No. 17-405

In the Supreme Court of the United States

RAYMOND BYRD,

Petitioner,

v.

KEIGHTON BUDDER,

Respondent.

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

BRIEF OF THE STATE OF KANSAS AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does *Graham v. Florida*, 560 U.S. 48 (2010), clearly establish for the purposes of habeas corpus relief that a State violates the Eighth Amendment when it imposes on a juvenile consecutive sentences for multiple nonhomicide crimes, where each individual sentence does not impose life without parole, but the aggregate result is that the felon will not be eligible for parole within his natural lifetime?

2. Can a rule of law be "clearly established" within the meaning of 28 U.S.C. § 2254(d)(1) when there is a significant division among courts about the existence of that rule?

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INTEREST OF *AMICI CURIAE*[1]

The States enact and enforce the vast majority of criminal laws in this country applicable to juvenile offenders. As a result, they have important sovereign interests in retaining the ability to impose the penalties they deem will best serve public safety.

The States also have an interest in ensuring that federal courts give state court rulings the deference to which they are entitled under the Antiterrorism and Effective Death Penalty Act (AEDPA). The Tenth Circuit disregarded that limitation on its authority by granting habeas relief on the basis of a legal rule this Court has not clearly established and whose existence has deeply divided the courts.

ARGUMENT

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court announced a landmark new constitutional rule: the Constitution does not permit "a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." *Id*. at 52-53. Lower courts have struggled with several unresolved questions concerning the extent of *Graham*'s holding, including the one at issue here: Does it apply to consecutive sentences imposed "for multiple nonhomicide crimes, where each individual sentence does not impose life without parole, but the aggregate result is that the felon will not be

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[1] Counsel of record for all parties received notice of the State's intent to file this *amicus curiae* brief at least 10 days before the brief was due. The State of Kansas, as *amicus curiae*, may file this brief without leave of Court or consent of the parties. Sup. Ct. R. 37.4.

eligible for parole within his natural lifetime?" Pet. i. Indeed, several recent petitions for certiorari—some filed by States, others by defendants—describe the conflict in detail and have asked this Court to resolve it.[2]

Whatever answer this Court ultimately provides, one thing is certain right now: *Graham* itself did not "clearly establish" that its bar on life-without-parole sentences extends to consecutive sentences imposed for multiple separate crimes. And that means the Tenth Circuit exceeded the authority Congress has given federal courts under AEDPA when it granted habeas relief in this case. This Court should summarily reverse the Tenth Circuit's ruling, just as it reversed a very similar ruling by the Fourth Circuit in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017).

This Court Should Grant Review Because the Tenth Circuit Exceeded the Limits on Its Authority Imposed by AEDPA When It Extended *Graham* to Consecutive Sentences.

1. This is not the first time this Court has been faced with the question whether a federal court improperly granted habeas relief based on a rule that *Graham* did not expressly establish. In *Virginia v. LeBlanc*, this

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[2] *E.g. State v. Moore*, *petition for cert. denied* 583 U.S. ___ (Oct. 2, 2017) (16-1167) (State's petition); *New Jersey v. Zuber*, *petition for cert. denied* 583 U.S. ___ (Oct. 2, 2017) (No. 16-1496) (State's petition); *Willbanks v. Missouri Dep't of Corr.*, *petition for cert. denied* 583 U.S. ___ (Oct. 2, 2017) (No. 17-165) (defendants' petition); *Lucero v. Colorado*, No. 17-5677 (defendant's petition); *Ali v. Minnesota*, No. 17-5578 (defendant's petition); *Rainer v. Colorado*, No. 17-5674 (defendant's petition).

Court reviewed a Fourth Circuit decision that granted habeas relief to a juvenile offender who, under a "geriatric release" program, could petition for release at age 60. 137 S. Ct. at 1728. This Court summarily reversed the Fourth Circuit, concluding that the court of appeals failed to give the state court's decision the deference owed under ADEPA. As the Court explained, the constitutionality of a geriatric release program was not presented in *Graham*, and reasonable minds can disagree over whether *Graham* should be extended to that situation. *Id*. at 1729.

