IN THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, v. BRANDON MOORE, Defendant-Appellant.	)	Case No. 18 MA 00055 On Appeal from the Court of Common Pleas, Mahoning County Case No. 02 CR 525

APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

Table of authorities iii

Introduction 1

Statement of the case and facts 3

A. Brandon's conviction and initial sentencing. 3

B. The Ohio Supreme Court held that Brandon's 112-year sentence was unconstitutional. 4

C. Brandon's resentencing hearing demonstrated his tragic and abusive upbringing, and his maturation and rehabilitation while incarcerated. 6

D. The trial court's resentencing decision ensures Brandon will live few, if any, years outside prison. 8

Standard of review 10

Argument 10

Assignment of Error No. 1: The trial court erred in sentencing the defendant, a juvenile nonhomicide offender, to fifty years' incarceration—a sentence that does not provide a "meaningful opportunity for release," in violation of the Eighth Amendment of the United States Constitution and Article I §9 of the Ohio Constitution. (See Def.'s Sentencing Mem. at pp. 3–21; Hr'g Tr. 24–27). 10

First Issue Related to Assignment of Error No. 1: Whether a sentence of fifty years denies a juvenile nonhomicide offender a "meaningful opportunity for release" required by the Eighth Amendment to the United States Constitution, as interpreted by *Graham v. Florida*, and Article I §9 of the Ohio Constitution. 10

I. Brandon's revised sentence is unconstitutional because it denies him a "meaningful opportunity for release." 10

A. To be meaningful, an opportunity for release must come early enough that those juvenile offenders who prove maturity and rehabilitation can live a substantial part of their lives outside prison. 12

1. The United States and Ohio Supreme Courts have held that a "meaningful opportunity for release" requires that juvenile nonhomicide offenders have a chance to spend a substantial part of their lives outside of prison. 12

2. Courts around the country have held that a 50-year sentence does not provide a meaningful opportunity for release. 15

3. Brandon's sentence is unconstitutional because it does not allow him to spend a substantial part of his life outside prison walls..... 18

B. An actuarial approach that bases a juvenile's opportunity for release on life-expectancy tables would be impractical and unconstitutional..... 20

C. Even if the Court adopts a life-expectancy-based approach, Brandon's sentence likely exceeds his individual life expectancy and therefore represents de facto life without parole..... 24

Second Issue Related to Assignment of Error 1: Whether sentencing a juvenile nonhomicide offender to fifty years' incarceration is cruel and unusual punishment because it violates evolving standards of decency nationwide. 25

II. "Evolving standards of decency" render 50-year sentences for juvenile nonhomicide offenders unconstitutional under the Eighth Amendment. 25

A. An emerging number of states ban Brandon's sentence..... 26

B. None of the legitimate purposes of punishment can justify imposing a 50-year sentence on a juvenile nonhomicide offender. 29

Assignment of Error No. 2: To the extent that the constitutionality of the defendant's sentence relies upon the opportunity for judicial release under R.C. 2929.20, the trial court erred because judicial release as a procedural mechanism does not provide a "meaningful opportunity for release" in violation of the Eighth Amendment of the United States Constitution and Article I §9 of the Ohio Constitution. (*See* Def.'s Sentencing Mem. at p. 22; Hr'g Tr. at p. 23)..... 32

Issue Related to Assignment of Error 2: Whether judicial release, which can be denied without a hearing, is a procedure that provides a "meaningful opportunity for release" required by the Eighth Amendment to the United States Constitution, as interpreted by *Graham v. Florida*, and Article I §9 of the Ohio Constitution..... 32

Conclusion..... 35

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña,
515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) 22

Arnold v. Cleveland,
67 Ohio St.3d 35, 616 N.E.2d 163 (1993) 12

Atkins v. Virginia,
536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 27, 29

Bear Cloud v. State,
334 P.3d 132 (Wyo.2014) 15, 17, 23

Carter v. State,
461 Md. 295, 192 A.3d 695 (2018) 27, 28

Casiano v. Commissioner of Correction,
115 A.3d 1031 (Conn. 2015) ..... *passim*

Clark v. Joseph,
95 Ohio.App.3d 207, 642 N.E.2d 36 (1994) 22

Commonwealth v. Perez,
480 Mass. 562 (2018) 28

Diatchenko v. District Attorney for Suffolk District,
27 N.E.3d 349 (Mass. 2015) 33

Eddings v. Oklahoma,
455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) 1

Estelle v. Gamble,
429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) 26

Funchess v. Prince,
E.D.La. No. 142105, 2016 WL 756530 (Feb. 25, 2016) 35

Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.,
95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 10

Graham v. Florida,
560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) ..... *passim*

Greiman v. Hodges,
79 F.Supp.3d 933 (S.D.Iowa 2015) 34

Hayden v. Keller,
134 F. Supp. 3d 1000 (E.D.N.C.2015) 34

In re C.P.,
131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729 ..... 12, 29

Ira v. Janecka,
419 P.3d 161 (N.M. 2018) 15

Johnson v. California,
543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) 22

Kennedy v. Louisiana,
554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) 26

People v. Contreras,
4 Cal.5th 349, 411 P.3d 445 (Cal. 2018) ..... *passim*

Roper v. Simmons,
543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) 31

State v. Broom,
146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620 12

State v. Brown,
99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 ..... 12, 35

State v. Farris,
109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 12

State v. Moore,
149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127 ..... *passim*

State v. Null,
836 N.W.2d 41 (Iowa 2013) ..... *passim*

State v. Pearson,
836 N.W.2d 88 (Iowa 2013) 28

State v. Smith,
295 Neb. 957, 892 N.W.2d 52 (2017) 19

State v. Walker,
7th Dist. Mahoning No. 08MA103, 2009-Ohio-1503 10

State v. Young,
794 S.E.2d 274 (N.C.2016) 35

State v. Zuber,
152 A.3d 197 (N.J.2017) 15, 17, 23

United States v. Pepin,
514 F.3d 193 (2d Cir.2008) 25

United States v. Taveras,
436 F.Supp.2d 493 (E.D.N.Y. 2006) 25

Federal statutory and constitutional provisions

42 U.S.C. § 416(l) 19

U.S. Const. amend. XIV 22

U.S. Const. amend. XIII ..... *passim*

Ohio statutes, regulations, and constitutional provisions

Ohio const. art. I §2 22
Ohio const. art. I §9 ..... *passim*
R.C. 2929.11 9
R.C. 2929.12 9
R.C. 2929.20 ..... 32, 33, 34

State laws

Ala. Bd. of Pardons and Paroles Art. 1 §9 27
Ala. Code § 13A-6-2 27
Ark. Code Ann. § 16-93-621(a)(1) 27
Cal. Penal Code § 3051(b)(1) 27
Colo. Rev. Stat. Ann. § 18-1.3-401(4)(c)(I)(B) 27
Conn. Gen. Stat. Ann. § 54-125a(f)(1) 27
D.C. Code Ann. § 24-403.03(a) 28
Del. Code Ann. tit. 11, § 4204A(d) 27
Fla. Stat. Ann. § 921.1402(2)(d) 28
Haw. Rev. Stat. § 706-669 28
Ky. Rev. Stat. §640.040 28
La. Rev. Stat. § 15:574.4(D)(1) 28
Mass. G. L. c. 279, § 24 28
Mont. Code Ann. § 46-18-222(1) 28
Mont. Code Ann. § 46-23-201 28
N.D. Cent. Code Ann. § 12.1-20-03(4) 28
N.D. Cent. Code Ann. § 12.1-32-13.1 28
N.J. Stat. Ann. § 2C:11-3; A.B. 373, 217th Gen. Sess. 28
N.J. Stat. Ann. § 2C:14-2 28
Nev. Rev. Stat. Ann. § 213.12135 28
S.D. Codified Laws §§ 22-6-1 & 24-15-5 28
Tex. Gov't Code Ann. § 508.145(c) 28
Utah Code Ann. §§ 76-3-203 & § 77-27-5 28
W.Va. Code § 61-11-23(b) 28
Wyo. Stat. Ann. § 6-10-301(c) 28

Other authorities

Benefits Planner: Retirement,
Social Security Administration 19

Campaign for the Fair Sentencing of Youth,
Michigan Life Expectancy Data for Youth Serving Natural Life Sentences (2012–2015)..... 24

Cummings & Colling,
There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post–Graham Sentences 18 U.C. Davis J. Juvenile L. & Policy 267 (2014)..... 23

Elizabeth Arias et al.,
National Vital Statistics Reports: United States Life Tables, 2014, U.S. Department of Health & Human Services (Aug. 14, 2017) 22

Federal Interagency Forum on Aging–Related Statistics,
Older Americans 2012: Key Indicators of Well–Being (June 2012),..... 19

Laurence Steinberg,
Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop (2014)..... 31

Models for Change,
Research on Pathways to Desistance: December 2012 Update 4 (2012) 31

