

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

CHAZ BUNCH,

Appellant.

08-0276

Case No. _____

On Appeal from the Mahoning County
Court of Appeals, Seventh Appellate
District, Case No. 06 MA 106

**APPELLANT CHAZ BUNCH'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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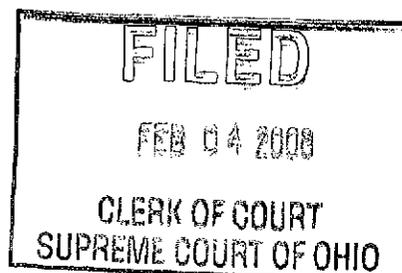


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Explanation of Why this Case Presents a Case of Public or Great General Interest and Involves a Substantial Constitutional Question

This case gives this Court an ideal test case to set an outer limit for the discretion of trial courts in sentencing. The facts of this case were brutal—a gang rape of a young woman who was returning from work at a group home. But Chaz was 16 at the time of the offense, and the juvenile court said on the record that a maximum sentence was “probably” going to have to be the sentence simply because that’s the sentence the court always imposes in rape cases:

See that lady sitting at the table there? She’s the lady who prosecutes rape cases in this community now. And she can tell you that somebody who rapes somebody in this court gets sentenced to the maximum. So if it’s going to be commensurate with a similar crime for similar offenders, that’s probably what I have to do.

T.p. (resentencing) 29. Chaz’s total sentence, including convictions for complicity to the acts of others, is 89 years with no eligibility for judicial release, parole, or good time. He will be released only if he lives beyond his 105th birthday.

The Court of Appeals put form over substance when it seized on the expression word “probably” to strip the true meaning from what the trial judge was saying. Opinion at ¶35. Appellant respectfully suggests that the trial court meant what it said when it declared, “somebody who rapes somebody in this court gets sentenced to the maximum.” Even if the word “probably” hedged the declaration of a blanket policy, the trial court was improperly using a presumption where the General Assembly provided and this Court provided none.

Life Without Parole and the Eighth Amendment

Kids grow up, but adults frequently do not. A sentence of life without parole cruelly and unusually throws away a child’s life. Given what the United States Supreme Court has held about juveniles’ culpability and how it is mitigated quite meaningfully by the juveniles’ lack of development and maturity, a sentence of life without parole (“LWOP”) sentence for juveniles must share the same constitutional fate as the juvenile death penalty. The United States Supreme

Court's decision declaring the death penalty for juveniles unconstitutional, Roper v. Simmons (2005), 543 U.S. 551, recognizes that children are different from adults in their ability to form judgments, in their weakness and vulnerability, in their openness to suggestion, in their ability to change, to grow, to have meaningful lives and to become productive citizens. A life sentence that denies any possibility of release or parole to children is a disproportionate punishment and illegal punishment.

Chaz's sentence is effectively life without parole.

Chaz's 89-year sentence is the equivalent of life without parole because he will have to live to be more than 105 years old to complete his prison term. A 16 year old can expect to live only an additional 62 years.¹ A 16 year old African American boy can expect to live only an additional 54 years.² Chaz would have to exceed his life expectancy by more than 35 years to leave prison. His sentence is life without parole in all but name.

A Sentence Of Life Without Parole For a Sixteen Year Old Child Violates The Eighth Amendment To The United States Constitution As It Constitutes "Cruel And Unusual Punishment."

A mandatory sentence of life imprisonment without the possibility of parole for a sixteen year old child is a cruel and unusual sentence. In Roper v. Simmons (2005), 543 U.S. 551, the Court struck down any death sentence for a juvenile because the "evolving standards of decency that mark the progress of a maturing society" demonstrate that it was disproportionate to execute a defendant for a murder committed while the defendant was under the age of eighteen. Id. at 561 (citation omitted). The Simmons Court concluded that states may not impose on a child a sentence that is marked by finality and the implication that the offender cannot be rehabilitated.

¹ Nationwide Publishing Company, 2006, Form 4026D, <http://www.claimspages.com/documents/docs/4026D.pdf> (last visited December 11, 2006).

² Elizabeth Arias, "United States Life Tables, 2003," National Vital Statistics Reports, Vol. 54, No. 14, April 19, 2006, Centers for Disease Control and Prevention, http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf (last visited December 11, 2006).

The scientific and sociological studies that the United States Supreme Court found persuasive in demonstrating that juveniles were less mature and possessed less sense of responsibility (and therefore were less deserving of the death penalty) apply equally to juvenile LWOP sentences.³ LWOP sentences are frequently the harshest possible sentence for an offender. They represent a determination that the offender's culpability is not mitigated in any meaningful way.

As the Supreme Court held, sixteen year olds do stupid and horrible things that the same person at 36, 46 or 56 years old would not commit. The Court explained that children under eighteen have diminished culpability and should be treated differently than adults:

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. ...

³ The Court cited the following articles and studies in its opinion: J. Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 *Developmental Review* 339 (1992); Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009, 1014 (2003); E. Erikson, Identity: Youth and Crisis (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. See Elizabeth Cauffman and Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 *Behavioral Sciences and the Law* 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88(1) *Journal of Criminal Law and Criminology* 137, 137-189 (1997); Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation, 21(22) *The Journal of Neuroscience* 8819, 8819-8829 (2001); National Institute of Mental Health, Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence, NIH Publication No. 01-4929 (2001); Kristen Gerencher, Understand your teen's brain to be a better parent. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, “Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,” 32 *Hofstra L. Rev.* 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ...

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.... The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." ... Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.

Id. at 569-70 (internal citations omitted).

