

ORIGINAL

IN THE SUPREME COURT OF OHIO

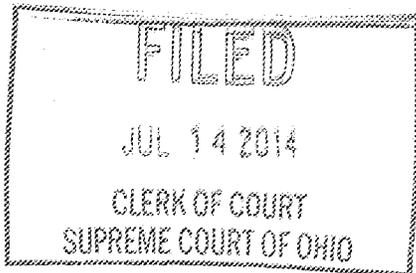
STATE OF OHIO, :  
: CASE No. 2014-120  
PLAINTIFF-APPELLEE, :  
: ON DISCRETIONARY APPEAL FROM THE  
v. : MAHONING COUNTY COURT OF APPEALS,  
: SEVENTH APPELLATE DISTRICT,  
BRANDON MOORE, : CASE No. 08 MA 20  
: :  
DEFENDANT-APPELLANT. :

**MERIT BRIEF OF AMICUS CURIAE,  
THE OFFICE OF THE OHIO PUBLIC DEFENDER,  
IN SUPPORT OF APPELLANT BRANDON MOORE**

Ralph M. Rivera, 0082063  
Assistant Prosecutor  
Office of the Mahoning County Prosecutor  
21 W Boardman St, 6th Fl.  
Youngstown, Ohio 44503  
(330) 740-2330; (330) 740-2008 (fax)  
rrivera@mahoningcountyoh.gov  
Counsel for Appellee, State of Ohio

Rachel S. Bloomekatz, 0091376  
(Counsel of Record)  
Kimberly A. Jolson, 0081204  
JONES DAY  
325 John H. McConnell Boulevard, Ste. 600  
P.O. Box 165017  
Columbus, Ohio 43216  
(614) 469-3919; (614) 461-4198 (fax)  
rbloomekatz@jonesday.com  
Counsel for Appellant Brandon Moore

Office of the Ohio Public Defender  
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 Amicus Curiae,  
Office of the Ohio Public Defender



## TABLES OF CONTENTS

	Page No.
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF THE CASE AND THE FACTS .....	1
ARGUMENT .....	1
<b>Proposition of Law:</b>	
The Eighth Amendment prohibits sentencing a juvenile non-homicide offender to consecutive term-of-years sentences that preclude a meaningful opportunity for release during the juvenile's life. ....	1
CONCLUSION .....	4
CERTIFICATE OF SERVICE .....	5

## TABLES OF AUTHORITIES

Page No.

### Cases:

<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) .....	1,2,3,4
<i>Harmelin v. Michigan</i> , 501 U.S. 957, 996, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) .....	2
<i>Naovarath v. State</i> , 105 Nev. 525, 779 P.2d 944 (1989) .....	3
<i>Solem v. Helm</i> , 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) .....	3
<i>Sumner v. Shuman</i> , 483 U.S. 66, 83, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) .....	2

### Constitutional Provision:

Eighth Amendment, United States Constitution.....	1,3,4
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## INTRODUCTION

*Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), is about the meaningful opportunity for release. It is not merely about the label, “life without parole.” Under *Graham*, children who do not kill are entitled to a “meaningful opportunity to obtain release[.]” *Id.* at 75. And the sentence imposed in this case, which guarantees that Brandon Moore will stay in prison for 92 years, provides *no* opportunity for release, meaningful or otherwise.

## STATEMENT OF THE CASE AND THE FACTS

Amicus defers to Brandon’s statement of the case and the facts.

## ARGUMENT

### Proposition of Law:

**The Eighth Amendment prohibits sentencing a juvenile non-homicide offender to consecutive term-of-years sentences that preclude a meaningful opportunity for release during the juvenile’s life.**

*Graham v. Florida*, 560 U.S. 48, 51, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), holds that the Eighth Amendment prohibits sentences that fail to provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” for children who do not commit homicide. *Id.* at 75. The holding of *Graham* is not that lifelong sentences for non-homicide juveniles are permitted so long as those sentences are pronounced using the word “years” instead of the word “life.” If that were the holding, then the rule that *Graham* pronounced would be meaningless. Legislatures

could rename all sentences of “life without parole” to “100 years without release” and thereby render *Graham* irrelevant. That is not a reasonable or fair application of this binding precedent.

