No. _____

In The
Supreme Court of the United States

RAYMOND BYRD,

Petitioner,

v.

KEIGHTON BUDDER,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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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?

PARTIES TO THE PROCEEDINGS

Petitioner is Raymond Byrd, Warden at Cimarron Correctional Facility, Oklahoma Department of Corrections, Cushing, Oklahoma. His predecessor, Mike Addison, was the named Respondent before the U.S. District Court for the Western District of Oklahoma and the named Appellee before the Tenth Circuit Court of Appeals. Pursuant to Supreme Court Rule 35.3, Byrd as Addison's successor in office is automatically substituted as a party to the proceedings, and Petitioner has notified the Clerk in writing of this succession. Respondent is Keighton Budder, inmate #615734 at Cimarron Correctional Facility, Cushing, Oklahoma.

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OPINIONS BELOW

The Tenth Circuit's decision (App. 1) is reported at 851 F.3d 1047. The district court's order (App. 26) is reported at 169 F. Supp. 3d 1213. The magistrate's report and recommendation (App. 41) is unreported. The Oklahoma Court of Criminal Appeals' decision (App. 92) is unreported.

The Oklahoma Court of Criminal Appeals' order denying rehearing and directing issuance of mandate (App. 129) is unreported. The Tenth Circuit's order denying appellee's petition for rehearing *en banc* (App. 132) is unreported.

JURISDICTION

The judgment of the Tenth Circuit was entered on March 21, 2017. A petition for rehearing *en banc* was denied on May 2, 2017. On July 19, 2017, Justice Sotomayor granted a 45-day extension of time to file this petition for writ of certiorari until September 14, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

In *Graham v. Florida*, this Court held that the Eighth Amendment prohibits states from imposing life without parole on a person for committing a nonhomicide crime as a juvenile.[1] Then, in *Miller v. Alabama*, this Court held that although a juvenile can be sentenced to life without parole for a homicide offense, that sentence must be made at the discretion of a jury

[1] 560 U.S. 48 (2010).

or a judge, not pursuant to statutory mandate.[2] Courts across the country, however, are deeply divided as to the scope of *Graham* and *Miller*. The most significant division concerns whether these cases prohibit a state from punishing a juvenile with separate sentences for separate crimes, where each sentence individually comports with the Eighth Amendment, but where the aggregate sentence results in the offender not having the opportunity for parole during his natural life.

Keighton Budder is one such individual. Budder was convicted of slashing a girl's throat, stabbing her seventeen times, bashing her head against rocks, raping her vaginally, raping her anally, again raping her vaginally, and then raping her orally. Budder was convicted of four separate crimes, none of which led to a sentence of life without parole. But because these sentences are to run consecutively, Budder will not be eligible for parole until he has served 131.75 years in prison. The Tenth Circuit held that Budder is entitled to habeas relief because these sentences, in the aggregate, clearly violate *Graham*.

On direct appellate review, the courts of at least 12 states have held that *Graham* or *Miller* does not apply to the aggregate effect of multiple consecutive sentences, while the courts of 10 states have held the opposite. The court below nonetheless held that *Graham* "clearly established" for purposes of habeas relief under 28 U.S.C. § 2254(d) that Budder's multiple sentences were unconstitutional, meaning, per this

[2] 567 U.S. 460 (2012).

Court's precedent, that the question was "beyond any possibility for fairminded disagreement."[3] In so holding, the Tenth Circuit agreed with the Ninth Circuit, but split with a ruling of the Sixth Circuit. The Tenth Circuit's ruling also deepened an existing split on whether federal law may ever be "clearly established" in the face of deep division among courts on the underlying question.

This Court has already recognized that *Graham* left unanswered questions as to its precise scope, and that courts attempting to answer such questions on habeas corpus review should be summarily reversed.[4] Here, the Tenth Circuit ignored the text and reasoning of *Graham*, as well as the widespread disagreement on the question at issue, all of which indicate that whether *Graham* applies to the effect of multiple consecutive sentences is at least debatable. Because there are "reasonable arguments on both sides" of this issue,[5] the court below manifestly erred in granting Budder's petition for habeas corpus, and that decision should be reversed.

[3] *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (*per curiam*) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

[4] *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*).

[5] *White v. Woodall*, 134 S. Ct. 1697, 1707 (2014).

STATEMENT OF THE CASE

I. Factual Background

On August 10, 2009, K.J., a 17-year-old girl, gave 16-year-old Keighton Budder a ride home from a party she hosted.[6] Budder directed her onto a dirt road in the woods, which was completely dark save for the car's headlights.[7] When K.J. asked how much further she had to drive, Budder assured her his aunt's house was only fifty yards away.[8] Then the violence began.

Budder suddenly placed her in a headlock, took a knife, and slit her throat.[9] He stabbed her in the stomach, arms, and legs – seventeen times in all – while she was screaming for him to stop.[10] Panicked, K.J. struggled to escape from the still-moving car, finally diving out as the car rolled into a ditch.[11] But Budder had grabbed on to one of her boots and followed her out of the moving car.[12]

K.J. attempted to use her phone to text for help, but Budder yanked it out of her hands and threw it into the woods.[13] He then mounted K.J. and punched

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[6] App. 93-94.

[7] App. 94.

[8] App. 94.

[9] App. 94.

[10] App. 94, 97.

[11] App. 94-95.

[12] App. 95.

[13] App. 95.

her in the face.[14] Wringing her hair up into his hand, Budder slammed her head against the rocks in the road.[15] "Everything went black," K.J. later testified.[16] When she regained consciousness, Budder was still on top of her, but now removing her shorts and underwear, throwing them into the woods.[17] He spread K.J.'s legs open and attempted to rape her while she desperately tried to push him off, already weak from the loss of blood and filled with the fear that she was going to die that night.[18] Unsuccessful in this initial rape attempt, Budder then jerked K.J. up and marched her to the car, and bent her over.[19] This time he was successful, raping K.J. over the open driver's door.[20]

Budder was not done yet. He next pushed the bloodied K.J. on the backseat of the car, following in after her and lifted her shirt and bra in an attempt to suck on her breasts.[21] Although she was still too weak to outrun him, K.J. again began to resist, but eventually stopped fighting back – in fear of what Budder might do – after Budder commanded her to quit.[22] Budder then removed K.J. from the car and bent her over the rear fender, where he pulled off her shirt and began

[14] App. 95.
[15] App. 95.
[16] App. 95.
[17] App. 95.
[18] App. 95.
[19] App. 95.
[20] App. 95.
[21] App. 95.
[22] App. 95.

anally raping her, causing her immense physical pain.[23] After he finished, he pushed K.J. – still bleeding from her neck and numerous stab wounds – back into the car.[24] She complied, still fearing for her life.[25] But she did not move fast enough for Budder, so he jammed one of his fingers into K.J.'s wounds.[26]

Apparently changing his mind, Budder took K.J. out of the car and laid himself down in the back seat, where he forced K.J. back in on top of him.[27] There, he vaginally raped K.J. again.[28] Having now raped K.J. twice vaginally and once anally, Budder pulled himself out of K.J., grabbed her head, and shoved it onto his penis.[29] The forced oral sodomy only stopped when Budder told K.J. to manually masturbate him.[30] Eventually, during the masturbation, Budder fell asleep, and K.J. saw her chance to escape.[31]

K.J. quietly snuck backwards from the car and, when she felt she was a safe enough distance to not

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[23] App. 95; Corrected Appendix of Appellant Keighton Budder Vol. 2, Tenth Circuit Court of Appeals, No. 16-6088 at 285 ("Aplt. App.").

[24] App. 95-96, Aplt. App. 286.

[25] Aplt. App. 286.

[26] Aplt. App. 286.

[27] App. 95-96.

[28] App. 96.

[29] App. 96.

[30] App. 96.

[31] App. 96.

wake Budder, she began running down the road, completely naked.[32] Weak and bleeding, she finally came upon a house and began shouting at the front door for help.[33] Getting no response, she opened the door of a nearby truck to get attention.[34] When the owner came out of the house after hearing the truck's open door signal, she discovered bloodied K.J. begging for help.[35] After giving K.J. what assistance she could, the owner called 911.[36] When the police arrived, K.J. was taken to the hospital and rushed into surgery.[37] She lived.

II. Procedural History

Budder was tried by jury and convicted of Assault and Battery with a Deadly Weapon, Forcible Oral Sodomy, and two counts of First Degree Rape.[38] The jury recommended as punishment life imprisonment with the possibility of parole for Assault and Battery, 20 years for Forcible Oral Sodomy, and life without the possibility of parole for each count of First Degree

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[32] App. 96; Aplt. App. 295.

[33] App. 96; Aplt. App. 295-98.

[34] App. 96.

[35] App. 96; Aplt. App. 313.

[36] App. 96.

[37] App. 97.

[38] App. 92.

Rape.[39] On May 4, 2010, the trial court ordered Budder to serve these sentences consecutively.[40]

Thirteen days later, this Court issued its opinion in *Graham*.[41] In that case, the Court addressed "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime."[42] To answer this question, the Court first surveyed state practices, and found that only 11 states had imposed a life without parole sentence on a juvenile for committing a nonhomicide crime, indicating "a national consensus has developed against it."[43] The Court then held that, given the characteristics of juveniles, the culpability associated with committing a single nonhomicide crime, and the lack of penological justification for giving such individuals the harsh punishment of life without parole for a single crime, such a sentence violates the Eighth Amendment.[44]

Following *Graham*, the Oklahoma Court of Criminal Appeals (OCCA) heard Budder's appeal.[45] The court first held that the sentences for rape violated this Court's decision in *Graham* and accordingly modified

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[39] App. 92.

[40] App. 92.

[41] 560 U.S. 48 (2010).

[42] *Id.* at 52-53.

[43] *Id.* at 61-67.

[44] *Id.* at 67-75.

[45] App. 92.

those sentences to life with the possibility of parole.[46] The court then rejected Budder's further argument that "the aggregate sentence imposed by running the sentences consecutively" also violated *Graham*.[47] The court explained that "[t]here is no absolute constitutional or statutory right to receive concurrent sentences," and that running the sentences consecutively was appropriate here, "[d]ue to the shocking brutality of the crimes committed by [Budder]"[48] and the "horrendous suffering [the victim] endured."[49] As a result of the OCCA's decision, Budder will be eligible for parole after he has served 131.75 years in prison.[50] On November 29, 2011, the OCCA denied Budder's petition for rehearing.[51]

Budder filed for a writ of habeas corpus under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Oklahoma.[52] The magistrate judge recommended granting the writ because "the OCCA's

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[46] 560 U.S. 48; App. 99.

[47] App. 100.

[48] App. 106.

[49] App. 118.

[50] App. 34, 47. Under Oklahoma law, a prisoner must serve 85% of his sentence for First Degree Rape, Assault with a Deadly Weapon, and Forcible Oral Sodomy before being considered for parole. OKLA. Stat. tit. 21, § 13.1. Life sentences and any sentence over 45 years are treated as 45 years for purposes of determining parole eligibility. App. 47 (citing *Anderson v. State*, 130 P.3d 273, 282 (Okla. Crim. App. 2006)).

[51] App. 130.

[52] App. 41.

decision was contrary to, and an unreasonable application of" *Graham*.[53]

Chief Judge Heaton disagreed with the recommendation, and denied Budder the writ.[54] The district court read *Graham* to hold only "that the Eighth Amendment prohibits a sentence of life without the possibility of parole for a juvenile who commits a nonhomicide offense."[55] Finding persuasive the reasoning of the Sixth Circuit in *Bunch v. Smith*,[56] the district court concluded that although "[t]he Supreme Court may eventually read or expand *Graham*" to forbid consecutive sentences like those imposed on Budder, "it has not done so yet and that 'expansive reading of *Graham* is not clearly established.' "[57]

The Tenth Circuit reversed.[58] The Tenth Circuit read *Graham* to apply "to all nonhomicide offenses, regardless of the number or severity of those offenses."[59] This is because, the court reasoned, the difference between a single sentence of life without parole for a single nonhomicide crime and shorter sentences with the same aggregate effect for multiple crimes is "merely"

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[53] App. 62.

[54] App. 26, 40.

[55] App. 30.

[56] App. 34 (citing *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), *cert. denied sub nom. Bunch v. Bobby*, 133 S. Ct. 1996 (2013)).

[57] App. 39 (quoting *Bunch*, 685 F.3d at 552).

[58] App. 1.

[59] App. 15; *see also* App. 19-21.

one of "label[s]" and "semantic[s]."[60] The court viewed multiple sentences for multiple crimes as an attempt to "circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences," and said that the State "may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule."[61] The Tenth Circuit concluded that "[n]o fair-minded jurist could disagree" with its analysis.[62]

Petitioner filed a petition for rehearing *en banc*, which was supported by an *amicus* brief submitted by every other State in the Tenth Circuit. On May 2, 2017, the Tenth Circuit denied the petition.[63]

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit violated this Court's precedent and diverged from other courts in holding that *Graham* clearly established that Budder's consecutive sentences for multiple crimes violate the Eighth Amendment.

Whether *Graham* should extend to prohibiting any series of consecutive sentences that, when totaled, functionally prevent a juvenile from being eligible for

[60] App. 17.

[61] App. 20.

[62] App. 25.

[63] App. 132.

parole is a difficult question. But it is not a question that should be answered by a federal court in order to reverse a state court's decision on habeas corpus. In so doing, the Tenth Circuit flouted this Court's habeas precedent and exacerbated an existing divide on this habeas issue among the federal courts of appeals.

A. The Tenth Circuit directly contradicted this Court's precedent concerning habeas corpus review and should be summarily reversed.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas corpus cannot be granted to a person in state custody unless that state's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[64] If prior Supreme Court cases do not "clear[ly] answer . . . the question presented" and "squarely address[] the issue," the habeas court cannot grant relief.[65] Thus, AEDPA "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal."[66] This "difficult to meet" and "highly deferential" standard "demands that state-court decisions be given

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[64] 28 U.S.C. § 2254(d)(1).

[65] *Wright v. Van Patten*, 552 U.S. 120, 125-26 (2008).

[66] *Harrington*, 562 U.S. at 102-03 (citation omitted).

the benefit of the doubt."[67] Habeas corpus "does not require state courts to extend [ ] precedent or license federal courts to treat the failure to do so as error."[68]

As a result, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision."[69] "The state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[70] The law is not clearly established, and a state court judgment cannot be invalidated on that basis, if there are "reasonable arguments on both sides" about how and whether the Supreme Court resolved the precise legal question at issue.[71]

The Tenth Circuit's decision below failed to adhere to these well-established standards. Specifically, the Tenth Circuit granted habeas relief despite five reasonable arguments made to it indicating that *Graham*'s categorical prohibition does not clearly extend to the aggregate effect of Budder's multiple sentences.

1. Starting with the text of *Graham*, the Court never explicitly addressed the Eighth Amendment's application to the aggregate effect of multiple juvenile

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[67] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

[68] *Woodall*, 134 S. Ct. at 1706 (emphasis omitted).

[69] *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (*per curiam*) (internal quotation marks and citation omitted).

[70] *Id.* (internal quotation marks and citation omitted).

[71] *Woodall*, 134 S. Ct. at 1707.

sentences, but instead repeatedly limited the scope of the case to single sentences for single nonhomicide crimes.[72] The Court opened its opinion by stating that "[t]he issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole *for a nonhomicide crime*."[73] The Court went on to note that the "case concern[ed] *only* those juvenile offenders sentenced to life without parole *solely* for *a* nonhomicide offense."[74] The Court held that, given the characteristics of juveniles, "*a* sentence of life without parole for *a* nonhomicide crime despite insufficient culpability" was unconstitutional.[75] While *Graham* levies a categorical prohibition on a type of sentence regardless of the particular nonhomicide crime committed, that category was consistently targeted at individual sentences for individual crimes, prohibiting lifetime denial of parole "based solely on *a* nonhomicide crime."[76] This understanding is further

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[72] *See, e.g.*, App. 36; *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017), *petition for cert. pending* No. 17-5677; *see also Bunch*, 685 F.3d at 551; *Moore v. Biter*, 742 F.3d 917, 919 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of reh'g *en banc*); *State v. Brown*, 118 So.3d 332, 337 (La. 2013); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 242 (Mo. 2017) (*en banc*), *petition for cert. pending* No. 17-165 (Aug. 2, 2017); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 925 (Va. 2016), *cert. denied* 137 S. Ct. 568 (2016).

[73] *Graham*, 560 U.S. at 52-53 (emphasis added).

[74] *Id.* at 63 (emphases added).

[75] *Id.* at 78 (emphases added and internal marks and citations omitted).

[76] *Id.* at 79 (emphasis added).

confirmed both by how *Graham* was presented on certiorari[77] and how this Court later characterized its holding.[78]

To be sure, the court below proffered its own textual reasons to interpret Graham's categorical rule expansively enough to encompass this case. But, as detailed above, reasonable and even persuasive arguments on the other side are not sufficient to justify overturning a state court decision on AEDPA review. A habeas court should not ignore all arguments that point to a more narrow interpretation and focus only on arguments supporting a broad interpretation, as the court did below.

2. The methodology applied by this Court in reaching *Graham*'s holding confirms that this Court did not intend to include in *Graham*'s categorical prohibition the aggregation of multiple sentences each less than life without parole. To determine whether the sentence at issue was rare (or unusual) for Eighth Amendment purposes, the Court made a tally of all individuals in the nation with that sentence.[79] The Court started with a study that counted all such sentences,

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[77] *See* Petition for Writ of Certiorari, *Graham*, 560 U.S. 48, 2008 WL 6031405, at i ("Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.").

[78] *See Miller*, 567 U.S. at 470 (describing *Graham* as prohibiting "a sentence of life without the possibility of parole for a child who committed a nonhomicide offense").

[79] *Graham*, 560 U.S. at 62-67.

then supplemented that study with its own independent tally.[80] The Court concluded that Graham's sentence was likely unconstitutional because a "national consensus ha[d] developed against it" as evidenced by "only 11 jurisdictions nationwide" having imposed it.[81]

Most important for this case are the juvenile offenders the Court did *not* include in its tally – indicating that those offenders are *not* subject to *Graham*'s categorical prohibition. The tally did not include any offenders with sentences like that imposed on Budder now, where no individual sentence for a single nonhomicide crime constituted life without parole, but the aggregate effect of consecutive sentences practically precluded the possibility of parole.[82] Indeed, Justice Thomas in dissent explicitly pointed out that "the Court counts only those juveniles sentenced to life

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[80] *Id.* at 62-64.

[81] *Id.* at 64, 67 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

[82] *See Lucero*, 394 P.3d at 1133 ("[N]either the study nor the Court listed Colorado as a state in which a juvenile was serving such a sentence, despite the fact that Lucero was serving the sentence he now challenges at the time *Graham* was decided."); *Willbanks*, 522 S.W.3d at 243 ("It also looked at the actual number of juvenile offenders serving life without parole sentences, which totaled only 123 nationwide. Obviously, the number of juveniles with multiple fixed-term sentences would number in the thousands. At no point did the Supreme Court consider a juvenile offender sentenced to multiple fixed-term periods and whether such terms, in the aggregate, were equal to life without parole.") (citation omitted); *see also Bunch*, 685 F.3d at 552; *Moore*, 742 F.3d at 919 (O'Scannlain, J., dissenting from denial of reh'g *en banc*); *State v. Moore*, 76 N.E.3d 1127, 1167 (Ohio 2016) (Kennedy, J., dissenting), *petition for cert. pending*, No. 16-1167 (Mar. 22, 2017).

without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment)."[83] Justice Alito, relying on this fact, stated with no response from the majority that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."[84]

And such offenders existed at the time of *Graham*. For example, the Court in *Graham* did not include Missouri in its list of 11 States with the sentence at issue. But in Missouri, Timothy Willbanks had been sentenced to life plus 355 years in prison for multiple crimes including a robbery and shooting he committed when he was 17 years old. In aggregate, he will not be eligible for parole until he is 85 years old.[85] Similarly, in California, Roosevelt Moore had been sentenced to 254 years in aggregate for 24 crimes including several

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[83] *Graham*, 560 U.S. at 113 n.11 (Thomas, J., dissenting).

