BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO PLAINTIFF-APPELLEE -vs- **BRANDON MOORE** DEFENDANT-APPELLANT	**CASE NO.: 2014-0120** ON APPEAL FROM **MAHONING COUNTY** COURT OF APPEALS, **SEVENTH APPELLATE DISTRICT.** COURT OF APPEALS Case No. **08 MA 20**

STATE OF OHIO-APPELLEE'S ANSWER BRIEF

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Certificate of Service

I certify that a copy of the State of Ohio's Answer Brief was sent by **Regular U.S. Mail** to **Rachel S. Bloomekatz, Esq.**, and **Kimberly A. Jolson, Esq.**, at their above address, on August 27, 2014.

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Statement of the Case, Facts, and Introduction

Defendant-Appellant Brandon Moore was previously sentenced to a 112-year stated prison term for three counts of Rape, three counts of Complicity to Rape, three counts of Aggravated Robbery, Kidnapping, Aggravated Menacing, and the accompanying Firearm Specifications following "the horrific robbery, kidnapping, and repeated rape of M.K., a 22-year-old female Youngstown State University student[,]" shortly after M.K. arrived to work the midnight shift at a group home for mentally-handicapped women. *See Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir., 2012), *cert. denied*, *Bunch v. Bobby*, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013).

Defendant and Chaz Bunch "brutally gang raped M.K. They each took turns orally raping her as the other one pointed a gun at her. Additionally, one would vaginally rape her while the other one orally raped her." *State v. Bunch*, 7th Dist. No. 02 CA 196, 2005 Ohio 3309, ¶ 171; *see State v. Moore*, 7th Dist. No. 10 MA 85, 2011 Ohio 6220, ¶ 3.

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

> Early in the evening on August 21, 2001, Jason Cosa, Christine Hammond and Jason's grandfather were returning to Jason's home located at 190 Maywood, Youngstown, Ohio. (Tr. 808, 814). After they had entered the driveway, a man wearing a mask (later admitted to being Brandon Moore), approached the car and robbed them at gunpoint. (Tr. 809-811, 826).
>
> Neither Jason nor Christine could identify who the gunman was, but they did notice that he got into an awaiting vehicle that was a dark, older automobile. Both described the car as being dark and very loud. (Tr. 813, 829).
>
> Later that night at approximately 10:20 p.m., M.K., a twenty-two year-old Youngstown State University student, arrived at a group home for mentally handicapped women to report to work for the evening; she worked the night shift. (Tr. 850, 854). The group

home she worked at was located at 1322 Detroit Avenue, Youngstown, Ohio. (Tr. 855).

Upon arriving, she exited her vehicle and went to get her belongings out of the trunk of her car. (Tr. 855). On her way to the trunk, M.K. noticed an older, black automobile (referred to as black automobile) coming up the street and stopping a few houses away. (Tr. 862-863). At this point, she also saw a tall man running through the grass. (Tr. 863). The man wearing a mask, later identified as Brandon Moore, pointed a gun at her and instructed her to give him all her money and belongings. (Tr. 864). The porch light of the group home then came on and Moore instructed her to get into the passenger seat of her car. (Tr. 864). Moore climbed over M.K., positioned himself into the driver's seat, and drove away with her in the car. (Tr. 864).

Upon leaving the driveway, Moore, driving M.K.'s car, began following the black automobile. Shortly thereafter, Moore stopped the car and a second gunman exited the black automobile in front of them and entered the victim's car through the rear passenger's side door. (Tr. 870). The second gunman, later identified as Bunch, put a gun to her head and demanded her money and belongings. (Tr. 873). She now had two guns pointed at her, one from Moore and one from Bunch, (Tr. 874). After Bunch had entered the vehicle, Moore began to drive and continued to follow the black automobile.

As all of this was occurring, Moore began to compliment M.K. on her beauty. Moore then, while driving, inserted his fingers into her vagina. (Tr. 876-877). Moore was so infatuated with her that he nearly hit the black automobile in front of them. (Tr. 877). It was at this point that M.K. was able to see the license plate of the black automobile. She memorized the license plate number as "CTJ6243." (Tr. 872). While all this was occurring, Bunch still had the gun pointed at her head.

At some point while Moore was driving, the black automobile stopped leading and began to follow Moore. Eventually, Moore drove down a dead-end street near Pyatt Street in Youngstown, Ohio, and both automobiles pulled into a gravel lot. (Tr. 879, 881, 1038-1039). Bunch ordered M.K. out of the car. (Tr. 884). Moore and Bunch then took turns orally raping her; one of them would have his penis in her mouth, while the other would force her head down. (Tr. 887-888). Guns were pointed at her while this was occurring. (Tr. 888).

After Moore and Bunch were finished orally raping her, they forced her at gunpoint to the trunk of the car. (Tr. 889). At the trunk of the car, she was anally raped. (Tr. 893). While this was occurring one of the individuals from the black automobile, who was later identified as Jamar Callier, went through her belongings in the trunk and took some of the items. (Tr. 890). The other individual in the black automobile stayed in the car the whole time and watched; he was later identified as Andre Bundy.

After the anal rape occurred, Bunch threw M.K. to the ground and then Moore and Bunch vaginally and orally raped her. (Tr. 895). While one of them vaginally raped her, the other would orally rape her, and then they would switch places. (Tr. 895-896). Both were armed as this occurred. (Tr. 895).

At some point while this was occurring, Bundy told Callier to stop what was going on. As a result, Callier pushed Bunch off M.K., helped her to her feet, and put her in her car. (Tr. 897, 1265-1266). This caused an altercation between Bunch and Callier. (Tr. 899). Bunch wanted to kill M.K., however, Callier told Bunch that he could not kill a pregnant woman. (Tr. 899). During the rapes, M.K. was pleading for her life and as part of that plea she claimed to be pregnant. (Tr. 893). Prior to her leaving, Moore and Bunch told her that they knew who she was and threatened to harm her and her family if she ever told what happened. (Tr. 900).

Once in her car, M.K. locked her doors and drove straight to her boyfriend's parents' house. While she was driving she kept repeating the license plate number of the car. (Tr. 902). Upon arriving at the house, the victim was hysterical, but she was able to scream out the license plate number, which someone wrote down. Her boyfriend's parents then immediately took her to the hospital. (Tr. 902). She arrived at the hospital at approximately 11:12 p.m. (Tr. 1029-1030).

At the hospital, her boyfriend's father immediately told Officer Lynch from the Youngstown Police Department that M.K. had been raped by individuals in an older black automobile with the license plate number "CTJ6423." (Tr. 1028). Officer Lynch was at the hospital for an unrelated matter, but when this information was given to her, she began broadcasting the plate number and the car's description over the police radio; this occurred at approximately 11:13 p.m. (Tr. 910, 1027, 1029-1030). Officer Lynch then began obtaining further information from the victim, including a detailed description of the assailants and the crimes. Officer Lynch broadcasted the description of the assailants over the police radio.

While this investigation was occurring, a sexual assault nurse at the hospital examined M.K. and completed a rape kit. The rape kit included swabs of the victim's mouth, vagina, and rectum. (Tr. 1588-189). Once completed, the rape kit was sealed and taken into police custody. (Tr. 1045-1050).

At approximately 11:30 p.m. Youngstown Police Officer Anthony Vitullo, who was on patrol and had heard Officer Lynch's broadcast, pulled his cruiser into the Dairy Mart at the intersection of Mahoning Avenue and Bella Vista. He noticed a black car at pump seven. (Tr. 1061). As the car was pulling out he noticed that the license plate number on the car as "CTJ6243." (Tr. 1061). The plate number was not the exact number that had been broadcasted over the radio, however, the numbers were very close. The number broadcasted over the radio was "CTJ6423." Given that the car matched the description and that the license plate number was very similar to the one broadcasted, Officer Vitullo began following the car.

The black automobile pulled onto Mahoning Avenue and headed east toward downtown. (Tr. 1062). It then merged onto I-680 southbound and exited at the first exit, Glenwood Avenue. (Tr. 1063). The black automobile then ran the stop sign, turned southbound on Edwards Street, and pulled into the first driveway on the west side of the street. (Tr. 1063, 1065).

Officer Vitullo followed the car the whole time; however, he did not activate his overhead lights. Upon arriving at the Edwards Street address, Officer Vitullo remained at his car waiting for backup before approaching the car. (Tr. 1065-11067). Moments later backup arrived, including Officer Schiffhauer from the YPD K-9 unit. The officers proceeded to the car. Upon reaching the car, the officers noticed that the driver of the vehicle had fled on foot. However, the passengers, Moore, Bundy, and Callier, remained in the vehicle and were subsequently arrested and detained. The passengers informed the police that the driver's name was "Shorty Mack."

At that point, the K-9 unit began trying to track the driver of the vehicle. Officer Schiffhauer was unable to track and find the driver, but he was able to determine that the driver headed west. (Tr. 1111).

At 11:50 p.m., Youngstown Police Officer Ronnie Jones heard the broadcast that the driver from the suspected automobile had

fled on foot. (Tr. 1152-1155). He then set up a perimeter and positioned his cruiser on Glenwood Avenue near Bernard Street in Volney Rogers parking lot. (Tr. 1155). Approximately five minutes later Officer Jones noticed Bunch "trotting" by on Glenwood Avenue. (Tr. 1157-1158). Officer Jones placed the spotlight on Bunch and Bunch slowed to a walk. (Tr. 1157-1158). Bunch proceeded to the side door of 349 Glenwood Avenue and began knocking. (Tr. 1158-1159).

