[Cite as *State v. Graham*, 2023-Ohio-2728.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - DAMANTAE D. GRAHAM, Defendant-Appellant.	**CASE NO. 2022-P-0086** Criminal Appeal from the Court of Common Pleas Trial Court No. 2016 CR 00107 E

O P I N I O N

Decided: August 7, 2023
Judgment: Affirmed

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Kort Gatterdam, Carpenter Lipps LLP, 280 Plaza, Suite 1300, 280 North High Street, Columbus, OH 43215 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Damantae D. Graham ("Mr. Graham"), appeals from the judgment of the Portage County Court of Common Pleas sentencing him to life imprisonment without the possibility of parole for aggravated murder following the Supreme Court of Ohio's vacation of his death sentence and this court's remand for resentencing.

{¶2} Mr. Graham asserts two assignments of error, contending (1) the trial court erred in failing to address his requests to represent himself, contrary to the United States and Ohio Constitutions; and (2) his sentence is unconstitutional because the Eighth and

Fourteenth Amendments to the United States Constitution prohibit a sentence of life imprisonment without the possibility of parole for offenders who were 21 years old and younger at the time of the offense.

{¶3} After a careful review of the record and pertinent law, we find as follows:

{¶4} (1) The trial court did not err in the manner in which it addressed Mr. Graham's two purported requests to represent himself. With respect to the first, the record indicates Mr. Graham did not clearly and unequivocally assert his right to self-representation. With respect to the second, the record indicates the trial court's inquiries were legally sufficient under the circumstances. To the extent Mr. Graham is challenging the trial court's denial of his request, we find no abuse of discretion. It appears the trial court reasonably believed Mr. Graham's true motive in representing himself was to advance frivolous and irrelevant "sovereign citizen" arguments. A request for self-representation may be denied when circumstances indicate the request is made for purposes of delay or manipulation of the trial process.

{¶5} (2) The Eighth Amendment, as construed by the Supreme Court of the United States, does not prohibit a discretionary prison sentence of life without the possibility of parole for offenders who were 21 years old or younger at the time of the offense.

{¶6} Thus, we affirm the judgment of the Portage County Court of Common Pleas.

Substantive and Procedural History

{¶7} In 2016, Mr. Graham shot and killed 18-year-old college student Nicholas Massa during the robbery of an apartment in Kent, Ohio. Mr. Graham had turned 19 the month before he committed the offenses.

{¶8} Following a jury trial in the Portage County Court of Common Pleas, Mr. Graham was found guilty of aggravated murder (count 1); three death-penalty specifications accompanying count 1; aggravated burglary (count 2); aggravated robbery (count 3); three counts of kidnapping (counts 4, 5, and 6); and six firearm specifications accompanying each count. The jury recommended Mr. Graham be sentenced to death on count 1. The trial court accepted the jury's recommendation and sentenced Mr. Graham accordingly. The court also imposed an aggregate prison term of 61 years on the remaining counts and specifications.

{¶9} Mr. Graham filed a direct appeal as of right in the Supreme Court of Ohio. The court affirmed Mr. Graham's convictions but vacated his death sentence and remanded the matter for resentencing consistent with R.C. 2929.06. *See State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶ 217 ("*Graham I*").[1]

March 2021 Resentencing

{¶10} Upon remand, the trial court scheduled a resentencing hearing for March 8, 2021. Mr. Graham moved to continue the hearing because, among other reasons, Dr. Aracelis Rivera ("Dr. Rivera"), one of his expert witnesses, was unavailable to testify on

1. The Supreme Court of Ohio subsequently denied Mr. Graham's application to reopen his direct appeal. *See State v. Graham*, 163 Ohio St.3d 1416, 2021-Ohio-1606, 167 N.E.3d 975. Mr. Graham filed two petitions for a writ of certiorari in the Supreme Court of the United States, which were denied. *See Graham v. Ohio*, --- U.S. ---, 142 S.Ct. 147, 211 L.Ed.2d 53 (2021), and *Graham v. Ohio*, --- U.S. ---, 142 S.Ct. 403, 211 L.Ed.2d 216 (2021).

that date. The trial court denied Mr. Graham's motion. Mr. Graham filed a resentencing memorandum, attaching reports from Dr. Rivera and Dr. Laurence Steinberg ("Dr. Steinberg").

