No. 17-405

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND BYRD, WARDEN,

Petitioner,

v.

KEIGHTON BUDDER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED
(Corrected)

Keighton Budder, at age 16, was convicted of four nonhomicide offenses arising out of a single course of events and given two sentences of life without parole, one life sentence with parole, and one sentence of twenty years, all to be served consecutively. During the pendency of his direct appeal, this Court issued its opinion in Graham v. Florida, holding that the twice-diminished culpability and the greater rehabilitative capacity inherent in youth require that children convicted of nonhomicide offenses cannot be given a sentence lacking in a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 75 (2010). The Oklahoma Court of Criminal Appeals subsequently found that the Graham opinion, which explicitly recognized Keighton Budder as one such child sentenced to die in prison for nonhomicide offenses, 560 U.S. at 64, applied to Keighton's case. However, the Oklahoma court undertook no action to provide any form of meaningful opportunity for release for Keighton, merely converting his "life without parole" sentences to life sentences requiring him to serve a minimum of 131.75 years and leaving him in the same situation he was in prior to this Court's ruling in Graham with no possibility of release. The question presented for this Court is:

Should this Court review a Circuit Court opinion granting relief from a state court decision that recognized clearly established

law in Graham, which requires that juvenile nonhomicide offenders previously sentenced to life imprisonment without parole be given some meaningful opportunity for release based on demonstrated maturity and rehabilitation, but refused to provide a sentence that allows Keighton Budder, a 16-year-old nonhomicide offender, any hope of a future opportunity to demonstrate maturity and rehabilitation to earn his release?

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INTRODUCTION

In Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court held that children convicted of nonhomicide offenses sentenced to life imprisonment without parole must be afforded a meaningful opportunity of release. The Supreme Court found that children, as a class, exhibit diminished culpability and possess a greater propensity for change. Further, the Supreme Court found that juveniles that have not committed the most violent offense, murder, exhibit doubly diminished culpability. As a result, the Court created a categorical rule that children convicted of nonhomicide offenses sentenced to die in prison must be afforded a meaningful opportunity for release.

Keighton was sentenced to two life-without-parole sentences, one life-with-parole sentence, and one twenty-year sentence, all to be served consecutively, for convictions arising out of a single course of conduct occurring early on August 11, 2009, when Keighton was 16 years old. On direct review, the Oklahoma Court of Criminal Appeals converted Keighton's "life-without-parole" sentences to life sentences, leaving unchallenged and unchanged the trial court's understanding and intention that Keighton never be released from prison. The Tenth Circuit correctly found that the Oklahoma state court decision imposing Keighton's sentence was contrary to the holding of Graham categorically barring children convicted of nonhomicide crimes from receiving a

sentence without a meaningful opportunity for release. This case raises no question not already answered in Graham, and the State provides no compelling or sufficient basis for granting certiorari review.

STATEMENT OF THE CASE
(Corrected)

Keighton Budder was convicted of and sentenced for nonhomicide offenses on May 4, 2010, for a single course of conduct that occurred less than a year earlier on August 11, 2009, when Keighton was 16 years old. Budder v. Addison, 851 F.3d 1047, 1049-50 (10th Cir. 2017). At sentencing, the trial judge made plain his judgment, without benefit of any specialized sentencing procedure, that Keighton was irredeemable and beyond rehabilitation. He explained his decision as follows, including an allusion to Mr. Budder's American Indian heritage and a corresponding stereotype:

> Now, all my life I have been around people who drink. Been around a lot of them. Had a lot of half brothers that were half Osage Indian who had a lot of problems with alcohol. And have found through the years that basically you have four kinds of alcoholics. . . . [U]nfortunately there's that fourth class of alcoholics that when they drink a whole bunch, they basically get mean. They want to fight. They want to hurt somebody. They want to do something. And counsel, Mr. Budder, I think you fall into that fourth class. When you drink too much, you just get mean.
> . . .
> I really don't see any reason to allow you back out of prison to get drunk and hurt somebody else. I just don't see it in this particular case.
> . . .
> It'll further be the sentence of this Court, I see no reason to run any

> of these concurrently. I see no reason to allow you the opportunity to get out of jail.