[84] *Id.* at 124 (Alito, J., dissenting); *see also United States v. Cobler*, 748 F.3d 570, 580 n.4 (4th Cir. 2014) ("The Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole."); *Vasquez*, 781 S.E.2d at 925 ("Justice Alito made this very point in his dissent without the slightest suggestion to the contrary in the majority opinion."); *Moore*, 742 F.3d at 920 (O'Scannlain, J., dissenting from denial of reh'g *en banc*); *Lucero*, 394 P.3d at 1133; *Brown*, 118 So.3d at 336; *Willbanks*, 522 S.W.3d at 243.

[85] *See Willbanks v. Dep't of Corr.*, No. WD 77913, 2015 WL 6468489, at *2 (Mo. Ct. App. Oct. 27, 2015), *cause transferred to* Mo. S. Ct. (Apr. 5, 2016); *see also* Petition for Writ of Certiorari, *Willbanks v. Dep't of Corr*., 522 S.W.3d 238 (Mo. 2017), 2017 WL 3278189.

rapes and robberies he committed before his eighteenth birthday. In aggregate, he will not be eligible for parole until he serves 127 years and two months. Yet Moore was not included in the *Graham* tally either.[86] Neither was Chaz Bunch from Ohio[87] whose multiple heinous crimes committed as a juvenile landed him in prison for 89 years.[88]

The State of Oklahoma, in consultation with other State Attorneys General, has been able to identify at least 23 states that had imposed Budder-type consecutive sentences at the time of *Graham*.[89] Because some states were not able to ascertain definitively whether they had any individuals with Budder-esque sentences, that number is almost certainly higher.[90] None of these individuals appears to have been included in

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[86] *Moore*, 742 F.3d at 918-19 (O'Scannlain, J., dissenting from denial of rehearing *en banc*).

[87] The Court in *Graham* did not include Ohio in its list of states that imposed the sentence at issue.

[88] *Bunch*, 685 F.3d at 547-48.

[89] These states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Kansas, Louisiana, Maryland, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin.

[90] This data is the result of a survey wherein Oklahoma asked other states whether, at the time of *Graham*, they had any individuals imprisoned for multiple nonhomicide crimes committed as a juvenile, serving consecutive sentences where the aggregate of those sentences results in parole ineligibility for at least 45 years. Oklahoma then supplemented this data with information gleaned from state court decisions on the issue. Nevertheless, not all states responded to the survey or were able to determine the answer to Oklahoma's admittedly complex question.

Graham's tally, which formed a principal basis for the Court's decision.[91] Thus, if the Tenth Circuit is correct about the clear scope of *Graham*, this Court's opinion in *Graham* failed to include at least 15 states in its list of jurisdictions that had imposed the sentence at issue – meaning that the Court missed (at minimum) 58% of the relevant states.

This should have been conclusive proof that *Graham*'s categorical bar did not encompass the effect of multiple consecutive sentences for multiple crimes, like those now imposed on Budder. Instead, the Tenth Circuit ignored this Court's decision to exclude such prisoners in its tally. The court below evidently concluding that this Court's decision in *Graham* was premised on a tally that was highly underinclusive. But the assumption that this Court's decision was constructed on so significant a mistake cannot form the basis for a writ of habeas corpus. A proposition of law cannot be "clearly established" if one must first presume that the Court's decision that purportedly established that law was based on an error.

3. The reasoning of *Graham* also does not necessarily extend to Budder's case. *Graham* found wanting the penological interests asserted to justify a life without parole sentence for a single nonhomicide crime, but

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[91] Indeed, with so many States having imposed such sentences, it is likely that if the Court reviews *this* sentencing practice, it would be difficult to find a "national consensus . . . against it." *Graham*, 560 U.S. at 67 (quoting *Atkins*, 536 U.S. at 316).

forbidding the aggregate effect of consecutive sentences implicates different penological interests.[92] For example, *Graham* never addressed the fact that the Tenth Circuit's rule would effectively prohibit the State from punishing crimes of a juvenile committed subsequently to the juvenile committing an earlier nonhomicide act for which he was sentenced to life. The State could punish Budder for slicing the throat of his victim and stabbing her seventeen times – for which he justly and lawfully received a life sentence with the possibility of parole after 38.25 years – but then could not punish him for later vaginally, anally, and orally raping her, since such separate sentences, when summed together, would deny him parole for many more years.

Similarly, the decision below also undermines the states' interests in a rational and proportionate sentencing regime, which ensures that similar crimes are punished similarly. Under the Tenth Circuit's approach, a juvenile who committed a single anal rape identical to Budder's crime would effectively receive far greater punishment than Budder for that specific crime simply because Budder had stabbed his victim and raped her vaginally beforehand. Nor did *Graham* address how the Tenth Circuit's approach undermines the states' efforts to deter offenders from pursuing repeated acts of criminality after their criminal conduct has already begun.[93] Under the Tenth Circuit's rule,

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[92] *Graham*, 560 U.S. at 71-74.

[93] *See, e.g.*, *State v. Merritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at *4 (Tenn. Crim. App. Dec. 10, 2013).

once a juvenile commits a serious crime, he has nothing to lose by continuing his felonious rampage.[94] Nothing in *Graham* declares these penological interests illegitimate, yet the court below ruled that the State was clearly forbidden from pursuing them.

It is true that *Graham* held that a single nonhomicide crime did not evince sufficient culpability for the sentence of life without parole.[95] But just as this Court has recognized that homicide involves greater culpability such that life without parole *is* a permissible sentence,[96] so too do multiple nonhomicide crimes involve greater culpability than a single nonhomicide crime. Moreover, as with homicide, the commission of multiple monstrous offenses is less likely to reflect "transient immaturity" than the commission of a single, nonhomicide offense.[97]

The Tenth Circuit brushed aside these penological arguments: the difference between a single sentence of life without parole for a single nonhomicide crime and shorter sentences with the same aggregate effect for multiple crimes is, the court argued, "merely" one of "label[s]" and "semantic[s]."[98] The Tenth Circuit viewed multiple sentences for multiple crimes as an

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[94] Indeed, such a criminal might even have the incentive to continue committing crimes in order to evade detection.

[95] *Graham*, 560 U.S. at 67-69.

[96] *Id.* at 69; *see also Miller*, 132 S. Ct. at 2469.

[97] *Miller*, 132 S. Ct. at 2469.

[98] App. 17-18.

attempt to "circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences," and that the State "may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule."[99] But the difference between one rape and three rapes is not one of labels and semantics; it is troubling to think the Tenth Circuit granted habeas relief on that basis. Nor did the State attempt to avoid *Graham* in the way it structured the charges in this case: Budder was charged, convicted, and initially sentenced before *Graham* was even decided. More importantly, Budder committed multiple and separate heinous crimes. The repeated stabbing, and vaginal, then anal, then oral rape of his victim are each distinct crimes. Forcible oral sodomy and anal rape are not "sub offenses" of assault with a deadly weapon.

Regardless, even if the court below makes colorable arguments that the reasoning of *Graham* should be extended to prohibit the aggregate effect of Budder's consecutive sentences, such an extension is not appropriate on AEDPA review.[100] Because there are "reasonable arguments on both sides," habeas relief is inappropriate.[101]

4. The Tenth Circuit also erred in its broad reading of *Graham* because that reading assumes *Graham*

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[99] App. 20.

[100] *See Harrington*, 562 U.S. at 102 ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable" under AEDPA.).

[101] *White*, 134 S. Ct. at 1707.

contravened background Eighth Amendment jurisprudence. Longstanding precedent holds that "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes."[102] Accordingly, absent explicit language in *Graham* overruling this precedent, the court below should have assumed that *Graham*'s rule applied only to single sentences for single crimes, rather than assuming the opposite. Similarly, this Court has generally approved of the notion that, as criminality increases, so should the sentence.[103] Nothing in *Graham* undermines that bedrock principle of the Eighth Amendment. But here, the Tenth Circuit commanded the opposite, requiring that for each subsequent crime Budder commits, he must be punished *less* or *not at all*, otherwise his cumulative punishment becomes too

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[102] *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) ("It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed."); *United States v. Ming Hong*, 242 F.3d 528, 532 (4th Cir. 2001); *Ali*, 895 N.W.2d at 245.

[103] *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 25 (2003); *Witte v. United States*, 515 U.S. 389, 400 (1995); *Oyler v. Boles*, 368 U.S. 448, 451 (1962); *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

much. The Court never clearly established this asymptotic approach to sentencing in *Graham*.[104]

5. Finally, the Tenth Circuit ignored the deep division among courts on the issue at bar, especially among courts considering the issue on direct appellate review (rather than deferential AEDPA review). Courts in at least 12 different states have held that the rules of *Graham* or *Miller* concerning life without parole sentences do not apply to the aggregate effect of multiple consecutive sentences.[105] Meanwhile, courts in 10 or so states have gone the other way.[106] The division is so great that eight petitions for certiorari are

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[104] *Cf. Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("[I]t is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim.").

[105] *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011); *Lucero*, 394 P.3d 1128; *People v. Rainer*, 394 P.3d 1141 (Colo. 2017), *petition for cert. pending* No. 17-5674; *Adams v. State*, 707 S.E.2d 359 (Ga. 2011); *State v. Redmon*, No. 113, 145, 380 P.3d 718 (Kan. Ct. App. 2016); *Brown*, 118 So.3d 332; *McCullough v. State*, No. 1081, 2017 WL 3725714 (Md. Ct. Spec. App. Aug. 30, 2017); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017), *petition for cert. pending* No. 17-5578 (filed Aug. 8, 2017); *Willbanks*, 522 S.W.3d 238; *State v. Nathan*, No. SC 95473, 2017 WL 2952773 (Mo. July 11, 2017) (*en banc*), *petition for cert. pending* No. 17-165; *Mardis v. Oklahoma*, No. F-2014-942 (Okla. Crim. App. Feb. 4, 2016), *cert. denied* 137 S. Ct. 566 (2016); *State v. Meritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145 (Tenn. Crim. App. Dec. 10, 2013); *Carmon v. State*, 456 S.W.3d 594 (Tex. App. 2014); *Vasquez*, 781 S.E.2d 920.

[106] *People v. Caballero*, 282 P.3d 291 (Cal. 2012), *cert. denied* 135 S. Ct. 1564 (2015); *State v. Riley*, 110 A.3d 1205 (Conn. 2015), *cert. denied* 136 S. Ct. 1361 (2016); *Henry v. State*, 175 So.3d 675 (Fla. 2015), *cert. denied* 136 S. Ct. 1455 (2016); *State v. Boston*, 363

pending before this Court seeking direct review of the consecutive sentences issue in *Graham* and *Miller*'s application.[107] As discussed more fully below, if courts reviewing this issue *de novo* are deeply divided on the question, it cannot be that all "fairminded jurists" would disagree with the state court's decision,[108] or that the Oklahoma state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[109]

Any one of these five reasons independently suffices to disqualify Budder from habeas relief because each demonstrate that *Graham* does not foreclose his sentences beyond reasonable debate. This Court routinely grants certiorari and summarily reverses in cases where courts of appeals have failed to abide by AEDPA's strictures.[110] It has "time and again" directed

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P.3d 453 (Nev. 2015); *State v. Zuber*, 152 A.3d 197 (N.J. 2017), *petition for cert. pending* No. 16-1496 (June 12, 2017); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Ramos*, 387 P.3d 650 (Wash. 2017), *petition for cert. pending*, No. 16-9363 (May 23, 2017); *cf. also Brown v. State*, 10 N.E.3d 1, 6-8 (Ind. 2014); *Commonwealth v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013); *Brown v. State*, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981 (Tenn. Crim. App. Apr. 15, 2016).

[107] *See supra* nn.72, 82, 105, 106.

[108] *Woods*, 136 S. Ct. at 1151.

[109] *Id.* (internal quotation marks and citation omitted).

[110] *See, e.g.*, *Johnson v. Lee*, 136 S. Ct. 1802 (2016) (*per curiam*); *Kernan v. Hinojosa*, 136 S. Ct. 1603 (2016) (*per curiam*);

federal courts to restrain themselves to the boundaries of habeas review.[111] Indeed, this Court in *LeBlanc* recently issued a summary reversal on a *Graham* issue, holding that resolution of such open questions by federal courts upending state court decisions through writs of habeas corpus "fail[s] to accord the state court's decision the deference owed under AEDPA."[112] As this Court stated in *LeBlanc*, "[t]he Court in *Graham* left it to the States, 'in the first instance, to explore the means and mechanisms for compliance' with the *Graham* rule."[113]

Etherton, 136 S. Ct. 1149; *White v. Wheeler*, 136 S. Ct. 456 (2015) (*per curiam*); *Donald*, 135 S. Ct. 1372; *Lopez v. Smith*, 135 S. Ct. 1 (2014) (*per curiam*); *Glebe v. Frost*, 135 S. Ct. 429 (2014) (*per curiam*). *See also generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591 (2016). Indeed, as one commentator noted, the Sixth Circuit's decision in *Bunch* about the scope of *Graham* "show[s] that an increasing number of lower courts are getting the Supreme Court's aggressively enforced AEDPA message: defer, or prepare to be reversed." *Recent Case*, 126 HARV. L. REV. 860, 867 (2013).

[111] *Wheeler*, 136 S. Ct. at 460.

[112] *LeBlanc*, 137 S. Ct. at 1728.

[113] *Id.* at 1727 (quoting *Graham*, 540 U.S. at 75).

"Perhaps the logical next step,"[114] is to extend *Graham* to cases like Budder's. But "*Graham* did not decide that."[115] "The state court thus did not diverge so far from *Graham*'s dictates as to make it so obvious that there could be no fairminded disagreement about whether the state court's ruling conflicts with this Court's case law."[116] Summary reversal is warranted here because fairminded jurists reasonably can and actually do disagree as to whether *Graham* extends to prisoners like Budder.

B. The courts of appeals are split on whether *Graham*'s categorical rule clearly applies to the aggregate effect of multiple sentences for multiple crimes.

Beyond the division among state courts on direct review of this issue, the federal courts of appeals are also divided as to whether, for purposes of AEDPA review, *Graham* clearly establishes the answer to this question.[117] Assuming this Court does not summarily reverse the decision below, this Court should grant review to resolve the inconsistent rulings among the federal courts of appeals.

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[114] *White*, 134 S. Ct. at 1707.

[115] *LeBlanc*, 137 S. Ct. at 1728.

[116] *Id.* at 1720 (internal marks and citation omitted).

[117] *Compare* App. 1; *Moore v. Biter*, 725 F.3d 1184, 1186 (9th Cir. 2013) (holding that it is clearly established), *with Bunch*, 685 F.3d at 547 (holding that it is not); *cf. Cobler*, 748 F.3d at 580 n.4.

The Sixth Circuit first addressed the question presented in *Bunch*.[118] The plaintiff had been "convicted . . . of robbing, kidnaping, and repeatedly raping a young woman when he was 16 years old."[119] Like Budder, Bunch diverted a female motorist to a deserted location where, threatening her with a weapon, he repeatedly raped her orally, vaginally, and anally (albeit with an accomplice).[120] The trial court sentenced him "to consecutive, fixed terms totaling 89 years' imprisonment . . . [,] the functional equivalent to life without parole for crimes he committed as a juvenile."[121]

The Sixth Circuit held that "*Graham* . . . does not clearly establish that consecutive fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole."[122] Although "[i]t [was] true that Bunch and Graham were both juvenile offenders who did not commit homicide[,] . . . Bunch was sentenced to consecutive, fixed-term sentences . . . for committing multiple nonhomicide offenses."[123] But the categorical rule laid down in *Graham* "concern[ed] *only* those juvenile offenders sentenced to *life without parole* solely for a

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[118] 685 F.3d 546.

[119] *Id.* at 547.

[120] *Id.* at 547-48.

[121] *Id.* at 547; *see also id*. at 551 n.1 (noting that Bunch would not be eligible for parole until he is at least 95).

[122] *Id.* at 547.

[123] *Id.* at 551.

nonhomicide offense."[124] The Sixth Circuit also noted that while *Graham* relied upon the frequency with which states "allowed juvenile nonhomicide offenders to be sentenced to 'life without parole,'" *Graham* "did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders."[125] The Sixth Circuit deduced that "[t]his demonstrate[d] that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment[]."[126] Finally, the court observed "that courts across the country are split over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy."[127] For these reasons, the court concluded that any application of *Graham* to Bunch was not "clearly established."[128]

On the other side of this divide is the Tenth Circuit's decision below and the Ninth Circuit's decision in *Moore v. Biter*.[129] In *Moore*, another 16-year-old was convicted of kidnaping with the specific intent to commit a felony sex offense and multiple counts of robbery,

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[124] *Id.* (quoting *Graham*, 560 U.S. at 63) (emphases in original).

[125] *Id.* at 551-52.

[126] *Id.* at 552.

[127] *Id.*

[128] *Id.* at 551.

[129] 725 F.3d 1184.

forcible rape, forcible oral copulation, and forcible sodomy.[130] The court held that "Moore's sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime."[131]

The Ninth Circuit's decision in *Moore* drew a 7-judge dissent from denial of rehearing *en banc*, authored by Judge O'Scannlain.[132] He wrote that the Ninth Circuit "defies AEDPA once again, this time by failing to distinguish one 'life without parole' sentence from multiple 'term-of-years' sentences."[133] In doing so, the Circuit was "ignoring the contrary holding of the Sixth Circuit, disregarding the views of state courts across the country, and flouting *Graham*'s text and reasoning."[134] And it did so in the face of repeated guidance from this Court, which "has consistently warned lower courts, and [the Ninth Circuit] in particular, to avoid defining 'clearly established' law too broadly."[135] Unfazed by this, "the panel's opinion defies AEDPA, creates a circuit split, and threatens frequent and unjustified intrusions into state sovereignty."[136]

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[130] *Id.* at 1186.

[131] *Id.* at 1191.

[132] 742 F.3d 917 (O'Scannlain, J., dissenting from denial of reh'g *en banc*).

[133] *Id.* at 917.

[134] *Id.* at 917-18 (citing *Bunch*, 685 F.3d 546; *Graham*, 560 U.S. 48).

[135] *Id.* at 919 (citing *Parker v. Matthews*, 567 U.S. 37 (2012); *Howes v. Fields*, 559 U.S. 1073 (2012); *Wright v. Van Patten*, 552 U.S. 120 (2008); *Carey v. Musladin*, 549 U.S. 70 (2006)).

[136] *Id.* at 922.

Judge O'Scannlain criticized the panel's opinion for "failing to confront the most meaningful distinction between Moore's case and *Graham*: Moore's term of imprisonment is composed of over two dozen separate sentences, none longer than eight years; Graham's is one sentence, 'life without parole.'"[137] In this way, the panel had ignored how this "Court explicitly stated that *Graham* concerned 'only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.'"[138] Even "*Graham*'s reasoning makes clear that the Supreme Court did not squarely address aggregate term-of-years sentences," since this Court did not include such "*de facto* life imprisonment" sentences in its survey of state practices, as dissents from Justices Thomas and Alito had observed.[139]

As further proof, Judge O'Scannlain pointed out that "courts across the country are split" on the issue.[140] "The existence of such a split is good evidence that the California courts' determination here – *Graham* does not apply to Moore's sentence – is not contrary to 'clearly established' federal law."[141] AEDPA requires "at least . . . a persuasive explanation of how so many courts erred so obviously," and yet "[t]he panel's opinion neither acknowledges the dispute nor

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[137] *Id.* at 919.

[138] *Id.* (quoting *Graham*, 540 U.S. at 62).

[139] *Id.* at 919-20.

[140] *Id.* at 920 (quoting *Bunch*, 685 F.3d at 522).

[141] *Id.* at 920-21 (citing *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006); *Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006)).

explains how the panel divined a clearly established holding of the Supreme Court in the face of such widespread disagreement."[142] Finally, Judge O'Scannlain noted the Pandora's Box of questions raised by the Ninth Circuit's decision – a box *Graham* otherwise left shut – including: "What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?"[143]

Given this division among the federal courts of appeals on the issue of whether inmates with sentences like those imposed on Budder are entitled to habeas relief, this Court should grant review of this case.

