

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: CASE No. <b>13-1281</b>
PLAINTIFF-APPELLEE,	:
	: ON DISCRETIONARY APPEAL FROM THE
V.	: MAHONING COUNTY COURT OF APPEALS,
	: SEVENTH APPELLATE DISTRICT,
CHAD BARNETTE,	: CASE No. 02CA65
	:
DEFENDANT-APPELLANT.	:

**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT CHAD BARNETTE**

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**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION  
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

This case concerns one of the four longest sentences imposed on any Ohio child for non-homicide offenses. This is also an appeal from a motion for delayed reconsideration, which is the *only* Ohio procedural vehicle available to raise constitutional challenges to non-death sentences based on retroactively applicable law from the United States Supreme Court. Ohio's postconviction statute permits retroactive challenges to death sentences and in cases of actual innocence, but no provision allows challenges to constitutionally cruel sentences other than death. R.C. 2953.23(A)(1)(b).

Further, this case is a good line-drawing case. Under House Bill 86, Chad can ask for judicial release at age 61, and, as shown in this memorandum, that is roughly the life expectancy of a child sent to prison for life. Further, *Graham v. Florida*, 560 U.S. 48, 51, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010), does not require merely the opportunity to seek release, it requires the "*meaningful* opportunity of release." (Emphasis added.) *Id.* at 51. A child does not have a meaningful opportunity for release if he is racing death to the prison gate.

This case is of great public importance because it concerns one of the four longest sentences that Ohio judges have imposed on children who have not killed. The Office of the Ohio Public Defender has surveyed the inmate population of the Department of

Rehabilitation and Correction, and this same trial judge has imposed the four longest sentences in this State for juvenile non-homicide offenders:

Name	Common Pleas Court Case No.	Term
Brandon Moore	Mahoning 2002 CR 525	112
Chaz Bunch	Mahoning 2001 CR 1024	89
Chad Barnette	Mahoning 2001 CR 173	84
James Goins	Mahoning 2001 CR 185	84

It is extraordinary that all four of the longest sentences for children who have not killed come from the same court and the same judge. This is an extraordinary case that merits the attention of this Court.

This Court should take this case despite a procedural problem created by the Seventh District's misunderstanding of the scope of a prior decision from this Court. When Chad first asked this Court to hear an appeal of his sentence, this Court accepted his case and reversed based solely on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. In its preface to *In re Ohio Crim. Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174, this Court noted that "[i]f propositions of law are noted, such reversals shall apply only to those portions of the judgments of the courts of appeals that are implicated by the applicable propositions of law[.]" *id.* at ¶ 2. And in Chad's case, this Court noted Proposition of Law No. III, which concerned only his *Blakely* claim. Accordingly, this Court's decision affected the Seventh District's jurisdiction to hear any other issue, including the one raised in this jurisdictional appeal. But, in a 2-1 decision, the Seventh District held that *In re Ohio Criminal Sentencing Statute Cases* prohibited it from reviewing Chad's motion:

We cannot reconsider this appeal on a sentencing matter because the sentence that was under review was reversed and remanded to the trial court for resentencing by the Ohio Supreme Court. *In re Ohio Crim. Sent. Statutes*, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶ 12. As an intermediate court, we cannot disobey or disregard the directives and rulings of the Ohio Supreme Court. *State v. Anderson*, 7th Dist. No. 11-MA-43, 2012-Ohio-4390, ¶ 50; *State v. Love*, 7th Dist. No. 06 MA 130, 2007-Ohio-7210, ¶ 19-20. Since the original sentence was reversed and remanded by the Ohio Supreme Court, there is no longer a valid sentence in our Case No. 02 CA 65 to reconsider.

June 28, 2013 Judgment Entry, Apx. A-2.

As predicted by Judge DeGeneraro's dissenting opinion,<sup>1</sup> Chad filed a second motion for delayed reconsideration after he lost the one he is appealing now.<sup>2</sup> That motion is now awaiting a decision in the case number from his initial post-*Foster* appeal, Mahoning App. No. 2006MA135. This Court should not wait to hear any appeal from that decision because the procedural problem could whipsaw Chad—this Court could rule that *only* the reconsideration motion filed in *this* appeal (Mahoning App. No. 02CA65, was a valid means of challenging Chad's improper sentence. And if this Court has already disposed of this appeal, Chad could be left with no means to challenge a sentence that is categorically cruel and unusual based on new, retroactively applicable law from the United States Supreme Court.

