IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. BRANDON MOORE, Defendant-Appellant.	)	Case No. 2014-0120 On Appeal from the Mahoning County Court of Appeals Seventh Appellate District, Case No. 08MA20

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT

CANDACE C. CROUSE (0072405)
NACDL Amicus Committee
Sixth Circuit Vice-Chair
Pinales Stachler Young Burrell & Crouse Co., LPA
455 Delta Avenue, Suite 105
Cincinnati, Ohio 45226
Telephone: (513) 252-2732
Fax: (513) 252-2751
ccrouse@pinalesstachler.com
Counsel for *Amicus Curiae,*
National Association of Criminal Defense Lawyers

Rachel S. Bloomekatz (0091376)
(counsel of record)
rbloomekatz@jonesday.com
Kimberly A. Jolson (0081204)
kajolson@jonesday.com
JONES DAY
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, Ohio 43216-5017
(614) 469-3919
(614) 461-4198 (fax)
Attorneys for Defendant-Appellant Brandon Moore

Ralph Rivera (0082063)
rrivera@mahoningcountyoh.gov
Assistant Prosecuting Attorney
Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503
(330) 740-2330
(330) 740-2008 (fax)
Attorney for Plaintiff-Appellee State of Ohio

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I. Introduction.

The United States Supreme Court has repeatedly held that children are categorically different from adults for purposes of criminal sentencing, and this Court has recently stressed that, "youth and its attendant circumstances are strong mitigating factors." *Ohio v. Long*, 138 Ohio St. 3d 478, 487 (2014). Consequently, because a "'juvenile offender who did not kill or intend to kill has a twice diminished moral culpability,' ... the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile for a nonhomicide offense." *Id.* at 481 (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)).

These essential constitutional and human realities—namely, that "juveniles who commit criminal offenses are not as culpable for their acts as adults are and are more amenable to reform," *Long*, 138 Ohio St. 3d at 488—preclude functional as well as formal life-without-parole sentences for juveniles convicted only of nonhomicide offenses. Because the U.S. Constitution requires that every Ohio juvenile nonhomicide offender be afforded "some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75 (emphasis added), this Court must invalidate any sentence like Brandon Moore's that amounts to a *de facto* life sentence due to its length and the complete lack of any parole eligibility until many decades after his reasonable life expectancy.

Though the U.S. Supreme Court has not yet addressed just how long a juvenile's term-of-years sentence must be to be unconstitutional, courts have recognized that extreme term-of-year sentences like the one imposed on Brandon Moore cannot be used to circumvent the limits of the Eighth Amendment. *See, e.g., California v. Caballero*, 55 Cal. 4th 262 (2012); *Iowa v. Ragland*, 836 N.W.2d 107 (Iowa 2013). In addition, *amicus curiae* NACDL suggests that this Court consider utilizing this case to give the Ohio Constitution distinctive force and meaning by providing Ohio courts and litigants guidance pursuant Article I, Section 9 concerning just how

"courts *must* treat youths who commit murders and other serious crimes differently from adults who commit those same crimes." *Long*, 138 Ohio St. 3d at 488 (O'Connor, C.J., concurring) (emphasis added).

II. Statement of Interest of *Amicus Curiae* National Association of Criminal Defense Lawyers.

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL files numerous amicus briefs each year in the United States Supreme Court and other courts, in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, NACDL has a long-standing institutional commitment to rational and humane sentencing practices that affirm the dignity of the individual, and files amicus briefs in cases which—like the case of Brandon Moore—directly implicate those concerns.

III. Statement of Case and Facts

NACDL adopts the Statement of Facts as articulated in the brief of Appellant Brandon Moore.

PROPOSITION OF LAW

The Eighth Amendment prohibits sentencing a juvenile to a term-of-years sentence that precludes any possibility of release during the juvenile's life expectancy.

IV. The Supreme Court And This Court Have Repeatedly Held That Children, Because They Are Categorically Less Culpable Than Adults, Must Be Subject to Categorically Less Severe Sentences Than Adults.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the death penalty is categorically unconstitutional as applied to all offenders under the age of 18. The Court noted that because of the significant differences between children and adults—including their immaturity, recklessness, vulnerability to peer pressure, and still-developing personality traits—children "cannot with reliability be classified among the worst offenders." *Id.* at 569. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570. The Court concluded that the death penalty was, by definition and as a matter of law, disproportionate punishment for all juvenile offenders.

