ORIGINAL

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

When the United States Supreme Court, in *Graham v. Florida*, placed a "flat ban" against sentencing juvenile nonhomicide offenders to "remain behind bars for life," it drew a clear line between juveniles who have been convicted of homicide, and those who have not. *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455, 2466 fn. 6, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Juveniles, the Court explained, are psychologically underdeveloped and have a great capacity for rehabilitation; hence they are inherently less culpable than adults. *Graham* at 68. Drawing on its death penalty jurisprudence, the Court reasoned that juveniles who have not committed murder are "categorically" less culpable than those who have, no matter the *number* or *nature* of the nonhomicide crimes they committed. *Id.* at 69. Accordingly, the Supreme Court reasoned that a juvenile offender who has not committed murder "has a *twice* diminished moral culpability" and cannot be sentenced to the *harshest* juvenile sentence (life without parole). (Emphasis added) *Id.* Based on these principles, the Court categorically held: "[F]or a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at 74.

Although Brandon's sentence is not labeled "life without parole," it is so long that it ensures he will die in prison without, as *Graham* guarantees, a "meaningful opportunity to obtain release." *Id.* at 75. It defies science to suggest that his 112-year sentence is anything but life without parole—he has no possibility of release until well beyond his life expectancy. Although Brandon's sentence is composed of multiple aggregate counts, he still has the "twice diminished moral culpability" for two simple reasons: (1) he was a juvenile at the time of his offense, and (2) he did not commit homicide. Indeed, giving him a sentence reserved only for juveniles who have murdered would violate *Graham*'s categorical ban and disrupt the proportionality scheme established by the Supreme Court. *Id.* at 69.

Rather than address the unique attributes of youth, the Court's distinction between homicide and nonhomicide offenders, or the Court's proportionality analysis, the State instead attempts to evade the reasoning of *Graham* by focusing on semantics and procedure. It starts by claiming that Brandon delayed in raising his *Graham* claim; yet it obscures the key fact that Brandon raised *Graham* the day it was handed down. (State's Br. at 13-18.) Then it argues that *Graham* is not retroactive; a proposition not supported by a single case it cites. (State's Br. at 18-19, 40-41.) The State next offers a parade of horribles, suggesting that following *Graham* would simply be too difficult for trial courts; as if such alleged complications could be reason for jettisoning a Supreme Court mandate. (State's Br. at 25-29.) The State offers distraction after distraction because it wants to avoid the very proposition of law for which this Court accepted jurisdiction. The State never addresses the substance of *Graham*'s reasoning, and it thus fails to demonstrate why Brandon should not be protected by *Graham*'s guarantee that all juvenile nonhomicide offenders have a "meaningful opportunity for release." *Graham* at 50.

ARGUMENT

I. *GRAHAM* PROHIBITS SENTENCING ANY JUVENILE WHO DID NOT COMMIT HOMICIDE TO SPEND THE REST OF HIS LIFE IN PRISON WITHOUT A MEANINGFUL OPPORTUNITY FOR RELEASE.

The Supreme Court's decision in *Graham* was unequivocal: "Th[e] Court now holds that for a *juvenile offender who did not commit homicide* the Eighth Amendment forbids the sentence of life without parole." (Emphasis added.) *Graham*, 560 U.S. at 74, 130 S.Ct. 2011, 176 L.Ed2d 825. 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. Brandon Moore is a "*juvenile offender who did not commit homicide*." (Emphasis added.) *Id.* at 74. Thus, *Graham* applies, and Brandon must be given a "meaningful opportunity" to obtain release.

Confusingly, the State actually cites this language (State's Br. at 20); yet—without acknowledging its import—the State argues that *Graham*'s holding applies only to juveniles sentenced to "life without parole" for a *single* nonhomicide offense. This argument artificially limits *Graham*. The Supreme Court did not confine *Graham* to juveniles who commit only *one* nonhomicide offense. As the State recognizes, Terrance Graham himself had committed many. *Graham* at 74; (State's Br. at 20-21.) Rather, the Court's reasoning was based on the fact that *all* juvenile nonhomicide offenders have "twice diminished moral culpability" and thus are not eligible for the harshest juvenile sentence permitted by law. *Graham* at 69. Nor did the Court limit its holding to sentences the State chooses to label as "life without parole." Instead, the Constitution "forbid[s] States from making the judgment at the outset that [these] offenders never will be fit to reenter society." *Id.* at 75. Yet that is what the trial court did to Brandon when it ruled: "[I]t is the intention of this court that you should never be released from the penitentiary." Tr. Third Sentencing (Jan. 24, 2008) at 33.