Kids grow up, but adults frequently do not. A sentence of life without parole cruelly and unusually throws away a child's life. This Court should accept jurisdiction to bring Ohio's sentencing code in line with federal constitutional limits.

Statement of the Case

Chaz Bunch appeals his resentencing. After a bindover, a jury convicted him of three counts each of rape, conspiracy to commit rape, and aggravated robbery, as well as single counts of kidnapping, aggravated robbery, conspiracy to commit aggravated robbery, and aggravated menacing. Firearm specifications were attached to each count, except for the menacing charge. He received maximum consecutive sentences for all counts, except for the misdemeanor menacing, which was run concurrently, for a total of 115 years in prison. State v. Bunch, Mahoning App. No. 02CA196, 2005-Ohio-3309, at ¶35. The court of appeals 1) vacated one count of conspiracy to commit aggravated robbery because the indictment did not allege an overt act in support of the conspiracy; 2) vacated the sentences for the firearm specifications; and 3) vacated the consecutive prison terms because the trial court did not support the sentences with findings as required by R.C. 2929.19. Id., at ¶ 19-27, 116. This Court reversed this Court's decision, and remanded for resentencing under State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856. In re Ohio Criminal Sentencing Cases, 109 Ohio St.3d 313, 2006-Ohio-2109, at ¶92.

On remand, the trial court sentenced Chaz to ten years plus a three-year firearm specification for each of the following: Count 1, aggravated robbery, R.C. 2911.01(A)(1)(c); Counts 4, 5, and 6, rape, R.C. 2907.02(A)(2)(b); Counts 7, 8, and 9, complicity to rape, R.C. 2923.03(A)(2)(f); and Count 10, Kidnapping, R.C. 2905.01(A)(4)(c). Specifications on Count 9 merged with the specifications from Counts 4-6. Specifications for counts 7-9 merged. He was also sentence to a concurrent jail term for misdemeanor aggravated menacing.

The total prison term is 89 years.

On appeal, Chaz argued that the trial court's policy was an illegal blanket policy, that sentencing a juvenile to sentence that is effectively life without parole violates the Eighth Amendment's ban on cruel and unusual punishment, as well as that the application of State v. Foster, 2006-Ohio-856, 109 Ohio St.3d 1, to his case violated the Ex Post Facto Clause of the United States Constitution. The Court of Appeals affirmed. This timely appeal follows.

Statement of the Facts

Early in the evening of August 21, 2001, Brandon Moore, a co-defendant of Appellant Chaz Bunch, robbed two people at gunpoint in their Youngstown driveway. After robbing them, Moore got into a dark car and left. Moore admits to the robbery. State v. Bunch, Mahoning App. No. 02CA196, 2005-Ohio-330, at ¶2. Later that evening, M.K., a twenty-two year-old Youngstown State student was arriving at work to start the late shift at a Youngstown home for mentally handicapped women. As she got out of her car, she saw a black car approaching slowly, and a man approached her and demanded her money. She testified that four men got out of the car, and raped her multiple times and robbed her. The hospital tested her for DNA from her attackers. M.K. identified Bundy, Collier and Moore from photographic line-ups. According to officer testimony, she was "drawn to" a picture of Bunch, but could not positively

identify him from a line up. She did not identify Bunch's photo until she saw a chest up picture, in isolation, in a newspaper article that identified Bunch as a suspect. *Id.* at ¶ 25-26.

No fingerprints were found. The DNA swabs were positive only for Moore—none pointed to Chaz. In police statements, Bundy admitted to being the driver of the black car. In police statements, Moore admitted to the early evening robbery, as well as to raping M.K., but he claimed he did the acts under duress from "Shorty Mack." Callier testified that Bunch and Moore raped M.K.. Callier also testified that Bunch told him to say that "Shorty Mack" was the guy who committed the crimes. *Id.* at ¶ 25-31.

Chaz Bunch has consistently maintained his innocence. He was 16 years old the day M.K. was attacked. Chaz's sentence will expire after his 105th birthday.

ARGUMENT

Proposition of Law No. I:

A sentence imposed for actions committed by a juvenile that is effectively life without parole violates the constitutional ban on cruel and unusual punishment.

A sentence of life without parole for a child aged sixteen violates the United States Constitution. The United States Supreme Court's recent decision declaring the death penalty for juveniles unconstitutional, Roper v. Simmons (2005), 543 U.S. 551, recognizes that children are different from adults in their ability to form judgments, in their weakness and vulnerability, in their openness to suggestion, in their ability to change, to grow, to have meaningful lives and to become productive citizens. This recognition demonstrates that a life sentence that denies any possibility of release or parole to children is an unconstitutional punishment.

A sentence of life imprisonment without the possibility of parole for a sixteen-year-old child constitutes a cruel and unusual sentence. In Roper v. Simmons (2005), 543 U.S. 551, the Court held that the "evolving standards of decency that mark the progress of a maturing society"

demonstrate that it was disproportionate to execute a defendant for a murder committed while the defendant was under the age of eighteen. *Id.* at 561 (citation omitted). The Simmons Court concluded that a sentence that is marked by its finality as well as the implication that the offender cannot be rehabilitated, cannot be imposed on children.

The Supreme Court's reasoning applies with equal force to sentencing juveniles to life in prison without any possibility of parole in that a sentence of life without parole is also marked by its finality as well as the implication that the offender cannot be rehabilitated. Indeed, LWOP is "the second most severe punishment known to the law," Harmelin v. Michigan (1991), 501 U.S. 957, 996, and the harshest sentences especially for a juvenile. Some thinkers, such as John Stuart Mill, have suggested that life in prison is indistinguishable or even worse than death.

