

ORIGINAL

IN THE SUPREME COURT OF OHIO  
2014

STATE OF OHIO,

Case No. 2014-0454

Plaintiff-Appellee,

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

-vs-

JASON WATKINS,

Court of Appeals  
Case No. 13AP-133, 13AP-134

Defendant-Appellant.

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION**

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## EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

There is mismatch between defendant Jason Watkins's single proposition of law and the argument in support of the proposition of law. But ultimately the mismatch does not matter, because neither the proposition nor the argument deserves this Court's review.

After being bound over from juvenile court, Watkins pleaded guilty to five counts of aggravated robbery and one count each of robbery, sexual battery, and gross sexual imposition. Three of the counts carried three-year firearm specifications. The charges stem from four separate armed robberies, with two of them also involving sexual assaults. The trial court sentenced Watkins to a total of 67 years. On appeal, Watkins claimed that the 67-year cumulative prison term violates *Graham v. Florida*, 560 U.S. 48 (2010), which held that the Eighth Amendment prohibits sentencing a juvenile offender to life without parole for a non-homicide offense. The Tenth District rejected this claim and denied reconsideration.

Watkins's single proposition of law raises a new claim based on *State v. Long*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-849. In *Long*—which was decided *after* the Tenth District denied reconsideration—this Court held that the record must show that the trial court specifically considered a juvenile's youth as a mitigating factor before imposing life without parole for aggravated murder. Echoing the two paragraphs of the *Long* syllabus, Watkins's proposition of law claims that *Long* should apply anytime a trial court imposes a sentence that is the “functional equivalent” of life without parole.

Although Watkins's proposition of law seeks to extend *Long*, the argument section of Watkins's memorandum raises an entirely different issue. The argument section reiterates Watkins's contention in the Tenth District that the 67-year cumulative prison term violates *Graham*. Indeed, *Long* is cited only once in the argument section (in the “Introduction”), and immediately following this citation Watkins expressly disavows any reliance on *Long* by stating

that this case presents a “different constitutional issue: whether the Constitution permits the imposition of a lengthy sentence that is the functional equivalent of a life sentence.” MSJ, p. 5.

Accordingly, the State is unsure as to what issue Watkins wants this Court address. Watkins’s proposition of law seeks to extend *Long*. Yet everything else in Watkins’s memorandum seeks to extend *Graham*. These are two distinct issues. Whereas *Graham* concerns *whether* a trial court can sentence a juvenile to life-without-parole, *Long* concerns the proper *procedure* that a trial court must follow before imposing such a sentence.

Either way, this Court should decline review. To start, Watkins’s claims under both *Graham* and *Long* are based on a false premise. Watkins states that his 67-year prison term provides “no opportunity for release within his normal life expectancy.” MSJ, pp. 1-2. This is wrong. As the Tenth District recognized, Watkins will be eligible for judicial release after serving one-half of the stated prison term—i.e., in 33 ½ years. Opinion at ¶ 17, citing R.C. 2929.20(C)(5). While Watkins downplays his judicial-release eligibility, the bottom line is that he has a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham* at 74. Even if this Court were inclined to address whether a lengthy term-of-years sentence for multiple offenses is the “functional equivalent” to life-without-parole under either *Graham* or *Long*, it should do so in a case where the sentence *actually* provides no opportunity for release within any normal life expectancy. This is not such a case. For this reason alone, this Court should decline jurisdiction entirely.

Furthermore, pertaining to Watkins’s *Graham* claim, the Tenth District correctly held that the Eighth Amendment does not prohibit the 67-year cumulative sentence because Watkins was not sentence to life-without-parole on any particular non-homicide offense. Opinion at ¶ 18. Although courts across the country are split on whether a lengthy term-of-years sentence for

multiple offenses is subject to *Graham*, resolving this nation-wide split is behind this Court's purview. And among Ohio courts, there is no split at all. "[N]o court in Ohio has accepted this expansive view of the *Graham* case and, in fact, two federal courts in this state have rejected it." *Id.* (citing cases from Sixth Circuit and Southern District of Ohio). The Tenth District's decision is also consistent with this Court's prior holding that proportionality claims under the Eighth Amendment look to "individual sentences imposed on each count and not the 'cumulative impact of multiple sentences imposed consecutively.'" *Id.* at ¶ 19, quoting *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶ 19. On top of all this, Watkins raised no Eighth Amendment objection at sentencing, so any review of his sentence would be limited to plain error.