Rather than engaging the Supreme Court's reasoning, the State instead focuses on alleged difficulties trial courts may face in complying with the Supreme Court's dictates. (State's Br. at 25-29.) At base, the State argues that applying *Graham* might be hard. But such difficulties are overstated, and not a reason to deny Brandon—or any juvenile—his Eighth Amendment rights.

A. *Graham*'s Reasoning Demonstrates That It Applies to All Juveniles Who Did Not Commit Homicide Irrespective of Whether They Are Sentenced to Multiple Consecutive Sentences.

As the State acknowledges, the Supreme Court's Eighth Amendment proportionality jurisprudence falls into two categories. (State's Br. at 21.) First, there are some sentences that are categorically barred, based on the nature of the offender and the offenses, regardless of the specific facts and circumstances. *Graham*, 560 U.S. at 60-61, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Roper v. Simmons*, 543 U.S. 551, 573, 125 S.Ct 1183, 161 L.Ed.2d 1 (2005). Second, for

sentences that are not categorically barred, the Court asks whether a specific term of years is unconstitutionally excessive given all the facts and circumstances. *Graham* at 59-60; *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). In *Graham*, the Supreme Court placed sentences that require a juvenile who did not commit homicide to "remain behind bars for life" in the first category. *Graham* at 75. That is, rather than being analyzed individually under *Harmelin*—or the Ohio equivalent, *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073—there is a "flat ban" on sentences that ensure a juvenile will die in prison without an opportunity for parole, unless he has committed homicide. *Miller*, 567 U.S. __, 132 S.Ct. 2455, 2466 at fn.6, 183 L.Ed.2d 407 (2012).

The Supreme Court's rationale for establishing this "flat ban" does not depend on whether the juvenile was convicted of a single nonhomicide count or has been sentenced for multiple nonhomicide counts. The core of *Graham*'s reasoning is that because of (1) their age, and (2) the fact that they did not commit murder, juvenile nonhomicide offenders have "twice diminished moral culpability." *Graham* at 69. Thus, giving a juvenile who did not commit murder the harshest juvenile penalty available—i.e., one that "guarantees he will die in prison"—would defy basic notions of proportionality required by the Eighth Amendment. *Id.* at 79. The Supreme Court explained that none of the four traditional justifications of punishment could justify such a harsh sentence for "a juvenile who did not commit homicide." *Id.* at 71. Rather, life without parole sentences are reserved for juveniles who commit murder, and even then such a punishment should be "uncommon." *Miller* at 2469; *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 29 ("[T]hat sentence should rarely be imposed on juveniles.").

Notably, the Supreme Court adopted this reasoning after having emphasized that Terrance Graham had committed multiple nonhomicide offenses, including a "spree" of armed

robberies. *Graham* at 73. Even for youth who have committed multiple crimes, like Terrance or Brandon, the Court recognized that a life without parole sentence requires "the sentencer to make a judgment that the juvenile is incorrigible." *Id.* at 72. Yet, the transient immaturity of youth, confirmed by well-established scientific research regarding adolescent brain development, makes such a determination inappropriate. *Id.* at 72-73; *see also* Brief of *Amici Curiae* Dr. Beatriz Luna, et al. in Support of Neither Party. Accordingly, even Terrance's "escalating pattern" of criminal activity could not be used to decide, at the outset, that he "would be a risk to society for the rest of his life." *Id.* at 73. Similarly, Joe Sullivan, the petitioner in a case argued the same day as *Graham*, had committed sexual assault and, despite "second and third chances," continued to have "encounters with the law," leading the trial court to decide he "needed to be kept away from society for the duration of his life." *Id.* at 76-77. The Supreme Court rejected the notion that, despite multiple nonhomicide convictions, such a judgment would be constitutional. *Id.*

Accordingly, the Supreme Court drew a "clear line" between juveniles who do, and do not, commit murder—not between juveniles convicted of single, or multiple, counts as the State contends. *Graham*, 560 U.S. at 74, 130 S.Ct. 2011, 176 L.Ed.2d 825. Lest there be any confusion as to where the Court drew its line, its reliance on the same categorical line from its death penalty jurisprudence clarifies the issue. As the Court described, the bar "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." *Miller*, 567 U.S. ___, 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). Relying on its death penalty cases, *Graham* explained that defendants who commit nonhomicide crimes, even multiple crimes or crimes as horrible as rape, "are categorically less deserving of the most serious forms of punishment than are murderers."