Graham v. Florida, 560 U.S. 48 (2010), followed *Roper* in holding that juvenile offenders cannot be given a sentence of life without parole ("LWOP") for any crime other than homicide. The Supreme Court reaffirmed *Roper*'s findings regarding the nature of children as compared with adults and noted that lifetime incarceration "is an especially harsh punishment for a juvenile." *Id.* at 70. *Graham* imposed a categorical ban on LWOP sentences for juvenile nonhomicide offenders, rejecting the suggestion that juries or judges just be instructed to take the juvenile's age into account in sentencing. The Supreme Court observed that sentencers likely could not "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 77. "Finally," the Supreme Court explained, "a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment

and self-recognition of human worth and potential." *Id.* at 79.[1]

This Court has recently echoed and expanded upon these important constitutional themes in a pair of rulings that provided further protection for Ohio juveniles from the most extreme state sentences generally applicable to adults. *See In re C.P.*, 131 Ohio St. 3d 513 (2012); *Ohio v. Long*, 138 Ohio St. 3d 478, 487 (2014). In *In re C.P.*, this Court highlighted that with "regard to the culpability of the offenders, ... Ohio has developed a system for juveniles that assumes that children are not as culpable for their acts as adults." 131 Ohio St. 3d at 523. This Court stressed that, "not only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness" and they "are more capable of change than adult offenders." *Id.* at 524. In *Long*, this Court stressed that "youth and its attendant circumstances are *strong* mitigating factors," 138 Ohio St. 3d at 487 (emphasis added). And the Chief Justice of this Court in *Long* wrote a separate opinion to stress that "courts *must* treat youths who commit murders and other serious crimes differently from adults who commit those same crimes" because "minors are less mature and responsible than adults, ... are lacking in experience, perspective, and judgment, and ... are more vulnerable and susceptible to the pressures of peers than are adults." *Id.* at 488-89 (O'Connor, C.J. concurring) (emphasis added).

These holdings articulating constitutional limits on imposing extreme adult sentences on juvenile offenders—which are soundly premised on the essential human reality that "juveniles who commit criminal offenses are not as culpable for their acts as adults are and are more amenable to reform," *Long*, 138 Ohio St. 3d at 488—must be understood to preclude functional as well as formal life-without-parole sentences for juveniles convicted only of nonhomicide

[1] Most recently, the Supreme Court reiterated the constitutional themes stressed in *Roper* and *Graham* to categorically prohibit mandatory LWOP sentences for juvenile homicide offenders in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The Court in *Miller* emphasized yet again that children are "constitutionally different from adults for purposes of sentencing" and categorically

offenses. State courts that have thoughtfully examined *Graham* have recognized—based on the Supreme Court's clear declaration that every juvenile nonhomicide offender must be afforded "some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75 (emphasis added)—that any extreme term-of-year sentences like the one imposed on Brandon Moore violates the Eighth Amendment. *See California v. Caballero*, 55 Cal. 4th 262 (2012); *Iowa v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Colorado v. Rainer*, 2013 COA 51, 2013 WL 1490107 (Col. App. 2013); *see also Parker v. Mississippi*, 119 So. 3d 987 (Miss. 2013) (addressing LWOP sentences under *Miller*); *Bear Cloud v. Wyoming*, 294 P.3d 36 (Wyo. 2013) (same). *See generally* Krisztina Schlessel, Graham*'s Applicability to Term–of–Years Sentences and Mandate to Provide A "Meaningful Opportunity" for Release*, 40 Fla. St. U. L. Rev. 1027, 1060 (2013) (explaining why "rejection of *Graham*'s applicability to term-of-years sentences [would] disregard the Supreme Court's reasoning and further the evils the Supreme Court sought to prevent; that is, it permits the disguised imposition of the second-harshest punishment on an offender whose culpability is diminished by the characteristics of youth, it lacks sufficient penological justification, and it deprives the juvenile offender of an opportunity to obtain release based on demonstrated reform.").