Sentencing Tr. 6-8. The trial judge imposed two sentences of life imprisonment without parole, one sentence of life with parole, and one sentence of twenty years, to run consecutively. He could not have been more clear that he was "making the judgment at the outset that [Keighton] never will be fit to reenter society." Graham v. Florida, 560 U.S. 48, 75 (2010).

A few days after this sentencing, on May 17, 2010, this Court issued its opinion in Graham v. Florida. In Graham, this Court erected a categorical bar to condemning children convicted of nonhomicide offenses to die in prison, holding that children not convicted of homicide offenses must be afforded "some meaningful opportunity for release based upon demonstrated maturity and rehabilitation." 560 U.S. at 75. This Court reasoned that children convicted of nonhomicide offenses exhibited twice-diminished moral culpability as compared to an adult murderer because they did not commit the worst offense, murder, and because, as established earlier in Roper v. Simmons, 543 U.S. 551 (2005), children are less mature, more impulsive, more susceptible to negative influences, have a generally less formed character, and have a greater capacity for change.

Consequently, this Court ruled there was no legitimate penological interest in subjecting children convicted of nonhomicide offenses to the most

severe punishment available for a child and the second most severe punishment imposed in the United States for any person. Retribution could not support imposition of the most severe sentence available for a child because the rationale for retribution is tied to the culpability of the offender. Graham, 560 U.S. at 71. Deterrence provides no justification because the same qualities that make children different from adults, the impulsivity and the underdeveloped sense of responsibility for example, make children less susceptible to deterrence. Id. at 72. Relatedly, incapacitation is ill-served because "it is difficult even for expert psychologists to differentiate between" a child exhibiting "transient immaturity" and the rare child whose offense "reflects irreparable corruption." Id. at 73 (quoting Roper, 543 U.S. at 573). Lastly, imprisonment for life without opportunity for release leaves no room for rehabilitation at all despite children's greater capacity for change. Id. This Court further found it necessary to erect a categorical bar because of the heightened and unacceptable risk that heinous facts and the difficulty of identifying the rare irredeemably-depraved child would "over power" the mitigating power of youth, despite a complete lack of penological justification. Id. at 78-79. "[A] categorical rule gives **all** juvenile nonhomicide offenders a chance to demonstrate maturity and reform." Id. at 79 (emphasis added).

Over a year later, on October 24, 2011, the Oklahoma Court of Criminal

Appeals ("OCCA") held that Graham did apply to Keighton, but merely modified the two "life-without-parole" sentences, converting them instead into life sentences, and leaving each sentence to run consecutively.[1] Budder, 851 F.3d at 1049. There is no question that the Oklahoma Court of Criminal Appeals provided zero substantive change for Keighton as he is still expected to die in prison and still lacks any opportunity to demonstrate maturity or rehabilitation. Keighton filed a request for rehearing before the OCCA, which was denied on November 29, 2011. Id. at 1050.

Following a timely-filed habeas petition in the Western District of Oklahoma, the magistrate judge recommended that Keighton be resentenced pursuant to Graham. Cert. Pet. App. 73. The magistrate judge concluded that the OCCA's opinion provided a "distinction without a difference": Keighton's sentence following the OCCA's opinion still "imposes the second-harshest punishment on an offender whose culpability is diminished by his or her youth," "in the absence of sufficient penological justification[,] and [] deprives the juvenile offender of a meaningful opportunity to obtain release based on demonstrated reform, in direct contradiction to Graham's reasoning and mandate." Id. at 62, 72. The district court did not adopt the recommendation,

[1]It is undisputed that Keighton's current sentence denies him any possibility of release and that he must serve at a minimum 131.75 years.

denying Keighton's habeas petition, but granted a certificate of appealability. Budder, 851 F.3d at 1050.

