No. _____

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

BRANDON MOORE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

PAUL J. GAINS
Mahoning County Prosecutor

RALPH M. RIVERA
Assistant Prosecutor
Counsel of Record

Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, OH 44503
(330) 740-2330
(330) 740-2008 (fax)
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

In *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), this Court established a categorical ban of sentencing juvenile offenders to life imprisonment without parole for a single non-homicide offense. In this case, the Supreme Court of Ohio extended *Graham* and held that a lengthy aggregate prison sentence for multiple non-homicide offenses imposed upon a juvenile that exceeds his life expectancy violates the Eighth Amendment. Two federal circuits and several other state supreme courts, by contrast, have rejected arguments that *Graham's* categorical rule extended to lengthy aggregate prison sentences for juveniles that committed multiple non-homicide offenses, and have instead held that *Graham* applied only to juveniles that committed a single non-homicide offense, and does not otherwise prohibit a lengthy aggregate prison sentence for multiple non-homicide offenses.

The three questions presented are:

1. Does *Graham's* categorical rule apply to consecutive, fixed-term prison sentences for multiple non-homicide offenses committed by a juvenile that result in a lengthy aggregate sentence?

2. If *Graham's* categorical rule applies to consecutive, fixed-term prison sentences for multiple non-homicide offenses, at what point must a juvenile be provided "some meaningful opportunity for release?"

3. Does *Graham* apply retroactivity to juveniles sentenced to consecutive, fixed-term prison sentences for multiple non-homicide offenses that result in a lengthy aggregate sentence?

LIST OF PARTIES

The Petitioner is the State of Ohio. The Respondent is Brandon Moore.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The Supreme Court of Ohio's opinion, *State v. Moore*, Slip Opinion No. 2016 Ohio 8288, is reproduced at Pet. App. 1. The Seventh District Court of Appeals' opinion denying Respondent's Application for Reconsideration, *State v. Moore*, 7th Dist. No. 08 MA 20, 2013 Ohio 5868, is reproduced at Pet. App. 96. The Seventh District Court of Appeals' opinion dismissing appeal, *State v. Moore*, 7th Dist. No. 10 MA 85, 2011 Ohio 6220, is reproduced at Pet. App. 121. The Mahoning County Court of Common Pleas' Nunc Pro Tunc Judgment Entry of Conviction, *State v. Moore*, Mahoning County No. 2002 CR 525 (Apr. 20, 2009), is reproduced at Pet. App. 132. The Seventh District Court of Appeals' mandamus opinion, *State ex rel. Moore v. Krichbaum*, 7th Dist. No. 09 MA 201, 2010 Ohio 1541, is reproduced at Pet. App. 139. The Seventh District Court of Appeals' opinion, *State v. Moore*, 7th Dist. No. 08 MA 20, 2009 Ohio 1505, is reproduced at Pet. App. 150. The Mahoning County Court of Common Pleas' Judgment Entry of Conviction, *State v. Moore*, Mahoning County No. 2002 CR 525 (Feb. 2, 2008), is reproduced at Pet. App. 160. The Seventh District Court of Appeals' opinion denying Chaz Bunch's Application for Reconsideration, *State v. Bunch*, 7th Dist. No. 06 MA 106 (Aug. 8, 2013), is reproduced at Pet. App. 165.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio entered its judgment in this case on December 22, 2016. The State of Ohio invokes this Court's jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Ohio's decision qualifies as a "[f]inal judgment[] or decree[]" within the meaning

of that statute. *Id*.; *see Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-487, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A. Brandon Moore and his Co-Defendant Chaz Bunch Brutally Raped and Robbed M.K., a 21-Year-Old Female.

Defendant-Respondent Brandon Moore was previously sentenced to a 112-year stated prison term for "the horrific robbery, kidnapping, and repeated rape of M.K., a [21]-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*, __ U.S. __, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013).

Moore 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.

On August 21, 2001, Moore, who was just 15 years old, began the night by robbing Jason Cosa and Christine Hammond at gunpoint outside Cosa's home, and then fleeing in an awaiting vehicle. Pet. App. 3.

Later that night, around 10:20 p.m., M.K., a 21-year-old student at Youngstown State University, arrived for her shift at a group home for mentally-handicapped women. While removing some things from the trunk of her vehicle, Moore pressed a gun to M.K. and demanded her money and belongings. Moore then ordered M.K. into the passenger seat of her vehicle, and Moore drove the two away. Pet. App. 3.

After a short distance, Moore stopped her vehicle behind the black vehicle that dropped Moore near M.K. Chaz Bunch entered the vehicle through the rear passenger door, and demanded her money while holding a gun to her head. *Id.*

Moore continued driving, following the black vehicle, which was being driven by Andre Bundy. Moore then inserted his fingers into M.K.'s vagina, and she pleaded for her life. Moore drove close enough to Bundy's vehicle that M.K. could make out its license plate. She memorized the number. Pet. App. 4.

Eventually, Moore pulled ahead of Bundy's vehicle, and the two made their way to a gravel lot on a dead-end street. Bunch ordered M.K. outside, and Moore and Bunch began forcing their penises into her mouth. The two orally raped her multiple times while the other forced her head down at gunpoint. *Id*.

Moore and Bunch then directed M.K. to the back of her vehicle where they both anally raped her. M.K.

tried to resist, even telling them that she was pregnant (she was not, in fact, pregnant). *Id*.

After M.K. was anally raped, Bunch threw her to the ground, and he and Moore now proceeded to vaginally and orally rape her simultaneously. The two would take turns raping her vaginally, while the other would force his penis into her mouth. *Id*.

The brutal attack finally ended when Jamar Callier, a passenger in Bundy's vehicle, pushed Bunch off M.K. Bunch said that he wanted to kill M.K., but Callier told Bunch that he could not kill a pregnant woman. Moore then put his gun into her mouth and told her, "Since you were so good, I won't kill you." Moore threatened to harm her and her family if she told anyone what happened. Pet. App. 5.

Hysterical, M.K. drove to the home of her boyfriend's relative. When she arrived, she ran through the yard screaming for help and yelling out the license-plate number to Bundy's vehicle. Youngstown police eventually arrested all four people involved in the attack. *Id.*

B. A Jury Convicted Brandon Moore on All Counts, and He is Ultimately Sentenced to a 112-Year Prison Term.

Thereafter, proceedings were initiated against Moore in the Mahoning County Court of Common Pleas, Juvenile Division, and the case was eventually transferred to the General Division. On May 16, 2002, Moore was charged with three counts of Aggravated Robbery, three counts of Rape, three counts of Complicity to Rape, one count of Kidnapping, one count of Conspiracy to Commit Aggravated Robbery, and one

count of Aggravated Menacing. *See State v. Moore*, 161 Ohio App.3d 778, 784 (7th Dist. 2005).

The jury convicted Moore on all counts, and the trial court sentenced him to an aggregate 141-year term of incarceration. *See id.* at 785. The Seventh District affirmed in-part, reversed in-part, and vacated in-part Moore's convictions and sentence, and remanded for resentencing. *See id.* at 802. Moore's subsequent application for reopening his direct appeal was denied. *See State v. Moore*, 7th Dist. No. 02 CA 216, 2005 Ohio 5630, ¶ 7.

Following remand, Moore's sentence was vacated pursuant to *State v. Foster*, and again remanded. *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 Moore to an aggregate 112-year prison sentence for the above offenses. Pet. App. 151. Defendant's third sentence was affirmed. *See id.*

Thereafter, Moore filed a petition for writ of mandamus and/or procedendo, in which he sought a final appealable judgment entry of sentence pursuant to *State v. Baker*, 119 Ohio St.3d 197 (2008). The Seventh District agreed and ordered the trial court to issue a revised sentencing entry. Pet. App. 142-149.

On April 20, 2010, the trial court issued a nunc pro tunc sentencing entry. Moore appealed and raised several issues regarding his conviction and sentence. The Seventh District, however, dismissed Moore's appeal. Pet. App. 129-130.

On March 30, 2012, Moore filed a Motion to Correct Void Portion of Sentence, and a Motion for Re-sentence. The trial court denied both motions. On appeal, the Seventh District concluded that the trial court properly dismissed Moore's untimely postconviction petition regarding the firearm specifications, but found that the trial court erred when it classified Moore as a Tier-III sex offender under Ohio's Adam Walsh statutes. *See State v. Moore*, 7th Dist. No. 12 MA 91, 2013 Ohio 1431, ¶ 2.

On April 8, 2013, the trial court classified Moore as a "sexually oriented offender," and he appealed the classification. *See id.* at ¶ 39. The Seventh District concluded that the trial court properly reclassified Moore. *See State v. Moore*, 7th Dist. No. 13 MA 60, 2014 Ohio 2525, ¶ 25.

C. The Court of Appeals Denies Moore's Application for Delayed Reconsideration, in Which He Contended that His 112-Year Prison Term is Unconstitutional under *Graham v. Florida* and *Miller v. Alabama*.

On September 16, 2013, Moore filed a Delayed Application for Reconsideration pursuant to Ohio Appellate Rules 14(B) and 26(A)(1), in which he argued 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). Pet. App. 97-98.

The Seventh District denied Moore's Application for Reconsideration, because he 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*: "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; [Pet. App. 165-171.] and *State v. Barnette*, 7th Dist. No. 06 MA 135, September 16, 2013, Appellant Brandon Moore's Delayed Application for Reconsideration is denied." Pet. App. 98.

D. The Supreme Court of Ohio Grants Moore's Application for Delayed Reconsideration and Holds that His 112-Year Prison Term is Unconstitutional under the Eighth Amendment as this Court Explained in *Graham v. Florida*.

On January 23, 2014, Moore filed a Notice of Appeal and Memorandum in Support of Jurisdiction in the Supreme Court of Ohio. The court accepted jurisdiction on April 23, 2014.

On December 22, 2016, in a sharply divided 4-3 decision, which contained five separate opinions, the Supreme Court of Ohio held "that pursuant to *Graham,* a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." Pet. App. 2. Accordingly, the majority found that Moore's 112-year aggregate prison term for multiple offenses was unconstitutional, because he is not eligible for

release until he is 92 years old.[1] *See* Ohio Rev. Code Ann. § 2929.20(C)(4)-(5) (West 2016).

Procedurally speaking, the majority found that *Graham* applied retroactively to juveniles sentenced to either life without parole or a lengthy aggregate fixed-term sentence for multiple non-homicide offenses. Pet. App. 45-46.

The majority began by recognizing that this Court has not addressed "whether a term-of-years prison sentence that extends beyond an offender's life expectancy—a functional life sentence—falls under the *Graham* categorical bar." Pet. App. 15. But it nevertheless concluded that *Graham's* categorical rule prohibits a lengthy aggregate fixed-term sentence for multiple non-homicide offenses committed by juveniles, because it is the functional equivalent of a life without parole sentence. *Id.*

The majority reasoned that although *Graham* specifically addressed a juvenile offender sentenced to life without parole for a *single* non-homicide offense, "the principles behind *Graham* apply equally to a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy." Pet. App. 22.

The majority found that "the lessened moral culpability of juvenile offenders, the severity of the sentence, and the inapplicability of penological justifications for life sentences for juveniles" applies

---

[1] Defendant conceded on appeal that he is eligible for release when he is 92 years old. Pet. App. 13.

equally to juveniles serving lengthy term-of-years sentences. *Id.*

After concluding that *Graham's* categorical rule applied to Moore's 112-year aggregate prison term, it found that Moore's sentence was the functional equivalent of a life sentence because it exceeded his life expectancy. Pet. App. 13, 26. The majority looked to the U.S. Department of Health and Human Services to determine Moore's life expectancy. Pet. App. 13 (citing U.S. Department of Health and Human Services, *National Vital Statistics Reports,* Volume 52, Number 3, at 26 (2003), http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_03.pdf (accessed Oct. 5, 2016)). According to those statistics, Moore's life expectancy fell between 70 and 75 years old. The majority determined that Moore's sentence was unconstitutional, because the opportunity for release at the age of 92 did not provide a meaningful opportunity to reenter society. Pet. App. 29.

The majority next found that *Graham's* holding was not limited to juvenile offenders sentenced for a *single* offense. Pet. App. 31. The majority reasoned that *Graham* applied to all juvenile offenders who were sentenced for non-homicide offenses, irrespective of the number of offenses that they committed. *Id.* Thus, the majority "conclude[d] that the Eighth Amendment prohibition of life imprisonment without parole or its practical equivalent for juvenile offenders is not limited to juveniles who commit a *single* nonhomicide offense." (Emphasis sic.) Pet. App. 33.

Justice Kennedy began her dissent by recognizing not only what this Court decided in *Graham*, but what this Court *did not* decide in *Graham*:

> The court in *Graham* did not decide whether the imposition of consecutive, fixed-term prison sentences for multiple nonhomicide offenses that result in a lengthy aggregate sentence violate the Eighth Amendment. As pointed out in Justice Alito's dissent in the case: "[*Graham*] holds only that 'for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*.' * * * Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."

(Emphasis sic.) Pet. App. 73 (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting), quoting *id.* at 74).

Like the majority, the dissent pointed out that while some jurisdictions have extended *Graham* to include multiple-offense sentences, several other state appellate courts have concluded that *Graham* applies only to juvenile offenders sentenced to life without parole for a *single* non-homicide offense. Pet. App. 76-81.

While the majority ignored the dilemma, the dissent highlighted the problem with applying *Graham's* categorical rule to lengthy aggregate fixed-term sentences for multiple non-homicide offenses. Pet. App. 82. In adopting a categorical rule, this Court specifically rejected a case-by-case proportionality review, because "it does not follow that courts taking a case-by-case approach could with sufficient accuracy

distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham*, 560 U.S. at 77.

But, applying *Graham's* categorical rule to lengthy aggregate fixed-term sentence for multiple non-homicide offenses committed by juveniles, courts must do just that; engage in a case-by-case review of the facts, the juvenile's age, various life-expectancy statistics, and the sentence imposed to determine if the sentence is constitutional or not.

More specifically, like the Supreme Court of Ohio, courts have utilized various sources to determine a juvenile's approximate life expectancy before concluding that a sentence was unconstitutional. Pet. App. 82-83. In this case, the majority used data from the Centers for Disease Control (CDC). *See id.* In contrast, a District Court of South Dakota used numerous sources of data, which included the United States Sentencing Commission, the Internal Revenue Service (IRS), and the Social Security Administration. *See id.* The dissent emphasized the slippery slope that this creates:

> data can be used only to *estimate* one's life expectancy, as there are numerous factors that can affect an individual's actual lifespan. For example, according to the CDC, life expectancy is at least ten years shorter for smokers than for nonsmokers. CDC, *Tobacco–Related Mortality,* http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/ (accessed Oct. 18, 2016). Would courts need to take such personal factors into account when determining life expectancy?

> Similarly, as imprisoned juveniles grow older, some will encounter new health issues that could shorten their lives. Would courts have to periodically reevaluate each juvenile's health and lifestyle for the purpose of re-estimating the juvenile's life expectancy?

(Emphasis sic.) Pet. App. 83. Thus, for sentences like Moore's, courts must engage in a case-by-case proportionality review that this Court specifically rejected in *Graham*.

Finally, Justice Kennedy's dissent pointed out that this Court previously declined the opportunity to extend *Graham's* holding to include lengthy aggregate sentences resulting from consecutive, fixed-term prison sentences for multiple non-homicide offenses. Pet. App. 73-74. And not only did this Court decline the opportunity, it did so in relation to Moore's co-defendant, Chaz Bunch. *See id.* Chaz Bunch, also a juvenile at the time, was sentenced to an aggregate 89-year sentence for nearly the same offenses as Moore. *See id.* (citing *State v. Bunch*, 7th Dist. No. 06 MA 106, 2007 Ohio 7211).

In addressing Bunch's habeas petition, the Sixth Circuit found that even if *Graham* applied retroactively, *Graham* was not applicable to him, because Bunch was sentenced to "consecutive, fixed-term sentences—the longest of which was 10 years—for committing multiple nonhomicide offenses." Pet. App. 75 (citing *Bunch*, 685 F.3d at 551). The Sixth Circuit reasoned that *Graham* applied only to juvenile offenders sentenced to life without parole for a *single* non-homicide offense. *Id.* (citing *Bunch*, 685 F.3d at 551, quoting *Graham*, 560 U.S. at 63). And similar to

Moore, Bunch is not eligible for release until he is 90 years old.[2]

This Court denied Chaz Bunch's petition for writ of certiorari. Pet. App. 76 (citing *Bunch v. Bobby*, __ U.S. __, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013)).

Furthermore, while Bunch's habeas petition was pending in federal court, he raised the same procedural motion and argument regarding *Graham's* application to his sentence in state court. Unlike in *Moore*, the Supreme Court of Ohio denied Bunch's discretionary appeal, even though Bunch was procedurally similar to Moore, and raised the exact same argument. *See State v. Bunch*, 137 Ohio St.3d 1425, 2013 Ohio 5285, 998 N.E.2d 1179. Thereafter, this Court denied Bunch's petition for writ of certiorari. *See Bunch v. Ohio*, 135 S. Ct. 152, 190 L. Ed. 2d 111 (2014).

Thus, this Court previously declined two opportunities—based upon the same facts and rationale offered by Moore—to extend *Graham's* holding to include lengthy aggregate sentences resulting from consecutive, fixed-term prison sentences for multiple non-homicide offenses committed by a juvenile.

---

[2] Chaz Bunch is serving an 89-year aggregate prison sentence (69 mandatory years and 20 non-mandatory years). Bunch is eligible "five years after the expiration of all mandatory prison terms." Ohio Rev. Code Ann. § 2929.20(C)(4) (West 2016). Thus, Bunch is eligible after he serves 74 years of incarceration. And because Bunch was 16 when he committed the offenses, he will be 90 years old when he is first eligible for release.

REASONS FOR GRANTING THE WRIT

For several reasons, this Court should grant the petition for writ of certiorari to review the Supreme Court of Ohio's decision in this case. *First*, the Supreme Court of Ohio's decision conflicts with two federal circuits courts of appeal and numerous decisions from other state appellate courts that have considered whether *Graham's* categorical rule applies to consecutive, fixed-term prison sentences for multiple non-homicide offenses committed by a juvenile that result in a lengthy aggregate sentence. *Second*, in applying *Graham* to consecutive, fixed-term prison sentences for multiple non-homicide offenses that result in a lengthy aggregate sentence, state courts are now forced to engage in a case-by-case proportionality review that this Court rejected in *Graham*. *Third*, this case provides a good vehicle for this Court to consider these important questions.

I. THE SUPREME COURT OF OHIO'S DECISION CONFLICTS WITH MANY FEDERAL AND STATE APPELLATE COURT DECISIONS.

This Court should grant the petition for writ of certiorari because the Supreme Court of Ohio's decision conflicts with decisions from two federal circuit courts of appeal and numerous state appellate courts.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Constitution's prohibition against cruel and unusual punishment includes not only inherently barbaric punishment, but also punishment that is disproportionate to the crime: "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham*, 560 U.S. at 59 (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S. Ct. 544, 54 L.Ed. 793 (1910)).

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

When Terrence 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, 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 him 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 additional robberies. *See id.* at 54-55. The trial court found that Graham had violated his probation, and sentenced him to *life imprisonment for the armed burglary* and 15 years for the attempted armed robbery." (Emphasis added.) *See id.* at 57.

In *Graham*, this Court established a categorical ban of sentencing juvenile offenders to life imprisonment

without parole for a *single* non-homicide offense: "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, 78-79.

In *Graham*, this Court specifically rejected the approach—having trial courts to take the juvenile offender's age and offenses into consideration—that would now be required should this Court find that Moore's 112-year prison sentence falls under *Graham*. *Id.* at 77. This Court rejected a case-by-case approach, because in this 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*.

Despite these arguments, the most telling in *Graham* 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, this 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 Moore—juvenile offenders sentenced to lengthy consecutive, fixed-term sentences.

Therefore *Graham's* plain language did not extend to consecutive, fixed-term sentences for multiple non-homicide offenses. *See id.* at 82; *accord id.* at 124 (Alito, J., dissenting) (stating "[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."); *see also United States v. Cobler,* 748 F.3d 570, 580, fn. 4 (4th Cir. 2014) (stating, "[t]he Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole.").

Although this Court established a categorical ban of sentencing juvenile offenders to *life imprisonment without parole* for a *single* non-homicide offense, several state and federal courts have disagreed on whether *Graham's* holding should be extended to also prohibit consecutive, fixed-term prison sentences for multiple non-homicide offenses that in the aggregate *could* preclude the possibility of release during the juvenile offender's life.

Federal Courts.

In *United States v. Walton*, the Fifth Circuit found that the defendant's 40-year prison term for conspiracy to use a firearm in relation to a crime of violence and carjacking resulting in death when he was 17 years old did not invoke either *Graham* or *Miller's* holdings. See *United States v. Walton*, 537 Fed.Appx. 430, 437 (5th Cir. 2013) (stating, "Neither holding applies to Walton's discretionary federal sentence for a term of years. Because Walton attempts to raise novel constitutional arguments that would require the extension of precedent, he fails to demonstrate plain error.").

The Sixth Circuit recognized the same in Chaz Bunch's habeas appeal. *See Bunch*, 685 F.3d at 552. Chaz Bunch (Moore's co-defendant) is serving an 89-year aggregate prison sentence. *See State v. Bunch*, 06

MA 106, 2007 Ohio 7211. And similar to Moore, Bunch is not eligible for release until he is 90 years old. *See* Ohio Rev. Code Ann. § 2929.20(C)(4) (West 2016).

The Sixth Circuit found that this Court's statistical review of state sentencing practices demonstrated that this 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 this Court prohibited in *Graham*. *See Bunch*, 685 F.3d at 547. The Sixth Circuit found that Bunch's habeas 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 Terrence Graham and Bunch (like Moore) were juveniles that committed non-homicide offenses, but 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 that committed multiple non-homicide offenses. *See Bunch*, 685 F.3d at 551.

The Sixth Circuit's application of *Graham* to Bunch's sentence was consistent with this Court's unequivocal decision to draw a "clear line" to protect juvenile offenders' Eighth Amendment right. *See Bunch*, 685 F.3d at 551-552; *accord Goins v. Smith*, 556 Fed. Appx. 434, 438-439 (6th Cir. 2014) (concluding that *Graham's* categorical rule does not apply to Goins' aggregate 84-year term of incarceration for multiple offenses committed when he was 16 years old); *Starks v. Easterling*, 659 Fed. Appx. 277 (6th Cir. 2016) (concluding that parole eligibility at the age of 77 for a defendant that was convicted of murder committed when he was 17 years old satisfied both *Graham* and *Miller*); *accord In re Harrell*, 6th Cir. No. 16-1048, 2016 WL 4708181 (Sept. 8, 2016) (denying motion for successive habeas corpus petition, because the defendant's 60-150 years of imprisonment for murder when he was 17 is not the functional equivalent of mandatory life without parole; the defendant is eligible for parole when he is 77 years old).

In contrast, the Ninth Circuit extended *Graham* to prohibit consecutive, fixed-term sentences for juveniles that result in a lengthy aggregate sentence for multiple non-homicide offenses. *See Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013). In *Moore v. Biter*, the defendant was sentenced to 254 years and four months for 24 non-homicide offenses that he committed when he was 16.

See id. at 1186. The defendant was eligible for parole after he served 127 years and two months. *See id*.

In *Moore*, the Ninth Circuit found that "[t]he California Court of Appeal's failure to apply *Graham* on the ground that Moore has a term-of-years sentence for multiple crimes was contrary to *Graham* because 'there are no constitutionally significant distinguishable facts' between Graham's and Moore's sentences." *Id*. at 1191 (citing *Cudjo v. Ayers,* 698 F.3d 752, 763 (9th Cir. 2012)).

"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." *Moore*, 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." *Id*. at 1192.

Thus, there is a clear split amongst the federal circuit courts of appeal regarding *Graham's* application, and this Court should grant the petition on this basis alone to unequivocally hold that *Graham* 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.

State Courts.

Like the federal circuit courts, state appellate courts are split on *Graham's* application to lengthy aggregate prison terms for multiple non-homicide offenses committed by juveniles.

The Supreme Court of Virginia held that "*Graham* does not apply to aggregate term-of-years sentences involving multiple crimes[.]" *Vasquez v. Commonwealth of Virginia*, 291 Va. 232, 246, 781 S.E.2d 920 (2016). In *Vasquez*, two 16-year-olds raped and robbed a female college student in her townhouse. *See id*. at 235-236. Vasquez was sentenced to 133 years, while Valentin was sentenced to 68 years. *See id*. at 239. Both defendants claimed that their aggregate term-of-years sentences were unconstitutional under *Graham*. *See id*.

In addressing *Graham's* application, the Supreme Court of Virginia specifically recognized that it was bound by this Court's clear holding in *Graham*: "the duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding." *Vasquez*, 291 Va. at 242. The court reasoned that it was not bound to follow an extension that other courts have made, because it distinguished the defendant's lengthy aggregate sentences from the one at issue in *Graham*: "[t]he only reason that the aggregate sentences exceeded their life expectancies was because they committed so many separate crimes. These cases are nothing like *Graham,* which involved a single crime resulting in a single life-without-parole sentence." *See id*. at 243. Thus, the court concluded that "*Graham* does not apply to aggregate term-of-years sentences involving multiple crimes[.]" *Id*. at 246.

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 v. State*, 288 Ga. 695, 700-701, 707 S.E.2d 359, 365 (2011).

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 for early release. *See State v. Brown*, 118 So.3d 332, 332 (La. 2013). The court 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 court 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.*

While the majority in this case relied on a subsequent decision from the Supreme Court of Louisiana, it ignored the fact that the court in that case distinguished the defendant's 99-year sentence for a *single* offense from the multiple offenses at issue in *Brown*. Pet. App. 35 (citing *State ex rel. Morgan v. State*, __ So.3d __, 2016 WL 6125428 (La. 2016)). In *State ex rel. Morgan*, the Supreme Court of Louisiana held "the categorical rule in *Graham* applies to the defendant's 99-year sentence without parole insofar as

it is the functional equivalent of a life sentence and denies him a meaningful opportunity for release, to which he is entitled." *State ex rel. Morgan*, supra at *8. Thus, the crucial fact that led to the court finding the defendant's 99-year sentence unconstitutional under *Graham* was the fact that he committed *one* offense rather than *multiple* offenses. *See id*. at *7.

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 State v. Kasic*, 228 Ariz. 288, 265 P.3d 410, 411 (Ariz.Ct.App. 2011).

In *Kasic*, 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*. at 414 (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 considered only whether the lengthy sentence was "grossly disproportionate" to his offenses. *See Kasic*, 265 P.3d at 415 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)).

