

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 : CASE No. 2013-1281
 :
 PLAINTIFF-APPELLEE, :
 :
 : ON DISCRETIONARY APPEAL FROM THE
 v. : MAHONING COUNTY COURT OF APPEALS,
 : SEVENTH APPELLATE DISTRICT,
 CHAD BARNETTE, : CASE No. 02CA65
 :
 :
 DEFENDANT-APPELLANT. :

MOTION FOR RECONSIDERATION OF
APPELLANT CHAD BARNETTE, A MINOR CHILD

Mahoning County Prosecutor's Office

Office of the Ohio Public Defender

Paul J. Gains, 0020323
Mahoning County Prosecutor

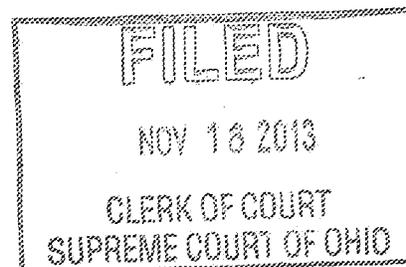
Stephen P. Hardwick, 0062932
Assistant Public Defender

21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503
(330) 740-2330
(330) 740-2008 (fax)
rrivera@mahoningcountyoh.gov

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellee, State of Ohio

Counsel for Appellant, Chad Barnette



**MOTION FOR RECONSIDERATION OF
APPELLANT CHAD BARNETTE, A MINOR CHILD**

I. Introduction

This Court should reconsider its decision not to hear this case because the Iowa Supreme Court has issued an opinion throwing out a sentence similar to Chad's based on an identical claim. Chad could not have cited the new authority in his jurisdictional memorandum because the decision was issued after he filed. This Court should also reconsider because it now has a body of related discretionary appeals that will permit this Court to resolve both procedural and substantive questions about how Ohio trial courts should apply *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010), and *Miller v. Florida*, 567 U.S. ___, 132 S.Ct. 2455, 183 L. Ed. 2d 407 (2012).

II. Discussion

A. Another state supreme court has issued authority under which Chad would likely prevail.

In *State v. Null*, 836 N.W.2d 41, 45, 70-71 (Iowa 2013), the Iowa Supreme Court applied *Graham* and *Miller* to retroactively vacate the sentence of a child who was eligible to seek release at age 69. Chad filed supplemental authority in this case citing to that decision, but a mere citation is no substitute for substantive argument. S.Ct.Prac.R. 7.04(A)(2) ("If a relevant authority is issued after the deadline has passed for filing a party's jurisdictional memorandum, that party may file a citation to the relevant authority *but shall not file additional argument.*") (Emphasis added.) The Iowa Supreme

Court is correct because *Graham* did not merely ban the label, “life without parole.” Instead, the decision mandated that every state provide juvenile non-homicide offenders a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75.

In this case, when the trial court sentenced Chad to 84 years in prison, the judge said he was “making sure that [Chad] never get[s] out[.]” T.p. 18 (July 5, 2006). The State could not and has not disputed that the trial court imposed a sentence that would ensure that Chad would serve his life in prison without parole. And a sentence that ensures that a child does not get out, by definition, cannot provide a “meaningful opportunity for release[.]” The State also has not disputed that, under the terms of the recently-enacted House Bill 86, Chad became eligible to ask the trial court for judicial release after he reaches age 61.¹ And finally, the State has not disputed that 61 years is Chad’s approximate life expectancy in prison.²

B. This Court now has a body of related discretionary appeals that will permit it to fully examine this issue.

This Court should also take this case because three other related discretionary appeals have been filed, and they now present a body of cases that will allow this Court to fully address how *Graham* and *Miller* apply to term-of-years sentences, as well as

¹ As explained in Chad’s jurisdictional memorandum, the dissenting judge miscalculated when she wrote that Chad would be eligible for release in his “mid-to late fifties[.]” Apx. A-15. Memorandum in Support of Jurisdiction at 6-7 (Aug. 9, 2013).

² *See*, Memorandum in Support of Jurisdiction at 10 (Aug. 9, 2013).

what remedy Ohio provides to apply retroactive new constitutional rules relating to non-capital sentences.