Nick Straley,
Miller's Promise: Re–Evaluating Extreme Criminal Sentences for Children,
89 Wash. L.Rev. 963 (2014) 24, 25

Ohio Criminal Sentencing Commission,
Memorandum of Jo E. Cline to Sara Andrews (Nov. 23, 2015)..... 18

Richard A. Bierschbach & Stephanos Bibas,
Constitutionally Tailoring Punishment, 112 Mich. L. Rev. 398 (2013)..... 33

Sarah F. Russell,
Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment,
89 Ind. L.J. 373 (2014) 33

Steinberg & Scott,
Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty, 58 Am. Psychologist 1009 (2003) 31

U.S. Sentencing Commission,
Preliminary Quarterly Data Report (through March 31, 2014) 17

INTRODUCTION

For both the Ohio and United States Supreme Courts, age is "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). These courts recognize that juveniles as a category are physiologically underdeveloped, immature, and generally unable to extricate themselves from crime-producing environments. As a result, they have developed a *sui generis* jurisprudence mandating that juveniles be sentenced in accordance with the diminished culpability of their actions and their unique capacity for rehabilitation. That's why, in rejecting Brandon's previous sentence, the Ohio Supreme Court emphasized a singular premise: that "[t]he most important attribute of the juvenile offender is the potential for change." *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶42. Quite simply, before a boy grows into adulthood, no one can say whether his crimes—including heinous crimes, as committed here—are the result of immaturity or incorrigibility. *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Thus, the Ohio Supreme Court, following the United States Supreme Court's decision in *Graham v. Florida*, held that all juveniles who have not committed murder must be afforded a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Moore* at ¶44 (quoting *Graham* at 75). Critically, neither *Graham* nor *Moore* requires the State to release Brandon or any juvenile nonhomicide offender if he does not mature and rehabilitate. But the Constitution does "prohibit States from making the judgment at the outset that [these] offenders never will be fit to reenter society." *Id.* at ¶45. And so "*Graham* protects juveniles categorically from a final determination while they are still youths that they are irreparably corrupt and undeserving of a chance to reenter society." *Id.* at ¶42.

But what does it mean for a juvenile to have a "meaningful opportunity" to be released and "reenter society"? That is the question at issue in this case. Although neither *Graham* nor *Moore*

answered the question with a precise time limit for juveniles' sentences, they do not leave lower courts without guidance–and constraints.

Most important, neither Court sets life expectancy as the bar for what constitutes a "meaningful opportunity for release." The State argues that all this constitutional standard requires is a sentence that gives a possibility of release before a defendant's life expectancy expires. Because in its view Brandon's 50-year sentence is lower than the general 69-year life expectancy for African-American men, it is constitutional. (*See* State's Supp. Sentencing Mem. at 4). But that approach suffers from fatal flaws. It requires courts to sentence based on unconstitutional factors such as race and gender, and it raises a host of questions about a person's life expectancy based on the conditions of incarceration and individual health issues.

More critically, however, an analysis based on life expectancy substitutes formalities for substance. While *Moore* had to determine only that Brandon's prior sentence was unconstitutional because it was so long as to exceed his life expectancy, that is not where the Court drew the line. Instead, it emphasized that its "intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society." *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶46. "It does not take an entire lifetime for a juvenile offender to earn a first chance to demonstrate that he is not irredeemable." *Id.* ¶47. Citing other cases from around the country that struck down the exact 50-year sentence at issue here, the Court emphasized that "life" means more than "biological survival"—and that the Constitution requires juvenile nonhomicide offenders the chance to "truly reenter society" and have a "meaningful life outside of prison." *Id.* ¶84 (quoting *Casiano v. Commr. of Corr.*, 78 115 A.3d 1031 (Conn. 2015)). Any sentence must therefore provide a juvenile nonhomicide offender not a guarantee of release, but rather an opportunity to prove that he's fit to reenter society when he can still lead a substantial portion of his life in freedom.

Brandon's sentence denies this "meaningful opportunity for release." The trial court sentenced him to a half century of incarceration. Judicial release under R.C. 2929.20 is an unconstitutional procedure for complying with *Graham* and *Moore* (as explained *infra* at 32); but even considering it, Brandon must serve at least 47 years in prison. No matter how much he matures, no matter how much rehabilitation he demonstrates, he will not be eligible for release until he reaches retirement age, and until after he has been incarcerated for the vast majority of his adult life. That is true even despite the fact that Brandon, in his resentencing hearing, already has demonstrated his enormous capability for transformation. As the expert psychologist's report lays bare, Brandon's crimes must be understood in the context of his tragic and abusive childhood. That's not to excuse his crimes, but to understand that they are not reflective of an irretrievably depraved character. In the expert's opinion, Brandon today poses no greater risk to society than the average parolee.

Rather than honor juveniles' capacity to change, Brandon's sentence mandates that he must stay behind bars until he is a senior citizen. The Court in *Graham* decried the possibility that a juvenile offender would have no opportunity to obtain release "even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Graham,* 560 U.S. at 79, 130 S. Ct. 2011, 176 L. Ed. 2d 825. But that is exactly how long Brandon will have to wait under his current sentence. It cannot stand.

STATEMENT OF THE CASE AND FACTS

A. Brandon's conviction and initial sentencing.

Brandon does not minimize the gravity of his crimes or their lasting impact on the victims and their families. On the evening of August 21, 2001, Brandon engaged in a "criminal rampage of escalating depravity" in Youngstown. *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶2. He was 15 years old. *Id.*

On October 2, 2002, a jury found Brandon guilty on twelve counts: three counts of aggravated robbery, three counts of rape, three counts of complicity to rape, one count of kidnapping, one count of conspiracy to robbery, and one count of aggravated menacing. *Id.* ¶12. The trial judge first sentenced him to 141 years, the maximum for each offense plus eleven firearm specifications. *Id.* ¶13. In sentencing Brandon, the trial judge rejected the notion that Brandon should be treated differently because he was a juvenile. The judge concluded that Brandon, at age 15, "[could not] be rehabilitated, that it would be a waste of time and money and common sense to even give it a try." *Id.* So he gave Brandon a life sentence, announcing to Brandon: "I want to make sure you never get out of the penitentiary." *Id.*

Through a "knotty" procedural history (described at *id.* ¶¶14–29)—not relevant to the issue here—Brandon's sentence was revised to 112-years. He had no possibility of release at all until age 92, at which point he could apply for judicial release. *Id.* ¶30.

B. The Ohio Supreme Court held that Brandon's 112-year sentence was unconstitutional.

After the United States Supreme Court's decision in *Graham*, Brandon challenged his sentence as unconstitutional under the Eighth Amendment. Given that his sentence exceeded his natural life expectancy, Brandon argued that it denied the "meaningful opportunity for release" that *Graham* mandated for all juvenile nonhomicide offenders. By contrast, the State argued that because Brandon's sentence was not technically a "life without parole" sentence, but was instead based on multiple consecutive counts, Brandon was not entitled to *Graham*'s protections. *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶¶48, 65.

The Ohio Supreme Court rejected the State's argument and ruled that Brandon's sentence violated the Eight Amendment. *Id.* The Court reasoned that regardless of how Brandon's sentence was structured or what it was called, Brandon, like the juvenile in *Graham*, had "twice-diminished

moral culpability" because (1) he was a juvenile rather than an adult and (2) he did not commit the most severe crime—murder. *Id.* ¶¶59, 65–74. Thus, he could not receive the harshest sentence for juveniles: life behind bars. Brandon is not guaranteed release, but his sentence must provide at minimum "an opportunity to seek release while it is still meaningful." *Id.* ¶63.

The Ohio Supreme Court's decision, following *Graham* and its own jurisprudence, was based on a fundamental premise: "The most important attribute of the juvenile offender is the potential for change." *Id.* ¶42. Because of a juvenile's physiological immaturity, it is impossible to determine whether "the commission of a crime is the result of immaturity or of irredeemable corruption." *Id.* And that means, as the Ohio Supreme Court held, that the Constitution "protects juveniles categorically from a final determination while they are still youths that they are irreparably corrupt and undeserving of a chance to reenter society." *Id.* While "*Graham* does not guarantee an eventual release,"—it may be that a teenager never demonstrates he or she is fit to reenter society—"'what the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* ¶44 (quoting *Graham* at 75). Brandon's 112-year sentence failed this test.

As to when such a "meaningful opportunity to obtain release" must occur, the Ohio Supreme Court, as described in greater detail below, rejected the notion that life expectancy should be the dividing line. The Constitution, the Court wrote, requires "more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society." *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶46. The Ohio Supreme Court did not determine Brandon's life expectancy; no such information was in the record. But because Brandon's sentence exceeded any conceivable

calculation of his life expectancy, there was no question that it denied a "meaningful opportunity for release" and could not stand. *Id.* ¶¶60, 63.

C. Brandon's resentencing hearing demonstrated his tragic and abusive upbringing, and his maturation and rehabilitation while incarcerated.