In *State v. Merritt*, the defendant pleaded guilty to nine counts of child rape that he committed when he was 17. He was sentenced to nine consecutive terms of twenty-five years for an aggregate 225-year prison sentence, for which there was no parole eligibility. *See State v. Merritt*, Tenn. Crim. App. No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at *1 (Dec. 10, 2013). The Tennessee appellate court recognized that while the defendant's aggregate 225-year sentence is the equivalent of life imprisonment, *Graham's* holding applies only to those juveniles specifically sentenced to life imprisonment without parole. *See id*. at *6.

Thus, the Fifth Circuit, the Sixth Circuit, the Supreme Court of Virginia, the Supreme Court of Georgia, the Supreme Court of Louisiana, a Tennessee appellate court, and an Arizona 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 that result in a lengthy aggregate prison sentence like Moore.

On the other hand, several state courts have extended *Graham* to lengthy aggregate terms of incarceration for juveniles that commit *multiple* non-homicide offenses.

For example, in *People v. Caballero*, the Supreme Court of California addressed whether the defendant's 110-years-to-life sentence for three counts of attempted murder with firearm specifications violated the Eight Amendment under *Graham*. *See People v. Caballero*, 55 Cal.4th 262, 265, 282 P.3d 291 (Cal. 2012). The court

reasoned that the only relevant fact to the analysis is when the defendant is eligible for release, not the defendant's particular sentence. *See id*. at 267-268. Because the defendant was not eligible for release until he served 110 years, 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." *Id*. at 268.

The Supreme Court of Iowa found parole eligibility at the age of 69 required a remand pursuant to *Graham* and *Miller*. *See State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013). In *Null*, the court 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.

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

In short, the Supreme Court of Ohio's decision below is irreconcilable with numerous state and federal appellate court decisions. Whether its analysis is right or wrong, the conflict warrants this Court's attention to clearly define *Graham's* application to consecutive, fixed-term prison sentences for multiple non-homicide offenses committed by a juvenile that result in a lengthy aggregate sentence.

II. THE SUPREME COURT OF OHIO'S DECISION REQUIRES LOWER COURTS TO UTILIZE A CASE-BY-CASE PROPORTIONALITY REVIEW THAT THIS COURT REJECTED IN *GRAHAM v. FLORIDA*.

This Court's review is necessary because *Graham* left lower courts with little guidance to determine at what point must a juvenile be provided "some meaningful opportunity for release?"

One Florida appellate court previously noted the many questions that courts will encounter should *Graham* be extended 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 v. State*, 82 So.3d 1084, 1089 (Fla. Dist. Ct. App. 2012), *overruled*

by Henry v. State, 175 So.3d 675 (Fla. 2015)). The dissent in this case emphasized the slippery slope that this extension of *Graham* creates:

> data can be used only to *estimate* one's life expectancy, as there are numerous factors that can affect an individual's actual lifespan. For example, according to the CDC, life expectancy is at least ten years shorter for smokers than for nonsmokers. CDC, *Tobacco–Related Mortality,* http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/ (accessed Oct. 18, 2016). Would courts need to take such personal factors into account when determining life expectancy?
>
> Similarly, as imprisoned juveniles grow older, some will encounter new health issues that could shorten their lives. Would courts have to periodically reevaluate each juvenile's health and lifestyle for the purpose of re-estimating the juvenile's life expectancy?

(Emphasis sic.) Pet. App. 83. Such an extension has undoubtedly created more questions than answers, 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 of a juvenile's sentence, trial courts are left with no guidance when an 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*? Similar to 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."

Furthermore, while several state courts have extended *Graham's* holding and rationale, those courts have not agreed on how the lower courts should arrive at finding that a lengthy aggregate prison sentence for multiple offenses is indeed the functional equivalent of life without parole.

For instance, courts have utilized various sources to determine a juvenile's approximate life expectancy before concluding that a lengthy aggregate sentence was unconstitutional. Pet. App. 82-83. In this case, the

majority used data from the Centers for Disease Control (CDC). *See id.* And so too did a Colorado appellate court. *See People v. Rainer*, Colo.App. No. 10 CA 2414, 2013 WL 1490107, 2013 COA 51, ¶ 36 (Apr. 11, 2013). In contrast, a District Court of South Dakota used numerous sources of data, which included the United States Sentencing Commission, the Internal Revenue Service (IRS), and the Social Security Administration. *See id.* The Supreme Court of Wyoming looked to the United States Sentencing Commission in its analysis. *See Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132, ¶ 34. The Supreme Court of Connecticut looked to the United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports. *See Casiano v. Commr. of Corr.*, 317 Conn. 52, 115 A.3d 1031, 1046 (2015). Thus, the use by various sources to determine an offender's life expectancy adds to the lack of consistency among the lower courts' application of *Graham*.

While state courts lack consistency in *Graham's* application, state legislatures are no more uniform than the courts:

> *Cal. Penal Code* §§ 1170(d)(2)(A)(i) (allowing juveniles sentenced to life without parole to petition court for resentencing after 15 years), 3051(b) (2016) (providing parole eligibility for juveniles after 15, 20, or 25 years, depending on length of original sentence); *Del. Code. Ann.* tit. 11, § 4204A(d)(1)–(2) (2016) (providing for judicial review of sentence for juvenile offenders after 30 years for first-degree homicide and after 20 years for other offenses); *Fla. Stat.* § 921.1402

> (2016) (providing for judicial review of sentences for juvenile offenders of at least 15 years after 15, 20, or 25 years, depending on length of original sentence, and establishing right to counsel); *Mont. Code Ann.* § 46–18–222(1) (2016) (exempting juvenile offenders from sentences of life without parole and restrictions on parole eligibility); *N.C. Gen. Stat.* § 15A–1340.19A (2016) (providing parole eligibility after 25 years for juvenile offenders convicted of first-degree murder); *Wash. Rev. Code* § 9.94A.730(1) (2016) (allowing juvenile offenders to petition sentence review board for release after 20 years); *W. Va. Code* § 61–11–23(b) (2016) (providing parole eligibility after 15 years for juvenile offenders sentenced to more than 15 years); *Wyo. Stat. Ann.* § 6–10–301(c) (2016) (providing parole eligibility after 25 years for juvenile offenders sentenced to life in prison).

State v. Zuber, 227 N.J. 422, 152 A.3d 197, 215, fn. 4 (2017); *see also* Va. Code Ann. § 53.1-40.01 (stating, "Any person serving a sentence imposed upon a conviction for a felony * * * who has reached the age of sixty-five or * * * the age of sixty or older * * * may petition the Parole Board for conditional release.").

Are state legislatures any more capable of defining what this Court meant in *Graham* than state and federal appellate courts?

Therefore, courts choosing to extend *Graham's* application have left trial courts to guess at what point does a sentence run afoul of the Eighth Amendment, because they are now required to conduct a case-by-case proportionality review that demands nothing short

of pure speculation, with little to no consistency, as to when a juvenile's aggregate term of incarceration for multiple non-homicide offenses *could* preclude "some meaningful opportunity for release."

III. THIS CASE PROVIDES A GOOD VEHICLE TO CONSIDER THE IMPORTANT QUESTIONS THAT IT PRESENTS.

This Court should lastly grant the petition for writ of certiorari because this case provides a good vehicle to consider the questions presented. To begin with, the Supreme Court of Ohio's decision rested *entirely* on the Eighth Amendment: "We hold that pursuant to *Graham,* a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." Pet. App. 2. Thus, there are no jurisdictional hurdles to overcome in considering the questions presented, because the Supreme Court of Ohio did not discuss or rely on any state-law issues. *See Michigan v. Long*, 463 U.S. 1032, 1044, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (stating, "we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground.").

Further, the facts in this case are primarily uncontested by the parties. Following Moore's brutal rape, robbery, and kidnapping of M.K, the trial court ultimately sentenced Moore to an aggregate 112-year prison sentence. Moore conceded below that he is eligible for release when he is 92 years old. Pet. App. 13. And based upon Moore's eligibility for release at the age of 92, the majority concluded that Defendant's 112-year aggregate prison sentence was unconstitutional

because his sentence is the functional equivalent of life without parole that *Graham* prohibits. Pet. App. 15.

As the dissent pointed out below, this Court previously declined the opportunity to extend *Graham's* holding to include a nearly identical sentence for multiple non-homicide offenses committed by a juvenile. Pet. App. 73-74. Chaz Bunch (Moore's co-defendant), also a juvenile at the time, was sentenced to an aggregate 89-year sentence for nearly the same offenses as Moore. *See id.* And similar to Moore, Bunch is not eligible for release until he is 90 years old.

The necessity to grant the petition is demonstrated by the fact that this Court previously declined two opportunities—based upon the same facts and rationale offered by Moore—to extend *Graham's* holding to include lengthy aggregate sentences resulting from consecutive, fixed-term prison sentences for multiple non-homicide offenses committed by Moore's juvenile co-defendant. *See Bunch*, 133 S. Ct. at 1996; *Bunch*, 135 S. Ct. at 152.

Therefore, this case provides a good vehicle to consider the questions presented, because the Supreme Court of Ohio did not discuss or rely on any state-law issues, the facts are primarily uncontested by the parties, and it certainly is not inconceivable that Moore's "opportunity for release" at the age of 92 is "meaningful."

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

PAUL J. GAINS
Mahoning County Prosecutor

RALPH M. RIVERA
Assistant Prosecutor
Counsel of Record

Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, OH 44503
(330) 740-2330
(330) 740-2008 (fax)
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

SUPREME COURT OF OHIO

No. 2016-Ohio-8288

[Filed December 22, 2016]

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Moore,* Slip Opinion No. 2016-Ohio-8288.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2016-OHIO-8288

THE STATE OF OHIO, APPELLEE, *v.* MOORE, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Moore,* Slip Opinion No. 2016-Ohio-8288.]

Criminal law—Eighth Amendment prohibition against cruel and unusual punishments—United States Supreme Court's holding in Graham v. Florida *prohibiting imposition of sentences of life*

imprisonment without parole on juvenile nonhomicide offenders also prohibits imposition on juvenile nonhomicide offender of term-of-years prison sentence that exceeds offender's life expectancy—Eighth Amendment's prohibition of life imprisonment without parole or its practical equivalent for juvenile offenders is not limited to juveniles who commit a single *nonhomicide offense—Court of appeals abused discretion in denying appellant's application for reconsideration—Court of appeals' judgment reversed and cause remanded.*

(No. 2014-0120—Submitted February 4, 2015—Decided December 22, 2016.)

APPEAL from the Court of Appeals for Mahoning County, No. 08 MA 20, 2013-Ohio-5868.

PFEIFER, J.

{¶ 1} We decide in this case whether the United States Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), prohibiting the imposition of sentences of life imprisonment without parole on juvenile nonhomicide offenders also prohibits the imposition of a term-of-years prison sentence that exceeds the offender's life expectancy on a juvenile nonhomicide offender. We hold that pursuant to *Graham*, a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender.

FACTUAL AND PROCEDURAL BACKGROUND

Moore's Crimes

{¶ 2} The facts of this case do not engender a sense of sympathy for appellant, Brandon Moore. Moore embarked on a criminal rampage of escalating depravity on the evening of August 21, 2001, in Youngstown. He was then 15 years old. Early that evening, Moore robbed at gunpoint Jason Cosa and Christine Hammond in the driveway of Cosa's home. Cosa and Hammond saw Moore get into an awaiting dark, older automobile as he fled the scene.

{¶ 3} Later that night, at around 10:20, M.K., a 21-year-old student at Youngstown State University, arrived for her night-shift job at a group home for mentally handicapped women. While removing some things from the trunk of her car, she noticed a black car driving up the street and stopping a few houses away. Moore, wearing a mask, emerged from the vehicle and started running toward her. When he arrived at her vehicle, he pressed a gun against her and instructed her to give him all her money and belongings. When a porch light came on at the group home, Moore ordered M.K. to get into the passenger seat of her car. Moore then got into the driver's seat, ordered M.K. to start the car, and drove away with her.

{¶ 4} As they were driving, he ordered her to give him her jewelry. After they drove a short distance, Moore stopped the car briefly behind the black car. Chaz Bunch entered the victim's car through the rear passenger door. Bunch put a gun to her head and demanded her money.

{¶ 5} Moore continued driving, following the black car, which was being driven by Andre Bundy. As Moore drove, he inserted his fingers into M.K.'s vagina. M.K. pleaded for her life. At one point, Moore drove close enough to the black car that he almost hit it, jerking to a stop; at that point, the cars were so close that M.K. could make out the black car's license plate. She memorized the number.

{¶ 6} Eventually, Moore pulled ahead of the black car and drove down a dead-end street. The black car followed. Both cars parked near a gravel lot, and Bunch ordered M.K. out of the car. Once outside the car, Moore and Bunch assaulted M.K., grabbing her by the hair and forcing their penises into her mouth; one would orally rape her while the other forced her head down. This was repeated two or three times, at gunpoint.

{¶ 7} Moore and Bunch then directed M.K. to the trunk of her car. At this point, another man, Jamar Callier, exited the black car and went through M.K.'s belongings in the trunk. M.K. was told to pull her pants down and turn around. M.K. resisted, and in an attempt to avoid any further violence, told the attackers she was pregnant (she was not, in fact, pregnant). But they showed no mercy; Moore and Bunch pushed her against the car, and at least one of them anally raped her.

{¶ 8} After the anal rape, Bunch threw M.K. to the ground, and he and Moore proceeded to vaginally and orally rape her. While one raped her vaginally, the other would force his penis into her mouth, and they would then switch places. Both were armed during the rapes.

{¶ 9} The attack finally ended when Callier pushed Bunch off M.K. Bunch said that he wanted to kill M.K., but Callier would not let him, telling Bunch that he could not kill a pregnant woman. Moore put his gun into M.K.'s mouth and told her, "Since you were so good, I won't kill you." Moore warned her that they knew who she was; he threatened to harm her and her family if she told anyone what had happened.

{¶ 10} Hysterical, M.K. got back into her car and drove immediately to the home of a relative of her boyfriend, where she had been attending a cookout before leaving to go to work. She arrived back at the party, got out of her car, and ran through the yard, screaming for help. When people came to her aid, she immediately yelled out the license-plate number she had memorized. Based on the license-plate number, police were eventually able to arrest all four people involved in the attack on M.K.

{¶ 11} In her testimony at trial, M.K. described the effect of the attack on her life: "[T]hey killed a part of me. They killed a part of my [soul] that I can never get back."

Moore's Convictions

{¶ 12} After Moore was taken into custody, juvenile proceedings were initiated against him. The case was transferred to the General Division of the Mahoning County Court of Common Pleas; a 12-count complaint with 11 firearm specifications was filed against Moore on May 16, 2002, for the crimes committed against Jason Cosa, Christine Hammond, and M.K. The counts included three counts of aggravated robbery in violation of R.C. 2911.01(A)(1), three counts of rape in

violation of R.C. 2907.02(A)(2), three counts of complicity to commit 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).

{¶ 13} Moore, Bunch, and Bundy were tried together. The trial began on September 23, 2002. On October 2, 2002, the jury found Moore guilty of all 12 counts and all the specifications. At the October 23, 2002 sentencing hearing, the trial court concluded that Moore "[could not] be rehabilitated, that it would be a waste of time and money and common sense to even give it a try." The court announced to Moore, "I want to make sure you never get out of the penitentiary, and I'm going to make sure that you never get out of the penitentiary." It sentenced Moore to the maximum prison term for each count, to be served consecutively, except for the menacing charge, which was to be served concurrently with the other sentences. The court also sentenced Moore to a prison term for each of the 11 firearm specifications, also to be served consecutively. The sentence totaled 141 years in prison.

Moore's Appeals

{¶ 14} Moore's appellate history is lengthy and knotty. We untangle it enough to establish the relevant through-line for purposes of the present appeal from the court of appeals' denial of Moore's application for reconsideration in his third direct appeal.

{¶ 15} In Moore's first appeal, *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85 (7th

Dist.) ("*Moore I*"), the appellate court vacated Moore's conviction for conspiracy to commit aggravated robbery as well as the accompanying firearm specification. *Id.* at ¶ 23. As for the other ten firearm specifications, the appellate court instructed the trial court to impose at resentencing a total of four separate terms: one for the specification attached to the charge for the aggravated robbery of Cosa and Hammond and three for the specifications attached to the charges for the aggravated robbery, rape, and kidnapping of M.K. *Id.* at ¶ 55.

{¶ 16} On September 7, 2005, the trial court, on remand, resentenced Moore according to the appellate court's instruction. The new sentence totaled 112 years. Moore appealed again, and in *State v. Moore*, 7th Dist. Mahoning No. 05 MA 178, 2007-Ohio-7215 ("*Moore II*"), the appellate court vacated the entire sentence and remanded for resentencing because Moore's previous sentence had involved judicial factfinding of the kind declared unconstitutional by this court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶ 17} On February 5, 2008, the trial court resentenced Moore to the aggregate 112-year prison term. The judge told Moore at the sentencing hearing, "[I]t is the intention of this court that you should never be released from the penitentiary."

{¶ 18} Moore's appeal from that sentence is the root of the present appeal. Moore appealed his resentencing, but his court-appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), seeking to withdraw from the case; *Anders* "permit[s] an attorney who, after conscientious

examination of the record, concludes that a criminal appeal is wholly frivolous to so advise the court and request permission to withdraw, provided that his request is accompanied with a brief identifying anything in the record that could arguably support the client's appeal," *Disciplinary Counsel v. Milhoan*, 142 Ohio St.3d 230, 2014-Ohio-5459, 29 N.E.3d 898, ¶ 8. Moore's counsel was unable to identify any issue that could arguably support an appeal, stating that he found "this third appeal to be frivolous in the legal sense and without merit," and the court granted his motion to withdraw. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2009-Ohio-1505 ("*Moore III*"). The court went on to consider the assignment of error that Moore had raised in his pro se brief—that his resentencing pursuant to *Foster* violated his due-process rights—and reviewed the entire record, concluded that Moore's appeal was meritless, and affirmed the trial court's judgment. *Moore III* at ¶ 24. The court announced its decision on March 24, 2009. It is this decision that Moore moved the court to reconsider—but he did not do so until September 16, 2013.

{¶ 19} In the meantime, Moore pursued other avenues of relief, and in that branch of his appellate history, first sought relief based on *Graham*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825. On December 30, 2009, Moore filed a petition for a writ of mandamus and/or a writ of procedendo in the Seventh District Court of Appeals, seeking to compel the trial court to issue a final, appealable judgment entry of sentence for his original 2002 convictions that would comply with Crim.R. 32(C), containing all the elements set forth by this court in *State v. Baker*, 119 Ohio St.3d 197, 2008-

Ohio-3330, 893 N.E.2d 163. On March 30, 2010, the appellate court partially granted Moore's petition, ordering the trial court to issue a revised sentencing entry that complied with Crim.R. 32(C). *State ex rel. Moore v. Krichbaum*, 7th Dist. Mahoning No. 09 MA 201, 2010-Ohio-1541 ("*Moore IV*").

{¶ 20} On April 20, 2010, the trial court issued a nunc pro tunc sentencing entry that complied with Crim.R. 32(C). On May 17, 2010, the United States Supreme Court decided *Graham*, holding that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Graham* at 74. That same day, Moore filed a notice of appeal from the trial court's nunc pro tunc entry; in his brief in support filed December 9, 2010, Moore raised several issues, including that pursuant to *Graham*, his 112-year sentence violated the Eighth Amendment to the United States Constitution.

{¶ 21} During the pendency of that appeal, this court held in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus, 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." Based on that decision, the court of appeals dismissed Moore's appeal from the nunc pro tunc entry. *State v. Moore*, 7th Dist. Mahoning No. 10-MA-85, 2011-Ohio-6220 ("*Moore V*"). Although it dismissed the appeal on the basis of *Lester*, the court briefly addressed Moore's *Graham*-centered claim, stating that it was "barred in this case by the doctrine of res judicata" and that it was an "argument * * * more

properly raised in a petition for postconviction relief." *Moore V* at ¶ 33. The court's decision was announced on November 30, 2011.

{¶ 22} On September 16, 2013, about a month after gaining new counsel, Moore filed an application for delayed reconsideration of the court of appeals' decision in *Moore III*, pursuant to App.R. 26(A)(1) and 14(B). App.R. 26(A)(1) allows a party to file an application to request the panel that issued a decision to reconsider its decision, but that application must be made no later than ten days after the clerk of the court has mailed the judgment or order to the parties. App.R. 14(B) allows for an exception to the App.R. 26(A)(1) timeline—the court may enlarge the time for filing an application for reconsideration "on a showing of extraordinary circumstances." Moore argued that the court should reconsider his appeal because his sentence was unconstitutional pursuant to *Graham* and *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In *Miller*, a case involving a juvenile who had been convicted of murder and sentenced to a mandatory term of life imprisonment without parole, the court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," reasoning that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 2469.

{¶ 23} A divided court denied Moore's application. The majority's two-paragraph opinion cited its judgment entries denying similar applications in *State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106 (Aug. 8,

2013), which involved one of Moore's codefendants, and *State v. Barnette*, 7th Dist. Mahoning No. 06 MA 135 (Sept. 16, 2013). *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2013-Ohio-5868, ¶ 2.

{¶ 24} In *Bunch*, the court first considered the timeliness of the application for reconsideration under App.R. 26(A)(1); the decision appealed from had been announced in 2007, but Bunch's application was not filed until 2013. Since the application was untimely, the court next determined whether Bunch had shown extraordinary circumstances meriting an enlargement of the time to request reconsideration pursuant to App.R. 14(B). Ultimately, the court held that Bunch failed to show extraordinary circumstances, for two reasons.

{¶ 25} First, the court looked to the delay from the date of the *Graham* decision to the date the application for reconsideration was filed, a period of almost three years: "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. Had the application and motion been filed more closely in time to the *Graham* decision it could support a finding of extraordinary circumstances." *Bunch* at 3.

{¶ 26} Second, and "most important," the court stated that "when appellate courts have found extraordinary circumstances based on binding decisions from higher courts, they have done so when the higher court's case is directly on point." *Id.* The court explained, "The basis for this reasoning is that 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." *Id.* If a higher court's decision is not directly on point, the court reasoned, then any error would not be obvious and would not warrant the requisite finding of extraordinary circumstances.

{¶ 27} The court in *Bunch* pointed out that both *Graham* and *Miller* concerned cases that "were based specifically on life sentences without the possibility of parole; they were not based on 'de facto' life sentences." *Id.* at 4. Thus, according to the court, although Bunch was a juvenile when he committed his crimes and his fixed-term sentence was 89 years, the fact that his sentence may be considered a "de facto" life sentence meant that his case was not directly on point with *Graham* or *Miller*. Further, the court stated 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." *Id.*

{¶ 28} The other decision the court cited in rejecting Moore's application for reconsideration, *Barnette* (another case in which the appellant sought reconsideration of a 2007 decision in 2013), contained virtually identical reasoning and language as the court's decision in *Bunch*.

{¶ 29} Moore appealed the denial of his application for reconsideration to this court. The cause is before this court upon the acceptance of a discretionary appeal. 138 Ohio St.3d 1467, 2014-Ohio-1674, 6 N.E.3d 1204. Moore raises one proposition of law: "The Eighth Amendment prohibits sentencing a juvenile to a term-of-years sentence that precludes any possibility of release during the juvenile's life expectancy."

LAW AND ANALYSIS

Moore's Sentence

{¶ 30} To begin, we establish the potential prison term we are addressing in this case. Moore accepts the state's interpretation of the effect of R.C. 2929.20(C)(5) on his 112-year sentence; under that interpretation, Moore would become eligible to file a motion for judicial release after serving 77 years of his sentence. R.C. 2929.20(C)(5) allows an offender to seek judicial release five years after the completion of the mandatory portions of the offender's sentence. Moore's six ten-year sentences relating to rape are mandatory, R.C. 2929.13(F), as are his four three-year sentences under the gun specifications, R.C. 2941.145. Moore would have to serve five additional years beyond the mandatory 72 years, for a total of 77 years, before becoming eligible to seek judicial release. Moore would thus be 92 years old before he would have his first chance to move a court for release. There is no dispute that his life expectancy falls well short of 92 years. A male who was 15 years of age in 2002 had a life expectancy of an additional 60.2 years; a 15-year-old black male had a life expectancy of an additional 54.9 years. U.S. Department of Health and Human Services, *National Vital Statistics Reports*, Volume 52, Number 3, at 26 (2003), http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_03.pdf (accessed Oct. 5, 2016). Therefore, we must consider whether a minimum 77-year sentence, i.e., a sentence that extends beyond the life expectancy of the offender, is constitutional when imposed on a 15-year-old nonhomicide offender.

Proportionality Review

{¶ 31} 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." A key component of 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." *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 732-733, 193 L.Ed.2d 599 (2016).

{¶ 32} There are two classifications of proportionality review—one involving the length of term-of-years sentences given in a particular case and the other involving categorical restrictions. In this case, we deal with a categorical restriction. Within that classification, there are two subsets. One subset considers the nature of the offense—for example, in *Kennedy v. Louisiana*, 554 U.S. 407, 437, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), the United States Supreme Court held that capital punishment is impermissible for defendants who commit a nonhomicide rape of a child. The second subset considers the characteristics of the offender; in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), for instance, the court ruled that the Eighth Amendment prohibits the execution of a mentally retarded defendant.

{¶ 33} In recent years, the United States Supreme Court has established categorical prohibitions of

certain punishments for juveniles, pursuant to the Eighth Amendment. In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the court prohibited imposition of the death penalty on defendants who committed their crimes before the age of 18; in *Graham*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825, the court prohibited the imposition of life-without-parole sentences on juvenile offenders who did not commit homicide; and in *Miller*, __ U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407, the court prohibited the mandatory imposition of life-without-parole sentences on offenders who had committed murder as juveniles.

{¶ 34} Our focus in this case is *Graham*. The court did not address in *Graham* whether a term-of-years prison sentence that extends beyond an offender's life expectancy—a functional life sentence—falls under the *Graham* categorical bar. But we conclude that *Graham* does establish a categorical prohibition of such sentences.

Graham

{¶ 35} *Graham* held that sentences of life imprisonment without parole for juvenile nonhomicide offenders were cruel and unusual in violation of the Eighth Amendment in light of three factors—the limited moral culpability of juvenile nonhomicide offenders, the inadequacy of penological theory justifying the length of life-without-parole sentences for such offenders, and the severity of life-without-parole sentences. *Graham* at 74.

{¶ 36} First, the court explained in *Graham* that a juvenile who did not kill or intend to kill has "twice diminished moral culpability" based on two factors: the

nature of the crime and the juvenile's age. *Id.* at 69. As for the nature of the crime, the court found that "[a]lthough an offense like robbery or rape is 'a serious crime deserving serious punishment,' *Enmund* [*v. Florida*, 458 U.S. 782] 797, 102 S.Ct. 3368, [73 L.Ed.2d 1140 (1982)], those crimes differ from homicide crimes in a moral sense," such that nonhomicide defendants "are categorically less deserving of the most serious forms of punishment than are murderers." *Graham* at 69.

