at 72 (internal quotation marks and citation omitted); *Miller* at 2464 (internal quotation marks and citation omitted). They are more susceptible "to negative influences and outside pressures," including peer pressure, and lack the ability to extricate themselves from "horrific, crime-produced settings." *Miller* at 2464 (internal quotation marks and citation omitted). Moreover, their characters are not as "'well formed,'" meaning that it is "'difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Graham* at 68 quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S.Ct 1183, 161 L.Ed.2d 1

(2005); *see also In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 40 ("Not only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness.").

These conclusions about juveniles rested "not only on common sense—on what 'any parent knows'—but on science and social science." *Miller* at 2464 (quoting *Roper* at 569). "[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds" making the actions of juveniles "less likely to be evidence of irretrievably depraved character." *Graham* at 68 (internal quotation marks and citation omitted). Specifically, the Court relied on amicus briefs from medical experts explaining the physiological differences between adult and juvenile brains. *Id.*; *see also Hall v. Florida*, 572 U.S. __, __ (2014) (slip. op. at 7-8) (emphasizing role of medical amicus in informing courts' Eighth Amendment decisions). For example, the amicus brief summarized the significant volume of scientific evidence demonstrating that "parts of the brain involved in behavior control continue to mature through late adolescence," *Graham* at 68, and that "[o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Miller* at 2464 (internal quotation marks and citation omitted).

These well-established and noncontroversial scientific findings—"of transient rashness, proclivity for risk, and inability to assess consequences—both lessen a child's 'moral culpability' and enhance the prospect that, as the years go by and neurological development occurs, [a juvenile's] deficiencies will be reformed." *Miller*, 132 S.Ct. at 2464-65, 183 L.Ed.2d 407 (internal quotation marks and citation omitted).[5] Accordingly, while juveniles are not absolved

[5] The Supreme Court further recognized that juveniles face particular challenges with respect to the criminal justice system. A juvenile "might have been charged and convicted of a

of responsibility, their transgressions are "not as morally reprehensible as that of an adult" and they are not deserving of the same sentences. *Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (internal quotation marks and citation omitted).

The Supreme Court then considered the nature of the offense. It reasoned that defendants who commit nonhomicide crimes "are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 69. The Supreme Court has drawn "a line 'between homicide and other serious violent offenses against the individual.'" *Id.* quoting *Kennedy*, 554 U.S. at 438, 128 S.Ct. 2641, 171 L.Ed.2d 525. That is because, as *Graham* acknowledged, even horrible crimes like rape "'cannot be compared to murder in their severity and irrevocability.'" *Graham* at 69 (quoting *Kennedy* at 538). Accordingly, "[a]lthough an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes" in both "moral culpability and consequential harm." *Id.* at 69 (internal quotation marks and citation omitted); *Miller* at 2465. *See also In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729 at ¶ 42 (*Graham* "bluntly noted" that rape is not as serious a crime as murder, so juvenile nonhomicide offenders have a "reduced degree of moral culpability.").

Based on these two factors—the characteristics of the offender and the nature of the offense—the *Graham* Court concluded that, compared to an adult murderer, a juvenile who commits a nonhomicide crime "has a twice diminished moral culpability." *Graham* at 69; *see also Long*, 138 Ohio St.3d 4718, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 9 ("a juvenile offender who

(continued...)

lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller* at 2468; *see also Graham* at 78 (explaining that juveniles "are less likely than adults to work effectively with their lawyers to aid in their defense," have "[d]ifficulty in weighing long-term consequences," and are "reluctan[t] to trust defense counsel").

did not kill or intend to kill has a twice diminished moral culpability" (internal quotation marks and citation omitted)); *In re C.P.* at ¶ 43 (same). This twice diminished moral culpability means that juveniles convicted of nonhomicide offenses cannot be subject to the harshest penalty for juveniles—life without the possibility of parole. *Id.* Rather, the harshest punishment must be reserved solely for juveniles who are convicted of homicide. *See Miller* at 2469. Even for homicide cases, however, the Supreme Court explained that life without parole sentences should be "uncommon." *Id.* at 2467.

B. *Graham* Analogized Life Without Parole Sentences for Juveniles to the Death Penalty for Adults, Establishing a Categorical Bar on Life Without Parole Sentences for Juveniles Who Do Not Commit Murder.

Graham's holding also rests on an analogy between life without parole sentences for juveniles and the death penalty for adults. *See Graham*, 560 U.S. at 69-70, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Miller*, 132 S.Ct. at 2467, 183 L.Ed.2d 407 (*Graham* "treat[ed] juvenile life sentences as analogous to capital punishment" (internal quotation marks and citation omitted)). Because adults are categorically barred from receiving the death penalty for nonhomicide crimes, so too juveniles are categorically barred from receiving life without parole sentences if they have not committed homicide. *Miller* at 2467. These categorical bars mean that no matter how many nonhomicide offenses—or how heinous—an adult cannot receive the death penalty. *See Kennedy*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (no death penalty for rape of a child). The same is true of juveniles with respect to life without parole. *Miller* at 2467.

First in *Graham*, and then in *Miller*, the Supreme Court made clear that "[f]or juveniles . . . a sentence of life without parole is the equivalent of a death penalty." *Long* at ¶ 27; *see also Graham* at 69; *Miller* at 2467; *United States v. Cobler*, 748 F.3d 570, 577 (4th Cir. 2014) (explaining that Supreme Court treats life without parole for juveniles like the death penalty for adults). Not only is life in prison the harshest possible sentence for a juvenile, but—like the

death penalty—it "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration." *Graham* at 69-70; *Miller* at 2467. And "life without parole is an especially harsh punishment for a juvenile," because a juvenile offender will almost inevitably "serve more years and a greater percentage of his life in prison than an adult offender." *Graham* at 70; *Miller* at 2466 (internal quotation marks and citation omitted). Put simply, as this Court has, "[f]or juveniles, the length of [a lifetime] punishment is extraordinary." *In re C.P.* at ¶ 45.

Because the Supreme Court "viewed this ultimate penalty [of life without parole] for juveniles as akin to the death penalty," it imported its capital punishment jurisprudence into the context of juveniles facing life without parole. *Miller* at 2466; *id.* at 2463 ("*Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents."). As the Court described, the "bar we adopted [in *Graham*] mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any nonhomicide crimes against individuals." *Id.* at 2467 citing *Kennedy* at 407.

Specifically, the death penalty cases directly relied upon in *Graham* held that an adult defendant convicted of nonhomicide crimes against individuals—no matter how many or how severe—cannot receive the death penalty. *Graham*, 560 U.S. at 60-61, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Kennedy*, 554 U.S. 407, 437-38, 128 S.Ct. 2641, 171 L.Ed.2d 525 (holding that "the death penalty should not be expanded to instances where the victim's life was not taken" including for rape of an 8-year-old child).

For instance, in *Coker v. Georgia*, an adult defendant was in prison for murder, rape, kidnapping, and other crimes when he escaped and committed another brutal rape, kidnapping, and armed robbery. 433 U.S. 584, 587, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). In sentencing the

defendant for these nonhomicide crimes, the Supreme Court held that the death penalty was unavailable despite the prior murder and rape. *Id.* at 599. Notably, the majority established this rule despite the dissent's concern that the Court's categorical bar against the death penalty for nonhomicide crimes "effective[ly]" prevented the State from punishing the defendant for these new crimes because he was already serving a near life sentence. *Id.* at 605 (Burger, J., dissenting). *See also Kennedy* at 466 (Alito, J., dissenting) (explaining that the majority's categorical bar on death penalty for adult nonhomicide offenders means that "a previously convicted child rapist [who] repeatedly rapes and tortures multiple child victims" cannot receive the death penalty). Because homicide crimes are categorically different, the Court placed a categorical bar on imposing the death penalty for any adult defendant who had not committed homicide. *Kennedy* at 438; *Coker* at 599-600.