Upon remand for resentencing, Brandon's trial counsel submitted extensive evidence of Brandon's abusive and destructive upbringing and his extraordinary remorse and rehabilitation. As Brandon himself testified at the hearing: "[P]rison saved my life, honestly." (April 17, 2018 resentencing hearing (hereinafter "Hr'g Tr.") at 42). Because of a deprived childhood, filled with physical and sexual abuse, alcoholism, murder, mental illness, and instability, Brandon "didn't appreciate life." (*Id.* at 43). But, as he explained (and the expert report confirmed), "once I was incarcerated and I got structure and stability in my life from the institutions, I began to understand the real pain I had caused. Not only to the victims, but to society." (*Id.*). As Brandon's journey demonstrates, "Brandon is literally not the same person now as he was when he committed the offenses for which he is incarcerated." (Stinson Rept., at 38).

Brandon's story of rehabilitation is most clearly described in the report of Dr. Robert Stinson, the expert psychologist who evaluated Brandon for over six hours. The trial court impermissibly denied Brandon's counsel any opportunity to present live testimony from Dr. Stinson or others. Such testimony would have further demonstrated Brandon's rehabilitation. (Hr'g Tr. at 22–23). Dr. Stinson's report alone tells a compelling story.

Brandon had a dreadful upbringing. Raised in a home with alcoholism and drug abuse, he took his first drink at age three. (Stinson Rept. at 5, 13, 40–41). He was first sexually abused at six or seven. (*Id.* at 6). He had a sexually transmitted disease by age 10 and had seven sexual partners by the time he was 15. (*Id.* at 7, 11, 12). He was beaten. (*Id.* at 6, 14). He witnessed domestic violence. (*Id.* at 7). Family members—including his father, who sexually assaulted women—were

in and out of prison. (*Id.* at 41). He moved around because his mother could not afford stable housing; he did not have a bed of his own. (*Id.* at 6, 14). He attended ten to fifteen different schools by the time he reached eighth grade. (*Id.* at 9). And he felt like he had no place in the world. From a young age he believed he was just a "mistake" from a one-night stand between his parents who had no relationship and who each had multiple other children. (*Id.* at 3–4). One of those half-siblings drowned while Brandon was approximately five years old. (*Id.* at 6). And that was just the beginning.

In the months preceding Brandon's heinous crime, more tragedy hit. (*Id.* at 30). His father, having recently returned from prison, began building a relationship with Brandon, then was murdered. (*Id.* at 4). Brandon's best friend was murdered several months later. (*Id.* at 7). Brandon himself was shot. (*Id.* at 9). Without stability, he ran on the "streets," and fell into a life of alcohol, drugs, and crime. (*Id.* at 13, 30). This was all by the age of 15—"a time," as Dr. Stinson reported, "when his <u>brain was not fully developed</u>." (*Id.* at 42) (emphasis in original). Thus, to understand Brandon's offenses and his current risk, one has "to understand the reciprocal relationships that existed between his early instability, his family dysfunction, the impact of limited family income, a series of losses and deaths that Brandon endured, repeated traumatization, his cognitive limitations, the normalization of criminal activity in [his] family and life, and the development of emotional disturbances—all in the context of adolescent brain development." (*Id.* at 43).

When Brandon was incarcerated following his crime, he finally got the structure and support he needed to mature and rehabilitate. Even then, Brandon suffered physical abuse in prison, (Hr'g Tr. at 24–25), and given his lengthy sentence, it has been difficult for him to take advantage of some programming. (Def.'s Sentencing Mem. at 22). But overall, through his time in prison he has been able to gain stability and he has "matured in many ways since the offenses charged." (Stinson Rept. at 42). In addition to the "natural process of neuromaturation / brain

development that occurs . . . through one's 20s," Brandon has worked hard to rehabilitate. (*Id.*). He's received his GED, engaged in rehabilitative programming, completed training in a series of evidence-based behavior management skills, and held a series of jobs, including those afforded only to model prisoners. (*Id.* at 24; Hr'g Tr., at 30). As Dr. Stinson observed, Brandon's prison records reveal his maturing and nonviolent nature: "The absence of serious disciplinary history in the past several years points to a more positive prognosis for success on parole." (Stinson Rept. at 37). Overall, he concluded that Brandon "does not present with an elevated risk of re-offending" as compared to other inmates who are paroled. (*Id.* at 42–43) (emphasis in original). And that would be for parole today, not in another three decades.

D. The trial court's resentencing decision ensures Brandon will live few, if any, years outside prison.

Foreshadowing the debate here, at the sentencing hearing the parties disputed the meaning of *Graham*, *Moore*, and the constitutional constraints on the trial court in resentencing. The State argued (incorrectly) that the Ohio Supreme Court, by looking at generic life expectancy tables, determined that Brandon's life expectancy was 69, thus "eligibility for judicial release at a point prior to Defendant's 69th birthday will satisfy *Graham's* requirement of a 'meaningful opportunity for release.'" (State Supp. Sentencing Mem., at 4). Accordingly, the State recommended an 82-year sentence that would make Brandon eligible for judicial release at age 62, "seven years short of [his] life expectancy." (Hr'g Tr., at 9–10).

Brandon maintained that the Ohio Supreme Court had explicitly rejected that approach. Not only had the Court failed to calculate Brandon's individual life expectancy—a point the State had conceded earlier in the litigation, (*see* Cert. Petition, No. 16-1167, at 28)—but it held that the purpose of the constitutional protection was "not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society." *Moore*, 149 Ohio

St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶46. (Def.'s Sentencing Mem., at 14–21). The Ohio Supreme Court clearly stated: "It does not take an entire lifetime for a juvenile offender to earn a first chance to demonstrate that he is not irredeemable." (*Id.* at 18 (quoting *Moore* at ¶47)). Moreover, Brandon explained that judicial release was not a "meaningful" procedure for release, given that, among other things, it could be denied without even a hearing. (*Id.* at 22). Surveying cases and legislation across the country, Brandon's counsel argued that to be consistent with the "evolving standards of decency" for juvenile nonhomicide sentencing, and to reflect Brandon's rehabilitation, Brandon should be given a 25-year sentence. (*Id.* at 3; Hr'g Tr. at 48).

The trial court sentenced Brandon to 50 years in prison—meaning he will be 65 at the end of his sentence. (Order 4-27-18), App'x 4.[1] Even considering judicial release—which the trial court did not discuss, and this Court should not rely upon, *infra* at 32—Brandon will have to serve 47 years, or until he is 62. The court stated that it considered the entire record, counsels' arguments, the purposes of sentencing under R.C. 2929.11, and the recidivism factors under R.C. 2929.12 (among others), but it provided little (if any) reasoned analysis based on the facts or caselaw. *Id.* at 1–3. It concluded, without any detailed reasoning, that "consecutive sentences are necessary to protect the public from future crime and to punish the offender, and that the consecutive sentences are not disproportionate to the seriousness of the offenders [sic] conduct and to the danger the offender poses to the public." *Id.* at 3. There was no discussion of *Graham* or *Moore* or any precedent.

[1] The trial court ordered eight-year terms on each of the three robbery counts, to run concurrently with each other and the remaining counts; ten-year terms on each of the three rape counts, to run consecutively to each other; ten-year terms on the three counts of complicity, to run concurrently with each other and all other counts; an eight-year term on the kidnapping count, to run consecutively; and four three-year firearm specifications, to run consecutively. App'x 1–2.

STANDARD OF REVIEW

The constitutionality of a defendant's sentence is a question of law that this Court reviews de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶4; *State v. Walker*, 7th Dist. Mahoning No. 08MA103, 2009-Ohio-1503, ¶10.

ARGUMENT[2]

Assignment of Error No. 1: The trial court erred in sentencing the defendant, a juvenile nonhomicide offender, to fifty years' incarceration—a sentence that does not provide a "meaningful opportunity for release," in violation of the Eighth Amendment of the United States Constitution and Article I §9 of the Ohio Constitution. (See Def.'s Sentencing Mem. at pp. 3–21; Hr'g Tr. 24–27).

First Issue Related to Assignment of Error No. 1: Whether a sentence of fifty years denies a juvenile nonhomicide offender a "meaningful opportunity for release" required by the Eighth Amendment to the United States Constitution, as interpreted by *Graham v. Florida*, and Article I §9 of the Ohio Constitution.

I. Brandon's revised sentence is unconstitutional because it denies him a "meaningful opportunity for release."

This case picks up where the Ohio Supreme Court left off in *Moore*. Following the United States Supreme Court's decision in *Graham*, the Ohio Supreme Court affirmed that all juvenile nonhomicide offenders—like Brandon—must be given a "meaningful opportunity for release." Certainly, a sentence that exceeds a juvenile's life expectancy is too long, and so without having to draw the line as to exactly which term-of-years sentences would violate *Graham*'s dictates, the Ohio Supreme Court held that Brandon's 112-year sentence clearly failed to provide that requisite "meaningful opportunity for release."[3] *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d

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[2] In this appeal, the appellant does not challenge the trial court's decision that the Ohio Supreme Court vacated his sex offender classification along with his sentence. (*See* Def. Motion in Opp. to State's Request for Class Hr'g (Feb. 16, 2018)). Because he has not yet been reclassified, he has no basis for determining whether he has been harmed by the trial court's erroneous decision to vacate his classification and require that he be reclassified. The appellant reserves his right to appeal this issue if it becomes ripe.