II. Courts of appeals are split on whether law can be "clearly established" for purposes of AEDPA review when there is a significant division among courts on the issue on direct review.

As noted above, the existence of "reasonable arguments on both sides" of a legal issue precludes a determination that the law was clearly established under AEDPA.[144] Habeas relief is warranted only if a state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded

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[142] *Id.* at 921.

[143] *Id.* at 922.

[144] *Woodall*, 134 S. Ct. at 1707.

disagreement."[145] There must be "no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."[146] Logically, then, if a significant number of courts disagree on the question of law, that should mean fairminded jurists can and *do* disagree on that question of law, precluding a finding that the law was "clearly established." In fact, this Court in *Musladin* concluded that because "lower courts have diverged widely" on the question at issue in that case, "it cannot be said that the state court unreasonably applied clearly established Federal law."[147] Similarly, Justice Stevens once observed, "[l]ower courts routinely look to circuit cases to provide evidence that Supreme Court precedents have clearly established a rule as of a particular time or to shed light on the reasonableness of the state courts' application of existing Supreme Court precedents," which he found to be "a healthy practice – indeed, a vital practice, considering how few cases this Court decides."[148]

Despite the statements in *Musladin* and other cases, some have noted that this "Court has failed to

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[145] *Harrington*, 562 U.S. at 103.

[146] *Id.* at 102.

[147] 549 U.S. at 76-77 (internal marks and citation omitted); *see also Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*).

[148] *Renico v. Lett*, 559 U.S. 766, 796-97 (2010) (Stevens, J., dissenting) (internal marks omitted) (quoting 2 R. HERTZ & J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROC. § 32.3, at 1585 n.10 (5th ed. 2005)).

provide clear guidance" on this question.[149] This has led courts of appeals to split when it comes to evaluating whether law can be "clearly established" if other courts are significantly divided on the issue when considering it *de novo*.

The Fifth and Eighth Circuits, for example, have held: "When the federal circuits disagree as to a point of law, the law cannot be considered 'clearly established' under 28 U.S.C. § 2254(d)(1)."[150] Thus, "in the habeas corpus context, the objective reasonableness of a state court's application of Supreme Court precedent may be established if our sister circuits have similarly applied the precedent."[151] Similarly, in the context of qualified immunity, the Sixth Circuit has held that

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[149] Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 831 (2014); *see also Order of Analysis*, 123 HARV. L. REV. 272, 278 (2009); Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 787 (2005).

[150] *Evenstad*, 470 F.3d at 783; *see also Holland v. Anderson*, 583 F.3d 267, 282 (5th Cir. 2009) ("This clear split among federal- and state-courts . . . indicates that the Mississippi Supreme Court's denial of [the petitioner's] claim that he had such a right cannot possibly be 'contrary to or involve[ ] an unreasonable application of, clearly established Federal law.' "), *cert. denied* 599 U.S. 1073 (2010).

[151] *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (quoting *Colvin v. Taylor*, 324 F.3d 583, 588 (8th Cir. 2003)).

"disagreement among the circuits . . . shows that the agents did not violate clearly established law."[152]

In contrast, the Third, Seventh, and (now) Tenth Circuits have explicitly rejected this rule, holding that the § 2254(d)(1) standard may be satisfied despite a split of authority.[153] For example, the Third Circuit –

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[152] *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco & Firearms*, 452 F.3d 433, 449 (6th Cir. 2006); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) ("When faced with inconsistent legal rules in different jurisdictions, national office-holders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken."); *Pearson v. Callahan*, 555 U.S. 223, 245 (2009) ("[I]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") (quoting *Wilson v. Layne*, 526 U.S. 603 (1999)); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) ("Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established."). *But see Morgan v. Morgensen*, 465 F.3d 1041, 1046 n.2 (9th Cir. 2006) ("The fact that there was a potential circuit split on this issue does not preclude [a] holding that the law was clearly established."). On this issue, see generally Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012); Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031 (2005).

[153] *Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012) ("The fact that a circuit split exists on an issue may be indicative of a lack of clarity in the Supreme Court's jurisprudence, but a split is not dispositive of the question.") (citations omitted); *Williams v. Bitner*, 455 F.3d 186, 193 n.8 (3d Cir. 2006) ("Even if our sister circuits had in fact split on the issue, we would not necessarily be prevented from finding that the right was clearly established.").

sitting *en banc* – rejected a litigant's argument that the existence of eight contrary Court of Appeals decisions "show that the state court's application of *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] was reasonable."[154] Judge Hardiman dissented, joined by three judges. In his view, "[t]he existence of a circuit split demonstrates that it is wrong to conclude that fairminded jurists could not disagree."[155] Meanwhile, other courts, like the Ninth Circuit, have issued conflicting decisions on this question.[156]

Nor can scholars agree. Eric Posner and Adrian Vermeule suggest that a circuit split seems to preclude a finding that law is clearly established: "if some appellate courts say that a certain rule counts as 'clearly established law,' and some say that it doesn't, doesn't that mean it doesn't? What if the second group says not merely that the rule isn't clearly established, but that the opposite rule is clearly established?"[157] Todd Pettys suggests that if courts are to look for objective indicia

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[154] *Garrus v. Sec'y of Pa. Dep't of Corr.*, 694 F.3d 394, 409 (3d 2012) (*en banc*) (citations omitted).

[155] *Id.* at 416 (Hardiman, J., dissenting).

[156] *Compare Moore*, 725 F.3d at 1194 n.6, *with Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006) ("[I]n the face of authority [from one state and three federal circuits] that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' [decision] . . . was contrary to, or involved an unreasonable application of, Supreme Court precedent.").

[157] Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 161 (2016).

of whether law is clearly established, "[p]erhaps a federal court should simply identify as many cases as possible in which other courts have been confronted with materially indistinguishable facts and then determine whether the state court ruling under review falls well within the range of what other courts have done in such cases or instead falls far out on the tails of the distribution."[158] In contrast, William Baude and Ryan Doerfler suggest that law can be "clearly established" if the disagreement is merely the result of differences in interpretive methodologies, rather than application of same methodologies.[159] Ruth Moyer similarly argues that "[t]he Supreme Court should resolve the uncertainty among the federal appellate courts and hold that the existence of a circuit split or 'other circuit' authority contrary to the asserted federal constitutional right underlying a § 2254 claim is relevant – but not dispositive – to the § 2254(d)(1) analysis."[160]

This Court should grant certiorari to resolve this divide.

[158] Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for 'Reasonably Erroneous' Applications of Federal Law*, 63 OHIO ST. L.J. 731, 768 (2002).

[159] William Baude & Ryan D. Doerfler, "Arguing with Friends" (June 13, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985032.

[160] Moyer, *supra* n.149, at 865-66.

CONCLUSION

For these reasons, this Court should grant Petitioners the writ of certiorari.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KEIGHTON BUDDER, Petitioner-Appellant, v. MIKE ADDISON, Warden, Respondent-Appellee.	No. 16-6088

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 5:13-CV-00180-HE)

(Filed Mar. 21, 2017)

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Before **BRISCOE, MATHESON,** and **PHILLIPS,** Circuit Judges.

BRISCOE, Circuit Judge.

Keighton Budder was convicted by an Oklahoma jury of several violent nonhomicide crimes committed when he was sixteen years old. After sentence modification on direct appeal, he received three life sentences and an additional sentence of twenty years, all to run consecutively. He will not be eligible for parole under Oklahoma law until he has served 131.75 years in prison. Budder filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, contending, as he did on direct appeal, that his sentence violates the Eighth Amendment. In support, he cites *Graham v. Florida*, 560 U.S. 48 (2010), which held that sentencing juvenile offenders who have not committed homicide crimes to life in prison without a meaningful opportunity for release is unconstitutional. The district court denied Budder's petition, and he appeals. We reverse and remand with instructions to grant Budder's petition.

I

In the early morning hours of August 11, 2009, when he was sixteen years old, Budder stabbed a seventeen-year-old girl approximately seventeen times and raped her multiple times. On April 1, 2010, an

Oklahoma state jury convicted Budder of two counts of first degree rape, one count of assault and battery with a deadly weapon, and one count of forcible oral sodomy. The jury recommended punishment of life without parole for each of the rape charges, life with parole for the assault charge, and twenty years' imprisonment for the forcible sodomy charge. On May 4, 2010, the state trial court sentenced accordingly and ordered the sentences to run consecutively.

Less than two weeks later, the Supreme Court decided *Graham*, which held that "the Eighth Amendment prohibits a state from imposing a life without parole sentence on a juvenile nonhomicide offender." *Id.* at 75. Budder filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA) and argued that, under *Graham*, his sentence was unconstitutional and must be modified. On October 24, 2011, the OCCA modified Budder's two life without parole sentences to life with the possibility of parole, but again ordered all of his sentences (three life sentences and a twenty-year sentence) to run consecutively. Aplt. App. at 238-39.

Under Oklahoma law, a prisoner must serve 85% of his sentence before he will be eligible for parole. *See* Okla. Stat. tit. 21, § 13.1. For purposes of parole, a life sentence is calculated as 45 years. *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-283 (Okla. 2006). Thus, Budder's sentences are considered to total 155 years, and he must serve 131.75 years before he will be eligible for parole.

Budder requested rehearing before the OCCA, again relying on *Graham*, and asked that his sentences be modified to run concurrently rather than consecutively in order to provide him with a potential of parole in his lifetime. The OCCA denied this petition on November 29, 2011. Aplt. App. at 246-47.

Budder timely filed his petition for habeas relief in federal district court on February 20, 2013. *See* 28 U.S.C. § 2244(d)(1)(A); *Lawrence v. Florida*, 549 U.S. 327, 333 (2007). The magistrate judge issued a Report and Recommendation concluding that *Graham* controlled and Budder should be resentenced. The district court declined to adopt that recommendation and denied Budder's petition, but granted a certificate of appealability.

II

As a habeas court tasked with review of the OCCA's ruling, our review is circumscribed by § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 92 (2011). "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, ___ U.S. ___, 134 S. Ct. 10, 16 (2013). We may reverse the state court's judgment only if the court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in

light of the evidence presented."[1] 28 U.S.C. § 2254(d). This high burden is placed on state habeas petitioners because "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)). The Court has also cautioned, however, that "'[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2277 (2015) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

Each of AEDPA's three prongs – contrary to clearly established federal law, unreasonable application of clearly established federal law, and unreasonable determination of the facts – presents an independent inquiry. 28 U.S.C. § 2254(d); *see also Williams v. Taylor*,

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[1] AEDPA § 2254(d) provides in full:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

529 U.S. 362, 404-05 (2000) (holding that the "contrary to" and "unreasonable application" clauses have independent meaning [sic]"). Budder argues that the OCCA's decision regarding his sentence is contrary to clearly established federal law, citing that portion of § 2254(d)(1),[2] so we focus on this prong of AEDPA.

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[2] Budder also argues that the OCCA's decision was an unreasonable application of clearly established federal law. A state court decision "involves an unreasonable application of" clearly established Supreme Court precedent when it unreasonably applies the law to the facts of a particular prisoner's case. *Williams*, 529 U.S. at 409; *Holland v. Allbaugh*, 824 F.3d 1222, 1227-28 (10th Cir. 2016). Thus, the "unreasonable application of" prong of § 2254(d)(1) is a better fit for cases involving application of general legal principles to fact-specific inquiries. *See, e.g.*, *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (noting that "lower courts have diverged widely in their treatment of defendants' spectator-conduct claims" and concluding that "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law' " (quoting 28 U.S.C. § 2254(d)(1))).

By contrast, a state court decision can be "contrary to" Supreme Court precedent only if a prior "case[ ] confront[s] 'the specific question presented.' " *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1377 (2015) (quoting *Lopez v. Smith*, ___ U.S. ___, 135 S. Ct. 1, 4 (2014)). A categorical holding answers "the specific question presented" for all cases within the category, so a state court decision that fails to follow a categorical rule is "contrary to" established law, not an "unreasonable application of" it. The other circuit courts to address the meaning of *Graham* to cases on habeas review have also considered the question under the "contrary to" prong of AEDPA. *See Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) ("[T]he state court's decision was contrary to the clearly established Federal law set forth in *Graham*."); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) ("[W]e cannot say that Bunch's sentence was contrary to clearly established federal law.").

Review under § 2254(d)(1) is a two-step process. *See Yarborough v. Alvarado*, 541 U.S. 652, 660-63 (2004). The first step is to determine the "relevant clearly established law." *Id.* at 660 ("We begin by determining the relevant clearly established law."). As used in the context of AEDPA, "[c]learly established Federal law" means only Supreme Court holdings, not the Court's dicta. *Id.* Federal courts must "look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Id.* at 661 (quoting *Lockyer v. Andrade*, 538 U.S. 62, 71, 72 (2003)). Thus, at this stage of the inquiry, we look only to Supreme Court decisions that existed at the time the state court rendered its decision, not at later opinions or opinions from lower courts.

After the relevant clearly established law has been determined, the second step is to examine the state court's judgment to determine whether it was either "contrary to, or involved an unreasonable application of" that clearly established law. 28 U.S.C. § 2254(d)(1); *see also Carey v. Musladin*, 549 U.S. 70, 74-77 (2006) (outlining the relevant Supreme Court precedent in Part II.A. and then considering the state court's application of that precedent in Part II.B.); *Yarborough*, 541 U.S. at 663 ("We turn now to the case before us and ask if the state-court adjudication of the claim 'involved an unreasonable application' of clearly established law. . . ."); *Williams*, 529 U.S. at 390-98 (discussing, in Part III, the precedent set in *Strickland v. Washington*, 466 U.S. 668 (1984), and then, in Part IV, concluding that the state court's decision was both contrary to and

involved an unreasonable application of that precedent). A state court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court cases or "if the state court confronts a set of facts that are materially indistinguishable from" a Supreme Court case "and nevertheless arrives at a result different from [that] precedent." *Williams*, 529 U.S. at 405; *Holland v. Allbaugh*, 824 F.3d 1222, 1227 (10th Cir. 2016). We must decide in the first instance what governing law has been set forth. Only after we have done so may we determine whether a state court's decision conflicts with that governing law. If we conclude at this second step that, in light of the clearly established federal law, the state court's judgment "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," then we may grant the petitioner's request for habeas relief. *See Harrington*, 562 U.S. at 103.

III

First, we must determine what law was clearly established at the time of the OCCA's decision. Specifically, we must look for the governing legal principle set forth in *Graham*. At the age of sixteen, Terrance Jamar Graham was charged as an adult for armed burglary with assault or battery, which is a first-degree felony under Florida law and carries a maximum penalty of life imprisonment. *Graham*, 560 U.S. at 53. He was also charged with attempted armed robbery, which is a

second-degree felony under Florida law and carries a maximum penalty of fifteen years' imprisonment. *Id.* at 53-54. Graham pleaded guilty to both charges. *Id.* at 54. The state trial court withheld adjudication of guilt and sentenced Graham to concurrent three-year terms of probation, including twelve months in the county jail. *Id.* Graham was released in June 2004. *Id.* Less than six months later, he was arrested for a series of crimes: participating in two home invasion robberies during which an accomplice was shot; leading police on a high speed chase while evading arrest; and possessing three handguns. *Id.* at 54-55. When questioned, Graham admitted to participation in an additional "two to three" robberies. *Id.* at 55. At the time of this arrest, Graham was thirty-four days shy of his eighteenth birthday. *Id.* As a result of violating the terms of his probation, Graham was found guilty on the original two charges and sentenced to the maximum term allowed on each – life imprisonment for armed burglary, and fifteen years for attempted armed robbery. *Id.* at 57. At the time, the state of Florida had no mechanism for parole. *Id.*

Graham appealed his sentence and raised what the Court described as "a categorical challenge to a term-of-years sentence." *Id.* at 61. Thus, the Court did not apply a proportionality analysis[3] to the circumstances of Graham's particular case. Instead, the Court

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[3] "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"

addressed whether life without parole sentences were *categorically* disproportionate and thus invalid under the Eighth Amendment when applied to juvenile non-homicide offenders. *See id.* ("This case implicates a particular type of sentence as it applies to *an entire class of offenders* who have committed a range of crimes." (emphasis added)); *id.* ("[T]he appropriate analysis is the one used in cases that involved the categorical approach."). The Court then announced a categorical rule:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A state need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Graham, 560 U.S. at 59 (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The Eighth Amendment " 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " *Id.* at 59-60 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000-01 (1991) (Kennedy, J., concurring in part and concurring in judgment.)).

Prior to *Graham*, challenges to term-of-years sentences (meaning non-death penalty sentences) were reviewed according to the proportionality analysis, and categorical analysis was reserved for cases involving the death penalty. *Id.* at 60-61. Thus, *Graham* presented a new issue for the Court under its Eighth Amendment jurisprudence. *Id.* at 61 ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence.").

Id. at 82; *see also id.* at 75 (explaining the necessity of a categorical rule). Thus, the Court's holding applies, not just to the factual circumstances of Graham's case, but to all juvenile offenders who did not commit homicide, and it prohibits, not just the exact sentence Graham received, but all sentences that would deny such offenders a realistic opportunity to obtain release.[4]

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[4] We recognize that the circuit courts do not agree as to what the Court held in *Graham*. *Compare Moore v. Biter*, 725 F.3d 1184, 1186 (9th Cir. 2013) (holding that, in *Graham*, "the United States Supreme Court clearly established that the Eighth Amendment prohibits the *punishment* of life without parole for *juvenile nonhomicide offenders*" (emphasis added)), *with Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012) (holding 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").

First, we must note that both of these cases involved lengthy fixed-term sentences imposed by state courts. *See Moore*, 725 F.3d at 1187 (sentence of 254 years); *Bunch*, 685 F.3d at 547 (sentence of 89 years). Budder, on the other hand, was not sentenced to a lengthy fixed-term, he was sentenced to "life," just as was the defendant in *Graham.* Thus, these cases regarding lengthy fixed-term sentences addressed an alleged factual distinction that is not relevant in Budder's case. We conclude that *Graham* addressed *any* sentence that would deny a juvenile nonhomicide offender a realistic opportunity to obtain release, regardless of the label a state places on that sentence. But, even if a material distinction could be drawn between lengthy fixed-terms and "life," that distinction would not apply here.

Second, we note that, given the two-step framework for habeas review, we owe no deference to other courts' decisions regarding what law the Supreme Court clearly established in *Graham*. We look to our sister circuits' decisions only for their persuasive value. In other words, AEDPA requires that the law be clearly established by the Supreme Court. It must be the Court's holding,

Although we reach this conclusion, as we must, by looking only to the Supreme Court's language in *Graham*, we cannot help but point out that the concurring and dissenting opinions in *Graham*, as well as the Court's subsequent decisions in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), support what is obvious from the text of the majority's opinion in *Graham* – the Court in *Graham* announced a categorical rule, not a fact-specific holding.

Chief Justice Roberts wrote separately in *Graham* because, although he agreed with the majority that "Graham's sentence of life without parole violate[d] the Eighth Amendment," he reached that conclusion by "[a]pplying the 'narrow proportionality' framework to the particular facts of th[at] case." *Graham*, 560 U.S. at 91 (Roberts, C.J., concurring in the judgment). "Unlike the majority," Chief Justice Roberts "s[aw] no need to invent a new constitutional rule." *Id.* He wrote that the majority "err[ed]" "in using [Graham's] case as a vehicle for unsettling [the Court's] established jurisprudence and fashioning a *categorical rule applicable to far different cases*." *Id.* at 96 (emphasis added). Thus, it is clear that Chief Justice Roberts recognized the majority opinion as a categorical holding that reached beyond the facts of Graham's individual circumstances.

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not dicta. It must be on point, not a general principle to be extended from another context. But it need not be the case that no other court has ever misinterpreted or failed to follow that clearly established law in order for it to remain "clearly established law."