What comparison can there really be, in point of severity between consigning a man to the short pang of rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

John Stuart Mill, Parliamentary Debate on Capital Punishment Within Prisons Bill (Apr. 21, 1868) quoted in Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 712 (1998). See also *Id.* at footnotes 141-47.

Finally, Simmons does not provide supporting LWOP for juveniles based on the fact that ultimately a LWOP sentence was substituted for the death penalty in that case. The Simmons Court's judgment affirmed the Missouri Supreme Court's setting aside of the death penalty, and no more. *Id.* at 578-79. The constitutionality or even the appropriateness of LWOP for Christopher Simmons was not an issue in that case. Nevertheless, the Simmons Court did comment on the harshness of LWOP for juveniles: "[I]t is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572. Indeed, the reasoning of Simmons leads to the conclusion that

juveniles are categorically different from adults when it comes to the criminal law, and that sentences for juveniles must take this categorical difference into consideration.

This Court should rely on the conclusions that the Supreme Court reached in Simmons. Because of their lower level of mental and emotional development, juvenile offenders are less culpable than are adults for similar crimes; that juvenile offenders are more amenable to rehabilitation than those who are older; and that it is impossible to determine with any reasonable certainty that any juvenile is beyond redemption. Simmons, 543 U.S. at 568-575 (differences between juveniles and adults “render suspect any conclusion that a juvenile falls among the worst offenders . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character”).

Indeed, after Simmons, such understandings about the culpability and rehabilitative differences between juvenile and adult offenders may be required in all Eighth Amendment cases. Thus, the Simmons Court, after noting that a plurality in Thompson v. Oklahoma (1988), 487 U.S. 815 had “recognized the import of these characteristics with respect to juveniles under 16,” stated: “We conclude the same reasoning applies to all juvenile offenders, . . .” *Id.* at 571.

In addition, LWOP sentences are final. Yet the Simmons Court concluded that children younger than age eighteen who commit crimes are more amenable to rehabilitation than older defendants and as a result should not be treated the same way at sentencing. *Id.* at 570 (“From 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 minor’s character deficiencies will be reformed.”). It follows that dictating that a child spend the rest of his life in prison is particularly cruel and unusual. The Court concluded that recent scientific studies show that a irredeemable determination about anybody below the age of eighteen cannot be made with any reasonable certainty, even by

psychiatrists and psychologists. *Id.* at 573-74. The likelihood of an offender's committing further crimes after release from prison decreases with age.⁴ That is, the juvenile offender, especially with rehabilitation, is less likely to commit crimes later on. The Supreme Court recognized this dynamic in Simmons: "Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." Simmons, 543 U.S. at 570 (quoting Johnson v. Texas (1993), 509 U.S. 350, 368). A law that is based largely on the notion that a child cannot be rehabilitated is not only cruel and unusual and violates due process, but it is unreasonable.

LWOP sentences for juveniles are excessive when considered within the commonly accepted purposes of punishment, 1) deterrence, 2) retribution, 2) incapacitation and 4) rehabilitation.⁵

1) LWOP sentences are an ineffective deterrent for juveniles. LWOP sentences cannot deter other juveniles from committing similar crimes any more reliably than can less harsh sentences. In Simmons the Court noted that even the death penalty could not be regarded as an effective deterrent, given that juveniles generally lack the mental ability to weigh the possible consequences of their actions. *Id.* at 571 (discussing psychological studies). The Simmons Court noted that, if a harsh penalty is needed for deterrence, many states still had LWOP for juveniles. *Id.* at 572.

The Supreme Court's mention of juvenile LWOP is noteworthy. The Supreme Court stated that a LWOP sentence is "a severe sanction, in particular for a young person" and indicated that LWOP is closely related to the death penalty. *Id.* at 570-572. Death is not an effective deterrent for young people who typically fail to weigh consequences, life without

⁴ Erica Beecher-Monas, Edgar Garcia-Rill, Ph.D., "Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World," 24 *Cardozo L.Rev.* 1845, 1899 (2003).

parole is not apt to have any more deterrent value. See also Naovarath v. State (1989), 105 Nev. 525, 531, 779 P.2d 944, 948 (holding that LWOP for thirteen-year-old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers). In exercising its independent judgment, this Court should recognize the unreasonableness, and excessiveness, of LWOP for juveniles.

2) LWOP sentences exact disproportionate retribution from juveniles. As for retribution, LWOP sentences are similarly improper. As the Supreme Court in Simmons stated about the death penalty: “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” Simmons, 543 U.S. at 571. This reasoning applies with equal force to juvenile LWOP sentences.

3) LWOP sentences exceed what is necessary to incapacitate a juvenile. Although LWOP sentences incapacitate offenders, such incapacitation would be unreasonable and disproportionate where the offender no longer poses a danger to the community. See United States v. Jackson (C.A. 7, 1987), 835 F.2d 1195, 1200 (Posner, J., concurring) (“A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die.”). According to Simmons, no one can assess with any reasonable certainty at sentencing whether a child convicted of murder is beyond rehabilitation, see Simmons, 543 U.S. at 573, so a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years.⁶

⁵ These are the four purposes typically set forth in criminal law casebooks. See, e.g., Paul Robinson, Criminal Law: Case Studies and Controversies 82-90 (2005); R.C. 2929.11.