[3] The Ohio Supreme Court had "no occasion to consider whether a term-of-years sentence violates the Eighth Amendment *only if* it exceeds a juvenile defendant's natural life expectancy."

1127, at ¶¶60–63. But the Court did not draw the line at life expectancy—and for good reason. Attempting to calculate an inmate's life expectancy is not only difficult, it raises a host of constitutional concerns about differential sentencing based on the race and gender of an offender. And it fails the "'rehabilitative ideal'" that *Graham* and Ohio have recognized is central to all jurisprudence involving juveniles. *Id.* ¶58 (quoting *Graham* at 74). Instead, the line the Court drew was whether a sentence provides a juvenile "an opportunity to seek release while it is still meaningful." *Id.* ¶63.

Neither *Moore* nor *Graham* set a specific age at which a juvenile nonhomicide offender must first be provided this chance "to obtain release based on demonstrated maturity and rehabilitation." *Id.* ¶¶44, 47. Those cases left the issue for the lower courts. *See id.* ¶138 (Lanzinger, J., concurring) (observing that "we leave unaddressed the problem of *when* the 'meaningful opportunity' would take place" and proposing a sentence for Brandon that would allow judicial release after 21 years). But those cases did set constitutional parameters within which trial courts must operate in sentencing juvenile offenders. And, as explained below, these cases require that an opportunity for release must come when a juvenile would still be able to live a substantial portion of his or her life in freedom—that is, to truly "reenter society" and find "fulfillment outside prison walls." *Moore* at ¶¶42–46; *Graham,* 560 U.S. at 79, 130 S.Ct. 2011, 176 L.Ed.2d 825. Yet, by sentencing Brandon to 50 years in prison, ensuring that he will be incarcerated until he is a senior citizen no matter how much rehabilitation he demonstrates, the trial court exceeded the bounds of

People v. Contreras, 4 Cal.5th 349, 361, 411 P.3d 445 (Cal. 2018). Thus, contrary to the State's position below, its holding should not be read as such. Moreover, by its reasoning (explained below), the Ohio Supreme Court indicated that it was not drawing a hard line between sentences that do and do not exceed life expectancy, "but between sentences that do and sentences that do not provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* at 372; *Moore* at ¶44.

those constitutional parameters. Brandon's sentence therefore violates the Eighth Amendment and Article I §9 of the Ohio Constitution and must be vacated.[4]

A. To be meaningful, an opportunity for release must come early enough that those juvenile offenders who prove maturity and rehabilitation can live a substantial part of their lives outside prison.

1. The United States and Ohio Supreme Courts have held that a "meaningful opportunity for release" requires that juvenile nonhomicide offenders have a chance to spend a substantial part of their lives outside of prison.

The critical question for evaluating a sentence under *Graham* and *Moore* is whether the juvenile defendant will have the opportunity to live a substantial part of his or her life outside of prison. As the Ohio Supreme Court recognized, *Graham's* "intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die." *Moore* at ¶46. Rather, the constitution requires that "the offender [have] an opportunity to seek release while it is still meaningful." *Id.* ¶63.

The Supreme Court's reasoning in *Graham* and its progeny makes this clear. *Graham* does not require any juvenile to ever be released: "those who commit truly horrifying crimes as juveniles

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[4] The appellant makes all arguments under both the Eighth Amendment to the United States Constitution and Article I §9 of the Ohio Constitution. As the Ohio Supreme Court has often noted, the Ohio Constitution is a "document of independent force." *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. The United States Constitution provides a floor for individual rights and civil liberties, but state constitutions are free to accord greater protections. *Id.* And the Ohio Supreme Court has repeatedly held that the Ohio Constitution must be construed in a manner that affords expansive protection to the rights of individuals, regardless of whether the same degree of protection would be afforded under the United States Constitution. *See*, *e.g.*, *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶46–48; *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶7.

Moreover, with respect to juvenile offenders specifically, the Ohio Supreme Court held that Article I Section 9 provides protection "independent of" the Eighth Amendment. *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶55 (citing *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶59). Therefore, to the extent that this court finds that the United States Constitution does not prohibit Brandon's sentence, the Ohio Constitution's independent protections for juveniles should instead.

may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham,* 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825. But *Graham* "does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.* "What the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. And although the high court did not state exactly when that opportunity for release must be provided, it described in detail its vision of what a meaningful opportunity for release should entail.

Just consider how the *Graham* Court repeatedly described what would constitute a "meaningful opportunity for release." It held that a lawful sentence must recognize a juvenile offender's "capacity for change and limited moral culpability." *Id.* at 74. Any sentence must offer "hope of restoration" and a "chance to demonstrate maturity and reform." *Id.* at 70, 79. In explaining what would make an opportunity for release meaningful, *Graham* held that juvenile offenders like Brandon should be given a "chance for fulfillment outside prison walls" and "for reconciliation with society." *Id.* at 79. By granting juveniles "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential," the Court expected that offenders should have the chance to actually realize that potential in the world. *Id.*

The Court's language regarding what it would mean for juvenile offenders to have a chance to "rejoin society," *id*. at 79, "envision[s] more than the mere act of release or a de minimis quantum of time outside of prison." *Contreras*, 4 Cal.5th at 368, 411 P.3d 445 (Cal. 2018). As other state supreme courts have recognized, "*Graham* spoke of the chance to rejoin society in qualitative terms—'the rehabilitative ideal'—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry." *Id.* Because children are different, the Court required that they be given the "chance for reconciliation with society," "the right to reenter the community," and the opportunity to reclaim one's "value and place in society." *Graham* at 74, 79.

If that ideal is to be realized, the chance for freedom must come at a time when a juvenile can truly be a productive member of society; not at retirement age, not when most are winding down their productive years. Indeed, if *Graham* requires only geriatric release, then there would have been no need for the Court to focus on giving juvenile offenders access to "vocational training" and "education," among other rehabilitative services. *Id.*

The Supreme Court of Ohio adopted these same principles in *Moore*. The Court did not treat a juvenile's constitutionally-mandated chance to "reenter society" as mere formalism. Rather, it recognized that "*Graham* is less concerned about how many years an offender serves in the long term than it is about the offender having an opportunity to seek release while it is still meaningful." *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶63. In the Court's view, the "key principle" for ensuring that a juvenile's sentence is constitutional is the recognition that "the commission of a nonhomicide offense in childhood should not preclude the offender from the opportunity to someday demonstrate that he is worthy to reenter society." *Id.* ¶63. It explained:

> The court in *Graham* did not establish a limit to how long a juvenile can remain imprisoned before getting the chance to demonstrate maturity and rehabilitation. But it is clear that the court intended more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society.

Id. ¶46. Affirmatively citing the Iowa Supreme Court, it stated that "'[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required.'" *Id.* ¶81 (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)). Borrowing from the Connecticut Supreme Court, the Ohio Supreme Court quoted: "The United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated

for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Id.* ¶84 (quoting *Casiano*, 115 A.3d at 1047).

2. Courts around the country have held that a 50-year sentence does not provide a meaningful opportunity for release.

Although neither *Graham* nor *Moore* had the opportunity to address whether a 50-year sentence for a juvenile nonhomicide offender provides a "meaningful opportunity for release," this Court is not the first to confront the question. Recognizing that *Graham* requires giving juveniles an opportunity to live a substantial part of their lives in society, courts around the country have held that a 50-year minimum sentence is unconstitutional for nonhomicide offenders. Specifically, among state high courts that have as a threshold matter agreed with the Supreme Court of Ohio that *Graham* applies to consecutive term-of-years sentences, none has subsequently upheld a 50-year sentence. Rather, several state courts have found that sentences offering an opportunity for release after approximately 50 years violate *Graham* and *Miller*. *See*, *e.g.*, *Contreras*, 4 Cal.5th at 382, 411 P.3d 445 (Cal. 2018) (holding a 50-year sentence unconstitutional under *Graham*); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (holding that a sentence with parole eligibility after 55 years is "the practical equivalent of life without parole"); *Casiano* at 1048 (finding that a 50-year sentence is the equivalent of life without parole and therefore triggers the protections of *Miller*); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (reaching the same conclusion for a 45-years-to-life sentence); *Null* at 71 (reaching the same conclusion for a sentence with parole eligibility after 52.5 years). *But see Ira v. Janecka*, 419 P.3d 161, 170 (N.M. 2018) (46-year sentence "is the outer limit of what is constitutionally acceptable"). As the California Supreme Court observed just months ago: "we are not aware of any state high court that has found incarceration of a juvenile for 50 years or more before parole eligibility to fall outside the strictures of *Graham* and *Miller*." *Contreras* at 369. Each of these state high courts has recognized that even when a sentence does not exceed the defendant's

life expectancy, it can still be so long and offer so little hope as to reflect a judgment that the child is irredeemable. *Graham* prohibits any such condemnation.