Lamont Hollingshead lived at 349 Glenwood Avenue. He opened the door when Bunch knocked, but Hollingshead would not let Bunch in because he did not know who Bunch was. Hollingshead testified that Bunch claimed to being chased by the police for a curfew violation. (Tr. 1184-1185). Bunch asked Hollingshead to tell the police he was Bunch's uncle. (Tr. 1184). Believing that the police were after Bunch for a curfew violation, Hollingshead complied with Bunch's request. (Tr. 1184).

Officer Jones questioned both Hollingshead and Bunch. Bunch informed the officer that he was sixteen years old, that his name was Chaz Bunch, and that he was on his way from his uncle's house to his cousin's house. (Tr. 1159-1161). Given the explanation and the fact that Bunch did not match the description of the driver that was broadcasted over the police radio, Officer Jones let Bunch go. The description broadcasted over the radio was that the driver was wearing gray sweats and went by the name of "Shorty Mack." (Tr. 1161-1162, 1167-1169). Bunch was wearing navy blue pants, a navy blue top with a white T-shirt underneath it. (Tr. 1164). Moore was wearing gray sweatpants, thus, the wrong description was broadcasted over the radio. (Tr. 1162).

After Officer Jones left, Bunch paid Hollingshead to make a telephone call from his house. Bunch called Brandy Miller; Brandy Miller's testimony and telephone records confirmed this. (Tr. 1195-1198, 1572-1573).

Three days later, while at roll call, Officer Jones was informed that the subject that fled the automobile on the night of the rape was suspected to be Bunch. Officer Jones informed his superiors that on the night of the rape he had seen an individual who identified himself as Chaz Bunch. Officer Jones was shown a photo array with Bunch in it; he identified Bunch as the individual he saw on the night of the rape. Bunch was subsequently arrested.

During the investigation of the rape, the police inventoried the black automobile. In inventorying the car, the police found the

victim's belongings. (Tr. 1071-1073, 1097, 1206-1208, 1211-121). The police also found a vehicle registration and credit union card belonging to Jason Cosa. (Tr. 1213, 1251, 1406-1407). Also in the car was a .38 caliber handgun and one blue and one black wave cap. (Tr. 1073-1074, 1097, 1208-1209).

Additionally, in further investigating the crimes, the police interviewed M.K. On August 22, 2001, M.K. was shown a series of photographic line-ups. (Tr. 910-911, 1425, 1433). She positively identified Bundy as the driver of the dark older automobile that watched the entire time. (Tr. 913, 14488). She also identified Callier as the person who went through her trunk and as the person who stopped the rape. (Tr. 913-914, 1451-1452). She identified Moore as the first gunman who abducted, robbed and raped her. (Tr. 919-920, 1446). She signed each individual photograph indicating the identifications. (Tr. 913, 920, 1446, 1448, 1451).

As to Bunch's identification, she was drawn to the photograph of him as being the second gunman, but she informed the detectives that she wanted to see a full body picture before signing the photograph. The police were unable to put together a full body array because they were unable to find juveniles of that build. (Tr. 1450). However, on September 7, 2001, the victim saw a local newspaper which showed a picture of Bunch from mid-chest up. Upon seeing this picture, the victim immediately knew that Bunch was the second gunman and called her victim-witness advocate to inform her of this information.

Furthermore, evidence that was obtained during the investigation was sent away for fingerprint and DNA testing. The rape kit was tested at BCI. The semen sample from the vaginal swab, rectal swab and the victim's shorts were not consistent with Bunch's DNA. However, it was determined that Moore could not be excluded; the chance of finding another individual with the same DNA as Moore was one in 94,000,000,000,000,000,000. (Tr. 1670). No fingerprints were found on the .38 caliber gun.

The police also obtained the video surveillance from Dairy Mart. Still pictures were made from the video surveillance. The pictures showed Callier and Bunch purchasing food and gas for pump seven.

Also, the police conducted interviews with the suspects. On August 22, 2001, Andre Bundy was interviewed by the police. Bundy admitted to being the driver of the black automobile. (Tr.

> 1419). Bundy also stated that he had Callier stop the rape. (Tr. 1421).
>
> Moore was interviewed on August 23, 2001. He informed the detective that he was the individual who robbed Cosa and Hammond. He stated that he was the individual who first approached M.K. and forced her into her car at gunpoint. He then admitted to raping her. (Tr. 1431). However, he claimed that he committed the crimes because an individual known as "Shorty Mack" made him do it. (Tr. 1464). He also claimed that the gun he used that night was a fake. (Tr. 1472).
>
> Callier was then interviewed by the police and also testified at trial. (Tr. 1276-1400). He testified that both Bunch and Moore raped M.K. (Tr. 1264). He stated that Bunch was the driver of the black automobile when it left the Dairy Mart. He then stated that once Bunch pulled the car into the house on Edwards Street, Bunch told them to tell the police that he was "Shorty Mack." (Tr. 1274). Callier also saw the pictures from Dairy Mart and indicated that he and Bunch were in the pictures. (Tr. 1276).

Bunch, supra at ¶¶ 2-31.

Thereafter, juvenile proceedings were initiated against Defendant in the Mahoning County Court of Common Pleas, Juvenile Division, and the case was eventually transferred to the General Division. On May 16, 2002, Defendant was charged with three counts of Aggravated Robbery, in violation of R.C. 2911.01(A)(1), three counts of Rape, in violation of R.C. 2907.02(A)(2), three counts of Complicity to Rape, in violation of R.C. 2923.03(A)(2) and 2907.02(A)(2), one count of Kidnapping, in violation of R.C. 2905.01(A)(4), one count of Conspiracy to Commit Aggravated Robbery, in violation of R.C. 2923.01(A)(1) and 2911.01(A)(1), and one count of Aggravated Menacing, in violation of R.C. 2903.21(A). *See State v. Moore*, 161 Ohio App.3d 778, 784. (7th Dist. 2005).

The jury convicted Defendant on all counts, and the trial court sentenced Defendant to an aggregate 141-year term of incarceration. *See id.* at 785.

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

Following remand, Defendant's sentence was vacated pursuant to *State v. Foster*, and again remanded to the trial court. *See State v. Moore*, 7th Dist. No. 05 MA 178, 2007 Ohio 7215, ¶ 25, citing *State v. Foster*, 109 Ohio St.3d 1 (2006); *accord In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313 (2006).

On February 5, 2008, the trial court resentenced Defendant to an aggregate 112-year stated prison term for the above offenses, and an appeal of right followed. *See State v. Moore*, 7th Dist. No. 08 MA 20, 2009 Ohio 1505, ¶ 1. Defendant's third sentence was affirmed. *See id.*

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

On April 20, 2010, the trial court issued a nunc pro tunc sentencing entry. Following the trial court's nunc pro tunc judgment entry of conviction, Defendant appealed and raised several issues regarding his conviction and sentence. *See Moore*, 2011 Ohio 6220, supra. The Seventh District, however, dismissed Defendant's appeal

pursuant to this Court's decision in *State v. Lester*, 130 Ohio St.3d 303, paragraph two of the syllabus (2011). *See id.* In *Lester*, this Court held that "[a] nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken." *Id.*

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

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

On April 8, 2013, the trial court classified Defendant pursuant to S.B. 5, which the trial court was ordered to do—"This matter is remanded to the trial court for the limited purpose of holding a sex offender classification hearing, and to classify Moore pursuant to S.B. 5." *See id.* at ¶ 39. Defendant timely appealed the trial court's classification pursuant to S.B. 5. The Seventh District concluded that the trial court properly reclassified Defendant as a "sexually oriented offender" pursuant to S.B. 5 and former R.C. 2950. *See State v. Moore*, 7th Dist. No. 13 MA 60, 2014 Ohio 2525, ¶ 25.

On September 16, 2013, Defendant filed a Delayed Application for Reconsideration pursuant to Appellate Rules 14(B) and 26(A)(1), in which he contended

that his sentence was unconstitutional pursuant to *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), and *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

The Seventh District denied Defendant's Application for Reconsideration, because his application did not justify such a delay, and the trial court's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment as stated in *Graham* and *Miller*: "We are unpersuaded by Moore's arguments. For the reasons articulated in *State v. Bunch*, 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." *See State v. Moore*, 7th Dist. No. 08 MA 20, 2013 Ohio 5868, ¶ 2.

On January 23, 2014, Defendant filed a Notice of Appeal and Memorandum in Support of Jurisdiction in this Court. The State responded on February 18, 2014. This Court accepted jurisdiction over Defendant's sole proposition of law on April 23, 2014, and Defendant filed his Merit Brief on July 14, 2014.

The State now responds with its Answer Brief and requests that this Honorable Court Affirm the Seventh District's denial of Defendant's Delayed Application for Reconsideration, and hold that the Eighth Amendment does not prohibit trial courts from sentencing juvenile offenders who commit non-homicide offenses to multiple, consecutive fixed-term sentences that may preclude the possibility of release during the juvenile offender's life.

Law and Argument

Defendant-Appellant Brandon Moore was given a fair trial that fully complied with all of the mandates of the Ohio State and United States Constitutions. Defendant's guilt is undeniable, and was proven beyond a reasonable doubt after "the horrific robbery, kidnapping, and repeated rape of M.K., a 22-year-old female Youngstown State University student." *Bunch*, 685 F.3d at 547.