⁶ See Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Prospective on Juvenile Justice 23 (Thomas Grisso & Robert G. Schwartz, eds., 2000) (“the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult”); John H. Laub and Robert J. Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70 (2003)

LWOP sentences frustrate rehabilitation of juvenile offenders. Last, LWOP sentences do not promote rehabilitation for juveniles; they frustrate it. Understandably, juveniles sent to prison forever lack any incentive to try to improve their character or skills for eventual release because there will be no release. Instead, the incentives, if any, are for the young offender—often placed into the same prisons as adult offenders—to adapt to prison life, which can include “improving” at inflicting violence on others as a means of self-defense and as a means of domination and increased standing in the prison pecking order. See Institute on Crime, Justice and Corrections and the National Council on Crime and Delinquency—U.S. Department, Office of Justice Programs, Bureau of Justice Assistance, Juveniles in Adult Prisons and Jails: A National Assessment p.63 (Oct. 2000).⁷ LWOP promotes the very antithesis of rehabilitation.

Supreme Court precedent has regularly categorized children differently from adults in various contexts other than for punishment.

Outside of the Eighth Amendment, the Supreme Court has often ensured that governmental power would protect juveniles in light of their undeveloped capacity for making reasonable judgments. For example, the Court has intervened to protect juveniles from the consequences of their actions and decisions where those consequences are far less severe than the death penalty or a LWOP sentence.⁸ The Court has also noted that the distinction between the juvenile and adult justice systems is rehabilitation, a goal based on the understanding that

(presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives).

⁷ Available at <http://www.ncjrs.org/pdffiles1/bja/182503-1.pdf> (last visited December 11, 2006).

⁸ See e.g., Kaupp v. Texas (2003), 538 U.S. 626 (considering age and experience in voluntariness of confession by seventeen year old); Fare v. Michael C. (1979), 442 U.S. 707, 725 (determining whether juvenile has waived Miranda rights “mandates . . . evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights . . . [courts must] take into account those special concerns that are present when young persons . . . are involved”); Schneckloth v. Bustamonte

children are less culpable and more amenable to rehabilitation than adults who commit similar crimes. McKeiver v. Pennsylvania (1971), 403 U.S. 528; In re Gault (1967), 387 U.S. 1, 15-16.

The Court has also allowed states to exercise power over juveniles that would be unconstitutional if exercised over adults, based on the differences between minors and adults, and the need to protect minors from the consequences of their decisions. Again, these consequences are far less severe than a LWOP sentence.⁹ The Court even has allowed states to use their power of *parens patriae* to preventively detain children in order to serve the best interests of the child, to keep them “from the downward spiral of criminal activity. . . .”¹⁰

This Court should consider these many, longstanding protections for children, and the reasons for them. Children have long been treated differentially under the law. Imposing a LWOP sentence upon a juvenile is cruel and unusual and violates due process.

Even if LWOP sentences were constitutional for juveniles, a mandatory LWOP sentence for juveniles violates the United States Constitution.

The mandatory nature of the trial court’s imposition of a sentence that is effectively life without the possibility of parole precluded the trial court from even considering Chaz’s age, immaturity, reduced mental capacity, reduced role in the offense, or any other invalidating factors related to his young age. These age-related factors include the special characteristics of

(1973), 412 U.S. 218, (in examining voluntariness of consent to search under Fourth Amendment, courts must consider, among totality of circumstances, the youth of the accused).

⁹ See e.g., Ashcroft v. American Civil Liberties Union (2004), 542 U.S. 656, 666-68 (compelling government interest in protecting young minors from harmful images on Internet); Bd. of Educ. v. Earls (2002), 536 U.S. 822, 838, (upheld random, suspicionless drug testing of students engaged in extracurricular activities, including marching band); Veronia School Dist. 47J v. Acton (1995), 515 U.S. 646 (same, but where drug testing was limited to athletes, in part because of the danger that drug-abusing athletes could end up as “role models” for other, impressionable high school students); Hazelwood Sch. Dist. V. Kuhlmeier (1988), 484 U.S. 260, 273 (public school officials may censor school-sponsored, student publications); Ginsburg v. New York (1968), 390 U.S. 629, 637 (states may prevent sale of obscene materials to minors).

¹⁰ Schall v. Martin (1984), 467 U.S. 253, 265-66 (upholding New York’s power to detain certain at-risk juveniles for up to seventeen days).

juveniles that make them less culpable than adults—the precise characteristics that the United States Supreme Court relied upon in striking down the imposition of the death penalty for juveniles in Simmons. Even assuming that LWOP sentences could be constitutionally applied to juveniles, a mandatory LWOP sentence for rape would be unconstitutional. Even if juvenile LWOP sentences were constitutional, the trial court’s policy of imposing the maximum sentence for rape is effectively a mandatory LWOP sentence. Such a mandatory sentence fails to take into account the age, immaturity and mental incapacity of juveniles.

LWOP sentences meted out to juveniles are unconstitutional. They do not act as a deterrent, they are disproportionate, are beyond the time necessary to incapacitate an offender, and frustrate rehabilitation. This Court should strike down Chaz Bunch’s sentence.

Proposition of Law No. II:

A trial court may not follow a blanket policy of giving maximum sentences to all defendants who have been convicted of rape or one that presumes maximum consecutive sentences.

The trial court abused its discretion by sentencing Chaz to maximum sentences based on its blanket policy of giving maximum sentences to all defendants convicted of rape. Although Foster gives trial courts significant discretion when sentencing criminal defendants, trial courts still must exercise that discretion on a case-by-case basis.¹¹

¹¹ Smith v. Smith, Wyandot App. No. 16-01-03, 2001-Ohio-2139, (“Trial courts have the discretion to render decisions; however, those decisions must be based upon the facts and circumstances before it. . . . To render a decision based upon a blanket court policy would rise, at least, to the level of an abuse of discretion.”); State v. Graves (Nov. 19, 1998), Franklin App. No. 98AP-272, (“Although the trial court has the discretion to refuse to accept a no contest plea, it must exercise its discretion based on the facts and circumstances before it, not on a blanket policy that affects all defendants regardless of their circumstances”); State v. Carter (2nd Dist. 1997), 124 Ohio App.3d 423, 428 (“Although the trial court has the discretion to refuse to accept a no-contest plea, it must exercise its discretion based on the facts and circumstances before it, not on a blanket policy that affects all defendants regardless of their situation. In short, the trial court must exercise its discretion in each case”).