Similarly, Justice Alito joined Justice Thomas's dissenting opinion but also wrote separately to emphasize that Graham did not raise "an as-applied claim in his petition for certiorari or in his merits briefs before [the Supreme] Court. Instead, [Graham] argued for only a categorical rule banning the imposition of life without parole on *any* juvenile convicted of a nonhomicide offense." *Id.* at 124-25 (Alito, J., dissenting) (emphasis in original). By this statement, the dissent highlights the question answered by the *Graham* majority: Does the Eighth Amendment *categorically* bar life without parole sentences for all juvenile offenders who did not commit homicide? According to the Court, it does.

Further, the Court in both *Miller* and *Montgomery* characterized the holding in *Graham* as categorical. *Montgomery*, 136 S. Ct. at 732 (stating that *Graham* fell within the line of Supreme Court "precedent holding certain punishments disproportionate when applied to juveniles" and that *Graham* "held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders"); *id.* at 734 (Scalia, J., dissenting) (referring to *Graham* as an example of a categorical holding); *id.* (stating that *Graham* "bar[red] a punishment for all juvenile offenders"); *Miller*, 132 S. Ct. at 2463-64 (listing *Graham* as belonging to a set of cases that have "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"); *id.* at 2465 (referring to *Graham*'s "categorical bar" with respect to life-without-parole sentences imposed on a juvenile for nonhomicide offenses); *id.* at 2466 n.6

(stating that *Graham* established "a flat ban" for nonhomicide offenses); *id.* at 2471 (referring to *Graham* as an example of a decision that "categorically bar[red] a penalty for a class of offenders or type of crime"); *id.* at 2476 (Breyer, J., concurring) (stating that "*Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who "kill or intend to kill" (quoting *Graham*, 560 U.S. at 69)); *id.* at 2480-81 (Roberts, C.J., dissenting) (stating that *Graham* "bar[red] life without parole for juvenile nonhomicide offenders"); *id.* at 2483 (Thomas, J., dissenting) (stating that the Court in *Graham* "conclude[d] that the Constitution prohibits a life-without-parole sentence for a nonhomicide offender who was under the age of 18 at the time of his offense"); *id.* at 2489-90 (Alito, J., dissenting) (stating that the Court "held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor who has committed a nonhomicide offense").

When the Court announces that a rule applies to an entire category of offenders, factual distinctions within that category are no longer "material." Thus, when the Court announces a categorical holding, it clearly establishes the law applicable within the defined contours of that category.[5] Federal courts must

[5] This conclusion is consistent with Supreme Court holdings that imply categorical rules would have a broader reach than holdings which merely apply principles to facts. *See Howes v. Fields*, 565 U.S. 499, 505 (2012) (holding that the court of appeals

determine only whether a case falls within the categorical holding announced by the Supreme Court. If it does, the law is clearly established, and the Supreme Court's rule must be applied.

The *Graham* Court defined its holding with respect to three criteria: (1) the "sentencing practice"; (2) "the nature of the offense"; and (3) "the characteristics of the offender." *See Graham*, 560 U.S. at 60-61; *id.* at 61 ("[A] sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."); *id.* at 68-69 (considering "the status of the offenders" and then "the nature of the offenses to which this harsh penalty might apply"); *id.* at 74 (holding that (1) "for a *juvenile offender*" (2) "who *did not commit homicide*" (3) "the Eighth Amendment forbids the *sentence of life without parole*." (emphasis added)). We examine each of these criteria in turn. We conclude, first, that the "sentencing practice" considered by the Court includes any sentence that would deny the offender a realistic opportunity for release in the offender's lifetime; second, that the Court's analysis regarding "the nature of the offense" applies to all nonhomicide offenses, regardless of the number or severity of those offenses; and, third, that the Court's analysis regarding "the characteristics of the offender"

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erred in concluding that the law was clearly established by a categorical rule when the Supreme Court had "repeatedly declined to adopt any categorical rule with respect to [the issue]," thereby implying that a categorical rule, if announced, would be clearly established law for all defendants who fell under the rule's purview); *Thaler v. Haynes*, 559 U.S. 43, 49 (2010) (same).

applies to any offender who was under the age of eighteen at the time of his or her offense.

A. The Sentencing Practice

The Court in *Graham* considered all "sentences that deny convicts the possibility of parole." *Id.* at 70. The Court repeatedly referred to these sentences as "life without parole sentences," *see, e.g.*, *id.* at 62, but a sentencing court need not use that specific label for a sentence to fall within the category considered by the Court. In fact, it is important to note that Graham himself was not sentenced to "life without parole"; he was sentenced to "life." *Id.* at 57. It was only because the State of Florida had abolished its parole system that Graham would have no opportunity to obtain release. *Id.* The Court in *Graham* focused, not on the label attached to the sentence, but on the irrevocability of the punishment. *Id.* ("[T]his sentence means denial of hope."); *id.* ("[T]he sentence 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."); *id.* at 74 ("By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society."). In this context, there is no material distinction between a sentence for a term of years so lengthy that it "effectively denies the offender any material opportunity for parole" and one that will imprison him for "life" without the opportunity for parole – both are equally irrevocable. *Id.* at 113 n.11 (Thomas, J., dissenting) ("It is difficult to argue that a judge or

jury imposing such a long sentence – which effectively denies the offender any material opportunity for parole – would express moral outrage at a life-without-parole sentence."); *see also Moore*, 725 F.3d at 1191 ("Moore's sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime.").

Despite Oklahoma's arguments to the contrary, we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as "life without parole." The Constitution's protections do not depend upon a legislature's semantic classifications.[6]

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[6] *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, ___ U.S. ___, 132 S. Ct. 2566, 2594-95 (2012) (taking a "functional approach" to decide whether a provision labeled a "penalty" was constitutional as a tax, because the label chosen by Congress does not "control whether an exaction is within Congress's constitutional power to tax"); *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991) (concluding that "a special trial judge is an 'inferior Officer' whose appointment must conform to the Appointments Clause" because "the degree of authority exercised by the special trial judges [was] so 'significant' that it was inconsistent with the classifications of 'lesser functionaries' or employees"); *Bernal v. Fainter*, 467 U.S. 216, 223-24 (1984) (holding that, in the context of an equal protection claim, the question of whether "notaries public fall within that category of officials who perform functions that 'go to the heart of representative government,' does not depend upon the state's designation of notaries because the "Court has always looked to the actual function of the position as the dispositive factor" (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973))); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977) (noting that courts should not "attach[ ] constitutional significance to a semantic difference"); *Ry. Express Agency v. Virginia*, 358 U.S.

Limiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of "life." The Constitution's protections are not so malleable.

More importantly, the Court did not just hold that it violated the Eighth Amendment to sentence a juvenile nonhomicide offender to life without parole; it held that, when a state imposes a sentence of life on a juvenile nonhomicide offender, it must provide that offender with a "meaningful opportunity to obtain release." *Id.* at 75; *see also id.* ("[The Eighth Amendment] does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society."). Further, the Court explained that its categorical holding was necessary because it would "give[ ] *all* juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Graham*, 560 U.S. at 79 (emphasis added). If the rule announced in *Graham* is to provide all juvenile offenders such an opportunity, it must be read to apply to all sentences that are of such length that they would remove any possibility of eventual release. Thus, we conclude, the sentencing practice that was the Court's focus in *Graham* was any sentence that denies a juvenile nonhomicide offender a realistic opportunity to obtain release in his or her

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434, 441 (1959) (noting that a legislature may not "effect a validation of a tax, otherwise unconstitutional, by merely changing its descriptive words").

lifetime, whether or not that sentence bears the specific label "life without parole."

B. The Nature of the Offense

The Court in *Graham* considered all juvenile offenders who had not committed homicide, regardless of the number or severity of nonhomicide crimes committed. The Court defined the nature of the offense in this way because it drew a "moral" distinction between homicide and nonhomicide crimes – a difference in kind. *See Graham*, 560 U.S. at 69. According to the Court, "[t]here is a line 'between homicide and other serious violent offenses against the individual.' Serious nonhomicide crimes 'may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" *Id.* (alteration in original) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). "Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). Therefore, "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." *Id.*

At no point did the Court draw any distinctions with regard to the severity or number of nonhomicide crimes a defendant had committed or indicate that anything short of homicide would rise to the level of

moral culpability that could justify a sentence of life without parole for a juvenile offender. Again, we decline Oklahoma's invitation to invent distinctions that were not drawn by the Court. To the contrary, the Court specifically referred to offenders with multiple crimes and multiple charges, including Budder himself,[7] as offenders who, as juveniles, regardless of their nonhomicide crimes, were not sufficiently culpable to deserve a sentence of life without the opportunity for parole. *See, e.g.*, *id.* at 641 (citing a news article about Budder's sentence); *id.* at 76-77 (referring to an offender's "past encounters with the law" and the "second and third chances" he had been given); *id.* at 79 (referring to Graham's multiple "bad acts," "crimes," and "mistakes").

Again, we must emphasize that states may not circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences. Just as they may not sentence juvenile nonhomicide offenders to 100 years instead of "life," they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole. When the Court compared the severity of the crime with the severity of the punishment, in light of the

[7] At that time, the OCCA had not yet modified Budder's two "life-without-parole" sentences to "life" sentences. This distinction, however, does not detract from the fact that the Court, although aware of Budder's multiple charges and corresponding multiple sentences, considered him as part of the category addressed in *Graham*.

characteristics of the offender, it did not look to the state's definitions or the exact charges brought. It looked to whether the offender was a juvenile, whether the offender killed or intended to kill the victim, and whether the sentence would deny the offender any realistic opportunity to obtain release. The Court specifically concluded that, not only was a categorical rule appropriate, it was "necessary," *id.* at 75, because a case specific approach "would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes," *id.* at 77. The Court found this approach to pose too great a risk that some juveniles would receive life without parole sentences "despite insufficient culpability." *Id.* at 78 (quoting *Roper*, 543 U.S. at 572-73). The Court was not convinced "that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 77. Not only did the Court draw the line at homicide, it structured a categorical rule specifically to prevent the possibility that a sentencing judge would ever impose a sentence of life without the possibility of parole on a juvenile who did not commit homicide. The Eight Amendment prohibits such a sentence, regardless of the severity of nonhomicide crimes a juvenile has committed.

C. The Characteristics of the Offender

The Court in *Graham* considered the unique characteristics of offenders who committed their crimes before reaching the age of eighteen. The Court had previously established in *Roper v. Simmons*, 543 U.S. 551 (2005), "that because juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569). The Court stated that it had no "reason to reconsider the Court's observations in *Roper* about the nature of juveniles" and "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* The Court addressed these differences at length in its discussion of whether "the culpability of the offenders at issue," "in light of their crimes and characteristics," was proportionate to "the severity of the punishment in question." *Id.* at 67. Throughout this part of the opinion, the Court's analysis relied upon the age of the offender as the distinguishing characteristic.

First, the Court noted that, "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they are 'more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id.* at 68 (quoting *Roper*, 543 U.S. at 569). "Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569). Further, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be

evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* (quoting *Roper*, 543 U.S. at 570).

Second, the Court noted that "life without parole is 'the second most severe penalty permitted by law.'" *Id.* at 69 (quoting *Harmelin*, 501 U.S. at 1001). But not only is it a severe penalty for all who receive it, it "is an especially harsh punishment for a juvenile" because "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70. "[A] juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.*

Third, the Court concluded that none of the recognized goals of penal sanctions – retribution, deterrence, incapacitation, and rehabilitation – justified the sentence of "life without parole for juvenile nonhomicide offenders." *Id.* at 71. In this discussion, the Court noted that retribution was not proportional, given the reduced culpability of juveniles, *id.* that juveniles' lack of maturity prevented a justification of deterrence, *id.* at 72, and that incapacitation was inadequate to justify the punishment because "incorrigibility is inconsistent with youth," *id.* at 72-73 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968)). All three of these conclusions are dependent upon the age of the offender.

Therefore, we conclude that the Court's categorical rule in *Graham* covered all offenders who committed their crimes before the age of eighteen and who did

not kill, intend to kill, or foresee that life would be taken. It compared the culpability of these offenders to the severity of the sentence, in this case any sentence that would deprive the offender of a realistic opportunity for release in his or her lifetime. The Court concluded that such sentences were categorically unconstitutional when applied to these juvenile offenders. *Id.* at 75. Although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.*

IV

We come, then, to the ultimate question presented here: Does Budder's case fall within *Graham*'s categorical holding? We say again, in the words of the Supreme Court:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A state need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Id. at 82. Like Graham, Budder committed his crimes as a juvenile. Like Graham, Budder did not commit homicide. Like Graham, Budder received a life sentence – in fact, even more harshly, he received three consecutive life sentences. And, like Graham, Budder's

sentence does not provide him a realistic opportunity for release; he would be required to serve 131.75 years in prison before he would be eligible for parole. No fairminded jurist could disagree with these conclusions. In fact, Oklahoma does not even contest them. Thus, under the categorical rule clearly established in *Graham*, Budder's sentence violates the Eighth Amendment. The OCCA's judgment was contrary to this clearly established Supreme Court precedent.[8] Accordingly, we reverse and remand with instructions to grant Budder's petition for writ of habeas corpus, to vacate Budder's sentence, and to direct the State of Oklahoma to resentence Budder within a reasonable period.

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[8] The OCCA's opinion provides little to no analysis to guide our understanding of how it read and applied the Supreme Court's rule from *Graham*. In the absence of an explanation from the state court, we consider the arguments that might have supported its decision. *See Harrington*, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). In this case, we do not know whether the OCCA applied the wrong rule by reading *Graham* too narrowly, or if it identified the correct rule, but applied it to materially indistinguishable facts and yet reached a contrary conclusion. *See Williams*, 529 U.S. at 405. In either case, we conclude that the OCCA's judgment was contrary to the Court's holding in *Graham*, which requires that Budder's sentence be vacated.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KEIGHTON BUDDER, Petitioner,	)	
vs.	)	NO. CIV-13-0180-HE
MIKE ADDISON, Warden, Respondent.	)	

ORDER

(Filed Mar. 8, 2016)

Petitioner, Keighton Budder, a state prisoner, filed this action seeking habeas relief pursuant to 28 U.S.C. § 2254. He claims his sentences are unconstitutional and that he received ineffective assistance of counsel in conjunction with his sentencing. Consistent with 28 U.S.C. §636(b)(1)(B), (C), the matter was referred for initial proceedings to Magistrate Judge Shon T. Erwin, who has recommended that the petition be granted in part and denied in part. While the magistrate judge rejected petitioner's claim that his counsel was ineffective, he concluded, relying on *Graham v. Florida*, 560 U.S. 48 (2010), that petitioner's aggregate life sentences for crimes he committed as a juvenile violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Background

In April 2010 petitioner was convicted by a jury in Delaware County, Oklahoma of two counts of first degree rape, one count of assault and battery with a deadly weapon and one count of forcible oral sodomy.[1] Petitioner, who at that time was 16 years old, had been an uninvited guest at a party at the home of K. J., the 17 year old victim. When the party ended, K. J. offered to drive guests home. She ended up alone with petitioner in her mother's car on a dirt road, using directions he had given her. Petitioner cut K. J.'s throat and stabbed her repeatedly on her stomach, arms and legs. After she dove out of the moving car, petitioner raped K. J. and forced her to sodomize him. Following the jury's recommendation, the trial judge sentenced petitioner to life imprisonment without parole on each of the rape counts, life imprisonment on the assault and battery count and twenty years imprisonment on the sodomy count, with the sentences to be served consecutively.

Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals ("OCCA"). He argued that being "sentenced to spend the entire remainder of his life in prison with no opportunity of hope of release" for nonhomicide offenses was unconstitutional in light of *Graham*, which was decided a few days after his sentencing. Doc. #20-1, p. 15. In *Graham*

[1] *The facts are taken from the Oklahoma Court of Criminal Appeals's opinion. Doc. #20-4. Page references are to the CM/ECF document and page number.*

the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 560 U.S. at 82. The Court stated that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* The State of Oklahoma conceded that *Graham* required that petitioner's sentences of life without parole be modified. Concluding that *Graham* applied retroactively to petitioner, the OCCA modified petitioner's sentences on the rape convictions to life imprisonment with the possibility of parole. In all other respects the OCCA affirmed petitioner's convictions and sentences, which were left to run consecutively. Petitioner then filed a petition for rehearing, asserting that the OCCA had not addressed all of his arguments based on *Graham*. The OCCA denied the petition stating that the court had fully considered all of the issues presented.

Petitioner asserts two grounds in support of his petition. In his first ground he claims that because he will not be eligible for parole until he has served 131.75 years, his consecutive life sentences, even if not labeled life without parole, violate *Graham* because they do not provide him with a realistic and meaningful opportunity for release. In his second ground petitioner contends that his trial attorney was ineffective because she failed to present mitigating evidence for the jury to consider in conjunction with sentencing and failed

to argue to the jury why it should consider such evidence in its sentencing determination if it convicted him.

Analysis

Petitioner did not object to the magistrate judge's recommendation that his petition be denied with respect to his claim of ineffective assistance of counsel. He thereby waived his right to appellate review of the factual and legal issues that section of the Report and Recommendation addressed, which the court adopts. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010); *see* 28 U.S.C. §636(b)(1)(C). That leaves the more difficult question of whether the OCCA's decision is contrary to *Graham* on the basis that petitioner's life sentences, when run consecutively, are the functional equivalent of the sentence determined by the Supreme Court to be unconstitutional.

Standard of Review

Because the OCCA decided petitioner's Eighth Amendment claim on the merits, the court can grant relief only if the OCCA's determination was "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).[2] "Whether the law is clearly established

[2] *Although habeas relief is also available under 28 U.S.C. § 2254(d)(2) if the petitioner can show that the "adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the*

is *the* threshold question under § 2254(d)(1)." *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) (quoting *Williams v. Taylor*, 529 U.S. 362, 380 (2000)). Supreme Court, not other appellate court, decisions, determine clearly established law. *Id.* And the "Supreme Court holdings . . . must be must be [sic] construed narrowly and consist only of something akin to on-point holdings." *Id.* "[C]learly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case sub judice." *Id.* at 1016. While "the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context." *Id.* As explained by the Supreme Court in *Wright v. Van Patten*, 552 U.S. 120, 125 (2008), a state court does not unreasonably apply clearly established law unless a Supreme Court decision "squarely addresses the issue" or a case gives a "clear answer to the question presented."

The Supreme Court concluded in *Graham* that the Eighth Amendment prohibits a sentence of life without the possibility of parole for a juvenile who commits a nonhomicide offense.[3] Graham had been arrested for attempting to rob a restaurant with three other

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State court proceeding," petitioner's remaining claim asserts only a legal error.