So too, a juvenile convicted of nonhomicide crimes—no matter how many or how severe—cannot receive a sentence amounting to life without the possibility of parole. Like the capital punishment cases, the dissent and concurrence in *Graham* highlighted a series of examples where juveniles had committed horrible crimes. *Graham* at 94 (Roberts, C.J., concurring) (citing "Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son"); *id.* at 118 (Thomas, J., dissenting). Yet, as Chief Justice Roberts acknowledged, *Graham* articulates a "rule—applicable well beyond the particular facts of Graham's case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional." (Emphasis sic.) *Id.* at 94; *see also Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) ("Importantly, in crafting its categorical bar, *Graham* drew only one line that was crime-specific: it distinguished between homicide and nonhomicide crimes."). Just like an adult cannot receive the harshest adult sentence for multiple nonhomicide

crimes, by analogy, a juvenile cannot receive the harshest juvenile sentence for multiple nonhomicide crimes. *Graham* at 69-70; *Miller* at 2467. In both instances, the most severe penalties are reserved for murderers. *Miller* at 2467.

C. *Graham* Held that Sentencing Juvenile Nonhomicide Offenders to Die in Prison Without a Meaningful Opportunity for Release Fails to Adequately Serve Any Penological Purpose.

Graham further reasoned that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2465, 183 L.Ed.2d 407. Because "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," the *Graham* Court considered whether sentencing juvenile nonhomicide offenders to life without parole would adequately serve the interests of retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71, 130 S.Ct. 2011, 176 L.Ed.2d 825. It concluded that "none of [these] goals of penal sanctions . . . provides an adequate justification" for sentencing a juvenile nonhomicide offender to life without parole. *Id.*

As for retribution, the Court noted that "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Id.* But because "'[t]he heart of the retribution rationale'" relates to the offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult.'" *Id.* quoting *Tison v. Arizona*, 481 U.S. 137, 149, 107 S.Ct. 1676, 97 L.Ed.2d 127 (1987) (internal quotation marks and citation omitted) and *Roper*, 543 U.S. at 571, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). "The case becomes even weaker with respect to a juvenile who did not commit homicide." *Id.* Accordingly, "retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender." *Id.*

Nor does deterrence justify such an interminable sentence. "'[T]he same characteristics that render juveniles less culpable than adults'"—their lack of maturity, impetuousness and ill-considered actions—means "they are less likely to take a possible punishment into consideration when making decisions." *Id.* at 72. *Graham* thus concluded that any "limited deterrent effect" provided by imposing life without parole sentences on juvenile nonhomicide offenders "is not enough to justify the sentence." *Id.*

Next, the Court stated that "[w]hile incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." *Graham*, 560 U.S. at 71, 130 S.Ct. 2011, 1762 Ed.2d 825. The incapacitation rationale assumes that a juvenile will forever pose a danger to society; it requires "the sentencer to make a judgment that the juvenile is incorrigible." *Id.* But the characteristics of juveniles make that judgment inherently suspect, as "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 73 quoting *Roper* at 573. As to Terrance, the *Graham* Court recognized that he had an "escalating pattern of criminal conduct," and "deserved to be separated from society for some time." *Id.* But it concluded that it did "not follow" from this pattern of criminal activity that "he would be a risk to society for the rest of his life." (Emphasis added.) *Id.* Indeed, the Court clarified: "Even if the State's judgment that [Terrance] was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset." (Emphasis added.) *Id.*

Finally, rehabilitation cannot justify a life without parole sentence. Such a punishment "forswears altogether the rehabilitative ideal." *Id.* 74. Instead, it reflects the State's "irrevocable

judgment about [an offender's] value and place in society"—a "judgment that is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Id.* Accordingly, the Court concluded: "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.*

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Based on this reasoning, the Supreme Court placed a categorical bar on sentencing juvenile nonhomicide offenders to spend the rest of their lives in prison without a chance for release. The Supreme Court explicitly rejected a case-by-case approach, instead noting that it was breaking new ground by recognizing a "categorical challenge to a term-of-years sentence," though it had imposed categorical bars only on the death penalty in the past. *Id.* at 61. As with the death penalty, this bar applies irrespective of the particular nonhomicide crimes at issue. A "categorical rule," the Court explained, "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." (Emphasis added.) *Id.* at 79.

Therefore, as Judge DeGenaro reasoned, though Brandon was involved in crimes that "were truly horrifying . . . . [n]onetheless, the Supreme Court has held that juvenile offenders, consistent with the heinous nature of their crimes, must be given a 'meaningful opportunity' at some point during the course of their sentence, to establish they have rehabilitated." *Barnette*, 7th Dist. Mahoning No. 02 CA 65, JE, June 28, 2013, at 10-11. The State "is not required to guarantee eventual freedom" during a juvenile's natural life; *Graham* recognized that those "who commit truly horrifying crimes as juveniles may turn out to be irredeemable." *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825. But that decision cannot be made at the outset. *Id.*

II. Brandon's "De Facto" Life Sentence Violates the Eighth Amendment.

Although the State has labeled Brandon's sentence a term-of-years, rather than a "life-without-parole" sentence, it defies science to conclude that Brandon's 112-year sentence

amounts to anything less than life without the possibility of parole. *Bunch JE* at 4. This is a distinction without a meaningful difference. Brandon has no possibility of release while he is still alive. He is ineligible for parole. *See Woods v. Telb*, 89 Ohio St.3d 504, 507-508, 733 N.E.2d 1103 (2000) (explaining legislative changes aimed at "eliminating indefinite sentences and eliminating parole"). He is ineligible for judicial release under R.C. 2929.20 until he is 107 years old, well beyond his natural life expectancy. Accordingly, Brandon's sentence violates *Graham*'s categorical rule that a juvenile nonhomicide offender cannot be given a sentence that "guarantees [that] he will die in prison." *Graham* at 79.

The fact that Brandon's sentence is based on aggregate consecutive sentences is not a basis for distinguishing *Graham*. *Graham*'s reasoning applies equally to "de facto" life without parole sentences based on aggregate consecutive nonhomicide sentences as to "true" life without parole sentences. Even though Brandon was convicted of multiple counts, he is a juvenile with "twice diminished moral culpability," which is at the heart of *Graham*. And just like an adult who did not commit homicide cannot be sentenced to death, Brandon cannot receive the juvenile equivalent. The Supreme Court's analysis of the penological justifications in *Graham* does not change either.

Without a meaningful way to distinguish *Graham*, all that it is left is labels and semantics. The Supreme Court sets forth basic principles of constitutional law, and their decisions cannot be evaded by wordplay or by focusing on meaningless distinctions. The categorical rule articulated in *Graham* is about outcomes, not labels. *See Biter*, 725 F.3d at 1192 ("*Graham*'s focus was not on the label of a 'life sentence'—but rather on the difference between life in prison with, or without, possibility of parole."). Yet the outcome prohibited in *Graham* is exactly the one that will result if Brandon's sentence stands. Indeed, as this Court has soundly acknowledged: "[T]he

words of [a United States Supreme Court] decision set forth a principle of law that goes well beyond the facts presented in the case" and "as a lesser appellate court for purposes of federal questions, we ignore the words of the United States Supreme Court at our peril just as the 'lesser' courts of Ohio ignore our words at their peril as to questions of state law." *See State v. Storch*, 66 Ohio St.3d 280, 291, 612 N.E.2d 305 (1993).[6]