First, the Seventh District properly denied Defendant's delayed application for reconsideration, because he failed to show an extraordinary circumstance in filing his application more than ***3 years*** after the U.S. Supreme Court's decision in *Graham*, and neither *Graham* nor *Miller* clearly established that the Seventh District's earlier decision was an "obvious error."

Second, the Court's holding in *Graham* specifically addressed juvenile offenders that were sentenced to "life without parole" for a non-homicide offense, and did not extend to juvenile offenders that were sentenced to multiple, consecutive fixed-term sentences. *See Graham*, 560 U.S. at 61-62. Extending the Court's holding in *Graham* to multiple fixed-term sentences would be inconsistent with the Court's bright-line approach, and would require courts to undertake a case-by-case, ad hoc analysis in which the court would merely speculate as to what point a juvenile offender's lengthy term of incarceration would deprive him of a "meaningful opportunity to obtain release."

Therefore, Defendant's delayed application for reconsideration was properly denied, and the Eighth Amendment does not prohibit trial courts from sentencing juvenile offenders who commit non-homicide offenses to multiple, consecutive fixed-term sentences that may preclude the possibility of release during the juvenile offender's life.

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

State's Response to Proposition of Law No. I: The Eighth Amendment does not prohibit trial courts from sentencing juvenile offenders who commit non-homicide offenses to multiple, consecutive fixed-term sentences that may preclude the possibility of release during the juvenile offender's life.

As for Defendant's sole proposition of law, he contends that the Eighth Amendment prohibits sentencing a juvenile non-homicide offender to consecutive term-of-years sentences that preclude any possibility of release during the juvenile's life expectancy. Defendant argues that *Graham's* mandate of a "meaningful opportunity to obtain release" extends to a juvenile sentenced to multiple, consecutive fixed-term sentences for non-homicide offenses.

First, the Seventh District properly denied Defendant's delayed application for reconsideration, because he failed to show an extraordinary circumstance, as neither *Graham* nor *Miller* clearly established that its earlier decision was an "obvious error."

Second, *Graham* specifically addressed juvenile offenders that were sentenced to "life without parole" for a non-homicide offense, and did not address or extend its application to juvenile offenders that were sentenced to multiple, consecutive fixed-term sentences. *See Graham*, 560 U.S. at 61-62.

Therefore, Defendant's 112-year aggregate term of incarceration remains constitutional, because Defendant's delayed application for reconsideration was properly denied, and the Eighth Amendment does not prohibit trial courts from sentencing juvenile offenders who commit non-homicide offenses to consecutive fixed-term sentences that *may* preclude the possibility of release during the juvenile offender's life.

A. DEFENDANT DID NOT DEMONSTRATE AN EXTRAORDINARY CIRCUMSTANCE TO JUSTIFY THE MORE THAN 3-YEAR DELAY IN FILING HIS DELAYED APPLICATION FOR RECONSIDERATION PURSUANT TO APPELLATE RULES 26(A)(1) AND 14(B).

To begin, Defendant's discretionary appeal before this Court followed the Seventh District's denial of his Delayed Application for Reconsideration pursuant to Appellate Rules 14(B) and 26(A)(1) following the U.S. Supreme Court's decisions in *Graham* and *Miller*. *See Moore*, 2013 Ohio 5868, ¶ 2.

Generally, "an application for reconsideration must call to the attention of the appellate court an obvious error in its decision or point to an issue that had been raised but was inadvertently not considered." *State v. Himes*, 7th Dist. No. 08 MA 146, 2010 Ohio 332, ¶ 4, citing *Juhasz v. Costanzo*, 7th Dist. No. 99 CA 294, unreported (Feb. 7, 2002); App.R. 26(A). "Reconsideration motions are rarely considered when the movant simply disagrees with the logic used and conclusions reached by an appellate court." *Himes*, supra at ¶ 4, citing *Victory White Metal v. N.P. Motel Syst.*, 7th Dist. No. 04 MA 245, 2005 Ohio 3828, ¶ 2, and *Hampton v. Ahmed*, 7th Dist. No. 02 BE 66, 2005 Ohio 1766, ¶ 16.

Further, while Appellate Rule 26(A)(1) requires an application for reconsideration to be filed within ten days of the judgment which the party seeks an appellate court to reconsider, Appellate Rule 14(B) provides for a delayed application for reconsideration. *See* App.R. 26(A)(1)(a); App.R. 14(B). Thus, Ohio courts have recognized that "[a] motion for reconsideration can be entertained even though it was filed beyond the ten-day limitation on motions for reconsideration if the motion raises an issue of sufficient importance to warrant entertaining it beyond the ten-day limit." *State v. Boone*, 114 Ohio

App.3d 275, 277 (7th Dist. 1996), citing *Carroll v. Feiel*, 1 Ohio App.3d 145 (8th Dist. 1981).

Appellate Rule 14(B) specifically provides that the moving party must establish "***extraordinary circumstances***" before an appellate may consider a delayed application for reconsideration: "Enlargement of time to file an application for reconsideration or for en banc consideration pursuant to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances." App.R. 14 (B).

Accordingly, Defendant was required to show an extraordinary circumstance before the Seventh District could reach and decide the merits of his Eighth Amendment argument pursuant to *Graham* and *Miller*.

Here, the Seventh District properly concluded that Defendant's application did not justify the delay of more than ***5 years*** after his conviction and sentence was ultimately affirmed following a limited remand pursuant to *Foster*, supra, and more than ***3 years*** after the U.S. Supreme Court's decision in *Graham*.

In denying Defendant's delayed application for reconsideration, the Seventh District relied upon its previous two opinions in which two other defendants (one being Defendant's co-defendant Chaz Bunch) filed delayed applications for reconsideration based upon *Graham* and *Miller*. *See Moore*, 2013 Ohio 5868, ¶ 2, citing *State v. Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013); *State v. Barnette*, 7th Dist. No. 06 MA 135 (J.E. Sept. 16, 2013).

In *Bunch*, the Seventh District rejected the defendant's delayed application for reconsideration for two reasons—unreasonable delay in filing the application, and *Graham's* inapplicability to the defendant's lengthy sentence.

First, in *Bunch*, the Seventh District found that the lengthy delay between *Graham* and his application did not support his argument for an extraordinary circumstance. The Seventh District noted in *Bunch* that its decision affirming his convictions and sentence was filed on December 21, 2007, and *Graham* was subsequently decided on May 17, 2010. *See Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013). Bunch, however, did not file his delayed application for reconsideration until April 30, 2013—nearly ***three years*** after *Graham* was decided. *See Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013).

The Seventh District reasoned that although Bunch had been pursuing relief through federal habeas, "the application for reconsideration filed in the state system is not as prompt. He could have filed it shortly after the *Graham* decision. The almost three year delay in filing the application for reconsideration and motion to enlarge time does not lend support for a finding of extraordinary circumstances." *Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013); *see, e.g., State v. Michael*, 114 Ohio App.3d 523, 527, 683 N.E.2d 435 (7th Dist. 1996) (finding delay of nearly *three years* between the defendant's motion for reconsideration and the date the judgment was affirmed was unreasonable).

Second, the Seventh District noted that Ohio appellate courts have found a defendant to have shown extraordinary circumstances when a higher court has issued a *binding* decision that was directly on point. *See Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013), citing *State v. Lawson*, 10th Dist. No. 12AP-53, 2013 Ohio 803, 984 N.E.2d 1126, ¶ 6 (delayed application for reconsideration granted after this Court later released three opinions clarifying the application of 2007 Am.Sub.S.B. No. 10 and S.B. No. 97 to offenders convicted under Megan's Law), *State v. Truitt*, 1st Dist. No. C-050188, 2011 Ohio 1885, ¶ 3 (delayed application for reconsideration granted after this

Court issued its decisions concerning the failure to property notify a defendant concerning post-release control), and *State v. Thomas*, 1st Dist. No. C-010724, 2009 Ohio 971, ¶ 5 (delayed application for reconsideration granted after this Court issued its decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008 Ohio 1625, 886 N.E.2d 181, because the court's earlier decision was based upon *State v. Rance*, 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699), *vacated on other grounds*, 124 Ohio St.3d 412, 2010 Ohio 577, 922 N.E.2d 964.

The Seventh District reasoned that Ohio "appellate courts will grant reconsideration petitions when either there is an obvious error in the appellate court's decision or when it is demonstrated that the appellate court did not properly consider an issue." *Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013), citing *State v. Weaver*, 7th Dist. No. 12 BE 21, 2013 Ohio 898, ¶ 6.

Here, like in *Bunch*, the Seventh District denied Defendant's delayed application for reconsideration when it concluded that neither *Graham* nor *Miller* were directly on point, because Defendant was sentenced to multiple, consecutive fixed-term sentence rather than life in prison without parole. *See Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013); *accord State v. Barnette*, 7th Dist. No. 06 MA 135 (J.E. Sept. 16, 2013).