{¶11} At the sentencing hearing, the defense presented testimony from Dr. Steinberg, who stated a person's brain continues to mature into his or her early 20s and the characteristics the Supreme Court of the United States has identified as mitigating against a sentence of death for juveniles also applies to life sentences without parole for 18- to 20-year-olds. The defense also presented statements from Mr. Graham's family members in a video and asserted several mitigating factors for the trial court's consideration. The defense requested the trial court resentence Mr. Graham to an aggregate prison term of 28 years to life.

{¶12} The state presented testimony from the victim's father, mother, and sister. The state requested the trial court resentence Mr. Graham to a prison term of life without the possibility of parole to run consecutively to the 61-year aggregate prison term previously imposed.

{¶13} The trial court sentenced Mr. Graham to prison terms of life without parole and three years on the accompanying firearm specification to run consecutively to each other and to the 61-year aggregate prison term previously imposed.

{¶14} Mr. Graham appealed to this court, raising, among other arguments, that the trial court abused its discretion by denying his motion to continue the resentencing hearing. In *State v. Graham*, 11th Dist. Portage No. 2021-P-0035, 2022-Ohio-1140 ("*Graham II*"), we reversed the trial court's judgment denying Mr. Graham's motion for a continuance. *Id*. at ¶ 75. We determined the trial court should have granted a

continuance to permit Dr. Rivera's testimony. *Id*. at ¶ 70-71. Accordingly, we vacated Mr. Graham's sentence and remanded for resentencing. *Id*. at ¶ 75.

June 2022 Status Hearing

{¶15} Upon remand, the trial court scheduled a status hearing and a resentencing hearing. Defense counsel moved to continue the resentencing hearing and requested the parties schedule a new date at the status hearing.

{¶16} Two days before the status hearing, Mr. Graham filed a pro se "Notice of Special Appearance and Removal of Counsel." He attached a letter he sent to his trial counsel stating he is "competent" to "handle [his] own affairs" and that they are "hereby declared incompetent" and "fired."

{¶17} The prosecutor and defense counsel appeared in person at the status hearing, and Mr. Graham appeared via Zoom. Defense counsel requested a continuance of six months for the purpose of hiring expert witnesses.

{¶18} The trial court referenced Mr. Graham's pro se "notice of special appearance" and asked him to elaborate. It appears there were periodic technological glitches when Mr. Graham spoke. However, the transcript indicates Mr. Graham stated he is present "upon special appearance"; he does not "consent to a video hearing"; and he would "move forward upon proof that an actual controversy gives this Court jurisdiction to proceed." The prosecutor responded there is no question regarding the trial court's jurisdiction. The trial court stated it would deny Mr. Graham's "motion."

{¶19} The trial court next asked Mr. Graham to elaborate on his "notice of removal" of defense counsel, and the following exchange occurred:

{¶20} "[MR. GRAHAM]: I present myself as a live man – as a live man (inaudible) representation.

{¶21} "[THE COURT]: Again, I'm going to deny your motion. [Defense counsel] will remain on this case * * *.

{¶22} "[MR. GRAHAM]: Your Honor, are you (inaudible) your post and violating your oath?

{¶23} "[THE COURT]: Mr. Graham, I'm not playing games here. We're trying to make sure that you get a fair sentencing hearing."

{¶24} The trial court confirmed defense counsel could continue representing Mr. Graham and stated it would continue the matter for at least six months so they could hire expert witnesses. Following the status hearing, the trial court filed a judgment entry denying Mr. Graham's pro se filing. The trial court subsequently granted defense counsel's motion to continue and rescheduled the resentencing hearing for December 6, 2022.

December 2022 Resentencing

{¶25} The day before the resentencing hearing, defense counsel filed a resentencing memorandum, attaching reports from Mark D. Cunningham, Ph.D., ABPP ("Dr. Cunningham"), and Dr. Rivera, as well as affidavits from family members.

{¶26} The day of the hearing, Mr. Graham filed a pro se "Affidavit of Truth." Mr. Graham averred he sent a letter to the prosecutor entitled "Conditional Acceptance for Value-request for proof of claim" and provided 30 days for a response. When the prosecutor did not respond, Mr. Graham sent a "Final Notice of Default and Res Judicata." Mr. Graham contended "[a]s an operation of law," the judgment against him is void, and

he must be immediately released and paid restitution. Mr. Graham attached copies of the letters he sent to the prosecutor.