Similar concerns militate against reviewing Watkins's *Long* claim. Just as a lengthy term-of-years sentence for multiple offenses does not trigger *Graham*, nor should it trigger the procedural requirements in *Long*. Also, *Long*—which was decided March 12, 2014—is practically brand new. There is no disagreement among the lower courts whether *Long* applies to lengthy term-of-years sentences. Indeed, as of the writing of this memorandum, *Long* has not been cited in a single Ohio appellate decision. This Court would benefit from allowing this issue to percolate in the lower courts before intervening. At the very least, this Court should wait for a case in which this issue is actually litigated in the proceedings below. Here it was not.

Because the Tenth District correctly affirmed Watkins's sentence, and because this case presents no questions of such constitutional substance or great public interest as would warrant this Court's review, this Court should decline jurisdiction.

#### **STATEMENT OF THE CASE AND FACTS**

After a juvenile-court bindover, defendant Jason Watkins was indicted on 22 counts: Six counts of aggravated robbery; six counts of robbery; six counts of kidnapping; two counts of rape; and two counts of gross sexual imposition (GSI). The counts stemmed from four separate

episodes occurring in February 2011. Watkins eventually agreed to plead guilty to five of the aggravated-robbery counts (three of them carrying a three-year firearm specification), one of the robbery counts, one count of sexual battery (as a lesser-included offense of rape), and one of the GSI counts.

Watkins moved to withdraw his guilty plea, but the trial court ultimately overruled the motion. The trial court sentenced Watkins to a total of 67 years. After announcing the sentence, the trial court asked the defense if the court had “overlooked” anything. The defense answered, “No, Your Honor.” At no point did the defense raise any constitutional objections to the 67-year cumulative sentence.

Watkins appealed, claiming (1) that the trial court abused its discretion in refusing to allow Watkins to withdraw his plea, and (2) that the cumulative 67-year sentence violates *Graham*. The Tenth District affirmed. Watkins thereafter sought reconsideration on the *Graham* issue, which the Tenth District denied. Watkins now seeks discretionary review.

## ARGUMENT

**Response to Proposition of Law:** A lengthy term-of-years sentence for multiple offenses is not the “functional equivalent” of a life-without-parole sentence for purposes of the Eighth Amendment, especially when the offender has the opportunity to apply for judicial release.

The argument under Watkins’s single proposition of law (but not the proposition of law itself) claims that the cumulative 67-year prison term imposed by the trial court amounts to cruel and unusual punishment under *Graham*. The defense, however, raised no constitutional objection to Watkins’s sentence, so Watkins has waived all but plain error. Crim.R. 52(B).

Watkins cannot show plain error. In *Graham*, the United States Supreme Court held that the Eighth Amendment prohibits a trial court from sentencing a juvenile to a life-without-parole on a non-homicide offense. But unlike the defendant in *Graham*, Watkins has a “meaningful

opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham* at 74. Specifically, the trial court found that the only prison terms that were mandatory were the nine years for the firearm specifications. Thus, because Watkins’s aggregated non-mandatory prison terms is more than ten years, he will be eligible for judicial release after serving one-half the stated prison term—i.e., 33½ years. R.C. 2929.20(C)(5).

Of course, there is no guarantee that Watkins will ever receive judicial release. But the Eighth Amendment “does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juvenile 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.” *Graham* at 74. Yet the mere possibility that Watkins *could* be released early means that the State has not “ma[de] the judgment at the outset that [Watkins] never will be fit to reenter society.” *Id.* Whether Watkins is actually granted judicial release will be largely up to him.

Because Watkins could be released early, there is no need to address whether consecutive sentences for multiple offenses can be the “functional equivalent” of a life-without-parole sentence for purposes of the Eighth Amendment. But even if this Court chooses to address this argument, it is without merit.