A. Brandon's Sentence Is Materially Indistinguishable From the Sentence in *Graham*.

Brandon's sentence mirrors the one given to Terrance—and rejected by the Supreme Court in *Graham*. Like Terrance, Brandon faced a difficult family and home environment. Terrance's parents were addicted to crack cocaine, *Graham*, 560 U.S. at 53, 130 S.Ct. 2011, 176 L.Ed.2d 825; Brandon's father was murdered. (Tr. Third Sentencing at 9.) Both Terrance and Brandon were addicted to drugs at an early age. *Graham* at 53; (Tr. Third Sentencing at 9.) And both were young teenagers when they committed a series of violent crimes alongside older codefendants. *Graham* at 53; (Sept. 23, 2002 Hearing Tr. in *State v. Moore*, Mahoning C.P. No. 02-CR-525 at 1151, 1312). One night, when he was just 16 years old, Terrance committed a series of crimes, including a violent robbery. Here too, Brandon committed several serious violent crimes one night when he was just 15 years old, including rape, robbery, and kidnapping. Both Terrance and Brandon were tried as adults. *Graham* at 53; *Moore I*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85 at ¶ 12. Terrance first received leniency in sentencing, but after committing a spree of further robberies when he was 17 years old, the judge concluded that

[6] Indeed, the United States Supreme Court reverses state courts that fail to apply their precedents faithfully. *See, e.g., Am. Tradition Partnership, Inc. v. Bullock*, 567 U.S. __, 132 S.Ct. 2490, 2491, 183 L.Ed.2d 448 (2012) (per curiam) (summarily reversing state court decision that "fail[ed] to meaningfully distinguish [precedent]"); *Wos v. E.M.A.*, 568 U.S. __, 133 S.Ct. 1391, 1398, 185 L.Ed.2d 471 (2013) (admonishing state court for using "semantics" and "creative statutory interpretation" to avoid preemptive force of federal law).

"there is nothing that we can do for you," and sentenced him to life imprisonment for armed burglary, and 15 years for attempted armed robbery—the maximum penalty for both crimes. *Graham* at 57. Brandon, too, was sentenced to the maximum for each of the multiple charges, and similarly the judge stated that Brandon "[could not] be rehabilitated, that it would be a waste of time and money and common sense to even give it a try." (Tr. First Sentencing at 49.)

Rather than receiving a "life" sentence like Terrance, Brandon received a 112-year sentence.[7] But there is no meaningful difference in sentencing a juvenile to life without parole or the functional equivalent. Either way, the judge is improperly deciding that a juvenile is "irredeemable," and forever a risk to society. *Graham* at 73. Either way, Terrance and Brandon were denied a "meaningful opportunity to obtain release." *Id.* at 75. Either way, Terrance and Brandon were given a sentence that "means denial of hope; . . . that good behavior and character improvement are immaterial; . . . that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 70 (internal quotation marks and citation omitted and alteration in original). While Terrance's sentence said "life" and Brandon's sentence said 112 years, neither sentence allows for a chance to demonstrate that they "will be fit to reenter society." *Id.* at 75; *Biter* at 1192 ("Both sentences deny the juvenile the chance to return to society. *Graham* thus applies to both sentences."). Either way, both are unconstitutional.

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[7] Contrary to the Seventh Appellate District's analysis, the juvenile in *Graham* was not "specifically sentenced to life in prison without parole." *Barnette JE* at 4. The juvenile in *Graham* received a sentence of "life imprisonment." 560 U.S. at 57, 130 S.Ct. 2011, 176 L.Ed.2d 825. "Because Florida had eliminated its parole system by statute, this amounted to a de facto life sentence without parole." *Moore v. Bitter*, 725 F.3d 1184, 1192 n.3 (9th Cir. 2013). Hence, *Graham* too "involved a de facto life sentence without parole." *Id.*

To be sure, *Graham*'s holding is in the context of a sentence to "life imprisonment" where the juvenile had no opportunity for parole. But it defies science and common sense to think that a 112-year sentence is anything but life without parole. *Graham*'s broad and repeated language about sentencing juveniles to "die in prison" forecloses an overly formalistic reading of its holding. *Graham* at 70; *see also, e.g., id.* at 70 (juvenile will "remain in prison for the rest of his days") (internal quotation marks and citation omitted); *id.* at 73 (juvenile not a risk to society "for the rest of his life"); *id.* at 75 (juveniles may end up deserving "incarceration for the duration of their lives"); *id.* (State forbidden from deciding juveniles "never will be fit to reenter society"). As other courts have concluded, "[i]n *Graham*, the Court did not employ a rigid or formalistic set of rules designed to narrow the application of its holding." *People v. Rainer*, 2013 COA 51, ¶ 71 (Colo.Ct.App.2013); *accord Biter*, 725 F.3d at 1192; *Caballero*, 55 Cal.4th at 267, 282 P.3d 291, 145 Cal. Rptr. 3d 286 (*Graham* applies "regardless of . . . how a sentencing court structures the life without parole sentence."). Rather, *Graham* "utilized broad language," in condemning sentences that "'give[] no chance for fulfillment outside prison walls.'" *Rainer* at ¶ 71 quoting *Graham* at 79 (alteration in third quote in original).

Moreover, adopting an overly formalistic approach to *Graham* would render it meaningless. Imagine, for example, that the judge had sentenced Terrance to 97 years for armed burglary (instead of "life imprisonment") and 15 years for attempted armed robbery (both were within the judge's discretion under Florida law); both without the possibility of parole. There is no rationale—based on the reasoning of *Graham*—that this hypothetical 112-year sentence would be constitutional, where a "life" sentence without the possibility of parole is not. Yet that hypothetical is precisely this case. As the Iowa Supreme Court explained: "the unconstitutional imposition of a . . . life-without-parole sentence is not fixed by substituting it with a [long, term-

of-years sentence] that is the practical equivalent of a life sentence without parole." *Ragland*, 836 N.W.2d at 121. Here, "[i]f the States were to have complete autonomy to define [sentences] as they wished, the Court's decision in [*Graham*] could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall v. Florida*, 572 U.S. __, __ (2014) (slip. op. at 18-19).

Quite simply, "a government system that resolves disputes could hardly call itself a system of justice with a rule that demands [protections] only to those youths facing a sentence of life without parole and not to those youths facing . . . . the functional equivalent of life without parole." *Ragland* at 121-22.

B. *Graham* Applies to Consecutive Nonhomicide Sentences that Exceed a Juvenile's Life Expectancy When Combined.

For the same reasons, there is no meaningful basis for limiting *Graham* to single sentences, rather than applying it to consecutive aggregate sentences that amount to life without parole. As an initial matter, the language in *Graham* demonstrates that its holding is not limited to single life without parole sentences, as opposed to aggregate sentences. The Court's repeated references to juvenile "nonhomicide offender[s]," (used 25 times in the text of the majority opinion) and juveniles "who did not commit homicide," *Graham*, 560 U.S. at 72, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825, demonstrate that the Court imposed a "flat ban" on a sentence for juvenile nonhomicide offenders irrespective of whether their sentence included multiple consecutive counts. *Miller*, 132 S.Ct. at 2466 at n.6, 183 L.Ed.2d 407.

More critically, *Graham*'s reasoning applies equally to Brandon's sentence. *See Thomas v. Pennsylvania*, No. 10-4537, ___ F. Supp. ___, 2012 U.S. Dist. LEXIS 181424, at *8 (E.D. Pa. Dec. 21, 2012) ("The Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based

on their label."); *Floyd v. State*, 87 So.3d 45, 46-47 (Fla. 1st DCA 2012) (noting that "courts should be guided by the principles set forth in *Graham* when evaluating a lengthy term-of-years sentence for a juvenile who was convicted of a nonhomicide offense" and holding unconstitutional a combined 80-year sentence for two counts of armed robbery);[8] *Rainer*, 2013 COA at ¶ 73 ("Rainer's 112-year sentence [for multiple crimes], with the virtually nonexistent possibility of parole at the age of seventy-five, violates the holding and reasoning of *Graham* . . . ."); *Caballero*, 55 Cal. 4th at 268, 282 P.3d 291, 145 Cal. Rptr. 3d 286 ("*Graham*'s analysis does not focus on the precise sentence meted out. Instead . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime.") quoting *Graham* at 82.