Graham at 69; *see also* Brief of *Amici Curiae* Criminal Law Scholars in Support of Appellant Brandon Moore, at 8. An adult who has committed multiple nonhomicide crimes cannot receive the death penalty, even if he will never serve the sentence for some of the crimes he committed because they are well past his lifetime. *See Coker v. Georgia*, 433 U.S. 584, 437-38, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Thus, the Supreme Court drew "a line 'between homicide and other serious violent offenses against the individual'" that extends to the juvenile context. (Citations omitted.) *Graham* at 69. Like the death penalty for adults, 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. *Miller* at 2466-67. Such differentiation is required to ensure that those who commit homicide are punished differently than those who do not.

For this reason too, there is no merit to the argument that prohibiting juvenile nonhomicide offenders from receiving aggregate sentences that exceed their lifetimes will "deprive society of its ability to restore . . . moral imbalance." (Amicus[1] at 13; State's Br. at 29.) Certainly, "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation." *Graham* at 71. But the Supreme Court explicitly stated that the case for retribution is "weaker with respect to a juvenile who did not commit homicide." *Id.* And "[r]etribution is not proportional" if the law's most severe penalty for juveniles who murder is imposed on juvenile nonhomicide offenders. *Id.* A juvenile offender may have a long sentence, extending over a century; and if he never proves that he is fit to reenter society, he will remain in prison.[2] Indeed, contrary to the State's contention about deterrence, the need to prove

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[1] "Amicus" herein refers to the Brief of Amicus Curiae Ohio Prosecuting Attorney Association In Support of Appellee State of Ohio.

[2] Amicus's argument that the sentence for each individual count must be reduced is mistaken. (Amicus at 13.) Brandon has never made such an argument.

rehabilitation is a strong incentive for not committing any further offenses while incarcerated. (State's Br. at 29.) In short, these concerns cannot justify eliminating all chance that a juvenile who did not commit murder could *ever* reenter society.

Furthermore, the *Graham* Court explicitly considered whether it would be more appropriate to allow "courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes," instead of drawing a clear line between homicide and nonhomicide crimes. *Graham* at 77; *see also id.* 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). It rejected such an approach, recognizing that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" such a draconian sentence in the absence of homicide, and that youth have "insufficient culpability" to justify a sentence of life in prison without the possibility of parole. *Id.* at 78, citing *Roper v. Simmons*, 543 U.S. at 572-573, 125 S.Ct. 1183, 161 L.Ed.2d. Therefore, a juvenile who has not committed homicide cannot be given a sentence that "guarantees he will die in prison without any meaningful opportunity to obtain release." *Id.* at 79. Otherwise, a juvenile's status would be meaningless—he could receive the same punishment as an adult for nonhomicide offenses.

B. Ohio Cannot Evade *Graham*'s Categorical Rule By Sentencing Juvenile Nonhomicide Offenders to "Term of Years" Sentences That Are the Functional Equivalent of Life Without Parole.

The State next asks this Court to side-step *Graham*'s categorical prohibition because Brandon's aggregate *nonhomicide* sentence was for 112 years, rather than technically "life without parole." It argues that all term of years sentences, no matter how long, must be analyzed individually under *State v. Hairston*. (State's Br. at 42-44.) This Court, however, cannot avoid *Graham*'s categorical rule by allowing the State to impose multiple term of years sentences for

nonhomicide counts that, in the aggregate, are the functional equivalent of life without parole. That is the precise result *Graham* prohibits.[3] This Court does not play such semantic games with core constitutional freedoms. *See State v. Storch*, 66 Ohio St.3d 280, 291, 612 N.E.2d 305 (1993) ("[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 "we ignore [those words] at our peril just as the 'lesser' courts of Ohio ignore our words at their peril as to questions of state law.").[4]

State courts around the country have recognized that they cannot evade the Supreme Court's mandate by giving juvenile nonhomicide offenders de facto life sentences, even for multiple consecutive counts. As the Iowa Supreme Court explained: "[T]he 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). *See also, e.g., People v. Caballero,* 55 Cal.4th 262,

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[3] The fact that *Graham* did not cite Ohio as one of the States that imposes "life without parole" sentences does not demonstrate that the Supreme Court has sanctioned sentencing juvenile nonhomicide offenders to life equivalent terms without the possibility of parole. *Graham* at 64. Such statistics were based on a single study where States self-reported statistics about juvenile sentences. P. Annino, et al., *Juvenile Life Without Parole for Nonhomicide Offenses: Florida Compared to the Nation*, 4 (Sept. 14, 2009). Self-serving data reports should not be used to undermine the Court's clear reasoning and holding. Even the *Graham* Court noted that "the statistics are not precise." *Graham* at 65. Moreover, the Court's holding was not based on mere statistics. As the Court emphasized, "[c]ommunity consensus . . . is not itself determinative of whether a punishment is cruel and unusual." *Id.* at 67. Instead, the "judicial exercise of independent judgment" reflected by the Court's reasoning articulated here, sets forth the boundaries of the Eighth Amendment. *Id.*