{¶ 37} In addition, juveniles are less morally culpable than adults due to their youth and what comes with it:

> [*Roper and Graham*] relied on three significant gaps between juveniles and adults. First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vulnerable * * * to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570, 125 S.Ct. 1183.

(Ellipsis sic.) *Miller*, __ U.S. __, 132 S.Ct. at 2464, 183 L.Ed.2d 407.

{¶ 38} Because of the characteristics of youth, a depraved crime committed by a juvenile may not be indicative of an irredeemable individual.

> These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." [*Roper*] at 573, 125 S.Ct. 1183. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569, 125 S.Ct. 1183. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson* [*v. Oklahoma*, 487 U.S. 815] 835, 108 S.Ct. 2687, [101 L.Ed.2d 702 (1988)] (plurality opinion).

Graham, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶ 39} The inherently diminished moral culpability and other characteristics of juvenile offenders means that the recognized, legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—do not justify the imposition of the harshest penalties on juveniles who have committed nonhomicide crimes:

> *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

> Because " '[t]he heart of the retribution rationale' " relates to an offender's blameworthiness, " 'the case for retribution is not as strong with a minor as with an adult.' " *Graham*, 560 U.S., at __, 130 S.Ct., at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Roper*, 543 U.S., at 571, 125 S.Ct. 1183). Nor can deterrence do the work in this context, because " 'the same characteristics that render juveniles less culpable than adults' "—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Graham*, 560 U.S., at __, 130 S.Ct., at 2028 (quoting *Roper*, 543 U.S., at 571, 125 S.Ct. 1183). Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—but " 'incorrigibility is inconsistent with youth.' " 560 U.S., at __, 130 S.Ct., at 2029 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky.App.1968)). And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." *Graham*, 560 U.S., at __, 130 S.Ct., at 2030. It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change. *Ibid.*

(Brackets sic.) *Miller* at 2465.

{¶ 40} The severity of the life-without-parole penalty also formed part of the basis of the court's decision in *Graham*. *Graham* explained that life-without-parole sentences are harsher when imposed on juveniles than when they are imposed on older defendants:

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. * * * This reality cannot be ignored.

Graham at 70-71.

{¶ 41} The imposition of the most severe penalties on juveniles is contrary to what the court described in *Miller*, __ U.S. __, 132 S.Ct. at 2466, 183 L.Ed.2d 407, as "*Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."

{¶ 42} The most important attribute of the juvenile offender is the potential for change. *Graham* relates the difficulty in determining whether the commission of a crime is the result of immaturity or of irredeemable corruption. And so *Graham* protects juveniles categorically from a final determination while they are still youths that they are irreparably corrupt and undeserving of a chance to reenter society. "It remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with

those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.' " *Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825, quoting *Roper*, 543 U.S. at 570, 125 S.Ct. 1183, 161 L.Ed.2d 1.

{¶ 43} That is why *Graham* recognizes that although an offender convicted as a juvenile can ultimately spend a lifetime in jail, the offender has to be given a chance at some point to prove himself worthy of reentering society. A sentence must not "den[y] the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Id.* at 73.

{¶ 44} Still, *Graham* does not foreclose the possibility that a defendant who commits a heinous crime as a youth will indeed spend his entire remaining lifetime in prison; *Graham* does not guarantee an eventual release. "What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. *Graham* leaves it to the states to determine how to achieve that requirement: "It is for the State, in the first instance, to explore the means and mechanisms for compliance." *Id*.

{¶ 45} Again, the state retains the ability, upon a meaningful evaluation of an offender who committed a nonhomicide as a juvenile, to impose lifetime incarceration upon the most serious offenders. "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes

committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶ 46} The court in *Graham* did not establish a limit to how long a juvenile can remain imprisoned before getting the chance to demonstrate maturity and rehabilitation. But it is clear that the court intended more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society. The court stated in *Montgomery*, a case involving a defendant who had been convicted of murder as a juvenile,

> In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, * * * prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.

Montgomery, __ U.S. __, 136 S.Ct. at 736-737, 193 L.Ed.2d 599.

{¶ 47} It does not take an entire lifetime for a juvenile offender to earn a first chance to demonstrate that he is not irredeemable. Pursuant to *Graham*, the Eighth Amendment prohibits the imposition of a

sentence that denies a juvenile some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Applying *Graham*

Term-of-Years Sentences

{¶ 48} The state argues that *Graham* applies only to juvenile offenders sentenced to life imprisonment without parole for a nonhomicide offense. Although the defendant in *Graham* was serving a life sentence, we conclude that the principles behind *Graham* apply equally to a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy.

{¶ 49} *Graham* cited the lessened moral culpability of juvenile offenders, the severity of the sentence, and the inapplicability of penological justifications for life sentences for juveniles as reasons for declaring life sentences for juvenile nonhomicide offenders unconstitutional under the Eighth Amendment. Those same factors apply to term-of-years prison sentences that exceed a juvenile offender's expected lifespan.

{¶ 50} As in *Graham*, in this case the defendant was convicted of nonhomicide offenses that he committed as a juvenile and thus has twice-diminished moral culpability. That is the overriding element in this case. As the court stated in *Miller*, "[C]hildren are different," and " ' "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults.' *J.D.B.*, 564 U.S., at __, 131 S.Ct., at 2404 (quoting *Eddings*, 455 U.S., at 115-116, 102 S.Ct. 869)." *Miller*, __ U.S. __, 132 S.Ct. at 2470, 183 L.Ed.2d 407.

{¶ 51} The protections in *Graham* flow from the defendant's juvenile status. The question we must consider is whether, under *Graham*, there is a consequential distinction between the life sentence imposed in *Graham* and the sentence imposed in this case, which extends beyond Moore's life expectancy.

{¶ 52} Did the trial court sentence Moore to life in prison? Undoubtedly, that was the aim of the sentencing court, as reflected in its statements at sentencing—"I want to make sure you never get out of the penitentiary, and I'm going to make sure that you never get out of the penitentiary"—and at resentencing—"[I]t is the intention of this court that you should never be released from the penitentiary." The fact that Moore could survive his current sentence is not outside the realm of possibility; Moore accepts the state's interpretation of R.C. 2929.20(C)(5), under which he would become eligible to file a motion for judicial release after serving 77 years of his sentence. Still, Moore would be 92 years old, well beyond his life expectancy, before he would have his first chance to move the court for release.

{¶ 53} *Graham* discusses the fact that under a life-without-parole sentence, a juvenile offender "will on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham*, 560 U.S. at 70, 130 S.Ct. 2011, 176 L.Ed.2d 825. The same mathematical reality—that a person who begins serving a life sentence as a juvenile serves a greater number of years and a greater percentage of his or her life in prison than a person who starts serving his sentence as an adult—extends to multidecade sentences that outstrip a juvenile's life expectancy. The

practical reality is that juveniles sentenced to terms extending beyond their life expectancies are serving the lengthiest sentences—in terms of the number of years actually served in prison—that a state can impose.

{¶ 54} In *Sumner v. Shuman*, 483 U.S. 66, 83, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987), the court compared sentences of life without parole and term-of-years sentences extending beyond an offender's life expectancy in addressing a Nevada statute that imposed a mandatory death sentence on a prisoner who committed murder in prison while serving a life-without-parole sentence. The court responded to the argument that the death penalty was a necessary deterrent to a person serving a life-without-parole sentence: "Close consideration of the deterrence argument also points up the fact that there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Id.* The court recognized that a person serving a term-of-years sentence extending beyond his life expectancy is in as hopeless a situation as a person serving a sentence of life without parole.

{¶ 55} The court held in *Graham* that life-without-parole sentences lacked penological justification when imposed on juvenile nonhomicide offenders. If "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation * * *—provides an adequate justification" for imposing a life-without-parole sentence on a juvenile nonhomicide offender, *Graham* at 71, then a term-of-years sentence that extends

beyond a juvenile nonhomicide offender's expected lifespan does not have penological justification either. As the court held in *Graham*, retribution is related to the moral culpability of the offender; retribution does not justify imposing on a person with twice-diminished moral culpability a sentence that is the most severe in terms of years served that a state can impose.

{¶ 56} Deterrence is also insufficient to justify the practice of imposing a sentence on a juvenile that extends past his life expectancy. *Graham* held that "[d]eterrence does not suffice to justify" a life sentence: "Because juveniles' 'lack of maturity and underdeveloped sense of responsibility * * * often result in impetuous and ill-considered actions and decisions,' *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), they are less likely to take a possible punishment into consideration when making decisions." (Ellipsis sic.) *Graham*, 560 U.S. at 72, 130 S.Ct. 2011, 176 L.Ed.2d 825. It is unrealistic to think that a sentence that likely extends for a lifetime could have more of a deterrent effect on a child than a life-without-parole sentence.

{¶ 57} The penological goal of incapacitation falls short as a justification for term-of-years sentences that extend beyond a juvenile's expected lifespan because of the inability to determine whether a juvenile offender is incorrigible and necessitates being separated from society for what will probably be the remainder of the juvenile's lifetime. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The

characteristics of juveniles make that judgment questionable." *Id.* at 72-73.

{¶ 58} Finally, as far as rehabilitation is concerned, like a life-without-parole sentence, a term-of-years sentence that extends beyond a juvenile's life expectancy "forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Id.* at 74.

{¶ 59} The sentence imposed on Moore is functionally a life sentence. We see no significant difference between a sentence of life imprisonment without parole and a term-of-years prison sentence that would extend beyond the defendant's expected lifespan before the possibility of parole. The court in *Graham* was not barring a terminology—"life without parole"—but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release. The state may not impose at the outset its harshest sentences on a person with twice-diminished moral culpability.

{¶ 60} It makes little sense that a juvenile offender sentenced to prison for life without parole would get a chance, pursuant to *Graham*, to prove his or her rehabilitation and be released but a juvenile offender sentenced to a functional life term would not. Could a court that imposed an unconstitutional life-without-parole sentence on a juvenile offender correct Eighth Amendment deficiencies upon remand by resentencing

the defendant to a term-of-years sentence when parole would be unavailable until after the natural life expectancy of the defendant? Certainly not.

{¶ 61} Further, the United States Supreme Court has all but abolished life-without-parole sentences even for those juveniles who commit homicide:

> *Miller* did not go so far as to bar courts from imposing the sentence of life without the possibility of parole on a juvenile. Yet because of the severity of that penalty, and because youth and its attendant circumstances are strong mitigating factors, that sentence should rarely be imposed on juveniles.

State v. Long, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 29, citing *Miller*, __ U.S. __, 132 S.Ct. at 2469, 183 L.Ed.2d 407. As the court recognized in *Montgomery*, "Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence." *Montgomery*, __ U.S. __, 136 S.Ct. at 734, 193 L.Ed.2d 599. *Graham* cannot stand for the proposition that juveniles who do not commit homicide must serve longer terms in prison than the vast majority of juveniles who commit murder, who, because of *Miller*, are all but assured the opportunity to demonstrate maturity and rehabilitation at a meaningful point in their sentences.

{¶ 62} Under his current sentence, Moore would probably die in prison. If he did survive the 77 years that he is required to serve, his period of incarceration likely would be among the longest ever served in Ohio. That would be the case despite the fact that he did not

commit the ultimate crime of murder and was not fully formed when he committed his nonhomicide crimes. The "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller* at 2466. Because Moore was a child when he committed his crimes, he must be treated differently, pursuant to *Graham*. The key principle in *Graham* is that the commission of a nonhomicide offense in childhood should not preclude the offender from the opportunity to someday demonstrate that he is worthy to reenter society: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 50 U.S. at 82, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶ 63} It is consistent with *Graham* to conclude that a term-of-years prison sentence extending beyond a juvenile defendant's life expectancy does not provide a realistic opportunity to obtain release before the end of the term. *Graham* decried the fact that the defendant in that case would have no opportunity to obtain release "even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Id.* at 79. Certainly, the court envisioned that any nonhomicide juvenile offender would gain an opportunity to obtain release sooner than after three quarters of a century in prison. *Graham* is less concerned about how many years an offender serves in the long term than it is about the offender having an opportunity to seek release while it is still meaningful.

{¶ 64} We determine that pursuant to *Graham*, a sentence that results in a juvenile defendant serving 77 years before a court could for the first time consider based on demonstrated maturity and rehabilitation whether that defendant could obtain release does not provide the defendant a meaningful opportunity to reenter society and is therefore unconstitutional under the Eighth Amendment.

Multiple Offenses

{¶ 65} The state also argues that *Graham* does not extend to juveniles sentenced to lengthy prison terms consisting of multiple, consecutive fixed-term sentences for nonhomicide offenses. The state argues that in *Graham*, the court simply held that the Eighth Amendment forbids the sentence of life imprisonment without parole for juvenile offenders who commit a *single* nonhomicide offense. We reject that argument.

{¶ 66} We note at the outset that the defendant in *Graham* had committed multiple offenses. When Graham was 16 years old, he and an accomplice entered a restaurant at closing time with the intent to rob it; the accomplice hit the restaurant manager in the back of the head with a metal bar, causing a head injury that required stitches. Graham was charged as an adult with armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, and attempted armed robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment. He pleaded guilty to both charges under a plea agreement. The trial court withheld adjudication of guilt and sentenced Graham to three years' probation, the first year of which had to be spent in the

county jail. *Graham*, 560 U.S. at 53-54, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶ 67} Less than six months after his release from jail, Graham was involved in an armed home-invasion robbery. Later that same evening, he and his accomplices attempted another home invasion, and an accomplice was shot. Graham later admitted to police that he had been involved in two or three other robberies before that night. *Id.* at 54-55.

{¶ 68} The trial court found that Graham had violated his probation by committing a home-invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity. *Id.* at 55. Citing an "escalating pattern of criminal conduct" and a desire to protect the community, the trial court sentenced Graham to the maximum sentence on each of the two original charges—life on the first charge and 15 years on the second. *Id.* at 57.

{¶ 69} The Supreme Court in *Graham* acknowledged that Graham committed serious crimes early on in his period of supervised release, "posed an immediate risk," and deserved to be separated from society "in order to prevent what the trial court described as an 'escalating pattern of criminal conduct.' " *Id.* at 73. In full recognition of the multiple crimes that Graham committed, the court concluded, however, that "it does not follow that he would be a risk to society for the rest of his life." *Id*. The nature or number of the crimes he committed was less important than who he was at the time he committed them: a juvenile whose age, coupled with his commission of nonhomicide crimes, left him with "limited moral culpability" such that he could not be condemned at the

outset to a lifetime of imprisonment without any hope for release. *Id.* at 74.

{¶ 70} The court created "a clear line * * * 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." *Id. Graham* enunciated "a categorical rule [that] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.* at 79. It did not limit that holding to juveniles who were sentenced for only one offense.

{¶ 71} Instead, the protections in *Graham* apply to juveniles who do not commit homicide. Moore fits that description. The court specifically rejected a case-by-case approach that would have required 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. The court admitted that "[t]his approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes." *Id.*

{¶ 72} In adopting a categorical approach, the court specifically rejected proportionality review on a case-by-case basis because "it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* The court in *Roper* had held that simply considering youth as a mitigating factor was insufficient because of an "unacceptable likelihood * * * that the brutality or cold-blooded nature of any particular crime would overpower mitigating

arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573, 125 S.Ct. 1183, 161 L.Ed.2d 1. The *Graham* court instructed that the same is the case with life-without-parole sentences: "Here, as with the death penalty, '[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.' " *Graham*, 560 U.S. at 78, 130 S.Ct. 2011, 176 L.Ed.2d 825, quoting *Roper* at 572-573.

{¶ 73} "[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, __ U.S. __, 132 S.Ct. at 2465, 183 L.Ed.2d 407. Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability. To suggest that a life-without-parole sentence would be permissible for a juvenile who committed multiple offenses would be to ignore the categorical restriction against that penalty for juveniles who do not commit homicide. A court cannot impose a sentence that is barred because of the identity of the offender on the ground that the offender committed multiple crimes. As an adult offender who commits multiple, nonhomicide offenses cannot become eligible for the death penalty, neither can a juvenile offender become eligible for the most severe penalty permissible for juveniles by committing multiple nonhomicide offenses. The number of offenses committed cannot

overshadow the fact that it is a child who has committed them.

{¶ 74} We conclude that the Eighth Amendment prohibition of life imprisonment without parole or its practical equivalent for juvenile offenders is not limited to juveniles who commit a *single* nonhomicide offense.

Consistency with Other States

{¶ 75} Our holding is consistent with those of other high courts that have held that for purposes of applying the Eighth Amendment protections set forth in *Graham* and *Miller*, there is no meaningful distinction between sentences of life imprisonment without parole and prison sentences that extend beyond a juvenile's life expectancy.

{¶ 76} In *People v. Caballero*, 55 Cal.4th 262, 268-269, 145 Cal.Rptr. 286, 282 P.3d 291 (2012), the California Supreme Court held 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." The defendant in that case had been convicted of multiple counts of attempted murder and would become eligible for parole only after serving 110 years. The court stated that "*Graham*'s analysis does not focus on the precise sentence meted out. Instead, * * * it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." *Caballero* at 268, quoting *Graham*, 560 U.S. at 82, 130 S.Ct. 1183, 176 L.Ed.2d 825.

{¶ 77} In *Henry v. State*, 175 So.3d 675 (Fla.2015), the Florida Supreme Court declared unconstitutional a term-of-years sentence imposed on a nonhomicide offender. The defendant in *Henry* had been sentenced to an aggregate sentence of 90 years, with mandatory prison time until he reached age 95. The court declared that sentence unconstitutional pursuant to *Graham*. The court pointed out that the specific term or terminology of the sentence is not determinative as to whether the sentence violates the Eighth Amendment:

> Thus, we believe that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of "life in prison." Instead, we have determined that *Graham* applies to ensure that juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation.

Henry at 679-680, citing *Graham* at 75.

{¶ 78} *Henry* held that the Constitution requires a mechanism for review of lengthy sentences given to juvenile offenders:

> In light of *Graham*, and other Supreme Court precedent, we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is

> qualitatively different than a comparable period of incarceration is for an adult.

Henry at 680.

{¶ 79} In *State ex rel. Morgan v. State*, __ So.3d __, 2016 WL 6125428 (La.2016), the Supreme Court of Louisiana addressed a sentence of "99 years [of] imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence" imposed on a defendant who had committed armed robbery at age 17. *Id.* at *1. The court held that "the categorical rule in *Graham* applies to the defendant's 99-year sentence without parole insofar as it is the functional equivalent of a life sentence and denies him a meaningful opportunity for release, to which he is entitled." *Id*. at *8.

{¶ 80} The Iowa Supreme Court in *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013), and *State v. Null*, 836 N.W.2d 41 (Iowa 2013), held that the constitutional infirmities of life-without-parole sentences for juveniles could not be overcome simply by imposing lengthy term-of-years sentences. *Ragland* dealt with a murder defendant who was sentenced to 60 years in prison; the defendant was 18 years old at the time of his imprisonment, and the sentence took him to the edge of his life expectancy. *Ragland* at 119. The court in *Ragland*, noting that "it is important that the spirit of the law not be lost in the application of the law," wrote:

> The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible. In

> light of our increased understanding of the decision making of youths, the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct. At the core of all of this also lies the profound sense of what a person loses by beginning to serve a lifetime of incarceration as a youth.

Ragland at 121. *Ragland* held that *Miller*'s requirement of individualized sentencing consideration for youths facing life-without-parole sentences also "applies to sentences that are the functional equivalent of life without parole." *Ragland* at 121-122.

{¶ 81} In *Null*, another murder case, the court addressed the defendant's minimum sentence of 52.5 years. The court stated that "[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*." *Null* at 71. The court recognized that the likelihood of simply surviving a sentence does not provide the protection to juvenile offenders envisioned by *Graham*: "The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*, 560 U.S. at __, 130 S.Ct. at 2030, 176 L.Ed.2d at 845-46." *Null* at 71.

{¶ 82} Moreover, *Null* made clear that courts should not undertake fine line-drawing to determine how close to the mark a sentencing court can come to a

defendant's life expectancy: "[W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Null* at 71. The important factor, instead, is the recognition that children have lessened moral culpability and are redeemable and so must be given a chance to demonstrate the change they have undergone since committing their crimes:

> In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at __, 130 S.Ct. at 2030, 176 L.Ed.2d at 845-46. We also note that in the flurry of legislative action that has taken place in the wake of *Graham* and *Miller*, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration.

Null at 71-72.

{¶ 83} Similarly, the Wyoming Supreme Court has held that "a lengthy aggregate sentence for closely-related crimes whose practical effect is that the juvenile offender will spend his lifetime in prison triggers the Eighth Amendment protections set forth by the United States Supreme Court in *Miller*." *Bear*

Cloud v. State, 2014 WY 113, 334 P.3d 132, ¶ 32 (2014). The defendant in *Bear Cloud* had been convicted of murder and aggravated burglary and sentenced to a term of 45 years. The court concluded,

> The United States Supreme Court's Eighth Amendment jurisprudence requires that a process be followed before we make the judgment that juvenile "offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75, 130 S.Ct. at 2030. That process must be applied to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole.

Bear Cloud at ¶ 37.

{¶ 84} In *Casiano v. Commr. of Corr.*, 317 Conn. 52, 115 A.3d 1031 (2015), the Supreme Court of Connecticut held that the defendant's 50-year sentence fell within *Miller*'s mandate of individualized sentencing for juvenile homicide offenders:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an

> age when the law presumes that he no longer has productive employment prospects. * * *
>
> The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Casiano at 78. Thus, the court held that the imposition of a 50-year sentence—like the life-without parole sentence in *Miller*—required the trial court to "engage in an individualized sentencing process that accounts for the mitigating circumstances of youth and its attendant characteristics." *Casiano* at 59.

{¶ 85} In *People v. Reyes*, 2016 IL 119271, 68 N.E.3d 884, the defendant was sentenced to a 97-year prison term for the first-degree murder and two attempted murders he committed when he was 16 years old; he was required to serve at least 89 years of his sentence. *Id.* at ¶ 2. The Supreme Court of Illinois held that the mandatory, functional equivalent of a life sentence was unconstitutional pursuant to *Miller*:

> A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity,

> and potential for rehabilitation. * * * Accordingly, we hold that sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment.

Reyes at ¶ 9.

{¶ 86} We agree with these other state high courts that have held that for purposes of applying the Eighth Amendment protections discussed in *Graham* and *Miller*, there is no distinction between life-without-parole sentences for juveniles and term-of-years sentences that leave a juvenile offender without a meaningful opportunity to demonstrate rehabilitation and growth leading to possible early release within the juvenile offender's expected lifespan.

{¶ 87} We note also that most of these cases from other state supreme courts involved juveniles who had been convicted of multiple offenses. The defendants in both *Caballero* and *Henry* were sentenced for committing multiple offenses, and both courts held that the functional life sentences imposed on them violated the Eighth Amendment pursuant to *Graham*. Caballero had been convicted of three counts of attempted murder, *Caballero*, 55 Cal.4th at 265, 145 Cal.Rptr. 286, 282 P.3d 291, and *Henry* had been convicted of three counts of sexual battery with a deadly weapon or physical force, one count of kidnapping with intent to commit a felony (with a firearm), two counts of robbery, one count of carjacking, one count of burglary of a dwelling, and one count of possession of 20 grams or less of cannabis, *Henry v. State*, 82 So.3d 1084, 1085

(Fla.App.2012). Likewise, in *Bear Cloud*, *Null*, *Casiano*, and *Reyes*, the courts held that the protections of *Miller* applied in cases in which the defendants had been convicted of murder and of other offenses; Bear Cloud was sentenced for first-degree murder, aggravated burglary, and conspiracy to commit aggravated burglary, *Bear Cloud*, 2014 WY 113, 334 P.3d 132, at ¶ 1, Null was sentenced for second-degree murder and first-degree robbery, *Null*, 836 N.W.2d at 45, Casiano was convicted of felony murder, attempted robbery, and conspiracy to commit robbery, *Casiano*, 317 Conn. at 55, 115 A.3d 1031, and Reyes was sentenced for first-degree murder and two counts of attempted murder, *Reyes*, 2016 IL 119271, 63 N.E.3d 884, at ¶ 2.

Procedure

{¶ 88} *Graham*'s prohibition on sentences of life imprisonment without parole for juvenile nonhomicide offenders also applies to prison sentences that are the functional equivalent of life sentences. But is Moore procedurally able to gain the protection of the Eighth Amendment at this stage of his proceedings? He asks this court to overturn the court of appeals' refusal to grant reconsideration of its March 24, 2009 decision affirming his 112-year sentence. *Graham* was decided on May 17, 2010. Moore filed his application for reconsideration on September 16, 2013.

{¶ 89} App.R. 26(A)(1) allows parties ten days to move an appellate court for reconsideration of a decision: "Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by

App.R. 30(A)." But under App.R. 14(B), the appellate court may expand or contract any time period set forth in the appellate rules, and the rule specifically allows a court to extend the time period for seeking reconsideration "on a showing of extraordinary circumstances." App.R. 14(B) reads:

> For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. * * * 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.

{¶ 90} Thus, the court below had the authority to grant Moore an extension of time to file his application for reconsideration if he showed "extraordinary circumstances." Ohio appellate courts have granted applications for delayed reconsideration well over a year after the issuance of the original decision, citing subsequent decisions of this court as providing the required extraordinary circumstances. *See, e.g.*, *State v. Finley*, 1st Dist. Hamilton No. C-061052, 2010-Ohio-5203, ¶ 6 (reconsideration granted over two years after original decision); *State v. Gandy*, 1st Dist. Hamilton No. C-070152, 2010-Ohio-2873, ¶ 8 (reconsideration granted 20 months after original decision); *Lyttle v. Ohio*, 12th Dist. Butler No. CA2010-04-089, 2012-Ohio-3042, 2012 WL 2520466, *1 (reconsideration granted over 18 months after original decision).

{¶ 91} The court below denied Moore's application for reconsideration based on its earlier decisions in *Bunch*, 7th Dist. Mahoning No. 06 MA 106, and *Barnette*, 7th Dist. Mahoning No. 06 MA 135. The court cited identical reasons for denying applications for reconsideration in *Bunch* and *Barnette*; both cases are inapplicable here.

{¶ 92} First, the court in *Bunch* and *Barnette* relied in part on the three-year lag time in both cases between the announcement of *Graham* and the filing of the application for reconsideration in state court. In *Bunch*, the court noted that Bunch had promptly raised *Graham* in his federal appeals but not in Ohio courts. The court wrote, "Had the application and motion been filed more closely in time to the *Graham* decision it could support a finding of extraordinary circumstances." *Bunch* at 3.