The Seventh District further recognized that "as of yet, no Ohio Supreme Court or United States Supreme Court decision has extended the *Graham* or *Miller* holding to 'de facto' life sentences." *See Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013), citing *Goins v. Smith*, N.D. Ohio No. 4:09-CV-1551, 2012 WL 3022206 (July 24, 2012), *State v. Kasic*, 228 Ariz. 288, 265 P.3d 410, 415-416 (Ariz.Ct.App. 2011), *Henry v. State*, 82 So.3d 1084, 1089 (Fla.Dist.Ct.App. 2012), *Walle v. State*, 99 So. 967, 972-973

(Fla.Dist.Ct.App. 2012), *Adams v. State*, 288 Ga. 695, 707 S.E.2d 359, 365 (2011), *People v. Taylor*, 2013 IL App (3d) 110876, 984 N.E.2d 580 (Ill.App.Ct. 2013), and *Bunch v. Smith*, 685 F.3d 546, 550-551 (6th Cir., 2012); *accord Barnette*, 7th Dist. No. 06 MA 135 (J.E. Sept. 16, 2013).

Even Judge DeGenaro's dissent recognized that *Graham* applied only to those juvenile offenders specifically sentenced to "life without parole" for a non-homicide offense rather than multiple, consecutive fixed-term sentences like Defendant: "This precise issue was concededly left open by the majority in *Graham*[.]" *Moore*, 2013 Ohio 5868, ¶ 18 (DeGenaro, P.J., dissenting).

And unlike Bunch, Defendant failed to challenge his sentence under the Eighth Amendment in any of his direct appeals. *Compare Moore*, 161 Ohio App.3d at 802, *Moore*, 2005 Ohio 5630, *Moore*, 2007 Ohio 7215, and *Moore*, 2009 Ohio 1505, *with State v. Bunch*, 7th Dist. No. 06 MA 106, 2007 Ohio 7211, ¶ 43 (Bunch argued "that sentencing a juvenile to a prison term of life without the possibility of parole or an equivalent sentence constitutes cruel and unusual punishment.").

Defendant raised an Eighth Amendment claim for the first time in 2010 after the trial court was required to issue a nunc pro tunc judgment entry of conviction. Defendant appealed the nunc pro tunc entry and raised several issues regarding his conviction and sentence, which included an Eighth Amendment argument pursuant to *Graham*. *See Moore*, 2011 Ohio 6220, ¶ 32. The Seventh District, however, dismissed Defendant's appeal pursuant to this Court's decision in *State v. Lester*, 130 Ohio St.3d 303, paragraph two of the syllabus (2011). *See id.*, at ¶ 34. In *Lester*, this Court held that "[a] nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to

correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken." *Id.*

Thus, in terms of Appellate Rule 26(A)(1), the Seventh District could not reconsider Defendant's Eighth Amendment claim, because its decision did not contain an obvious error or previously fail to consider an Eighth Amendment claim during any of Defendant's numerous direct appeals when it would have been properly before the court.

Simply stated, "given the length of delay and the fact that neither *Graham* nor *Miller* is directly on point, there is no basis to find extraordinary circumstances that would warrant granting the App.R. 14(B) motion to enlarge the time period to file the application for reconsideration." *Bunch*, 7th Dist. No. 06 MA 106 (J.E. Aug. 8, 2013); *accord Barnette*, 7th Dist. No. 06 MA 135 (Sept. 16, 2013 J.E.).

Furthermore, the Seventh District properly denied Defendant's delayed application for reconsideration, because his conviction became final in 2009.

In *Ali v. State*, this Court stated that "[a] new judicial ruling may be applied only to cases that are pending on the announcement date." *Ali v. State*, 104 Ohio St.3d 328, 2004 Ohio 6592, 819 N.E.2d 687, ¶ 6, citing *State v. Evans*, 32 Ohio St.2d 185, 186, 291 N.E.2d 466 (1972). "The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies." *Id.*, citing *State v. Lynn*, 5 Ohio St.2d 106, 108, 214 N.E.2d 226 (1966), *State v. Gonzalez*, 138 Ohio App.3d 853, 859, 742 N.E.2d 710 (2000), and *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 323, 649 N.E.2d 1229 (1995), quoting *Doe v. Trumbull Cty. Children Serv. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605, paragraph one of the syllabus (1986).

In *State v. Ditzler*, the Ninth District applied *Ali* to the defendant's argument that his conviction for the sexually violent predator specification was rendered void pursuant to this Court's decision in *State v. Smith*, 104 Ohio St.3d 106, 2004 Ohio 6238, 818 N.E.2d 283. *See State v. Ditzler*, 9th Dist. No. 13 CA 010342, 2013 Ohio 4969, ¶ 5.[1] In *Ditzler*, the Ninth District concluded *Smith* could not be retroactively applied to the defendant's conviction on the sexually violent predator specification, because at the time this Court decided *Smith*, the defendant's case was no longer pending on appeal. *See Ditzler*, supra at ¶ 10.

Similarly in *State v. Ratkosky*, the Ninth District concluded that the defendant was not entitled to the retroactive application this Court's decision in *State v. Brooks*, 103 Ohio St.3d 134, 2004 Ohio 4746, 814 N.E.2d 837, because he had exhausted his appellate remedies when *Brooks* was decided. *See State v. Ratkosky*, 9th Dist. No. 05CA0012-M, 2005 Ohio 4368, ¶ 10.

Finally, contrary to Defendant's assertion, his argument regarding *Graham's* retroactive application to his sentence should have been raised pursuant to R.C. 2951.23.

Therefore, the Seventh District properly denied Defendant's delayed application for reconsideration, because he failed to show an extraordinary circumstance in filing his application more than ***3 years*** after the U.S. Supreme Court's decision in *Graham*, and neither *Graham* nor *Miller* clearly established that the Seventh District's earlier decision was an "obvious error."

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[1] In *Smith*, this Court held that "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Smith*, at syllabus. The General Assembly, however, amended R.C. 2971.01(H)(1) four months later. *See Ditzler*, supra at ¶ 10; *accord State v. Wagers*, 12th Dist. No. CA2009-06-018, 2010 Ohio 2311, ¶ 30.

B. *GRAHAM v. FLORIDA*'S REQUIREMENT OF A "MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE" APPLIES ONLY TO THOSE JUVENILE OFFENDERS SENTENCED TO "LIFE WITHOUT PAROLE" FOR A NON-HOMICIDE OFFENSE.

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *State v. Long*, 138 Ohio St.3d 478, 480, 8 N.E.3d 890 (2014), quoting the Eighth Amendment; *accord* Ohio Constitution, Article I, Section 9. This Court previously recognized that "[c]entral 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.'" *Long*, 138 Ohio St.3d at 480, quoting *In re C.P.*, 131 Ohio St.3d 513, 2012 Ohio 1446, 967 N.E.2d 729, ¶ 25 (2012), quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544 (1910).

In *Graham v. Florida*, the U.S. Supreme Court addressed whether the Eighth Amendment permitted a juvenile offender to be sentenced to life imprisonment without parole for a non-homicide offense. *See Graham*, 560 U.S. at 52-53.

In *Graham*, the Court specifically held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *See id.* at 74. While the state is not required to guarantee a juvenile's release, the state must afford juvenile offenders sentenced to life imprisonment "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See id.* at 75.

When Graham was 16 years old, he and three other juveniles robbed a barbeque restaurant in Jacksonville, Florida. *See id.* at 53. Graham was charged as an adult with armed burglary with assault or battery, which carried a maximum sentence of life

imprisonment, and attempted armed robbery. *See id.* Graham pleaded guilty to both charges, and the trial court withheld adjudication of guilt as to both offenses and sentenced Graham to three years of probation. *See id.* at 54. Less than a year later, and 34 days short of his 18th birthday, Graham was arrested for two separate robberies. The trial court found that Graham had violated his probation, and sentenced him to the maximum sentence of life imprisonment—although Graham faced a minimum of 5 years imprisonment. *See id.* at 54-57.

The Court began its decision by reaffirming that Eighth Amendment analysis addresses the proportionally of an offender's sentence, which falls into two general classifications—challenges to a specific term-of-years sentence, and categorical restrictions. *See id.* at 59.

An offender's challenge to a specific term-of-years sentence asks whether a sentence is unconstitutionally excessive given all of the case's circumstances. *See id.*, citing *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001 (1983) (concluding life without parole was unconstitutional following the offender's seventh nonviolent felony), and *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680 (1991) (concluding life without parole was constructional following the offender's conviction for possessing a large quantity of cocaine).

The second classification has used categorical rules to determine a sentence's constitutionality. *See Graham*, 560 U.S. at 60. In these cases, for example, the Court concluded that the death penalty cannot be imposed on those offenders under the age of 18, or those offenders that are developmentally disabled. *See id.* at 61, citing *Roper v.*

Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), and *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242 (2002).

In *Graham*, the Court specifically applied the categorical approach to determine whether the U.S. Constitution permitted a juvenile offender to be sentenced to life imprisonment without parole for a non-homicide crime. *See Graham*, 560 U.S. at 61-62, 75 (stating "[c]ategorical rules tend to be imperfect, but one is necessary here.").

In applying the categorical approach, the Court began by looking to the objective indicia of national consensus regarding juvenile offenders who have been specifically sentenced to life in prison without parole. *See id.* at 62. In doing so, the Court found that only 11 jurisdictions nationwide have imposed life without parole sentences on juvenile offenders for non-homicide offenses. *See id.* at 64. The Court concluded that based upon that fact—only 11 jurisdictions nationwide have imposed life without parole sentences on juvenile offenders for non-homicide offenses—a national consensus has developed against such a practice. *See id.* at 67.

The Court then found that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability[,]" *id.* at 69, "[l]ife without parole is an especially harsh punishment for a juvenile[,]" *id.* at 70, and the "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.* at 74.