Subsequently, the Tenth Circuit Court of Appeals properly held that Keighton's sentence violated the Eighth Amendment and that the OCCA's opinion was contrary to this Court's holding in Graham that categorically barred children convicted of nonhomicide offenses from receiving a sentence that afforded no meaningful opportunity for release based on demonstrated maturity and rehabilitation. Budder, 851 F.3d at 1059. The Tenth Circuit correctly identified the holding of Graham after first recounting the facts giving rise to the Eighth Amendment issue before the Graham Court. Terrance Graham, then 16 years old, was charged as an adult with armed burglary with assault or battery and attempted armed robbery, for which he pleaded guilty pursuant to an agreement whereby the trial court withheld adjudication on guilt but imposed three years of probation, with one of those years to be served in county jail. Budder, 851 F.3d at 1052; Graham, 560 U.S. at 54. Just a few months after his release from jail, when 17 years old, Terrance Graham was arrested and charged with two home-invasion robberies, including one in which an accomplice was shot, evading arrest during a high-speed police chase, and possessing three handguns, though under questioning he also admitted participation in two or three additional robberies. Budder, 851 F.3d at 1052; Graham, 560 U.S. at 55.

As a result of this crime spree and concomitant violation of his probation terms, the trial court found Terrance Graham guilty of the initial armed burglary and attempted armed robbery charges and it imposed a sentence of life imprisonment and fifteen years' imprisonment, respectively. Budder, 851 F.3d at 1052; Graham, 560 U.S. at 57. Though sentenced to "life," because of Florida's abolition of parole, Terrance Graham had no opportunity for release based on demonstrated maturity and rehabilitation. Budder, 851 F.3d at 1052; Graham, 560 U.S. at 57.

On these facts, the Tenth Circuit explained, this Court held that the Eighth Amendment categorically barred sentencing children that have not been convicted of murder to die in prison without any opportunity for demonstrating maturity and rehabilitation. Budder, 851 F.3d at 1059. The Tenth Circuit identified the three distinct facets of this Court's holding in Graham: 1) children 2) convicted of nonhomicide offenses 3) cannot be denied "some meaningful opportunity for release based on demonstrated maturity and rehabilitation." Id. at 1055. Especially given the similarities between Terrance Graham's case and the facts here, the Tenth Circuit found that Keighton's case fell within these contours and thus his sentence violated the clearly established holding of Graham. Id. at 1059-60.

In finding Keighton's sentence to be contrary to this Court's "clearly

established" holding in Graham, the Tenth Circuit reiterated what this Court had said, that no penological justification, including those put forward by the State, could support sentencing a child who has not committed murder without providing some meaningful opportunity for release based on demonstrated rehabilitation. Id. at 1059. The Tenth Circuit also rejected the State's argument for a mechanistic interpretation of Graham by pointing out that Terrance Graham himself was sentenced to "life" and by observing that "[t]he Constitution's protections are not so malleable" as to permit evasion of Constitutional limits through mere semantic substitutions. Id. at 1056.

After correctly identifying this Court's holding in Graham and reviewing the facts giving rise to that holding, the Tenth Circuit rightly found the OCCA's decision was contrary to that clear holding, granted Keighton relief, and ordered that he be resentenced pursuant to the limits set forward in Graham. 851 F.3d at 1060. The State sought rehearing by the panel and en banc, but the State's application was denied without dissent. Cert Pet App. 132.

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit Correctly Held That Keighton Budder's Sentence, Imposed Upon a Juvenile for Nonhomicide Offenses and Affording No Opportunity for Release Based on Demonstrated Maturity and Rehabilitation, Violated the Eighth Amendment and This Court's Holding in Graham v. Florida.

In Graham v. Florida, 560 U.S. 48 (2010), this Court issued a

three-faceted, categorical holding: 1) children 2) convicted of nonhomicide crimes 3) cannot receive a life sentence lacking in some meaningful opportunity for release based on demonstrated maturity and rehabilitation. Id. at 82; see also id. at 60-61 ("This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."); Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017). This case concerns a 16-year-old child, Keighton Budder. Keighton's sentence arises from a single course of conduct on August 11, 2009, in which no homicide was committed. However, it is undisputed Keighton will die in prison because he has no meaningful opportunity for release. Thus, Keighton's case falls squarely within the holding of Graham, as the Tenth Circuit properly found, and this Court should deny the petition for a writ of certiorari.