Graham's conclusion that Terrance had "twice diminished culpability" was based on the facts that: (1) he was a juvenile, and (2) he had not committed homicide. *Graham* at 69. Neither of these factors is different for Brandon simply because his sentence is composed of multiple, consecutive terms. *First*, "none of what [*Graham*] said about children . . . their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific" or limited to youth charged with only a single count. *Miller* at 2465 (recognizing that a youth's developmental "features are evident in the same way, and to the same degree," when youth commit murder). *Second*, although Brandon's sentence is composed of multiple aggregate counts, he is "categorically less deserving of the most serious forms of punishment" because he did not commit homicide. *Graham* at 69. Terrance had a history of offenses, and just days

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[8] Florida courts of appeal are split on the question of whether *Graham* applies to extreme term-of-years sentences for juvenile nonhomicide offenders. The issue is currently under review by the Florida Supreme Court. *See Gridine v. State*, 103 So. 3d 139 (Fla. 2012) (review and rehearing granted).

before his eighteenth birthday committed a spree of robberies. Despite recognizing this "escalating pattern of criminal conduct," the Court explained that committing homicide crosses a critical moral line. *Id.* at 73 (internal quotation marks and citation omitted). Just as an adult cannot receive the death penalty for multiple violent nonhomicide crimes, Brandon too cannot receive life without parole based on these aggregate fixed term sentences. *Id.* at 69-70; *Miller* at 2467.

Furthermore, there is no basis for distinguishing Brandon's sentence based on penological justifications. Even if a juvenile's sentence is based on multiple consecutive counts, for retribution purposes, it still does not merit the level of punishment appropriate for murder. *Graham*, 560 U.S. at 71, 130 S.Ct. 2011, 176 L.Ed.2d 285; *see Kennedy*, 544 U.S. at 442, 128 S.Ct. 2641, 171 L.Ed.2d 525. Similarly, whether facing a "de facto" or "true" life sentence, the characteristics of juveniles make them "less susceptible to deterrence." *Graham* at 72 (internal quotation marks and citation omitted). Likewise, a court cannot make the "subjective" determination that Brandon is irredeemable. *Graham* at 77. Terrance was a recidivist, and still the Court held that incapacitation was an insufficient rationale. *Id.* at 73. Lastly, just as a "true" life without parole sentence "forswears altogether the rehabilitative ideal," so does sentencing a juvenile to die in prison based on consecutive aggregate sentences. Accordingly, just as in *Graham*, there is no adequate penological justification to support Brandon's "de facto" life sentence.

Thus, unsurprisingly, federal and state courts across the country have applied *Graham* to invalidate juvenile sentences that, based on consecutive aggregate counts, exceed life expectancy. *Biter*, 725 F.3d at 1186-87 (striking 254-year aggregate juvenile nonhomicide sentence); *Thomas v. Pennsylvania*, ___ F. Supp. ___, 2012 U.S. Dist. LEXIS 181424 (same for 65 to 150 years);

United States v. Mathurin, No. 09-21075-Cr-COOKE, __ F. Supp. __, 2011 U.S. Dist. LEXIS 69364 (S.D.Fla. June 29, 2011) (same for 307 years); *Caballero*, 55 Cal.4th 262, 282 P.3d 291, 145 Cal. Rptr. 3d 286 (same for 110 years); *Rainer*, 2013 COA 51 (same for 112 years). Contrary to these decisions, the Sixth Circuit concluded that *Graham* did not "clearly establish" for federal habeas purposes that consecutive, fixed-term sentences for juveniles who have been convicted on multiple nonhomicide counts are unconstitutional when they amount to the practical equivalent of life without parole. *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). That decision was decided under the strict standard required by "AEDPA," and the Sixth Circuit even acknowledged that a court "on direct review" could reach the opposite conclusion. *Id.* at 552.[9] In any event, such a ruling contradicts both the language and reasoning of *Graham*, as the categorical rule it sets forth applies to "all" juveniles who do not commit homicide offenses. *Graham* at 79.

[9] *Bunch* was decided under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which requires that a Supreme Court case be "clearly established" before it may be applied in federal habeas proceedings. 28 U.S.C. § 2254(d). *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012). AEDPA's stringent standard sets an exceedingly high bar. *See Schriro v. Landrigan*, 550 U.S. 465, 473; 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (stating AEDPA's standard is "a substantially higher threshold" than standard asking whether decision was incorrect); *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7; 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (noting AEDPA establishes a "highly deferential standard for evaluating state court rulings"); *Durr v. Mitchell*, 487 F.3d. 423, 445 (6th Cir. 2007) (explaining "we are not on direct appeal here, but applying the deferential standard of the AEDPA"). Contrary to *Bunch*, some courts have held that *Graham* is applicable on AEDPA review to consecutive fixed-term sentences that exceed a juvenile nonhomicide offender's life expectancy. *See Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) (applying *Graham* on AEDPA review to "de facto" life sentence based on consecutive aggregate nonhomicide crimes); *Thomas v. Pennsylvania*, No. 10-4537, __ F. Supp. __, 2012 U.S. Dist. LEXIS 181424 (E.D. Pa. Dec. 21, 2012) (same). Even though the Sixth Circuit held that *Graham* did not apply on AEDPA review, it recognized that a court on "direct review" would face a different question that could lead to a different outcome. *Bunch*, 685 F.3d at 552; *see also State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) (distinguishing *Bunch* because "the Court in *Bunch* was confined to a very narrow standard of review").

Holding that Brandon could receive a sentence that exceeds his life expectancy without the possibility of parole would turn proportionality on its head. It would mean that juveniles who do not kill are subject to the same punishment as those who do. Indeed, it would directly contradict *Miller*—which says that life sentences can be given only to juveniles in "uncommon" homicide cases—to allow trial judges to achieve the same result by giving 100-year sentences in nonhomicide cases. *Miller*, 132 S.Ct. at 2469, 183 L.Ed.2d 407. If juvenile homicide offenders should only "rarely" receive life without parole, but nonhomicide offenders could receive consecutive aggregate sentences exceeding their life expectancy, then nonhomicide offenders could indeed receive longer sentences. *Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 29. Indeed, this Court held in *Long* that a sentencing judge must consider youth and other mitigating factors before sentencing a juvenile who has committed murder to life without parole. *Id.* at ¶ 19. But there are no such protections—Brandon did not receive any—for sentencing a youth to multiple consecutive sentences for lesser crimes, even if those sentences add up to a "de facto" life sentence. Thus, juveniles who commit murder could indeed end up with more protections that those who have committed nonhomicide crimes.

Similarly, affirming Brandon's sentence would subvert basic notions of proportionality by subjecting juveniles and adults to the same maximum punishment for the same crimes. For an adult who commits multiple rapes, the harshest penalty possible is life without parole. *In re CP*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 27 (citing *Kennedy*, 554 U.S. at 437, 128 S.Ct. 2641, 171 L.Ed.2d 525). If this Court allows juvenile nonhomicide offenders to be sentenced to consecutive sentences that exceed their life expectancy without a "meaningful opportunity for release," then juveniles would be subject to the same harshest punishment as adults who committed the same crimes. Yet this Court—and the Supreme Court—has already

rejected such a notion. *See Long* at ¶ 33 (O'Connor, C.J., concurring) ("courts must treat youths who commit murders and other serious crimes differently from adults who commit those same crimes") (Emphasis added.).