In doing so, this Court reaffirmed its holding in *White v. Woodall*, 134 S. Ct. 1697 (2014), that "if a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not "clearly established at the time of the state-court decision." *Id*. at 1706. AEDPA deference "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Id*.

Like the Fourth Circuit in *LeBlanc*, the Tenth Circuit held that *Graham* clearly established a rule that *Graham* did not address and that reasonable minds can disagree over. Specifically, the Tenth Circuit held that *Graham* categorically barred States from imposing consecutive sentences that amount to the practical equivalent of life without the possibility of parole on juvenile nonhomicide offenders no matter the number or severity of the crimes or the number of victims, even when no individual sentence is life without parole.

But, as in *LeBlanc*, the Tenth Circuit's holding does not necessarily follow from *Graham*. *Graham* did not

involve consecutive sentences imposed on a juvenile, but instead addressed a life-without-parole sentence imposed for a single armed burglary. *Graham*, 560 U.S. at 58. For that reason, the Court stated that "[t]he issue before this Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for *a* nonhomicide crime." *Id.* at 52-53 (emphasis added). This statement of the issue says nothing about an aggregation of consecutive term-of-years sentences pertaining to multiple counts. Indeed, as the dissent by Justice Alito observed, "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Id.* at 124.

The data this Court relied on for finding a national consensus against imposing life without parole sentences on juvenile nonhomicide offenders also shows that the Tenth Circuit improperly extended *Graham* by applying it to consecutive sentences. *Graham* found that "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders," *id.* at 64—a tally that excluded the 15 (or more) States that had imposed consecutive sentences whose "aggregate effect . . . practically precluded the possibility of parole," Pet. 17, 19-20. Because *Graham* solely reviewed one individual sentence for a juvenile defendant serving life without parole for a nonhomicide offense, any conclusion that this Court spoke to the issue of consecutive sentences is unwarranted.

Thus, as in *LeBlanc*, the Tenth Circuit "erred by failing to accord the state court's decision the deference owed under AEDPA" by extending *Graham* to a new context. *LeBlanc*, 137 S. Ct. at 1726. This lack of

deference resulted in a "legal quagmire" for Virginia where Virginia courts were permitted to impose, and required to affirm, certain sentences "while federal courts presented with the same fact pattern were required to grant habeas relief." *Id*. at 1729-30. The Tenth Circuit has now placed the state courts in its circuit in the same "legal quagmire" the Virginia courts faced as a result of the Fourth Circuit's extension of *Graham*. Based on the "federalism interest implicated in AEDPA cases," *id*., this Court should again spare state courts from this predicament.

2. There are sound reasons why *Graham* should not be extended to consecutive sentences, where the individual sentences do not amount to life without parole, and the Tenth Circuit erred in doing so on habeas review.

First, a rule that effectively bars States from imposing consecutive sentences once a certain threshold has been met gives juvenile offenders an automatic volume discount on crimes. Once a juvenile offender starts a crime spree there is little incentive to stop because additional crimes will not result in any additional prison time. The rule would thus prevent the States from adequately deterring and punishing heinous and repeated criminal behavior.

Second, the commission of multiple abhorrent offenses may reflect more than fleeting immaturity. *See Graham*, 560 U.S. at 68 (juveniles' "transient immaturity" should be taken into account). Instead, it could reflect moral depravity that is permanent. Such moral depravity should not be rewarded by prohibiting the States from fully punishing heinous conduct.

Third, courts have concluded that the Eighth Amendment analysis is not focused on cumulative sentences for multiple crimes, but rather only on the sentence imposed for each specific crime. *E.g. Hawkins v. Hargett*, 200 F.3d 1279, 1285 n. 5 (10th Cir. 1999); *see also O'Neil v. Vermont*, 144 U.S. 323, 331 (1892) (quoting the Virginia Supreme Court's identical conclusion, but not reaching the merits as the claim was dismissed on other grounds).

In disregarding these reasons, the Tenth Circuit glossed over difficult questions that militate against adopting its interpretation of *Graham*:

1) Can aggregate sentences amount to life sentences if the crimes are from different cases or jurisdictions?