State v. Chaz Bunch, Case No. 2013-1510, presents the bright line issue of whether spending your life in prison with no chance for parole is the same as serving a sentence labeled “life without parole.” No one has disputed that the child in *Bunch* will die in prison as a result of his 89-year sentence, which gives him the theoretical possibility of seeking judicial release at age 95. But the Seventh District held that *Graham* was not directly on point because, in *Graham*, the sentence was labeled, “life without parole,” whereas in *Bunch*, the sentence was labeled as a term of years that exceeded any reasonable life expectancy. *State v. Bunch*, 7th. Dist. Mahoning No. 06 MA 106 (August 8, 2013).³

Chad’s two pending discretionary appeals, this case and Case No. 2013-1703, are opportunities to explain how a defendant should challenge constitutionally cruel sentences based on new, retroactive case law from the United States Supreme Court. Two members of the panel below held that Chad should have filed under his appeal following a remand pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845

³ Chaz’s co-defendant, Brandon Moore, represented by pro bono private counsel, has filed a motion for delayed reconsideration in the Seventh District. The motion is nearly identical to Chaz’s, so it is expected that the Seventh District will soon deny the motion, and that denial will be appealed to this Court. See, Amicus Memorandum in Support of Jurisdiction of Brandon Moore, *State v. Bunch*, Case No. 2013-1510 (Sept. 23, 2013). It is likely that the issues in Chaz’s and Brandon’s cases will be the same.

N.E.2d 470. Apx. A1-A2. The dissent held that Chad properly filed his motion. A4-A9. Combined, Chad's two discretionary appeals address the question of which appellate decision should be reconsidered when a defendant had an initially successful appeal, a resentencing, and a second appeal.⁴ Taking one case but not the other could prevent a merits ruling if, after briefing and argument, this Court determines that only the non-accepted case was properly filed.

Finally, in *State v. Willie Evans*, Case No. 2013-1550, this Court is deciding whether to hear an appeal that addresses how to retroactively apply *Miller* to a sentence of life without parole for aggravated murder where the trial court did not consider youth as a mitigating factor. *Evans* addresses the same substantive question before this Court on the merits in *State v. Eric Long*, Case No. 2012-0711. But *Evans* concerns a sentence that became final before *Miller*, so it also addresses how to apply *Miller* retroactively.

Together, Chad's two cases, as well as the cases of Chaz Bunch and Willie Evans, address 1) whether *Graham* applies to life-long sentences labeled as terms of years when such sentences deny a child his or her right to a "meaningful opportunity for release[;]" 2) what a sentencing court must consider before sentencing a child to life without parole for a homicide; and 3) which procedural mechanism should be used to litigate retroactively applicable new rights declared by the United States Supreme Court.

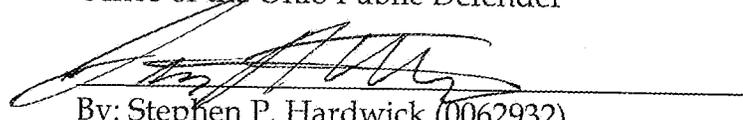
⁴ The decision of the Seventh District in Chad's other jurisdictional appeal is, *State v. Barnette*, 7th Dist. Mahoning No. 06 MA 135 (Sept. 16, 2013), attached as Apx. A-17.

III. Conclusion

This Court should hear this case and decide it along with *State v. Chaz Bunch*, Case No. 2013-1510, *State v. Willie Evans*, Case No. 2013-1550, and *State v. Chad Barnette*, Case No. 2013-1703.

Respectfully submitted,

Office of the Ohio Public Defender



By: Stephen P. Hardwick (0062932)
Assistant Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellant Chad Barnette

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by e-mail to Assistant Prosecuting Attorney Ralph Rivera, rrivera@mahoningcountyoh.gov, on this 18th day of November, 2013.



Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant Chad Barnette

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
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V.	: MAHONING COUNTY COURT OF APPEALS,
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	:
DEFENDANT-APPELLANT.	:

APPENDIX TO

MOTION FOR RECONSIDERATION OF
APPELLANT CHAD BARNETTE, A MINOR CHILD

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

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 28 2013
FILED
ANTHONY VIVO, CLERK

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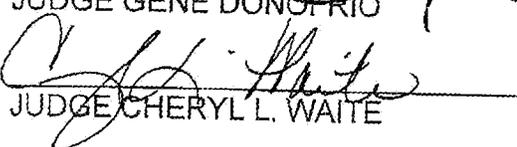
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683 N.E.2d 67 (7th Dist.1996). App.R. 14(B) gives us the discretion to extend the 10-day time limit of App.R. 26(A) for good cause shown and upon a showing of extraordinary circumstances.

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, ¶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. 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 CHERYLL 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 resentenced 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.

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.*

(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:

(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 sentenced violated clearly established federal law. For that reason, the District Court could not so hold with respect to Goins, "even though an eighty-nine-year aggregate sentence [referring to Bunch, Goins' sentence is 84 years] without the possibility of parole may be—and probably is—the functional equivalent of life without the possibility of parole." *Goins v. Smith* at *6.

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

Perhaps more important, the Ohio General Assembly has changed Ohio's sentencing law to markedly improve Goins's ability to pursue release. In particular, Ohio law now permits a defendant to 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

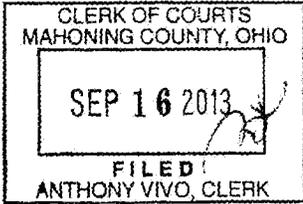
may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the 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.