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<sup>1</sup> *Id.*, Apx. A-7 ("The practical result of the majority's decision will be for Appellant to file an identical motion in *Barnette I* for the panel to consider the merits.").

<sup>2</sup> What courts and litigants call a "motion for delayed reconsideration" is actually two motions often filed in the same document—a motion for an extension to file a motion for reconsideration under App.R. 14(B) and a motion for reconsideration under App.R. 26(A).

If this Court decides not to hear this case on the merits now, it should accept this case, hold it for the discretionary appeal (by whichever side does not prevail) from the Seventh District's decision in Chad's post-*Foster* appeal (Mahoning App. No. 2006MA135), and then decide whether to accept or dismiss both cases.

## STATEMENT OF THE CASE AND THE FACTS

### A. Sentencing history.

Before trial, the State offered to recommend a 23-year sentence in exchange for a guilty plea, but Chad declined the offer. March 20, 2002 T.p., 20-21. After a jury trial, Chad was convicted of 11 of 12 charges – attempted aggravated murder, two counts of aggravated burglary, three counts of aggravated robbery, three counts of kidnapping, one count of felonious assault, and one count of receiving stolen property. At sentencing, the trial judge held that the public would not “be adequately protected by allowing either [Chad or his co-defendant] to be released from prison.” March 20, 2002 T.p. 42. Accordingly, when sentencing Chad and his co-defendant, the trial court announced that “[i]t is the intention of this Court that you *should not be released from the penitentiary and the State of Ohio during your natural lives.*” (emphasis added.) *Id.* at 47. The trial court then made its intention reality by imposing maximum and consecutive sentences on all the charges for a total of 85 ½ years in prison. March 20, 2002 T.p. at 44-47.

After Chad won a resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the trial court was more explicit about its intent to impose life with no possibility of release at the resentencing hearing. The trial judge held that he couldn’t “imagine anybody in a position I am in as a judge elected to see to it that justice is done doing anything with you but *making sure that you never get out.*” (emphasis added.) July 25, 2006 T.p. 18. The judge added that he would impose even longer sentences if the law allowed. “The legislature says that’s all I can give you

because I would give you more if I could." July 25, 2006 T.p. at 19. This time, the trial court imposed a total of 84 years in prison. July 25, 2006 T.p. at 25.

**B. The facts.**

The charges in this case arose from two home invasions in January 2001. Both involved extended assaults on the elderly people living in the home.<sup>3</sup> In one, Chad and his co-defendant "repeatedly pushed, hit, and kicked" one of the victims, an 84-year-old man, knocking him to the ground, pushed him down the stairs, causing him to lose consciousness, and then locked him in a fruit cellar, where he was found by a neighbor with a punctured lung, broken ribs, and other broken bones. In the other, either Chad or his co-defendant hit a 64 year-old man over the head with a plate, causing him to bleed, and then hit his wife with a gun on her head and legs. They stole a car and a television set from the couple's home.

**C. Chad does not become eligible for judicial release until after his 61st birthday.**

The dissenting judge in this case would have denied Chad's claim on the merits because, according to the judge's opinion, Chad has the opportunity to request judicial release after serving "half of his 84 year sentence[.]" June 28, 2013 Judgment Entry, p. 13, Exhibit 1 (DeGenaro, J., concurring). The concurring judge also stated that Chad would be eligible to seek judicial release in his "mid-to late fifties[.]" Respectfully, the concurring judge was incorrect because Chad will not be eligible to seek judicial release until he passes his 61<sup>st</sup> birthday. He did receive an 84-year prison term, but that

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<sup>3</sup> Unless otherwise stated, the facts are based on the court's recitation in *State v. Barnette*, Mahoning App. No. 02 CA 65, 2004-Ohio-7211.

includes 6 years of firearm specifications, which cannot be reduced. Accordingly, only 78 years of his sentence may be reduced down to 39 years. He must serve the 6 years of specification time day-for-day. R.C. 2929.14(B)(1)(b). Because he was 16 years old at the time of the offense, he will not be allowed to ask for judicial release until he is past his 61<sup>st</sup> birthday.