[3] *In **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455 (2012), the Supreme Court "extended the reasoning in **Graham** to mandatory sentences of life without parole for juveniles convicted of homicide offenses." **Bunch v. Smith**, 685 F.3d 546, 553 (6th Cir. 2012).*

youths. Although he was 16 at the time of the attempted robbery, he was charged as an adult. He pleaded guilty to armed burglary with assault or battery and attempted armed robbery pursuant to a plea agreement. The state trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation. When less than six months later Graham violated the terms of his probation by committing additional crimes,[4] the trial court revoked his probation and found him guilty of the earlier charges. Graham was eligible under Florida law to receive a minimum sentence of five years imprisonment and the state recommended a 30 year prison term on the armed burglary count and a 15 year term on the attempted robbery count. The trial court sentenced him to the maximum sentence authorized on each charge, which was life imprisonment for the armed burglary and 15 years for the attempted robbery, on the basis that it viewed Graham as incorrigible. *Graham*, 560 U.S. at 76. As Florida had abolished its parole system, a defendant given a life sentence had no possibility of release unless granted executive clemency. Graham's Eighth Amendment challenges to his sentence in state court were unsuccessful and the Supreme Court granted *certiorari.*

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[4] *The court found that Graham had committed a home invasion robbery, possessed a firearm and associated with persons engaged in criminal activity.* ***Graham****, 560 U.S. at 55.*

Noting that the case involved "a categorical challenge to a term-of-years sentence"[5] and "implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes," *Graham*, 560 U.S. at 61, the Supreme Court began its analysis of the constitutionality of Graham's sentence by considering whether a community consensus had developed against sentencing juvenile nonhomicide offenders to life without parole. Relying on actual sentencing practices – the minimal number of juvenile nonhomicide offenders serving life without parole sentences nationwide – the Court concluded " 'it is fair to say that a national consensus has developed against it.' "[6] *Graham*, 560 U.S. at 67 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

The Court then proceeded to consider the culpability of the offenders, the severity of the punishment and

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[5] *To determine whether a sentence is so grossly disproportionate to the crime that it amounts to cruel and unusual punishment, the Supreme Court uses two classifications.* ***Moore v. Biter****, 725 F.3d 1184, 1188 (9th Cir. 2013). "The first classification 'involves challenges to the length of term-of-years sentences,' where the court considers 'all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.'" Id. (quoting* ***Graham****, 560 U.S. at 59). "The second classification of cases . . . "use[s] categorical rules to define Eighth Amendment standards."* ***Graham****, 560 U.S. at 60. All "previous cases in this classification involved the death penalty." Id.*

[6] *While thirty-seven States, the District of Columbia and federal law permitted sentences of life without parole for juvenile nonhomicide offenders, the actual sentencing practice was rare.* ***Graham****, 560 U.S. at 62-63. State legislatures appear to have a very limited role in expressing, for Eighth Amendment purposes, what the community thinks.*

whether the challenged sentencing practice serves legitimate penological goals, stating that "[c]ommunity consensus, while 'entitled to great weight' is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 560 U.S. at 67 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)). Citing *Roper v. Simmons*, 543 U.S. 551 (2005), the Court said it had already been established that juveniles "are less deserving of the most severe punishments" because, "[a]s compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Graham*, 560 U.S. at 68 (internal quotation marks omitted). With respect to the severity of the sentence, the Court recognized that "[l]ife without parole is an especially harsh punishment for a juvenile," because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 70. It then concluded that the challenged sentencing practice did not serve the legitimate penological goals of retribution, deterrence, incapacitation and rehabilitation. That determination, coupled with "the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead," the Court stated, "to the conclusion that the sentencing practice under consideration is cruel and unusual." *Id.* at 74. The Court "[held] that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.*

The State of Oklahoma does not dispute that, because petitioner's sentences run consecutively rather than concurrently, petitioner will have to serve 131.75 years before he will be eligible for parole.[7] His sentences therefore amount to the functional equivalent of life without parole. However, applying the standard noted above – that the Supreme Court holding must be narrowly construed in this context – the court concludes the OCCA' s determination was not contrary to "clearly established" law. In reaching that conclusion, the court finds persuasive the reasoning of the Sixth Circuit Court of Appeals in a similar context. In *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), that court determinated [sic] that *Graham* "does not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." *Id.* at 547. While *Bunch* involved consecutive fixed-term sentences, and this case involved consecutive life terms with possible parole, the distinction has no significance for present purposes.[8] Because of their aggregate sentences, neither will be given "some meaningful opportunity to

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[7] *Parole eligibility for a life sentence under Oklahoma law is calculated on a sentence of 45 years.* ***Anderson v. State****, 130 P.3d 273, 282 (Okla. Crim. App. 2006). Petitioner must serve 85% of each sentence before being eligible for parole consideration. 21 Okla. Stat. §§ 12.1, 13.1.*

[8] *In* ***Graham*** *the Supreme Court construed the phrase "term of years" to* ***include*** *a life sentence.* ***Graham****, 560 U.S. at 70 (the Court noted that "the only previous case striking down a sentence for a term of years as grossly disproportionate," was* ***Solem v.***

obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

The defendant in *Bunch* had been convicted in Ohio state court of robbing, kidnaping and repeatedly raping a young woman when he was 16 years old.[9] The trial court sentenced him to consecutive, fixed terms of imprisonment totaling 89 years, stating: "I just have to make sure that you don't get out of the penitentiary. I've got to do everything I can to keep you there, because it would be a mistake to have you back in society." *Id.* at 548.[10] The Ohio Court of Appeals rejected Bunch's argument that the trial court violated the Eighth Amendment by sentencing him to 89 years imprisonment, the functional equivalent of life without parole for crimes he committed as a juvenile, and the Ohio Supreme Court denied his petition for discretionary review. Bunch then raised the Eighth Amendment issue in a § 2254 habeas petition. The district court

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***Helm**, 463 U.S. 277 (1983), which involved a sentence of life imprisonment without parole).*

[9] *Bunch was found guilty of three counts of rape, three counts of complicity to commit rape, one count of aggravated robbery, one count of conspiracy to commit aggravated robbery, one count of kidnaping, one count of misdemeanor menacing, and related firearm specifications. The conspiracy conviction was vacated on appeal but the other convictions were affirmed.*

[10] *The trial judge made similar remarks during petitioner's sentencing. He commented: "I really don't see any reason to allow you [petitioner] back out of prison to get drunk again and hurt somebody else. I just don't see it in this particular case. . . . I see no reason to allow you the opportunity to get out of jail." Sentencing Transcript, p. 8*

denied Bunch habeas relief and the Sixth Circuit affirmed, noting that while Bunch and Graham were both juvenile offenders who did not commit homicide, it was there that the similarities ended. Graham had been sentenced to life in prison for committing one nonhomicide offense, while Bunch "was sentenced to consecutive, fixed-term sentences – the longest of which was 10 years – for committing multiple nonhomicide offenses." *Bunch*, 685 F.3d at 551. The Sixth Circuit stated that the Court in *Graham* had both "made it clear that '[t]he instant case concerns *only* those juvenile offenders sentenced to *life without parole* solely for a nonhomicide offense,'" and "stressed that drawing a 'clear line' was required to prevent juvenile nonhomicide offenders from being sentenced to life without parole when they were "'not sufficiently culpable to merit that punishment.'" *Id.* (quoting *Graham*, 560 U.S. at 74).

Because "no federal court [had] ever extended *Graham*'s holding beyond its plain language to a juvenile offender who received consecutive, fixed-term sentences," the Sixth Circuit concluded that Bunch's sentence was not contrary to clearly established federal law. *Id.* The appellate court found that the Supreme Court's analysis in *Graham* supported its decision because that "analysis did not encompass consecutive, fixed-term sentences." *Id.* In determining the nation's views on the imposition of life sentences on juveniles of nonhomicide crimes, the Supreme Court "did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for

juvenile nonhomicide offenders." *Id.* at 552. That demonstrated, the Sixth Circuit concluded, "that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments." *Id.*

The Sixth Circuit found further support for its conclusion due to the split in the courts across the country "over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy." *Id.* Some courts have held that "nothing in *Graham* addresses a defendant convicted of multiple offenses and given term of year sentences." *State v. Brown*, 118 So.3d 332, 342 (La. 2013).[11] Others, including the Ninth Circuit, *see*

[11] *In an unpublished decision,* ***United States v. Walton****, 537 Fed. Appx. 430 (5th Cir 2013) (per curiam), the Fifth Circuit rejected, under plain error review, an Eighth Amendment challenge to a forty year federal sentence imposed on an offender for crimes committed as a juvenile, stating that* ***Graham*** *did not apply to the defendant's "discretionary federal sentence for a term of years." and that the defendant was "attempt[ing] to raise novel constitutional arguments that would require the extension of precedent." Id. at 437. The Fourth Circuit stated in dicta that "[t]he Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole."* ***United States v. Cobler****, 748 F.3d 570, 580 n.4(4th Cir. 2014), cert. denied, 135 S.Ct. 229 (2014). Accord* ***Vasquez v. Com.****, ___ S.E.2d ___, 2016 WL 550280, at *4 (Va. Feb. 12, 2016) ("Nowhere did* ***Graham*** *address multiple term-of-years sentences imposed on multiple crimes that, by virtue of the accumulation, exceeded the criminal defendant's life expectancy."); **Bear Cloud v. State**, 334 P.3d 132, 141 (Wyo.2014) ("The United States Supreme Court has*

Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013),[12] have held that an aggregate term-of-years sentence that exceeds a juvenile's life expectancy "is a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham.*" *Bunch*, 685 F.3d at 552. There is language in *Graham* that arguably supports that conclusion, but none that makes clear that the Supreme Court's ruling extends to consecutive term-of-years or life sentences for juvenile nonhomicide offenders.

Moreover, petitioner's argument is contrary to the traditional focus of Eighth Amendment analysis, which, the Tenth Circuit has repeatedly stated, is "on the sentence imposed for each specific crime, not on the cumulative sentence or multiple crimes." *Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) citing *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892) ("If [the defendant] has subjected himself to a severe penalty, it is

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*not, however, decided whether its rationale in the line of cases summarized above [including **Graham**] applies to cases such as this, where aggregate sentences result in what is for practical purposes a lifetime in prison.").*

[12] *The Ninth Circuit attempted to distinguish **Bunch** by asserting that Moore's sentence was "significantly different" than the sentence addressed by the Sixth Circuit in **Bunch**." **Moore**, 728 F.3d at 1194 n.6. The Ninth Circuit stated that the 89-year aggregate sentence in Bunch "provided for some possibility of parole." Id. The court disagrees. The Sixth Circuit stated "[t]o be sure, Bunch's 89-year aggregate sentence may end up being the functional equivalent of life without parole," **Bunch**, 685 F.3d at 551, decided the case under that assumption, and stated in a footnote: "Bunch claims, and the Warden does not dispute, that under Ohio's recently revised sentencing laws, he will be at least 95 years old before he is eligible for release from prison." Id. at 551 n.1.*

simply because he committed a great many such offences."). *But cf. Lockyer v. Andrade*, 538 U.S. 63 (2003). Petitioner, like the habeas petitioners in *Hawkins, Patrick v. Patton*, ___ Fed. Appx. ___, 2015 WL 9239238, at *2 (10th Cir. Dec. 17, 2015)[13] and other Tenth Circuit cases, *e.g. Powers v. Dinwiddie*, 324 Fed. Appx. 702, 705 (10th Cir. 2009), does not challenge the constitutionality of any individual sentence. Rather he contends that serving the terms of multiple sentences consecutively makes his sentences violate the Eight [sic] Amendment. In *Graham* only one sentence – life imprisonment without parole – was being reviewed.

The Supreme Court may eventually read or expand *Graham* such that, regardless of the number of offenses committed or the sentences imposed, every juvenile must be eligible for parole within his or her lifetime. However, it has not done so yet and that "expansive reading of *Graham* is not clearly established." *Bunch*, 685 F.3d at 552. *See House*, 527 F.3d 1016. Further, the court is confronting the issue of the constitutionality of petitioner's sentences on habeas review, constrained by AEDPA's "highly deferential standard . . . [which] demands that state-court decisions be given the benefit of the doubt." *Woodford v.*

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[13] *The petitioner in* ***Patrick*** *was not a juvenile, but was claiming that "it [was] cruel and unusual to make him serve consecutive sentences [for multiple convictions] because he [would] be elderly after serving only a portion of his sentence."* ***Patrick****, 2015 WL 9239238, at * 1.*

Visciotti, 537 U.S. 19, 24 (2002). Applying the applicable standards, the court concludes petitioner's sentences do not violate clearly established law.

Conclusion

The court adopts the magistrate judge's Report and Recommendation insofar as it recommends that petitioner's second ground for relief, based on alleged ineffective assistance of counsel, be denied. That aspect of the Report and Recommendation was not contested by petitioner. The court declines to adopt the Report as to the Eighth Amendment challenge. Having conducted the required *de novo* review of Mr. Budder's petition, the court concludes he is not entitled to habeas relief.

Accordingly, the § 2254 petition for writ of habeas corpus is **DENIED**. A certificate for writ of appealability is **GRANTED** as to petitioner's first ground for relief, in which he claims that his sentences violate the Eighth Amendment.

IT IS SO ORDERED.

Dated this 8th day of March, 2016.

/s/ Joe Heaton
JOE HEATON
CHIEF U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KEIGHTON BUDDER,	)	
Petitioner,	)	
	)	**Case No.**
vs.	)	**CIV-13-180-HE**
MIKE ADDISON, Warden,	)	
Respondent.	)	

REPORT AND RECOMMENDATION

(Filed Dec. 17, 2015)

Petitioner, a state prisoner appearing *pro se*, seeks a writ of habeas corpus under 28 U.S.C. § 2254. The matter has been referred to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). The Respondent has filed a Response (hereafter ECF No. 20), to which Petitioner has filed a Reply (hereafter ECF No. 27). For the reasons set forth below, it is recommended that the Petition (hereafter ECF No. 1) for habeas relief be **GRANTED in part and DENIED in part**.

I. BACKGROUND[1]

Petitioner was tried and convicted on two charges of First Degree Rape, Assault and Battery with a

[1] This summary is prepared for background purposes only and taken from the opinion of the Oklahoma Court of Criminal Appeals (ECF No. 20-4); record citations will be provided as they are relevant to the discussion of the issues.

Deadly Weapon and Forcible Oral Sodomy, Case No. CF-2009-269, District Court of Delaware County, State of Oklahoma. Petitioner was 16 years old when he committed these crimes. On each of the rape counts, Petitioner was sentenced to life imprisonment without the possibility of parole. On the count of assault and battery with a deadly weapon, he was sentenced to life imprisonment with the possibility of parole. On the count of forcible oral sodomy, he was sentenced to twenty years imprisonment. The trial court ordered that each of these sentences should run consecutively.

K.J., the victim in this case and a high school student at the time, testified that on the evening of August 10, 2009, she was having a party at her house to celebrate the beginning of school. Petitioner arrived at the party, though he had not specifically been invited. During the party, K.J. text messaged several individuals that she was "drunk," "pretty drunk" and "very drunk" but at trial, K.J. testified that she had lied to those people and had only had two beers and one drink of something banana-flavored. At the end of the night, K.J. offered to give two friends a ride home and Petitioner also asked K.J. to give him a ride.

K.J. dropped off the two friends and thought Petitioner was going to get out of the car at the home of the second friend. Instead, Petitioner got into the front seat of the vehicle and asked K.J. to drive him to his aunt's house. While they were on a dirt road, Petitioner put his arm around K.J.'s head and cut her throat. As she struggled, he continued to stab her. K.J. unlocked the driver's side door and dove out of the vehicle and

onto the road. Petitioner followed after her by sliding out of the driver's side door of the moving vehicle.

Petitioner punched K.J. in her face and slammed her head against rocks on the road. K.J. blacked out and when she could refocus, she realized Petitioner was taking off her shorts and underwear. Petitioner then raped K.J. both vaginally and anally then forced her to sodomize him. Afterward, K.J. heard Petitioner snoring. K.J. then ran to a house she saw on the road and was able to obtain help to call law enforcement and medical personnel. In addition to the injuries associated with the violent sexual assaults, and the slicing wound to her neck, K.J. suffered approximately seventeen stab wounds.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals (OCCA). While Petitioner's appeal was pending, the United States Supreme Court issued its decision in *Graham v. Florida*, 560 U.S. 48 (2010), wherein the court held that the Eighth Amendment's prohibition against cruel and unusual punishment dictated it is unlawful to sentence an individual to life without the possibility of parole for acts he committed while he was a juvenile. *Id.* at 82. The OCCA affirmed Petitioner's convictions. However, based on *Graham* and recognizing Petitioner was sixteen years of age when the underlying crimes were committed, the OCCA modified Petitioner's sentences with regard to each of his rape convictions from life

without the possibility of parole to life with the possibility of parole.[2] The OCCA left each of Petitioner's four sentences as running consecutively.

II. GROUNDS FOR FEDERAL HABEAS CORPUS RELIEF

Petitioner raises two grounds for habeas corpus relief and each of these grounds were also raised during his appellate process to the OCCA.

(1) Petitioner's sentences, as applied, violate the Eighth Amendment's prohibition against cruel and unusual punishment, as established in *Graham v. Florida*, 560 U.S. 48 (2010). (ECF No. 1:5-10)

(2) Petitioner was prejudiced by ineffective assistance of trial counsel based on counsel's failure to introduce mitigating evidence. (ECF No. 1:11-21).

III. STANDARD OF REVIEW

The standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (AEDPA) applies to all grounds for habeas relief raised in this action. Under AEDPA, a petitioner

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[2] Applying *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), the OCCA recognized that because *Graham* was issued while Petitioner's appeal was pending there was no question that the ruling therein applied to Petitioner's case. (ECF No. 20-4:8-9) ("When a decision of the U.S. Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review.").

is entitled to federal habeas relief only if an adjudication on the merits by a state's highest court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" *Id.* (28 U.S.C. § 2254 (d)(1)). This standard "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice system, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). This Court must first determine "whether the principle of federal law on which the petitioner's claim is based was clearly established by the Supreme Court at the time of the state court judgment." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006); *see also Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012).

"Clearly established law" consists of Supreme Court holdings in cases where the facts are similar to the facts in the petitioner's case. *See House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008). If clearly established federal law exists, this Court then considers whether the state court decision was contrary to or an unreasonable application of that clearly established federal law. *See Bland*, 459 F.3d at 1009. "A decision is 'contrary to' clearly established federal law . . . if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts . . . materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from the

result reached by the Supreme Court." *Id.* (quotations omitted) (alterations in original). A decision is an unreasonable application of federal law if the state court identifies the correct legal principle but unreasonably applies that principle to the facts of a petitioner's case. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "As a condition for obtaining federal habeas relief, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

IV. ANALYSIS

A. Ground One: Petitioner's Aggregate Sentences Violate the Eighth Amendment

In *Graham*, the Supreme Court held that a sentence of life without parole is unconstitutional for a juvenile offender and that if a state "imposes a sentence of life [on a juvenile offender] it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82. As previously noted, the OCCA applied *Graham* and without elaboration, stated, "Appellant's sentences [of life without the possibility of parole] are modified to life imprisonment with the possibility of parole." (ECF No. 20-4:9).[3]

[3] Following the OCCA's ruling on Petitioner's appeal, he filed a Petition for Rehearing with the OCCA in which he argued that

As his sentences currently stand, Petitioner is serving three sentences of life with the possibility of parole, as well as a twenty-year sentence, each running consecutively.

Under Oklahoma law, an inmate convicted of Petitioner's crimes must serve 85% of a sentence before being considered eligible for parole. Okla. Stat. tit. 21, §§ 12.1, 13.1. Parole eligibility on a life sentence is calculated based on a 45-year sentence. *See Anderson v. Okla.*, 130 P.2d 273, 282 (Okla. Crim. App. 2006) ("The Oklahoma Pardon and Parole Board currently, and for the past several years, has provided that parole for any sentence over 45 years, including a life sentence, is calculated based upon a sentence of 45 years."). Because Petitioner's must serve 85% of his three life sentences and his 20 year sentence all running consecutively, it is undisputed Petitioner will not be eligible for parole until he has served 131.75 years.

Petitioner contends that his sentences, as applied, are materially indistinguishable from that presented to the Supreme Court in *Graham* and violate the holding of that decision because they do not provide a realistic opportunity to obtain release during his lifetime. (ECF No. 1: 8, 10). Petitioner urges this Court to find that the OCCA's decision as it relates to his imposed

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it "failed to fully address all aspects of [Petitioner's] arguments that were based on *Graham*." (ECF No. 20-5:1). In denying the Petition, the OCCA merely stated that it fully considered all of Petitioner's arguments initially raised in his appeal. (ECF No. 20-5:2).

sentences is contrary to, and an unreasonable application of, *Graham* and requests habeas relief.

1. *Graham v. Florida*

In *Graham*, the petitioner was 16 years old when he committed armed burglary with assault or battery and attempted armed robbery. *Id.* at 53-54. Pursuant to a plea agreement, he was sentenced to concurrent 3-year terms of probation and the trial court withheld adjudication of guilt. *Id.* at 54. However, during his probation but while still seventeen years old, the petitioner participated in two home invasions. *Id.* at 54-55. Because he violated the terms of his probation, the petitioner went back before the trial court on his previous armed burglary and attempted robbery charges. *Id.* at 55. The State recommended a total of 45 years for both counts but the trial judge, stating that 'this' was how the petitioner had chosen to live his life and there was nothing anyone could do to help him get on the right track, sentenced him to life imprisonment. *Id.* at 56-57. Because Florida had previously abolished its parole system, "a life sentence gives a defendant no possibility of release unless he is granted executive clemency." *Id.* at 57.