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Following this reasoning, courts around the country have invalidated sentences like Brandon's. *See, e.g., Biter*, 725 F.3d at 1186-87 (holding that 254-year aggregate sentence for "sexually victimizing four separate women on four occasions during a five-week period" with a firearm was unconstitutional under *Graham*); *Thomas v. Pennsylvania*, ___ F. Supp. ___, 2012 U.S. Dist. LEXIS 181424, at *6 (juvenile sentence based on separate counts for rape, indecent assault, armed robbery, and burglary unconstitutional under *Graham* because he was not eligible for parole until age 83, an "age more than a decade beyond his life expectancy"); *Mathurin*, __ F. Supp. __, 2011 U.S. Dist. LEXIS 69364 (striking as unconstitutional portion of the Hobbs Act that requires terms of imprisonment for its violation to run consecutively because resulting 307-year sentence for juvenile violated *Graham*); *Caballero*, 55 Cal.4th 262, 282 P.3d 291, 145 Cal. Rptr. 3d 286 (juvenile's 110-year sentence, based on three consecutive counts of attempted murder, violates *Graham*); *Rainer*, 2013 COA 51, ¶ 73 (juvenile's "112 year sentence [based on consecutive aggregate counts], with the virtually nonexistent possibility of parole at the age of seventy-five, violates the holding and reasoning of *Graham*"). *But see State v. Brown*, 118 So.3d 332, 335 (La. 2013) (holding that *Graham* does not apply to a "juvenile offender who committed multiple offenses resulting in cumulative sentences matching or exceeding his life expectancy without the opportunity [for] early release.").

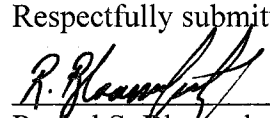
The fact that Brandon received a "de facto" life without parole sentence based on aggregate consecutive counts—rather than a "true" life without parole sentence—is "a

distinction without a difference." *Moore*, 2013-Ohio-5868, at ¶ 29 (DeGenaro, J. dissenting). As in *Graham*, Brandon has "twice lessened culpability" because he is a juvenile who did not commit homicide. There are, likewise, no penological bases for holding him in prison for the rest of his life without the mere opportunity to prove that he is fit to reenter society. Accordingly, *Graham* applies, and the Constitution guarantees Brandon a "meaningful opportunity" to prove he has changed.

CONCLUSION

For the reasons stated above, Brandon respectfully requests that this Court reverse the Seventh Appellate District and hold that the Eighth Amendment prohibits sentencing a juvenile nonhomicide offender to a term-of-years sentence that precludes any possibility of release during the juvenile's life expectancy.

Respectfully submitted,



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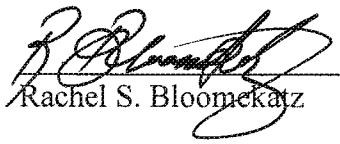
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant Brandon Moore was served by regular, U.S. Mail, postage prepaid, to Ralph Rivera, Esq., Assistant Mahoning County Prosecutor, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503, on this 14th day of July, 2014.



Rachel S. Bloomekatz

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. 14-0120
	:	
v.	:	ON DISCRETIONARY APPEAL
	:	FROM THE MAHONING
BRANDON MOORE,	:	COUNTY COURT OF APPEAL,
	:	SEVENTH APPELLATE DISTRICT,
Defendant-Appellant.	:	CASE NO. 08MA20

NOTICE OF APPEAL

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Defendant-Appellant Brandon Moore hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Seventh Appellate District of Ohio, Case No. 08MA20, entered on December 9, 2013.

This case originated in the Mahoning County Court of Common Pleas and was appealed to the Seventh Appellate District.

This cases raises a substantial constitutional question and is one of public and great general interest.

Respectfully submitted,

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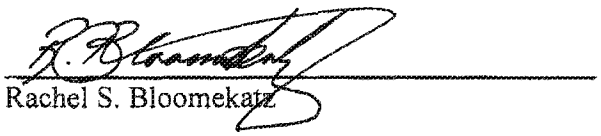
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was served by regular, U.S. Mail, postage prepaid, to Ralph Rivera, Esq., Assistant Mahoning County Prosecutor, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503, on this 23rd day of January, 2014.



Rachel S. Bloomekatz

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, PLAINTIFF-APPELLEE, - VS - BRANDON MOORE, DEFENDANT-APPELLANT.	)	CASE NO. 08 MA 20 OPINION AND JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS: Motion for Reconsideration.

JUDGMENT: Motion Denied.

APPEARANCES:

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 9, 2013

{¶1} Defendant-Appellant Brandon Moore asks this Court for delayed reconsideration of his resentencing appeal, *State v. Moore (Moore III),* 7th Dist. No. 08 MA 20, 2009-Ohio-1505 as he has no other avenue to avail himself of the retroactive constitutional argument that his sentence violates *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). In *Graham,* the United States Supreme Court held that imposing a life sentence without the possibility of parole upon nonhomicide juvenile offenders as a category violates the prohibition against cruel and unusual punishment of the Eighth Amendment to the United States Constitution. The Court reasoned that because juveniles as a category are fundamentally different from adult offenders, they cannot in the first instance be subjected to spending the rest of their natural lives in prison. Rather, they must be afforded a 'meaningful opportunity' to establish that they are rehabilitated and eligible for parole. Moore argues that his 112 year sentence deprives him of a meaningful opportunity to obtain release as contemplated by *Graham,* because the trial court imposed a de facto life sentence, and indicated as much at sentencing.

{¶2} We are unpersuaded by Moore's arguments. For the reasons articulated in *State v. Bunch,* 7th Dist. No. 06 MA 106, J.E. August 8, 2013 and *State v. Barnette,* 7th Dist. No. 06 MA 135, September 16, 2013, Appellant Brandon Moore's Delayed Application for Reconsideration is denied. DeGenaro, P.J., dissents, see dissenting opinion.

JUDGE JOSEPH J. VUKOVICH

JUDGE CHERYL L. WAITE

DeGenaro, P.J. dissents.

Because Moore has no other avenue to make this argument, Moore's delayed motion for reconsideration should be granted. App.R. 14(B) provides delayed reconsideration "pursuant to App. R. 26(A) shall not be granted except on a showing of *extraordinary circumstances*." That showing has been made here; namely, a United States Supreme Court retroactive holding involving a criminal constitutional issue. We would be considering an arguably valid extension of a constitutional argument which was not available to Moore when his case was before the trial court, this Court and the Ohio Supreme Court in either his direct or second appeal. Significantly, the day *Graham* was announced, Moore filed his pro-se notice of appeal in *Moore V,* arguing that his sentence was unconstitutional pursuant to *Graham*; however the panel refused to address that argument, suggesting in dicta the issue was barred by res judicata and could be raised via post-conviction proceedings.

Turning to the merits of Moore's motion, R.C. 2929.20 enacted by the Ohio Legislature subsequent to *Graham* provides a constitutionally meaningful opportunity to seek parole or judicial release. Thus, on its face, Moore's argument fails. However, under the facts of this case, Moore's sentence may be so long as to still impose a de facto life sentence. Accordingly, Moore's motion for reconsideration should be granted, and the case remanded to the trial court.

Facts and Procedural History

This is Moore's seventh proceeding before this court. In October 2002, Moore was convicted following a jury trial of 12 counts of aggravated robbery, rape, complicity to rape, kidnapping, conspiracy to commit aggravated robbery, and aggravated menacing, along with 11 firearm specifications pursuant to R.C. 2941.145(A). These offenses arose from a brutal gang rape by Moore, Chaz Bunch, and two others. The vicious attack began with the defendants abducting the victim while she was leaving her place of employment and driving her to a secluded location, while Moore digitally raped her. Arriving at a dead end street, Moore and Bunch proceeded to vaginally, orally and anally rape the victim multiple times as well as simultaneously orally and vaginally raping her, all

at gunpoint. Telling her attackers she was pregnant in the hope of stopping the attack, the other two defendants eventually stopped the rapes; the victim was escorted to her car, when she was finally able to escape, after being told they knew who she was and that she and her family would be killed if she reported the incident. *State v. Moore (Moore I),* 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶3-9. The trial court's October 29, 2002 judgment entry imposed maximum consecutive sentences on all counts, except for the misdemeanor menacing charge to be served concurrently with the other sentences, and consecutive sentences on the 11 firearm specifications, for an aggregate sentence of 141 years.