[4] The State's reference to Justice Alito's dissenting opinion does not demonstrate otherwise. (State's Br. at 31.) A single sentence in a *dissenting* opinion cannot limit the scope of the majority opinion. Moreover, Justice Alito's assertion that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole" does not specifically address de facto life sentences. *Graham* at 124 (Alito, J. dissenting). Indeed, his following sentence—noting that petitioner "conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional"—suggests that he was contemplating sentences of a few decades, not of the greater part of a century. *Id.*

282 P.3d 291, 145 Cal.Rptr.3d 286 (2012) (*Graham* applies to aggregate sentence of 110 years); *People v. Rainer*, 2013 COA 51 (Colo.Ct.App.2013) (same for 112 years); *Floyd v. State*, 87 So.3d 45, 46-47 (Fla.1st DCA 2012) (same for 80 years); *see also* Brief of Juvenile Law Center *et al.* as *Amici Curiae* in Support of Defendant-Appellant Brandon Moore. *But see State v. Brown*, 118 So.3d 332, 335 (La.2013) (70 year aggregate sentence constitutional).

Indeed, only a week ago the Wyoming Supreme Court unanimously agreed with many sister states that *Graham* and *Miller*'s protections apply when "the aggregate sentences result in the functional equivalent of life without parole." *Cloud v. State*, 2014 WY 113, ¶ 33. "To do otherwise," it explained, "would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile 'die in prison.'" *Id.*, quoting *Miller*, 567 U.S. __, 132 S.Ct. at 2460, 18 L.Ed.2d 407. The Constitution requires that a court "'focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Id.*, quoting *Brown v. State*, 10 N.E.3d 1, 8 (Ind.2014).

To avoid the strength of these courts' analysis, the State offers another distraction: the Tenth Appellate District's decision in *State v. Watkins*.[5] (State's Br. 33-34.) There, according to the State, the juvenile will be eligible for release after serving approximately thirty-three years in prison. 10th Dist. Franklin Nos. 13AP-133 and 13AP-134, 2013-Ohio-5544, ¶ 17. That is a far cry from the sentence here. Similarly, the State's reliance on the Supreme Court of Georgia's decision in *Adams v. State* is unpersuasive. (State's Br. at 35.) There, the juvenile received only a 25-year sentence. 288 Ga. 695, 702, 707 S.E.2d 359 (2011). Regardless, and despite any

[5] This Court accepted jurisdiction over *State v. Watkins* and held it for the Court's decision here. *See Watkins*, Case No. 2014-0454.

conflicting authority, this Court should look to *Graham*'s language and reasoning and recognize that all juveniles who did not commit homicide are entitled to some *chance* to prove that they are "fit to reenter society."

C. Any Alleged Difficulty In Discerning a "Meaningful Opportunity for Release" Does Not Allow this Court to Evade the Supreme Court's Holding.

Having failed to meaningfully distinguish *Graham* on the merits (which it cannot), the State suggests that Brandon should not receive a "meaningful opportunity for release" because implementing this requirement would be too "daunting" or lead to an "ad hoc guessing game." (State's Br. at 25-29.) Of course, here, the State's argument is particularly off the mark because the trial court did the exact opposite, ensuring that Brandon never have any opportunity for release. Ignoring this reality, the State offers hypothetical difficulties for complying with *Graham*, arguing that trial judges would have to become actuaries, judging life expectancies based on race, health factors, or class. (*Id.*) The State claims that such an outcome could not have been the Supreme Court's objective, and hence that—somehow—it could not have actually meant to give juveniles like Brandon a "meaningful opportunity for release." (*Id.*) This argument fails for three reasons.

First, the State's alleged concerns—to the extent they have merit—exist even for juveniles who are convicted of a *single* nonhomicide count. The State's argument appears to be that *Graham* does not apply to Brandon because he is serving multiple sentences, causing a line-drawing problem. (State's Br. at 25-29.) But the line-drawing challenge is equally present for juveniles who are convicted of single or multiple nonhomicide counts. Put another way, a juvenile sentenced to 100 years for a *single* offense would present the same line-drawing question for a court. Accordingly, concerns the State flags flow from *Graham* itself, not any alleged "extension" to aggregate term of years sentences. (*Id.* at 25.)