{¶ 93} Moore, on the other hand, first attempted to raise *Graham* in Ohio courts on the same day *Graham* was decided. He filed a notice of appeal from the trial court's April 20, 2010 nunc pro tunc sentencing entry on May 17, 2010, the same day *Graham* was announced; in his merit brief—filed in December 2010 after he had procured appointed counsel—he raised the issue that *Graham* prohibited his lengthy sentence. That appeal was not dismissed until November 2011. Despite the fact that the court dismissed the appeal for lack of a final, appealable order, the court added in dicta that Moore's *Graham*-based argument was "barred in this case by the doctrine of res judicata" and "is one more properly raised in a petition for postconviction relief." *Moore V*, 7th Dist. Mahoning No. 10-MA-85, 2011-Ohio-6220, at ¶ 33.

{¶ 94} So, unlike the appellants in *Bunch* and *Barnette*, Moore did attempt to raise *Graham* in state court contemporaneously with its release but was discouraged from pursuing relief on that basis in dicta by the court of appeals. Once Moore obtained new counsel, however, in September 2013, he filed an application for reconsideration raising *Graham* just over a month later.

{¶ 95} Even so, the delay in filing was the less significant reason cited by the court for rejecting the applications for reconsideration in *Bunch* and *Barnette*. The court in both cases wrote that the more important reason was that "when appellate courts have found extraordinary circumstances based on binding decisions from higher courts, they have done so when the higher court's case is directly on point," *Bunch* at 3, citing *State v. Lawson*, 2013-Ohio-803, 984 N.E.2d 1126, ¶ 6 (10th Dist.), *State v. Truitt*, 1st Dist. Hamilton No. C-050188, 2011-Ohio-1885, ¶ 3, and *State v. Thomas*, 1st Dist. Hamilton No. C-010724, 2009-Ohio-971, ¶ 5; *Barnette* at 3 (same). The court reasoned that because *Graham* and *Miller* were not directly on point, those cases did not demonstrate any obvious error in the appellate court's decision and, therefore, that the requisite finding of extraordinary circumstances warranting the enlargement of the time for filing an application for reconsideration was missing.

{¶ 96} For the reasons discussed above, we have established that Moore's case is controlled by *Graham* and that there is no meaningful distinction between the two cases. A defendant convicted of crimes he committed as a juvenile cannot at the outset be

sentenced to a lifetime in prison—whether labeled "life in prison without parole" or consisting of a term of years extending beyond the defendant's life expectancy—without having a meaningful opportunity to establish maturity and rehabilitation justifying release.

{¶ 97} Generally, a new decision does not apply to convictions that were final when the decision was announced. But "courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include * * * 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Montgomery*, __ U.S. __, 136 S.Ct. at 728, 193 L.Ed.2d 599, quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). *Graham* prohibits life-without-parole sentences or their equivalents for juveniles.

{¶ 98} In *Montgomery*, the court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral-review courts to give retroactive effect to that rule." *Id.* at 729. Specifically, *Montgomery* involved the application of the court's decision in *Miller* prohibiting the automatic imposition of a life-without-parole sentence on a defendant who had committed a homicide as a juvenile. The court found that "*Miller* announced a substantive rule of constitutional law." *Montgomery* at 734. In doing so, it recognized that "*Miller* is no less substantive than are *Roper* and *Graham*." *Montgomery* at 734.

{¶ 99} This court has applied an abuse-of-discretion standard in reviewing an appellate court's decision

regarding an application for reconsideration. *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 224, 480 N.E.2d 802 (1985). In this case, we hold that the court of appeals abused its discretion in not granting Moore's application for reconsideration concerning his unconstitutional sentence. Extraordinary circumstances warranted the request for delayed reconsideration—the on-point, substantive, retroactive United States Supreme Court decision in *Graham*.

CONCLUSION

{¶ 100} We hold in this case that *Graham*'s categorical prohibition of sentences of life imprisonment without the possibility of parole for juveniles who commit nonhomicide crimes applies to juvenile nonhomicide offenders who are sentenced to term-of-years sentences that exceed their life expectancies. The court of appeals abused its discretion in failing to grant Moore's application for reconsideration. The 112-year sentence the trial court imposed on Moore violates the Eighth Amendment's prohibition against cruel and unusual punishments. We reverse the judgment of the court of appeals and vacate Moore's sentence, and we remand the cause to the trial court for resentencing in conformity with *Graham*.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and LANZINGER and O'NEILL, JJ., concur.

O'CONNOR, C.J., concurs, with an opinion.

LANZINGER, J., concurs, with an opinion.

KENNEDY, J., dissents, with an opinion joined by

O'DONNELL, J.
FRENCH, J., dissents, with an opinion.

O'CONNOR, C.J., concurring.

{¶ 101} I fully concur in the majority opinion's holding that *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), prohibits the imposition, in nonhomicide cases, of a sentence that exceeds a juvenile offender's life expectancy. I write separately to address the dissenting justices' suggestion that this cause is not properly before us and to explain why this appeal satisfies the extraordinary-circumstances standard for granting an application for delayed reconsideration.

ANALYSIS

{¶ 102} The first dissenting opinion would hold on both procedural and substantive grounds that the appeal is meritless. The second dissenting opinion also suggests that the cause is not properly before us but does not reach the merits of the claims raised by appellant, Brandon Moore, even though the propriety of the procedural analysis turns largely on the substantive analysis of whether extraordinary circumstances warrant allowing an application for delayed reconsideration. However framed, both dissenting opinions ultimately assert that the Seventh District Court of Appeals in this case did not abuse its discretion in denying Moore's application because, at the time of that decision, there purportedly was ample authority for the notion that *Graham* did not apply to lengthy term-of-years sentences. But the authority on

which the dissenting justices rely is less compelling than the dissenting justices suggest.

The standard for granting an application for delayed reconsideration

{¶ 103} " 'App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law.' " *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 10th Dist. No. 03AP-269, 2004-Ohio-2715, ¶ 2, quoting *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996).

{¶ 104} The plain language of App.R. 14(B) permits a court to enlarge the time to reconsider a judgment under App.R. 26(A)(1) upon a showing of extraordinary circumstances. Although the extraordinary-circumstances is a limited one, Ohio courts have recognized those circumstances in three categories of cases.

{¶ 105} In the first category, the Seventh District has held that omissions in records can constitute an extraordinary circumstance warranting delayed reconsideration. *See, e.g.*, *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. No. 09-BE-4, 2011-Ohio-421, ¶ 9. *Accord Reichert v. Ingersoll*, 18 Ohio St.3d 220, 222-223, 480 N.E.2d 802 (1985). Because this category of cases does not encompass the present case, it is not discussed in this opinion.

{¶ 106} The second category of cases features the announcement of a new rule of law that applies directly to a pending appeal, which is the basis for the majority's conclusion that the cause is properly before

us. I agree that Ohio appellate courts routinely recognize that extraordinary circumstances exist when this court issues an opinion that is directly on point with the issue raised on appeal. *See, e.g.*, *State v. Lawson*, 2013-Ohio-803, 984 N.E.2d 1126, ¶ 6 (10th Dist.); *Lyttle v. Ohio*, 12th Dist. Butler No. CA2010-04-089, 2012-Ohio-3042, ¶ 5; *State v. Cedeno*, 192 Ohio App.3d 738, 743, 950 N.E.2d 582 (1st Dist.2011); *State v. Truitt*, 1st Dist. Hamilton No. C-050188, 2011-Ohio-1885, ¶ 3.

{¶ 107} The third category of cases in which an application for delayed reconsideration may be granted consists of cases in which the question presented in the application raises an issue of sufficient importance to warrant entertaining it beyond the ten-day limit. *See, e.g.*, *Carroll v. Feiel*, 1 Ohio App.3d 145, 145-146, 439 N.E.2d 962 (8th Dist.1981). Notably, the Seventh District, the appellate court that denied Moore's application, has recognized that this rule exists. *State v. Boone*, 114 Ohio App.3d 275, 277, 683 N.E.2d 67 (7th Dist.1996).

Graham *is a decision of sufficient importance to warrant granting Moore's application for delayed reconsideration of his lengthy term-of-years sentence*

{¶ 108} In this case, Moore received a 112-year aggregate sentence for nonhomicide offenses that he committed when he was 15 years old. At sentencing, Judge Krichbaum opined that Moore could not be rehabilitated and baldly informed Moore of the court's intention to ensure that Moore would never be released from confinement.

{¶ 109} Notwithstanding Moore's significant crimes, such a penalty is exactly what a majority of the United States Supreme Court agreed was unconstitutional in *Graham.* But despite the significance of the *Graham* claim raised by Moore, the court of appeals summarily dispensed with it:

> 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.

2013-Ohio-5868, ¶ 2.

{¶ 110} Consideration of youth in sentencing is no longer a subject of political or jurisprudential debate; the high court has decided *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2468, 183 L.Ed.2d 407 (2012), *Graham*, and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and we may not ignore those commands any more than the court of appeals or Judge Krichbaum may do so.

{¶ 111} The gravity of the Supreme Court's decision in *Graham* is apparent from its holding that the Eighth Amendment categorically bars a sentence of life without parole for juvenile nonhomicide offenders. *Graham*, 560 U.S. at 82, 130 S.Ct. 2011, 176 L.Ed.2d 825. The court not only compared life-without-parole sentences for juveniles to the death penalty, *id.* at 69; *see also Miller* at 2463, but also noted that life-without-parole sentences are "irrevocable," *Graham* at 69. As the court explained, a sentence of life without parole

> deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence * * *. [T]his sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

(Second brackets sic.) *Id.* at 69-70, quoting *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989).

{¶ 112} Judges must treat juveniles differently, no matter how horrific their crimes may be. And different treatment of juveniles in nonhomicide cases requires "some meaningful opportunity" to reenter society, *id.* at 75. The trial court's sentence in this case is irreconcilable with *Graham*, and the court of appeals' summary denial of Moore's application for delayed reconsideration is irreconcilable with the extraordinary-circumstances standard applicable to App.R. 26(A). As Judge DeGenaro stated in her dissent from the court of appeals' refusal to consider Moore's claim on its merits:

> Because Moore has no other avenue to make this argument, Moore's delayed application for reconsideration should be granted. App.R. 14(B) provides delayed reconsideration "pursuant to App.R. 26(A) shall not be granted except on a showing of *extraordinary circumstances.*" That showing has been made here; namely, a United States Supreme Court retroactive holding

> involving a criminal constitutional issue. We would be considering an arguably valid extension of a constitutional argument which was not available to Moore when his case was before the trial court, this Court and the Ohio Supreme Court in either his direct or second appeal. Significantly, the day *Graham* was announced, Moore filed his pro-se notice of appeal in [*State v. Moore*, 7th Dist. No. 10-MA-85, 2011-Ohio-6220], arguing that his sentence was unconstitutional pursuant to *Graham*; however the panel refused to address that argument, suggesting in dicta the issue was barred by res judicata and could be raised via post-conviction proceedings.

(Emphasis sic.) 2013-Ohio-5868, at ¶ 3 (DeGenaro, J., dissenting).

{¶ 113} Even assuming arguendo that "[r]elief under App.R. 14(B) is subject to the court of appeals' discretion," dissenting opinion, French, J., at 3, citing *L.R. Patrick, Inc. v. Karlsberger & Assocs., Architects, Inc.*, 10th Dist. Franklin No. 81AP-70, 1981 WL 3231, *1 (June 4, 1981), we are not compelled to rubber-stamp the ruling of the court of appeals. And as explained below, the authorities cited by the dissenting justices do not undermine the majority's conclusion that the appellate court abused its discretion in refusing to grant Moore's application for delayed reconsideration.

{¶ 114} Before proceeding, I note my agreement with the dissenting justices that "abuse of discretion" in a criminal case means more than an error of law or judgment and implies that the lower court's attitude

was unreasonable, arbitrary, or unconscionable. *See State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980), citing *Steiner v. Custer*, 137 Ohio St. 448, 31 N.E.2d 855 (1940); *see also Steiner* at 451 (an abuse of discretion is " 'a view or action "that no conscientious judge, acting intelligently, could honestly have taken" ' "), quoting *Long v. George*, 296 Mass. 574, 579, 7 N.E.2d 149 (1937), quoting *Davis v. Boston Elevated Ry. Co.*, 235 Mass. 482, 502, 126 N.E. 841 (1920). But "discretion" " 'means the equitable decision of what is just and proper under the circumstances,' " including the rights and interests of all parties, justice, and equity. *Long* at 578, quoting *Paquette v. Fall River*, 278 Mass. 172, 174, 179 N.E. 588 (1932), quoting *The Styria v. Morgan*, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1207 (1902). And "[j]udicial discretion must be carefully—and cautiously—exercised before this court will uphold an outright dismissal of a case on purely procedural grounds." *Reichert*, 18 Ohio St.3d at 222, 480 N.E.2d 802.

The dissents' reliance on federal habeas law is improper

{¶ 115} Both dissents rely upon federal habeas decisions governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. 2254(d). Dissenting opinion of French, J., at 6-7, citing *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir.2012) (*Graham* did not "clearly establish" that consecutive, fixed-term sentences for juveniles are unconstitutional when they amount to "the practical equivalent of life without parole"), and *Goins v. Smith*, N.D.Ohio No. 4:09-CV-1551, 2012 WL 3023306, *6 (July 24, 2012), *aff'd*, 556 Fed.Appx. 434 (6th Cir.2014);

dissenting opinion of Kennedy, J., at 6-8, citing *Bunch v. Smith* at 550- 552.

{¶ 116} But a federal court hearing a habeas case must judge the merits of a prisoner's claim by applying the " 'highly deferential' " standard imposed by AEDPA. *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That standards forbids a federal court from granting habeas relief in a collateral attack on a state court's judgment unless that decision was "contrary to" clearly established federal law, 28 U.S.C. 2254(d)(1), i.e., one in which "the state court applie[d] a rule different from the governing law set forth [by the Supreme Court] or * * * decide[d] a case differently than [the Supreme Court] has done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), citing *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Indeed, in federal habeas review, reasonable, good-faith interpretations of federal constitutional precedent by state courts will stand even if subsequent federal constitutional decisions render them incorrect. *See Lockhart v. Fretwell*, 506 U.S. 364, 372-373, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). *See also Harrington* at 102 ("If this [AEDPA] standard is difficult to meet, that is because it was meant to be"); *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (noting that a principal function of habeas corpus is " ' "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted" ' " and that a new rule of law does not apply on habeas review unless they

are of such a nature that "without [it] the likelihood of an accurate conviction is seriously diminished" [brackets sic]), quoting *Teague v. Lane*, 489 U.S. 288, 312-313, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion), quoting *Desist v. United States*, 394 U.S. 244, 262, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

{¶ 117} Because the standard employed in AEDPA is so highly deferential to state courts, it is virtually impossible for a federal court sitting in habeas to give relief to a juvenile. *Budder v. Addison*, 169 F.Supp.3d 1213 (W.D.Okla.2016), *appeal filed* Apr. 6, 2016, is illustrative.

{¶ 118} In *Budder*, a 16-year-old committed horrific crimes: he cut the throat of another juvenile and stabbed her repeatedly on her stomach, arms, and legs, and after she dove from a moving car to escape him, he raped and sexually assaulted her. The trial judge sentenced him to two terms of life imprisonment without parole for the rapes, to life imprisonment for assault and battery with a deadly weapon, and to 20 years of imprisonment for sodomy, with all sentences to be served consecutively. The state appellate court reversed in part in light of *Graham*, which was decided days after the juvenile's sentencing, and modified the sentences for the rape convictions to life imprisonment with the possibility of parole. But even after that modification, the juvenile would not be eligible for parole until he had served almost 132 years in prison. *Id.* at 1215.

{¶ 119} Although the federal habeas court recognized that the modified aggregate sentence remained the functional equivalent of life without parole, it nevertheless found that habeas relief was not

warranted. As it explained, "the court is confronting the issue of the constitutionality of [the] petitioner's sentences on habeas review, constrained by AEDPA's 'highly deferential standard * * * [which] demands that state-court decisions be given the benefit of the doubt.' " (Brackets sic.) *Id.* at 1220, quoting *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002). Applying the AEDPA standard, the court concluded that the petitioner's sentences did not violate clearly established law. *Id.*

{¶ 120} If a federal court considering an AEDPA-controlled habeas petition cannot declare that three consecutive life sentences imposed on a juvenile who would not be eligible for parole until he had served nearly 132 years in prison violates the Eighth Amendment under *Graham*, there can be no doubt how "highly deferential" the AEDPA standard is.

{¶ 121} Federal habeas jurisdiction serves an important purpose. But we must remember that federal habeas review is driven at least as much by principles of finality, comity, and respect for the sovereignty of state courts as it is driven by principles of constitutional correctness. *Harrington*, 562 U.S. at 103, 131 S.Ct. 770, 178 L.Ed.2d 624; Painter, *O'Sullivan v. Boerckel and the Default of State Prisoners' Federal Claims: Comity or Tragedy?*, 78 N.C.L.Rev. 1604, 1604-1606 (2000). *See also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 442-444 (1963). And but for principles of finality, the rationales for AEDPA's highly deferential standard are not ones that are applicable to the consideration of App.R. 26(A)(1)

applications for reconsideration, nor have we previously suggested that they were.

{¶ 122} I am not oblivious to the importance of finality in criminal decisions. "The importance of finality in any justice system, including the criminal justice system, cannot be understated." *Witt v. State*, 387 So.2d 922, 925 (Fla.1980). But the benefits of finality must be balanced with principles of fairness. *Ferguson v. State,* 789 So.2d 306, 312 (Fla.2001). As the Florida Supreme Court has held,

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt at 925, quoting American Bar Association, *Standards Relating to Post-Conviction Remedies* 37 (1968).

{¶ 123} This is particularly true when, as occurred in *Graham*, a court announces a new rule of law that

applies retroactively.[1] *See, e.g.*, *Moore v. Biter*, 725 F.3d 1184, 1190-1191 (9th Cir.2013); *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011); *Loggins v. Thomas*, 654 F.3d 1204, 1221 (11th Cir.2011). *See also In re Williams,* 759 F.3d 66, 70 (D.C.Cir.2014) (permitting a prisoner to file a successive habeas petition based on *Graham* claims because there was a sufficient showing that *Graham* applies retroactively); *State v. Callaway*, 658 So.2d 983, 987 (Fla.1995) ("The concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality").

{¶ 124} We who sit at the pinnacle of a state judiciary should be reluctant to adopt the limited standards of federal habeas jurisdiction as a proper proxy for the rigorous constitutional analysis that claims like Moore's deserve. *See State v. Ronquillo*, 190 Wash.App. 765, 361 P.3d 779, ¶ 24 (2015) (describing *Bunch v. Smith*, 685 F.3d 546, as "a habeas matter[ ] [that] is unhelpful because of the restricted standard of review"); *see also Danforth v. Minnesota*, 552 U.S. 264,

---

[1] The Supreme Court has explained the framework to be used in determining whether a rule announced should be applied retroactively to judgments in criminal cases that are already final on direct review, noting that although "a new rule is generally applicable only to cases that are still on direct review," there are two exceptions: "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a " ' "watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' " *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), quoting *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), quoting *Teague*, 489 U.S. at 311, 109 S.Ct. 1060, 103 L.Ed.2d 334.

280-281, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (describing *Teague*'s rule of nonretroactivity as one "fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings" and "intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions"). Indeed, even courts that refuse to apply *Graham* to lengthy term-of-years aggregate sentences question the propriety of using federal habeas cases to do so. *See State ex rel. Morgan v. Louisiana*, __ So.3d __, 2016 WL 6125428 (La. 2016), fn.8. The constitutional propriety of a 112-year aggregate sentence imposed on a defendant who committed the underlying crimes as a juvenile is a question that should be answered carefully, based on federal and state constitutional precedent rather than a rigid federal statutory scheme that has no direct application to the question before us.

The dissents' reliance on state court decisions is an unpersuasive, post hoc rationalization for the court of appeals' abuse of discretion in refusing to consider Moore's claims

{¶ 125} I turn now to the nonhabeas decisions cited by the dissenting justices. That authority is sparse and suspect.

{¶ 126} Both dissenting justices suggest that when the court of appeals denied Moore's application for delayed reconsideration, numerous courts had held that *Graham* is inapplicable to lengthy term-of-years sentences. But the appellate court did not cite a single case that the dissenting justices rely upon here to

support the appellate court's decision. *See* 2013-Ohio-5868. Moreover, the decisions cited by the dissenting justices do not support the court of appeals' refusal to consider Moore's *Graham* claim because some of those decisions were not extant at the time[2] and the ones that did exist are poorly reasoned attempts to avoid the holding in *Graham*.

{¶ 127} Justice French relies on two state court decisions cited in *State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106 (Aug. 8, 2013), and *State v. Barnette*, 7th Dist. Mahoning No. 06 MA 135 (Sept. 16, 2013) (the two judgment entries cited in the court of appeals' opinion summarily denying Moore's application for delayed reconsideration)—*State v. Kasic*, 228 Ariz. 228, 265 P.3d 410 (Ariz.App.2011), and *Henry v. State*, 82 So.3d 1084, 1089 (Fla.App.2012), *quashed*, 175 So.3d 675 (Fla.2015). Justice Kennedy includes *Kasic* in her analysis, which is more extensive but ultimately no more persuasive than Justice French's.

{¶ 128} *Kasic* is wholly distinguishable from the present case. The defendant in *Kasic* committed a series of arsons and related crimes that spanned nearly a year and included crimes he committed as an adult.

---

[2] Justice Kennedy includes an unpublished state intermediate-appellate court decision, *State v. Merritt*, Tenn.Crim.App. No. M2012-00829-CCA-R3CD, 2013 WL 6505145 (Dec. 10, 2013), and *Vasquez v. Commonwealth*, 291 Va. 232, 781 S.E.2d 920 (2016), as justifications for the court of appeals' denial of Moore's application for delayed reconsideration. But neither decision had been published at the time that the court of appeals announced its decision in this case and thus cannot support the court of appeals' denial of Moore's application. Accordingly, I do not consider them in my analysis.

See Kasic at ¶ 11 and 12. There is no reason to believe that *Graham* has any application to defendants who commit crimes after they reach the age of majority. *See Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest"); *State v. Bates*, 464 S.W.3d 257, 268 (Mo.App.2015) (holding that *Miller*, which holds that the imposition of mandatory sentences of life without parole on defendants who committed their crimes while under the age of 18 violates the Eighth Amendment's prohibition on "cruel and unusual punishments," is applicable only to juveniles and not to those who commit their crimes after the age of 18 years); *Humphrey v. Stewart*, No. 2:15-cv-12638, 2015 WL 4967152 (E.D.Mich. Aug. 20, 2015) ("Neither *Graham* nor *Miller* have been extended to adults offenders").

{¶ 129} *Henry*, the other state court decision cited in Justice French's dissent, is a Florida intermediate-appellate court decision that was pending on appeal at the time the Seventh District cited it in *Bunch* and *Barnette*. *See Henry v. State*, 107 So.3d 405 (Fla.2012) (announcing that the court had accepted jurisdiction of the cause).

{¶ 130} More importantly, it was subsequently quashed—unanimously—by the Florida Supreme Court. *Henry v. State*, 175 So.3d 675 (Fla.2015). In so doing, the Florida high court unequivocally concluded that *Graham* applies to juveniles who are sentenced to the functional equivalent of life without parole. *Henry* at 679-680. In language with direct application to

Judge Krichbaum's stated intention in sentencing Moore, it held, "*Graham* prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation." *Henry* at 680. It then reiterated,

> In light of the United States Supreme Court's long-held and consistent view that juveniles are different—with respect to prison sentences that are lawfully imposable on adults convicted for the same criminal offenses—we conclude that, when tried as an adult, the specific sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated. Thus, we believe that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of "life in prison." Instead, we have determined that *Graham* applies to ensure that juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation. *See Graham*, 560 U.S. at 75, 130 S.Ct. 2011 [176 L.Ed.2d 825].
>
> In light of *Graham*, and other Supreme Court precedent, we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating

> this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.

Henry at 680.

{¶ 131} Decisions like *Kasic*, *Henry*, *Bunch*, and *State v. Brown*, 118 So.3d 332 (La.2013), are unpersuasive for at least two reasons.

{¶ 132} First, as the Nevada Supreme Court has recognized, these decisions ignore that the United States Supreme Court did nothing in *Graham* to specifically limit its holding to offenders who were convicted of a single nonhomicide offense. *State v. Boston*, 363 P.3d 453, 457 (Nev.2015). And *Miller*, which was decided after *Graham* but before the Seventh District's denial of Moore's application for delayed reconsideration, involved a juvenile offender who had been convicted of multiple crimes, *see* 132 S.Ct. at 2461, 183 L.Ed.2d 407, but the Supreme Court offered no indication in *Miller* that the fact that the juvenile had been convicted of multiple crimes affected its analysis.

{¶ 133} Second, these decisions ignore the foundational rationales for the high court's prohibition on state court sentences, imposed at the outset, that forever prohibit consideration of a juvenile offender's ability to reenter society. "[T]he teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for

reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole." *Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132, ¶ 33, quoting *Miller* at 2464. Whether the principles of *Graham* apply in a given case should not turn "on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates" but, rather, on the Supreme Court's repeated emphasis "in *Roper, Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *State v. Null*, 836 N.W.2d 41, 71-72 (Iowa 2013), quoting *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶ 134} Lastly, I note that to the extent Justice Kennedy believes that *Graham* is distinguishable from this appeal, *see* dissenting opinion of Kennedy, J., at 4-5, her sole authority is Justice Alito's *dissenting* opinion in *Graham*—a summary analysis that no other justice joined, *see Graham* at 124-125 (Alito, J., dissenting). But a dissent is just that: "[a] disagreement with a majority opinion," *Black's Law Dictionary* 574 (10th Ed.2014), without force of law or precedential value. Even if Justice Alito's dissenting opinion had persuasive value, it is not binding on this court. We must adhere to the majority opinions of the United States Supreme Court on federal constitutional matters because it is the ultimate arbiter of the federal Constitution, *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), just as our trial and intermediate appellate courts must adhere to our majority opinions because we are the ultimate arbiters

of Ohio law, *Addis v. Howell*, 137 Ohio App.3d 54, 57-58, 738 N.E.2d 37 (2d Dist.2000); *accord Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

CONCLUSION

{¶ 135} *Graham* is one of the most momentous decisions in American juvenile law. Given its significance, the stated intention of the sentencing judge in this case, the de facto life sentence he imposed, and the curtness with which the court of appeals denied Moore's application to reconsider his sentence in light of *Graham*, I conclude that the appellate court abused its discretion in refusing to consider Moore's claim. The court was not bound to accept his arguments, but it was bound to consider them more thoughtfully after allowing the application for delayed reconsideration.

{¶ 136} I concur fully in the majority opinion, which addresses the significant constitutional question that is properly before us and which holds that the court of appeals abused its discretion in failing to recognize that extraordinary circumstances were presented by Moore's application, i.e., the unconstitutional imposition of a lengthy term-of-years sentence on a juvenile offender.

LANZINGER, J., concurring.