Thus, the Court held in *Graham* "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." While the state is not required to guarantee a juvenile's release, the state must afford juvenile offenders sentenced to life imprisonment "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See id.* at 74-75.

Here, Defendant was sentenced to an aggregate 112-term of incarceration for three counts of Rape, three counts of Complicity to Rape, three counts of Aggravated Robbery, Kidnapping, Aggravated Menacing, and the accompanying Firearm Specifications following "the horrific robbery, kidnapping, and repeated rape of M.K., a 22-year-old female Youngstown State University student[,]" shortly after M.K. arrived for work at a group home for mentally-handicapped women. *Bunch*, 685 F.3d at 547.

Defendant subsequently exhausted all of his state appellate rights, but filed a delayed application for reconsideration, in which he contended that *Graham* rendered his aggregate 112-term of incarceration unconstitutional, because Defendant will be 92 years old when he is first eligible for judicial release.[2] *See* R.C. 2929.20(C)(4)-(5). *Graham*, however, does not apply to Defendant because he was not sentenced to a life sentence.

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[2] While the State and Defendant agree that Defendant is serving 72 mandatory years and 40 nonmandatory years of incarceration, the State disagrees with Defendant's calculation of the date upon which he is eligible for judicial release pursuant to R.C. 2929.20(C).

Revised Code 2929.20(C)(5) is the starting point, because it states, "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.) Thus, pursuant to subsection (C)(5), Defendant would be eligible after only 56 years, because 56 is one-half of Defendant's "stated prison term." *See* R.C. 2929.01(F)(F) (stating, "'Stated prison term' means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court * * *.").

Accordingly, subsection (C)(4) governs Defendant's eligibility date rather than (C)(5), because the "later of the date" referenced in subsection (C)(5) would be "five years after the expiration of all mandatory prison terms." *See* R.C. 2929.20(C)(4).

Therefore, Defendant is eligible after he serves 77 years of incarceration (72 mandatory + 5 additional years after the mandatory portion expires). Because Defendant was 15 when he committed the offenses, he will be approximately 92 years old (77 + 15 = 92) when he is first eligible. *See* Felony Sentencing Quick Reference Guide, Ohio Criminal Sentencing Commission, by David J. Diroll (effective September 30, 2011).

1. ***GRAHAM* APPLIES ONLY TO THOSE JUVENILE OFFENDERS SENTENCED TO A *LIFE* SENTENCE WITHOUT PAROLE FOR A NON-HOMICIDE OFFENSE, AND DOES NOT EXTEND TO JUVENILES LIKE DEFENDANT SENTENCED TO A LENGTHY PRISON TERM FOR *MULTIPLE* NON-HOMICIDE OFFENSES.**

Here, Defendant contends that *Graham's* holding should be extended so that the Eighth Amendment prohibits sentencing a juvenile non-homicide offender to consecutive fixed-term sentences that in the aggregate *could* preclude any possibility of release during the juvenile's life. Accordingly, he contends that *Graham* rendered his aggregate 112-term of incarceration unconstitutional, because he will be 92 years old when he is first eligible for judicial release. *See* R.C. 2929.20(C)(4)-(5).

To the contrary, the Eighth Amendment does not prohibit trial courts from sentencing juvenile offenders who commit non-homicide offenses to multiple, consecutive fixed-term sentences that *may* preclude the possibility of release during the juvenile offender's life, because *Graham* applies only to those juvenile specifically sentenced to life imprisonment for a non-homicide offense.

There is undoubtedly a split among state and federal courts as to whether *Graham's* holding should be extended so that the Eighth Amendment prohibits sentencing a juvenile non-homicide offender to consecutive fixed-term sentences that in the aggregate *could* preclude any possibility of release during the juvenile's life. *Compare Bunch*, 685 F.3d at 546; *State v. Watkins*, 10th Dist. Nos. 13AP-133, 13AP-134, 2013 Ohio 5544, *Adams*, 288 Ga. at 695, *with People v. Caballero*, 55 Cal.4th 262, 282 P.3d 291 (2012), *State v. Null*, 836 N.W.2d 41 (Iowa 2013), and *Moore v. Biter*, 725 F.3d 1184 (9th Cir., 2013).

This split in authority has resulted in some courts applying *Graham* as it was written, without extending its rationale to multiple, consecutive sentences that the Court did not address, while others have extended *Graham's* application to encompass any lengthy sentence, regardless of the number of offenses that the defendant committed.

a.) <u>This Court's Extension of *Graham* to Multiple, Consecutive Fixed-Term Sentences Will Result in Requiring Courts to Engage in an Ad Hoc Guessing Game as to When a Defendant Receives a "Meaningful Opportunity to Obtain Release."</u>

In *Graham*, the U.S. Supreme Court established a categorical ban of sentencing juvenile offenders to life imprisonment without parole for a single non-homicide offense. *Graham's* plain language did not extend to prohibiting consecutive fixed-term sentences for multiple non-homicide offenses that in the aggregate *could* preclude the possibility of release during the juvenile offender's life.

To do so would require trial courts to conduct a case-by-case analysis that demands nothing short of pure speculation as to when a juvenile's aggregate term of incarceration for consecutive fixed-term sentences *could* preclude the possibility for parole during the juvenile's life.

One Florida appellate court has previously noted the many questions that courts will encounter should *Graham* be extend to lengthy consecutive fixed-term sentences for multiple non-homicide offenses:

> At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter?

Bunch, 685 F.3d at 552, quoting *Henry*, 82 So.3d at 1089. Such an extension would undoubtedly create more problems than answers for state courts and legislatures.

For example, in *People v. Caballero*, the Supreme Court of California found that the defendant's 110-years-to-life sentence for three counts of attempted murder with firearm specifications violated the Eight Amendment under *Graham*. *See Caballero*, 55 Cal.4th at 265. The court concluded "that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." *See id.* at 268.

In *Caballero*, the Supreme Court of California provided juvenile offenders with a procedure to challenge their sentence, but failed to provide California's lower courts with any guidance as to when a juvenile's lengthy sentence for a non-homicide offense violates the Eighth Amendment:

> Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, we will not provide trial courts with a precise time frame for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" under *Graham*'s mandate.

55 Cal.4th at 269. Thus, California trial courts are left guessing at point does a sentence run afoul of the Eighth Amendment under *Graham*.

The Supreme Court of Iowa found parole eligibility at the age of 69 required a remand pursuant to *Graham* and *Miller*. *See Null*, 836 N.W.2d at 71. In *State v. Null*, the

defendant was sentenced to a 75-year term of incarceration for one count of murder and one count of robbery. *See id.* at 45-46. By statute, the defendant must serve 70% of his sentence before he is eligible for parole. *See id.* Accordingly, the defendant was required to serve 52.5 years of his sentence before he was eligible for parole, when he is approximately 69 years old. *See id.* at 46.

In *Null*, the defendant argued that his sentence was a de facto life sentence pursuant to both *Graham* and *Miller*. *See id.* at 50. In support, Null cited to a National Vital Statistics Report that indicated the life expectancy of a 20-year-old black male is 51.7 years. *See id.* at 50-51.

The Supreme Court of Iowa found that while a minimum 52.5-year sentence is not technically life-without-parole, "such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections." *See id.* at 71. The court reasoned that a juvenile's potential release in his or her late sixties is insufficient to escape the rationales of *Graham* and *Miller*. *See id.* The court, however, admitted that the evidence did not clearly establish that Null's sentence extended beyond his life expectancy. *See id.* Thus, a remand was necessary for the district court to consider that very issue. *See id.* at 76.

Like California trial courts, Iowa trial courts are left guessing at point does a sentence run afoul of the Eighth Amendment under *Graham*.

In *Moore v. Biter*, the defendant was sentenced to 254 years and four months for 24 non-homicide offenses that he committed in the early 90s when he was 16. *Moore*, 725 F.3d at 1186. The defendant was convicted of 9 counts of forcible rape, 7 counts of forcible oral copulation, 2 counts of attempted robbery, 2 counts of robbery, forcible sodomy, kidnaping with the specific intent to commit a felony sex offense, genital

penetration by a foreign object, and the unlawful driving or taking of a vehicle. 725 F.3d at 1186. The defendant was eligible for parole after he served 127 years and two months when he would be approximately 144 years old. 725 F.3d at 1186.

In *Moore*, the Ninth Circuit found that "Moore's sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime." 725 F.3d at 1191. The court reasoned that "*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." 725 F.3d at 1192.

The Ninth Circuit, however, gives no guidance on when a defendant's sentence becomes unconstitutional under *Graham*.

Thus, courts choosing to extend *Graham's* application to fixed-term sentences for multiple non-homicide offenses have required trial courts to conduct a case-by-case analysis that demands nothing short of pure speculation as to when a juvenile's aggregate term of incarceration for multiple, consecutive fixed-term sentences *could* preclude the possibility for parole during the juvenile's life.

Thus, should this Court extend *Graham*, and absent a clear and concise legislative enactment from the General Assembly, Ohio courts have no choice but to engage in this ad hoc determination, which presents numerous problems at the beginning, middle, and end of a juvenile's sentence.