**D. Chad filed his motion for delayed reconsideration 29 days after completing his challenge to his initial sentence.**

Chad continuously litigated his sentence based on the issues he raised before *Graham* existed. He lost his timely habeas action on February 14, 2013. He filed a motion for delayed reconsideration under his initial appeal number 29 days later. *Barnette v. Kelley*, Case No. 4:09CV1005, 2013 U.S. Dist. LEXIS 20059 (N.D. Ohio Feb. 14, 2013). Further, he could not file a postconviction petition, because R.C. 2953.23 permits a delayed petition challenging a sentence only when that sentence is death. R.C. 2953.23(A)(1)(b).

## ARGUMENT

### Proposition of Law No. I:

**A trial court may not sentence a child to die in prison for a non-homicide offense.**

A critical portion of the trial court's reasoning is inconsistent with facts related to children as determined by the United States Supreme Court. Specifically, the trial judge explained that "making sure that [Chad] never get[s] out" was needed because he was "a menace to society." October 5, 2006 T.p. 18. But the United States Supreme Court has held that it is impossible to know whether a child will remain dangerous. The Court explained that a sentence that denies release makes "an irrevocable judgment about that person's value and place in society. Such a judgment is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability." *Graham v. Florida*, 560 U.S. 48, 49, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). Further, the Court held that denying a child the opportunity for rehabilitation itself violates the Eighth Amendment. "A life without parole sentence improperly denies 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 48.

The trial court's effective life sentence violates the Eighth Amendment ban denying a child a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 51. A sentence that does not give a child the opportunity for release until well after his 100<sup>th</sup> birthday is not "meaningful" in any

rational sense of that word.<sup>4</sup> But that is exactly the sentence that the trial court intended to impose on Chad in this case.

In addition, Chad's decision not to accept the State's 23-year plea offer demonstrates the deficiencies of youth. As the United States Supreme Court has explained, the accused child "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (*including on a plea agreement*). . . ." (Emphasis added.) *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S.Ct. 2455, 2468 183 L.Ed. 2d 407 (2012).

Finally, the State has correctly not contested that *Graham* applies retroactively. "New substantive rules generally apply retroactively," especially when a defendant "faces a punishment that the law cannot impose on him." *Schiro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519; 159 L.Ed. 2d 442 (2004). A rule is substantive rather than procedural "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 352. Chad is no longer constitutionally eligible for a sentence that does not give him a meaningful opportunity for release. *Graham* applies to him retroactively.

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<sup>4</sup> The impact of recent changes to the judicial release statute is discussed in Proposition of Law No. II.

**Proposition of Law No. II:**

**The right to seek judicial release at age 61 does not create a meaningful opportunity for release, especially when the trial court states on the record that the child is irredeemable and should remain in prison for life.**

*Graham* does not merely require an opportunity to seek release. It requires a “meaningful opportunity to obtain release[.]” (Emphasis added.) *Graham v. Florida*, 560 U.S. 48, 51 (2010). And the mere potential for release after a prisoner’s 61<sup>st</sup> birthday is not a “meaningful opportunity for release[.]” especially given that prisoners have significantly reduced life expectancies.

Chad is not eligible to seek judicial release until he is expected to die. Normal life expectancy for a 16 year-old black male child is 55 years, which would take him to his 71st birthday. See Arias, Division of Vital Statistics, Centers for Disease Control, *United States Life Tables, 2006*, National Vital Statistics Report (June 28, 2010) Vol. 58, No. 21, p. 21.<sup>5</sup> But Chad is in prison, which greatly decreases his life span. One recent study showed that a mere five years in prison by age 30 reduces life expectancy by ten years. Patterson, *The Dose--Response of Time Served in Prison on Mortality: New York State, 1989–2003*, American Journal of Public Health (March 2013) Vol. 103, No. 3, p. 526.<sup>6</sup> That would reduce Chad’s life expectancy to 61 years – which is when he can first ask for judicial release. However, that figure is likely high because Chad will have spent far more than five years in prison.

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<sup>5</sup> <[http://cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_21.pdf](http://cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_21.pdf) (viewed July 17, 2013).

<sup>6</sup> <<http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2012.301148> (viewed July 17, 2013).

Judicial release also does not provide a meaningful opportunity for release because the trial court held that Chad should never be released. March 20, 2002 T.p. 47 (“[i]t is the intention of this Court that you *should not be released from the penitentiary and the State of Ohio during your natural lives*”). (Emphasis added.) And at the resentencing hearing, the trial judge explained he was “making sure that [Chad] never get[s] out[.]” Oct. 5, 2006 T.p. 18. Although it is extremely unlikely that the same trial judge will be sitting on the bench in 2045, the judge was speaking for the court. And this Court should assume that the trial court meant what it said.