JUDGE MARY DeGENARO

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STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT

STATE OF OHIO,)
PLAINTIFF-APPELLEE,) CASE NO. 06 MA 135
VS.) JUDGMENT ENTRY
CHAD BARNETTE,)
DEFENDANT-APPELLANT.)

Defendant-appellant Chad Barnette has filed a delayed motion for reconsideration of our decision in *State v. Barnette*, 7th Dist. No. 06MA135, 2007-Ohio-7209, pursuant to App.R. 26(A) and 14(B). The final opinion in that case was issued on December 21, 2007. Appellant filed this motion for reconsideration on July 3, 2013, alleging that his sentence is a violation of the Eighth Amendment's ban on cruel and unusual punishment, as explained by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). Appellant's motion for reconsideration is denied based on the reasons set forth below.

Before this court can address the merits of an application for reconsideration, we must address the timeliness of the application. An application for reconsideration of an appellate decision can be filed no later than ten days after the clerk has both mailed the parties the judgment and made a note on the docket of the mailing. App.R. 26(A)(1)(a). Appellant's current motion for reconsideration was filed more than five years after the final resolution of this case and, therefore, is untimely. "An untimely application for reconsideration must be denied." *State v. Hess*, 7th Dist. No. 02JE36, 2004 Ohio 1197, ¶ 4, citing *Martin v. Roeder*, 75 Ohio St.3d 603, 665 N.E.2d 196 (1996).

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This court has 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, 683 N.E.2d 67 (7th Dist.1996). App.R. 14(B) gives us the discretion to extend the ten day time limit of App.R. 26(A) for good cause shown and upon a showing of extraordinary circumstances. Nevertheless, we find that appellant failed to present any compelling evidence showing that there is good cause or extraordinary circumstances for extending the time period for filing this delayed motion for reconsideration.

The state has filed a brief contending that extraordinary circumstances should not be found in this case because the motion for enlargement and the application for reconsideration could have and should have been filed more closely in time to when the United States Supreme Court issued its decisions in *Graham* and *Miller*. The state also suggests that the delay in this case was not justified since appellant is not similarly situated as the defendants in *Graham* and *Miller*.

Pursuant to this court’s recent decision denying a motion for reconsideration in *State v. Bunch*, 7th Dist. No. 06MA106 (08/08/13 J.E.), we agree with the state that there has not been a showing of extraordinary circumstance for two reasons.

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

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

Upon a review of *Graham* and *Miller*, *Graham* is the most applicable to the present case, as appellant did not commit a homicide. However, appellant's application for reconsideration and motion for enlargement was filed more than three years after *Graham*. This constitutes a lengthy delay. Admittedly, during this delay appellant was filing a petition for writ of habeas corpus in federal court, in which he was arguing that the *Graham* and *Miller* decisions support his position that the sentence he received constitutes cruel and unusual punishment. For instance, in 2009, prior to the United State Supreme Court's decision in *Graham*, appellant filed a petition for a writ of habeas corpus in the United States District Court in the Northern District of Ohio. *Barnette v. Kelley*, N.D. Ohio No. 4:09CV1005, 2013 WL 591983 (Feb. 14, 2010). This petition was denied on February 14, 2013.

Appellant filed his first motion for reconsideration in this court twenty-eight days after his federal habeas challenge was complete. However, this court held that it had no jurisdiction to hear a challenge to the decision in that case, which was his earlier appeal. Three days after that decision, appellant filed this motion. *State v. Barnette*, 7th Dist No. 02CA65 (06/28/13 J.E.)

Despite the fact that appellant promptly pursued relief through the federal system, the application for reconsideration filed in the state court system is not as prompt. He could have filed it shortly after the *Graham* decision. The over three year delay in filing the application for reconsideration and motion to enlarge time does not lend support for a finding of extraordinary circumstances. Had the application and motion been filed more closely in time to the *Graham* decision, it could support a finding of extraordinary circumstances.

Secondly, and most importantly, when appellate courts have found extraordinary circumstances based on binding decisions from higher courts, they have done so when the higher court's case is directly on point. *State v. Lawson*, 2013-Ohio-803, 984 N.E.2d 1126, ¶ 6 (10th Dist.) (opinions from the Ohio Supreme Court directly apply to appellate court holding and therefore constitutes exceptional circumstances); *State v. Truitt*, 1st Dist. No. C-050188, 2011-Ohio-1885, ¶ 3 (same); *State v. Thomas*, 1st Dist. No. C-010724, 2009-Ohio-971, ¶ 5 (same). The basis for this reasoning is that appellate courts will grant reconsideration petitions when either

there is an obvious error in the appellate court's decision or when it is demonstrated that the appellate court did not properly consider an issue. See *State v. Weaver*, 7th Dist. No. 12BE21, 2013-Ohio-898, ¶ 6 (reasons for granting reconsideration petitions). Thus, if the higher court's binding decision is not directly on point, there would not be an obvious error and, as such, the requisite finding of extraordinary circumstances, to enlarge the time for filing an application for reconsideration, would not be warranted.