{¶27} At the beginning of the hearing, defense counsel informed the trial court that Mr. Graham requested to represent himself. The trial court addressed Mr. Graham, and the following exchange occurred:

{¶28} "THE COURT: How old are you now, Mr. Graham?

{¶29} "MR. GRAHAM: I'm 25 years old.

{¶30} "THE COURT: 25 already. Okay. Mr. Graham, it has been brought to my attention that you would like to proceed on your own behalf without counsel; is that correct?

{¶31} "MR. GRAHAM: That's correct.

{¶32} "THE COURT: Do you understand that – the famous saying of somebody who represents themselves has a fool for a client?

{¶33} "MR. GRAHAM: I do.

{¶34} "THE COURT: Do you understand that you have very learned counsel that are working in your best interest?

{¶35} "MR. GRAHAM: I do.

{¶36} "THE COURT: And you would still like to proceed without counsel?

{¶37} "MR. GRAHAM: Yes."

{¶38} The trial court asked one of Mr. Graham's defense attorneys to speak. Defense counsel stated Mr. Graham believes he is a "sovereign citizen" (Mr. Graham objected to this statement) and the trial court does not have jurisdiction over him. Defense counsel stated they were prepared to move forward but requested Mr. Graham be

permitted to make a record of his request and rationale. The trial court asked Mr. Graham to explain his rationale, at which time the following exchange occurred:

{¶39} "MR. GRAHAM: -- I am here under special appearance in propria persona. I'm only here to settle this matter once and for all. Now, an affidavit was submitted to this Court exhibiting an administrative remedy that I executed with the prosecutor speaking on behalf of the state, which he agreed upon stipulation, that the judgment sentence rendered in 2016 CR 107 E is based upon fraud and is void.

{¶40} "THE COURT: And that's your rationale?

{¶41} "MR. GRAHAM: That's what happened."

{¶42} Defense counsel and the prosecutor declined to respond to Mr. Graham's statement. The trial court stated, "Okay. I'm going to deny your motion. We will proceed. Go have a seat. Thank you."

{¶43} Defense counsel presented testimony from Dr. Rivera and Dr. Cunningham. Dr. Rivera testified that several risk factors in Mr. Graham's environment increased the likelihood he would engage in criminal activity, including his rebelliousness, family neglect, poor parenting, substance abuse, poor academic achievement, racial discrimination, and association with adults who engaged in criminal activity. Dr. Cunningham testified adolescence incorporates the time period in which physiological and brain development occurs, and this development continues until age 25. Juveniles and persons between the ages of 18 and their early 20s are less capable of mature judgment, which is often exhibited in misconduct like delinquency and criminal activity. Dr. Cunningham opined that Mr. Graham's life status at the time of his offenses is

consistent with "marked adolescent immaturity." Defense counsel requested the trial court resentence Mr. Graham to an aggregate prison term of 28 years to life.

{¶44} The state did not present any witnesses but requested the trial court consider the prior testimony of the victim's family. The state requested the trial court resentence Mr. Graham to a prison term of life without the possibility of parole.

{¶45} Mr. Graham spoke on his own behalf, stating as follows:

{¶46} "Your Honor, you have blatantly disregarded my unequivocal exercise of the privilege of self representation. So I just want the record to reflect that I did not consent to continuing this hearing with appointed counsel. So I expect to be back again for another pony show, but know this, I will not let you or anybody else stop me from liberating myself."

{¶47} The trial court again sentenced Mr. Graham to prison terms of life without parole and three years on the accompanying firearm specification to run consecutively to each other and to the 61-year aggregate prison term previously imposed.

{¶48} Mr. Graham filed a notice of appeal and a motion for the appointment of appellate counsel. This court granted Mr. Graham's motion and appointed him new counsel.

{¶49} Mr. Graham raises the following two assignments of error:

{¶50} "[1.] The trial court erred in failing to address appellant's request for the removal of counsel and for self-representation contrary to the United States and Ohio Constitutions.

{¶51} "[2.] The Eighth and Fourteenth Amendments to the U.S. Constitution prohibit a sentence of life without the possibility of parole for offenders who were 21 years old and young at the time of the offense."