Second, the State overstates its speculative concerns about how to define a "meaningful opportunity for release"—none of which, in any event, must be decided by the Court in this case. The State asserts for the first time that Brandon may be eligible for judicial release at age 92, as opposed to age 107. (State's Br. at 23 fn.2.) Brandon does not oppose the State's calculation, but also notes that it has little significance to the merits of his case. At 92 or 107, judicial release under R.C. 2929.20(C) does not give Brandon a meaningful opportunity for release because both ages are well beyond his life expectancy. The life expectancy of a 15-year-old in the United States, regardless of race, gender, or incarceration status, falls measurably short of 92 years old. U.S. Dept. of Health and Human Services, *National Vital Statistics Reports*, Vol. 61, No. 4, (May 8, 2013) at 31, Table 8 (average life expectancy for individual born in 1986 is 74.7).[6] Certainly a sentence that exceeds any juvenile's life expectancy by decades does not provide a chance for a juvenile to prove he is "fit to reenter" society. The Court can remand to the trial court to determine in the first instance how to provide Brandon with a "meaningful opportunity for release."

Likewise, the Supreme Court's standard does not require trial court judges to become actuaries, as the State supposes, trying to discern the life expectancy of each and every juvenile defendant precisely. As the Wyoming Supreme Court explained, echoing the Iowa Supreme Court, the principles of *Miller* and *Graham* do not "'turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates.'" *Cloud*, 2014 WY 113 at ¶ 33, quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013). A trial court is charged with providing a "meaningful opportunity" for release, not a release upon a juvenile's deathbed.

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[6] The United States Sentencing Commission equates a sentence of 470 months (39.17 years) to a life sentence. *Cloud*, 2014 WY 113, at ¶ 34 (citing U.S. Sentencing Commission Preliminary Quarterly Data Report (through March 31, 2014), at Appendix A, 8).

"[T]he prospect of geriatric release . . . does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *Id.* at ¶ 34. Hence, trial courts do not have to become actuaries. As per their expertise—which is not akin to "guessing" (State's Br. at 25)—they may take into account general life expectancy and other facts and circumstances, including common sense, to determine whether a juvenile would have a real (not geriatric) chance to become a member of society.

Third, and most critically, the fact that neither the Supreme Court nor the Ohio General Assembly has yet drawn such a line does not mean that it may be evaded. *Graham* is hardly the first time that the Supreme Court has announced a new constitutional principle, but left to the States and lower federal courts the responsibility of its implementation in the first instance. Such a structure comports with the principles of federalism, judicial restraint, and not issuing advisory opinions. The Supreme Court ruled that *Graham*'s sentence was unconstitutional, but did not tell the lower court just how many years Terrance's sentence should be reduced. That determination was left for the lower court.

Similarly, in *Atkins v. Virginia*, the Supreme Court prohibited States from executing persons who are intellectually disabled, but it did not define how to discern which defendants were "intellectually disabled." *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Hall v. Florida*, 572 U.S. __, 134 S.Ct. 1986, 1991, 188 L.Ed.2d 1007 (2014). It allowed States to use their expertise in the first instance. *Hall* at 1996-98 (discussing various States' implementation of *Atkins*). Notably, however, it did not allow States to evade *Atkins*'s holding by setting too high a bar for defendants to prove intellectual disability. It struck Florida's law just last term, cautioning "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and

the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999. Hence, that lower courts are tasked with applying the Supreme Court's rule that juvenile nonhomicide offenders have a "meaningful opportunity for release" does not mean that they may evade the standard. *See Jacobellis v. Ohio*, 378 U.S. 184, 194, 84 S.Ct. 1676, 22 L.Ed.2d 793 (1964) ("Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of [constitutional] rights.").

II. *GRAHAM* APPLIES RETROACTIVELY TO BRANDON'S SENTENCE.

Again attempting to evade *Graham*, the State for the first time asserts that *Graham* does not apply at all because it does not apply retroactively. (State's Br. at 18-19, 40-41.) The State has never raised this argument before, and thus it is waived. *See Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, 973 N.E.2d 228, ¶ 41 ("[A]ppellees waived the issue because this argument was not presented before the court of appeals."). Regardless, it is without merit, as is its Amicus's argument that the Court of Appeals has no jurisdiction to entertain Brandon's Motion to Reconsider because his sentence is final.