Here, similarly to this court's decision in *Bunch*, neither *Graham* nor *Miller* is directly on point. In both of those cases the offenders received life sentences without the possibility of parole. Appellant fails to recognize that he is not similarly situated to those defendants because he was not specifically sentenced to life in prison without parole. Appellant was sentenced to consecutive, fixed-term sentences totaling eighty-four years for various, distinct felonies, including the following: aggravated murder, two counts of aggravated burglary, three counts of aggravated robbery, kidnapping, and felonious assault. Appellant's sentence differs vastly from the sentences of life in prison without parole imposed in *Graham* and *Miller*. Thus, due to this essential difference in facts, the delay is not justified.

Admittedly, appellant's sentence may be considered a "de facto" life sentence since he was sixteen-years-old when he committed these crimes and the stated term of his sentence will not expire until he is 100 years old. However, the United States Supreme Court's decisions were based specifically on life sentences without the possibility of parole. They were not based on "de facto" life sentences.

Furthermore, as of yet, no Ohio Supreme Court or United States Supreme Court decisions has extended the *Graham* or *Miller* holding to "de facto" life sentences. In fact, many courts have declined to do so. See *Goins v. Smith*, N.D. Ohio No. 4:09-CV-1551, 2012 WL 3022206 (July 24, 2012) ("even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham's* holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Kasic*, 228 Ariz. 288, 265 P.3d 410, 415-416 (Ariz.Ct.App.2011) (concurrent and consecutive prison terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*);

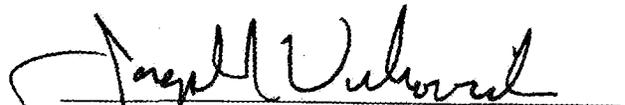
Henry v. State, 82 So.3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (a nonhomicide child offender's ninety year sentence is not unconstitutional); *Walle v. State*, 99 So.3d 967, 972-973 (Fla. Dist. Ct. App. 2012) (refusing to extend *Graham* to aggregate sentences totaling ninety-two years on the reasoning that *Graham* applies only to single sentences); *Adams v. State*, 288 Ga. 695, 707 S.E.2d 359, 365 (2011) (child's seventy-five year sentence and lifelong probation for child molestation did not violate *Graham*); *People v. Taylor*, 2013 IL App (3d) 110876, 984 N.E.2d 580 (Ill. App. Ct. 2013) (*Graham* does not apply because the defendant was only sentenced to forty years and not life without the possibility of parole); *Bunch v. Smith*, 685 F.3d 546, 550-551 (6th Cir. 2012) (stating that the United States Supreme Court in *Graham* "did not address juvenile offenders, like Bunch, who received consecutive fixed-term sentences for committing multiple nonhomicide offenses"). *But see People v. Rainer*, ___ P.3d ___, 2013COA51, 2013WL1490107 (Colo. App. 2013) (*Graham's* holding and reasoning can and should be extended to apply to term of year sentences that result in a "de facto" life without parole sentence); *People v. Caballero*, 55 Cal.4th 262, 282 P.3d 291 (Cal. 2012) (held that term of years sentences that extend beyond a juvenile's life expectancy, and are imposed for nonhomicide offense, violate the Eighth Amendment pursuant to *Graham*).

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

A reconsideration application must call to the attention of the appellate court an obvious error in its decision or point to an issue that was raised to the court but was inadvertently either not considered at all or not fully considered. *Juhasz v. Costanzo*, 7th Dist. No. 99CA294, 2002-Ohio-553. An application for reconsideration may not be utilized where a party simply disagrees with the conclusion reached and the logic used by an appellate court. *Victory White Metal Co. v. N.P. Motel Syst.*, 7th Dist. No. 04MA245, 2005-Ohio-3828, ¶ 2; *Hampton v. Ahmed*, 7th Dist. No. 02BE66, 2005-Ohio-1766 ¶ 16. In the present case, appellant's contentions fail to call attention to an obvious error in this court's decision or an issue that was raised but not fully considered.

In conclusion, given the length of delay and the fact that neither *Graham* nor *Miller* is directly on point, there is no basis to find extraordinary circumstances that would warrant granting the App.R. 14(B) motion to enlarge the time period to file the application for reconsideration.

Accordingly, appellant's motion to enlarge is denied and the application for reconsideration is dismissed as untimely.



JOSEPH J. VUKOVICH,



GENE DONOFRIO,



CHERYL L. WAITE, JUDGES.