The California Supreme Court's recent decision in *Contreras* represents the consensus among states that have considered how *Graham* applies to sentences similar to Brandon's. In that case, the court considered the 50-year sentence of a defendant who was 16 years old when he committed kidnapping and sexual offenses similar to those involved in this case. *Id.* at 368, 380. Even though the juvenile's crimes were "awful and shocking," the court recognized that under *Graham* the 50-year minimum sentence could not stand. *Id.* at 380. For juvenile nonhomicide offenders, the Constitution requires a sentence that provides a chance for release that leaves a juvenile with "a sufficient period to achieve reintegration as a productive and respected member of the citizenry" and "a measure of belonging and redemption that goes beyond mere freedom from confinement." *Id.* at 368. These goals cannot be achieved by providing the first opportunity for release when a juvenile offender is in his sixties. *Id.* In short, sentencing a teenage defendant to 50 years in prison "reflect[s] a judgment [that the defendants] are irretrievably incorrigible and fall[s] short of giving them the realistic chance for release contemplated by *Graham*." *Id.* (internal quotation marks omitted).

Likewise, the Ohio Supreme Court in *Moore* also recognized—and cited approvingly—a series of older state supreme court cases holding that 50-year sentences denied juveniles a "meaningful opportunity for release." *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶¶75–87. One such case that the *Moore* Court relied upon (at ¶84) was from the Connecticut Supreme Court, which also concluded that a 50-year sentence invoked the protections of *Graham* and *Miller*. *Casiano*, 115 A.3d 1031. Rather than focusing on the length of the sentence, that court focused on the range of human experiences that are unavailable in prison: "A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and

responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting." *Id.* at 1046. For an opportunity for release to be meaningful, it should offer some hope of achieving a full life on the outside: "Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left." *Id.*; *see also Zuber* at 212 (55-year sentence unconstitutional).

Similarly, in *Moore* (at ¶¶81–82) the Court relied heavily on the Iowa Supreme Court's decision in *Null*, which invalidated a juvenile defendant's 52.5-year minimum sentence. *Null*, 836 N.W.2d at 71. Specifically, the Iowa court reasoned in words later quoted in *Moore*, that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society." *Id.* The court therefore did "not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient" to survive constitutional scrutiny. *Id.* And in *Bear Cloud*—also cited affirmingly in *Moore* (at ¶83)—the Wyoming Supreme Court held that "[a]s a practical matter, a juvenile offender sentenced to a lengthy term-of-years sentence will not have a 'meaningful opportunity for release'" and noted that the "United States Sentencing Commission recognizes this reality when it equates a sentence of 470 months (39.17 years) to a life sentence." *Bear Cloud*, 334 P.3d at 142.[5] These cases rest on the simple premise that, to be constitutional, juvenile nonhomicide offenders' sentences must afford an opportunity for release while it is still meaningful—that is, when they can lead a substantial portion of their adult lives in freedom.

[5] *See* U.S. Sentencing Commission, *Preliminary Quarterly Data Report* 8 (through March 31, 2014), https://perma.cc/HY8K-L8EC.

In accordance with all these precedents, the principal sentencing authority in Ohio—the Ohio Sentencing Commission, chaired by Chief Justice O'Connor—recommended that the General Assembly adopt a juvenile sentencing statute that provides juveniles with an opportunity to spend a substantial portion of their lives outside prison. Ohio Criminal Sentencing Commission, Memorandum of Jo E. Cline to Sara Andrews (Nov. 23, 2015), available at https://perma.cc/6J7N-62GT. Relevant here, if a juvenile offender's total term is over 15 years, the Commission suggested that his or her first opportunity for parole should be at 15 years. Even for juveniles given true "life without parole" sentences, the Commission recommended that they should be eligible for parole at age 40. *Id.* at 3. Notably, the Commission did not rely upon judicial release. It proposed that juveniles receive an opportunity for "parole" that allows the defendant to appear with counsel and requires that the parole board consider youth as a mitigating factor. *Id.*

3. Brandon's sentence is unconstitutional because it does not allow him to spend a substantial part of his life outside prison walls.

Brandon's 50-year sentence fails constitutional muster under these precedents. Even assuming that Brandon lives long enough to receive judicial release in his mid-sixties (*see infra* at 24), the opportunity will not come until near the end of his life, when the opportunity to engage in society is rapidly diminishing. Confinement with no realistic opportunity for release until age 65 does not allow for the reintegration that *Graham* contemplates.

Under his current sentence, for example, Brandon will reach retirement age without ever having a true job, never mind learning a trade or pursuing a profession. Indeed, Brandon's release would come "at an age when the law presumes that he no longer has productive employment prospects." *Casiano*, 115 A.3d at 1046. He will be age-qualified for Social Security benefits without

ever having had the opportunity to participate in gainful employment. *See* 42 U.S.C. § 416(l) (defining "retirement age" under Social Security Act as between ages sixty and sixty-seven).[6]

Employment is just one example. Consider many other meaningful aspects of life—having a spouse and family, supporting one's parents or siblings, developing friendships, and serving one's community. In nearly every aspect of his life, Brandon will be starting when most others are about to finish. And all of this socialization and reacclimating takes *time*—especially for someone attempting to live in the outside world for the first time since adolescence, following decades of incarceration. "For any individual released after decades of incarceration, adjusting to ordinary civic life is undoubtedly a complex and gradual process." *Contreras,* 4 Cal.5th at 368, 411 P.3d 445 (Cal. 2018). Moreover, "[a]ny such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age, including heart disease, hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis." *Casiano* at 1047.[7]

"In light of the foregoing statistics and their practical effect," Brandon's "fifty year term and its grim prospects for any future outside of prison" means Brandon effectively has "'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'" *Casiano* at 1047 (quoting *Graham,* 560 U.S at 79, 130 S.Ct. 2011, 176 L.Ed.2d 825). His sentence is therefore unconstitutional.[8]

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[6] *See generally Benefits Planner: Retirement*, Social Security Administration, www.ssa.gov/planners/retire (last visited July 31, 2018).

[7] *See* Federal Interagency Forum on Aging–Related Statistics, *Older Americans 2012: Key Indicators of Well–Being*, at pp. xvi, 27 (June 2012), https://perma.cc/E3ND-RJZG.

[8] The appellant is mindful—and happy—that many people have robust and full careers and lives after age 65. As one court has recognized, "it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62." *State v. Smith*, 295 Neb. 957, 978, 892 N.W.2d 52 (2017). However, it would erroneous for this Court to base its view on the most optimistic scenario, rather than one based on statistics. Moreover, the situation is much different for someone reentering society after a half-century in prison—particularly when someone like Brandon was incarcerated as a youth, and not even legally able to drive or vote before going behind bars. The diminished likelihood that someone reentering society at 65 would live a long and

B. An actuarial approach that bases a juvenile's opportunity for release on life-expectancy tables would be impractical and unconstitutional.

The State, by contrast, argued below that any sentence that is shorter than Brandon's life expectancy satisfies *Moore* and *Graham*. (State Supp. Sentencing Mem., at 4). That argument must be rejected. As argued *supra*, such an interpretation would be at odds with the constitutional requirement of a meaningful opportunity for release as interpreted in *Moore* and *Graham*. What's more, if determining whether a sentence is constitutional were to depend on how long a defendant is likely to live, it would put a court in the untenable position of making predictions about when a person will die—a question that could raise equal protection concerns this Court should avoid.

As an initial matter—contrary to the State's assertion in the trial court, (*id.* at 3)—the Ohio Supreme Court in *Moore* did not decide the question of whether any sentence that falls below a defendant's life expectancy necessarily satisfies the Constitution. In *Moore*, the Court considered a sentence of 112 years that did not provide an opportunity for release until Brandon was 92 years old, long after he would likely die. In the context of such an absurdly long sentence, it was sufficient for the Court to hold that "a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶1. But holding that a sentence exceeding an offender's life expectancy is *unconstitutional* is a far cry from holding that any sentence within that life expectancy is necessarily *constitutional*. The Court did not say that *only* sentences exceeding life expectancy violate the Eighth Amendment. It did not even calculate Brandon's specific life expectancy. There was "no dispute that [Brandon's] life expectancy falls well short of 92 years," *id.* ¶30, and thus the Court in *Moore* had no occasion to

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productive life (assuming he survives to that age) does not make the opportunity for release at that age "meaningful."

delve into the administrative and constitutional difficulties that an actuarial approach based on a specific offender's life expectancy presents. It could merely look to the generic life expectancy chart and note that Brandon's sentence well-exceeded it. *Id.*

The Ohio Supreme Court did not adopt a rule based on life expectancy—and for good reason. A court taking the position that a sentence is constitutional so long as it ends one day or one year before the offender's anticipated death would face insurmountable difficulties. The court would have two options for measuring life expectancies, both of which suffer from constitutional defects. *First*, the Court could use generic life-expectancy data that applies to the entire general population. But tying the constitutionality of a sentence to a generally applicable life expectancy presents a high probability that an offender will die in prison before ever receiving the required meaningful opportunity for release. By its nature, life expectancy is an average. *See* Elizabeth Arias et al., *National Vital Statistics Reports: United States Life Tables, 2014*, U.S. Department of Health and Human Services, at 2 (Aug. 14, 2017), available at https://perma.cc/XQ3L-22HB. In a normal distribution, about half of people will live long enough to reach or exceed their life expectancy. The other half will not. As the California Supreme Court aptly observed in deciding to reject the use of life-expectancy tables, "[a]n opportunity to obtain release does not seem 'meaningful' or 'realistic' within the meaning of *Graham* if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss." *Contreras*, 4 Cal.5th at 364, 411 P.3d 445 (Cal. 2018).