Tellingly, the State fails to cite a single case in Ohio or elsewhere that has held *Graham* not to apply retroactively to sentences on collateral review. And for good reason—all Circuit precedent dictates otherwise. *See, e.g., Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir.2013) ("*Graham* established a new rule of law that is retroactive on collateral review."); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir.2013); *In re Sparks*, 657 F.3d 258, 260 (5th Cir.2011). Indeed, *Graham*'s retroactivity has so much support that it is usually conceded by the Government, even in Ohio. *See, e.g., In re Williams*, Nos. 12-3037 and 13-3060, 2014 WL 3585514, *4 (D.C.Cir. July 22, 2014) ("[T]he government agrees that *Graham* is retroactive to cases on collateral review."); *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at *5 (N.D.Ohio July 24, 2012) ("Goins and [the Ohio warden] agree" *Graham* "applies retroactively."). The State's argument

that Brandon may not take advantage of *Graham* amounts to a contention that the Constitution should be ignored. This is not the law federally, under *Teague*, or in Ohio.

First, the State mistakenly relies on the Supreme Court's decision in *Teague* to argue that *Graham* does not apply retroactively to Brandon's case. But the State misses the Supreme Court's key distinction between procedural and substantive rules that is at the heart of the retroactivity question. To be sure, *Teague* explained that "[u]nless they fall within an exception to the general rule, new constitutional rules of *criminal procedure* will not be applicable to those cases which have become final before the new rules are announced." (Emphasis added.) *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 224 (1989); *Schriro v. Summerlin*, 542 U.S. 348, 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Unlike procedural rules, however, "[n]ew substantive rules generally apply retroactively" to cases on collateral review. *Schriro* at 351. As *Teague* recognized, a new substantive rule applies retroactively when it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." (Citation omitted.) *Teague* at 311. "[R]ules prohibiting a certain category of punishment for a class of defendants because of their status or offense" also apply retroactively under *Teague*'s framework. *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335. "Such rules apply retroactively because they necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Schriro* at 352. Because *Graham* announced a new substantive rule "prohibiting a certain category of punishment for a class of defendants," it applies retroactively to cases on collateral review, like Brandon's. *Penry* at 330.

Second, the State errs in relying on three Ohio cases to argue that even if the Supreme Court of the United States establishes a new substantive rule of constitutional law, made retroactive under federal law, it must be ignored by Ohio courts and not applied to cases with final convictions. (State's Br. at 18-19.) Quite the opposite. Ohio courts follow federal law as to the application of federal constitutional rules, including *Teague* and the procedural versus substantive distinction set forth by the United States Supreme Court. *See State v. Singleton*, 2d Dist. Montgomery No. 21289, 2006-Ohio-4522, ¶ 12-13 ("As to convictions that are already final . . . [n]ew substantive rules generally apply retroactively. . . . New rules of procedure, on the other hand, generally do not apply retroactively."); *State v. Bishop*, 2014-Ohio-173, 7 N.E.3d 605, ¶ 16 (1st Dist.) ("Ohio's retroactivity jurisprudence contains no suggestion that the retroactive effect of [a Supreme Court decision] should be determined under a standard other than that set forth in *Teague*"); *id.* ("Ohio appellate districts have applied *Teague* to determine the retroactive effect of other cases" [citing cases]); *State v. Gotschall*, 3d Dist. Mercer Nos. 10-06-37 and 10-06-38, 2007-Ohio-3980, ¶ 16 (applying *Teague*).

None of the three cases the State cites shows otherwise. (State's Br. at 18-19.) In *Ali v. State*, the Court explained that "[a] new judicial ruling may be applied only to cases that are pending on the announcement date," without explaining the *Teague* exceptions. 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6. Yet this narrow focus made sense because it was considering only the retroactive application of a *procedural rule*, namely, this Court's decision in *State v. Comer*, which required trial courts to make their statutorily enumerated findings at the sentencing hearing. *Id.* at ¶ 3. The same is true of the two Ninth Appellate District cases the State cites. *See State v. Ditzler*, 9th Dist. Lorain No. 13CA 010342, 2013-Ohio-4969, ¶ 9 (rejecting retroactive application of *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818

N.E.2d 283, regarding the procedure for proving a sexual offender specification "if the conduct leading to the conviction and the [specification] are charged in the same indictment"); *State v. Ratkosky*, 9th Dist. Medina No. 05CA0012-M, 2005-Ohio-4368, ¶ 4-10 (declining to apply retroactively *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, which addresses the notice a trial court must provide to an offender sentenced to a community control sanction). Because these cases address new procedural rules, not substantive ones, they are not controlling here.