{¶ 137} I concur in the majority's holding that an aggregate prison term for multiple offenses that extends beyond the defendant's natural lifespan is a life-without-parole sentence by another name. Therefore, *Graham v. Florida*, 560 U.S. 48, 130 S.Ct.

2011, 176 L.Ed.2d 825 (2010), which forbids imposition of life-without-parole sentences for juvenile nonhomicide offenders, applies to this case. I also agree that allowing review of the 112-year sentence of appellant, Brandon Moore, only after 77 years when he is 92 does not provide the "meaningful opportunity to obtain release" that *Graham* requires, *id.* at 75.

{¶ 138} But I write separately due to concern that in simply remanding for "resentencing in conformity with *Graham*," majority opinion at ¶ 100, we leave unaddressed the problem of *when* the "meaningful opportunity" would take place. While we hold that 77 years is too long to wait, how exactly does the trial court follow our instruction and resentence Moore? What is a constitutional sentence, and how is it arrived at? We have chosen not to say.

{¶ 139} Unfortunately, no statute is on point and, in fact, Ohio felony-sentencing law now seems to encourage the longest prison terms for multiple offenses as there is no limit on the number of consecutive sentences a trial court may impose once the trial court makes any of the findings required by R.C. 2929.14(C)(4). We upheld against an Eighth Amendment attack the imposition of maximum, consecutive sentences for an aggregate term of 134 years for the nonhomicide offenses of a 24-year-old in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073. Just as in Moore's case, Hairston received separate terms for firearm specifications as well as the longest term within the authorized range for each individual offense, all to be served consecutively. *Id.* at ¶ 9. In my separate opinion in *Hairston*, the General Assembly was asked to consider

restoring guidelines to establish when consecutive sentences are appropriate so as to discourage the routine "max and stack" of prison terms in multiple-count indictments. *Id.* at ¶ 28-33 (Lanzinger, concurring). Although it subsequently enacted R.C. 2929.14(C)(4), as part of 2011 Am.Sub.H.B. No. 86, effective September 30, 2011, to require trial courts to make certain statutory findings before imposing consecutive sentences, the General Assembly did not place any limit on the length of these aggregate sentences. Because the General Assembly has yet to address "max and stack" sentencing, it is unlikely to quickly enact a new statute to govern the judicial release of offenders who committed their offenses while juveniles.

{¶ 140} In the absence of specific statutory authority then, on remand in this case, the trial court must determine at what point in his sentence Moore should be allowed the chance to demonstrate his maturity and rehabilitation to potentially obtain an earlier release from custody. The court may not just provide a review date for parole or judicial release in the sentencing entry as it must still follow current law.

{¶ 141} I believe the existing judicial-release statute can help the court in choosing a sentence that will satisfy *Graham* even though the statute itself does not mention the specific situation before us. Judicial release is governed by R.C. 2929.20. Those eligible are defined in R.C. 2929.20(A), and unless certain offenses have been committed, none of which were committed in Moore's case, the length of the nonmandatory-prison term determines the time for application. *See* R.C. 2929.20(C). Moore's aggregate 112-year prison sentence

consists of 12 years of mandatory time for four, three-year gun specifications, with the remainder of his sentence being ten maximum prison terms of ten years each for first-degree felonies, *see* former R.C. 2929.14(A)(1), Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, 7464 (providing for maximum ten-year sentence for first-degree felonies committed by Moore at time of his resentencing).[3] As the record shows, the trial judge intended to and did impose the harshest penalty possible by imposing all the felony terms consecutively: "[I]t is the intention of this court that you should never be released from the penitentiary."

{¶ 142} On resentencing, however, the trial court must craft a sentence that will allow Moore a meaningful opportunity to obtain judicial release before he is 92. Because mandatory time must be served without reduction, the court must resentence Moore the same way on the four firearm specifications for at least 12 years of mandatory and consecutive time. The rest of his sentence is subject to the court's modification. It must be emphasized again that allowing Moore an earlier opportunity to apply for judicial release does not guarantee the release. It allows him the chance to persuade the judge that he need not be in prison for the rest of his natural life. The timing of eligibility will depend on the court's sentencing decision.

{¶ 143} I suggest that to remain in accord with the sentencing statutes, the trial court may either reduce the maximum penalties on some or all of the

---

[3] Moore was also sentenced to a six-month term for aggravated menacing to be served concurrently with the felony sentences.

underlying ten felonies or may decide to impose some or all of them concurrently rather than consecutively. To illustrate, if the court were to grant minimum sentences for all ten underlying felonies, Moore would be sentenced to 12 plus 30 years for a stated prison term of 42 years. *See* R.C. 2929.14(A)(1) (providing for three-year minimum term for first-degree felonies committed by Moore). Under the judicial-release statute, this would mean that he would have an opportunity to apply for judicial release after serving 21 years, when he would be 36 years old. *See* R.C. 2929.20(C)(5) (if the aggregated nonmandatory term or terms is more than ten years, the earliest opportunity is one-half of the stated prison term). Alternatively, the court could impose concurrent sentences for some or all of the first-degree felonies. For example, Moore was found guilty of three rapes and three conspiracies to commit rape. If all these sentences remained maximum terms but were made concurrent, the prison term for these six offenses would be 10 years instead of 60, and without any other modification, would allow Moore to apply for judicial release at age 46 after serving 31 years (one-half of the stated prison term of 62 years).

{¶ 144} These are just two examples of ways in which the trial court at resentencing can allow Moore's eligibility for judicial release before the passage of 77 years.

{¶ 145} Of course, the General Assembly could choose an entirely new method to ensure that *Graham*'s requirements are followed by enacting specific time limits for one who was a juvenile at the time of the offense to have a meaningful opportunity to obtain release. My suggestions are offered only as a

temporary approach to implementing this court's instructions upon remand.

KENNEDY, J., dissenting.

{¶ 146} Because the court of appeals was without authority to consider the motion for delayed reconsideration and because *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), does not extend to a juvenile offender sentenced to consecutive, fixed prison terms for multiple nonhomicide offenses, I dissent. I would affirm the judgment of the court of appeals.

{¶ 147} While I agree with the majority's statement of the facts and procedural history of this case, it is important to emphasize several dates and court decisions.

{¶ 148} Moore was convicted in 2002. He appealed his convictions several times, but on March 24, 2009, the court of appeals issued a judgment that affirmed his resentencing. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2009-Ohio-1505 ("*Moore III*"). Moore did not appeal that judgment. On September 16, 2013, approximately four years after his convictions became final and nearly three years after *Graham* was decided, Moore filed a motion for delayed reconsideration of *Moore III* for the purpose of arguing that *Graham* applied to his sentence.

I. Delayed Reconsideration of *Moore III*

{¶ 149} An appellate court's decision regarding an application for reconsideration of its judgment is reviewed under an abuse-of-discretion standard.

Reichert v. Ingersoll, 18 Ohio St.3d 220, 222, 480 N.E.2d 802 (1985). An " ' "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *State ex rel. Associated Builders & Contrs. of Cent. Ohio v. Franklin Cty. Bd. of Commrs.*, 125 Ohio St.3d 112, 2010-Ohio-1199, 926 N.E.2d 600, ¶ 43 (Pfeifer, J., dissenting), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 150} "Courts of appeal[s] have jurisdiction to reconsider their judgments on a timely motion filed pursuant to App.R. 26 until an appeal as of right is filed in this court, or this court rules on a motion to certify the record." *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 249, 594 N.E.2d 616 (1992), citing *State v. Murphy*, 49 Ohio St.3d 293, 551 N.E.2d 1292 (1990), and *Cincinnati v. Alcorn*, 122 Ohio St. 294, 171 N.E. 330 (1930). And "by virtue of the jurisdiction conferred by Section 3(B), Article IV, Ohio Constitution, courts of appeals also have inherent authority, in the furtherance of justice, to reconsider their judgments sua sponte." *LTV Steel* at 249, citing *Tuck v. Chapple*, 114 Ohio St. 155, 151 N.E. 48 (1926).

{¶ 151} However, under Article IV, Section 3(A)(3) of the Ohio Constitution, judgments of the courts of appeals "are final unless appealed as of right or by a request for [the Supreme Court's] discretionary review pursuant to Section 2(B)(2), Article IV, Ohio Constitution." *LTV Steel* at 249. "[I]f no such appeal is filed, the judgment is binding and no longer subject to the court of appeals' jurisdiction to reconsider." Id. at 249-250, citing *Wigton v. Lavender*, 9 Ohio St.3d 40, 43, 457 N.E.2d 1172 (1984).

{¶ 152} Under App.R. 26(A)(1), a party may seek reconsideration no later than ten days after the clerk of courts has mailed the judgment or order to the parties. However, applying App.R. 14(B), courts of appeals have held that upon " 'a showing of *extraordinary circumstances*,' " they may accept an application for reconsideration beyond the ten-day limit. (Emphasis added.) *E.g., Rice v. Rice*, 7th Dist. Columbiana No. 2001-CO-28, 2002-Ohio-5032, ¶ 2, quoting App.R. 14(B). But under *LTV Steel*, no court of appeals can reconsider its judgment if the time for appealing that judgment to this court has expired and no appeal was filed.

{¶ 153} On March 24, 2009, the court of appeals affirmed the trial court's resentencing of Moore for his 2002 convictions. Under *LTV Steel*, the court of appeals had jurisdiction to reconsider its judgment in *Moore III* until Moore appealed that judgment to this court or the 45-day appeal period expired. Moore did not appeal *Moore III* and did not file his application for reconsideration until September 16, 2013, more than four years after *Moore III* was decided and approximately three years after *Graham* was decided. Therefore, the court of appeals lacked authority to reconsider *Moore III*. Accordingly, the court of appeals did not abuse its discretion in denying Moore's application for reconsideration.

II. *Graham* Is Distinguishable

{¶ 154} It is important to understand what the United States Supreme Court decided and what it did not decide in *Graham*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825. In *Graham*, the juvenile defendant was found guilty of armed burglary and attempted armed

robbery and ultimately sentenced to life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida had abolished its parole system, Graham's life sentence was a sentence for life *without parole*. *Id*. at 57.

{¶ 155} The court in *Graham* did not decide whether the imposition of consecutive, fixed-term prison sentences for multiple nonhomicide offenses that result in a lengthy aggregate sentence violate the Eighth Amendment. As pointed out in Justice Alito's dissent in the case: "[*Graham*] holds only that 'for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*.' * * * Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." (Emphasis sic.) *Id.* at 124 (Alito, J., dissenting), quoting *id.* at 74.

III. An Invitation to Extend Graham Was Denied

{¶ 156} One of Moore's codefendants, Chaz Bunch, was convicted of aggravated robbery, three counts of rape, three counts of complicity to commit rape, kidnapping, conspiracy to commit aggravated robbery—all with firearm specifications—and aggravated menacing. *State v. Bunch*, 7th Dist. Mahoning No. 02 CA 196, 2005-Ohio-3309. Similar to the trial judge in Moore's case, the trial judge who sentenced Bunch imposed maximum, consecutive sentences on each offense, except for the menacing charge, which resulted in an aggregate 115-year prison term. The court of appeals affirmed Bunch's convictions (except for his conspiracy conviction) but remanded for resentencing, resulting in a new aggregate sentence of

89 years in prison. The court of appeals affirmed the new sentence, *State v. Bunch*, 7th Dist. Mahoning No. 06MA 106, 2007-Ohio-7211, and we denied Bunch's discretionary appeal, *State v. Bunch*, 118 Ohio St.3d 1410, 2008-Ohio-2340, 886 N.E.2d 872.

{¶ 157} Thereafter, Bunch filed a petition for a writ of habeas corpus in federal district court, alleging that his 89-year sentence was cruel and unusual punishment in violation of the Eighth Amendment. *Bunch v. Smith*, N.D.Ohio No. 1:09 CV 901, 2010 WL 750116 (Mar. 2, 2010). *Graham* was pending in the Supreme Court at the time, but the federal district court declined to stay consideration of Bunch's petition, finding *Graham* distinguishable because *Graham* involved a life sentence without the possibility of parole. *Id*. at *2. Consequently, the court dismissed Bunch's petition. *Id*. at *3.

{¶ 158} Thereafter, Bunch appealed to the Sixth Circuit Court of Appeals. *Bunch v. Smith*, 685 F.3d 546 (6th Cir.2012). While his appeal was pending, the Supreme Court decided *Graham*.

{¶ 159} A writ of habeas corpus will issue only if the holding at issue is " 'contrary to, or involve[s] an unreasonable application of, clearly established Federal law.' " *Greene v. Fischer*, __ U.S. __, 132 S.Ct. 38, 45, 181 L.Ed.2d 336 (2011), quoting 28 U.S.C. 2254(d)(1). "[C]learly established Federal Law" means the law that existed at the time of "the last state-court adjudication on the merits." *Id*.

{¶ 160} Even though *Graham* was not decided until after Bunch had exhausted his state appeals, the Sixth Circuit nevertheless determined that an argument

could be made that *Graham* applies retroactively on collateral review under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Bunch v. Smith* at 550. However, the court determined that it did not need to address that "threshold question" because even if the court assumed that *Graham* did apply retroactively, "[it] is not clearly applicable to [Bunch]." *Bunch v. Smith* at 550. The Sixth Circuit's reasoning in reaching this decision is persuasive support for the conclusion that *Graham* does not extend to Moore's case.

{¶ 161} The Sixth Circuit recognized that while both cases involved juveniles who committed nonhomicide offenses, *Graham* involved a sentence of life in prison while Bunch's case involved "consecutive, fixed-term sentences—the longest of which was 10 years—for committing multiple nonhomicide offenses." *Bunch v. Smith,* 685 F.3d at 551. The court observed that *Graham* "made it clear that [it] 'concerns *only* those juvenile offenders sentenced to *life without parole* solely for a nonhomicide offense.' " (Emphasis sic.) *Bunch v. Smith* at 551, quoting *Graham*, 560 U.S. at 63, 130 S.Ct. 2011, 176 L.Ed.2d 825. The Sixth Circuit pointed out that *Graham*'s analysis confirms this limitation by "not encompass[ing] consecutive fixed-term sentences": *Graham* "did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders." *Bunch v. Smith* at 551-552. The Sixth Circuit added, " 'If the [United States] Supreme Court has more in mind, it will have to say what that is.' " *Id.* at 552, quoting *Henry v. State*, 82 So.3d 1084, 1089 (Fla.App.2012), *quashed*, 175 So.3d 675 (Fla.2015).

{¶ 162} Bunch appealed to the United States Supreme Court, which denied certiorari. *Bunch v. Bobby*, __ U.S. __, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013).

IV. Other Jurisdictions Recognize that Graham's Holding Is Limited

{¶ 163} While the majority points to courts in some jurisdictions that have extended *Graham* to cases involving consecutive, fixed-term sentences for multiple nonhomicide offenses, courts in other jurisdictions have not done so. The Louisiana Supreme Court has held that *Graham* does not apply to a juvenile offender who has been sentenced to multiple sentences that, when aggregated, result in a lengthy term-of-years sentence. And courts in Tennessee, Arizona, and Virginia have all recognized that *Graham*'s holding is limited to cases in which the defendant received an actual life sentence without the possibility of parole for a nonhomicide offense committed while a juvenile.

A. Louisiana

{¶ 164} The majority cites *State ex rel. Morgan v. State*, __So.3d__, 2016 WL 6125428 (La.2016), a Louisiana Supreme Court decision, in support of its holding that *Graham* applies to Moore's sentence. As the majority asserts, in *Morgan*, the court held that "the categorical rule in *Graham* applies to the defendant's 99-year sentence without parole insofar as it is the functional equivalent of a life sentence and denies him a meaningful opportunity for release, to which he is entitled." *Id.* at *8. However, noting that Morgan was sentenced to a *single* 99-year term, the court distinguished the case from *State v. Brown*, 118

So.3d 332 (La.2013), in which it had addressed the application of *Graham* to a different sentence three years earlier. *Morgan* at *4.

{¶ 165} In *Brown*, a juvenile was convicted of aggravated kidnapping and four counts of armed robbery. The trial court imposed a mandatory life sentence for aggravated kidnapping and ten years in prison for each of the armed-robbery convictions to be served consecutively for 40 additional years, without the possibility of parole for any of the convictions.

{¶ 166} Brown filed a motion challenging his sentence as illegal under *Graham*. The trial court agreed, holding that Brown was eligible for parole on all five convictions, and the intermediate appellate court affirmed. The Louisiana Supreme Court "granted the State's writ application to consider its argument that while the district court properly eliminated the parole restriction on the life sentence, nothing in *Graham* authorized it to amend [Brown's] four 10-year armed robbery sentences." *Brown* at 334-335. The court recognized that following *Graham*, the legislature had amended a state sentencing statute in order to allow inmates serving a life sentence without the possibility of parole for a nonhomicide offense committed while a juvenile to become eligible for parole after serving 30 years. *Brown* at 341.

{¶ 167} The court then considered whether *Graham* applied to Brown's sentence. Brown was 16 years old at the time of his offenses. Therefore, Brown would not become eligible for parole until at least age 86—once he had served 30 years for the kidnapping conviction and ten years for each of the four armed-robbery convictions. *Brown*, 118 So.3d at 342. The court stated:

> In our view, *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, and, absent any further guidance from the United States Supreme Court, we defer to the legislature which has the constitutional authority to authorize such sentences.

Brown at 341-342.

{¶ 168} The *Brown* court concluded that "nothing in *Graham* addresses a defendant convicted of multiple offenses and given term of year sentences, that, if tacked on to the life sentence parole eligibility date, equate to a possible release date when the defendant reaches the age of 86." *Brown* at 342.

{¶ 169} The court in *Morgan* distinguished *Brown*:

> Brown was convicted of *five* offenses resulting in *five consecutive sentences* which, when aggregated, resulted in a term pursuant to which he would have no opportunity for release; here, the defendant was convicted of a single offense and sentenced to a single term which affords him no opportunity for release. In declining to extend *Graham* to modify any of Brown's term-of-years sentences, we were most influenced by the fact that his actual duration of imprisonment would be so lengthy only because he had committed five offenses. * * * In contrast, any concern about a policy that would afford an opportunity for parole to defendants convicted of multiple offenses is not implicated here.

(Emphasis added.) *Morgan*, __So.3d__, 2016 WL 6125428, at *4. Therefore, *Brown* continues to stand for the proposition that *Graham* does not apply to a juvenile offender who has been sentenced to multiple sentences that, when aggregated, result in a lengthy term-of-years sentence. Similar to the juvenile defendant in *Brown*, Moore was a juvenile offender who had been sentenced to multiple sentences that, when aggregated, result in a lengthy term-of-years sentence. Consequently, contrary to the majority's assertion, Louisiana Supreme Court precedent is still consistent with the conclusion that *Graham* is not applicable to Moore's lengthy term-of-years sentence.

B. Tennessee

{¶ 170} In *State v. Merritt*, the defendant pleaded guilty to nine counts of rape of a child committed when the defendant was 17 years old. Tenn.Crim.App. No. M2012-00829-CCA-R3CD, 2013 WL 6505145 (Dec. 10, 2013). The trial court imposed a 25-year prison term for each of the nine offenses to be served consecutively, for an aggregate prison sentence of 225 years.

{¶ 171} On appeal, Merritt argued that his prison sentence was a de facto life sentence without the possibility of parole and constituted cruel and unusual punishment under *Graham*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825. Although the Tennessee Court of Criminal Appeals reversed the sentence after determining that it was excessive, the court rejected Merritt's argument that his sentence was unconstitutional under *Graham*. *Merritt* at *6. The court reasoned:

> Although the Defendant's effective 225-year sentence is the equivalent of life imprisonment, the sentence does not violate *Graham*'s specific holding because he was not sentenced to life imprisonment without the possibility of parole. We conclude that *Graham* applies *only to juveniles sentenced to life imprisonment without the possibility of parole* for nonhomicide offenses and that the Defendant is not entitled to relief on this basis.

(Emphasis added.) *Merritt* at *6.

C. Arizona

{¶ 172} In *State v. Kasic*, the defendant was found guilty of, among other offenses, six arsons and one attempted arson—some of which he committed at the age of 17—and the court imposed an aggregate prison term of 139.75 years. 228 Ariz. 228, 265 P.3d 410 (Ariz.App.2011). On appeal, Kasic argued that the "reasons underlying the Court's decision in *Graham* are applicable to juveniles, such as [Kasic], serving a term-of-years sentence exceeding the juvenile's life expectancy." *Kasic* at ¶ 20. The Arizona Court of Appeals disagreed, reasoning that *Graham* " 'concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.' " *Kasic* at ¶ 20, quoting Graham at 63. The court gleaned further support for its conclusion in recognizing that "[*Graham*] emphasized 'that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.' " *Kasic* at ¶ 20, quoting *Graham* at 75.

D. Virginia

{¶ 173} In *Vasquez v. Commonwealth*, two juveniles, Vasquez and Valentin, robbed and repeatedly sexually assaulted a woman. 291 Va. 232, 781 S.E.2d 920 (2016), *cert. denied*, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __, 2016 WL 4380983 (Dec. 5, 2016). After a bench trial, the court found both defendants guilty of multiple criminal offenses and imposed multiple term-of-years sentences. Ultimately, Vasquez received an aggregate sentence of 133 years in prison and Valentin received an aggregate sentence of 68 years in prison. Vasquez and Valentin appealed to the Virginia Court of Appeals, which denied relief to both.

{¶ 174} Vasquez and Valentin appealed to the Virginia Supreme Court, arguing that their sentences constituted cruel and unusual punishment and urging the court to "expand *Graham*'s prohibition of life-without-parole sentences to nonlife sentences that, when aggregated, exceed the normal life spans of juvenile offenders." *Vasquez* at 241. The court refused to extend *Graham*, noting that *Graham* applied "only to 'the imposition of a *life without parole sentence* on a juvenile offender who did not commit homicide.' " (Emphasis added in *Vasquez*.) *Id*., quoting *Graham*, 560 U.S. at 82, 130 S.Ct. 2011, 176 L.Ed.2d 825. The court recognized that both Vasquez and Valentin were subject to multiple sentences and that "[t]he only reason that the aggregate sentences exceeded their life expectancies was because they committed so many separate crimes. These cases are nothing like *Graham*, which involved a single crime resulting in a single life-without-parole sentence." *Id.* at 243. The court concluded:

> We find no basis for declaring the aggregate sentences imposed on Vasquez and Valentin to be cruel and unusual under the Eighth Amendment. Nothing in *Graham* dictates that multiple sentences involving multiple crimes be treated, for Eighth Amendment purposes, in exactly the same manner as a single life-without-parole sentence for a single crime.

Id. at 251.

V. *Graham*'s Analysis Is Insufficient to Justify Extending Its Holding to Consecutive, Fixed-Term Sentences for Multiple Nonhomicide Offenses

{¶ 175} Even assuming for the sake of argument that *Graham* could apply to consecutive, fixed-term sentences for multiple nonhomicide offenses, there are practical problems that require additional inquiry and might preclude the extension of *Graham*.

A. Determining Life Expectancy Is a Slippery Slope

{¶ 176} The majority uses life-expectancy data reported by the Centers for Disease Control ("CDC") to conclude that Moore will *probably* die before he becomes eligible to be released. But there are a myriad of sources for determining life expectancy. For example, in *Boneshirt v. United States*, the defendant was convicted of a murder committed as a juvenile and sentenced to 48 years in prison. D.S.D. No. CIV 13-3008-RAL, 2014 WL 6605613 (Nov. 19, 2014). Boneshirt claimed that his sentence was a de facto life sentence and therefore unconstitutional under *Miller v. Alabama*, __ U.S. __, 132 U.S. 2455, 183 L.Ed.2d 407 (sentencing a juvenile offender who commits murder to

a mandatory life sentence violates the Eighth Amendment). In exploring whether Boneshirt's sentence was a de facto life sentence, the court considered numerous sources, including statistics from the United States Sentencing Commission, Internal Revenue Service (IRS) actuarial tables, and Social Security actuarial tables, as well as a mortality study showing particularly low life expectancies for Native American males in certain South Dakota counties. The court noted that while it is "easy" to view a 100-year sentence as a de facto life sentence, Boneshirt's 48-year sentence, which he began serving at age 18, "makes for a more difficult answer." *Boneshirt* at *9. Undoubtedly, determining whether a lengthy term-of-years aggregate sentence is a de facto life sentence will be a difficult, case-by-case determination.

{¶ 177} Moreover, data can be used only to *estimate* one's life expectancy, as there are numerous factors that can affect an individual's actual lifespan. For example, according to the CDC, life expectancy is at least ten years shorter for smokers than for nonsmokers. CDC, *Tobacco-Related Mortality*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/ (accessed Oct. 18, 2016). Would courts need to take such personal factors into account when determining life expectancy?

{¶ 178} Similarly, as imprisoned juveniles grow older, some will encounter new health issues that could shorten their lives. Would courts have to periodically reevaluate each juvenile's health and lifestyle for the purpose of re-estimating the juvenile's life expectancy?

{¶ 179} There are many sources for life-expectancy data and many factors that affect an individual's life

expectancy, and neither *Graham* nor the majority have explored these issues.

B. Determination of National Consensus as Required by Graham*'s Categorical-Rule Analysis*

{¶ 180} The categorical-rule analysis employed in *Graham* included two steps. 560 U.S. at 61, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶ 181} The first step required the court to determine whether there was a national consensus against sentencing juvenile offenders who commit nonhomicide offenses to a sentence of life in prison without parole, and the second step required the court to apply its own Eighth Amendment decisions to determine whether that sentencing practice violated the Eighth Amendment. *Id*. at 61-62. The results of the first step of the analysis, national consensus, while "not [ ] determinative of whether a punishment is cruel and unusual is 'entitled to great weight.' " *Id.* at 67, quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). The court in *Graham* determined whether there was a national consensus against sentencing a juvenile who committed a nonhomicide offense to life in prison without parole, not whether there was a national consensus against sentencing a defendant who committed multiple nonhomicide offenses while a juvenile to consecutive, fixed prison terms that exceed the offender's life expectancy. Arguably, consideration of whether there is a national consensus against the latter type of sentence could yield a different result. Without this analysis, *Graham* cannot be extended to consecutive, fixed-term sentences for multiple nonhomicide offenses like Moore's. The majority opinion never even

addresses the first step of the categorical-rule analysis employed in *Graham*.

VI. The Separation-of-Powers Doctrine Grants the General Assembly Sole Authority to Enact Sentencing Guidelines

{¶ 182} The United States Supreme Court "leave[s] to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Ford v. Wainwright*, 477 U.S. 399, 416, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (plurality opinion). It is well settled that "[t]he power to define and classify and prescribe punishment for felonies committed within the state is lodged in the General Assembly of the state." *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922), syllabus, *rev'd in part on other grounds*, *Steele v. State*, 121 Ohio St. 332, 333, 168 N.E. 846 (1929). Accordingly, "the authority for a trial court to impose sentences derives from the statutes enacted by the General Assembly." *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶ 12.