Further, the United States Supreme Court has—at least twice—expressly held that lifelong sentences are indistinguishable from sentences labeled “life without parole.” In a decision written by Justice Scalia, the Court held that there was a “negligible difference between life without parole and . . . a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man.” *Harmelin v. Michigan*, 501 U.S. 957, 996, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). The Court has also upheld the commonsense notion that “there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy.” *Sumner v. Shuman*, 483 U.S. 66, 83, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

In keeping with *Harmelin* and *Sumner*, *Graham* focused on how a juvenile’s sentence functions, not how it is labeled. In *Graham*, the Court held that, although “[a] State is not required to guarantee eventual freedom to a juvenile [non-homicide] offender,” the state “must” impose a sentence that provides “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”

*Graham* at 75. Thus, under *Graham*, the Eighth Amendment bars sentencing a child who has not killed to any sentence that fails to provide a meaningful opportunity for release.

And when applying its reasoning to the case before it, the *Graham* Court did not end its inquiry with the label Florida placed on Terrance Graham's sentence. Instead, the Court asked whether the sentence provided a meaningful opportunity to obtain release. Specifically, the State of Florida labeled Terrance Graham's sentence merely as "life," not "life without parole." *Id.* at 57. But the Court noted that another part of Florida law abolished parole, so the sentence was substantively life without parole. *Id.* And when the Court considered the availability of clemency, it again returned to substance, not labels. It noted that "the remote possibility of [clemency] does not mitigate the harshness of the sentence." *Id.* at 70, citing *Solem v. Helm*, 463 U.S. 277, 300-301, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

More generally, the Court's description of why life-long sentences are prohibited focuses entirely on whether the juvenile non-homicide offender has a meaningful opportunity for release, not on how a state labels the sentence. The Court held that a sentence that does not provide for the possibility of parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham* at 70, quoting, *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989). A sentence labeled "life without parole" and a

sentence labeled "112 years" (with the theoretical chance to seek judicial release after 92 years) equally deny hope, render good behavior and character improvement immaterial, and mean that he will die in prison.

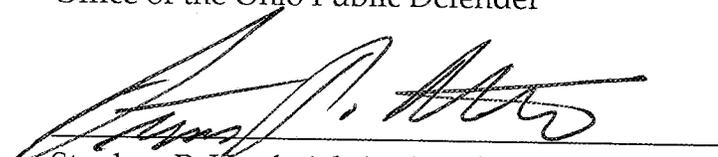
Perhaps most importantly, the United States Supreme Court expressly held that the *Graham* decision concerned "term-of-years" sentences. *Graham* at 61 ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence"). Brandon is serving a term-of-years sentence. *Graham* applies to his case.

### CONCLUSION

The Eighth Amendment is implicated by the degree to which a punishment is cruel and unusual, not by the label used to describe the punishment. This Court should reverse the decision of the court of appeals and remand this case to the trial court with an order to impose a sentence that punishes Brandon for the very serious crimes he committed at age 15, but that also provides him with the constitutionally-mandated meaningful opportunity for release.

Respectfully submitted,

Office of the Ohio Public Defender

A handwritten signature in black ink, appearing to read "Stephen P. Hardwick", written over a horizontal line.

Stephen P. Hardwick (0062932)

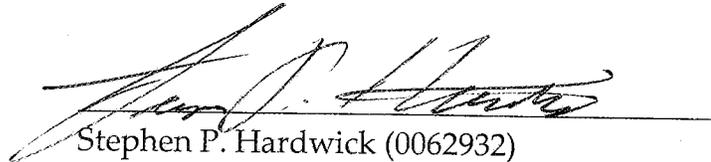
Assistant Public Defender

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

Counsel for Amicus,  
Office of the Ohio Public Defender

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Ralph Rivera, rrivera@mahoningcountyoh.gov, and Rachel Bloomkatz, rbloomekatz@jonesday.com, on this 14th day of July, 2014.

A handwritten signature in black ink, appearing to read "Stephen P. Hardwick", is written over a horizontal line.

Stephen P. Hardwick (0062932)  
Assistant Public Defender

Counsel for Amicus,  
Office of the Ohio Public Defender

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