The petitioner appealed his sentence arguing it violated the Eighth Amendment's prohibition against cruel and unusual punishment. In analyzing the issue, the Court took the categorical approach, marking the first time it had extended this approach beyond the

death penalty. *Id.* at 56-58.[4] Categorical restrictions on a particular sentence fall into two subsets: (1) the nature of the offense and (2) characteristics of the offender. *Id.* at 60-61. As to the former, the Court previously held that the Eighth Amendment forbids the imposition of the death penalty for non-homicide offenses. *Id.* at 61 (citing *Kennedy v. Louisiana*, 554 U.S. 437-38 (2008)). As to the latter, the Court previously held that the Eighth Amendment forbids the imposition of the death penalty for defendants who were juvenile offenders (less than 18 years of age) and for defendants who have a low IQ. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002), respectively).

In applying the categorical analysis, the Court first considers state "legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Id.* (citing *Roper*, 543 U.S. at 563). Second, the Court uses its own independent judgment to scrutinize the constitutionality of the sentence based upon its evolving standards and precedents. *Id.* (citing *Kennedy*, 554 U.S. at 421).

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[4] Sentence challenges had previously fallen within two distinct categories: (1) straight proportionality challenges in which the court reviewed the length of a term-of-years sentence given all the circumstances in a particular case and (2) challenges to the application of particular sentences in certain categorical situations. *Id.*

In considering national consensus, the Court noted six jurisdictions prohibit life without parole sentences for juvenile offenders and seven prohibit such sentences for juvenile non-homicide offenders. *Id.* at 62. Meanwhile, 37 states, the District of Columbia and federal law conceivably permit life without parole sentences for juvenile offenders in non-homicide crimes. *Id.* (citing 28 U.S.C. §§ 2241, 5032). Despite the availability of this option, the actual sentencing practice is rare. *Id.* Relying on a recent study and its own research, the Court noted that at the time of the decision, there were only 123 juvenile offenders – 77 of them in Florida – serving sentences of life without parole for non-homicide offenses. *Id.* at 62-64 (citing P. Annino, D. Rasmussen, & C. Ride, Juvenile Life Without Parole for Non-Homicide Offense: Florida Compared to Nation 2 (Sept. 14, 2009)).[5] *Id.* Only 11 jurisdictions nationwide were imposing life without parole sentences on juvenile non-homicide offenders, in spite of apparent widespread availability. *Id.* at 64, 67.

Turning to its own independent judgment, the Court considered the culpability of the categorical class, *i.e.*, juvenile non-homicide offenders, the severity of life without parole, and whether the sentencing

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[5] Incidentally, the Court also noted that since the study was completed "a defendant in Oklahoma has apparently been sentenced to life without parole for a rape and stabbing committed at the age of 16." *Id.* at 64 (citing Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12)). The reference is to the Petitioner currently before this Court. As previously noted, the *Graham* opinion was prepared and issued while Petitioner's case was pending before the OCCA.

practice serves legitimate penological goals. *Id.* at 67. In its analysis of class culpability, the Court relied upon the extensive physiological data cited in *Roper* establishing that juvenile offenders are fundamentally different from adult offenders for purposes of criminal sentencing. *Id.* at 67-69 (citing *Roper*, 543 U.S. at 568-70, 572-73 (prohibiting the death penalty for defendants who committed their crimes before age 18)).

Specifically, the Court explained, "[J]uveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id.* at 68 (quoting *Roper*, 543 U.S. at 569-570).

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16-24; Brief for American Psychological Association et al. as *Amici Curiae* 22-27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S., at 570, 125 S.Ct. 1183. It remains true that "[f]rom 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." *Ibid.*

Id. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (quoting *Roper*, 543 U.S. at 573).

With regard to the nature of the offenses involved in juvenile cases, the Court relied upon its previous reasoning that those who commit non-homicide crimes are less deserving of the most severe punishment. *Id.* at 69 (citing *Kennedy*, 554 U.S. at 438). "Although an offense like robbery or rape is 'a serious crime deserving severe punishment,' those crimes differ from homicide crimes in a moral sense." *Id.* at 69 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). As for the severity of the punishment, the Court noted, "[L]ife without parole is 'the second most severe penalty permitted by law.'" *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)). It is especially harsh for a juvenile offender as he "will on average spend more years and a greater percentage of his life in prison than an adult offender." *Id.*

Based largely upon these same principles and reasoning, the Court concluded that historically recognized penological justifications for certain sentences, including retribution, deterrence, incapacitation and rehabilitation, are insufficient to justify life imprisonment for a juvenile offender. *Id.* at 71. In so doing, the

Court soundly rejected the trial court's rationale in sentencing the petitioner in *Graham*.

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.. . . . As one court concluded in a challenge to a life without parole sentence for a 14-year-old, "incorrigibility is inconsistent with youth." *Workman v. Commonwealth*, 429 S.W. 2d 374, 378 (Ky. 1968).
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> . . . . Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset.

Id. at 72-73.

Rehabilitation was also considered underserved by these sentences being applied against juvenile offenders as "the penalty forswears altogether the rehabilitative ideal." *Id* at 73-74. In many prison systems, those serving sentences without chance of parole are denied access to rehabilitative services, including counseling, vocational training, or educational opportunities. *Id.* at 73, 79. The absence of the same makes the disproportionality of the sentences for juveniles, who already have more capacity for change and less moral culpability than adults, all the more evident. *Id.* at 73-74, 79.

While acknowledging the imperfect nature of categorical rules, the Court nevertheless concluded it was the best alternative as "[a] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.* at 79.

> 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 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.

Id.[6] The Court held that while the Eighth Amendment does not require a state to "guarantee the offender eventual release, . . . if [the state] imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82.[7]

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[6] The Supreme Court also recognized international consensus against the sentencing practice, explaining that the United States was the only industrialized nation that imposed life without parole sentences on juvenile non-homicide offenders. *Id.* at 80-82.

[7] Since *Graham*, the Supreme Court has continued its decisional trend of providing more constitutional protections for juvenile offenders. In *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455,

2. Application of *Graham* to Term-of-Years Sentences

To date, the Tenth Circuit has not addressed whether *Graham* applies to consecutive, term-of-years sentences. Two Circuit Courts, the Sixth and Ninth, as well as various lower courts, have confronted this question and drawn differing conclusions. In *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), the petitioner was 16 years old at the time of the underlying crimes and was sentenced to 10 years each for three counts of rape, 10 years each for three counts of complicity to commit rape, 10 years for aggravated robbery, 10 years for kidnapping and 180 days for misdemeanor menacing, all to run consecutively for a total of 89 years imprisonment. *Id.* at 548. In ruling that the petitioner's sentence and appellate court's upholding of the same was not contrary to *Graham*, the Sixth Circuit contended that the *Graham* petitioner was convicted to life without the possibility of release for one armed burglary conviction, whereas Bunch was sentenced to consecutive, fixed-term sentences – the longest of which was ten years – for committing multiple non-homicide offenses. *Id.* at 550-51.[8] "[I]n *Graham*, the Court said

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2457-58 (2012), the Court explicitly extended the reasoning of *Roper* and *Graham*, holding that a *mandatory sentence* of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment.

[8] The Sixth Circuit's characterization of Petitioner's sentence is not entirely accurate. As previously discussed, the petitioner in *Graham* was sentenced for armed burglary and attempted robbery, *id.* at 57 (though the life sentence was limited

that a juvenile is entitled to [] a 'realistic opportunity to obtain release' if a state imposes a sentence of 'life.' That did not happen in this case." *Id.* at 551 (internal citations omitted).

The Sixth Circuit further pointed out the Supreme Court's conclusion that there is a national consensus against the sentencing practice is based solely on sentences of 'life without parole' and did not discuss sentencing practices related to those having the 'functional equivalent' of life without parole, nor did the Supreme Court "even consider the constitutionality of such sentences." *Id.* at 552. The court also noted that state courts were split as to the application of *Graham* to consecutive, fixed term sentences and therefore, the petitioner's sentence could not be contrary to 'clearly established' federal law, as required for habeas relief. *Id.* (listing state cases illustrating differing conclusions regarding *Graham's* application to term-of-years sentences). Finally, the court stated that a contrary result would lead to unanswered questions regarding precisely what length of years is too long. *Id.*[9]

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to the former), and only after repeated and escalating criminal activity and a probation violation. *Id.* at 54-58.

[9] Notably, in this regard, *Bunch* relied heavily on the reasoning of *Henry v. State*, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012), in which the court stated, "There is language in the *Graham* opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is "life" or 107 years. Without any tools to

By contrast, the Ninth Circuit, in *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) reached the opposite result. In *Moore*, the defendant was convicted of nine counts of forcible rape, seven counts of forcible oral copulation, two counts of attempted second degree robbery, two counts of second degree robbery, forcible sodomy, kidnaping with the specific intent to commit a felony sex offense, genital penetration by a foreign object, and the unlawful driving or taking of a vehicle. *Id.* at 1186. These convictions were based upon the defendant sexually victimizing four separate women on four occasions during a five-week period while he was 16 years old. *Id.*

The record in *Moore* illustrated *Graham's* discussion regarding the inability of expert psychologists to determine whether a juvenile is capable of reform. Prior to the defendant's sentencing hearing, one psychologist on staff with the California Department of the Youth Authority found that "there is no reason to believe [the defendant] would not continue to be dangerous well into the future." *Id.* However, the remaining members of the clinical team as well as a casework

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work with, however, we can only apply *Graham* as it is written." However, that opinion has since been quashed by *Henry v. State*, 174 So. 3d 675 (Fla. 2015), which held *Graham's* constitutional prohibition against cruel and unusual punishment is implicated when a juvenile non-homicide offender's sentence does not afford any meaningful opportunity to obtain release. "Because Henry's *aggregate sentence*, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him this opportunity, that sentence is unconstitutional under *Graham*." *Id.* at 679-80 (emphasis provided).

specialist concluded that the defendant "has the mental and physical capacity to benefit from rehabilitation." *Id.* at 1186-87.

The trial judge agreed with the lone psychologist and sentenced the defendant to "consecutive sentences totaling 254 years and four months." *Id.* at 1187. Under California's penal code, the defendant would not be eligible for parole for 127 years and two months. *Id.* (citing Cal. Penal Code § 2933(a) (1991)). The California Court of Appeals held that *Graham* did not apply to consecutive term-of-years sentences and the California Supreme Court summarily denied review. *Id.*[10]

The Ninth Circuit ruled that the state appellate decision was contrary to *Graham* because the petitioner's consecutive, term-of-years sentence was materially indistinguishable from the sentence presented in *Graham*. *Id.* at 1190. "Contrary to the California Court of Appeals' analysis, *Graham's* focus was not on the label of a 'life sentence' – but rather on the difference between life in prison with, or without, the possibility of parole." *Id.* at 1192.

> [W]e cannot ignore the reality that a seventeen year-old sentenced to life without parole and a seventeen year-old sentenced to 254 years with no possibility of parole, have effectively received the same sentence. Both sentences deny the juvenile the chance to return

[10] The federal district court dismissed Moore's habeas petition based on its ruling that *Graham* was not retroactive but the Ninth Circuit disagreed, as did both parties and every other court. *Id.* at 1187, 1190-91.

> to society. *Graham* thus applies to both sentences. See *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." (internal quotation marks and citation omitted)).

Id. The court also noted that the sentence at issue in *Graham* was also not formally life without parole but instead a de facto life without parole sentence due to Florida's lack of parole system. *Id.* at 1192, n.3.

The Ninth Circuit rejected the state court's conclusion that *Graham* was inapplicable because the nature of the underlying crimes differed. *Id.* at 1192. "*Graham* expressly rejected a case-by-case approach that 'would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes.'" *Id.* at 1192-93 (quoting *Graham*, 560 U.S. at 77).

Lower courts have also split on the issue of whether *Graham* applies to consecutive, term-of-years sentences. Several courts have held consecutive, fixed-term sentences for juvenile non-homicide offenders are unconstitutional, pursuant to *Graham*. *See LeBlanc v. Mathena*, Civil Action No. 2:12CV340, 2015 WL 4042175, at *9-17 (E.D. Va. July 1, 2015) (finding state court's decision that juvenile sentenced to life without parole who could apply for release under Virginia's Geriatric Release Program an unreasonable application of *Graham* and granting habeas relief); *Thomas v. Pennsylvania*, Civil No. 10-4537, 2012 WL 6678686, at

*2 (E.D. Pa. Dec. 21, 2012) ("This Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime."); *U.S. v. Mathurin*, No. 09-21075-Cr, 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011) (holding a 307 year sentence against a juvenile offender unconstitutional under *Graham*); *People v. Caballero*, 282 P.3d 291, 295-96 (Cal. 2012) (holding a de facto life without parole sentence, including for example a sentence of 110-years-to-life, is constitutionally barred in juvenile non-homicide cases); *People v. Rainer*, ___ P.3d ___, 2013 WL 1490107, at *14 (Col. App. 2013) ("Given what we view as the broad nature of *Graham's* directives, we conclude that the Court's holding and reasoning should apply to a sentence that denies a juvenile offender any meaningful opportunity for release within his or her life expectancy, or that fails to recognize that 'juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults.' "); *Henry v. State*, 174 So. 3d 675, 679-80 (Fla. 2015) ("Because Henry's aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him this opportunity, that sentence is unconstitutional under Graham.")

Other courts have held *Graham* only applies to juvenile non-homicide offenders expressly sentenced to

"life without parole." *See State v. Kasic*, 265 P.3d 410, 415-16 (Az. Ct. App. 2011) (holding that concurrent and consecutive prison terms totaling 139.75 years for a non-homicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*); *Adams v. State*, 707 S.E. 2d 359, 365 (Ga. 2011) (relying on Justice Alito's dissent to hold that the majority does not "affect[ ] the imposition of a sentence to a term of years without the possibility of parole."); *Diamond v. State*, 419 S.W.3d 435 (Tex. Crim. App. 2012) (upholding a sentence of ninety-nine years for a non-homicide child offender without mentioning *Graham*).

3. Application of *Graham* to Petitioner's Sentence

The issue before this Court is limited to whether the OCCA's decision in applying *Graham* to Petitioner's sentences is contrary to, or an unreasonable application of, clearly established law. *See* 28 U.S.C. § 2254. The Supreme Court has emphasized that "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington*, 562 U.S. 86, 102 (2011). In light of the abbreviated manner in which the OCCA addressed *Graham*, this Court can only speculate as to that court's underlying reasoning. We do know, however, that following the

OCCA's application of *Graham*, Petitioner is under aggregate sentences that dictate he will serve over 130 years prior to being eligible for parole. His aggregate sentences are the functional equivalent of life without parole, merely missing the label. The OCCA's application of *Graham* to Petitioner's sentence has provided a distinction without a difference. After analyzing the reasoning and analysis of the Supreme Court in *Graham*, as well as subsequent case law interpreting and applying the same, the undersigned finds that the OCCA's decision was contrary to, and an unreasonable application of, federal law and habeas relief is warranted.

The primary factors upon which *Graham* relied were: "the limited culpability of juveniles" as compared to adult offenders and the insufficiency of any penological theory to rationally justify "the severity of life without parole sentences." *Id.* at 74. The Court's concerns regarding juvenile culpability and inadequate penological justification apply equally to formal and de facto life without parole sentences. *Moore*, 725 F.3d at 1191; *Henry*, 174 So. 3d at 679-80; *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014). There is no basis within *Graham* to distinguish between sentences based solely upon their label.

Petitioner's consecutive term-of-years sentence effectively denies any possibility of parole and is no less severe than a formal sentence of "life without parole." Removing the label does not confer any greater penological justification, nor does it make a juvenile any more or less culpable as compared to an adult offender.

People v. Nunez, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. App. 2011), *review dismissed*, 287 P.3d 71 (Cal. 2012). After *Graham*, finding a determinate sentence constitutional, based on nothing more than its label, that indisputably exceeds a juvenile offender's lifetime is wholly arbitrary and places semantics above thoughtful, legal reasoning. To hold otherwise degrades the holding of the Supreme Court and ignores its directive that juveniles are constitutionally different from adults for purposes of sentencing. *Thomas* 2012 WL 6678686, at *2; *Nunez*, 125 Cal. Rptr. 3d at 624.

Furthermore, as other courts have noted, the sentence at issue in *Graham* was also merely the functional equivalent of life without parole. The petitioner's sentence was technically life imprisonment and only effectively became life without parole due to Florida's abolition of its parole system. *Graham*, 560 U.S. at 57; *Moore*, 725 F.3d at 1192 n.3. The *Graham* court framed the issue and its holding in terms of 'life without parole' because it recognized it as the petitioner's practical sentence. This is materially indistinguishable to Petitioner's sentences, which are de facto life without parole due to Oklahoma's 85% rule and the fact that the sentences are ordered to run consecutively.

Additionally, contrary to the Sixth Circuit's reasoning in *Bunch, Graham* does not support a distinction between consecutive sentences based on multiple offenses or victims and sentences based on one offense or victim. In *Graham*, the petitioner was a recidivist offender and the sentence at issue was based on an earlier charge and a subsequent parole violation for

different offenses. *Id.* at 53-55; *Moore*, 725 F.3d at 1192 n.3. Aggregated sentences for multiple offenses do not change the constitutional principles underlying *Graham*. "While the sum of his conduct is more serious because he committed multiple offenses, and he is accordingly more culpable than a defendant who commits only a single offense, under *Graham* [and *Roper*] his culpability remains diminished as a juvenile. Accordingly, no penological justification supports a permanent denial of parole consideration." *Nunez*, 125 Cal. Rptr. 3d at 624. *See also Henry*, 174 So. 3d at 679-80 (finding aggregate sentences totaling 90 years unconstitutional under *Graham*).

A Colorado court's discussion of the breadth and application of *Graham* is also persuasive:

> In *Graham*, the Court did not employ a rigid or formalistic set of rules designed to narrow the application of the holding. Instead, it utilized broad language, condemning the sentence of life without parole in that case for qualitative reasons, such as because it 'gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope'; because '[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual'; and because the prison system itself sometimes reinforces the lack of development of inmates, leading to 'the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.'

People v. Rainer, ___ P.3d ___, 2013 WL 1490107, at *13 (quoting *Graham*, 560 U.S. at 79).

More significant, the Supreme Court specifically rejected the idea of a case-by-case approach requiring courts to simply consider age prior to sentencing a juvenile non-homicide offender. *Graham*, 560 U.S. at 78. In so doing, the Court explained that it would leave

> 'an unacceptable likelihood [] that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe. . . .' Here, [] 'the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.'

Id. (quoting *Roper*, 543 U.S. at 573) (internal citations omitted). This rationale, wherein the Supreme Court pointedly avoided the possibility that *Graham's* reasoning could be set aside based upon particularly brutal or heinous underlying crimes, renders unreasonable an application of *Graham* that draws a distinction between aggregate sentences based on multiple offenses and a sentence based on just one offense.

Moreover, the trial judge's language in this case when sentencing Petitioner implicates the very basis of the Supreme Court's holding in *Graham.* The Court

found that the Eighth Amendment "forbid[s] States from making the judgment at the outset that" a juvenile convicted of non-homicide offenses "never will be fit to reenter society." *Id.* at 75. However, the state court here twice made the judgment that Petitioner would never be fit to reenter society. The state court first made that determination when it sentenced Petitioner to life without parole. During Petitioner's sentencing, the trial judge, in addition to questionable remarks related to Native Americans' tendencies toward alcoholism, stated the following:

> And, Counsel, Mr. Budder, I think you fall into that fourth class [of people who drink too much]. When you drink too much, you just get mean. Now, I really don't see from this presentence investigation any redeeming value here other than your age. But the problem with that is you manage to score in the high percentile of recidivism, and if you don't understand what that word means, it basically means given the chance to commit a new crime or another crime, you wouldn't have any hesitation to do so.
>
> . . . .
>
> *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.*

(Sent. Tr., p. 7-8) (emphasis provided). After announcing Petitioner's sentences, the trial judge stated further:

> 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.* Hopefully nobody else will get hurt at your hands. Now, that may not be a possibility within the custody of Department of Corrections, but at least it won't be a private citizen. So all four of those will run consecutively.
>
> * * *
>
> Now, the only relief that this Court can see based upon the record before the Court is whether or not the Court of Criminal Appeals thinks that the sentences running consecutively are too severe. He may have an opportunity with them to get them to run concurrently, but he's not going to have that opportunity with this Court.