{¶ 183} In determining whether imposing a life sentence on a juvenile nonhomicide offender violated the Eighth Amendment, the court in *Graham* looked to "science" and concluded that juveniles are different from adults in that juveniles are " 'more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;' and their characters are 'not as well formed.' " 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825, quoting *Roper v. Simmons*, 543 U.S. 551, 569-570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Pursuant to this "science," the court concluded that " '[i]t is difficult even for expert psychologists to differentiate between the juvenile

offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " *Id.* at 68, quoting *Roper* at 573. The court also considered "penological justifications" (e.g., retribution, deterrence, incapacitation, rehabilitation) for imposing a life sentence on a juvenile nonhomicide offender. *Id.* at 71.

{¶ 184} While I agree that the science and penological considerations are relevant in formulating a sentence, these subjects are for the General Assembly—not the courts—to debate and weigh in establishing sentencing guidelines for juvenile offenders. *See O'Mara*, 105 Ohio St. 94, 136 N.E. 885, at syllabus. To do so here by extending *Graham* to consecutive, fixed-term sentences for multiple nonhomicide offenses will effectively invalidate the sentences imposed for certain offenses, which will have the effect of permitting an offender to commit some offenses "for free."

{¶ 185} The General Assembly has made a policy decision creating a bindover scheme for a juvenile defendant who commits one of a multitude of types of offenses at a certain age. R.C. 2152.10. Therefore, it is the General Assembly that must consider relevant factors, such as the growing body of science and pronouncements by the United States Supreme Court, and promulgate appropriate sentencing guidelines for those juveniles whom the General Assembly has deemed must be subjected to adult consequences.

{¶ 186} And it is this court's obligation to educate Ohio judges who would pass consecutive, fixed-term sentences for multiple nonhomicide offenses committed by a juvenile about the vulnerability and susceptibility

of juveniles to negative influences and peer pressure, the science of brain development and the growing body of evidence that juveniles' characters are not as well formed as those of adults, and the law as enunciated by the United States Supreme Court that a trial judge can fashion an individualized sentence to meet the overriding purposes of felony sentencing, *see* R.C. 2929.11.

{¶ 187} While I would gladly add my voice to the conversation supporting the creation of separate sentencing guidelines for juvenile offenders who are bound over to the adult system, I cannot join today's majority when there is no basis in law and when to do so, in my opinion, would violate the separation-of-powers doctrine, which "[t]his court has repeatedly affirmed" is embedded in the Ohio Constitution, *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134, 729 N.E.2d 359 (2000).[4]

VII. Conclusion

{¶ 188} Because the court of appeals was without authority to consider the application for delayed reconsideration and because Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825, does not extend to a juvenile offender who is sentenced to consecutive, fixed prison terms for multiple nonhomicide offenses, I dissent. I would affirm the judgment of the court of appeals.

---

[4] During the 131st session of the General Assembly, the legislature considered a bill to "enact section 2967.132 of the Revised Code to provide special parole eligibility dates for persons with an indefinite or life sentence imposed for an offense committed when the person was less than 18 years of age." Am.H.B. No. 521, at 1.

O'DONNELL, J., concurs in the foregoing opinion.

FRENCH, J., dissenting.

{¶ 189} I respectfully dissent.

{¶ 190} This discretionary appeal stems from the application of appellant, Brandon Moore, for delayed reconsideration of his direct appeal from his resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Moore asks us to decide whether the constitutional prohibition against life-without-parole sentences for juvenile nonhomicide offenders announced in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and extended to mandatory life-without-parole sentences for juvenile homicide offenders in *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), also prohibits lengthy term-of-years sentences that approximate de facto life sentences. But we need not reach the constitutional question because, no matter how the court decides it, the Seventh District Court of Appeals did not abuse its discretion by denying Moore's application for delayed reconsideration. I would therefore affirm the court of appeals' judgment.

{¶ 191} On March 24, 2009, the Seventh District affirmed Moore's resentencing, following the remand pursuant to *Foster*, and rejected Moore's pro se assignment of error that the resentencing violated his right to due process. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2009-Ohio-1505 ("*Moore III*"). The court noted that this was Moore's third appeal, that most issues with respect to his convictions and sentence were res judicata, and that its review was

limited to issues arising from Moore's most recent resentencing. Moore did not appeal the March 24, 2009 decision.

{¶ 192} On September 16, 2013, Moore filed an application for delayed reconsideration of *Moore III* pursuant to App.R. 26(A)(1) and 14(B). The standard for reviewing an application for reconsideration is whether the application calls to the court's attention an obvious error in its decision or raises an issue that the court either did not consider at all or did not consider fully when it should have. *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist.1981), paragraph two of the syllabus. Moore argues that his sentence violates the constitutional rule established in *Graham*.

{¶ 193} Moore's application for reconsideration was unquestionably untimely under App.R. 26(A)(1), but the court of appeals implicitly recognized—consistent with the majority opinion's holding here—that it had authority, pursuant to App.R. 14(B), to permit the untimely filing upon a showing of extraordinary circumstances. App.R. 14(B) authorizes a court of appeals to enlarge the time for doing any act or to permit the act to be done after the expiration of the prescribed time upon a showing of good cause, but "[e]nlargement of time to file an application for reconsideration * * * pursuant to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances." Relief under App.R. 14(B) is subject to the court of appeals' discretion. *L.R. Patrick, Inc. v. Karlsberger & Assocs., Architects, Inc.*, 10th Dist. Franklin No. 81AP-70, 1981 WL 3231, *1 (June 4, 1981).

{¶ 194} I agree with both the majority opinion and Justice Kennedy's dissenting opinion that the appropriate standard of review in this case is abuse of discretion. *See Reichart v. Ingersoll*, 18 Ohio St.3d 220, 222, 224, 480 N.E.2d 802 (1985). An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. *Gen. Motors Corp. v. Tracy*, 73 Ohio St.3d 29, 32, 652 N.E.2d 74 188 (1995). Assuming that the court of appeals had authority under App.R. 14(B) to consider Moore's application for delayed reconsideration more than four years after the decision in *Moore III*, it did not abuse its discretion in denying the application.

{¶ 195} The court of appeals summarily denied Moore's application for the reasons it articulated in *State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106 (Aug. 8, 2013), and *State v. Barnette*, 7th Dist. Mahoning No. 06 MA 135 (Sept. 16, 2013). *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2013-Ohio-5868, ¶ 2. In both of those cases, the court rejected applications for delayed reconsideration in which the applicants asked the court to extend the holdings in *Graham* and *Miller* to prohibit "de facto life sentences" for juveniles. In *Bunch* and *Barnette*, the court found no extraordinary circumstances under App.R. 14(B) for two reasons: the lengthy delay between the *Graham* and *Miller* decisions and the applications for delayed reconsideration and, "most important[ly]," *Graham* and *Miller* were not directly on point and neither this court nor the United States Supreme Court had extended them to de facto life sentences. *Bunch* at 3; *Barnette* at 3.

{¶ 196} In *Bunch*, the court stated, "[W]hen appellate courts have found extraordinary circumstances based on binding decisions from higher courts, they have done so when the higher court's case is directly on point." *Bunch* at 3. It reasoned, "[I]f the higher court's binding decision is not directly on point, there would not be an obvious error and, as such, the requisite finding of extraordinary circumstances, to enlarge the time for filing an application for reconsideration, would not be warranted." *Id.*

{¶ 197} Any error regarding application of *Graham* and *Miller* to the facts of Moore's case was far from obvious. The majority opinion acknowledges that the defendant in *Graham* was serving a life sentence, and the actual holding in *Graham* states, "The Constitution prohibits the imposition of a *life without parole sentence* on a juvenile offender who did not commit homicide." (Emphasis added.) 560 U.S. at 82, 130 S.Ct. 2011, 176 L.Ed.2d 825. *Miller* extended that constitutional prohibition to mandatory *life-without-parole sentences* to juvenile homicide offenders. ___ U.S. ___, 132 S.Ct. at 2464, 183 L.Ed.2d 407. Unlike the defendants in *Graham* and *Miller*, however, Moore did not receive a sentence of life without parole. Rather, having been found guilty of 12 counts and 11 firearm specifications, Moore received multiple, consecutive term-of-years sentences, which added up to a lengthy aggregate prison term. So, even if the considerations underlying *Graham* would support extending that case to lengthy term-of-years sentences, the Supreme Court's decisions in *Graham* and *Miller*, as the Seventh District held in *Bunch* and *Barnette*, are not directly on point.

{¶ 198} Here, the majority extrapolates from *Graham* the rule that the Eighth Amendment prohibits the imposition of any sentence on a juvenile—whether designated a life sentence or a term-of-years sentence—that extends beyond the offender's life expectancy and denies the offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. But when the court of appeals denied Moore's application for delayed reconsideration, not only had neither this court nor the United States Supreme Court extended *Graham* in the manner that Moore requests, but numerous courts had held that *Graham* does not apply to lengthy term-of-years sentences. *See, e.g., State v. Kasic*, 228 Ariz. 228, 265 P.3d 410, ¶ 20 (Ariz.App.2011); *Henry v. State*, 82 So.3d 1084, 1089 (Fla.App.2012), *quashed*, 175 So.3d 675 (Fla.2015). *See also Goins v. Smith*, N.D.Ohio No. 4:09-CV-1551, 2012 WL 3023306, *6 (July 24, 2012), *aff'd*, 556 Fed.Appx. 434 (6th Cir.2014); *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir.2012) (denying habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 because *Graham* did not clearly apply to lengthy term-of-years sentence for multiple nonhomicide offenses; *Graham* "did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole"). In its decisions denying applications for delayed reconsideration in *Bunch* and *Barnette*, the Seventh District cited five decisions from other states that refused to extend *Graham* to prohibit lengthy term-of-years sentences, while also acknowledging two decisions from other states that held to the contrary. In any event, there was no clear authority as to whether the holdings of

Graham and *Miller* extend to lengthy term-of-years sentences like Moore's.

{¶ 199} Finally, Moore did not challenge his sentence based on the Eighth Amendment in *Moore III*. Rather, Moore raised a single assignment of error that his resentencing violated his right to due process. Even accepting the majority's conclusion that Moore's sentence violates the Eighth Amendment to the United States Constitution, *Graham* and *Miller* do not establish an obvious error in the Seventh District's decision upholding Moore's resentencing on due-process grounds. Moore was not entitled to use an application for delayed reconsideration as a substitute for a request that the court consider, in the first instance, an issue that was not previously presented to the court. A court of appeals may not ordinarily consider on a motion for reconsideration an issue that was not previously raised. *Fenton v. Time Warner Entertainment Co.*, 2d Dist. Montgomery No. 19755, 2003-Ohio-6317, ¶ 2, citing Whiteside, *Ohio Appellate Practice* 700 (2003) (author's comment).

{¶ 200} Because *Graham* and *Miller* are not directly on point, because neither this court nor the United States Supreme Court has extended *Graham* and *Miller* to Moore's situation, because case law from across the country conflicts as to whether *Graham* and *Miller* apply to Moore's situation, and because *Moore III* did not include an Eighth Amendment challenge, I cannot conclude that the Seventh District abused its discretion by denying Moore's application for delayed reconsideration. Accordingly, I dissent.

Paul J. Gains, Mahoning County Prosecuting Attorney, and Ralph M. Rivera, Assistant Prosecuting Attorney, for appellee.

Jones Day and Rachel S. Bloomekatz, for appellant.

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Assistant Public Defender, urging reversal for amicus curiae Office of the Ohio Public Defender.

Marsha Levick, urging reversal for amicus curiae Juvenile Law Center.

Jenner & Block, L.L.P., Matthew S. Hellman, and Erica L. Ross, urging reversal for amicus curiae Criminal Law Scholars.

Covington & Burling, L.L.P., Anna P. Engh, and Matthew Kudzin, urging reversal for amici curiae James M. Petro, Nancy Hardin Rogers, and Evelyn Lundberg Stratton.

Pinales, Stachler, Young, Burrell & Crouse Co., L.P.A., and Candace C. Crouse, urging reversal for amicus curiae National Association of Criminal Defense Lawyers.

Sidley Austin, L.L.P., Joseph R. Guerra, Kwaku A. Akowuah, and Jennifer J. Clark; and Vorys, Sater, Seymour & Pease, L.L.P., Alycia N. Broz, and Daniel E. Shuey, in support of neither party, for amici curiae Dr. Beatriz Luna, Dr. Charles Alexander Nelson III, Dr. Silvia Bunge, Dr. Adriana Galván, and Dr. Linda Patia Spear.

Ron O'Brien, Franklin County Prosecuting Attorney, and Seth L. Gilbert, Assistant Prosecuting

Attorney, urging affirmance for amicus curiae Ohio Prosecuting Attorney Association.

APPENDIX B

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CASE NO. 08 MA 20

[Filed December 9, 2013]

STATE OF OHIO,	)
PLAINTIFF-APPELLEE,	)
	)
- VS-	)
	)
BRANDON MOORE,	)
DEFENDANT-APPELLANT.	)
	)

OPINION AND JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:
Motion for Reconsideration.

JUDGMENT:
Motion Denied.

APPEARANCES:
For Plaintiff-Appellee:
Attorney Paul J. Gains
Prosecuting Attorney
Attorney Ralph M. Rivera
Assistant Prosecuting Attorney
21 W. Boardman St., 6th Floor
Youngstown, OH 44503

For Defendant-Appellant:

Attorney Kimberly A Jolson
Attorney Rachel S. Bloomekatz
Jones Day
325 John H. McConnell Blvd.
Suite 600
P.O. Box 165017
Columbus, OH 43216-5017

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

Dated: December 9, 2013

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

obtain release as contemplated by *Graham*, because the trial court imposed a de facto life sentence, and indicated as much at sentencing.

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

/s/ Joseph J. Vukovich
JUDGE JOSEPH J. VUKOVICH

/s/ Cheryl L. Waite
JUDGE CHERYL L. WAITE

DeGenaro, P.J. dissents.

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

panel refused to address that argument, suggesting in dicta the issue was barred by res judicata and could be raised via post-conviction proceedings.

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

Facts and Procedural History

This is Moore's seventh proceeding before this court. In October 2002, Moore was convicted following a jury trial of 12 counts of aggravated robbery, rape, complicity to rape, kidnapping, conspiracy to commit aggravated robbery, and aggravated menacing, along with 11 firearm specifications pursuant to R.C. 2941.145(A). These offenses arose from a brutal gang rape by Moore, Chaz Bunch, and two others. The vicious attack began with the defendants abducting the victim while she was leaving her place of employment and driving her to a secluded location, while Moore digitally raped her. Arriving at a dead end street, Moore and Bunch proceeded to vaginally, orally and anally rape the victim multiple times as well as simultaneously orally and vaginally raping her, all at gunpoint. Telling her attackers she was pregnant in the hope of stopping the attack, the other two defendants eventually stopped the rapes; the victim was escorted to her car, when she was finally able to escape, after being told they knew who she was and

that she and her family would be killed if she reported the incident. *State v. Moore (Moore I)*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶3-9. The trial court's October 29, 2002 judgment entry imposed maximum consecutive sentences on all counts, except for the misdemeanor menacing charge to be served concurrently with the other sentences, and consecutive sentences on the 11 firearm specifications, for an aggregate sentence of 141 years.

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

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

acknowledged the dismissal of one count, as directed by this court. The trial court then sentenced Moore to maximum, consecutive sentences on the remaining counts for an aggregate sentence of 112 years. Moore then filed his second appeal. This court vacated his sentence based on *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470, and remanded the matter for resentencing. *State v. Moore (Moore II)*, 7th Dist. No. 05 MA 178, 2007-Ohio-7215, 2007 WL 4696843.

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

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

> On April 7, 2010, Moore filed a pro-se motion to dismiss all further proceedings due to unreasonable delay in sentencing. On April 20, 2010, the trial court issued a nunc pro tunc judgment entry to comply with Crim.R. 32(C) and re-imposed the 112 year term of incarceration. Moore then appealed on May 17, 2010. On May 19, 2010, the trial court overruled appellant's motion to dismiss all further proceedings due to unreasonable delay in sentencing. This court dismissed Moore's appeal on the basis of *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. This court found that the nunc pro tunc judgment entry issued to comply with Crim.R. 32(C) was not a final order subject to appeal. *State v. Moore (Moore V)*, 7th Dist. No. 10–MA–85, 2011-Ohio-6220, 2011 WL 6017942.
>
> This brings us to the instant matter and Moore's sixth appeal. On March 30, 2012, Moore filed a pro-se motion for resentencing, arguing that the trial court designating him a Tier III sex offender was error pursuant to *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. He also filed a pro-se motion to correct the void portion of sentence, claiming the trial court failed to correctly merge his firearm specifications. On April 26, 2012, the State filed motions to dismiss in response to each of these motions.

Moore VI, ¶4-9.

In *Moore VI* this court rejected most of Moore's arguments, reversing and remanding the matter solely

for a sex offender classification hearing pursuant to S.B. 5, known as Megan's Law, Moore having been classified pursuant to the Adam Walsh Act.

Untimely Application for Reconsideration

General Test

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

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

obvious error or renders an unsupportable decision under the law.

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

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

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

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

Deutsche Bank II, 112-6 (internal citations omitted).

{¶3} In *Deutsche Bank II*, the appellee asked to supplement the record with a transcript that had been ordered but due to a clerical mistake had not been filed on appeal, and then for the court to reconsider its decision in light of the supplemented record. In the underlying case, *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. No. 09-BE-4, 2010-Ohio-3277 (*Deutsche Bank I*), the panel had reversed and remanded the trial court, in part, because of the absence of the transcript. *Deutsche Bank* at ¶39-41. Granting leave to supplement the record and reconsideration in *Deutsche Bank II*, the panel reiterated that its original decision was due, in part, to the absence of that transcript, and that it would have decided the case otherwise had the missing transcript been in the record. Deutsche *Bank II* at ¶10, vacating its reversal in *Deutsche Bank I* and affirming the trial court's decision. *Deutsche Bank II* at ¶14.

Extraordinary Circumstances

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

II at ¶9, citing *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 222-23, 480 N.E.2d 802 (1985).

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

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

Degens at ¶5.

Because Moore filed his reconsideration motion well beyond the 10 days provided by App.R. 26(A), we look to App.R. 14 for guidance. In *Deutsche Bank II*, a civil case where a part of the transcript was omitted, and *Degens*, a criminal case involving a four year sentence, reconsideration was granted on the basis of the interest of justice, extraordinary circumstances having been shown based upon those facts: no error or omission was found in the appellate panel's prior decision. Given this is a criminal matter where an 112 year sentence was imposed, and Moore is arguing a Supreme Court decision involving the Eighth Amendment retroactively applies to his sentence; Moore has established extraordinary circumstances warranting delayed reconsideration. To do otherwise in this narrow

circumstance would create a miscarriage of justice that relief under App.R. 26 was enacted to avoid.

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

No Other Available Remedy

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

Nor can Moore raise this claim via a state habeas petition. "Whoever is unlawfully restrained of his

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

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

habeas petition, it would be rejected on procedural grounds as it had been in *Bunch* and *Goins*.

Graham v. Florida

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

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

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

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. *What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.* It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the *Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender*, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society. (Emphasis Added)

Graham, 130 S.Ct. at 2030.

The majority in *Graham* signaled that it may be constitutionally valid to impose lengthy sentences upon

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

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

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

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

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

> Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Ante*, at 2030. But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.

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

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

Moore argues that according to the Ohio Department of Rehabilitation and Correction, he and three other nonhomicide juvenile offenders, sentenced by the same trial judge, have the longest sentences in Ohio. However, a review of the facts from the direct appeals of these four juveniles, Moore and his co-

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

R.C. 2929.20 Affords Meaningful Review

Since Moore's original sentencing, not only has *Graham* been decided, Ohio's judicial release statute has been modified, which may afford Moore the constitutionally required 'meaningful opportunity' to prove he has been rehabilitated and eligible for parole as contemplated by *Graham.*

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

> (A)(1)(a) Except as provided in division (A)(1)(b) of this section, "eligible offender" means any person who, *on or after April 7, 2009, is serving a stated prison term that includes one or more nonmandatory prison terms.*
>
> * * *

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

The interplay between this statute and *Graham* was discussed in the unsuccessful habeas petition of James Goins. In *Goins v. Smith*, the District Court held that for AEDPA purposes *Graham* was not the clearly established law at the time Goins' 84 year sentence was imposed or reviewed on the merits for the last time, and his claim failed for that reason. Moreover, the

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

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

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

> years after expiration of their mandatory prison terms). Although he faces an extremely long sentence, Goins does not face a sentence on the order of the one imposed in *Graham*.

Goins v. Smith at *7.

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

What is clear from *Graham* is that if a juvenile offender is sentenced to, say, 200 years for multiple offenses, including mandatory and nonmandatory sentences, pursuant to R.C. 2929.20 he would have to serve 100 years before being eligible for parole, this

would not be constitutional under *Graham*. What if it was 75 years, or 50 years? An explicit versus de facto life sentence is a distinction without a difference. In any event, the determination of whether R.C. 2929.20 provides a juvenile nonhomicide offender a meaningful opportunity to demonstrate rehabilitation must be made on a case by case basis, in order to consider the character of the juvenile, the facts supporting the offenses, and the length of the sentence. Moore was 15 years old at the time he committed these heinous crimes, and the trial court imposed a 112 year aggregate sentence consisting of mandatory and non-mandatory terms. The trial court was clear that the lengthy sentence was imposed to ensure Moore never left the penitentiary; thus imposing a de facto life sentence.

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

Conclusion

Moore's delayed motion for reconsideration should be considered in the interest of preventing a manifest injustice, because a criminal defendant should have some mechanism to seek review of an asserted retroactive constitutional protection. Moreover, Moore

in fact raised the issue in *Moore V* and we declined to address the issue; thus we should do so now.

As to the merits, the United States Supreme Court has made it clear that as a category, juvenile offenders, irrespective of the nature of their crimes, may not be *explicitly* sentenced to life without the possibility of parole; they must *categorically* be afforded a meaningful opportunity to establish they have rehabilitated and can be paroled. At the heart of the Court's decisions in *Graham* and *Miller* is that juvenile offenders *as a category* fundamentally differ from adult offenders. Given those holdings and underlying rationale, it would appear that juvenile offenders *implicitly* sentenced to life without parole via consecutive maximum sentences for multiple offenses, which results in *no opportunity for parole* violates the Eight Amendment. Where a juvenile who has committed 'truly horrifying crimes' receives a *de facto* life sentence for one or multiple offenses, that juvenile must, nonetheless, be eligible, at some point, to be evaluated and a determination made whether they are rehabilitated, or that they "may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 130 S.Ct. 2030.

Subsequent to the decision in *Graham*, the Ohio Legislature amended R.C. 2929.20 to afford juvenile and adult offenders sentenced to a non-mandatory

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

APPROVED

/s/ Mary DeGenaro
JUDGE MARY DeGENARO

APPENDIX C

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CASE NO. 10-MA-85

[Filed November 30, 2011]

STATE OF OHIO,	)
PLAINTIFF-APPELLEE,	)
	)
VS.	)
	)
BRANDON MOORE,	)
DEFENDANT-APPELLANT.	)
	)

OPINION

CHARACTER OF PROCEEDINGS:
Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio
Case No. 02CR525

JUDGMENT:
Dismissed

APPEARANCES:
For Plaintiff-Appellee:

Paul Gains
Prosecutor
Ralph M. Rivera
Assistant Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, Ohio 44503-1426

For Defendant-Appellant:

Attorney Douglas A. King
91 West Taggart St., P.O. Box 85
East Palestine, Ohio 44413

JUDGES:
Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: November 30, 2011

DONOFRIO, J.

{¶1} Defendant-appellant, Brandon Moore, appeals from a Mahoning County Common Pleas Court judgment denying his motion to dismiss all charges against him for an unreasonable delay in sentencing.

{¶2} Appellant has been before this court numerous times.

{¶3} In 2002, appellant was convicted of aggravated robbery, three counts of rape, three counts of complicity to rape, one count of kidnapping, one count of conspiracy to commit aggravated robbery, and one count of aggravated menacing. All counts were first-degree felonies except for aggravated menacing, which

was a first-degree misdemeanor. The court sentenced appellant to the maximum prison term for each count, to be served consecutively (except for the misdemeanor menacing charge, which was to be served concurrently with the other sentences). The court also sentenced appellant on 11 firearm-specifications, also to be served consecutively. The total sentence was 141 years in prison.

{¶4} On direct appeal, this court affirmed in part, reversed in part, and remanded the matter for resentencing. *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311.

{¶5} Next, this court denied appellant's motion to reopen his direct appeal based on a claimed speedy trial violation. *State v. Moore*, 7th Dist. No. 02-CA-216, 2005-Ohio-5630.

{¶6} Upon resentencing, the trial court merged some of the firearm specifications and dismissed one count. It then sentenced appellant to maximum, consecutive sentences on the remaining counts for a total prison term of 112 years. Once again appellant appealed. Based on *State v. Foster*, 109 Ohio St. 3d 1, 2006- Ohio-856, this court vacated appellant's sentence and remanded the matter for resentencing once again. *State v. Moore*, 05-MA-178, 2007-Ohio-7215.

{¶7} The trial court held appellant's third sentencing hearing in 2008. It again sentenced him to an aggregate 112-year sentence. Appellant again appealed. This time we upheld his sentence. *State v. Moore*, 7th No. Dist. 08-MA-20, 2009-Ohio-1505.

{¶8} On December 30, 2009, appellant filed a petition for writ of mandamus and/or procedendo with

this court, seeking to compel the trial court to issue a final appealable judgment entry of sentence in compliance with Crim.R. 32(C) as set forth in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, asserting that his sentencing entry did not specify his manner of conviction and, therefore, did not constitute a final, appealable order. We agreed and ordered the trial court to issue a revised sentencing entry that complied with Crim.R. 32(C). *State ex rel. Moore v. Krichbaum*, 7th Dist. No. 09-MA-201, 2010-Ohio-1541.

{¶9} Next, on April 7, 2010, appellant filed a pro se motion to dismiss all further proceedings due to unreasonable delay in sentencing.

{¶10} On April 20, 2010, the trial court filed a nunc pro tunc sentencing entry that complied with this court's order. The trial court again imposed a 112-year sentence.

{¶11} Appellant filed a timely notice of appeal on May 17, 2010.

{¶12} Two days later, on May 19, 2010, the trial court overruled appellant's motion to dismiss all further proceedings due to unreasonable delay in sentencing.

{¶13} Appellant now raises five assignments of error, which state:

{¶14} "DEFENDANT/APPELLANT'S SENTENCES MUST BE VACATED BECAUSE OF UNREASONABLE DELAY, WHICH CAN BE ATTRIBUTED ONLY TO THE STATE, BETWEEN THE JURY'S VERDICT AND SENTENCE."