At the beginning, trial courts are left to guess at what point a juvenile's sentence runs afoul of *Graham's* mandate of a "meaningful opportunity to obtain release." While it is easy to identify a life-without-parole sentence, it is a daunting task to recognize when consecutive terms of incarceration add up to a de facto life sentence without parole. Trial

courts can surely take into consideration a person's average life expectancy, but they cannot ignore such variables as the effect of imprisonment, family medical history, and future medical advances. These variables can both increase and decrease a person's life expectancy.

In the middle, trial courts are left with no guidance when a juvenile offender commits additional offenses while incarcerated. Assuming the juvenile's original sentence satisfied *Graham*, at what point would additional sanctions imposed upon the juvenile now run afoul of *Graham*. And if a trial court can no longer impose any additional sanctions upon the juvenile, the juvenile is left without any deterrent to future criminal behavior while incarcerated. The same question applies to the situation where a juvenile commits multiple offenses in multiple jurisdictions. What is the limit?

At the back end, how would a trial court remedy a sentence that is found to have violated *Graham*? Like at the beginning, trial courts are left with guessing at what point a juvenile's sentence runs afoul of *Graham's* mandate of a "meaningful opportunity to obtain release."

Thus, the U.S. Supreme Court's unambiguous, bright-line holding in *Graham*—the Eighth Amendment forbids a sentence of life imprisonment without parole for juvenile offenders for a single non-homicide offense—must leave unaffected juvenile offenders like Defendant who have been sentenced to multiple, consecutive fixed-term sentences.

b.) Applying *Graham v. Florida* as it was Written, the Court's Mandate Only Affects Juveniles Sentenced to a *Life* Sentence Without Parole for *a* Non-Homicide Offense, But Does Not Extend to Juveniles Sentenced to a Lengthy Prison Term for *Multiple* Non-Homicide Offenses.

The U.S. Supreme Court's plain and unambiguous bright-line holding in *Graham*—the Eighth Amendment forbids the sentence of life imprisonment without parole for juvenile offenders who commit a single non-homicide offense—does not apply to juvenile offenders like Defendant who have been sentenced to multiple, consecutive fixed-term sentences. This Court must apply *Graham* as it was written and conclude that its mandate of a "meaningful opportunity to obtain release" does not extend to a juvenile sentenced to multiple, consecutive fixed-term sentences for non-homicide offenses.

To be sure, the Court established a categorical ban through its bright-line test: "This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *See Graham*, 560 U.S. at 74.

In *Graham*, the Court specifically rejected the approach that would have to be undertaken here should this Court find that Defendant's aggregate 112-year term of incarceration fall under *Graham*—requiring trial "courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime." *Id.* at 77. Thus, the Court rejected a case-by-case proportionality approach, because in the Court's opinion, trial courts could not "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *See id.*

Justice Alito's dissenting opinion made it clear that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional." *Id.* at 124 (Alito, J., dissenting). The Court's categorical prohibition of life imprisonment without parole applied only to those juvenile offenders specifically sentenced to "*life without parole*" for a non-homicide offense rather than consecutive fixed-term sentences. *See id.* at 124 (Alito, J., dissenting).

Graham's majority opinion demonstrated that the categorical prohibition of life imprisonment without parole applied only to those juvenile offenders specifically sentenced to "*life without parole*" for a single non-homicide offense rather than a lengthy sentence that resulted from multiple, consecutive fixed-term sentences. *See id.* at 62.

Most telling was the fact that Ohio was not listed as 1 of the 11 jurisdictions nationwide that have imposed life without parole sentences on juvenile offenders for non-homicide offenses. *See id.* at 64. Thus, the Court addressed only those juvenile offenders who were specifically sentenced to "life without parole" rather than encompassing those juvenile offenders that are similarly situated with Defendant—juvenile offenders sentenced to consecutive fixed-term sentences.

The Sixth Circuit recognized this in Chaz Bunch's (Defendant's co-defendant who was sentenced to an aggregate 89-year term of incarceration) habeas appeal. *See Bunch*, 685 F.3d at 552. The Sixth Circuit found that the Court's statistical review of state sentencing practices demonstrated that the Court "did not analyze sentencing laws or

actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders." *Bunch*, 685 F.3d at 552.

The Sixth Circuit rejected Bunch's argument that his lengthy aggregate term of incarceration amounted to the equivalent of a life sentence that the Court prohibited in *Graham*. *See Bunch*, 685 F.3d at 547. The Sixth Circuit concluded that Bunch's petition was properly denied, because *Graham* did not "clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." *Bunch*, 685 F.3d at 547.

The Sixth Circuit recognized that *Graham* "implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Bunch*, 685 F.3d at 550, quoting *Graham,* 130 S.Ct. at 2022-2023.

The Sixth Circuit reasoned that *Graham* and Bunch (like Defendant), while both juveniles that committed non-homicide offenses, were not similarly sentenced: "while *Graham* was sentenced to life in prison for committing one nonhomicide offense, Bunch was sentenced to consecutive, fixed-term sentences—the longest of which was 10 years—for committing multiple nonhomicide offenses." *Bunch*, 685 F.3d at 551. The Sixth Circuit concluded that *Graham's* application was limited to those juvenile offenders that were specifically sentenced to "life without parole" rather than extending to those juvenile offenders sentenced to consecutive, fixed-term sentences for committing multiple non-homicide offenses. *See Bunch*, 685 F.3d at 551; *accord Goins v. Smith*, 556 Fed.Appx. 434, 438-439 (6th Cir., 2014).

The Sixth Circuit's application of *Graham* to Bunch's sentence was consistent with the Court's unequivocal decision to draw a "clear line" to protect juvenile offenders' Eighth Amendment right, because the Court's "analysis did not encompass consecutive, fixed-term sentences" for multiple non-homicide offenses that in the aggregate *could* preclude the possibility of parole. *See Bunch*, 685 F.3d at 551-552.

Several other courts have applied *Graham* in a similar fashion to juvenile offenders like the Sixth Circuit did in *Bunch*, which provides a bright-line application rather than an ad hoc approach.

In *State v. Watkins*, the Tenth District Court of Appeals rejected the defendant's argument that his 67-term of incarceration for multiple offenses committed when he was 16 violated his Eighth Amendment right pursuant to *Graham*. *See Watkins*, supra at ¶ 14; *appeal accepted, State v. Watkins*, Case No. 2014-0454.[3]

In *Watkins*, the Tenth District stated that "*Graham* does not specifically apply to appellant's case because he did not receive a life sentence without the possibility of parole for his convictions." *Watkins*, supra at ¶ 17, citing *State v. Bokeno*, 12th Dist. No. CA2011-03-044, 2012 Ohio 4812, ¶ 29 (concluding that the trial court's sentenced of life imprisonment with parole eligibility after 20 years satisfied *Graham*). Further, the Tenth District noted that Watkins was eligible for judicial release after serving 33 ½ years in prison, which even assuming that *Graham* did apply, satisfied *Graham's* mandate for a "meaningful opportunity to obtain release." *See Watkins*, supra at ¶ 17.

More importantly, the Tenth District rejected the defendant's argument that his lengthy aggregate term of incarceration was the "functional equivalent of a life sentence"

[3] Watkins' discretionary appeal was accepted and held for this Court's decision here.

that *Graham* prohibits. *See Watkins*, supra at ¶ 18, citing *People v. Rainer*, Colo.App. No. 10 CA 2414, 2013 WL 1490107, ¶¶ 60-79 (Apr. 11, 2013).

Like the Sixth Circuit, the Tenth District interpreted *Graham* to only include those juvenile offenders specifically sentenced to life without parole rather than multiple, consecutive fixed-term sentences: "The category of punishments prohibited is clear and easy to identify. The court did not include non-lifetime but otherwise lengthy sentences and indeed, it would be hard to arrive at a categorical prohibition against such a wide range of possible sentences that could, arguably, constitute a 'functional equivalent of a life sentence.'" *Watkins*, supra at ¶ 18, quoting *Bunch,* 685 F.3d at 552-553, citing *Henry*, 82 So.3d at 1089 (stating "If the Supreme Court has more in mind, it will have to say what that is.").

The Tenth District then noted that this Court has focused its Eighth Amendment disproportionality analysis on a defendant's individual sentences rather than a lengthy aggregate term of incarceration. *See Watkins*, supra at ¶ 19, citing *State v. Hairston*, 118 Ohio St.3d 289, 2008 Ohio 2338, 888 N.E.2d 1073, ¶ 20.

The Tenth District finally recognized that there was "nothing shocking about an individual receiving such a lengthy prison term sentence because he pled guilty to a number of offenses, * * *." *Watkins*, supra at ¶ 19. The Tenth District reasoned that "[t]he ***more crimes an individual commits, the more likely it is that the ultimate prison sentence will indeed be a lengthy one***." (Emphasis added.) *Watkins*, supra at ¶ 19, citing *State v. Carse*, 10th Dist. No. 09AP-932, 2010 Ohio 4513, ¶ 74.

Likewise, the Supreme Court of Georgia concluded that the defendant's 25-year sentence followed by a lifetime of probation for aggravated child molestation and child molestation did not involve *Graham's* application. *See Adams*, 288 Ga. at 700-701.

In *Adams*, the Supreme Court of Georgia first decided that the defendant's sentence did not involve a categorical Eighth Amendment restriction like that in *Graham*. *See id.* at 701. Because the defendant's sentence did not involve a categorical restriction, the Supreme Court of Georgia determined instead whether the defendant's sentence was grossly disproportionate to his offenses. *See id.* In looking specifically at the defendant's conduct, the Supreme Court of Georgia found that the sentence was not grossly disproportionate to the defendant's conduct. *See id.* at 702.