Lastly, there is no merit to Amicus's fleeting argument (wisely not adopted by the State) that the Court of Appeals lacks jurisdiction to reconsider its final judgments under Ohio Constitution, Section 3(B)(3), Article IV. (Amicus at 4.) Pursuant to this argument, a Court of Appeals would *never* have jurisdiction to entertain a delayed motion for reconsideration under Rules 26 and 14 to reconsider a final judgment. That certainly is not right. Article IV gives the Supreme Court authority to "prescribe rules governing practice and procedure in all courts of the state," as long as they do not "modify any substantive right." Ohio Constitution, Article IV, Section 5(B). Under this authority, the Supreme Court has provided a *procedure* for which litigants may ask for delayed reconsideration of final decisions. No authority Amicus cites suggests that such oft-applied rules are invalid.

The only case that Amicus cites to support such a drastic proposition is *State ex. rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 594 N.E.2d 616 (1992). There, this Court recognized that the Courts of Appeals have authority to reconsider judgments under (1) Appellate Rule 26 motions and (2) the "inherent authority" conferred by Section 3(B), Article IV, Ohio Constitution. *Id.* at 249. The question presented in that case addressed only the latter—i.e., the scope of a Court of Appeals' "inherent authority" to *sua sponte* reconsider its judgments. *Id.* at

251. The "inherent authority" to reconsider judgments *sua sponte*, the Court explained, does not "exist[] forever" and is instead limited by when a judgment becomes final. *Id.* Thus, as other Ohio courts have explained, *Gwin* stands for the proposition that, under Section 3(B), Courts of Appeal have a limited time to *sua sponte* reconsider a decision, but it does not limit their authority when a party files a motion to reconsider. *See, e.g., In re D.H.*, 4th Dist. Gallia No. 10CA2, 2011-Ohio-601, ¶ 17 (citing *Gwin* for the proposition that it lacked jurisdiction to alter its prior opinion because neither party filed an App.R. 26(A) application); *Wilner v. State Farm Mut. Auto Ins. Co.*, 8th Dist. Cuyahoga No 70720, 1997 WL 67759, at *4 (Feb. 13, 1997) (same).

Therefore, *Graham* is retroactively applicable, and the Court of Appeals has jurisdiction to reconsider its prior decision in light of this new substantive constitutional rule.

III. THERE IS NO PROCEDURAL BASIS FOR AVOIDING THE IMPORTANT CONSTITUTIONAL QUESTION THIS COURT ACCEPTED JURISDICTION TO DECIDE.

Nor is there merit to the State or its Amicus's argument that procedural issues make resolution of the proposition of law improper. The State argues that Brandon delayed in bringing his *Graham* claim, obscuring the fact that Brandon raised his *Graham* claim immediately after the case was decided. The State then argues that Brandon should be penalized for the delay and, thus, this Court should not reach the merits. Further, it argues that he should have brought his claim through a petition for postconviction relief; an avenue even the State's Amicus recognizes was unavailable. Taken together, the State's position is clear. It does not want this Court to consider the merits because the merits favor Brandon.

The State argues that because Brandon delayed "more than ***5 years***" after his conviction and "more than **3 *years***" after the decision in *Graham* before raising his Eighth Amendment argument, he does not merit delayed reconsideration and a decision on the merits of his claim here. (State's Br. at 14.) In large part, the State relies on the Seventh Appellate District's

decision in *Bunch*, which it incorporated by reference in Brandon's case. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2013-Ohio-5868, ¶ 2. However, as Brandon explained in detail in his jurisdictional memorandum, and Judge Degenaro noted in her dissent, his procedural history is markedly different from Chaz Bunch's, who did not raise his *Graham* claim in Ohio courts until nearly three years after *Graham* was decided. *State v. Bunch*, 7th Dist Mahoning No. 06 MA 106, JE, at 2 Aug. 8, 2013 ("*Bunch JE*"); *Moore*, 2013-Ohio-5868, at ¶ 13 (DeGenaro, J., dissenting). Certainly, Brandon did not raise his *Graham* claim "**5 *years***" ago, when his conviction became final—but that was because *Graham* had *not yet been decided.*[7] However, on the same day that *Graham* was handed down, Brandon filed a pro se notice of appeal from the trial court's nunc pro tunc judgment, which had fixed his sentence to comply with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. In that appeal he explicitly challenged his 112-year sentence as a violation of *Graham* in his opening brief. There was no delay. *Moore*, 2013-Ohio-5868, at ¶ 13 (DeGenearo, J., dissenting) (noting lack of delay in raising *Graham*).