Here, the trial court imposed maximum consecutive sentences on all counts based on a blanket policy that all defendants convicted of rape receive the harshest possible sentence:

See that lady sitting at the table there? She's the lady who prosecutes rape cases in this community now. And she can tell you that somebody who rapes somebody in this court gets sentenced to the maximum. So if it's going to be commensurate with a similar crime for similar offenders, that's probably what I have to do.

T.p. (resentencing) 29.

The trial court erred by imposing Chaz's sentence based on a blanket policy of giving the maximum to defendants who commit rape. While the trial court did walk through the sentencing factors, the trial court made clear that the result would have been the same regardless of the facts of the case—the maximum sentence.

Chaz's sentence should be vacated because the judge's blanket policy taints all counts. The trial court did not say that he was imposing the maximum for only the rape counts—he said that defendants who commit rape “get sentenced to the maximum.” Further, the trial court's willful refusal to follow the law shatters any presumption of regularity.

Rape, aggravated robbery and kidnapping deserve harsh punishment, the legislature has directed judges to choose from a range of three to ten years and between consecutive and concurrent sentences based on a set of prescribed sentencing factors. R.C. 2929.12, 2929.13, and 2929.14. The trial court refused to follow its duty to sentence Chaz based on the statutory factors. This Court should vacate the sentence and remand for resentencing on all counts.

Proposition of Law No. III:

A defendant may not be resentenced pursuant to a sentencing scheme in which the presumptive minimum sentence has been eliminated subsequent to the commission of the underlying crime.

Proposition of Law No. IV:

Trial counsel is ineffective for failing to raise Blakely error, and appellate counsel is ineffective for failing to raise trial counsel's ineffectiveness and plain error, when

the failure to properly preserve the issue results in the affirmance of the maximum possible sentence.

The remedy of set forth in State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856 violates the Ex Post Facto and Due Process clauses of the United States Constitution because it retroactively changes the sentencing structure to Mr. Bunch's disadvantage by permitting non-minimum, maximum, and consecutive sentences to be imposed without jury findings, which were required before Foster.¹² This Court should order the Court of Appeals to exercise its discretion to modify Appellant's sentence to a minimum, concurrent prison term. R.C. 2953.08. Under Foster and Blakely, Appellant's sentence is illegal, and no judge may make the findings needed to support a non-minimum prison term. Under Miller v. Florida and Bouie v. Columbia, this Court cannot remand for resentencing without a presumption for a minimum sentence. The only lawful remedy is to modify his sentence to the statutory minimum.

If Chaz has waived his claim in Proposition of Law No. III because trial counsel failed to object or because appellate counsel failed to expressly raise the claim as plain error or ineffective assistance trial counsel, Chaz has been denied his right to the effective assistance of counsel because the deficient failure of counsel to raise the issue properly prejudiced Chaz by denying him a new sentencing hearing at which his sentence could not get worse.¹³

Conclusion

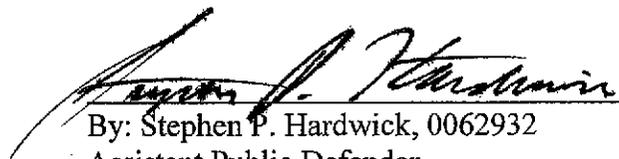
This Court should accept jurisdiction and modify the sentence to minimum concurrent terms or remand this case for the imposition of a sentence less than life without parole.

¹² Cunningham v. California (2007), __ U.S. __, 127 S.Ct. 856; Blakely v. Washington (2004), 542 U.S. 296; Weaver v. Graham (1981), 450 U.S. 24, 31; Bouie v. Columbia (1964), 378 U.S. 347, 354; Calder v. Bull (1798), 3 U.S. 386 (seriatim opinion of Chase, J.); Miller v. Florida (1987), 482 U.S. 423, 432; State ex rel. Mason v. Griffin, 104 Ohio St.3d 279, 2004-Ohio-6384, at ¶17; Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

¹³ Roe v. Flores-Ortega (2000), 528 U.S. 470, Strickland v. Washington (1984), 466 U.S. 668, Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

Office of the Ohio Public Defender

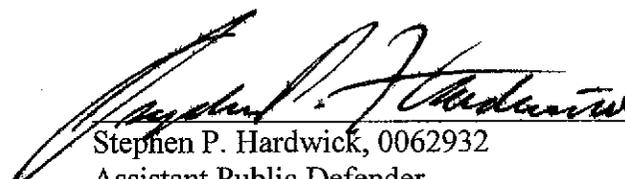

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Certificate of Service

I certify that a copy of the foregoing **APPELLANT CHAZ BUNCH'S MEMORANDUM IN SUPPORT OF JURISDICTION** was sent by regular U.S. mail, postage prepaid to Rhys Cartwright-Jones, Mahoning County Assistant Prosecutor, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503 on this 4th day of February, 2008.


Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Appellant Chaz Bunch

#271780

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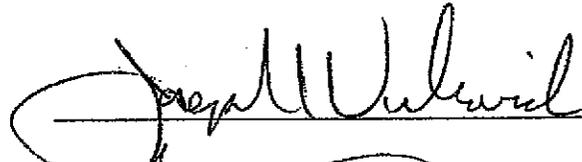
STATE OF OHIO)
MAHONING COUNTY)

IN THE COURT OF APPEALS OF OHIO
SS: SEVENTH DISTRICT

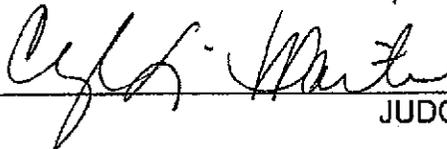
STATE OF OHIO,)
PLAINTIFF-APPELLEE,)
VS.)
CHAZ BUNCH,)
DEFENDANT-APPELLANT.)

CASE NO. 06 MA 106
JOURNAL ENTRY

For the reasons stated in the opinion rendered herein, the assignments of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio is hereby affirmed. Costs taxed against appellant.





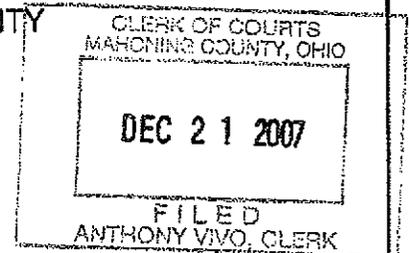


JUDGES.

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT



STATE OF OHIO,)
)
 PLAINTIFF-APPELLEE,)
)
 - VS -)
)
 CHAZ BUNCH,)
)
 DEFENDANT-APPELLANT.)

CASE NO. 06 MA 106

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Common Pleas Court, Case No. 01CR1024.

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Rhys Cartwright-Jones
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 21, 2007

VUKOVICH, J.

{¶1} Defendant-appellant Chaz Bunch appeals the sentence issued in the Mahoning County Common Pleas Court for his convictions for aggravated robbery, three counts of rape, three counts of complicity to commit rape, kidnapping, and aggravating menacing. Three issues are raised in this appeal. The first issue is whether the trial court's use of a blanket policy that all defendants who commit rape get the maximum sentence amounted to an abuse of discretion. The second issue is whether *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violates ex post facto laws. The third issue is whether the imposition of an 89 year sentence, which effectively is a life sentence without parole, for a crime committed by a juvenile offender, violates the Eighth and Fourteenth Amendments of the United States Constitution. For the reasons stated below, the judgment of the trial court is hereby affirmed.

STATEMENT OF CASE AND FACTS

{¶2} This appeal is related to Bunch's prior appeal – *State v. Bunch*, 7th Dist. No. 02CA196, 2005-Ohio-3309. In *Bunch*, we affirmed his convictions for aggravated robbery, three counts of rape, three counts of complicity to commit rape, kidnapping, and aggravated menacing. We also affirmed the gun specifications attached to the aggravated robbery conviction, kidnapping conviction, three rape convictions, and three complicity to commit rape convictions. However, in that opinion, we reversed and remanded for resentencing because the trial court failed to comply with the felony sentencing statute. *Id.* at ¶233. Specifically, we noted that it failed to make the appropriate consecutive sentencing findings. *Id.* at ¶177-187. Furthermore, we directed the trial court that on the eight gun specifications, at most, the trial court could sentence Bunch to nine years. *Id.* at ¶229. Thus, we explained, if Bunch received maximum consecutive sentences for the convictions, he could, at most, receive an aggregate sentence of 89 years. *Id.* at ¶233.

{¶3} Bunch appealed our decision to the Ohio Supreme Court. The Supreme Court accepted the appeal but only as to issues related to the Ohio felony sentencing scheme – whether the Ohio felony sentencing scheme that requiring certain findings for maximum, nonminimum and consecutive sentences was constitutional. The Ohio

Supreme Court, in *Foster*, determined that it was not and provided the remedy of severance. In accordance with that opinion, it reversed Bunch's sentence and remanded it for resentencing.

{¶4} Bunch was resentenced on July 13, 2006. He received a total of 89 years. He received the maximum sentence for all nine crimes. The eight felonies were ordered to be served consecutive to each other, but by law, the misdemeanor was ordered to be served concurrently. Bunch received three years apiece on each of the eight gun specifications. Due to merging of some of the gun specifications, Bunch received a total of nine years for the gun specifications. Bunch now appeals that sentence.

FIRST ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED BY USING A BLANKET POLICY TO SENTENCE CHAZ INSTEAD OF EXERCISING ITS DISCRETION."

{¶6} We review a trial court's post-*Foster* sentence for an abuse of discretion. The Ninth Appellate District has recently explained:

{¶7} "*Foster* 'vest[ed] sentencing judges with full discretion' in sentencing. *Foster* at ¶100. Accordingly, post-*Foster*, this Court reviews felony sentences under an abuse of discretion standard. *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶12. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621." *State v. Coleman*, 9th Dist. No. 06CA008877, 2006-Ohio-6329, ¶11.

{¶8} Bunch admits that trial courts now have significant discretion in sentencing. However, he argues that the trial court made a blanket statement that a person who commits rape will get the maximum sentence. He claims that such a blanket statement means the trial court was not looking at all the facts and was just following that blanket policy, which in his opinion, is an abuse of discretion.

{¶9} The statement he points to was made by the trial court during sentencing. It stated:

{¶10} "See that lady sitting at the table there? She's the lady who prosecutes rape cases in this community now. And she can tell you that somebody who rapes somebody in this court gets sentenced to the maximum. So if it's going to be commensurate with a similar crime for similar offenders, that's probably what I have to do." (Tr. 29).