Self-Representation

{¶52} In his first assignment of error, Mr. Graham contends the trial court violated his rights under the federal and Ohio Constitutions by failing to make sufficient inquiries into his requests to represent himself.

Standard of Review

{¶53} "Generally, we review a trial court's denial of a request for self-representation asserted prior to the commencement of trial de novo; when the right is invoked after the commencement of trial we generally review for abuse of discretion." *State v. Degenero*, 11th Dist. Trumbull No. 2015-T-0104, 2016-Ohio-8514, ¶ 19. "The balance in question is primarily the accused's interest in self-representation versus the disruption of proceedings that are already in progress." *Id*.

Legal Requirements

{¶54} The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence." The Ohio Constitution provides, "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Article I, Section 10, Ohio Constitution.

{¶55} The Sixth Amendment right to counsel "implicitly embodies a 'correlative right to dispense with a lawyer's help.'" *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 23, quoting *Adams v. United States ex rel. McCann*, 317 U.S.

269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). Thus, the Supreme Court of Ohio has held that "[t]he Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph one of the syllabus, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "[I]f a trial court denies the right to self-representation when that right is properly invoked, the denial is, per se, reversible error." *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 28.

{¶56} "However, the right to represent oneself is not unlimited." *State v. McAlpin*, 169 Ohio St.3d 279, 2022-Ohio-1567, 204 N.E.3d 459, ¶ 47. Rather, it is subject to limitations on its invocation and exercise. *State v. Godley*, 3d Dist. Hancock No. 5-17-29, 2018-Ohio-4253, ¶ 13. For instance, "[a] criminal defendant must 'unequivocally and explicitly invoke' the right to self-representation." *Obermiller* at ¶ 29, quoting *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 38. "Requiring that a request for self-representation be both unequivocal and explicit helps to ensure that a defendant will not 'tak[e] advantage of and manipulat[e] the mutual exclusivity of the rights to counsel and self-representation.'" *Id*., quoting *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir.2000). "For this reason, courts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *Id*., quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

{¶57} Additionally, "the trial court must be sure that the criminal defendant 'knowingly and intelligently' forgoes the 'traditional benefits associated with the right to counsel.'" *Id*. at ¶ 30, quoting *Faretta* at 835. "The defendant 'need not himself have the skill and experience of a lawyer' in order to choose to represent himself, but he 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."'" *Id*., quoting *Faretta* at 835, quoting *Adams* at 279.

{¶58} Importantly, the right of self-representation exists "to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *McKaskle v. Wiggins*, 465 U.S. 168, 176-177, 79 L.Ed.2d 122, 104 S.Ct. 944 (1984). The right "does not exist * * * to be used as a tactic for delay; for disruption; for distortion of the system; or for manipulation of the trial process." (Citations omitted.) *Frazier-El* at 560.

{¶59} Most relevant here, "a defendant's unambiguous assertion of the right to self-representation triggers a trial court's duty to conduct the *Faretta* inquiries to establish that the defendant is knowingly and voluntarily waiving his constitutional right to counsel." *Obermiller* at ¶ 30. There is no "'prescribed * * * formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election * * * will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.'" *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 101, quoting *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Stated differently, "[t]he Sixth

Amendment does not require extensive warnings in every case." *Id*. at ¶ 102. Rather, "a trial judge 'must investigate [a defendant's request for self-representation] as long and as thoroughly as the circumstances of the case before him [or her] demand.'" *Obermiller* at ¶ 42, quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

{¶60} While the Ohio Constitution is a document of independent legal force, *Humphrey v. Lane*, 89 Ohio St.3d 62, 68, 728 N.E.2d 1039 (2000), Mr. Graham does not contend Article I, Section 10 imposes different requirements than the Sixth Amendment in the present context. Therefore, we review Mr. Graham's arguments pursuant to the foregoing legal standards.

Analysis

{¶61} Mr. Graham first argues the trial court failed to make *Faretta* inquiries after he filed his "Notice of Special Appearance and Removal of Counsel." While we agree the trial court did not make *Faretta* inquiries, the record indicates Mr. Graham did not clearly and unequivocally assert his right to self-representation.