Keighton, 16 at the time of the offense, falls within the first facet of Graham's holding limiting its application to children. Children like Keighton, as compared to adults, lack maturity, have an underdeveloped sense of responsibility, are more vulnerable to negative influences and outside pressures, are of less developed character, and have a greater capacity for change. Graham, 560 U.S. at 67-69; Roper v. Simmons, 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character

deficiencies will be reformed."); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). The differences between children and adults are abundantly clear in behavioral observation, but they are rooted in structural and operational differences between the still-growing child's brain and that of a mature adult. Graham, 560 U.S. at 68; Budder, 851 F.3d at 1058 (reviewing this Court's awareness that scientific understanding of differences between children and adults has only become clearer, more solidified, and better understood since Roper). These "fundamental differences" make Keighton and all other children, as a class, less culpable than adults and imbue them with a greater capacity for rehabilitation than adults.[2] Graham, 560 U.S. at 67-69.

Next, Keighton's case falls within the second facet of Graham's holding as he has not been convicted of homicide. The Graham Court distinguished homicide from all other offenses. Budder, 851 F.3d at 1057-58 ("The Court . . . drew a 'moral' distinction between homicide and nonhomicide crimes a difference in kind."). Recalling Kennedy v. Louisiana, 554 U.S. 407 (2008), this

[2]As this Court has held, "none of what [Graham] said about children about their distinctive (and transitory) mental traits and environmental vulnerabilities is crime-specific. Those features are evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing." Miller v. Alabama, 567 U.S. 460, 473 (2012).

Court stated "there is a line 'between homicide and other serious violent offenses,'" and this line means those like Keighton and Terrance Graham who do not commit homicide are not deserving of the most severe punishment. Graham, 560 U.S. at 69 ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."). Even the vast majority of children convicted of homicide are undeserving of the most serious punishment. See, e.g., Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) ("Miller [v. Alabama, 567 U.S. 460 (2012)], it is true, did not bar a punishment for all juvenile offenders, as the Court did in Roper or Graham. Miller did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."). The Graham Court, in demarcating homicide from all else, took full account of the multiple violent offenses and "escalating pattern of conduct" over several months that resulted in Terrance Graham's imprisonment.[3] 560 U.S. at 57-58, 73. However, unlike Terrance Graham, Keighton was not condemned to die in prison for offenses spread out over months but for a single course of conduct in which no

[3]Similarly, in Sullivan v. Florida, companion to Graham, the trial judge imposed sentence after noting Mr. Sullivan had been "given opportunity after opportunity" but "demonstrated himself to be unwilling to follow the law." Id. at 76-77.

homicide occurred.

Lastly, Keighton's sentence runs afoul of the third facet of Graham's holding requiring a meaningful opportunity for release. The most severe penalty available for a child is a sentence that eliminates any opportunity for release, and it is reserved only for a small minority of those children who have committed the worst offense, homicide. Id. at 69-71; Miller, 567 U.S. at 479-80. Critically, the Supreme Court compared a sentence without hope of release to the death penalty in that it "alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ." Graham, 560 U.S. at 69-70. Here, the trial court clearly sought to deny Keighton all hope of release, explicitly stating, "I see no reason to allow you the opportunity to get out of jail," and the OCCA did nothing to upset that message to Keighton.

Graham focused not on how a sentence is labeled, but eyed a single concern: an irrevocable "denial of hope."[4] Id.; see also id. at 70 (recognizing "negligible differences" in sentence outcomes despite difference in label in Harmelin v. Michigan, 501 U.S. 957 (2001)). In turn, this Court held that a child

[4]In its review of children entitled to Graham relief, this Court included children convicted of multiple offenses and receiving multiple convictions. Graham, 560 U.S. at 62-63. This tally included Keighton himself, indicating that the Court clearly viewed him as part of the cohort that should receive a meaningful opportunity for release. Id. at 64.

who has not been convicted of homicide must be provided "some realistic opportunity to obtain release." Id. at 82. Here, since being sentenced by the trial court on May 4, 2010, despite this Court's opinion in Graham, Keighton has never had any hope of a future opportunity to demonstrate that his brain has matured from that of a 16-year-old and that he has been rehabilitated. It is clear that the denial of hope matters, not the sentence label, because Terrance Graham, like Keighton, was sentenced to "life" at no point did the sentencing court utter the phrase "life without parole," nor could it have since Florida's sentencing statute provided only for "life." See id. at 56 (quoting sentencing court's description "facing a life sentence up to life"); id. ("The maximum was life imprisonment."). The State's rote, mechanistic interpretation of Graham would have foreclosed relief for Terrance Graham himself.[5]