Furthermore, if a court were to rely on life-expectancy data that does not account for individual characteristics, certain offenders will likely have far less than a 50-50 chance of reaching the predicted age. According to the Centers for Disease Control, women live longer than men. *Arias*, *supra* at 3. Whites live longer than African-Americans. *Id.* Putting these together, the life expectancy of a white woman varies significantly from that of a black man. *Id.* And these statistics

do not even account for the health impacts of life in prison or an individual's particular health condition (both discussed more fully below). Simply applying the overall American life expectancy of 78.9 years to all defendants would guarantee that only a small fraction of black men would reach the opportunity to obtain release. *Id.* Many would die without ever having the chance to prove their maturity and rehabilitation. But *Graham*'s promise of a meaningful opportunity is not general. It requires that each *individual* be presented with an opportunity for release. Of course, no matter when an opportunity for judicial release is presented, some offenders might die before reaching that point. But "the outer boundary of a lawful sentence" cannot be set "by a concept that by definition would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders." *Contreras* at 364. Relying on general life expectancy data therefore would too often foreclose a meaningful opportunity for release during an individual's lifetime.

Second, a court could customize the life-expectancy data to account for the defendant's gender, age, health status, time in prison, and other relevant characteristics. Such an approach would come closer to granting an individual defendant a meaningful opportunity for release, but it raises serious constitutional concerns of its own. For instance, authorizing longer sentences for girls than for boys opens the state to claims of gender discrimination in violation of the Equal Protection clauses of both the federal and state constitutions. *See* U.S. Const. amend. XIV; Ohio const. art. I §2; *see also Clark v. Joseph*, 95 Ohio.App.3d 207, 211, 642 N.E.2d 36 (1994). Perhaps the use of gender-based tables could pass intermediate scrutiny. But then what about race-based tables? As noted above, racial differences in life expectancies are well-documented, but racial classifications are subjected to strict scrutiny, requiring that they be narrowly tailored to a compelling government interest. *See generally Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). "Although persons of different races and genders are not similarly situated in terms of

life expectancy, it seems doubtful that considering such differences in juvenile sentencing would pass constitutional muster." *Contreras* at 362.

Moreover, race and gender are not the only critical factors that influence life expectancy. "[L]ife expectancy is affected by many variables that have long been studied by social scientists but are not included in U.S. Census or vital statistics reports—income, education, region, type of community, access to regular health care, and the like." *Contreras*, 4 Cal.5th at 362, 411 P.3d 445 (Cal. 2018) (citing Cummings & Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. Davis J. Juvenile L. & Policy 267, 282 (2014)).

The way out of this catch-22 is clear: a sentence's constitutionality should turn on whether it grants a meaningful opportunity for release to the individual defendant, not on how it relates to a life-expectancy calculation. Brandon's sentence is unconstitutional because it does not provide a meaningful opportunity for release, regardless of whether it exceeds his life expectancy. And Ohio courts should avoid these difficult constitutional questions entirely by eschewing life-expectancy tables in determining whether a sentence meets the requirements of *Graham*.

For these reasons, courts across the country have held that life expectancy data should not be used to measure whether an individual's sentence triggers Eighth Amendment protections. As the Iowa Supreme Court held: "[w]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Null*, 836 N.W.2d at 71; *Bear Cloud*, 334 P.3d at 142 (same). The Supreme Court of New Jersey concurred in no uncertain terms, holding that "[j]udges . . . should not resort to general life-expectancy tables when they determine the overall length of a sentence," because those "tables rest on informed estimates, not firm dates, and the use of factors like race, gender, and income could raise constitutional issues." *Zuber*, 152

A.3d at 214 (N.J. 2017). *See also*, *e.g.*, *Contreras* at 365 (rejecting the use of life-expectancy tables in reviewing lengthy term-of-years sentences for juvenile nonhomicide offenders); *Casiano*, 115 A.3d at 1046 (substantially similar).

C. Even if the Court adopts a life-expectancy-based approach, Brandon's sentence likely exceeds his individual life expectancy and therefore represents de facto life without parole.

Even assuming that the Court rejects the analysis in the previous section and bases its review of Brandon's sentence on whether his term-of-years sentence exceeds his life expectancy, the Court should still hold Brandon's sentence 50-year sentence unconstitutional. Brandon's new sentence allows for release at age 65 (age 62 considering judicial release). When taking into account Brandon's individual characteristics, including his long history of incarceration and his heart condition, he is unlikely to outlive his sentence.

Start by considering life expectancy for African-American men who were age 15 in 2002; they had a life expectancy of an additional 54.9 years (or until approximately age 70). *See Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶30. Brandon's life expectancy must further be adjusted downward based on his years of incarceration. *See Casiano* at 1045–1046. Studies suggest that incarceration vastly reduces life expectancy. *Id.; see* Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, 2 (2012–2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); Straley, *Miller's Promise: Re–Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L.Rev. 963, 986 n.142 (2014) (explaining that data from New York suggests that "[a] person suffers a two-year decline in life expectancy for every year locked away in prison"). "The high levels of violence and communicable diseases, poor diets, and shoddy health care all contribute to a significant reduction in life expectancy behind bars." Straley at 986 n.142; *see also Null,* 836 N.W.2d at 71 (acknowledging that "long-term incarceration [may present] health and

safety risks that tend to decrease life expectancy as compared to the general population"); *United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y. 2006) (finding "persistent problems in United States penitentiaries of prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases" that lead to a lower life expectancy in prisons in the United States), *aff'd in relevant part sub nom. United States v. Pepin*, 514 F.3d 193 (2d Cir.2008).

Entering prison at a young age is particularly dangerous. Straley at 986 n.142. Youth incarcerated in adult prisons are five times more likely to be victims of sexual or physical assault than are adults. *Id.* Brandon is no stranger to this. He was a victim of the now well-known beatings and assaults of Major Michael Budd, a former major in the Mahoning County Sherriff's Office. (Hr'g. Tr. at 24–25).

Brandon's life expectancy must be adjusted downward even further based on his health. Though he was healthy entering prison, he has since developed a heart condition that requires a pacemaker. His thyroid has also been removed and he is on a series of medications to deal with these health conditions. (Hr'g. Tr. at 24; Hr'g. Ex. A (medical records); Stinson Rept. at 14–15).

Taking all these factors into account, there is a substantial chance that Brandon will not live to get the chance to prove he's rehabilitated. In light of all these statistics, other courts have concluded that "a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom." *Casiano*, 115 A.3d at 1046–1047. The likelihood that he won't survive his sentence places it in direct violation of *Moore*.

Second Issue Related to Assignment of Error 1: Whether sentencing a juvenile nonhomicide offender to fifty years' incarceration is cruel and unusual punishment because it violates evolving standards of decency nationwide.

II. "Evolving standards of decency" render 50-year sentences for juvenile nonhomicide offenders unconstitutional under the Eighth Amendment.

Brandon's sentence violates the Eighth Amendment for another reason. In addition to being disproportionate under *Graham* and *Moore*, it also violates the "evolving standards of decency" enshrined in Eighth Amendment and Article I § 9 because a significant and increasing number of states ban imprisoning juvenile nonhomicide offenders for 50 years without a possibility of parole.

"To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham*, 560 U.S. at 58, 130 S.Ct. 2011, 176 L.Ed.2d 825 (quoting *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Id.* (quoting *Kennedy v. Louisiana,* 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008)).

Evaluating whether a punishment violates this standard involves a two-step inquiry. *First*, a court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Id.* at 61. *Second*, "guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* (internal citations and quotations omitted). Here, both prongs demonstrate that Brandon's sentence violates the Eighth Amendment and Article I §9's prohibitions on cruel and unusual punishment.