The procedural history of Moore's six prior appeals is detailed in *State v. Moore* (Moore VI), 7th Dist. No. 12 MA 91, 2013-Ohio-1431, 990 N.E.2d 165:

> On direct appeal, this court affirmed in part, reversed in part, and remanded the matter for resentencing. In response to Moore's argument that the trial court failed to merge his firearm specifications, this court directed that upon remand, the trial court was limited to imposing, at most, one prison term for the firearm specifications contained in counts two and three of the indictment and, at most, three separate prison terms for the firearm specifications in counts one, four, five, six, seven, eight, nine, and ten. *State v. Moore (Moore I),* 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶ 115 (7th Dist.). Moore applied to reopen his direct appeal based on an alleged speedy trial violation, which was denied. *State v. Moore,* 7th Dist. No. 02 CA 216, 2005-Ohio-5630, 2005 WL 2715460.
>
> Upon remand for resentencing, at the September 7, 2005 hearing and in the judgment entry entered that day, the trial court merged some of the firearm specifications and acknowledged the dismissal of one count, as directed by this court. The trial court then sentenced Moore to maximum, consecutive sentences on the remaining counts for an aggregate sentence of 112 years. Moore then filed his second appeal. This court vacated his

sentence based on *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and remanded the matter for resentencing. *State v. Moore (Moore II),* 7th Dist. No. 05 MA 178, 2007-Ohio-7215, 2007 WL 4696843.

The trial court held a resentencing hearing on January 24, 2008, and it reimposed the 112 year prison term and designated Moore as a Tier III sexual offender. Moore filed a third appeal, and this court upheld his sentence. *State v. Moore (Moore III),* 7th Dist. No. 08 MA 20, 2009-Ohio-1505, 2009 WL 825758.

On December 30, 2009, Moore filed a petition for writ of mandamus and/or procedendo with this court, seeking to compel the trial judge to issue a final appealable judgment entry of sentence in compliance with Crim.R. 32(C) as set forth in *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. Moore argued that he was entitled to a new sentencing hearing and a revised sentencing entry that specified his manner of conviction. This court granted the writs in part and ordered the trial court to issue a revised sentencing entry that complied with Crim.R. 32(C). *State ex rel. Moore v. Krichbaum (Moore IV),* 7th Dist. No. 09 MA 201, 2010-Ohio-1541, 2010 WL 1316230.

On April 7, 2010, Moore filed a pro-se motion to dismiss all further proceedings due to unreasonable delay in sentencing. On April 20, 2010, the trial court issued a nunc pro tunc judgment entry to comply with Crim.R. 32(C) and re-imposed the 112 year term of incarceration. Moore then appealed on May 17, 2010. On May 19, 2010, the trial court overruled appellant's motion to dismiss all further proceedings due to unreasonable delay in sentencing. This court dismissed Moore's appeal on the basis of *State v. Lester,* 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. This court found that the nunc pro tunc judgment entry issued to comply with Crim.R. 32(C) was not a final order subject to appeal. *State v. Moore (Moore V),* 7th Dist. No. 10–MA–85, 2011-Ohio-6220, 2011 WL 6017942.

> This brings us to the instant matter and Moore's sixth appeal. On March 30, 2012, Moore filed a pro-se motion for resentencing, arguing that the trial court designating him a Tier III sex offender was error pursuant to *State v. Williams,* 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. He also filed a pro-se motion to correct the void portion of sentence, claiming the trial court failed to correctly merge his firearm specifications. On April 26, 2012, the State filed motions to dismiss in response to each of these motions.

Moore VI, ¶4-9.

In *Moore VI* this court rejected most of Moore's arguments, reversing and remanding the matter solely for a sex offender classification hearing pursuant to S.B. 5, known as Megan's Law, Moore having been classified pursuant to the Adam Walsh Act.

Untimely Application for Reconsideration

General Test

With this procedural history in mind, we consider the timeliness of Moore's motion. This court's decision in *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. No. 09 BE 4, 2011-Ohio-421 (*Deutsche Bank II*) is instructive here; not only does it outline general principles for considering delayed motions for reconsideration, the specific facts in that case support granting Moore's motion here. The panel analyzed the interplay between App.R. 26 and 14 as follows:

> App.R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not at all or was not fully considered by us when it should have been. An application for reconsideration is not designed for use in instances where a party simply disagrees with the

conclusions reached and the logic used by an appellate court. Rather, App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law.

Initially, we must address the timeliness of appellee's motion. * * * Yet even though appellee's motion was late, we may still consider it. This court has held that a motion for reconsideration can be entertained even though it was filed beyond the ten-day limit if the motion raises an issue of sufficient importance to warrant entertaining it beyond the time limit. In this case, we find that appellee's motion raises an issue of sufficient importance so as to warrant its consideration.

Furthermore, App.R. 26 is not jurisdictional. App.R. 14(B) provides as much, stating:

"For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. The court may not enlarge or reduce the time for filing a notice of appeal or a motion to certify pursuant to App.R. 25. *Enlargement of time to file an application for reconsideration * * * shall not be granted except on a showing of extraordinary circumstances.*" (Emphasis added.)

Thus, App.R. 14(B) gives this court jurisdiction to enlarge the time to file an application for reconsideration.

Deutsche Bank II, ¶2-6 (internal citations omitted).

{¶3} In *Deutsche Bank II,* the appellee asked to supplement the record with a transcript that had been ordered but due to a clerical mistake had not been filed on appeal, and then for the court to reconsider its decision in light of the supplemented record. In the underlying case, *Deutsche Bank Natl. Trust Co. v. Knox,* 7th Dist. No. 09-BE-4, 2010-Ohio-3277 (*Deutsche Bank I),* the panel had reversed and remanded the trial

court, in part, because of the absence of the transcript. *Deutsche Bank* at ¶39-41. Granting leave to supplement the record and reconsideration in *Deutsche Bank II*, the panel reiterated that its original decision was due, in part, to the absence of that transcript, and that it would have decided the case otherwise had the missing transcript been in the record. Deutsche *Bank II* at ¶10, vacating its reversal in *Deutsche Bank I* and affirming the trial court's decision. *Deutsche Bank II* at ¶14.

Extraordinary Circumstances

Absent from the analysis in *Deutsche Bank II* is a finding that the panel had made an obvious error or omission in the original decision, an apparent requirement to grant reconsideration under App.R. 26. However, in the interest of justice, the panel determined that appellee's showing of extraordinary circumstances as contemplated by App.R. 14, was sufficient for App.R. 26 purposes as well. *Deutsche Bank II* at ¶3. "The Ohio Supreme Court has held that in this unique type of situation where there was an accidental omission of part of a transcript, reconsideration should be allowed in light of the accidentally omitted transcript portion." *Deutsche Bank II* at ¶9, citing *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 222–23, 480 N.E.2d 802 (1985).

Similarly, in *State v. Degens*, 6th Dist. No. L-11-1112, 2011-Ohio-3711, where the appellant was seeking reconsideration of the appellate court's decision denying bail and a stay of a four year prison sentence pending appeal, the Sixth District granted reconsideration and moreover vacated its prior decision granting bail and a stay:

> Although appellant's motion neither calls to our attention an obvious error in our prior decision nor raises an issue that was not considered or not fully considered when it should have been, we find in the interests of justice that appellant's motion for reconsideration should be granted.

Degens at ¶5.