Importantly, the three-faceted holding in Graham erects a categorical bar reaching beyond the facts in Terrence Graham's individual case. Id. at 77-79; Budder, 851 F.3d at 1054. This Court imposed a categorical rule because "a categorical rule gives **all juvenile nonhomicide offenders** a chance to demonstrate maturity and reform. The juvenile should not be deprived of the

[5]Relatedly, the State's efforts at linguistic gymnastics only serve to elucidate other parallels between Terrance Graham's and Keighton's cases. Compare Cert. Pet. 21 ("repeated acts of criminality"), with Graham, 560 U.S. at 73 ("escalating pattern of criminal conduct").

opportunity to achieve maturity of judgment and self-recognition of human worth and potential." Graham, 560 U.S. at 79 (emphasis added). Citing Roper, 543 U.S. at 572-73, this Court felt a categorical rule was needed to avoid the "unacceptable likelihood" that tragic and heinous facts would provoke a subjective sentence counter to the objective mitigating attributes of youth. Graham, 560 U.S. at 78. Here, this "unacceptable likelihood" came to fruition in the state courts below, like when the trial judge relied on his own subjective experiences with youth and alcohol, and now the State continues in its attempts to exploit that unacceptable risk again, see, e.g., Cert. Pet. at 10 ("shocking brutality," "horrendous suffering" (citing Cert. Pet. App. 106)); 23 ("heinous crimes"), in clear defiance of this Court's rejection of a case-by-case approach in favor of a categorical bar.

II. Keighton Budder's Sentence Means He Has No Future Opportunity to Demonstrate Maturity and Rehabilitation, A Denial of Hope Barred By Graham Presenting No Question Left Open By This Court's Decision.

The State has repeatedly sought to minimize the sentence imposed here by citing cases in other jurisdictions where there was no "life" or "life without parole" sentence imposed. Cert. Pet. at 25 ("aggregate effect of multiple consecutive sentences"), 25 n.105. As the Tenth Circuit explained, this case stands apart, Budder, 851 F.3d at 1053 n.4, and the State cites no nonhomicide case where a child received life sentences that undisputably deny any

meaningful opportunity for release. There is no question here that Keighton, since being sentenced by the trial court and regardless of the rote label change by the OCCA, has never had any hope there would be a future opportunity to demonstrate any gained maturity or rehabilitation. As a result, this case is not comparable to those involving stacked term-of-years sentences, like Bunch for example, where the Sixth Circuit also noted the district court's finding that "despite the Magistrate Judge's prompting, there is still no indication that Bunch will not be eligible for parole prior to completion of that sentence." 685 F.3d at 549.

Thus, contrary to the State's mischaracterizations, whatever unanswered questions remain after Graham, as to what term-of-years reaches some undefined life expectancy or what constitutes a meaningful opportunity for release for example, this case does not present them. This case presents no question like that posed in Virginia v. LeBlanc, 137 S. Ct. 1726 (2017), concerning what constitutes a meaningful opportunity for release, nor does it pose any question of legislative response, in part because the State has made no mention of anyone other than Keighton affected by the Tenth Circuit decision below.[6] In holding Terrance Graham's sentence unconstitutional, this Court has

[6]The State's "data," Cert. Pet. 19 n.90 ("This data is a result of a survey . . . ask[ing] other states whether, at the time of Graham, they had any individuals . . . serving consecutive sentences where the aggregate of those

already drawn the line crossed by the trial court and OCCA, and the Tenth Circuit accordingly granted the necessary relief. At sentencing, the trial court told Keighton: "I see no reason to allow you the opportunity to get out of jail." Sentencing Tr. 8. By this Court's own words, the relief granted by the Tenth Circuit was necessary:

> [Keighton Budder]'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 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.

Graham, 560 U.S. at 79 (emphasis added).

The State's Petition for a Writ of Certiorari is therefore due to be denied. Keighton Budder has not been convicted of homicide yet is serving a sentence without any meaningful opportunity of release based on maturity and rehabilitation. Whatever questions Graham left open, the State cannot escape the reality that this case is premised upon the same set of basic facts this Court encountered in Graham and upon which this Court granted relief.