A. An emerging number of states ban Brandon's sentence.

The "basic mores" of society today demonstrate that sentencing a juvenile nonhomicide offender to fifty years' incarceration without a meaningful opportunity for release constitutes "cruel and unusual" punishment. There are at least 24 states (including the District of Columbia) that

ban 50-year sentences without parole for nonhomicide offenders. *Graham* at 106 ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").[9] Critically, all the movement is in the same direction—state legislatures are acting to ensure that juvenile nonhomicide offenders receive an opportunity for release after serving between 15 to 40 years. *See Atkins v. Virginia*, 536 U.S. 304, 315, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."). These laws have been passed in states from coast to coast—and by legislatures controlled by both political parties. But these statutes have one thing in common: None would permit Brandon's sentence. Brandon's sentence "exceeds the threshold duration recognized by most courts in decisions and legislatures in reform legislation (significantly less than 50 years)." *Carter v. State*, 461 Md. 295, 362, 192 A.3d 695 (2018).

This chart demonstrates, to the best of counsel's knowledge, the states where no juvenile nonhomicide offender (or in some cases even no *homicide* offender) may be sentenced to 50 year in prison without parole eligibility:

- **Alabama:** Ala. Code § 13A-6-2 (life with parole possibility after 30 years for nonhomicide offenses); Ala. Bd. of Pardons and Paroles Art. 1 §9 (eligible for parole after maximum 15 years for nonhomicide offenses);
- **Arkansas:** Ark. Code Ann. § 16-93-621(a)(1) (eligible for parole after no more than 20 years);
- **California:** Cal. Penal Code § 3051(b)(1) (eligible for parole after 15 years); *see Contreras*, *supra*;
- **Colorado:** Colo. Rev. Stat. Ann. § 18-1.3-401(4)(c)(I)(B) (opportunity for parole after 40 years);
- **Connecticut:** Conn. Gen. Stat. Ann. § 54-125a(f)(1) (juvenile offenders sentenced to over 50 years eligible for parole after 30 years);
- **Delaware:** Del. Code Ann. tit. 11, § 4204A(d) (eligible for release opportunity after 20 years);

[9] There may also be other states that simply do not impose 50-year sentences without parole on juvenile nonhomicide (or homicide) offenders as a matter of practice—but because states do not regularly collect and publicly report this data, counsel is unable to provide such information to the Court. *See Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (counting states that do not in fact have juveniles serving a particular sentence, even if the state's law allows it, in evaluating evolving standards of decency).

- **District of Columbia:** D.C. Code Ann. § 24-403.03(a) (juvenile offenders eligible for a sentence reduction after 20 years);
- **Florida:** Fla. Stat. Ann. § 921.1402(2)(d) (opportunity for release after no more than 20 years);
- **Hawaii:** Haw. Rev. Stat. § 706-669 (judge sets maximum penalty, but parole can be available much earlier by discretion of parole board);
- **Iowa:** *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013) (35-year minimum sentence prohibited);
- **Kentucky:** Ky. Rev. Stat. §640.040 (youthful homicide offenders eligible for parole after 25 years);
- **Louisiana:** La. Rev. Stat. § 15:574.4(D)(1) (eligible for parole after at most 25 years);
- **Maryland:** *Carter v. State*, 461 Md. 295 (2018) (50 years without parole unconstitutional);
- **Massachusetts:** G. L. c. 279, § 24 (parole eligibility after maximum 30 years for aggravated homicide offenders); *Commonwealth v. Perez*, 480 Mass. 562 (2018) (absent extraordinary circumstances, parole eligibility for nonhomicide offenses cannot exceed homicide offenses);
- **Montana:** Mont. Code Ann. § 46-18-222(1) (making life sentences, mandatory minimums, and restrictions on parole eligibility inapplicable for juvenile offenders); Mont. Code Ann. § 46-23-201 (granting parole eligibility to prisoners serving term-of-years sentences after one-fourth of their term and to prisoners serving life sentences after 30 years);
- **Nevada:** Nev. Rev. Stat. Ann. § 213.12135 (eligible for parole after at maximum of 15 years);
- **New Jersey:** N.J. Stat. Ann. § 2C:11-3; A.B. 373, 217th Gen. Sess. (N.J. 2017) (granting parole eligibility for juvenile homicide offenders after 30 years); N.J. Stat. Ann. § 2C:14-2 (granting parole eligibility for aggravated sexual assault after 25 years);
- **New York:** N.Y. Penal Law §§ 70.00 & 70.25, 9 CRR-NY 8002.1(15- to 25-year minimum sentence for sexual assault crimes, with parole available once the minimum sentence has been served).
- **North Dakota:** N.D. Cent. Code Ann. § 12.1-20-03(4) (limiting the mandatory minimum of 20 years for sexual assault to offenders age 22 and older), N.D. Cent. Code Ann. § 12.1-32-13.1 (permitting petitions for a sentencing reduction after 20 years); H.B. 1194, HB 1195 65th Leg. (N.D. 2017);
- **South Dakota:** S.D. Codified Laws §§ 22-6-1 & 24-15-5 (first-time felony offenders eligible for parole after serving one-fourth of their sentences, meaning an offender would be eligible for parole earlier than 50 years on any sentence less than 200 years); S.B. 140 2016 Reg. Sess. (SD. 2016);
- **Texas:** Tex. Gov't Code Ann. § 508.145(c) (granting parole eligibility after 35 years for aggravated sexual assault crimes);
- **Utah:** Utah Code Ann. §§ 76-3-203 & § 77-27-5 (setting "indeterminate" sentence of 5 years to life for first-degree felonies, with discretion for parole board to set parole eligibility date);
- **West Virginia:** W.Va. Code § 61-11-23(b) (eligible for parole after 15 years);
- **Wyoming:** Wyo. Stat. Ann. § 6-10-301(c) (eligible for parole after 25 years).

This evidence of an emerging national consensus is even stronger than what the Supreme Court considered in *Graham*. At that time, more than half of the states (37) *permitted* life without parole sentences for nonhomicide offenders. *Graham,* 560 U.S. at 62, 130 S.Ct. 2011, 176 L.Ed.2d

825. The Court still held the punishment *unconstitutional*. *Id.* The objective indicia of societal consensus are far stronger here. As this chart demonstrates, the emerging consensus provides an opportunity for release well before 50 years. In several states, Brandon would have already received a parole opportunity (after 15 years). Sentencing a juvenile nonhomicide offender to spend "half [a] century" incarcerated, "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character," is now "exceedingly rare." *Id.* at 79, 67. "'[I]t is fair to say that a national consensus has developed against it.'" *Id.* (quoting *Atkins*, 536 U.S. at 316, 122 S.Ct. 2242, 153 L.Ed.2d 335).

B. None of the legitimate purposes of punishment can justify imposing a 50-year sentence on a juvenile nonhomicide offender.

In addition to the objective criteria, independent analysis of Brandon's sentence based on basic penological justifications demonstrates that it cannot stand. Because of juvenile offenders' reduced culpability, the traditional penological justifications—retribution, deterrence, incapacitation, and rehabilitation—do not justify keeping them incarcerated for half a century. The United States and Ohio Supreme Courts already held that none of these penological goals justifies sentencing juvenile nonhomicide offenders to term-of-years sentences that will guarantee they die in prison. *Graham* at 68–75; *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶¶55–60. This reasoning applies just as forcefully to a 50-year sentence that guarantees these teenagers' incarceration until they are senior citizens (if not past their life expectancy).

The Ohio Supreme Court has repeatedly emphasized that juveniles must be treated differently in sentencing because of their lessened culpability and greater capacity for change. *See, e.g., In re C.P.,* 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶40 ("Not only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness."). It is unnecessary here to repeat in detail the various differences between juveniles

and adults that are pertinent to sentencing. The United States and Ohio Supreme Courts have often referenced that teenagers: (1) have an underdeveloped sense of responsibility because of their immature brain development, leading to reckless and impulsive risk-taking; (2) are more susceptible to negative influences, including peer pressure and abusive family situations, and are less capable of extricating themselves from "horrific, crime-producing settings" because they have limited control over their environment; and (3) have a great capacity for rehabilitation because their characters are not as well formed, their traits are less fixed, and their actions are less likely to be "evidence of irretrievable depravity." *Moore* at ¶¶37–42 (internal quotation marks and citations omitted).

Consider first the *retributivist* rationale for punishment. To be sure, "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Graham* at 71. But because "[t]he heart of the retribution rationale" relates to the offender's blameworthiness, it is simply not as strong when applied to teenagers, especially those who do not commit homicide. *Id.* Despite the severity of the crime, teenagers like Brandon are not as culpable given their lack of brain development and the influence of depraved upbringings and "horrific, crime-producing settings." *Moore* at ¶37 (internal quotation marks and citation omitted).