{¶11} The above is only a small portion of what the trial court stated prior to sentencing Bunch. Below is a recitation of the majority of the analysis the court gave prior to issuing a sentence:

{¶12} "The court has to consider the principles and purposes of sentencing. Those being to punish the offender and to protect the public from future crime by this offender and by others like him. That means that when I sentence someone, when I say and others, that I have to make sure that anybody like you who would think about doing this to another human being, better know and understand you're going to get whacked.

{¶13} "The court also has to consider the need for incapacitation, deterrence, rehabilitation and restitution. Well, certainly you need to be incapacitated and deterred. I don't know that someone that did what you did could be rehabilitated. And restitution is out of the question.

{¶14} "The sentence has to be commensurate with and not demeaning to the seriousness of your conduct. Can't be more serious. It's impact on the victim. The impact can't be more profound. And it must be consistent with sentences for similar crimes by similar offenders.

{¶15} "See that lady sitting at the table there? She's the lady who prosecutes rape cases in this community now. And she can tell you that somebody who rapes somebody in this court gets sentenced to the maximum. So if it's going to be commensurate with a similar crime for similar offenders, that's probably what I have to do.

{¶16} " * * *

{¶17} "The court has to consider the seriousness factors in 2929.12(B) and (C). The victim suffered serious physical, psychological and economic harm as a result of the offense.

{¶18} "Now, as much as you claim race as a card in this case, this court could find that your crime was motivated by some prejudice based upon the victim's race, because that's one of the factors that is listed in the seriousness factors that make a crime more serious. This court also felt that the injury to the victim in this case was worsened by the age of the victim.

{¶19} " * * *

{¶20} "The factors that make the crime less serious are absolutely, unequivocally inapplicable in this case.

{¶21} "Factors that make the -- or factors to consider regarding recidivism under 2929.12(B) and (E), the offender was out on bail before trial or sentencing or under court sanction or postrelease control or parole when it was committed. Those were juvenile sanctions imposed upon the offender. He has several prior adjudications of delinquency. He had failed to respond favorably in the past to sanctions imposed for those delinquencies. He shows absolutely no remorse for the offense.

{¶22} "Factors that make recidivism unlikely, obviously none of them apply. He was too young to have any prior criminal convictions, so even though that is a factor for recidivism unlikely, it's completely inapplicable due to its impossibility.

{¶23} "And so it's very clear that this crime was far -- these crimes are far more serious than less serious, and that recidivism is far more likely than it is unlikely. The court also has to consider the sentencing criteria under 2929.13. Felonies of the first degree bear presumption in favor of a prison term, unless a nonprison term would both adequately protect the public and punish the offender. Well, I don't believe that.

{¶24} "And because factors indicating recidivism is less likely outweigh factors indicating recidivism is more likely. Well, that's obviously not the fact in this case.

{¶25} "The court would also have to find that a nonprison sanction would not demean the seriousness of the offense because the less serious factors outweigh the more serious factors. Again, that is not a fact in this case.

{¶26} "The court has to review 2929.14(A), because that's about all that's left of it, and take into account the facts of this case and the presentence investigation and report that was prepared. These defendants abducted the victim from her job at a

group home. In fact, she had purchased a treat for the persons at the group home and had gone to work early that day to share the treat with them when she was confronted by one of these four.

{¶127} "She was abducted into a vehicle, her vehicle. She was robbed at gunpoint in the vehicle and raped digitally while in the vehicle. She was kidnapped from the area on Detroit Avenue all the way down to Pyatt Street.

{¶128} "At the Pyatt Street location she was raped over and over and over again by this defendant and others. As the victim described it, like persons taking turns at a drinking fountain when they're in grade school.

{¶129} "She was threatened with a firearm again. In fact, it was placed in her mouth when this defendant was going to kill her. Apparently was talked out of it, because the victim claimed to be pregnant. One of his codefendants convinced him that he shouldn't shoot a pregnant lady.

{¶130} "She got away, and these fellahs got together and split up the bounty from their robbery. In fact, went up and purchased some items at the Dairy Mart on Mahoning Avenue.

{¶131} "When the police discovered the vehicle and started to follow them and then had to give chase, this defendant jumped out of the vehicle once it stopped up on the lower end of the south side. And after the investigation and identification by the victim, the defendant was apprehended and indicted.

{¶132} "I don't know that anyone could do anything worse to another human being than you did to that lady. I don't know how anything could be more inhumane, disrespectful, evil, vicious, brutal, unspeakable than what you did to this lady." (Tr. 28-34).

{¶133} The court then went on to sentence Bunch to a total of 89 years. (Tr. 39-41).

{¶134} In view of the above, we cannot find that the trial court abused its discretion in sentencing Bunch to maximum, consecutive sentences. The Ohio Supreme Court has stated that trial courts must consider R.C. 2929.11 (purposes of sentencing) and 2929.12 (factors relating to seriousness of offense and recidivism of the offender) when sentencing an offender. *State v. Mathis*, 109 Ohio St.3d 54, 2006-

Ohio-855, ¶38. As the above excerpt shows, the trial court did just that; it provided five plus pages of analysis concerning the facts of the case and the statutory considerations.

{¶35} That said, it is acknowledged that the trial court did state "that somebody who rapes somebody in this court gets sentenced to the maximum." However, in the following sentence it stated that to be proportionate with similar crimes that was what it "probably" should do. The court specifically used the word **probably**. It did not state that it had to or would do that. Thus, its statement does not show an abuse of discretion.

{¶36} Accordingly, for all the above reasons, the trial court did not abuse its discretion when it sentenced Bunch to 89 years. This assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

{¶37} "THE TRIAL COURT ERRED BY IMPOSING NON-MINIMUM, MAXIMUM, AND CONSECUTIVE PRISON SENTENCES. SENTENCING ENTRY, APX. AT A-1."