In *State v. Brown*, the Supreme Court of Louisiana addressed whether *Graham* applied to cases in which a juvenile offender committed multiple offenses that resulted in an aggregate 70-year term of incarceration that matched or exceeded the juvenile's life expectancy without the opportunity of obtaining an early release. *See State v. Brown*, 118 So.3d 332, 332 (La. 2013). The Supreme Court of Louisiana held that "*Graham's* holding that the Eighth Amendment's prohibition of cruel and unusual punishment forbids the imposition of life in prison without parole for juveniles committing non-homicide crimes, applies only to sentences of life in prison without parole, and does not apply to a sentence of years without the possibility of parole." *Id.*

In *Brown*, the juvenile would have been eligible for parole at age 46 had he not committed four additional offenses that carried a mandatory term of incarceration without parole. *See id.* at 341.

In breaking down the juvenile's sentences individually, the court reasoned that "nothing in *Graham* prohibits a ten-year sentence without parole, four ten-year consecutive sentences without parole, or four ten-year consecutive sentences from running consecutive to a life sentence that has been amended to give a defendant parole eligibility at age 46." *Id.*

In *Brown*, the Supreme Court of Louisiana recognized the Sixth Circuit's approach in *Bunch*. *See id.* at 337-338, quoting *Bunch*, 685 F.3d at 551. And like the Sixth Circuit, the Supreme Court of Louisiana concluded that *Graham* does not apply to sentences for multiple convictions: "as *Graham* conducted no analysis of sentences for multiple convictions and provides no guidance on how to handle such sentences." *See Brown*, 118 So.3d at 341.

The Supreme Court of Louisiana concluded that the juvenile's aggregate 70-year term of incarceration, in which he would be eligible for parole at the age of 86, did not violate the juvenile's Eighth Amendment right, because "*Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime, * * *." *Id.*

In *State v. Kasic*, an Arizona appellate court likewise concluded that *Graham* did not apply to the defendant's 139.75-year term of incarceration following his convictions for 32 felonies arising from six arsons and one attempted arson that he committed when he was 17. *See Kasic*, 265 P.3d at 411.

In *Kasic*, the court stated that *Graham* did not apply to juvenile offenders who are serving a term-of-years sentence that happens to exceed the juvenile's life expectancy. *See id.* at 414. The court reasoned that *Graham* made it clear that it concerned "only

those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *See id.*, quoting *Graham*, 130 S.Ct. at 2023; *see also Shivers v. Kerestes*, E.D. Pa. No. Civ. 12-1291, 2013 WL 1311142, *3 (Apr. 2, 2013) (finding that the defendant did "not fall within the bright-line rule enunciated in *Graham* because he was sentenced to incarceration for thirty-five to seventy years, not life without parole.").

Thus, the Arizona appellate court declined to extend *Graham* to the defendant's 139.75-year term of incarceration, and instead determined whether the lengthy sentence was "grossly disproportionate" to his offenses. *See Kasic*, 265 P.3d at 415, citing *Harmelin*, 501 U.S. at 1005, 111 S.Ct. at 2680.

While Florida appellate courts are split and the issue in now before the Florida Supreme Court, the rationale from the 2nd District is far more persuasive.

In *Walle v. State*, Florida's Second District Court of Appeals concluded that the defendant's 92-year aggregate sentence for two separate instances of criminal conduct that occurred in two separate counties did not violate the Eighth Amendment. *See Walle* , 99 So. at 972-973. The defendant pleaded guilty to 18 non-homicide offenses that he committed when he was 13: "two counts of armed kidnapping, eleven counts of armed sexual battery with a deadly weapon, one count of armed burglary of a structure, one count of grand theft motor vehicle, one count of attempted armed robbery with a firearm, one count of grand theft in the third degree, and one count of carjacking with a deadly weapon." *See id.* at 968. The defendant was sentenced to a 65-year term on incarceration, which the court ran consecutive to an unrelated case in which he received a 27-year term of incarceration. *See id.* Thus, a 92-year aggregate sentence was imposed by two separate

trial courts for two separate instances of criminal conduct that occurred in two separate counties.[4] *See id.*

On appeal, Walle argued that his 92-year sentence violated *Graham*. *See id.* The Second District identified four necessary factors that must be present for *Graham* to apply: "(1) the offender was a juvenile when he committed his offense, (2) the sentence imposed applied to a singular nonhomicide offense, (3) the offender was 'sentenced to life,' and (4) the sentence does not provide the offender with any possibility of release during his lifetime." *See id.* at 970.

In *Walle*, the Second District found that *Graham* did not apply because the defendant committed multiple offenses, and was not sentenced to a life sentence for any of his offenses. *See id.* at 971. The court reasoned that *Graham* addressed a single sentence of life in prison without parole rather than multiple consecutive sentences. *See id.* Further, the court reasoned that "none of the sentences in this case satisfies the fourth factor because there is nothing in the record to show that any of the sixty-five-year sentences will equate to life imprisonment for Mr. Walle." *See id.*

Thus, Florida's Second District Court of Appeal concluded in *Walle* that the defendant's 92-year aggregate sentence for two separate instances of criminal conduct that occurred in two separate counties did not violate Eighth Amendment. *See id.* at 973; *accord Henry*, 82 So.3d at 1084, *but see Floyd v. State*, 87 So.3d 45 (Fla.Dist.Ct.App. 2012); *Adams v. State*, Fla.App. No. 1D11-3225, 2012 WL 3193932 (Aug. 8, 2012) (concluding that sentence requiring a juvenile offender to serve 58.5 years in prison

[4] Walle will have to serve at least 85% of his total sentence. *See Walle*, 99 So. at 973, citing Florida Stat. 921.002(1)(e).

before an opportunity for release amounted to a de facto life sentence that violated the Eighth Amendment under *Graham*).

The Florida Supreme Court has recognized the conflict, and has already heard oral argument in a related case on September 17, 2013. *See Gridine v. State*, No. SC12-1223 (Fla.). On June 26, 2014, the Florida Supreme Court ordered supplemental briefing on the effect, if any at all, that recent juvenile sentencing legislation had on the case.

Thus, the Sixth Circuit, the Ohio District Court of Appeals, the Supreme Courts of Georgia and Louisiana, an Arizona appellate court, and a Florida appellate court have properly concluded that *Graham's* categorical prohibition of life imprisonment without parole applied only to those juvenile offenders specifically sentenced to "*life without parole*" for a single non-homicide offense rather than multiple, consecutive fixed-term sentences like Defendant.

In *Graham*, the Court established a categorical ban of sentencing juvenile offenders to life imprisonment without parole for a single non-homicide offense. *Graham's* plain language did not extend to prohibiting multiple, consecutive fixed-term sentences for non-homicide offenses that in the aggregate *could* preclude the possibility of release during the juvenile offender's life.

c.) ***Graham v. Florida*** **Cannot Be Applied Retroactively to Defendant's Sentence under *Teague v. Lane*, Because *Graham* Does Not Extend to Juveniles Sentenced to a Lengthy Prison Term for *Multiple* Non-Homicide Offenses.**

In *Teague v. Lane*, the U.S. Supreme Court addressed the retroactive application of new constitutional rulings that resulted from judicial decisions, and whether these new rulings should be applied evenly to all similarly situated defendants. *See Teague v. Lane,* 489 U.S. 288, 300-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *see also State v. Miller*, 7th Dist. No. 98 JE 51, 2001 Ohio 3397, *2.

The Court concluded that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Chambers v. State*, 831 N.W.2d 311, 323 (Minn. 2013), quoting *Teague*, 489 U.S. at 305 (internal quotation marks omitted). "But once a conviction or sentence becomes final, the defendant is not entitled to the retroactive benefit of a new rule, subject to two exceptions." *Chambers*, 831 N.W.2d at 323, citing *Teague*, 489 U.S. at 307.

Teague, however, provides two exceptions. First, "a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* (citation omitted) (internal quotation marks omitted). Second, "a new rule should be applied retroactively if it requires the observance of those procedures that are * * * implicit in the concept of ordered liberty." *Id.* (citation omitted) (internal quotation marks omitted). The second exception is "reserved for watershed rules of criminal procedure." *Chambers*, 831 N.W.2d at 323, citing *Teague*, 489 U.S. at 311.

"The Court rested its general rule of nonretroactivity to cases pending on collateral review on comity and finality considerations." *Chambers*, 831 N.W.2d at 323, citing *Danforth v. Minnesota* (*Danforth II*), 552 U.S. 264, 279, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), *rev'g Danforth v. State* (*Danforth I*), 718 N.W.2d 451 (Minn. 2006).

The Court recognized in *Teague* that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Chambers*, 831 N.W.2d at 323, citing *Teague*, 489 U.S. at 309.

Here, *Graham* cannot be applied retroactively to Defendant under *Teague*, because Defendant is not a similarly situated defendant to the juvenile offender in *Graham*. *See Teague*, 489 U.S. at 300-310. Defendant is not similarly situated to the defendant in *Graham*, because Defendant was sentenced to multiple, consecutive fixed-term sentences for non-homicide offenses, while the defendant in *Graham* was sentence to life imprisonment without parole for a single non-homicide offense. *See Bunch*, 685 F.3d at 551; *but see In re Moss*, 703 F.3d 1301, 1303 (11th Cir., 2013); *Bonilla v. State*, 791 N.W.2d 697, 700-701 (Iowa 2010).