{¶15} "DEFENDANT/APPELLANT'S SENTENCES TOTALING 112 YEARS VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT."

{¶16} "THE TRIAL COURT ERRED BY IMPOSING MAXIMUM CONSECUTIVE SENTENCES INSTEAD OF MINIMUM CONCURRENT SENTENCES."

{¶17} "COUNTS FOUR, FIVE AND SIX AND COUNTS SEVEN, EIGHT AND NINE OF DEFENDANT/APPELLANT'S INDICTMENT FILED MAY 16, 2002 ARE CONSTITUTIONALLY DEFECTIVE."

{¶18} "DEFENDANT/APPELLANT'S INDICTMENT FAILED TO ALLEGE A CRIME IN COUNTS SEVEN, EIGHT AND NINE AND WAS THEREFORE FATALLY DEFECTIVE."

{¶19} Appellant also raises what he terms as an "*Anders* assignment of error," which states:

{¶20} "THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE ALLIED OFFENSES OF SIMILAR IMPORT FOR PURPOSES OF SENTENCING."

{¶21} Based on recent case law, however, we must dismiss appellant's appeal.

{¶22} On October 13, 2011, the Ohio Supreme Court held: "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." *State v. Lester*, ___ Ohio St.3d ___, 2011-Ohio-5204, at paragraph two of the syllabus.

{¶23} In *Lester*, the judgment entry of conviction stated the fact of Lester's conviction but did not state how the conviction was effected, i.e. jury verdict, guilty plea, no-contest plea. The Court acknowledged that in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, it confirmed that a judgment entry of conviction must contain (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the judge's signature; and (4) a journal entry by the clerk of courts. *Lester*, at ¶8, citing *Baker*, at the syllabus. The Court observed that the requirement for the "manner of conviction" had created confusion over the finality of judgments. Id. at ¶9. It went on to reason:

{¶24} "[W]hen the substantive provisions of Crim.R. 32(C) [the fact of the conviction, the sentence, the judge's signature, and the entry on the journal] are contained in the judgment of conviction, the trial court's omission of how the defendant's conviction was effected, i.e., the 'manner of conviction,' does not prevent the judgment of conviction from being an order that is final and subject to appeal. Crim .R. 32(C) does not require a judgment entry of conviction to recite the manner of conviction as a matter of substance, but it does require the judgment entry of conviction to recite the manner of conviction as a matter of form. In this regard, the identification of the particular method by which a defendant was convicted is merely a matter of orderly procedure rather than of substance. A guilty plea, a no-contest plea upon which the court has made

a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial explains how the fact of a conviction was effected. Consequently, the finality of a judgment entry of conviction is not affected by a trial court's failure to include a provision that indicates the manner by which the conviction was effected, because that language is required by Crim.R. 32(C) only as a matter of form, provided the entry includes all the substantive provisions of Crim.R. 32(C)." Id. at ¶12.

{¶25} Thus, the Court modified *Baker* to the extent that it implied that more than the fact of the conviction and substantive provisions of Crim.R. 32(C) must be set out in the judgment entry of conviction before it becomes a final order. Id. at ¶14.

{¶26} Subsequently, on November 3, 2011, this court applied *Lester* in dismissing an appeal very similar to the case at bar. In *State v. Staffrey*, 7th Dist. Nos. 10-MA-130, 10-MA-131, 2011-Ohio-5760, Staffrey pleaded guilty to several charges in 1996 and the court sentenced him accordingly. Staffrey appealed his conviction and sentence and this court affirmed in 1999. In 2009, after *Baker* was decided, Staffrey filed a motion to withdraw his guilty plea and a motion for resentencing based on *Baker*. He alleged that the trial court's judgment entry of conviction was not a final, appealable order because it failed to comply with Crim.R. 32(C) . The trial court did not immediately rule on the motion. So on Staffrey's motion, we granted a writ of mandamus holding that the trial court's judgment entry of sentence was not a final, appealable order because it did not state the means of conviction. We stated that Staffrey was entitled to a revised

sentencing entry that complied with Crim.R. 32(C) and *Baker*. The trial court, in 2010, subsequently reissued the 1996 judgment entry of conviction, this time including the means of conviction.

{¶27} Staffrey filed an appeal from the 2010 judgment entry of conviction raising assignments of error dealing with ineffective assistance of counsel, the voluntariness of his plea, and two sentencing issues. We determined, however, we would not address the merits of Staffrey's arguments because the 2010 nunc pro tunc entry did not provide him with a second chance to appeal his conviction and sentence. Id. at ¶14. Relying on *Lester*, we explained:

{¶28} "Thus, the 1996 judgment of conviction which stated the fact of conviction was a final appealable order. However, Staffrey, upon his request, was entitled to a judgment of conviction that stated the manner of conviction. After direction from this court, the trial court issued a corrected judgment of conviction that stated the manner of conviction—that is the July 2010 order.

{¶29} "Despite Staffrey's insistence to the contrary, he does not have the right to appeal from the July 2010 order that solely added the manner of conviction. In *Lester*, the Court explained that when the sole purpose of the nunc pro tunc entry is to add the manner of conviction, the entry was merely correcting a clerical mistake. Id. at ¶20. 'Thus, the trial court's addition indicating how appellant's conviction was effected affected only the form of the entry and made no substantive changes.' Id. The nunc pro tunc entry is not a new final order from which a new appeal may be taken. Id.

{¶30} "Consequently, given the facts, the July 9, 2010 order is not a final order subject to appeal. Staffrey already exhausted the appellate process concerning his judgment of conviction; the nunc pro tunc entry does not give him the proverbial 'second bite at the apple'. The appeal is dismissed." Id. at ¶¶21-23.

{¶31} As was the case in *Staffrey*, there is no final order subject to appeal in this case. The trial court resentenced appellant in 2008. Appellant appealed and we affirmed his sentence. In 2010, upon appellant's motion and this court's order, the trial court filed a nunc pro tunc sentencing entry to include the means of conviction in compliance with *Baker*. The trial court's 2010 nunc pro tunc order is not a final order subject to appeal. It merely corrected a clerical mistake.

{¶32} Furthermore, appellant bases a large part of his argument on the United States Supreme Court case *Graham v. Florida* (2010), 130 S.Ct. 2011 . In that case, the trial court sentenced Graham, who was a juvenile at the time he committed armed burglary and attempted armed robbery, under Florida law to life in prison with no possibility of parole for the armed burglary count. The Court held that due to "the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences * * * the sentencing practice under consideration is cruel and unusual." Id. at 2030. Thus, the Court found that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. Id.

{¶33} Contrary to appellant's assertion, however, this argument is barred in this case by the doctrine of res judicata. *State v. Green*, 7th Dist. No. 10-MA-43,

2010-Ohio-6271, at ¶26, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 180. Appellant's argument regarding *Graham* is one more properly raised in a petition for postconviction relief.

{¶34} Thus, based on *Lester* and *Staffrey*, this appeal is hereby dismissed.

Vukovich, J., **concurs.**

DeGenaro, **J., concurs.**

APPROVED:

/s/ Gene Donofrio
Gene Donofrio, Judge

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

CASE NO. 10-MA-85

[Filed November 30, 2011]

STATE OF OHIO,	)
PLAINTIFF-APPELLEE,	)
	)
VS.	)
	)
BRANDON MOORE,	)
DEFENDANT-APPELLANT.	)
	)

JUDGMENT ENTRY

For the reasons stated in the opinion rendered herein, this appeal is dismissed. Costs taxed against Appellant.

/s/ Gene Donofrio

/s/ Joseph J. Vukovich

/s/ Mary DeGenaro
JUDGES.

APPENDIX D

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

CASE NUMBER: 02 CR 525

[Filed April 20, 2010]

STATE OF OHIO	)
PLAINTIFF	)
	)
VS.	)
	)
BRANDON MOORE	)
DEFENDANT	)
	)

JUDGE R. SCOTT KRICHBAUM

NUNC PRO TUNC JUDGMENT ENTRY OF SENTENCE

The Judgment Entry of Sentence dated January 24, 2008 is hereby amended Nunc Pro Tunc this 19th day of April, 2010 to comply with the dictates of Cr. R. 32(C), *State v. Baker*, 119 Ohio St.3d 97, 2008-Ohio-3330, 893 N.E.2d 163, *Dunn v. Smith*, 119 Ohio St. 3d 364, 2008-Ohio-4565, 894 N.E.2d 312, *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-3881, 892 N.E.2d 914, *State v. Culgan*, 9th Dist. No. 08 CA0080-M, 2009-Ohio-2783, and the Seventh District Court of Appeals Opinion on Case Number 09 MA 201.

Pursuant to State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470, the Seventh District Court of Appeals has remanded this matter for re-sentencing.

On this 24th day of January, 2008, Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. Present in open Court were Defendant Brandon Moore and his counsel Attorney Jennifer McLaughlin standing in for Attorney Damian Billak. The State of Ohio was represented by Assistant Prosecuting Attorney Dawn Krueger.

The Prosecutor informed the Court that the victim of this case was notified of today' s hearing. Said victim did not wish to attend and/or address the Court prior to re-sentencing.

Counsel for Defendant presented Defendant's mother who addressed the Court prior to re-sentencing.

The State of Ohio also addressed the Court regarding sentencing as did Defendant and his Counsel.

The Court has considered the trial record, the statements of counsel and of Defendant, the pre-sentence investigation report, as well as the purposes and principles of sentencing under O.R.C. 2929.11. The Court has balanced the seriousness and recidivism factors under O.R.C. 2929.12 and has followed the guidance by degree of felony in O.R.C. 2929.13.

The jury trial in this case commenced on September 23, 2002. The Court finds that Defendant was found Guilty Beyond a Reasonable Doubt by Jury verdicts on October 2, 2002 at 5:00 PM and has been convicted of Aggravated Robbery on Counts One, Two, and Three,

violations of O.R.C. 2911.01(A)(1)(C), felonies of the first degree, with firearm specifications, in violation of O.R.C. 2941.145(A); Rape on Counts Four, Five, and Six, violations of O.R.C.2907.02(A)(2)(B), felonies of the first degree, with firearm specifications, in violation of O.R.C. 2941.145(A); Complicity to Rape on Counts Seven, Eight, and Nine, violations of O.R.C. 2923.03(A)(2)(F) and 2907.02(A)(2)(B), felonies of the first degree, with firearm specifications, in violation of O.R.C. 2941.145(A); Kidnapping on Count Ten, a violation of O.R.C. 2905.01(A)(4)(C), a felony of the first degree, with a firearm specification, in violation of 2941.145(A); and Aggravated Menacing on Count Twelve, a violation of O.R.C. 2903.21(A)(B), a misdemeanor of the first degree. Judgment was entered on the above verdicts on October 2, 2002. On June 24, 2005 under Case Number 02 CA 216, the Seventh District Court of Appeals vacated the sentence, reversed the Judgment, and dismissed Count Eleven, Conspiracy to Aggravated Robbery, a violation of O.R.C. 2923.01(A)(1) and O.R.C. 2911.01(A)(1)(C), a felony of the second degree.

In accordance with the jury verdicts, the Court enters Judgment on the jury verdicts and specifications as set forth therein, except on Count Eleven, said count and specification having been dismissed by the Seventh District Court of Appeals.

Upon consideration of all of the foregoing, the Court finds that Defendant is not amenable to a community control sanction and that prison is consistent with the purposes and principles of O.R.C. 2929.11.

It is hereby Ordered that Defendant be taken from here to the Mahoning County Justice Center and from

there to the Department of Rehabilitation and Corrections to serve a term of ten years of incarceration on each of the three charges of Aggravated Robbery, felonies of the first degree on Counts One, Two, and Three, a term of three years of actual incarceration in the Department of Rehabilitation and Corrections on the firearm specification on Count One to be served prior to and consecutively to the sentences imposed for the charges of Aggravated Robbery, and a term of three years of actual incarceration in the Department of Rehabilitation and Corrections on the firearm specifications on Counts Two and Three to be served prior to and consecutively to the sentences imposed for the charges of Aggravated Robbery. The Court of Appeals has determined that the firearm specifications on Counts Two and Three merge, therefore, one firearm specification sentence is imposed on Count One and one firearm specification sentence is imposed on Counts Two and Three. Defendant is Ordered to serve a term of ten years of incarceration in the Department of Rehabilitation and Corrections on each of the three charges of Rape, felonies of the first degree on Counts Four, Five, and Six, and three year terms of actual incarceration in the Department of Rehabilitation and Corrections on the firearm specifications on Counts Four, Five, and Six to be served prior to and consecutively to the sentences imposed on the charges of Rape; Defendant is Ordered to serve a term of ten years of incarceration in the Department of Rehabilitation and Corrections on each of the three charges of Complicity to Rape, felonies of the first degree on Counts Seven, Eight, and Nine, and three year terms of actual incarceration in the Department of Rehabilitation and Corrections on the firearm specifications on Counts Seven, Eight, and Nine to be

served prior to and consecutively to the sentences imposed on the charges of Complicity to Rape. The Court of Appeals has determined that the firearm specifications on Counts Four, Five, Six, Seven, Eight, and Nine merge, therefore, one firearm specification sentence is imposed on Counts Four, Five, Six, Seven, Eight, and Nine. Defendant is Ordered to serve a term of ten years of incarceration in the Department of Rehabilitation and Corrections on the charge of Kidnapping, a felony of the first degree on Count Ten, and a term of three years of actual incarceration on the firearm specification on Count Ten, to be served prior to and consecutively to the sentence imposed on the charge of Kidnapping; and Defendant is Ordered to serve a term of six months of incarceration in the Mahoning County Justice Center on the charge of Aggravated Menacing, a misdemeanor of the first degree on Count Twelve, to be served concurrently to the above sentences as required by law.

Each of the felony sentences imposed herein is Ordered to be served consecutively to every other sentence, being necessary to fulfill the purposes and principles of O.R.C. 2929.11.

As the sentence for Aggravated Menacing is for a misdemeanor offense, by law, the sentence of incarceration of six months in the county jail runs concurrently to the sentences imposed for the felonies.

All four firearm specifications herein are Ordered to be served prior to and consecutively to the sentences on the first ten counts imposed herein.

Defendant is Ordered conveyed to the custody of the Department of Rehabilitation and Corrections.

Pursuant to O.R.C. 2967.19.1, the Defendant shall receive jail credit of 2348 days. This credit includes all time of incarceration served on this case up to and including today's date.

In accordance with recently adopted legislation by the State of Ohio, Defendant is now classified as a Tier Three sexual offender.

Defendant was advised that if he is ever released, pursuant to O.R.C. 2929.19 and O.R.C. 2967.28, he shall serve a mandatory period of five years of post release control supervised by the Adult Parole Authority subject to all laws, and all rules, regulations, and other conditions imposed by the Adult Parole Authority. Defendant was also advised of punishments for violations of Post Release Control and that such punishments are included within this sentence pursuant to O.R.C. 2929.19, 2929.141, and 2967.28 as follows: a period of post release control supervised by the Adult Parole Authority is mandatory in this case. The post release control period will be for a term of five years. A violation of any post release control rule or condition can result in the imposition of a more restrictive post release control sanction, and/or an increase in the duration of post release control up to the maximum duration set forth above, and/or re-imprisonment for up to nine months for each violation, not to exceed a cumulative maximum of ½ of the total prison term imposed herein. If Defendant violates the law or commits another felony while on a period of post release control, an additional prison term consisting of the maximum period of unserved time remaining on post release control or twelve months, whichever is greater, will be imposed and must be served

consecutively to any prison sentence imposed for a new felony committed by Defendant.

Defendant has been given notice under O.R.C. 2929.19(B) and of appellate rights under O.R.C. 2953.08 and Criminal Rule 32(B).

/s/ R. Scott Krichbaum
JUDGE R. SCOTT KRICHBAUM

cc: Prosecutor Ralph Rivera
Prosecutor Dawn Krueger
Attorney Damian Billak
Brandon Moore, #A 434-865
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901
Court of Appeals
DRC
MCJC
APA
(Done RM)

APPENDIX E

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CASE NO. 09 MA 201

[Filed March 30, 2010]

STATE ex rel.,	)
BRANDON MOORE,	)
RELATOR,	)
	)
- VS-	)
	)
JUDGE R. SCOTT KRICHBAUM,	)
COMMON PLEAS COURT JUDGE,	)
RESPONDENT.	)
	)

OPINION AND JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:
Petition for Writ of Mandamus.

JUDGMENT:
Petition Granted in Part and Denied in Part.

APPEARANCES:
For Relator:

Brandon Moore, Pro-se
#434-865
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901

For Respondent:

Attorney Paul J. Gains
Prosecuting Attorney
Attorney Ralph M. Rivera
Asst. Prosecuting Attorney
21 W. Boardman Street, 6th Floor
Youngstown, OH 44503

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 30, 2010

PER CURIAM:

{¶1} On December 30, 2009, Pro-se Relator Brandon Moore filed a petition for writ of mandamus and/or procedendo with this Court, seeking a writ to compel Respondent Judge Scott R. Krichbaum to issue a final appealable judgment entry of sentence for *State v. Moore*, Mahoning County Court of Common Pleas Case No. 02-CR- 525 in compliance with Crim.R. 32(C) as set forth in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. Moore contends that he is entitled to a new sentencing hearing and a revised sentencing entry that specifies Moore's manner of conviction. Respondent Krichbaum has filed a

combined answer· and Civ.R. 12(C) motion for judgment on the pleadings, arguing that this Court may not retroactively apply *Baker* to Moore's original sentencing order, pursuant to our decision in *State ex rel. Wells v. Jefferson Cty. Court of Common Pleas*, 7th Dist. No. 08 JE 28, 2008-Ohio-6972, affirmed, 122 Ohio St.3d 39, 2009-Ohio-2358, 907 N.E.2d 1166.[1] Moore argues in his response and supplemental memorandum that this Court is obligated to retroactively apply *Baker* to his original sentencing order pursuant to *State ex rel Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 635, 2008-Ohio-4609, 896 N.E.2d 805. Because we are bound to follow the Ohio Supreme Court's decision in *Culgan*, we must partially grant Moore's writs of mandamus and procedendo to compel Respondent to issue a sentencing entry that complies with Crim.R. 32(C).

{¶2} On October 2, 2002, subsequent to a trial by jury, Moore was convicted on twelve counts of aggravated robbery, rape, complicity to rape, kidnapping, conspiracy to commit aggravated robbery, and aggravated menacing, with accompanying firearm specifications. On October 29, 2002, the trial court issued a judgment entry of sentence imposing maximum consecutive sentences on all counts for a total of 141 years. Subsequent to Moore's direct appeal, this Court partially reversed and remanded the decision. *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85. Moore then filed an application to reopen his direct appeal based on a speedy trial violation claim, which this Court denied.

---

[1] Though the Ohio Supreme Court affirmed *Wells*, it did so on alternative grounds, and did not address the retroactivity issue.

State v. Moore, 7th Dist. No. 02 CA 216, 2005-Ohio-5630.

{¶3} On remand, the trial court merged some of Moore's firearm specifications, acknowledged the dismissal of one count, imposed maximum sentences for the remaining counts for a total of 112 years, and made the findings required by the then current law to run the sentences consecutively. Moore filed a second appeal, contending that the trial court's sentencing decision violated the Ohio Supreme Court's recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. This court vacated and remanded Moore's case for resentencing in compliance with *Foster. State v. Moore*, 7th Dist. No. 05 MA 178, 2007-Ohio-7215.

{¶4} The trial court held a third sentencing hearing on January 4, 2008, and explained at length all of the factors it considered pursuant to R.C. 2929.11 and R.C. 2929.12 in order to arrive at its sentencing decision. The trial court issued a sentencing entry on February 5, 20013, re-imposing the 112 year prison term and designating Moore as a Tier III sexual offender. Moore filed a third appeal, contending that the trial court's compliance with *Foster* violated his constitutional rights to due process. Appellate counsel requested leave to withdraw from the case and filed a no merit brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.. E.2d 493 and *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.E.2d 419. This Court granted appellate counsel's motion to withdraw and affirmed the decision of the trial court *State v. Moore*, 7th Dist No. 08 MA 20, 2009 Ohio-1505.

{¶5} On September 17, 2009, Moore filed a pro se "Motion to Resentence Defendant" with the Mahoning County Court of Common Pleas. Respondent Judge R. Scott Krichbaum denied the motion on September 22, 2009. Moore then filed the present petition for writ of mandamus and/or procedendo with this Court. Moore pleaded specific facts in his petition, and attached a verification affidavit, an affidavit regarding the genuineness of his attached exhibits, a memorandum of law in support of his petition, and a combined affidavit of indigence and of prior civil actions.

{¶6} Moore contends that his original and subsequent sentencing entries did not contain the guilty plea, the jury verdict, or the court finding upon which his convictions were based. Moore argues that his sentencing entry therefore did not constitute a final appealable order. Moore further argues that the appropriate remedy for his improper sentencing entry requires that the trial court both hold a new sentencing hearing and issue a judgment entry of sentence that complies with Crim.R. 32(C) and *Baker*.

{¶7} In order for a court to issue a writ of mandamus, a relator must have a clear legal right to the relief prayed for, the respondent must have a clear legal duty to perform the act requested, and the relator must have no plain and adequate remedy at law. *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, at ¶8. To be entitled to a writ of procedendo, "a relator must establish a clear legal right to require the court to proceed, a clear legal duty on the part of the court to proceed, and the lack of an adequate remedy in the ordinary course of law." *State ex rel. Miley v. Parrott*, 77 Ohio St.3d 64, 65,

1996-Ohio-350, 671 N.E.2d 24. "[P]rocedendo and mandamus will lie when a trial court has refused to render, or unduly delayed rendering, a judgment." *State ex rel. Reynolds v. Basinger*, 99 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459, at ¶5. See, also, *Culgan*, supra, at ¶8; *State ex rel. Agosto v. Cuyahoga Cty. Court of Common Pleas*, 119 Ohio St3d 366, 2008-Ohio-4607, 894 N.E.2d 314, at ¶8.

{¶8} Crim.R. 32(C) mandates that "[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.*** The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk." The Ohio Supreme Court held in *Baker* that a proper final appealable order in a criminal case requires "(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *Baker* at syllabus. The decision specified that multiple documents could not constitute the required final appealable order. Id. at ¶15.

{¶9} In order to seek a remedy for an improper final order that is lacking any of these four requirements, a defendant must file a motion in the trial court requesting a revised sentencing entry. *Dunn v. Smith*, 119 Ohio St.3d 364, 2008-Ohio-4565, 894 N.E.2d 312, at ¶8. If the trial court refuses the defendant's motion for a revised sentencing entry, the defendant may compel the trial court to act by filing an action for a writ of mandamus or procedendo with the court of appeals. Id. at ¶9. The appropriate remedy for a trial

court's failure to comply with Crim.R. 32(C) and *Baker* is a correction of the sentencing entry. Id. at ¶10; *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-3881, 892 NE2d 914, at ¶7; *Culgan*, supra, at ¶11.

{¶10} Moore's October 29, 2002 sentencing entry did not specify the guilty plea, the jury verdict, or the finding of the court upon which the convictions were based, and thus it did not constitute a final appealable order. The State concedes that Moore's sentencing entry does not comply with *Baker*, but argues that Moore's petition should be dismissed because Moore did not include a verification affidavit or an affidavit regarding previous civil actions as required by R.C. 20731.04 and R.C. 2969.25(A). However, Moore did include a verification affidavit on the final page of his petition, and also a statement that he had not filed any civil action or appeal in the last five years, which was included in his Combined Affidavit of Inmate Pursuant to R.C. 2969.21 et seq. Thus the State is incorrect that Moore's petition should be dismissed on procedural grounds.

{¶11} Additionally, the State argues that Moore's petition should be dismissed pursuant to this Court's holding that *Baker* cannot be applied retroactively, and that a defendant's remedy at law for an improper judgment entry of sentence would be a direct appeal. *Wells* at ¶5-6. Moore counters that this Court's analysis in *Wells* conflicts with the Ohio Supreme Court's application of *Baker* in *Culgan*.

{¶12} In *Wells*, this Court considered whether a defendant was entitled to writs of mandamus and procedendo compelling the trial court to enter a sentencing entry that complied with Crim.R. 32(C),

when his convictions in 1997 had been previously reviewed and affirmed on a direct appeal prior to the Ohio Supreme Court's July 9, 2008 decision in *Baker*. This Court noted that although the defendant's sentencing entry did not comply with *Baker*, the "*Baker* holding cannot be applied retroactively to a case in which the direct appeal became final almost eight years prior to the date *Baker* was decided. Although a new interpretation of a rule or statute by the Ohio Supreme Court is generally applied to cases that are then pending on appeal, this new interpretation is not applied to cases that have already completed the direct appeal process. *State v. Evans* (1972), 32 Ohio St.2d 185, 186, 291 N.E.2d 466. A new rule of law issued by the Ohio Supreme Court only applies to active cases pending on the date of announcement of the new rule. *State v. Lynn* (1966), 5 Ohio St.2d 106, 108, 214 N.E.2d 226." *Wells* at ¶5 This Court further concluded that Wells had a prior adequate remedy at law through his opportunity to raise the sentencing formality issue in his direct appeal, and thus that mandamus could not lie. Id. at ¶6.

{¶13} In *Culgan*, the Supreme Court of Ohio considered whether a defendant was entitled to writs of mandamus and procedendo compelling the trial court to enter a judgment on his convictions that complied with Crim.R. 32(C), even though his convictions in 2002 had been previously reviewed and affirmed on a direct appeal. *Culgan* at ¶3. The Ohio Supreme Court concluded that the defendant was entitled to a new sentencing entry irrespective of prior appellate review, because the original sentencing entry did not constitute a final appealable order. Id. at ¶10-11. Because the Ohio Supreme Court applied *Baker* to

Culgan's petitions even though Culgan's convictions and direct appeal had been finalized prior to the decision in *Baker*, this Court can no longer hold that *Baker* may only be applied prospectively. We therefore conclude that we are obligated to apply *Baker* retrospectively.

{¶14} The dissenting opinion in *Culgan* noted that the defendant was not deprived of the opportunity to appeal his convictions even though his sentencing entry did not specify the manner of conviction, and the appellate court was able to determine that the defendant had pleaded guilty to the counts for which he was convicted. *Culgan* at ¶15. Indeed, the injury from a formally improper sentencing entry as articulated in *Baker* is that "appellate review of the case would be impossible." *Baker* at ¶16. The dissenting opinion in *Culgan* concluded that the defendant had already been provided an adequate remedy at law through his appeal, and thus that the majority's conclusion compelled a vain act which elevated form over substance. *Culgan* at ¶16-17.

{¶15} In the case at hand, Moore was provided review of the merits of his case on appeal, and further consideration of sentencing issues in two additional appeals. To say that Moore is now entitled to a new sentencing entry due to the possibility that "appellate review of the case would be impossible" truly does seem to elevate form over substance. However, because we can find no pertinent distinctions between the case at hand and that of *Culgan*, we find that we must reach the same conclusion issued in *Culgan* and grant Moore's writs to the extent that they demand a sentencing entry that complies with Crim.R. 32(C).