2) If the aggregate sentences include different jurisdictions, does the Constitution speak to which jurisdiction must modify its sentence?

3) Does the number of crimes matter? Or the escalating nature or sequence of the crimes?

4) Does the number of victims matter?

5) How is life expectancy predicted or calculated? Are courts required to engage in specific fact-finding to calculate life expectancy? Are they expected to account for race, gender, socio-economic class, or high-risk behaviors such as smoking or drug use when predicting life expectancy?

It is implausible to believe that *Graham*—which involved a life-without-parole sentence imposed for

commission of a single crime—clearly resolved these issues. State courts may reasonably decide to steer clear of these many unanswered questions by declining to extend *Graham*'s holding to consecutive sentences (something *Graham* simply did not address). And under AEDPA, federal courts must not second-guess such state court decisions.

3. In one very important respect, the Tenth Circuit's failure to abide by AEDPA's limits is even more troubling than was the Fourth Circuit's in *LeBlanc*. Although no courts outside Virginia had occasion to address *Graham*'s application to Virginia's geriatric release program, courts around the nation have addressed whether *Graham* applies to consecutive sentences —and they are deeply divided on the issue. This Court has noted that where "lower courts have diverged widely in their treatment of a claim," it reflects "the lack of guidance from this Court," rather than "clearly established" law. *Carey v. Musladin*, 549 U.S. 70, 76 (2006). Here the wide divergence is manifest.

a. The federal appellate courts disagree about *Graham*'s scope. On the one hand, the Sixth Circuit held that *Graham* "did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012). In contrast, the Ninth Circuit, like the Tenth Circuit here, concluded that *Graham* extends to consecutive term-of-years sentences that, when aggregated, are the practical equivalent of life without parole. *Moore v. Biter*, 725 F.3d 1184, 1192-93 (9th Cir. 2013); *but see Moore v. Biter*, 742

F.3d 917, 917-22 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc).

Among state courts, the divide is even deeper. The state high courts in Colorado, Louisiana, Minnesota, Missouri, Oklahoma, and Virginia have all declined to extend *Graham*'s holding to consecutive sentences. *Lucero v. People*, 394 P.3d 1128, 1131-32 (Colo. 2017), *petition for cert. pending*, No. 17-5677 (filed August 18, 2017) (*Graham* did not bar aggregate sentences of 84 years); *State v. Brown*, 118 So.3d 332, 341 (La. 2013) ("[W]e see nothing in *Graham* that even applies to sentences for multiple convictions, as *Graham* conducted no analysis of sentences for multiple convictions and provides no guidance on how to handle such sentences."); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017), *petition for cert. pending*, No. 17-5578 (filed August 8, 2017) (*Miller* does not extend to juvenile offenders being sentenced for multiple crimes); *Willbanks v. Missouri Dep't of Corr.*, 522 S.W.3d 238, 240 (Mo. 2017), *petition for cert. denied* 583 U.S. ___ (Oct. 2, 2017) (No. 17-165) ("Because *Graham* did not address juveniles who were convicted of multiple nonhomicide offenses and received multiple fixed-term sentences, as Willbanks had, *Graham* is not controlling."); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016) (the Eighth Amendment is not violated by aggregate term-of-years sentences amounting to 133 years and 68 years).

Intermediate state courts in Arizona, Kansas, Maryland, Tennessee, and Texas have also declined to extend *Graham* beyond a single sentence for a single conviction. *State v. Kasic*, 265 P.3d 410, 413, 415-16 (Ariz. Ct. App. 2011) (prison terms for 32 felonies, some

of which were committed when the defendant was a juvenile, totaling 139.75 years was not barred by *Graham*); *State v. Redmon*, 380 P.3d 718 (Kan. Ct. App. 2016) (consecutive sentencing totaling 61 years was not a de facto sentence of life without the possibility of parole requiring the application of *Graham*); *McCullough v. State*, No. 1081, 2017 WL 3725714, at *1 (Md. Ct. Spec. App. Aug. 30, 2017) (Graham did not extend to categorically bar four consecutive 25-year sentences, with multiple victims); *State v. Merritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at *6 (Tenn. Crim. App. 2013) (*Graham* only applies to sentences of life without the possibility of parole, not aggregate sentences); *Carmon v. State*, 456 S.W.3d 594, 601 (Tex. App. 2014) (nothing in *Graham* precludes 99-year sentence for aggravated robbery from being served consecutively to a life sentence with the possibility of parole for murder).