Therefore, this Court must apply *Graham* as it is written until the U.S. Supreme Court says otherwise, and conclude here that *Graham's* mandate of a "meaningful opportunity to obtain release" does not extend to a juvenile sentenced to multiple, consecutive fixed-term sentences for separate non-homicide offenses.

Accordingly, Defendant's 112-year stated prison term remains constitutional.

2. THIS COURT MUST EMPLOY *HAIRSTON'S* GROSSLY-DISPROPORTIONATE ANALYSIS THAT LOOKS TO EACH SEPARATE SENTENCE RATHER THAN THE AGGREGATE WHEN DETERMINING IF A JUVENILE'S SENTENCE FOR MULTIPLE, CONSECUTIVE FIXED-TERM SENTENCES VIOLATED THE 8TH AMENDMENT.

In *Graham*, the U.S. Supreme Court established a categorical ban of sentencing juvenile offenders to life imprisonment without parole for a non-homicide offense. *Graham's* plain language did not extend to prohibiting multiple, consecutive fixed-term sentences for non-homicide offenses that in the aggregate could preclude the possibility of release during the juvenile offender's life.

When confronting Eighth Amendment challenges from juveniles who have been sentenced to lengthy terms of incarceration for multiple, consecutive fixed-term sentences for non-homicide offenses, this Court must simply apply its earlier test set forth in *Hairston*, supra.

In *Hairston*, this addressed whether a 134-term of incarceration for multiple offenses that involved non-life threatening injuries constituted cruel and usual punishment and violated the Eighth Amendment and Section 9, Article I of the Ohio Constitution. *See id.* This Court held that "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Id.* at syllabus.

This Court has long stressed that Eighth Amendment violations are rare: "[c]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable

person." *State v. Weitbrecht*, 86 Ohio St.3d 368, 370-371, 715 N.E.2d 167 (1999), quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70, 203 N.E.2d 334, 336 (1964). This Court further stated that "the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community." *Weitbrecht*, 86 Ohio St.3d at 371, quoting *McDougle*, 1 Ohio St.2d at 70, and citing *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46, paragraph three of the syllabus (1972).

In *Weitbrecht*, this Court adopted Justice Kennedy's concurring opinion in *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991): "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Weitbrecht*, 86 Ohio St.3d at 371-372, quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and in judgment); *accord Hairston*, 118 Ohio St.3d at 293.

This Court further emphasized in *Weitbrecht* that "'only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality' may a court compare the punishment under review to punishments imposed in Ohio or in other jurisdictions." *Hairston*, 118 Ohio St.3d at 293, quoting *Weitbrecht*, 86 Ohio St.3d at 373, fn. 4, quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and in judgment).

In *Hairston*, the defendant argued that this Court should focus on the aggregate sentence rather than each sentence for each individual offense. *See Hairston*, 118 Ohio St.3d at 293. This Court recognized that it previously held that "[a] sentence is the sanction or combination of sanctions imposed for each separate, individual offense." *Hairston*, 118 Ohio St.3d at 293, quoting *State v. Saxon*, 109 Ohio St.3d 176, 846 N.E.2d

824, paragraph one of the syllabus (2006). In *Saxon*, this Court reasoned that "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time," and "[o]nly after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." *Hairston*, 118 Ohio St.3d at 293, quoting *Saxon,* 109 Ohio St.3d at 179.

This Court concluded in *Hairston* "that for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." *Hairston*, 118 Ohio St.3d at 295. Thus, this Court held that "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Id.*

The Seventh Circuit previously recognized the same: "it is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir., 2001).

Therefore, this Court must simply apply its earlier test set forth in *Hairston* to juvenile offenders who argue that their lengthy stated prison term for multiple, consecutive fixed-term sentences for non-homicide offenses violated the Eighth Amendment. *See, e.g., State v. Flagg*, 8th Dist. Nos. 95958, 95986, 2011 Ohio 5386, ¶¶ 14-16, citing *Hairston*, supra at ¶¶ 19-21.

3. R.C. 2929.20(C) PROVIDES DEFENDANT WITH A "MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE," BECAUSE HE WILL BE 92 WHEN HE IS ELIGIBLE FOR JUDICIAL RELEASE.

Assuming that this Court concludes that *Graham's* mandate of a "meaningful opportunity to obtain release" extends to a juvenile, like Defendant, sentenced to multiple, consecutive fixed-term sentences for separate non-homicide offenses that in the aggregate *could* preclude the possibility of release during the juvenile offender's life, *and* *Graham* can be applied retroactively to Defendant's sentence, R.C. 2929.20 provides Defendant with a "meaningful opportunity to obtain release."[5]

Here, Defendant was sentenced to an aggregate 112-term of incarceration for three counts of Rape, three counts of Complicity to Rape, three counts of Aggravated Robbery, Kidnapping, Aggravated Menacing, and the accompanying Firearm Specifications following "the horrific robbery, kidnapping, and repeated rape of M.K., a 22-year-old female Youngstown State University student[,]" shortly after M.K. arrived for work at a group home for mentally-handicapped women. *Bunch*, 685 F.3d at 547.

The State and Defendant agree that he is serving an aggregate 112-term of incarceration. And of the 112-year term, 72 are mandatory whereas 40 are nonmandatory. The State, however, disagrees with Defendant's calculation of the date upon which he is eligible for judicial release pursuant to R.C. 2929.20(C). As stated above, the State

[5] The State does not concede that *Graham's* mandate of a "meaningful opportunity to obtain release" extends to a juvenile, like Defendant, sentenced to multiple, consecutive fixed-term sentences for separate non-homicide offenses. The State only makes this argument should this Court find that *Graham* is applicable to Defendant's sentence, and the issue is properly before this Court.

contends that Defendant must serve 77 (not 92) of the 112-year sentence before he is eligible for judicial release. *See* R.C. 2929.20(C). *See* Defendant's Brief at 4, fn. 4.

Revised Code 2929.20(C)(5) is the starting point, because it states, "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.) Pursuant to subsection (C)(5), Defendant would be eligible after only 56 years, because 56 is one-half of Defendant's "stated prison term." *See* R.C. 2929.01(F)(F) (stating, "'Stated prison term' means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court * * *."). Accordingly, subsection (C)(4) governs Defendant's eligibility date, because the "later of the date" referenced in subsection (C)(5) would be "five years after the expiration of all mandatory prison terms." *See* R.C. 2929.20(C)(4).

Thus, R.C. 2929.20 provides Defendant with a "meaningful opportunity to obtain release," because he is eligible after he serves 77 years of incarceration (72 mandatory + 5 additional years after the mandatory portion expires). Because Defendant was 15 when he committed the offenses, he will be approximately 92 years old (77 + 15 = 92) when he is first eligible. *See* R.C. 2929.20(C); Felony Sentencing Quick Reference Guide, Ohio Criminal Sentencing Commission, by David J. Diroll (effective September 30, 2011).

Conclusion

Defendant-Appellant Brandon Moore was given a fair trial that fully complied with all of the mandates of the Ohio State and United States Constitutions. Defendant's guilt is undeniable, and was proven beyond a reasonable doubt after "the horrific robbery, kidnapping, and repeated rape of M.K., a 22-year-old female Youngstown State University student." *Bunch*, 685 F.3d at 547. The facts in this case speak for themselves.

First, the Seventh District properly denied Defendant's delayed application for reconsideration, because he failed to show an extraordinary circumstance in filing his application more than ***3 years*** after the U.S. Supreme Court's decision in *Graham v. Florida*, and neither *Graham* nor *Miller v. Alabama* clearly established that the Seventh District's earlier decision was an "obvious error."

Further, contrary to Defendant's assertion, his argument regarding *Graham's* retroactive application to his sentence should have been raised pursuant to R.C. 2951.23.

Second, *Graham* established a categorical ban of sentencing juvenile offenders to life imprisonment without parole for a single non-homicide offense. *Graham* specifically addressed juvenile offenders that were sentenced to "life without parole" for a non-homicide offense, and did not extend to juvenile offenders that were sentenced to multiple, consecutive fixed-term sentences. *See Graham*, 560 U.S. at 61-62. Extending the Court's holding in *Graham* to multiple, consecutive fixed-term sentences would be inconsistent with the Court's bright-line approach, and would require courts to undertake a case-by-case, ad hoc analysis in which the court would merely speculate as to what point would a juvenile offender's lengthy term of incarceration deprive him of a "meaningful opportunity" for release.

Finally, *Graham* cannot be applied retroactively to Defendant under *Teague v. Lane*, because he is not similarly situated to the juvenile offender in *Graham*. *See Teague*, 489 U.S. at 300-310. Defendant is not similarly situated to the defendant in *Graham*, because he was sentenced to multiple, consecutive fixed-term sentences for non-homicide offenses, while the defendant in *Graham* was sentenced to life imprisonment without parole for a single non-homicide offense. *See Bunch*, 685 F.3d at 551.

Therefore, the U.S. Supreme Court's unambiguous, bright-line holding in *Graham*—the Eighth Amendment forbids a sentence of life imprisonment without parole for juvenile offenders for a single non-homicide offense—does not extend to or affect juvenile offenders like Defendant who have been sentenced to multiple, consecutive fixed-term sentences that in the aggregate *could* preclude the possibility of release during the juvenile offender's life.

Respectfully Submitted,

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