{¶62} In his "notice," Mr. Graham purported to notify the trial court he had removed defense counsel. In support, he attached a letter informing defense counsel they are "fired." Mr. Graham gave no reason for counsels' termination other than he declared them to be "incompetent." While Mr. Graham wrote he is "competent to handle [his] own affairs," this statement does not clearly and unequivocally invoke his right to proceed pro se at the sentencing hearing. Therefore Mr. Graham's "notice" did not trigger the trial court's duties under *Faretta*.

{¶63} At the status hearing, the trial court asked Mr. Graham to elaborate on his "notice." In response, Mr. Graham stated he was present "upon special appearance" and did not consent to the hearing. He also challenged the trial court's jurisdiction to proceed and described himself as a "live man."

{¶64} These remarks implicate "sovereign citizen theories," which "'involve the alleged corporate status of Ohio and the United States * * *.'" *State v. Few*, 2d Dist. Montgomery No. 25969, 2015-Ohio-2292, ¶ 6, quoting *DuBose v. Kasich*, S.D. Ohio No. 2:11-CV-00071, 2013 WL 164506, *3 (Jan. 15, 2013). "Sovereign citizens" maintain they do not have a contract with Ohio and the United States and, therefore, do not have to follow government laws. *See id*. at ¶ 6; *DuBose* at *3. Courts have consistently rejected these assertions and deemed them baseless or frivolous. *See Furr v. Ruehlman*, Slip Opinion No. 2023-Ohio-481, ¶ 10 (citing cases). Courts have also held a "notice of removal" of counsel based on sovereign citizenship does not constitute an unequivocal request for self-representation. *See State v. Armstrong*, 8th Dist. Cuyahoga No. 103088, 2016-Ohio-2627, ¶ 12. Accordingly, Mr. Graham's remarks at the status hearing also did not trigger the trial court's duties under *Faretta*.

{¶65} Mr. Graham next argues the trial court failed to make *Faretta* inquiries after he requested to represent himself at the December 2022 resentencing hearing. While we agree Mr. Graham's request was clear and unequivocal, the record indicates the trial court's *Faretta* inquiries were legally sufficient under the circumstances.

{¶66} At the beginning of the hearing, defense counsel informed the trial court Mr. Graham wanted to represent himself. The trial court asked Mr. Graham how old he was and confirmed he wanted to represent himself. The court next asked Mr. Graham whether

he was familiar with the famous saying "somebody who represents themselves has a fool for a client"; whether he understood he had "very learned counsel" working in his "best interest"; and whether he still wanted to represent himself. Mr. Graham responded in the affirmative to these inquiries. When the trial court asked Mr. Graham to explain his rationale, Mr. Graham began espousing frivolous "sovereign citizen" theories.

{¶67} Mr. Graham claims the trial court did not make any *Faretta* inquiries. Specifically, he contends the trial court did not make him aware "of the dangers of self-representation"; "the trial court never determined whether [he] fully understood and intelligently relinquished his right to counsel"; and "[t]here was no inquiry into whether [he] knew what he was doing and his choice was made with eyes open." We disagree. The trial court's inquiries fairly encompassed *all* of these topics.

{¶68} While the trial court's *Faretta* inquiries were brief, a trial court is only required to "'investigate [a defendant's request for self-representation] as long and as thoroughly as the circumstances of the case before him [or her] demand,'" *Obermiller*, *supra*, at ¶ 42, quoting *Von Moltke*, *supra*, at 723-724, depending on, among other things, "'the stage of the proceeding.'" *Johnson*, *supra*, at ¶ 101, quoting *Tovar*, *supra*, *at* 88. Here, the matter was before the trial court on resentencing following this court's remand in *Graham II*. The sole purpose of the remand was to permit Dr. Rivera to testify in mitigation. *See id*. at ¶ 70-71, ¶ 75. Under these circumstances, the trial court's *Faretta* inquiries were legally sufficient.

{¶69} To the extent Mr. Graham is challenging the trial court's denial of his request to represent himself, we find no abuse of discretion. It appears the trial court believed Mr. Graham's true motive in representing himself was to advance frivolous and irrelevant

arguments. Having the benefit of observing Mr. Graham's behavior and listening to his rhetoric, the trial court was in the best position to distinguish between a manipulative effort and a sincere desire to proceed pro se. *See State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 72 ("A request for self-representation may be denied when circumstances indicate that the request is made for purposes of delay or manipulation of the trial process"); *Frazier-El*, *supra*, at 560 ("A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel"). Under the facts of this case, we cannot conclude the trial court abused its discretion in denying Mr. Graham's request.