{¶16} Moore further argues that the trial court must be compelled to hold a new sentencing hearing in order to produce a valid sentencing entry. In support of his argument, Moore cites to the Ninth District's opinion in *Culgan* upon remand from the Ohio Supreme Court. *State v. Culgan*, 9th Dist. No. 08CA0080-M, 2009-Ohio-2783. On remand, the Ninth District noted that the trial court had issued a nunc pro tunc judgment entry in order to comply with the Ohio Supreme Court's decision. Id. at ¶5. The Ninth District reversed and remanded the trial court's nunc pro tunc entry, holding that the trial court was also required to resentence Culgan in compliance with *Foster*. Id. at ¶6. Moore contends that the Ninth District's conclusion indicates that he must be afforded a new sentencing hearing.

{¶17} We find that the Ninth District's post-remand decision does not apply to the case at hand for multiple reasons. The Ohio Supreme Court specified in *Foster* that the decision was only to be applied to cases then pending on direct review. *Foster* at ¶104. Culgan was sentenced on August 2, 2002, his sentence was affirmed by the Ninth District on May 28, 2003, and the Ohio Supreme Court declined further review on November 5, 2003. Culgan's case was therefore not pending on direct review when *Foster* was decided on February 27, 2006. Because *Foster* is limited to prospective application, we would not have reached the same conclusion as the Ninth District in *Culgan*. Moreover, Moore's case is factually distinguishable from *Culgan*, as Moore has already been resentenced in compliance with *Foster*. Moore cites no further authority to justify a new sentencing hearing, and we find no legal basis for the same. We conclude that Moore is not entitled to a new

sentencing hearing, and is only entitled to a revised sentencing entry pursuant to Ohio Supreme Court decisions in *Dunn*, *McAllister*, and *Culgan*, supra. We therefore deny Moore's writs to the extent that they demand a new sentencing hearing.

{¶18} Given the foregoing, we partially grant Moore's writs of mandamus and procedendo to compel Respondent to issue a revised sentencing entry that complies with Crim.R. 32(C).

{¶19} Costs taxed against Respondent. Final Order. Clerk to serve notice upon the parties as provided by the Civil Rules.

/s/ Mary DeGenaro
JUDGE MARY DeGENARO

/s/ Gene Donofrio
JUDGE GENE DONOFRIO

/s/ Cheryl L. Waite
JUDGE CHERYL L. WAITE

APPENDIX F

[Cite as *State v. Moore*, 2009-Ohio-1505.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CASE NO. 08 MA 20

[Filed March 24, 2009]

STATE OF OHIO,)
PLAINTIFF-APPELLEE,)
)
-VS.-)
)
BRANDON MOORE,)
DEFENDANT-APPELLANT.)
)

OPINION

CHARACTER OF PROCEEDINGS:
Criminal Appeal from Common Pleas Court, Case No. 02 CR 525.

JUDGMENT:
Affirmed. Counsel's Motion to Withdraw Granted.

APPEARANCES:
For Plaintiff-Appellee:

Attorney Paul J. Gains
Prosecuting Attorney
Attorney Ralph M. Rivera
Assistant Prosecuting Attorney
21 W. Boardman St., 6th Floor
Youngstown, OH 44503

For Defendant-Appellant:

Attorney Gary Van Brocklin
P.O. Box 3537
Youngstown, OH 44513

Brandon Moore, Pro-se
#434-865
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901-0788

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

Dated: March 24, 2009

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Pro se Appellant, Brandon Moore, appeals the February 5, 2008 decision of the Mahoning County Court of Common Pleas that resentenced Moore to maximum consecutive prison sentences for aggravated robbery, rape, kidnapping and aggravated menacing. Counsel for Moore filed a no merit brief pursuant to

Anders v. California (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 and *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.E.2d 419, and requested leave to withdraw from the case. Moore's pro-se brief argues that his resentencing pursuant to *Foster* constituted a violation of the Due Process and Ex Post Facto Clauses. It has been well established that *Foster* does not violate due process or the prohibition against ex post facto laws. After a thorough review of the filings, transcripts, and pro-se argument for this case, we agree that there is no meritorious issue on appeal. Accordingly, counsel's motion to withdraw is granted, and the judgment of the trial court is affirmed.

{¶2} On October 2, 2002, subsequent to a trial by jury, Moore was convicted on 12 counts of aggravated robbery, rape, complicity to rape, kidnapping, conspiracy to commit aggravated robbery, and aggravated menacing, along with 11 firearm specifications. The trial court imposed maximum consecutive sentences on all counts for a total of 141 years. Moore appealed that decision and on June 24, 2005, this court partially reversed and remanded the decision. *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85. On remand, the trial court merged some of Moore's firearm specifications, acknowledged the dismissal of one count, imposed maximum sentences for the remaining counts for a total of 112 years, and made the findings required by the then current law to run the sentences consecutively. Moore applied to reopen his direct appeal based on a speedy trial violation claim, which was denied by this court on October 20, 2005 as

meritless. *State v. Moore*, 7th Dist. No. 02 CA 216, 2005-Ohio-5630.

{¶3} Subsequent to the Ohio Supreme Court's decision in *Foster*, Moore filed another appeal. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. This court vacated and remanded Moore's case for resentencing pursuant to *Foster*. *State v. Moore*, 7th Dist. No. 05 MA 178, 2007-Ohio-7215. The trial court held a third sentencing hearing on January 4, 2008, and explained at length all of the factors it considered pursuant to R.C. 2929.11 and R.C. 2929.12 in order to arrive at its sentencing decision. The trial court issued a sentencing entry on February 5, 2008, re-imposing the 112 year prison term and designating Moore as a Tier III sexual offender. This third appeal followed. Moore's appointed counsel filed a no merit brief and request to withdraw, pursuant to *Anders* and *Toney*, supra. Moore was given the opportunity to file his own appellate brief, which he did on November 3, 2008, identifying one assignment of error.

{¶4} This court has identified seven issues and considerations for our review of non-merit briefs:

{¶5} "1. An indigent accused has a constitutional right to court-appointed counsel for the purposes of appeal from his conviction.

{¶6} "2. Court-appointed counsel should conscientiously examine the record of the trial court and present any assignments of error which could arguably support the appeal.

{¶7} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and

that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶8} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.

{¶9} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶10} "6. Where the Court of Appeals make such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.

{¶11} "7. Where the Court of Appeals determines that an indigents appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed. *Toney* at syllabus.

{¶12} In the present case, counsel for Moore noted that this is the third time Moore's case has been before this court, that the most recent appearance before the trial court was for the limited purpose of resentencing pursuant to the Ohio Supreme Court's decision in *Foster*, and that the trial court exercised its discretion in imposing Moore's sentence pursuant to *Foster*.

Counsel concluded that he was unable to identify any issue that could arguably support an appeal.

{¶13} We proceed to examine the entire record below, along with the assignment of error identified by Moore pro-se, to determine if his appeal wholly lacks merit. Given that we last remanded this case solely for resentencing pursuant to *Foster*, our review of Moore's case is limited to issues within Moore's most recent sentencing hearing, specifically, whether the trial court followed the mandates of *Foster* in reaching its sentencing decision.

{¶14} When reviewing a felony sentence, an appellate court first reviews the sentence de novo to ensure that the sentencing court clearly and convincingly complied with the applicable laws. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶4. If this inquiry is satisfied, we then review the trial court's decision for abuse-of-discretion. Id. A trial court's sentence would be contrary to law if, for example, it were outside the statutory range, in contravention to a statute, or decided pursuant to an unconstitutional statute. Id. at ¶15. An abuse of discretion, "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶15} Trial courts have the discretion to impose a sentence within the statutory range for the offense, and are not required to give reasons for imposing more than the minimum sentence. *Kalish* at ¶11, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶100. The courts still must carefully consider

all of the statutes that apply to the felony case, including R.C. 2929.11 and R.C. 2929.12, which provide guidance regarding the purposes of sentencing and factors indicating or counter-indicating the seriousness of the offense or the likelihood of recidivism. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, N.E.2d, at ¶38. However, the record need not indicate anything beyond the fact that the court considered such statutes. *State v. Jones*, 7th Dist. No. 05CR375, 2008-Ohio-3336, at ¶14.

{¶16} In this case, Moore had ultimately been convicted and sentenced for the following offenses: three counts of aggravated robbery, in violation of R.C. 2911.01(A1C), with firearm specifications pursuant to R.C. 2941.145(A); three counts of rape, in violation of R.C. 2907.07(A2B), with firearm specifications pursuant to R.C. 2941.145(A); three counts of complicity to rape, in violation of R.C. 2923.03(A2F) and R.C. 2907.02(A2B), with firearm specifications pursuant to R.C. 2941.145(A); one count of kidnapping, in violation of R.C. 2905.01(A4C), with a firearm specification pursuant to R.C. 2941.145(A); and one count of aggravated menacing, in violation of R.C. 2903.21(AB). These counts total ten first-degree felonies, each with firearm specifications, and one first-degree misdemeanor. The statutory sentence range for a first degree felony is three to ten years, and the statutory sentence range for a first degree misdemeanor is up to six months. R.C. 2929.14(A)(1); R.C. 2929.24(A)(1). The sentencing court imposed a sentence of ten years for each first degree felony offense, and a sentence of six months for the first degree misdemeanor offense, thus within the sentencing ranges for each offense. Firearm

specifications pursuant to R.C. 2941.145 carry three-year mandatory prison terms, which the trial court imposed in compliance with the statute. The trial court also stated that it took the guidance of R.C. 2929.11 and R.C. 2929.12 into consideration, and explicitly stated that it would not rely on sections of Chapter 2929 rendered unconstitutional by *Foster*. The trial court's imposition of each sentence was thus not contrary to law.

{¶17} The trial court heard statements from Moore, Moore's mother, counsel for both sides, and took such statements into consideration. The trial court stated that it considered the principles and policies behind sentencing, took into account the age of both the defendant and the victim, and listed many seriousness and recidivism factors. The trial court's thorough consideration of such factors indicates that it did not proceed in an unreasonable, arbitrary or unconscionable manner by imposing maximum and consecutive sentences.

{¶18} Pursuant to the guidelines of *Toney*, this court has conducted a thorough examination of the record. As this is the third appeal of Moore's original case, most issues are res judicata for the purposes of this appeal. The resentencing hearing and subsequent sentence were decided in accordance with the law and within the discretion of the sentencing court. We conclude, as did counsel, that there are no arguable non-frivolous issues that could be presented on appeal.

{¶19} Moore puts forth the following sole assignment of error:

{¶20} "The imposition of maximum consecutive sentences to first time offender whose offenses occurred prior to *State v. Foster* pursuant to the revised statute is unconstitutional because the revised statutes' statutory maximum sentences are significantly higher than those in effect when the Appellant was originally sentenced. See *Rogers v. Tennessee* (2001), 532 U.S. 451, 457, 121 S.Ct. 1693. As a result, the sentence violates the due process clauses of the United States Constitution."

{¶21} Moore argues that the application of *Foster* violates the prohibition against ex post facto laws because it involves an expansion of the maximum sentences allowed by statute. Moore indicates that this expansion occurs because *Foster* eliminated the presumptions of minimum concurrent terms that existed at the time of Moore's offenses.

{¶22} Upon review of Moore's most recent sentencing transcript, Moore failed to raise his ex post facto and due process arguments before the trial court at his resentencing hearing. It is therefore not necessary for this court to reach the merits of Moore's argument. By failing to raise the issue below, Moore cannot compel this court to address the merits of his claim. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶377, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus.

{¶23} Even if this court addresses the merits of Moore's appeal, his argument fails. This court has conclusively determined that the retroactive application of *Foster* does not violate the Ex Post Facto Clause or a defendant's right to due process of law. *State v. Palmer*, 7th Dist. No. 06-JE-20, 2007-Ohio-

1572, appeal not allowed by 115 Ohio St.3d 1410, 2007-Ohio-4884, 873 N.E.2d 1315. More specifically, the statutory range of punishment for crimes did not expand pursuant to *Foster*, contrary to what Moore claims. *State v. Stone*, 7th Dist. No. 08 MA 64, 2008-Ohio-6296, at ¶8. Although the sentencing court's obligations have evolved, "the statutory range of punishment a criminal defendant faced before *Foster* is the same as they face after *Foster*." Id., citing *Palmer* at ¶63-67. The sentencing range for felonies is delineated in R.C. 2929.14(A), a section which was unaffected by *Foster*. "As such, a post- *Foster* offender will still be subject to the same range of punishment as he would have prior to *Foster,* i.e. the offenders had notice of the range of statutory ranges and maximum sentences." *State v. Hawkins*, 7th Dist. No. 07 JE 14, 2008-Ohio-1529, at ¶26.

{¶24} Because Moore's argument is the same as the arguments we have rejected in *Palmer* and subsequent cases, we will continue to adhere to our prior decisions and conclude that the trial court did not violate Moore's rights under the Due Process and Ex Post Facto Clauses when resentencing him pursuant to *Foster*. Moore's sole assignment of error is meritless. Accordingly, the judgment of the trial court is affirmed and counsel's motion to withdraw is granted.

Vukovich, P.J., concurs.

Waite, J., concurs.

APPENDIX G

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

CASE NUMBER: 02 CR 525

[Filed February 5, 2008]

STATE OF OHIO	)
PLAINTIFF	)
	)
VS.	)
	)
BRANDON MOORE	)
DEFENDANT	)
	)

JUDGE R. SCOTT KRICHBAUM

JUDGMENT ENTRY OF SENTENCE

Pursuant to State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470, the 7th District Court of Appeals has remanded this matter for re-sentencing.

On this 24th day of January, 2008, Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. Present in open Court were Defendant Brandon Moore and counsel Attorney Jennifer McLaughlin for Attorney Damian Billak. The State of Ohio was represented by Assistant Prosecuting Attorney Dawn Krueger.

The Prosecutor informed the Court that the victim of this case was notified of today's hearing. Said victim

did not wish to attend and/or address the Court prior to resentencing.

Counsel for Defendant presented Defendant's mother who addressed the Court prior to sentencing.

The State of Ohio also addressed the Court regarding sentencing as did Defendant and his Counsel.

The Court has considered the record, statements of counsel and of Defendant, the pre-sentence investigation report, as well as the purposes and principles of sentencing under O.R.C. 2929.11. The Court has balanced the seriousness and recidivism factors under O.R.C. 2929.12 and has followed the guidance by degree of felony in O.R.C. 2929.13.

The Court finds that Defendant has been convicted of Aggravated Robbery in Counts 1, 2, and 3, violations of O.R.C. 2911.01(A)(1)(C), felonies of the first degree, with firearm specifications in violation of O.R.C. 2941.145(A); Rape in Counts 4, 5, and 6, violations of O.R.C.2907.02(A)(2)(B), felonies of the first degree, with firearm specifications, in violation of O.R.C. 2941.145(A); Complicity to Rape in Counts 7, 8, and 9, violations of O.R.C. 2923.03(A)(2)(F) and 2907.02(A)(2)(B), felonies of the first degree, with firearm specifications, in violation of O.R.C. 2941.145(A); Kidnapping, a violation of O.R.C. 2905.01(A)(4)(C), a felony of the first degree with a firearm specification 2941.145(A); and Aggravated Menacing, a violation of O.R.C. 2903.21(A)(B), a misdemeanor of the first degree.

Upon consideration of all of the foregoing, the Court finds that Defendant is not amenable to a community

control sanction and that prison is consistent with the purposes and principles of O.R.C. 2929.11.

It is hereby Ordered that Defendant be taken from here to the Mahoning County Justice Center and from there to the Department of Rehabilitation and Corrections to serve a term of ten years on each of the charges of Aggravated Robbery, felonies of the first degree, in Counts 1, 2, and 3; three years of actual incarceration on the firearm specification in Count 1 and three years of actual incarceration on the firearm specifications in Counts 2 and 3 to be served prior to and consecutively to the sentences imposed for the charges of Aggravated Robbery; The Court of Appeals has determined that the firearm specifications in Counts 2 and 3 merge, therefore, one firearm specification sentence is imposed for Count 1 and one firearm specification sentence is imposed on Counts 2 and 3; Defendant is to serve a term of ten years of incarceration in the Department of Rehabilitation and Corrections on each of the charges of Rape, felonies of the first degree, in Counts 4, 5, and 6 and three year terms of actual incarceration on the firearm specifications in Counts 4, 5, and 6 to be served consecutively to the sentences imposed for the charges of Rape; Defendant is to serve ten years of incarceration in the Department of Rehabilitation and Corrections on each of the charges of Complicity to Rape, felonies of the first degree, in Counts 7, 8, and 9 and three year terms of actual incarceration for the firearm specifications in Counts 7, 8, and 9 to be served prior to and consecutively to the sentences imposed for the charges of Complicity to Rape. The Court of Appeals has determined that the firearm specifications in Counts 4, 5, 6, 7, 8, and 9 merge, therefore one

firearm specification sentence is imposed for Counts 4, 5, 6, 7, 8, and 9; Defendant is to serve ten years of incarceration in the Department of Rehabilitation and Corrections on the charge of Kidnapping, a felony of the first degree, in Count 10 and three years of actual incarceration for the firearm specification in Count 10, to be served prior to and consecutively to the sentence imposed for the charge of Kidnapping; and Defendant is to serve six months of incarceration in the Mahoning County Justice Center on the charge of Aggravated Menacing, a misdemeanor of the first degree, to be served concurrently to the above sentences as required by law.

Each of the felony sentences imposed herein is Ordered to be served consecutively to every other sentence, being necessary to fulfill the purposes and principles of O.R.C. 2929.11.

As the sentence for Aggravated Menacing is for a misdemeanor offense, by law, the sentence of incarceration of six months in the county jail runs concurrently to the sentences imposed for the felonies.

All four firearm specifications are Ordered served prior to and consecutively to the sentences on the first ten counts imposed herein.

Defendant is Ordered conveyed to the custody of the Department of Rehabilitation and Corrections. Pursuant to O.R.C. 2967.19.1, the Defendant shall receive jail credit of 2348 days. This credit includes all time of incarceration served on this case up to and including today's date.

In accordance with recently adopted legislation by the State of Ohio, Defendant is now classified as a Tier Three sexual offender.

If Defendant is ever released, he shall serve a mandatory period of five years of post release control supervised by the Adult Parole Authority and subject to all of their rules and regulations.

Defendant has been given notice under O.R.C. 2929.19(B) and of appellate rights under O.R.C. 2953.08 and Criminal Rule 32(B). Defendant was also advised of post release control pursuant to O.R.C. 2967.28 at the time of his plea, during the sentencing hearing, and at this re-sentencing hearing.

/s/ R. Scott Krichbaum
JUDGE R. SCOTT KRICHBAUM

cc: Prosecutor Dawn Krueger
Attorney Jen McLaughlin
DRC
MCJC
APA

APPENDIX H

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

CASE NO. 06 MA 106

[Filed August 8, 2013]

STATE OF OHIO,
PLAINTIFF-APPELLEE,

VS.

CHAZ BUNCH,
DEFENDANT-APPELLANT.

JUDGMENT ENTRY

Defendant-appellant Chaz Bunch filed a joint App.R. 14(B) application for extension of time to file a delayed application for reconsideration and App.R. 26(A) application for reconsideration. One of the issues raised in Bunch's direct appeal was whether the 89 year sentence for a 16 year old offender constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *State v. Bunch*, 7th Dist. No. 06MA106, 2007-Ohio-7211, ¶40-41. We found that the sentence did not amount to cruel and unusual punishment. *Id.* at ¶48. Years after that decision the United States Supreme Court released two decisions, *Miller v. Alabama*, 132 S.Ct 2455, ___ U.S.

___ (2012) and *Graham v. Florida*, 130 S.Ct. 2011, 560 U.S. 48 (2010). In his application for reconsideration, Bunch argues that these decisions support his position that an 89 year sentence, an equivalent to a life sentence without parole, for a juvenile is cruel and unusual punishment.

Before we can address the merits of the application for reconsideration, we must address the timeliness of the application. Pursuant to App.R. 26(A) an application for reconsideration shall be made no later than 10 days after announcement of the decision. Our decision finding no merit with the cruel and unusual punishment argument was filed with the clerk and announced on December 21, 2007. Clearly, pursuant to that rule, the 2013 application for reconsideration is untimely.

Bunch attempts to make his application timely by filing an App.R. 14(B) motion for enlargement of time to file the application for reconsideration. The language of this rule provides that the time period for filing an application for reconsideration cannot be enlarged unless there is a showing of extraordinary circumstances. App.R. 14(B).

The state contends that extraordinary circumstances should not be found because the motion for enlargement and the application for reconsideration could have and should have been filed more closely in time to when the United States Supreme Court issued its decisions in *Grahm* and *Miller*.

We agree with the state that in this instance there has not been a showing of extraordinary circumstances for two reasons.

First, there is a lengthy delay between the United States Supreme Court decisions of *Miller* and *Graham* and the current application for reconsideration and motion for enlargement.

The *Graham* decision was decided on May 17, 2010, and in that case the Court held that the Eighth Amendment's prohibition on cruel and unusual punishment prohibits the imposition of a life without parole sentence on a juvenile offender who committed a nonhomicide offense. *Graham*, 130 S.Ct. 2011. Two years later on June 25, 2012, the Court, in *Miller*, extended that holding. The Court found subjecting a juvenile offender to a mandatory life sentence without the possibility of parole for a homicide offense violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Miller*, 132 S. Ct. at 2475.

In reviewing *Graham* and *Miller*, *Graham* is the most applicable to Bunch; Bunch did not commit a homicide. However, Bunch's application for reconsideration and motion for enlargement was filed almost three years after *Graham.* This is a lengthy delay. Admittedly, during this delay Bunch was filing petitions for writs of habeas corpus in the federal courts arguing that the *Graham* and *Miller* decisions support his position that the sentence he received constitutes cruel and unusual punishment. For instance, in 2009, prior to the United State Supreme Court's decision in *Graham*, Bunch filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of Ohio. *Bunch v. Smith*, N.D. Ohio No. 1:09CV0901, 2010 WL 750116 (Mar. 2, 2010). That petition was dismissed on March 2, 2010. *Id.* Following that decision, the Sixth Circuit Court of

Appeals granted a certificate of appealability, but ultimately affirmed the dismissal of the petition on the merits. *Bunch v. Smith*, 685 F.3d 546, 549 (6th Cir.2012). In addressing the merits of the petition, the Sixth Circuit Court of Appeals did discuss the United States Supreme Court's decision in *Graham*. *Id.* Bunch appealed the Sixth Circuit Court's dismissal to the United States Supreme Court. Eight days before filing the delayed application for reconsideration with this court, the United States Supreme Court denied Bunch's petition for writ of certiorari. *Bunch v. Bobby*, ___ S.Ct. ___ (Apr. 22, 2013).

Despite the fact that Bunch has promptly pursued relief through the federal system, the application for reconsideration filed in the state court 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. Had the application and motion been filed more closely in time to the *Graham* decision it could support a finding of extraordinary circumstances.

Secondly, and most important, when appellate courts have found extraordinary circumstances based on binding decisions from higher courts, they have done so when the higher court's case is directly on point. *State v. Lawson*, 2013-Ohio-803, 984 N.E.2d 1126, ¶6 (10th Dist.) (Opinions from Ohio Supreme Court directly apply to appellate court holding and therefore constitutes exceptional circumstances); *State v. Truitt*, 1st Dist. No. C-050188, 2011-Ohio-1885, ¶3 (same); *State v. Thomas,* 1st Dist. No. C-010724, 2009-Ohio-

971, ¶5 (same). The basis for this reasoning is that 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. *See State v. Weaver*, 7th Dist. No. 12BE21, 2013-Ohio-898, ¶6 (reasons for granting reconsideration petitions). Thus, if the higher court's binding decision is not directly on point there would not be an obvious error and, as such, the requisite finding of extraordinary circumstances, to enlarge the time for filing an application for reconsideration, would not be warranted.

Here, neither *Graham* nor *Miller* is directly on point. In both of those cases the offenders received life sentences without the possibility of parole. Bunch did not; he received a consecutive, fixed term sentence of 89 years. Admittedly Bunch's sentence may be considered a "de facto" life sentence since he was 16 years old when he committed the crimes and the stated term of the sentence will not expire until he is 105 years old. However, the United State Supreme Court's decisions were based specifically on life sentences without the possibility of parole; they were not based on "de facto" life sentences.

Furthermore, 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. In fact, many courts have declined to extend the holding to "de facto" life sentences. *Goins v. Smith*, N.D.Ohio No. 4:09-CV-1551, 2012 WL 3023306 (July 24, 2012) ("even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham*'s

holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Kasic*, 228 Ariz. 228, 265 P.3d 410, 415–16 (Ariz.Ct.App.2011) (concurrent and consecutive prison terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*); *Henry v. State*, 82 So.3d 1084, 1089 (Fla.Dist.Ct.App.2012) (a nonhomicide child offender's ninety-year sentence is not unconstitutional); *Walle v. State*, 99 So.3d 967, 972–73 (Fla.Dist.Ct.App.2012) (refusing to extend *Graham* to aggregate sentences totaling ninety-two years on reasoning that *Graham* applied only to single sentences); *Adams v. State*, 288 Ga. 695, 707 S.E.2d 359, 365 (2011) (child's seventy-five-year sentence and lifelong probation for child molestation did not violate *Graham*); *People v. Taylor*, 2013 IL App (3d) 110876, 984 N.E.2d 580, (Ill.App.Ct.2013) (*Graham* does not apply because the defendant was only sentenced to forty years and not life without possibility of parole); *Bunch*, 685 F.3d at 550-51 (stating United States Supreme Court in *Graham* "did not address juvenile offenders, like Bunch, who received consecutive, fixed-term sentences for committing multiple nonhomicide offenses"). *But see People v. Rainer*, ___ P.3d ___, 2013 COA 51, 2013 WL 1490107 (Colo. App.2013) (*Graham*'s holding and reasoning can and should be extended to apply to term-of-year sentences that result in a "de facto" life without parole sentence); *People v. Caballero*, 55 Cal. 4th 262, 282 P.3d 291 (Cal.2012) (held that term-of-years sentences that extend beyond a juvenile's life expectancy, and are imposed for nonhomicide offenses, violate the Eighth Amendment pursuant to *Graham*).

Consequently, since neither *Graham* nor *Miller* is directly on point there is no basis to find extraordinary circumstances in this case.

In conclusion, 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. Accordingly, the motion to enlarge is denied and the application for reconsideration is dismissed as untimely.

/s/ Joseph J. Vukovich
JOSEPH J. VUKOVICH,

/s/ Gene Donofrio
GENE DONOFRIO,

/s/ Cheryl L. Waite
CHERYL L. WAITE, JUDGES.