To be sure, courts across the country are split on whether consecutive sentences for multiple offenses can be the constitutional equivalent to a life-without-parole sentence under *Graham*. However, the Sixth Circuit in *Bunch v. Smith*, 685 F.3d 546 (6th Cir.2012), refused to extend *Graham* to consecutive sentences. Although *Bunch* was applying the deferential federal habeas standard of review, its analysis is persuasive here. In *Bunch*, the Ohio juvenile was

sentenced to consecutive prison terms totaling 89 years. *Id.* at 548. The Court denied habeas relief, noting that in *Graham* “the Court made clear that “[t]he instant case concerns *only* those juvenile offenders sentence to *life without parole* solely for a nonhomicide offense.” *Id.* at 551, quoting *Graham* at 63 (emphasis in *Bunch*). Thus, *Graham* “did not address juvenile offenders, like Bunch, who received consecutive, fixed-term sentences for committing multiple nonhomicide offenses.” *Bunch* at 551.

The Sixth Circuit rejected Bunch’s argument that the 89-year sentence was the “functional equivalent of life without parole,” finding that Bunch was not entitled to a “realistic opportunity to obtain release” because he was not sentenced to “life.” *Id.*, quoting *Graham* at 82. “The Court’s analysis in *Graham* supports this conclusion because the analysis did not encompass consecutive, fixed-term sentences.” *Bunch* at 551. The Sixth Circuit also cited a Florida appellate court that noted the various problems with extending *Graham* to consecutive sentences:

At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is “life” or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written.

*Id.* at 552, quoting *Henry v. State*, 82 So.3d 1084, 1089 (Fla. Ct. App.2012).

Another Florida appellate court raised additional concerns with extending *Graham* to consecutive sentences:

What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?

*Walle v. State*, 99 So.3d 967, 972 (Fla. Ct. App.2012).

Moreover, refusing to extend *Graham* to consecutive sentences is consistent with this Court's decision in *Hairston*. "Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Hairston* at syllabus. "[I]t is not the aggregate term of incarceration but, rather, the individual sentences that are relevant for purposes of Eighth Amendment analysis." *Id.* at ¶ 22. Although *Hairston* did not involve a juvenile, its command to review Eighth Amendment proportionality claims on a count-by-count basis nonetheless defeats Watkins's claim that consecutive sentences for multiple offenses triggers *Graham*'s categorical restriction for a life-without-parole sentence for a juvenile's non-homicide offense.

In short, Watkins cannot show plain error under *Graham* because he was not sentenced to life-without-parole for any particular non-homicide offense. And even if *Graham* did apply to consecutive sentences for multiple offenses, Watkins has a meaningful opportunity to obtain release.

Apart from the argument in Watkins's memorandum, the proposition of law claims that *Long* required the trial court to state on the record that it considered his youth as a mitigating factor. This claim is also without merit. In *Long*, the juvenile offender was sentenced to life without parole for aggravated murder. This Court held that "[a] court, in exercising its discretion under R.C. 2929.03(A), must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole." *Long* at paragraph one of the syllabus.

Also, “[t]he record must reflect that the court specifically considered the juvenile offender’s youth as a mitigating factor at sentencing when a prison term of life without parole is imposed.” *Id.* at paragraph two of the syllabus.

But here, Watkins was not sentenced to life without parole for aggravated murder. Instead, he was sentenced to consecutive term-of-years sentenced for multiple non-homicide offenses. For the same reasons that a lengthy term-of-years sentence for multiple offenses does not trigger *Graham*’s categorical ban, nor does it trigger *Long*’s procedural requirements. In any event, the sentencing entry specifically states that the trial court considered the principles and purposes of felony sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. Compliance with these statutes is enough to show that the trial court considered Watkins’s youth as a mitigating factors. *Id.* at ¶¶ 17-18. The “on the record” component to *Long* is based on the unique nature of a life-without-parole sentence. *Id.* at ¶ 19 (“Yet because a life-without-parole sentence implies that rehabilitation is impossible, when the court selects this most serious sanction, its reasoning for the choice ought to be clear on the record.”). These concerns are absent when a trial court imposes term-of-years sentences for multiple offenses.

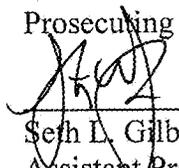
Watkins’s proposition of law (and the argument thereunder) deserves no further review.

### CONCLUSION

For the foregoing reasons, the State respectfully submits that jurisdiction should be declined.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was hand-delivered this day, April 23, 2014,  
to DAVID L. STRAIT, 373 South High Street-12th Fl., Columbus, Ohio 43215.



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