The same reasoning undermines any *deterrent* rationale for Brandon's sentence. "[T]he same characteristics that render juveniles less culpable than adults" mean "they are less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72, 130 S.Ct. 2011, 176 L.Ed.2d 825. Any limited deterrence effect "is not enough to justify the sentence." *Id.*

Likewise, *incapacitation* cannot justify keeping a juvenile offender incarcerated for five decades. Judging that a juvenile will be a danger to society until he could apply for Social Security requires an implicit determination that he is incorrigible, and "incorrigibility is inconsistent with

youth." *Id.* at 73; (*see also* Stinson Rept. at 38–40). While a sentencing judge must of course consider whether the defendant may pose a danger to society, a sentence must not "'den[y] 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.'" *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶43 (quoting *Graham* at 73).[10]

Nor can Brandon's 50-year sentence rest on a *rehabilitative* rational. In *Graham*, the life without parole sentence at issue forswore rehabilitation altogether by condemning the defendants to die in prison. But a 50-year sentence also gives Brandon little hope of a meaningful release and therefore does not provide an incentive to remake his life in anticipation of rejoining society. As the California Supreme Court recognized, "a juvenile offender's prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives

[10] Allowing possible release from prison before a juvenile offender reaches his geriatric years is consistent with research showing that juvenile recidivism rates drop off significantly long before late adulthood. As the United States Supreme Court has recognized, "[f]or most teens, [risky and antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Notably, in a study of juvenile offenders, "even among those individuals who were high frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop* 3 (2014), https://perma.cc/W8GA-FDWP. Therefore, most juvenile offenders pose no public safety risk once they reached their late twenties, let alone later in their lives. Because most juveniles will outgrow antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g.*, Models for Change, *Research on Pathways to Desistance: December 2012 Update* 4 (2012), https://perma.cc/D4U3-CN89 (concluding that "it is hard to determine who will continue or escalate their antisocial acts and who will desist[,]" as the "original offense . . . has little relation to the path the youth follows over the next seven years").

and opportunities available to the juvenile going forward." *Contreras*, 4 Cal.5th at 368, 411 P.3d 445 (Cal. 2018).

The upshot: Brandon's 50-year sentence violates the evolving standards of decency and is not consistent with basic penological justifications. It is therefore unconstitutional.

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Assignment of Error No. 2: To the extent that the constitutionality of the defendant's sentence relies upon the opportunity for judicial release under R.C. 2929.20, the trial court erred because judicial release as a procedural mechanism does not provide a "meaningful opportunity for release" in violation of the Eighth Amendment of the United States Constitution and Article I §9 of the Ohio Constitution. (*See* Def.'s Sentencing Mem. at p. 22; Hr'g Tr. at p. 23).

Issue Related to Assignment of Error 2: Whether judicial release, which can be denied without a hearing, is a procedure that provides a "meaningful opportunity for release" required by the Eighth Amendment to the United States Constitution, as interpreted by *Graham v. Florida*, and Article I §9 of the Ohio Constitution.

The Court should not factor judicial release into its analysis of the constitutionality of Brandon's sentence. Under the judicial release statute, at most Brandon would be able to seek release three years before the expiration of his entire 50-year sentence. *See* R.C. 2929.20. The constitutionality of Brandon's sentence does not turn on this three-year difference. The trial court did not mention judicial release in evaluating Brandon's sentence. And whether Brandon is denied any chance for release until he is 62 or 65 is immaterial: both violate *Graham* and *Moore* because they do not afford Brandon a chance to spend a substantial portion of his life outside of prison.

Even assuming that a three-year difference matters, this Court still cannot rest its holding on the availability of judicial release because it is a defective mechanism for complying with *Graham* and *Moore*. The opportunity for release must be "meaningful" both substantively and procedurally, lest it not be meaningful at all. Judicial release under R.C. 2929.20 fails that standard.[11]

[11] The Ohio Supreme Court did not decide in *Moore* that judicial release would provide a constitutional mechanism for providing a "meaningful opportunity for release." It did not need to

Most important, judicial release can be denied by a judge, without reasons and without a hearing. *See* R.C. 2929.20(D) ("[T]he court may deny the motion without a hearing or schedule a hearing on the motion."). And if the judge denies judicial release without a hearing "with prejudice," that's the end of the supposed "opportunity"—the offender does not even get to apply for judicial release again. How can an opportunity for release be "meaningful" if the defendant does not receive so much as a hearing or a reasoned decision? And that is only the beginning of the infirmities of the judicial release mechanism.

Even assuming that the judge does afford a hearing, it is unclear whether there is any right for Brandon to be present, to submit evidence, or to have an attorney. *See id.* Reviewing parole procedures around the country, scholars have observed that many would fail scrutiny under *Graham* because they (1) prevent juvenile offenders from appearing before decision makers, (2) deny them the right to see and rebut evidence, and (3) limit the role of counsel. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 376–77 (2014); *see also* Bierschbach & Bibas, *Constitutionally Tailoring Punishment*, 112 Mich. L. Rev. 398 (2013). Ohio's judicial release procedure is no different. Other courts have rejected such minimal review procedures. The Supreme Judicial Court of Massachusetts held that juveniles serving life sentences are entitled to representation by counsel at their initial parole hearings, access to funding for experts, and judicial review of parole board decisions. *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 27 N.E.3d 349 (Mass. 2015). This Court should do the same.

Moreover, "[i]f a court denies a motion [for judicial release] after a hearing, the court shall not consider a subsequent motion for that eligible offender." R.C. 2929.20(D). That means that Brandon only has one (unrepresented) chance to prove he's rehabilitated. The judge is afforded no

address that question because Brandon's sentence was so long that even counting judicial release it was unconstitutional. *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶¶30, 62.

opportunity under the statute to hold a hearing and conclude that a juvenile offender may need to serve more of his or her sentence to fully rehabilitate but may not need to serve the entire sentence. Either the offender is released upon first application, or he has no hope. That does not ensure a meaningful opportunity for release based on "maturity and rehabilitation."

Nor does the juvenile release statute mandate that the judge consider the mitigating qualities of youth. *See* R.C. 2929.20(J). Indeed, the exhaustive list of factors to be considered does not mention the age of the offender at all. *Id.* (incorporating by reference factors in R.C. 2929.12). Courts have found that a failure to incorporate consideration of youth renders a release procedure unconstitutional under *Graham*. *See Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C.2015) (holding that the failure to distinguish parole review for juvenile offenders and to consider children's diminished culpability and heightened capacity for change "wholly fails to provide [petitioner] with any 'meaningful opportunity'" for parole); *Greiman v. Hodges*, 79 F.Supp.3d 933, 944 (S.D.Iowa 2015) (denying motion to dismiss based in part on allegation that board of parole failed to take into account plaintiff's youth and demonstrated maturity and development).

The factors that are listed within the judicial release statute, as applied to juvenile nonhomicide offenders, also present constitutional concerns. A judge is to focus on rehabilitative programs a defendant has participated in while in prison. But participation in such programs is based upon the length of an inmate's sentence, and many are out of reach to Brandon. And a judge is mandated to focus on the underlying criminal conduct itself—and whether "the eligible offender's conduct was more serious than conduct normally constituting the offense." *Id.* But that's contrary to *Graham*. What's relevant to juvenile sentencing is the *offender*, not just the offense. Even for the most heinous crimes, the Court (and scientists) recognize that juveniles can be rehabilitated—the offense itself cannot be the overriding factor denying a juvenile nonhomicide offender the chance to reenter society, lest *Graham* cease to have any meaning. *See*, *e.g.*, *Greiman* at

944 (denying defendants' motion to dismiss based in part on plaintiff's allegation that the parole board denied parole solely because of the seriousness of the offense, thus depriving him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation); *Brown v. Precythe*, W.D.Mo. No. 2:17-cv-04082-NKL, 2017 WL 4980872, at *9 (Oct. 31, 2017) (denying motion to dismiss challenge to parole system citing, inter alia, allegations that parole is usually denied based on seriousness of the offense and that parole hearings focus mostly on the crime rather than youth-related mitigation or maturity and rehabilitation).

Worse, whatever the result, there does not appear to be any mechanism for appeal. The judge essentially has unfettered discretion. The North Carolina Supreme Court rejected the argument that statutory sentence review offered a meaningful opportunity for release under *Graham*, explaining that: "the possibility of alteration or commutation . . . is deeply uncertain and is rooted in essentially unguided discretion." *State v. Young*, 794 S.E.2d 274, 279 (N.C.2016); *see also Funchess v. Prince*, E.D.La. No. 142105, 2016 WL 756530 (Feb. 25, 2016) (holding that Louisiana's former "two-step parole procedure," which would require commutation of a sentence by the governor, failed to provide a meaningful opportunity for release). Such unfettered discretion is unconstitutional. Judicial release, therefore, cannot satisfy *Graham* or *Moore*.

CONCLUSION

For these reasons, the trial court's sentencing decision should be vacated and the matter remanded for resentencing.

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was sent through regular U.S. Mail this 21st day of November 2018, to Ralph Rivera, Esq., Assistant Prosecutor, Mahoning County Prosecutor's office, 21 W. Boardman Street, 6th Floor, Youngstown, OH 44503.

Rachel Bloomekatz