Additionally, the Supreme Court of Georgia, relying on Justice Alito's dissent in *Graham*, concluded that *Graham* does not apply to term-of-years sentences at all. *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) ("Clearly, '[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.'" (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting)).

On the other side of the divide are courts in California, Florida, Illinois, Indiana, Iowa, Nevada, New Jersey, Ohio, and Wyoming. These courts have ruled that *Graham*'s holding or logic dictate that its categorical rule extends to aggregate sentences. *See People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (consecutive sentencing of over 100 years before parole

eligibility found to violate *Graham*); *Henry v. State*, 175 So.3d 675, 679 (Fla. 2015) (reviewing aggregate sentences amounting to 90 years in prison, the court held *Graham* bars juvenile nonhomicide sentences when there is no meaningful opportunity to obtain release); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (citing both *Graham* and *Miller v. Alabama*, 567 U.S. 460 (2012), to find the consecutive sentences at issue unconstitutional); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (relying on the principles in *Graham* to modify an aggregated 150-year sentence to an aggregated 80-year sentence); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (relying on both *Graham* and *Miller* to find the aggregated sentences unconstitutional); *State v. Boston*, 363 P.3d 453, 457 (Nev. 2015) (holding that *Graham* "applies to aggregate sentences that are the functional equivalent of life without the possibility of parole"); *State v. Zuber*, 152 A.3d 197 (N.J. 2017), *petition for cert. denied*, 583 U.S. ___ (Oct. 2, 2017) (No. 16-1496) (applying principles of both *Graham* and *Miller* to consecutive sentences); *State v. Moore*, 76 N.E.3d 1127, 1137-38 (Ohio 2016), *petition for cert. denied*, 583 U.S. ___ (Oct. 2, 2017) (No. 16-1167) (concluding *Graham*'s principles "apply equally to a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy" when determining whether the aggregate sentences at issue in the case were lawful); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (relying on both *Graham* and *Miller* to find the consecutive sentences at issue unconstitutional).

b. Disregarding this substantial split, the Tenth Circuit concluded that the law was clearly established. That cannot be correct.

Six state high courts and five state intermediate appellate courts have concluded that not only does *Graham* not apply to consecutive sentences by its own terms, but its logic does not justify extending its rule to consecutive sentences. In addition, a federal court of appeals has concluded that *Graham* did not clearly hold that its categorical rule applies to consecutive sentences. Surely, then, the Oklahoma Court of Criminal Appeals' ruling that *Graham* does not apply to consecutive sentences was *not* "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *cf. Stanton v. Sims*, 134 S. Ct. 3, 5-7 (2013) (holding that a constitutional rule was not "clearly established" for purposes of qualified immunity when courts around the Nation were sharply divided on the question).

Based on similar reasoning, the Fifth and Eighth Circuits have concluded that disagreement among federal and state courts over the scope of a legal rule is strong evidence that the rule is not clearly established for AEDPA purposes. *See Holland v. Anderson*, 583 F.3d 267, 282 (5th Cir. 2009) (disagreement among federal and state courts); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006) (disagreement among federal circuits). In contrast, the Tenth Circuit is not alone in holding that a legal rule can be clearly established despite a split of authority among the circuits. *See*

Williams v. Bitner, 455 F.3d 186, 193 n.8 (3d Cir. 2006); *Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012).

This Court should now affirmatively declare that significant splits among the lower courts undoubtedly demonstrate—or at the least, very powerfully indicate—that a legal rule has not been clearly established by this Court. The aggregate-sentence issue presented in this case is one such rule, and therefore "cannot be resolved on federal habeas review." *LeBlanc*, 137 S. Ct. at 1729.

CONCLUSION

This Court should either summarily reverse or grant review and reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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