Because Moore filed his reconsideration motion well beyond the 10 days provided by App.R. 26(A), we look to App.R. 14 for guidance. In *Deutsche Bank II,* a civil case where a part of the transcript was omitted, and *Degens*, a criminal case involving a four

year sentence, reconsideration was granted on the basis of the interest of justice, extraordinary circumstances having been shown based upon those facts: no error or omission was found in the appellate panel's prior decision. Given this is a criminal matter where an 112 year sentence was imposed, and Moore is arguing a Supreme Court decision involving the Eighth Amendment retroactively applies to his sentence; Moore has established extraordinary circumstances warranting delayed reconsideration. To do otherwise in this narrow circumstance would create a miscarriage of justice that relief under App.R. 26 was enacted to avoid.

Significantly, the day *Graham* was announced, Moore filed his pro-se notice of appeal in *Moore V.* In that appeal, Moore argued that his sentence did not comply with Crim.R. 32 and was unconstitutional pursuant to *Graham.* The panel held that pursuant to *State v. Lester,* 2011-Ohio-5204, 130 Ohio St.3d 303, 958 N.E.2d 142, the clerical correction the trial court made to Moore's original sentencing entry was not a final appealable order and dismissed the appeal. *Moore V,* ¶21-2. Thus, it did not reach the merits of Moore's *Graham* argument; suggesting in dicta the issue was barred by res judicata and could be raised via post-conviction proceedings. *Id.*, ¶33.

No Other Available Remedy

Reconsideration of our prior decision is warranted to avoid a manifest injustice as Moore has no other avenue available to raise this constitutional challenge. Moore is correct that R.C. 2953.23 does not permit a non-capital defendant to raise a constitutional challenge to his sentence via post-conviction petition. *State v. Barkley,* 9th Dist. No. 22351, 2005-Ohio-1268 ¶11. *Contra Moore V,* in dicta. Further, as discussed above, he is correct that App.R. 14(B) only requires an extraordinary circumstance with respect for *reason* for the delayed filing, not the *length* of the delay. *Contra* App.R. 5(A), and App.R. 26(B), requiring a showing good cause for the length in the delay before filing a motion for a delayed appeal or reopening, respectively.

Nor can Moore raise this claim via a state habeas petition. "Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the

cause of such imprisonment, restraint, or deprivation." R.C. 2725.01. Because as a matter of law it is an open question in Ohio as to how much of a lengthy sentence a juvenile offender must serve before being eligible to seek judicial release or parole, Moore cannot state that he is unlawfully in custody; his habeas claim is not ripe.

Nor can Moore raise this claim via a federal habeas petition. Pursuant to The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a retroactive application of *Graham* fails in federal habeas proceedings because a defendant cannot establish that the state court sentence was "'contrary to, or involved an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1). The Supreme Court has recently clarified that 'clearly established Federal Law' means the law that existed at the time of 'the last state-court adjudication on the merits.' *Greene v. Fisher*, —— U.S. ——, 132 S.Ct. 38, 45, 181 L.Ed.2d 336 (2011)." *Bunch v. Smith*, 685 F.3d 546, 549 (6th Cir. 2012) (*Graham* challenge to 89 year sentence rejected under AEDPA procedural parameters). Similarly, in *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306 (N.D.Ohio July 24, 2012) the district court rejected Goins' habeas petition primarily pursuant to the Sixth Circuit's AEDPA analysis in *Bunch*. Because *Graham* was not the clearly established law at the time Moore's case was being considered by the trial court and this court, the AEDPA bars federal habeas relief on that basis. Thus, if Moore would raise *Graham* in a federal habeas petition, it would be rejected on procedural grounds as it had been in *Bunch* and *Goins*.

Graham v. Florida

Turning to the merits of Moore's argument, he contends that his 112 year sentence deprives him of a meaningful opportunity to obtain release as contemplated by *Graham*, because in effect the trial court imposed a life sentence, and indicated as much at sentencing. In *Graham*, by a 5-4 vote, the Supreme Court held that, *categorically*, nonhomicide juvenile offenders cannot be sentenced to life without parole. A related issue currently pending before the Ohio Supreme Court in *State v. Long*, Case No. 2012-1410 is whether it is constitutional to impose a *non-mandatory* sentence of life without the possibility of parole upon a nonhomicide juvenile defendant. That this issue is presently

pending before the Ohio Supreme Court lends further support to hearing Moore's argument herein.

In the underlying case in *Long*, the First District held that it was constitutional, reasoning that in *Graham* the life sentence in Florida was mandatory, whereas it is discretionary in Ohio. *State v. Long,* 1st Dist. No. C-110160, 2012-Ohio-3052, *appeal accepted*, 133 Ohio St.3d 1502, 2012-Ohio-5693, 979 N.E.2d 348 (oral argument on June 11, 2013). However, in *Graham* the majority drew no such distinction; it held the Eighth Amendment prohibited the imposition of a life without parole sentence upon a juvenile nonhomicide offender. *Graham,* 130 S.Ct. at 2034. That prohibition was later extended to juvenile homicide offenders in *Miller v. Alabama,* 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Moore argues here that under an extension of *Graham's* categorical holding, a *de facto* life sentence without the possibility of parole, i.e., an extraordinarily long sentence (in this case 112 years) that becomes in all practicality a life sentence, though not *explicitly* so imposed, is unconstitutional. This precise issue was concededly left open by the majority in *Graham:*

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. *What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.* It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the *Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender*, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before

> adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society. (Emphasis Added)

Graham, 130 S.Ct. at 2030.

The majority in *Graham* signaled that it may be constitutionally valid to impose lengthy sentences upon nonhomicide juvenile offenders whose crimes are especially heinous, brutal, depraved and grotesque; and moreover, after a meaningful opportunity to demonstrate maturity and rehabilitation, to keep a juvenile offender incarcerated for their natural life if they prove to be irredeemable. But an initial, outright life without parole sentence is constitutionally prohibited. *Id.* The analysis of Chief Justice Roberts in his concurring in judgment opinion, concluding that the sentencing decision in these circumstances should be made on a case by case basis, alludes to the issue Moore presents here:

> So much for Graham. But what about Milagro Cunningham, a 17–year–old who beat and raped an 8–year–old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? See Musgrave, Cruel or Necessary? Life Terms for Youths Spur National Debate, Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12–year–old son? See 3 Sentenced to Life for Gang Rape of Mother, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case—that a sentence of life without parole imposed on

> *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.
>
> A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.
>
> * * *
>
> In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes—like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor—are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Graham, 130 S.Ct. at 2041 (Roberts, C.J. concurring in judgment)

The issue raised by Moore in this case, where the juvenile's sentence is so lengthy that, in effect, a life sentence without the possibility of parole was imposed in contravention of the Eighth Amendment, was expressly raised by Justice Thomas in his dissenting opinion, albeit framed from the State's perspective rather than the juvenile offender. How long of a sentence can the trial court impose, without violating the Eighth Amendment, where it finds the crime to be exceptionally depraved and rare in its brutality:

> Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Ante,* at 2030. But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And

> what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.

Graham, 130 S.Ct. at 2057, (Thomas, J., dissenting.)

Thus, the Supreme Court is apparently unanimous in foreseeing that a crime so heinous, even though committed by a juvenile, would warrant imposing a sentence so long that, once a 'meaningful opportunity' to establish rehabilitation has been afforded, the juvenile still would remain incarcerated for their natural life. The question Moore's case presents here is where to draw that sentencing line.

Moore argues that according to the Ohio Department of Rehabilitation and Correction, he and three other nonhomicide juvenile offenders, sentenced by the same trial judge, have the longest sentences in Ohio. However, a review of the facts from the direct appeals of these four juveniles, Moore and his co-defendant Bunch, summarized above, and co-defendants Chad Barnette and James Goins, demonstrate they were involved in two separate criminal incidents that were truly horrifying crimes rare for their brutality and depravity. *Barnette I; State v. Goins,* 7th Dist. No. 02 CA 68, 2005-Ohio-1439; *State v. Moore,* 7th Dist. No. 02 CA 216, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, *State v. Bunch,* 7th Dist. No 02 CA 196, 2005-Ohio-3309. Nonetheless, the Supreme Court has held that juvenile offenders, consistent with the heinous nature of their crimes, must be given a 'meaningful opportunity' at some point during the course of their sentence, to establish they have rehabilitated; or after that review are found to be irredeemable and must remain incarcerated for their natural lives. *Graham,* 130 S.Ct. at 2030.