**Proposition of Law No. III:**

**A sentence that is categorically cruel and unusual based on a new, retroactively applied rule from the United States Supreme Court creates an “extraordinary circumstances” justifying an extension to file a motion for reconsideration.**

**A. Chad need only show “extraordinary circumstances” justifying the extension—he need not show “good cause for delay.”**

As the dissent below recognized, App.R. 14(B) does not require that the applicant show good cause *for the delay* in filing a reconsideration. June 28, 2013 Judgment Entry (Degenaro, J., dissenting), Apx. A-5 (“[Chad] 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.”) (Emphasis sic.) Appellate Rule 14(B) requires only a showing of “extraordinary circumstances” before this Court may grant an extension. By contrast, App.R. 26(B)(1) expressly requires that “the applicant show[] *good cause for filing* at a later time.” (Emphasis added.) Similarly, App.R. 5(A) requires a late applicant to “set

forth *the reasons for the failure . . . to perfect an appeal as of right.*" (Emphasis added.) Accordingly, when ruling on an App.R. 14(B) motion, courts should look beyond the reasons for delay (which are sufficient in Chad's case), and determine whether the motion presents "extraordinary circumstances" that justify reconsideration.

**B. A sentence that is categorically cruel and unusual presents "extraordinary circumstances" justifying an extension to file a motion for reconsideration.**

Chad continuously litigated his sentence based on the issues he raised before *Graham* existed. He lost his timely habeas action on February 14, 2013. He filed a motion for delayed reconsideration under his initial appeal number 29 days later. *Barnette v. Kelley*, Case No. 4:09CV1005, 2013 U.S. Dist. LEXIS 20059 (N.D. Ohio Feb. 14, 2013). Further, he could not file a postconviction petition, because R.C. 2953.23 permits a delayed petition challenging a sentence only when that sentence is death. R.C. 2953.23(A)(1)(b). Reconsideration of his appeal is his only remedy.

The United States Supreme Court has determined that a sentence like Chad's is cruel and unusual under the Eighth Amendment. Few harms are greater than forcing a child to endure a life of cruelty until his death. Even though an extension is an "extraordinary" remedy, this case involves a punishment that is extraordinary. The State does not dispute that Chad filed his motion a mere 29 days after his federal habeas challenge was complete (and three days *before* he could have filed an appeal from that denial). It is true that his motion was filed more than nine months after *Miller*, and longer even after *Graham* – but he was challenging his sentence in another forum. Under App.R. 14(B), an extension to file a reconsideration motion can be filed only in

“extraordinary circumstances[.]” and it made no sense to file such an *extraordinary* motion while Chad was still had *ordinary* challenges available.

**Proposition of Law No. IV.**

**A higher court’s decision binds a lower court on all matters within the compass of the judgment.**

The Seventh District incorrectly held that it did not have authority to hear Chad’s reconsideration motion because this Court reversed the Seventh District’s decision based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-855. June 28, 2013 Judgment Entry, Apx. A-2. But, as this Court recently explained, a decision of a higher court is only binding on a lower court on matters “within the compass” of the judgment. *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 28.

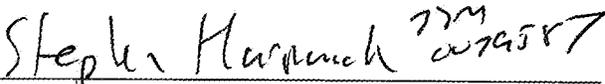
This Court’s decision to remand Chad’s case pursuant to *Foster* was not a ruling on whether his sentence was cruel and unusual. In fact, this Court expressly limited its ruling to the *Foster* issue. In a preface to the list of cases summarily reviewed, this Court noted that “[i]f propositions of law are noted, such reversals shall apply only to those portions of the judgments of the courts of appeals that are implicated by the applicable propositions of law[.]” *In re Criminal Sentencing Decisions*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174, ¶ 2. And as to Chad’s case, this Court held that the decision was limited to “Proposition of Law III of the appeal[.]” which concerned only his *Blakely* challenge. *Id.*, ¶ 12.