(Sent. Tr., p. 8-9) (emphasis provided). Second, the OCCA made that determination when it modified Petitioner's sentences to consecutive life sentences with the possibility of parole knowing that under Oklahoma's 85% rule, Petitioner would not be eligible for parole in his lifetime.

The Supreme Court in *Graham* addressed similar comments made by the sentencing court in Terrance Graham's case. *Graham*, 560 U.S. at 57 (reflecting upon the trial court's suggestion that Terrance Graham was beyond all hope of rehabilitation). The Supreme Court specifically forbid states from making this judgment "at the outset." *Id.* at 75. *See also id.* at

77 (recognizing that "existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability"); *id.* at 78-79 (concluding that "[a] categorical rule avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide" offense).

The undersigned notes the concern raised by some courts that applying *Graham* to term-of-years sentences creates line-drawing problems related to how many years is too many for constitutional purposes. *See Bunch*, 685 F.3d at 552. It is undeniable that applying *Graham* to term-of-years sentences could and likely will generate significant questions. Indeed, questions have arisen regarding not only how many years is too many but what constitutes a meaningful opportunity for release. For example, in *LeBlanc*, the district court granted a writ of habeas corpus against the state court's decision upholding the petitioner's two life sentences without the possibility of parole because he could apply for release under Virginia's Geriatric Release Program upon reaching the age of sixty. The court determined that this was contrary to and an unreasonable application of *Graham* because it did not provide a "meaningful opportunity for release." *Id.*, 2015 WL 4042175, at *15.

Additionally, the question of a constitutionally acceptable 'number of years' has also presented a quandary for courts, though many have resolved this by relying upon the lifetime expectancy tables published by the Center for Disease Control and finding no constitutional violation if the defendant becomes eligible for parole within his or her expected lifetime. *See, e.g.*, *Moulayi v. Long*, No. SA CV 13-31-1S (PLA), 2015 WL 4273332, at *14 (C.D. Cal. Feb. 3, 2015) ("Because petitioner's sentence did not mandatorily impose life without parole and allows for the possibility of parole well within his expected lifetime, it does not violate constitutional norms."), report and recommendation adopted, 2015 WL 4304764 (C.D. Cal. July 10, 2015); *Silva v. McDonald*, 891 F.Supp.2d 1116, 1131 (C.D. Cal. 2012) ("Notwithstanding the holdings in *Roper, Graham*, or *Miller*, this Court is not aware of any controlling Supreme Court precedent which holds, or could be construed to hold, that the sentence at issue here of 40-years-to-life with the possibility of parole [at the earliest at age 55, but not later than age 60], for a juvenile who was 16 years old at the time of the nonhomicide crime, violates the Eighth Amendment."); *People v. Perez*, 154 Cal. Rptr. 3d 114, 119-21 (Cal. Ct. App. 2013) (holding defendant had a meaningful opportunity to obtain release where sentence included parole eligibility at the age of 47; charted cases showing "remarkably consistent pattern" of lengthy sentences upheld under *Graham* and *Miller* where the petitioner has substantial life expectancy remaining at potential end of sentence); *People v. Lehmkuhl*, No. 12CA1218, 2013 WL 3584754, at *1-4 (Colo. App. June 20, 2013) (holding

that a sentence where the defendant would be eligible for parole just under the age of 67 was not the functional equivalent of life without parole), *cert. granted by* No. 13SC598, 2014 WL 7331019 (Colo. Dec. 22, 2014); *People v. Lucero*, No. 11CA2030, 2013 WL 1459477, at *3 (Colo. App. Apr. 11, 2013) (holding that 84-year sentence was not de facto life without parole sentence because defendant would be parole eligible by age 57 – "well within his natural lifetime"), *cert. granted by* No. 13SC624, 2014 WL 7331018 (Colo. Dec. 22, 2014); *Angel v. Commonwealth*, 704 S.E. 2d 386, 402 (Va. 2011) (finding no *Graham* violation because defendant could petition for conditional release at age sixty [notably, this approach was rejected by *LeBlanc*]).

In any event, there are two reasons why these concerns do not affect Petitioner's request for habeas relief. First, in the present case, it is undisputed Petitioner will not be eligible for parole during his lifetime. Thus, neither the OCCA nor this Court was presented with a question of whether 50, 60, 70 or any other number of years is too long. Petitioner is not eligible for parole for over 130 years. He is unquestionably denied the meaningful opportunity for release during his lifetime that *Graham* requires. *Id.* at 82.

Second, the Supreme Court anticipated that its categorical approach to life without parole sentences would be inevitably problematic but did not alter its ruling. "Categorical rules tend to be imperfect, but one is necessary here." *Id.* at 75. The Court discussed various alternatives to this approach that might otherwise avoid these kinds of issues, *id.* at 75-79, but concluded

that the alternatives were "not adequate to address the relevant constitutional concerns." *Id.* at 75. The Court resolved these concerns by requiring that all juvenile non-homicide offenders be provided with the opportunity for parole, sentencing review hearings or other opportunity for release allowing them a chance to "demonstrate maturity and reform." *Id.* at 79.

Finally, in *Bunch*, the Sixth Circuit noted that when the Supreme Court concluded national consensus weighed against life without parole sentences for juvenile nonhomicide offenders, it did not consider the prevalence of lengthy term-of-years sentences that added up to de facto life imprisonment, but limited its data to actual life without parole sentences. *Bunch*, 685 F.3d at 551-52. While this appears accurate, the Supreme Court was clear

> Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U.S. at 434 []. In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility.' *Roper*, 543 U.S. at 575.

Id. at 67. This coupled with a reading of the *Graham* opinion as a whole leaves little question that the holding and its underlying reasoning are not negated by a lack of additional data related to aggregate sentences.

In reviewing a habeas petition, this Court does not decide whether it agrees with the relevant Supreme Court decision, nor whether it would have reached a

similar decision if presented with the same facts. Its role is limited to determining whether the state court identified the correct governing legal principle and reasonably applied that principle to the facts of Petitioner's case. *Wiggins*, 539 U.S. 510 at 520. That is to say, "a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). In this regard, the Supreme Court has instructed, "In order for a federal court to find a state court's application of our precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Id.* at 520-21 (internal citations omitted).

"The Supreme Court has reiterated that *Graham's* and *Roper's* 'foundational principle' is that 'children are constitutionally different' and warrant special consideration regarding sentencing" *LeBlanc*, 2015 WL 4042175, at *12 (quoting *Miller*, 132 S. Ct. at 2458). A lengthy term-of-years sentence prohibiting parole within the juvenile offender's lifetime has precisely the same effect that *Graham* prohibits. It imposes the second-harshest punishment on an offender whose culpability is diminished by his or her youth. *Id.* at 67-69. It does so in the absence of sufficient penological justification and it 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 71-73, 79. "A

sentencing scheme that applies the holding of *Graham* in a manner that contravenes *Graham's* foundational principle, that courts must account for differences between children and adults, evinces an unreasonable application of federal law." *LeBlanc*, 2015 WL 4042175, at *14 (citing *Wiggins*, 539 U.S. at 520).

The undersigned acknowledges that Petitioner may very well "turn out to be irredeemable, and thus deserving of incarceration for the duration of [his life]." *Graham*, 560 U.S. at 75. The Eighth Amendment does not foreclose the possibility Petitioner may remain behind bars for life, depending upon his own maturity, development and actions while imprisoned in taking advantage of those services that offer the possibility for him to demonstrate rehabilitation. *See id. at 74.* However, the holding and reasoning in *Graham* forbid states "from making the judgment at the outset that [Petitioner] never will be fit to reenter society," as the trial judge and the OCCA did in this case. *Id.* Petitioner's sentence, which from the outset fails to offer him any meaningful chance at parole during his lifetime, is an unreasonable application of *Graham* and "improperly denies [him] a chance to demonstrate growth and maturity" at any point during his lifetime, as required by federal law. *Id.* at 73.

B. Ground Two: Ineffective Assistance of Counsel

On direct appeal, Petitioner raised four bases to argue that he was denied his Sixth Amendment right

to effective assistance of counsel. In this proceeding, Petitioner raises only two bases to support this ground for relief. Specifically, Petitioner claims that his defense counsel was ineffective because counsel failed to present any arguments to the jury as to why they should consider mitigating evidence in the sentencing determination, and also failed to offer such evidence. Additionally, Petitioner contends defense counsel was ineffective by failing to do the same during formal sentencing.

Ineffective assistance claims are analyzed under the now-familiar two-part test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, [Petitioner] must show that counsel's performance was deficient." *Id.* at 687. To satisfy this prong, Petitioner must show that his attorney's performance "fell below an objective standard of reasonableness," or, in other words, that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *Id.* at 687, 688. Second, Petitioner must show that counsel's deficient performance prejudiced the defense. *Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012) (citing *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011)).

There is a strong presumption that counsel acted reasonably, and counsel's performance will not be deemed deficient if it "might be considered sound trial strategy." *Id.* at 689. With respect to the second prong of the analysis, Petitioner must show that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have

been different. *Id.* at 694. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695.

This Court's review of the OCCA's determination of Petitioner's ineffective assistance of counsel claim is subject to the deference due all state court decisions in the context of federal habeas review. However, when a state court's decision includes review of ineffective assistance of counsel claims, the pivotal question for a federal habeas court is "whether the state court's application of *Strickland* was unreasonable. This is fundamentally different from asking whether defense counsel's performance fell below *Strickland's* standard." *Harrington*, 562 U.S. at 101. "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Id.* at 105 (internal citations omitted).

1. Failure to Offer Mitigating Evidence to the Jury

Petitioner argues defense counsel was ineffective because she did not present evidence to the jury regarding his age, drug and alcohol addiction, time in a rehabilitation facility, chaotic and dysfunctional family, and that Petitioner experienced peer rejection, poor parental management and a lack of social support, has

a borderline or below average intellectual functioning and was previously sexually abused, which Petitioner contends was confirmed in the pre-sentence investigation report. (ECF No. 1:11-17). Additionally, Petitioner argues that defense counsel should have made a plea for mercy to the jury. (ECF No. 1: 15-16).

In denying Petitioner relief on this claim, the OCCA stated, in relevant part, as follows:

> Appellant next argues counsel failed to present a complete defense by failing to offer admissible mitigating evidence and argument in regards to the guilt/innocence determination. Specifically, Appellant asserts that counsel should have obtained an expert to explain the possible effects of alcohol, that counsel shouldn't have suggested in closing argument that Appellant did not rape the victim and that counsel should have asked the jury for mercy in sentencing. Appellant now asserts trial counsel's omissions failed to subject the State's case to proper 'adversarial testing.'
>
> As addressed in Proposition II, since this is a non-capital case, Appellant was not legally entitled to present 'mitigating evidence.' *Malone*, 2002 OK CR 34, 1111 6-7, 58 P.3d at 209-210. Therefore, counsel was not ineffective for failing to present evidence he was not legally entitled to present.. . . .
>
> Despite the seemingly inadmissible nature of the evidence, Appellant stands firm in his argument that such evidence would have been relevant in the jury's . . . determination of

punishment. We fail to see the relevance of the evidence. Generally speaking, the possible side effects of alcohol are not a topic most lay-people need an expert to set out. Further, it is not clear from the record whether Appellant has been evaluated by any experts concerning the possible side effects of his consumption of alcohol. The relevance to the possible side effects of alcohol on someone other than Appellant is questionable. Additionally, while Appellant sees his alcohol consumption as an addiction, which with supporting evidence could have benefitted his defense, it can also be seen as voluntary conduct which results in Appellant harming others and the presentation of such evidence would be detrimental to Appellant. What could reasonably be viewed as mitigating evidence to one person may be viewed as aggravating evidence to another. *Murphy v. State*, 2002 OK CR 24,11 54, 47 P.3d 876, 886-887.

The decision to call witnesses is a strategic decision which this Court will not second guess on appeal. *Matthews v. State*, 2002 OK CR 16, 1 32, 45 P.3d 907, 919. Based upon the record before us, counsel's decision to not call an expert on the side effects of alcohol consumption was reasonable trial strategy which we will not second guess. The record shows counsel extensively questioned Appellant on the amount of alcohol he drank the day and night of the party and the effects of that alcohol. Counsel sufficiently presented the issue for the jury's consideration. Appellant has failed

> to show that if counsel had presented any expert testimony, that the result of the trial could have been different.
>
> * * *
>
> Appellant next argues counsel was ineffective for failing to make a plea of mercy before the jury. This was a one stage trial. For counsel to argue for minimal sentencing would have been inconsistent with Appellant's own testimony that he did not attack the victim and would have been a concession of guilt. Counsel's argument regarding sentencing was a matter of trial strategy. Under the circumstances of this case, we find counsel's strategy reasonable and not subject to second guessing.

(ECF No. 20-4:23-26).

The undersigned does not find the OCCA's determination to be unreasonable. The OCCA considered the testimony and evidence presented at trial. The state court found it to be a reasonable decision for counsel to focus on a defense of actual innocence based on Petitioner's testimony. The reasonableness of this decision could also be further supported by evidence pertaining to the abbreviated medical examination conducted on the victim, lack of DNA evidence matching Petitioner to the DNA taken from the victim, and evidence suggesting that the victim's boyfriend actually assaulted the victim and set up Petitioner. (ECF No. 20-4:25).

Assuming without deciding that counsel were deficient for failing to present this type of mitigating evidence to the jury, Petitioner cannot demonstrate a reasonable probability that the evidence would have affected the jury's weighing of the evidence. Specifically, as other courts have observed, evidence of this sort has a "double-edged" quality. *Wackerly v. Workman*, 580 F.3d 1171, 1178 (10th Cir. 2009). That is, a jury presented with evidence that the defendant is a chronic substance abuser might draw a negative inference from that evidence just as easily as a jury might find it mitigating. *See Davis v. Exec. Dir. of Dep't of Corr.*, 100 F.3d 750, 763 (10th Cir. 1996) (finding the petitioner not prejudiced by counsel's failure to investigate and present expert testimony at sentencing on nature and effects of his severe alcoholism because whatever the mitigating effect of such evidence, it was equally possible that jury would have faulted the petitioner for repeated failures to address problem).

Given the uncertainty about how a jury might receive this type of evidence, the undersigned cannot find Petitioner has demonstrated a reasonable probability that the jury would have reached a different sentencing result if it had been presented with evidence of Petitioner's history of alcohol and drug abuse and evidence that he had already been to a rehabilitation center. In light of the testimony related to the exorbitant amount of alcohol Petitioner consumed on the night at issue, if evidence had been presented to the jury that he had already been through treatment and counseling programs, it is reasonable to consider that

the jury might have concluded Petitioner was beyond further rehabilitation. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (stating new evidence of more serious substance abuse, mental illness, and criminal problems is "by no means clearly mitigating" because the jury might have concluded that the petitioner was simply beyond rehabilitation). *See also Sutton v. Bell*, 645 F.3d 752, 763 (6th Cir. 2011) (stating "[i]t is well established that . . . extensive involvement with drugs" is "often viewed by juries as harmful," not mitigating); *Pace v. McNeil*, 556 F.3d 1211, 1224 (11th Cir. 2009) (finding that trial counsel's failure to present evidence of the petitioner's substance abuse was not deficient in part because "presenting evidence of a defendant's drug addiction to a jury is often a 'two-edged sword'; while providing a mitigating factor, such details may alienate the jury and offer little reason to lessen the sentence"); *DeLozier v. Sirmons*, 531 F.3d 1306, 1332 (10th Cir. 2008) (finding that appellate counsel's decision not to argue that trial counsel was ineffective for failing to put on evidence of the petitioner's substance abuse was not ineffective assistance because such evidence can be considered a "two-edged" sword); *Jones v. Page*, 76 F.3d 831, 846 (7th Cir. 1996) (finding that counsel's failure to introduce evidence of the petitioner's drug abuse was reasonable strategic choice because such evidence was "double-edged sword").

The OCCA's conclusion that counsel's action in failing to offer mitigating evidence or ask the jury for mercy in sentencing was based entirely on trial strategy, and not any deficiency of performance, finds

considerable support in the record. Thus, its determination that Petitioner failed to meet the *Strickland* standard for an ineffective assistance claim on this basis is neither contrary to nor an unreasonable application of clearly established Supreme Court authority. Petitioner's claim for habeas relief should be denied.

2. Failure to Offer Mitigating Evidence During Formal Sentencing

Petitioner complains that defense counsel was ineffective by failing to present evidence regarding his age, alcohol and drug addiction, troubled family life and alleged potential for rehabilitation during formal sentencing proceedings. (ECF No. 1:17-19). Petitioner also complains that defense counsel did not ask the judge to suspend a portion of his sentences or set them to run concurrently, in spite of the fact that the prosecution had asked the court to run Petitioner's sentences consecutively. (ECF No. 1:19).

Simultaneous with his direct appeal, Petitioner filed an Application to Supplement Appeal Record in Regard to Claim of Ineffective Assistant (sic) of Trial Counsel and Application for Evidentiary Hearing ("Application"), pursuant to Rule 3.11 of the Oklahoma Court of Criminal Appeals. (ECF No. 26).[11] The

[11] Rule 3.11(B)(3)(b) and (B)(3)(b)(i) provides, "When an allegation of the ineffective assistance of trial counsel is predicated upon an allegation of failure of trial counsel to properly utilize available evidence . . . and a proposition of error alleging ineffective assistance of trial counsel is raised in the brief-in-chief of appellant, appellate counsel may submit an application for an

Application relied upon records from mental health care providers, treatment centers and public schools to demonstrate to the OCCA that Petitioner's trial counsel had readily available evidence showing his chaotic and dysfunctional family life, struggles in academic settings and history of substance abuse. (ECF No. 26).[12] Petitioner argued that had defense counsel presented the evidence contained therein, there is a strong possibility the trial judge would have pronounced a lesser sentence because doing so would not have seemed as futile. (ECF No. 26:5).

The OCCA denied Petitioner's Application as well as Plaintiff's ground for relief. The explanation for its denial, though lengthy, bears quoting:

> Appellant next asserts counsel was ineffective for failing to present mitigating evidence and argument to the court at formal sentencing. Specifically, he argues that counsel could have presented to the court evidence contained

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evidentiary hearing, together with affidavits setting out those items alleged to constitute ineffective assistance of trial counsel.. . . . In order to rebut the strong presumptions of regularity of trial proceedings and competency of trial counsel, the application and affidavits must contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence."

[12] Due to the sensitive materials contained within the Application, a copy of the same was filed with this Court under seal. (ECF Nos. 19, 24, 25).

within affidavits included in his contemporaneously filed *Application for Evidentiary Hearing on Sixth Amendment Grounds*. . . .

Contrary to his earlier argument, Appellant admits that at formal sentencing counsel did argue there were "mitigating circumstances" for the court to consider before imposing sentence and these included Appellant's young age and the "ravages of alcohol and marijuana." (S. Tr. Pgs. 4-5). . . .

In his *Application to Supplement Appeal Record in Regard to Claim of Ineffective Assistance of Trail Counsel and Application for Evidentiary Hearing*, Appellant requests this Court allow supplementation of the record on appeal with documents which were not presented to the trial court but could have been presented through supporting witnesses at Appellant's formal sentencing. These documents include copies of Appellant's records from Cherokee nation Jack Brown Treatment Center; Kansas, Oklahoma, Public Schools; and Oklahoma Juvenile Authority. (Exhibits A-V).