R.C. 2929.20 Affords Meaningful Review

Since Moore's original sentencing, not only has *Graham* been decided, Ohio's judicial release statute has been modified, which may afford Moore the constitutionally

required 'meaningful opportunity' to prove he has been rehabilitated and eligible for parole as contemplated by *Graham*.

R.C. 2929.20, governing judicial release, now provides in pertinent part relative to Moore's sentence:

> (A)(1)(a) Except as provided in division (A)(1)(b) of this section, "eligible offender" means any person who, *on or after April 7, 2009, is serving a stated prison term that includes one or more nonmandatory prison terms.*
> * * *
> (B) On the motion of an eligible offender or upon its own motion, the sentencing court may reduce the eligible offender's aggregated nonmandatory prison term or terms through a judicial release under this section.
> (C) An eligible offender may file a motion for judicial release with the sentencing court within the following applicable periods:
> * * *
> (4) If the aggregated nonmandatory prison term or terms is more than five years but not more than ten years, the eligible offender may file the motion not earlier than five years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.
>
> (5) If the *aggregated nonmandatory prison term or terms is more than ten years*, the eligible offender may file the motion *not earlier than* the later of the date on which *the offender has served one-half of the offender's stated prison term* or the date specified in division (C)(4) of this section. (Emphasis added.)

The interplay between this statute and *Graham* was discussed in the unsuccessful habeas petition of James Goins. In *Goins v. Smith*, the District Court held that for AEDPA purposes *Graham* was not the clearly established law at the time Goins' 84 year sentence was imposed or reviewed on the merits for the last time, and his claim failed for that reason. Moreover, the District Court found that Goins failed to establish that *Graham* clearly applied to him, noting it was bound by the Sixth Circuit's decision in *Bunch v. Smith*, which held that because *Graham* was limited to juvenile offenders who were specifically sentenced to life without parole and no federal court had extended *Graham* to juvenile offenders sentenced to consecutive, fixed-term sentences for multiple nonhomicide offenses, the Sixth Circuit could not hold that Bunch's sentenced violated clearly established federal law. For that reason, the District Court could not so hold with respect to Goins, "even though an eighty-nine-year aggregate sentence [referring to Bunch, Goins' sentence is 84 years] without the possibility of parole may be—and probably is—the functional equivalent of life without the possibility of parole." *Goins v. Smith* at *6.

Having disposed of Goins' habeas petition on the narrow AEDPA procedural grounds, the District Court noted in dicta:

> Perhaps more important, the Ohio General Assembly has changed Ohio's sentencing law to markedly improve Goins's ability to pursue release. In particular, Ohio law now permits a defendant to re-quest judicial release after he has served a portion of his sentence. Accordingly, Goins now faces a mandatory prison term of 42 or 45 years, after which he will be able to apply for judicial release. [Doc. 23; 25]. See Ohio H. 86, 129th Gen. Assembly (eff. Sept. 30, 2011) (amending Ohio Rev. Code § 2929.20 to permit offenders to file a motion for judicial release with the sentencing court after the later of one-half of their stated prison terms or five years after expiration of their mandatory prison terms). Although he faces an

> extremely long sentence, Goins does not face a sentence on the order of the one imposed in *Graham*.

Goins v. Smith at *7.

Similarly, Moore can avail himself of R.C. 2929.20. Thus, the ultimate issue to be resolved is whether the 'meaningful opportunity' contemplated by the Supreme Court in *Graham* is afforded Moore via the amendments made by the Ohio Legislature to Ohio's judicial release statute. After serving the mandatory portion and one-half of the nonmandatory portion of his 112 year sentence before he is eligible for parole, does that length of time afford Moore with the meaningful opportunity to be evaluated and a determination made whether he is rehabilitated or unredeemable? Based upon the analysis of the three separate opinions in *Graham,* and the dicta in *Goins v. Smith*, on its face, R.C. 2929.20 affords Moore a meaningful review in conformity with the Eighth Amendment. Moore was fifteen when he committed the crimes, which were especially heinous and brutal, as recounted in his direct appeal. This warrants that he serve a lengthy sentence before he can be *considered* for judicial release, and be granted the opportunity to prove he is rehabilitated. *Graham* cannot be read to mean or even extended to mean, that upon that review Moore will be *granted* judicial release.

What is clear from *Graham* is that if a juvenile offender is sentenced to, say, 200 years for multiple offenses, including mandatory and nonmandatory sentences, pursuant to R.C. 2929.20 he would have to serve 100 years before being eligible for parole, this would not be constitutional under *Graham*. What if it was 75 years, or 50 years? An explicit versus de facto life sentence is a distinction without a difference. In any event, the determination of whether R.C. 2929.20 provides a juvenile nonhomicide offender a meaningful opportunity to demonstrate rehabilitation must be made on a case by case basis, in order to consider the character of the juvenile, the facts supporting the offenses, and the length of the sentence. Moore was 15 years old at the time he committed these heinous crimes, and the trial court imposed a 112 year aggregate sentence consisting of mandatory and non-mandatory terms. The trial court was clear that the lengthy sentence

was imposed to ensure Moore never left the penitentiary; thus imposing a de facto life sentence.

Pursuant to statute it appears that Moore may have to serve approximately 60 years of his sentence before he could seek judicial release, at the age of 75. However, it would be premature for us to determine whether or not Moore's 112 year sentence is unconstitutional in light of the nature of his crimes. As the trier of fact, the trial court must have the first opportunity to apply the holding in *Graham* within the context of R.C. 2929.20, and impose a constitutional sentence commensurate with the rarity and severity of Moore's crimes.

Conclusion

Moore's delayed motion for reconsideration should be considered in the interest of preventing a manifest injustice, because a criminal defendant should have some mechanism to seek review of an asserted retroactive constitutional protection. Moreover, Moore in fact raised the issue in *Moore V* and we declined to address the issue; thus we should do so now.

As to the merits, the United States Supreme Court has made it clear that as a category, juvenile offenders, irrespective of the nature of their crimes, may not be *explicitly* sentenced to life without the possibility of parole; they must *categorically* be afforded a meaningful opportunity to establish they have rehabilitated and can be paroled. At the heart of the Court's decisions in *Graham* and *Miller* is that juvenile offenders *as a category* fundamentally differ from adult offenders. Given those holdings and underlying rationale, it would appear that juvenile offenders *implicitly* sentenced to life without parole via consecutive maximum sentences for multiple offenses, which results in *no opportunity for parole* violates the Eight Amendment. Where a juvenile who has committed 'truly horrifying crimes' receives a *de facto* life sentence for one or multiple offenses, that juvenile must, nonetheless, be eligible, at some point, to be evaluated and a determination made whether they are rehabilitated, or that they "may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of

nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." *Graham,* 130 S.Ct. 2030.

Subsequent to the decision in *Graham*, the Ohio Legislature amended R.C. 2929.20 to afford juvenile and adult offenders sentenced to a non-mandatory sentence of more than 10 years the opportunity to seek judicial release after having served one-half of their stated non-mandatory sentence. As this appears to afford the 'meaningful opportunity' contemplated by *Graham,* on its face, Moore's argument fails. However, under the facts of this case, Moore's sentence may be so long as to still impose a de facto life sentence. Accordingly, Moore's motion for reconsideration should be granted, and the case remanded to the trial court.

APPROVED:

Mary DeGenaro

JUDGE MARY DeGENARO

UNITED STATES CONSTITUTION AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.