## CONCLUSION

This Court should accept this appeal, reverse the decision of the court of appeals, and remand this case for a decision on the merits of Chad's reconsideration motion. In the alternative, this Court should accept this appeal and hold it until the non-prevailing party appeals the decision in Chad's motion for reconsideration in Mahoning App. No. 2006MA135.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Paul J. Gains, Mahoning County Prosecutor, 21 W. Boardman Street, 6<sup>th</sup> Floor, Youngstown, Ohio 44503, on this 9th of August, 2013.

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#399749

IN THE SUPREME COURT OF OHIO

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	: SEVENTH APPELLATE DISTRICT,
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APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT CHAD BARNETTE

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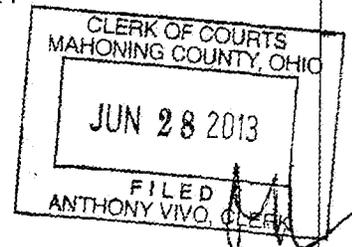
STATE OF OHIO )  
MAHONING COUNTY )

IN THE COURT OF APPEALS OF OHIO  
SS: SEVENTH DISTRICT

STATE OF OHIO )  
PLAINTIFF-APPELLEE )  
VS. )  
CHAD BARNETTE )  
DEFENDANT-APPELLANT )

CASE NO. 02 CA 65

JUDGMENT ENTRY



Appellant Chad Barnette has filed a delayed motion for reconsideration pursuant to App.R. 26(A) and 14(B) in our Case No. 02 CA 65. The final Opinion in this appeal was issued on December 28, 2004. Appellant filed a motion for reconsideration, which was decided on February 2, 2005. Appellant filed this subsequent motion for reconsideration now under review on March 15, 2013. Appellee has filed a brief requesting that we deny the motion because it was not filed by the deadline set forth in App.R. 26(A).

App.R. 26(A)(1)(a) states: "(a) 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)." Appellant's current motion was filed eight years after the final resolution of this appeal and is obviously untimely.

We have recognized, though, that "[a] motion for reconsideration can be entertained even though it was filed beyond the ten-day limitation on motions for reconsideration if the motion raises an issue of sufficient importance to warrant entertaining it beyond the ten-day limit." *State v. Boone*, 114 Ohio App.3d 275, 277,



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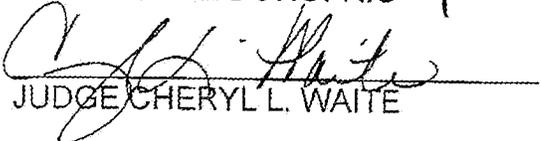
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683 N.E.2d 67 (7th Dist.1996). App.R. 14(B) gives us the discretion to extend the 10-day time limit of App.R. 26(A) for good cause shown and upon a showing of extraordinary circumstances.

We cannot reconsider this appeal on a sentencing matter because the sentence that was under review was reversed and remanded to the trial court for resentencing by the Ohio Supreme Court. *In re Ohio Crim. Sent. Statutes*, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶12. As an intermediate court, we cannot disobey or disregard the directives and rulings of the Ohio Supreme Court. *State v. Anderson*, 7th Dist. No. 11-MA-43, 2012-Ohio-4390, ¶150; *State v. Love*, 7th Dist. No. 06 MA 130, 2007-Ohio-7210, ¶19-20. Since the original sentence was reversed and remanded by the Ohio Supreme Court, there is no longer a valid sentence in our Case No. 02 CA 65 to reconsider. We find no good cause or extraordinary circumstances for extending the time period for filing this delayed motion for reconsideration. Therefore, Appellant's motion is hereby overruled.

DeGenaro, P.J., would consider the motion for delayed reconsideration and find it to be without merit, as a meaningful opportunity for judicial release is available under amended R.C. 2929.20. See separate analysis of DeGenaro, P.J.

  
JUDGE GENE DONOFRIO

  
JUDGE CHERYL L. WAITE

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DeGenaro, P.J., dissenting.

Appellant asks this Court for delayed reconsideration of his direct appeal, as he has no other avenue to avail himself of the retroactive constitutional argument that his sentence violates *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). In *Graham*, the United States Supreme Court held that imposing a life sentence without the possibility of parole upon nonhomicide juvenile offenders as a category violates the prohibition against cruel and unusual punishment of the Eighth Amendment to the United States Constitution. The Court reasoned that because juveniles as a category are fundamentally different from adult offenders, they cannot in the first instance be subjected to spending the rest of their natural lives in prison. Rather, they must be afforded a 'meaningful opportunity' to establish that they are rehabilitated and eligible for parole. Appellant argues that his 84 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.