After the appellate briefing, however, this Court decided *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 20, holding for the first time that a nunc pro tunc order is not a "final order from which a new appeal may be taken." As a result, the Seventh Appellate District did not decide the merits of Brandon's *Graham* claim, even though it was promptly raised. The Seventh Appellate District, in dicta, also erroneously suggested that Brandon's

[7] The State's Amicus suggests that Brandon, pro se, should have raised his *Graham* claim even before *Graham* was decided, noting that other defendants (like Terrance Graham) raised the novel Eighth Amendment claim. (Amicus at 5.) However, *Graham* was unavailable at that point, a fact illuminated by the fact that the court granted Brandon's appointed counsel's *Anders* motion to withdraw because it saw "no arguable non-frivolous issues that could be presented on appeal." *State v. Moore*, 7th Dist. Mahoning No. 08 MA20, 2009-Ohio-1505, at ¶ 18, 22, 24.

Graham claim was res judicata, indicating that it could not be raised again.[8] Without counsel, and thwarted by this incorrect dicta, Brandon did not proceed with his *Graham* claim until he was able to obtain new counsel, who filed for reconsideration less than a month later. In sum, Brandon raised *Graham* promptly, yet was thwarted by procedural barriers. The discussion of delay from *Bunch* is irrelevant and not a basis for denying Brandon a decision on the merits.

Moreover, even if Brandon should have pursued his motion for reconsideration sooner, delay on its own is not the standard for deciding a delayed motion to reconsider, and it was not the sole factor the Seventh Appellate District relied upon in denying the motion. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2013-Ohio-5868, ¶ 2 (citing "*Bunch JE*" and *State v. Barnette*, 7th Dist. Mahoning No. 06 MA 135, JE, Sept. 16, 2013 ("*Barnette JE*")). As the State notes, delayed motions for reconsideration may be granted if there are "extraordinary circumstances" (State's Br. at 14)—delay does not negate all possibility of "extraordinary circumstances." The Seventh Appellate District concluded there were no "extraordinary circumstances" here because it found that *Graham* was not controlling. *Bunch JE* at 4; *Barnette JE* at 4. The court explained: "Admittedly, appellant's sentence may be considered a 'de facto' life sentence . . . . However, [*Graham* was] based specifically on life sentences without the possibility of parole." *Barnette JE* at 4. That is precisely the issue this Court accepted jurisdiction to decide, and any (false) allegations of delay do not diminish the importance of this question in resolving Brandon's constitutional rights.

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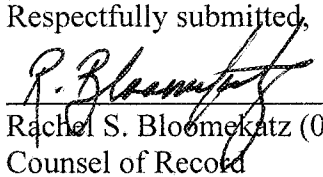
[8] The Seventh Appellate District noted, without explanation, that the *Graham* claim was barred by res judicata, and suggested that the claim would be "more properly raised in a petition for postconviction relief." *State v. Moore*, 7th Dist. Mahoning No. 10 MA85, 2011-Ohio-6220, ¶ 33. This reasoning 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.

Likewise, there is no merit to the State's argument that Brandon's *Graham* claim could be raised only in a petition for postconviction relief under R.C. 2953.21. The State improperly asserts this contention in a single (repeated) sentence, without any supporting argument, so it is not appropriate for appellate review. (State's Br. at 19, 47.) Regardless, it is without merit. As the State's Amicus concedes, and Judge DeGenaro thoughtfully explained, Brandon could not have received review of his *Graham* claim through postconviction relief. (Amicus at 7.) *Moore*, 2013-Ohio-5868, at ¶ 14. When *Graham* was decided in May 2010, the time limit for Brandon to file a postconviction motion from his last resentencing in January 2008 had already expired. *See* R.C. 2953.21(A)(2). And Brandon did not meet the statutory requirements for filing a petition out of time. *See* R.C. 2953.23(A)(1)(b) (requiring petitioner to show "but for constitutional error at trial," defendant not guilty or "eligible for the death sentence"). Without any case citation, Amicus argues that because postconviction relief is not available, Brandon is simply out of luck, and cannot receive the benefit of his Eighth Amendment rights. (Amicus at 7.) This Court is not as dismissive of juveniles' constitutional rights, and Brandon's inability to bring his *Graham* claim through postconviction relief is simply another "extraordinary" reason why he sought reconsideration and needs review by this Court on the merits here.

CONCLUSION

For the reasons stated above, Brandon respectfully requests that the Court conclude that Brandon's sentence is unconstitutional under the Eighth Amendment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant Brandon Moore was served by regular, U.S. Mail, postage prepaid, to Paul J. Gains, Esq., Mahoning County Prosecuting Attorney and Ralph Rivera, Esq., Assistant Mahoning County Prosecutor, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503, on this 18th day of September, 2014.

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