{¶38} Bunch's second assignment of error argues that the *Foster* remedy of severance violates the prohibition against ex post facto laws.

{¶39} During sentencing, Bunch did not argue that *Foster* violated the prohibition against ex post facto laws and thus it should not apply to him. As such, it is not necessary to address the merits of his argument. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. Regardless, even if we proceed to address the merits, this court has continually found the ex post argument to be meritless. *State v. Palmer*, 7th Dist. No. 06JE20, 2007-Ohio-1572, ¶59-76; *State v. Balwanz*, 7th Dist. No. 07BE20, 2007-Ohio-5041, ¶16-19. Therefore, this assignment of error lacks merit.

THIRD ASSIGNMENT OF ERROR

{¶40} "THE TRIAL COURT ERRED BY IMPOSING A SENTENCE THAT IS EQUIVALENT OF LIFE WITHOUT PAROLE FOR A CRIME COMMITTED AS A JUVENILE."

{¶41} Bunch argues that his 89 year prison sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. He states that when he completes his sentence, he will be 106 years old. He indicates, with citation to

authorities, that his life expectancy is only 70 years. Thus, he maintains that the 89 year sentence is equivalent to a sentence of life in prison without the possibility of parole and argues that the sentence constitutes "a cruel and unusual sentence."

{¶42} In support of his argument, Bunch cites this court to the United States Supreme Court's decision in *Roper v. Simmons* (2005), 543 U.S. 551. In *Simmons*, the Supreme Court found that it was violative of the Eighth Amendment to execute a juvenile. The *Simmons* Court first noted that the death penalty is the most severe punishment and should be "limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* citing *Atkins v. Virginia* (2002), 536 U.S. 304, 319. In explaining that juveniles do not fall within that category, the Court pointed out the developmental differences between juveniles and adults. For instance, juveniles lack maturity and have an underdeveloped sense of responsibility that often results in ill-considered actions and decisions. *Id.* Also, juveniles are more susceptible to negative influences and peer pressure. *Id.* Furthermore, a juvenile's character is not as well formed as that of an adult. *Id.* It explained that these "differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* It then added that once the diminished culpability of juveniles is recognized, the penological justifications for the death penalty (retribution and deterrence of capital crimes by prospective offenders) apply to them with lesser force than adults. *Id.*

{¶43} Bunch uses the above analysis to argue that sentencing a juvenile to a prison term of life without the possibility of parole or an equivalent sentence constitutes cruel and unusual punishment. He maintains that the factors that make the death penalty cruel and unusual for juveniles equally applies to a sentence of life in prison without the possibility of parole or an equivalent sentence. He supports this by pointing this court to the following statement made by the *Simmons* Court. "[I]t is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." He contends that that

statement along with the *Simmons* analysis of juveniles being immature and irresponsible leads to the conclusion that his sentence violates the Eighth Amendment.

{144} The statement Bunch points to about the "harshness" of a sentence of life imprisonment without the possibility of parole for a juvenile is only a selected part of a sentence that when read by itself may seem to lend support for his position. However, when that statement is read within the context within which it was written, it is clear that the Supreme Court is not indicating such a position. The whole paragraph reads as follows:

{145} "As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes. Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in *Thompson*, '[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.' To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* (internal citations omitted).

{146} As can be seen by this paragraph, the Supreme Court is discussing the deterrent effect that the death penalty would have on a juvenile. The Supreme Court determines that it is unclear whether the death penalty provides a deterrent to juvenile offenders. It is at this point that the Supreme Court mentions life imprisonment without the possibility of parole. The purpose of mentioning life imprisonment without the possibility of parole is not to equate it with the death penalty. Rather, it is used to indicate that it is a severe sanction for a juvenile and due to the impact it has on a juvenile it could be used instead of the death penalty. It is simply indicating that life imprisonment without the possibility of parole is a good alternative to the death penalty

for juveniles. It is not an indication that life imprisonment without the possibility of parole or an equivalent sentence to that is cruel and unusual punishment.

{¶47} Furthermore, the reasons the *Simmons*' Court gives to render the death penalty unconstitutional for juveniles are used specifically for the context of death penalty analysis alone, i.e. to determine whether they fall within the category of the worst offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. The analysis for the determination of the death penalty is not equally applicable to a non death penalty situation. As the Supreme Court notes, the death penalty is the most severe punishment and in that context the Eighth Amendment applies to it with special force. *Id.*

{¶48} Considering all the above, we find that the analysis and reasoning for not applying the death penalty to juveniles does not support the conclusion that for a juvenile, a life imprisonment term without the possibility of parole or an equivalent sentence, is unconstitutional.

{¶49} Lastly, Bunch argues that even if the sentence is constitutional, the trial court's mandatory nature to sentencing renders it unconstitutional. This argument fails for the same reason the first assignment of error fails.

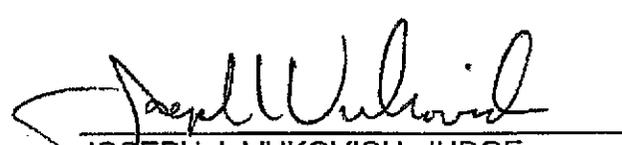
{¶50} For all the above stated reasons, the sentence did not violate the Eighth Amendment prohibition against cruel and unusual punishment. This assignment of error fails.

{¶51} In conclusion all assignments of error lack merit. The judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.

DEC 31 2007 10:02 1 2 320

APPROVED:


JOSEPH J. VUKOVICH, JUDGE