Because Appellant has no other avenue to make this argument, I disagree with the majority that we cannot consider Appellant's delayed motion for reconsideration. First, 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. Second, by doing so we would neither be disobeying nor disregarding a directive or ruling by the Ohio Supreme Court. Rather, we would be considering an arguably valid extension of a constitutional argument which was not available to Appellant when his case was before the trial court, this Court and the Ohio Supreme Court in either his direct or second appeal. Turning to the merits of Appellant's motion, it appears that legislation enacted by the Ohio Legislature subsequent to *Graham* provides a constitutionally meaningful opportunity to seek parole or judicial release. Thus, on the merits I would deny Appellant's motion.

#### **Facts and Procedural History**

Appellant's original sentence was affirmed in his direct appeal by this court in *State v. Barnette*, 7th Dist. No. 02 CA 54, 2004-Ohio-7211 (DeGenaro, J., dissenting),

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reconsideration denied, 2005-Ohio-477 (*Barnette I*). The Ohio Supreme Court reversed *Barnette I* and remanded the case to the trial court in *In re Ohio Crim. Sent. Statutes*, as well as over 175 other cases across the state, solely to apply *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2006) and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 on resentencing. The trial court resentedenced Appellant accordingly, and in *State v. Barnette*, 7th Dist. No. 06 MA 135, 2007-Ohio-7209 (*Barnette II*) this court affirmed. In *Barnette II* the panel rejected Appellant's Eighth Amendment argument that the trial court unconstitutionally applied R.C. 2929.41(A) by imposing maximum consecutive sentences, reasoning *Foster* severed it from the Revised Code, thus that section was not applicable.

Further, in 2009, Appellant filed a federal habeas petition pursuant to 28 U.S.C. 2254, which was reassigned to another district judge on January 21, 2011, and denied. *Barnette v. Kelley*, No. 4:09CV1005, 2013 WL 591983 (N.D. Ohio Feb. 14, 2013).

Subsequent to all the state decisions, and during Appellant's federal habeas proceedings, *Graham* was released in 2010. Although Appellant did not amend his then pending federal habeas petition to include an argument pursuant to *Graham*, as discussed below, it nonetheless would have been rejected on procedural grounds and thus not barred by res judicata here.

### **Untimely Application for Reconsideration**

#### ***General Test***

With this procedural history in mind, we consider the timeliness of Appellant's motion, filed less than 30 days after the district court denied his habeas petition. 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 Appellant'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

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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.

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

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, it appears 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

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the interests of justice that appellant's motion for reconsideration should be granted.

*Degens* at ¶5.

Because Appellant 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 84 year sentence was imposed, and Appellant is arguing a Supreme Court decision involving the Eighth Amendment retroactively applies to his sentence; Appellant 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.

#### **No Other Available Remedy**

Reconsideration of our prior decision is warranted to avoid a manifest injustice as Appellant has no other avenue available to raise this constitutional challenge. Appellant 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 State v. Moore*, 7th Dist. No. 10 MA 85, 2011-Ohio-6220, 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 Appellant 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

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sentence a juvenile offender must serve before being eligible to seek judicial release or parole, Appellant cannot state that he is unlawfully in custody; his habeas claim is not ripe.

Although *Graham* was decided while Appellant's federal habeas petition was pending, he has not waived the error by failing to raise it there, as it would have been procedurally rejected. Pursuant to the 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). Appellant's co-defendant sought federal habeas relief pursuant to *Graham*, which the district court rejected primarily pursuant to the Sixth Circuit's AEDPA analysis in *Bunch*. See also *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306 (N.D.Ohio July 24, 2012). Because *Graham* was not the clearly established law at the time Appellant's case was being considered by the trial court, this court or the Ohio Supreme Court, the AEDPA barred federal habeas relief on that basis. Had Appellant raised *Graham* in his then pending federal habeas petition, it would have been rejected on procedural grounds as it had been in *Bunch* and *Goins*. Thus, res judicata does not preclude us from reaching the merits here.

By considering this new argument pursuant to *Graham*, we are not ignoring the reason the Supreme Court remanded the case to the trial court for resentencing, namely to address the constitutional violation annunciated in *Blakely*. Instead, we are being asked to consider a distinct, new constitutional challenge, namely the categorical sentencing prohibition announced in *Graham*. The alleged error first occurred at the original sentencing and was repeated on resentencing; thus we should review the alleged error at its first instance.