If there could be any real doubt about the constitutional infirmity of Brandon Moore's functional life-without-parole sentence, this concluding paragraph by the Supreme Court discussing the problems with the defendant's sentence in *Graham* should put any such doubt to rest:

> Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of

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"less deserving of the most severe punishments." 132 S. Ct. at 2464.

> his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

560 U.S. at 79. The State here cannot seriously deny that Brandon Moore's extreme term-of-years sentence "guarantees he will die in prison without any meaningful opportunity to obtain release" and that it serves to deny him any real "chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child." For that reason, Brandon Moore's sentence, like Terrance Graham's, must be declared unconstitutional.

V. This Court Should Consider, Pursuant to Article I, Section 9 of the Ohio Constitution, Articulating More Fully How Ohio Courts Must Treat Youths Differently Than Adults At Sentencing.

This Court recently declared unconstitutional a punishment for juvenile sex offenders under the Ohio Constitution, stressing that Article I, Section 9 "contains its own prohibition against cruel and unusual punishment [which] provides unique protection for Ohioans." *In re C.P.*, 131 Ohio St. 3d 513, 529 (2012). This Court reiterated the principle that the "Ohio Constitution is a document of independent force," and it stressed that "state courts are unrestricted in according greater civil liberties and protections to individuals and groups." *Id.* (citing *Arnold v. Cleveland*, 67 Ohio St. 3d 35 (1993)). This case presents this Court with an opportunity to articulate how the "unique protections" of Article I, Section 9 should impact the sentencing of juvenile offenders convicted only of nonhomicide offenses in Ohio. *See generally* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 707-13 (2011) (explaining why it is "increasingly difficult to justify" interpreting state constitutional provisions just like parallel federal provisions and asserting that "state courts diminish their constitutions by interpreting them in lockstep with the Federal Constitution"); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L.

Rev. 489, 495 (1977) (praising the trend of "more and more state courts ... construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased"); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U. L. Rev. 421, 496 (1996) (same).

The fundamental and forceful animating principles set forth by this Court in *C.P.* and *Long*, and stressed by the U.S. Supreme Court in *Roper* and *Graham* and *Miller*—which collectively establish that "courts *must* treat youths who commit murders and other serious crimes differently from adults who commit those same crimes," *Long*, 138 Ohio St. 3d at 488 (O'Connor, C.J. concurring) (emphasis added)—justifies this Court's application of Article I, Section 9 of the Ohio Constitution to set forth distinct sentencing rules for juvenile nonhomicide offenders given their "twice diminished moral culpability." *Graham*, 560 U.S. at 59. Notably, the Supreme Court stated in *Graham* that any "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed," *id.* at 76; but the sentencing decision in this case provides a stark reminder of how dangerously easy it is for well-intentioned sentencing judges, focused only on the nature of criminal offenses, to lose sight of the essential reality that "youth and its attendant circumstances are strong mitigating factors." *Long*, 138 Ohio St. 3d at 487. In order to ensure future sentencings of Ohio juveniles are constitutionally sound and practically wise, this Court should consider in this case articulating in some detail the considerations that Ohio judges must consider in order to ensure at sentencing that children who commit even serious crimes are consistently and properly treated distinctly from adult offenders.

Dated: July 14, 2014

Respectfully submitted,

Candace C. Crouse (per authorization)

CANDACE C. CROUSE (Ohio Bar No. 0072405)
NACDL Amicus Committee
Sixth Circuit Vice Chair
Pinales Stachler Young Burrell & Crouse Co., LPA
455 Delta Avenue, Suite 105
Cincinnati, Ohio 45226
Telephone: (513) 252-2732
Fax: (513) 252-2751
ccrouse@pinalesstachler.com

Counsel for *Amicus Curiae*
National Association of Criminal Defense Lawyers

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT was served on the following parties by ordinary U.S. mail:

Rachel S. Bloomekatz (0091376)
Kimberly A. Jolson (0081204)
JONES DAY
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, Ohio 43216-5017
(614) 469-3919
(614) 461-4198 (fax)

Attorneys for Appellant Brandon Moore

Ralph Rivera (0082063)
Assistant Prosecuting Attorney
Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503
(330) 740-2330
(330) 740-2008 (fax)

Attorney for Appellee State of Ohio

Candace C. Crouse (per authorization)
Candace C. Crouse (0072405)