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sentences results in parole ineligibility for at least **45 years**." (emphasis added)), regarding other state practices is of no value here: Keighton's punishment is unquestionably more severe than a 45-year aggregate sentence. Unlike with a 45-year sentence, Keighton has no hope of release or an opportunity to demonstrate maturity that could justify release.

III. The Tenth Circuit Properly Granted Habeas Relief Here Where the Oklahoma Court of Criminal Appeals Correctly Found That Graham Applied to Keighton Budder, But Failed to Provide the Meaningful Opportunity for Release Required By This Court's Holding.

There is no dispute that Keighton Budder was 16 years old on August 9, 2011, and likewise there is no dispute that the trial court sentenced Keighton to die in prison without any opportunity for release based on maturity and rehabilitation. The Oklahoma Court of Criminal Appeals correctly concluded that this Court's holding in Graham applied to Keighton, but failed to provide any meaningful opportunity for release despite this Court's categorical holding. On these facts, which mirror those in Terrance Graham's case and fall squarely within the strictures of this Court's holding, the Tenth Circuit was obligated to uphold Graham and was well within the constrained parameters for granting habeas relief.

Habeas relief can only be granted if a state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). "Clearly established Federal law" refers to holdings, not dicta "in other words . . . the governing legal principle or principles set forth by the Supreme Court." Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (citing Williams v. Taylor, 529 U.S. 362 (2000)). As this Court has explained, "the lack of a Supreme Court decision

on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law." Marshall v. Rodgers, 569 U.S. 58, 62 (2013) (per curiam); see also Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."). Yet here, Graham's categorical bar is a Supreme Court holding "on nearly identical facts": like Keighton, Terrance Graham was a child not convicted of homicide yet lacking any opportunity to demonstrate rehabilitation; like Keighton, Terrance Graham did not have a "life without parole" sentence; like Keighton, Terrance Graham would not have been sentenced but for the commission of multiple offenses (which in that case were not the result of a single course of conduct, instead coming months later).

The Tenth Circuit properly found that the OCCA decision was contrary to Graham's clear holding that juvenile nonhomicide offenders must be afforded some meaningful opportunity of release based on maturity and rehabilitation.[7]

[7]The Tenth Circuit did not find the state court ruling to be an "unreasonable application" of this Court's holding Graham. Budder, 851 F.3d at 1051. Thus, the State's repeated citations to and discussion of this Court's jurisprudence on what constitutes an "unreasonable application" of federal law, including reasonability as judged by "fairminded jurists," is inapposite and irrelevant. See, e.g., Cert. Pet. 14 n.68 (citing White v. Woodall, 134 S. Ct. 1697 (2014)), 23 n.100 (citing Harrington v. Richter, 562 U.S. 86, 102 (2011)).

After finding that Graham applied, the OCCA failed to comply with the relief warranted by this Court's holding, providing the exact set of circumstances in which habeas relief ought to be granted. Williams, 529 U.S. at 406 ("[I]f the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent . . . a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause."). That the State points out other questions potentially unresolved by Graham, like whether a 45-year sentence reaches some formulation of life expectancy, Cert. Pet. 19 n.90, or the consequences of convictions arising out of separate incidents in separate jurisdictions, Cert. Pet. 33, is immaterial; those questions are not presented here and this case cannot be used as a vehicle to answer them. The OCCA failed to comply with this Court's clear holding in Graham and letting its decision stand would eviscerate any Eighth Amendment protections granted children, even those categorical in nature.

CONCLUSION

The Tenth Circuit, like the OCCA, identified that Graham's categorical bar applied to Keighton Budder, but adhered to this Court's decision where the OCCA failed to comply, vindicating the protections afforded Keighton by the Eighth Amendment owing to his status as a child not convicted of homicide.

Keighton Budder was 16 years old and was not convicted of homicide, but he has no opportunity to ever show that he has matured, that his brain has developed, or that he has rehabilitated himself in order to earn release. "This the Eighth Amendment does not permit," and the petition should be denied. Graham, 560 U.S. at 79.

Respectfully submitted,

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