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The practical result of the majority's decision will be for Appellant to file an identical motion in *Barnette II* for the panel to consider the merits; free of a claim of res judicata as the majority has not reached the merits of his argument here. Thus, in the interest of judicial economy, and the other reasons given herein, Appellant's delayed motion is properly before this court for merit determination because he has demonstrated extraordinary circumstances.

***Graham v. Florida***

Which brings us to the merits of Appellant's argument, that his 84 year sentence deprives him of a meaningful opportunity to obtain release as contemplated by *Graham*, because in effect the trial court imposed a life sentence, and indicated as much at sentencing. In *Graham*, by a 5-4 vote, the Supreme Court held that, *categorically*, nonhomicide juvenile offenders cannot be sentenced to life without parole. A related issue currently pending before the Ohio Supreme Court in *State v. Long*, Case No. 2012-1410 is whether it is constitutional to impose a *non-mandatory* sentence of life without the possibility of parole upon a nonhomicide juvenile defendant. That this issue is presently pending before the Ohio Supreme Court lends further support to hearing Appellant'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. 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).

Appellant argues here that under an extension of *Graham's* categorical holding, an *implicit* life sentence without the possibility of parole, i.e., an extraordinarily long sentence (in this case 84 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*:

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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 Appellant 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

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Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? See 3 Sentenced to Life for Gang Rape of Mother, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.

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In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes—like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor—are especially heinous or grotesque, and thus may be deserving of more severe punishment.

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

The issue raised by Appellant 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

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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 Appellant's case presents here is where to draw that sentencing line.

Appellant first 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, Appellant and James Goins, and Brandon Moore and Chaz Bunch, 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,

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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 Appellant's original sentencing, not only has *Graham* been decided, Ohio's judicial release statute has been modified, which may afford Appellant 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 Appellant'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.*

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(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:

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(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, Appellant's co-defendant. In *Goins v. Smith*, the District Court held that for AEDPA purposes *Graham* was not the clearly

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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 sentence 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 request 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, Appellant 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 Appellant via the amendments made by the Ohio

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Legislature to Ohio's judicial release statute. Does serving half of his 84 year sentence before he is eligible for parole afford Appellant 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*, I conclude that R.C. 2929.20 affords Appellant a meaningful review in conformity with the Eighth Amendment. Appellant was sixteen 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 of 40-45 years before he can be *considered* for judicial release, and be granted the opportunity, not the guarantee, to prove he is rehabilitated. He will be *eligible* for judicial release consideration in his mid-to late fifties, which while it is a lengthy sentence, is not a constitutionally proscribed explicit or *implicit* life sentence without the possibility of parole. Again, it bears repeating that just because Appellant will be eligible for judicial release after he has served half of his 84 year sentence, *Graham* cannot be read to mean or even extended to mean, that upon that review Appellant will be *granted* judicial release. What is clear from *Graham* is if a juvenile offender is sentenced to, say, 200 years for multiple offenses, serving half of that term before being eligible for judicial release consideration pursuant to R.C. 2929.20 likely would not be constitutional under *Graham*. 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 of the offenses and the length of the sentence.

#### Conclusion

I would consider the merits of Appellant's delayed motion for reconsideration and deny same. It is obviously arguable whether or not this is the proper appeal for Appellant to seek reconsideration; however, App.R. 26 does not give clear guidelines, and in the interest of preventing a manifest injustice, a criminal defendant should have some mechanism to seek review of an asserted retroactive constitutional protection.

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

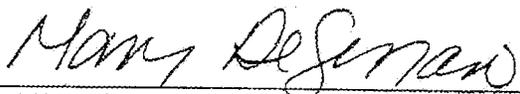
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afforded a meaningful opportunity to establish they have rehabilitated and can be paroled. At the heart of the Court's decisions in *Graham* and *Miller* is that juvenile offenders as a category fundamentally differ from adult offenders. Given those 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 Eighth Amendment. Where a juvenile who has committed 'truly horrifying crimes' receives a *practical* 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

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 more than 10 years eligibility for judicial release after having served one-half of their stated sentence. As this appears to afford the 'meaningful opportunity' contemplated by *Graham*, at least under the facts of this case, Appellant's motion for reconsideration should be denied.

  
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JUDGE MARY DeGENARO

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