{¶70} Mr. Graham's first assignment of error is without merit.

Constitutionality of Sentence

{¶71} In his second assignment of error, Mr. Graham contends the Eighth and Fourteenth Amendments to the United States Constitution prohibit a prison sentence of life without the possibility of parole for offenders who were 21 years old and younger at the time of the offense. Mr. Graham does not cite or raise an argument under Article I, Section 9 of the Ohio Constitution.

Standard of Review

{¶72} Mr. Graham was resentenced for aggravated murder pursuant to R.C. 2929.06. R.C. 2953.08(D)(3) provides that "[a] sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to *2929.06* of the Revised Code is not subject to review *under this section*." (Emphasis added.) However, the Supreme Court of Ohio has held R.C. 2953.08(D)(3) does not preclude an appeal of a sentence for aggravated murder based on constitutional grounds. *State v. Patrick*, 164 Ohio St.3d 309, 2020-

Ohio-6803, 172 N.E.3d 952, ¶ 22. Therefore, Mr. Graham's appeal of his sentence on constitutional grounds is properly before us.

{¶73} Since Mr. Graham failed to raise his constitutional challenge in the trial court, he has forfeited all but plain error. *See Graham I* at ¶ 179; Crim.R. 52(B). To prevail, Mr. Graham must show an error occurred; the error was plain; and the error affected the outcome. *Graham I* at ¶ 31.

Analysis

{¶74} The Eighth Amendment to the federal Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

{¶75} In construing the Eighth Amendment, the Supreme Court of the United States has adopted categorical bans on certain sentences for *juvenile* offenders, i.e., offenders under the age of 18, based on their lesser culpability and greater potential for rehabilitation. For instance, in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the court held the Eighth Amendment prohibits the imposition of capital punishment on juvenile offenders under the age of 18 at the time of the offense. *Id*. at 578. In *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the court held the Eighth Amendment forbids a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. *Id*. at 82. In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the court held "mandatory life without

parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id*. at 465.

{¶76} None of these cases apply to Mr. Graham. Unlike in *Miller*, Mr. Graham was 19 at the time of his offenses, not a juvenile. In addition, Mr. Graham's life-without-parole sentence was not mandatory. *See State v. Lane*, 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶ 77 ("*Miller* is distinguishable because appellant's sentence of life without parole was *discretionary*, not mandatory"). At resentencing, the trial court also had options to impose life imprisonment with parole eligibility after 25 or 30 years. *See* R.C. 2929.06(A)(2); R.C. 2929.03(D) (Effective January 1, 2008, to April 5, 2017).

{¶77} Mr. Graham essentially asks this court to extend the Supreme Court of the United States' holding in *Miller* to apply to discretionary life-without-parole sentences imposed on those aged 21 or younger. Notably, Mr. Graham asserted an analogous argument in his direct appeal to the Supreme Court of Ohio. There, Mr. Graham requested an extension of the Supreme Court of the United States' holding in *Roper* to find the imposition of a death sentence on a capital defendant who was under 21 years old at the time of the offense violated the Eighth Amendment. *See Graham I* at ¶ 179, ¶ 182. The Supreme Court of Ohio rejected this argument, stating as follows:

{¶78} "[B]ecause the United States Supreme Court has drawn the line at 18 for Eighth Amendment purposes, state courts are not free to invoke the Eighth Amendment as authority for drawing it at a higher age. * * * 'It has long been settled that the Supremacy Clause binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law.' *State v. Burnett*, 93 Ohio St.3d 419, 422, 755 N.E.2d 857 (2001). And as the United States Supreme Court has

cautioned, '[i]f a precedent of [the United States Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the United States Supreme Court] the prerogative of overruling its own decisions.' *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.E.2d 526 (1989). *Roper* is controlling, and we must follow it. We do not find plain error." *Id*. at ¶ 182.

{¶79} Here, *Miller* is controlling, and we are required to follow it. Accordingly, we do not find plain error.

{¶80} Mr. Graham's second assignment of error is without merit.

{¶81} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is affirmed.

JOHN J. EKLUND, P.J.,

MATT LYNCH, J.,

concur.