As addressed in Proposition II, the parameters of formal sentencing are very limited. When a defendant has elected to have the jury determine punishment, as in Appellant's case, state statutes do not allow for the presentation of 'mitigation evidence' in a non-capital case such as Appellant's. *See Malone*, 2002 OK CR 24, 1111 6-7, 58 P.3d at 209-210 *citing* 22 O.S. 2001, §§ 970-973. Prior to the trial court's

pronouncement of the sentence, the defendant may offer any legal cause limited to either a reasonable ground for believing the defendant is insane or ground that would support a motion for new trial. *Id.* If no such legal cause is shown, the trial court must pronounce sentence. *Id.*

Appellant had no legal grounds to present 'mitigating evidence' to the jury. Therefore, we will not find counsel ineffective for failing to present evidence [s]he was not legally able to present. Reviewing the affidavits submitted by Appellant in his Application for Evidentiary Hearing, they concern Appellant's history of alcohol abuse, troubled home life, school discipline and behavioral problems, and in-patient treatment with Oklahoma Juvenile Authority. None of the affidavits contain any information which supports a claim that Appellant was insane or that a new trial is warranted.

Appellant insists that had the trial judge had some documentation of Appellant's troubled history and some scientific evidence, he would not have relied on his own personal experience in rendering sentencing. As discussed above, the evidence Appellant now offers was not the kind of evidence which could be presented at formal sentencing. Further, the judge did not merely rely on his own personal experiences in imposing sentence. In pronouncing sentencing, the judge made his feelings about the case quite clear. He commented that after sitting through the jury trial and

reviewing the Presentence Investigation Report (PSI), "this is probably the cruelest case that I have ever presided over in the twelve years I have been here. Short of killing the victim, I don't know that there was any more degradation that could have been heaped upon this victim that [sic] what was heaped upon her during this episode." (S.Tr. pg.6). The judge momentarily injected a personal note that he had family members who were half Native American and had trouble with alcohol. However, he did not attribute Appellant's alcohol problems with the fact he was Native American. Rather, based upon findings in the PSI and evidence at trial, the judge said that Appellant was one of those people that when they drink too much alcohol, they "want to hurt somebody". The judge told Appellant, "when you drink too much, you just get mean". (S. Tr. Pg. 7). The judge went on to state that Appellant's age was the only redeeming value and the PSI indicated Appellant was a likely repeated offender. The judge said he found no reason to allow Appellant out of prison "to get drunk and hurt somebody else." (S.Tr. pgs. 7-8). Appellant has failed to show that any evidence he now offers would have had any impact at formal sentencing.

Having thoroughly reviewed the evidence contained in the affidavits attached to the Application for Evidentiary Hearing, we find Appellant has failed to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to present evidence he was not legally able to

> present at formal sentencing. His request for an evidentiary hearing on this issue is DENIED.
>
> * * *
>
> Having thoroughly reviewed Appellant's claims of ineffective assistance of counsel, we find Appellant has failed to carry his burden to show either deficient performance by counsel, or prejudice from the omission of this specific evidence. Merely because appellate counsel may have defended the case in a different manner is not grounds for finding trial counsel ineffective. *See Shultz v. State*, 1991 OK CR 57, 1 9, 811 P.2d 1322, 1327. This proposition is denied.

(ECF No. 20-4:26-29, 30).

Petitioner appears to ask this Court to undertake a *de novo* review of his ineffectiveness of trial counsel claim on the ground that the OCCA's disposition rested on Rule 3.11's clear and convincing standard rather than the analysis mandated by the Supreme Court in *Strickland* (ECF No. 1:20-21). However, as the OCCA explained in *Simpson v. State of Okla.*, 230 P.3d 888 (Okla. Crim. App. 2010), "When we review and deny a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we necessarily make the adjudication that Appellant has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in *Strickland*" *Id.* at 906. *Simpson* also confirmed that when evaluating an application under Rule 3.11, the

OCCA thoroughly examines the non-record evidence. *Id.* at 905.

The Tenth Circuit has held that, given the OCCA's assurances in *Simpson*, as a matter of federal law, "any denial of a request for an evidentiary hearing on the issue of ineffective assistance of counsel filed pursuant to OCCA Rule 3.11 . . . operates as an adjudication on the merits of the *Strickland* claim and is therefore entitled to deference under § 2254(d)(1)." *Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013). Accordingly, the OCCA's ineffectiveness determination in this case would be entitled to AEDPA deference even had the OCCA not made explicit its finding that Petitioner had failed to meet his *Strickland* burden. (ECF No. 20-4:30).

Looking now to the merits of Petitioner's ground for relief, as noted by the OCCA, defense counsel did in fact argue for a reduced sentence based on mitigating evidence. During formal sentencing, defense counsel made the following argument to the trial judge:

> We ask the Court to take into consideration as to mitigating circumstances two things. This young man is now 17 years old. He was 16 years old at the time of the offense. He turned 17 in January of this year. Clearly according to the PSI and some of the evidence presented at trial, his home life, his upbringing was certainly unstructured, lacking in stability, and any kind of positive influence or direction.
>
> Secondly, alcohol was obviously involved in this offense, your Honor. It's clear from the

> testimony, including the Defendant's own testimony, that he had ingested an incredible amount of alcohol on the day and evening of the event.
>
> The PSI on page 13, I want to draw your attention to that, [Petitioner] says when he participated in rehabilitation, I'm on the top paragraph on page 13, your Honor, he had participated in rehabilitation through the Office of Juvenile Affairs. He likes treatment. It helped while he was there and he wished he could have stayed longer. He acknowledges he has a substance abuse problem and wants to participate in further counseling. We ask that you consider that in determining your sentence. Directing if you will his participation in all available alcohol and drug abuse programs whether he is incarcerated or whether he is allowed community sentencing, your Honor.

(Sent. Tr., p. 4-5). Notably, defense counsel raised Petitioner's age and history of substance abuse, as well as his history of substance abuse treatment and the instability that pervaded his childhood.

Petitioner's argument here is that if defense counsel had presented the documentary evidence attached to his Application to support these arguments, the trial judge might have handed down a lesser sentence. To prevail on his ineffective assistance claim, Petitioner must show that but for counsel's actions, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. As noted by the OCCA, it is highly unlikely Petitioner's

evidence would have even been admissible but presuming it was, Petitioner has presented no evidence to support his conclusion, beyond his own conjecture, that such evidence would have resulted in a lesser sentence. Petitioner cannot show prejudice under *Strickland* based solely on his own unfounded speculation that the trial judge would have been swayed by documentary evidence reflecting arguments already presented to court.

Finally, Petitioner's argument that defense counsel was ineffective by failing to request a suspended sentence or for the sentences to run concurrently is also without merit. On appeal, the OCCA ruled:

> However, Appellant argues counsel was ineffective for failing to present any evidence in support of his arguments, evidence which could have "provided the court with a balanced view of the pros and cons of running Appellant's sentences concurrently and ordering treatment through incarceration." (Appellant's brief, pg. 41).
>
> Finally, Appellant finds counsel ineffective for failing to argue that the sentences should be run concurrently. Based upon the trial court's comments at sentencing, any such request for concurrent sentences would have been overruled. Appellant has not shown any prejudice by counsel's omissions.

(ECF No. 20:26-27, 30). The OCCA noted that based upon the trial judge's statements regarding the bases

for Petitioner's sentence, including specifically the severity of the crime, it is exceedingly unlikely that any such request on the part of defense counsel would have been granted. The OCCA's determination that Petitioner cannot show he suffered prejudice due to defense counsel's failure to make either of these requests during sentencing was reasonable. *See Harrington*, 562 U.S. at 101. Accordingly, Petitioner's request for habeas relief should be denied.

V. RECOMMENDATION

It is recommended that the Petition for Writ of Habeas Corpus be **GRANTED in part and DENIED in part**. Specifically, the undersigned recommends that the Petition be **GRANTED** with regard to Petitioner's Ground One claim that his sentence is unconstitutional under the Eighth Amendment and the case be **REMANDED** to the state court for re-sentencing based upon the Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010) and the principles espoused herein. Additionally, the undersigned recommends the Petition be **DENIED** with regard to Ground Two based upon Petitioner's claim of ineffective assistance of counsel.

VI. NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to file specific written objections to this Report and Recommendation. *See* 28 U.S.C. §636 and Fed. R. Civ. P. 72. Any such objections should be filed with the Clerk of the

District Court by **January 4, 2016**. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

VII. STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on December 17, 2015.

/s/ Shon T. Erwin
SHON T. ERWIN
UNITED STATES
MAGISTRATE JUDGE

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEIGHTON JON BUDDER, Appellant, v. STATE OF OKLAHOMA Appellee.	)	**NOT FOR PUBLICATION** Case No. F-2010-555

OPINION

(Filed Oct. 24, 2011)

LUMPKIN, JUDGE:

Appellant Keighton Jon Budder was tried by jury and convicted of First Degree Rape (Counts I and III) (21 O.S.Supp.2008, § 1114); Assault and Battery with a Deadly Weapon (Count II) (21 O.S.Supp.2007, § 652); and Forcible Oral Sodomy (Count IV) (21 O.S.Supp.2009, § 888), in the District Court of Delaware County, Case No. CF-2009-269. The jury recommended as punishment imprisonment for life without the possibility of parole in each of Counts I and III, life imprisonment in Count II, and twenty (20) years in Count IV.[1] The trial court sentenced accordingly ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

[1] Pursuant to 21 O.S.2001, § 13.1, Appellant must serve 85%of the sentences for First Degree Rape and Forcible Oral Sodomy before being considered for parole.

On August 10, 2009, 17 year old K.J. held a party at her parent's home in Colcord, Oklahoma. K.J. and her friends were celebrating the start of their senior year at Colcord High School. During the evening, the 16 year old Appellant arrived at the party with three other male students, Anthony, Ben and Dakota. Appellant was not a friend of K.J.'s and had not been invited to the party. Nevertheless, she let him stay as two of the young men in the group had been invited to the party and because they arrived with a "thirty pack" of beer.

Most of the students at the party spent their time "playing beer pong" and "sitting around talking". During the course of the party, Appellant made K.J. feel "really uncomfortable". At one point, she sat down on a loveseat to send text messages on her cell phone. Appellant said [sic] down beside her. K.J. tried to "scoot away" from him. Appellant told K.J. his name and asked K.J. her name. Appellant also asked "if it would be too much" to ask for her phone number? K.J. [sic] that it was "too much to ask", explaining she had a boyfriend. When Appellant asked a second time for her phone number, K.J. offered to give her cell phone to Appellant so he could put his phone number in it. She did so in the hope that Appellant would then leave her alone, and with the intent of deleting the number later.

As the evening wore on, Appellant spent most of his time drinking beer. Whenever he walked past K.J., he would slap her on the leg. When the party ended, K.J. inquired if everyone had a ride home. While she was doing so, Appellant went to her bedroom. K.J. had

Anthony get Appellant out of her room. This was the second time during the evening that K.J. had to have someone get Appellant out of her bedroom.

Anthony, Ben and Dakota indicated they did not have a ride home, so K.J. offered to take them in her mother's Malibu. As it turned out, Dakota ended up getting a ride with someone else, so Appellant asked if he could take his place. However, when it came time for the group to leave, Appellant was nowhere to be found. As the others searched for him, K.J. went to her bedroom to put on her boots. As she did so, Appellant jumped out from behind the bedroom door. K.J. would later describe Appellant's conduct as "creepy".

As K.J. drove, the boys continued to drink beer, Ben sat in the front passenger seat and was the first to be dropped off. K.J. then drove to the trailer park where Anthony lived. Appellant had initially indicated he would exit with Anthony and spend the night with him. However, when it came time for Appellant to get out of the car he refused. He eventually moved to the front seat and said he wanted K.J. to take him to his aunt's house.

Appellant directed K.J. where to drive. She ended up on an unfamiliar dirt road in the woods. There were no lights anywhere, either street lights or car lights. When K.J. asked Appellant how much further she had to drive, Appellant replied, "fifty yards". Suddenly, Appellant reached over, placed K.J. in a headlock and cut her throat. K.J. screamed. Appellant then stabbed her repeatedly on her stomach, arms and legs. She tried,

unsuccessfully, to get out of the still moving car. She was eventually able to dive out of the car onto her hands. Appellant grabbed one of her boots and followed her out of the car. The car ended up rolling into a ditch.

Lying on her back in the middle of the dirt road, K.J. tried to send a text message for help. However, Appellant saw her, grabbed the phone and threw it into the woods. Appellant got on top of K.J. and punched her in the face. He then grabbed her hair, "wired it up in his hand" and slammed K.J.'s head against the rocks in the road. K.J. later testified that "everything went black". When she came to, she felt Appellant lying on top of her, removing her shorts and underwear. Appellant threw K.J.'s clothes into the woods and tried to rape her. Despite feeling weak from the loss of blood and afraid that she was going to die, K.J. fought Appellant, trying to push him off of her. Unsuccessful in his rape attempt, Appellant jerked K.J. up and pushed her toward the car. There he forced her to bend over the open driver's door and raped her.

Appellant then opened the driver's side passenger door and pushed K.J. inside the car. She fell onto her back in the back seat. Appellant came in after her, lifting her shirt and bra and attempting to "suck" on K.J.'s breasts. K.J. put her arms in the way. Appellant told her to "quit" and she complied. He then pulled her out of the car and bent her over the rear fender. He pulled her shirt off over her head. K.J. pressed the shirt against her bleeding neck. Appellant then anally raped her. When he was finished, he pushed her back into the car. Apparently changing his mind, Appellant pulled

her out of the car, so he could lie down in the back seat. He then made K.J. get on top of him. Appellant raped K.J. again, telling her "your pussy is so good". After some time, Appellant pulled out of K.J., grabbed her head, and shoved it onto his penis. K.J. bit down in an attempt to get Appellant to stop, but it had no effect.

After forcing K.J. to sodomize him, Appellant told K.J. to "stroke" his penis. K.J. complied and at Appellant's directions, began masturbating him. Eventually, K.J. heard Appellant snore and realized he had fallen asleep. K.J. took the opportunity to get away from the car and run down the road for help. With the exception of her boots, K.J. was naked. She eventually came to a house and went to the front door, shouting for help. No one came. Noticing a pickup parked out front, K.J. thought if the homeowner believed the truck was being stolen, she could get some attention and some help. She opened the driver's door to the truck. As the inside light came on, and the truck began "dinging' ", Ms. Burton came out of the house and yelled at K.J. to get out of her truck. K.J. shouted to Ms. Burton that she needed help, that she had been attacked. Ms. Burton helped the bleeding K.J. into her home, gave her towels to cover up with and a drink of water. Ms. Burton let K.J. use her phone to call her mother. With the help of her grandson, Ms. Burton then called 911.

K.J.'s mother, her 21 year old brother, T.J., and his friend D.M. arrived at Ms. Burton's home soon thereafter. K.J. told them what had happened. T.J. and D.M. went looking for Appellant. They found the Malibu parked in a ditch as K.J. described and Appellant

passed out in the backseat. Appellant's white t-shirt was covered in blood and his pants were around his ankles. The only lights in the area were the headlights of T.J.'s pickup truck. T.J. looked through the trunk of the Malibu and found a tire tool so he could keep Appellant "where he was" until law enforcement arrived. T.J. shouted at Appellant until he woke up. Despite T.J.'s warnings not to do so, Appellant attempted to get out of the car. T.J. hit him on the head with the tire tool. When Appellant refused to cooperate, T.J. hit him on the head again, a little harder. Appellant tried a third time to get out of the car, T.J. swung at him but missed. This was enough however to convince Appellant to lie back down.

The Chief of Police soon arrived, ordered Appellant out of the car and attempted to handcuff him. Appellant resisted, swinging at the officer, "cussing at everyone telling them he was going to kill everyone." Chief Hunt eventually subdued Appellant and placed him under arrest. While the chief talked with T.J. and others on the scene, Appellant attempted to escape. Chief Hunt caught him in time and had Appellant sit on the ground until backup arrived. Appellant complied but remained angry and very vocal. He was eventually taken into town and booked into jail.

Meanwhile, K.J. was transported to the hospital and taken immediately to surgery. In addition to the injuries associated with the violent sexual assaults, and the slicing wound to her neck, K.J. suffered approximately seventeen stab wounds.

Appellant testified in his own behalf. He admitted he had been to K.J.'s party, and talked to her, although he did not know her well. He said that earlier that day he had consumed a liter of Kentucky Deluxe with his cousin and drank more whiskey at the home of another cousin. At K.J.'s party, he drank a shot of Bacardi and approximately five beers before he "passed out" on the floor. Appellant said someone woke him up and told him to get on the bed so he did.

When it was time to leave the party, Appellant's friends had to wake him up and help him into K.J.'s car. Appellant testified he did not remember getting into the car, and that he fell asleep while they were driving. Appellant said he woke up when Anthony was dropped off. He said that K.J. asked him to go somewhere with her. So, he moved into the front passenger seat; but while they were driving, he again passed out. Appellant denied asking K.J. to take him to his aunt's home. Appellant testified that when he woke up, he was face down on the ground and did not see K.J. anywhere around. He said he heard people talking, a "muffled scream", the sound of a loud truck, and someone saying, "get him". Appellant said he thought someone had hit him in the head, but he could not remember anything after that. The next thing he remembered, he was being arrested and he did not know why. Appellant remembered threatening those at the scene because he was confused and angry. Appellant said someone went through his pockets and pushed his pants down. He said he fell asleep again and did not know how he ended up in the jail.

In his first proposition of error, Appellant contends his life without parole sentences in Counts I and III for First Degree Rape are excessive and must be modified in light of *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). The State agrees. In *Graham v. Florida*, the U.S. Supreme Court held that a sentence of life without parole violates the Eighth Amendment when applied to juvenile offenders who did not commit a homicide. The Court stated in part:

> In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

130 S.Ct. at 2030 (internal citations omitted).

Appellant clearly falls under *Graham* as he was 16 years when he committed the crimes charged in Counts I and III.

When a decision of the U.S. Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Schriro v. Summerlin*, 542 U.S. 348, 351-352, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004) *citing Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). *See also Hogan v. State*, 2006 OK CR 19, 2006 OK CR 27, 139 P.3d 907, 919 (new standard of review applies retroactively to all cases reviewed on appeal subsequent to adoption of standard). Appellant was convicted in April 2010. *Graham v. Florida* was decided in May 2010. Under, *Schriro* and *Griffith, Graham* plainly retroactively applies to Appellant's case. Therefore, Appellant's sentences in Count I and III are modified to life imprisonment with the possibility of parole.

In his second proposition of error, Appellant asserts that not only is the sentence in each of the four counts excessive, but the aggregate sentence imposed by running the sentences consecutively should shock the conscience of this Court. He argues that due to his intoxication at the time of the crimes, his young age and the erroneous limitation on his presentation of mitigating evidence, his sentences should be reduced and modified to run concurrently, or in the alternative the case should be remanded for resentencing.

The question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rackley v. State*, 1991 OK CR 70, ¶ 7, 814 P.2d 1048, 1050; *Rogers v. State*, 1973 OK CR 111, ¶ 11, 507 P.2d 589, 590. This Court has repeatedly held that if a sentence is within the statutory guidelines, we will not disturb that sentence unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148; Bartell *v. State*, 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101.

As addressed above in Proposition I, Appellant's sentences of life imprisonment without the possibility of parole in Counts I and III were illegal and his sentences have been modified to life imprisonment with the possibility of parole. 21 O.S.Supp.2009, § 1115 (First Degree Rape is punishable by death or imprisonment for five years to life without parole). The remaining sentences are also within statutory range. In Count II, Appellant was sentenced to life in prison for Assault and Battery with a Deadly Weapon. The statutory range of punishment is any term up to life in prison. 21 O.S.Supp.2007, § 653(C). In Count IV Appellant was sentenced to twenty years imprisonment for Forcible Oral Sodomy, the maximum allowed by 21 O.S.Supp.2009, § 888(A).

Appellant asserts modification is due in part because at the time of the crimes he was only sixteen years old and was intoxicated to the extent he "blacked out". Appellant admits that while intoxication is not a defense to the elements of the charges in this case, and

that the level of his intoxication would not have supported a voluntary intoxication defense, his intoxication can be considered by this Court, along with his youth, in determining the appropriateness of sentence modification.

In cases relied upon by Appellant, the age of the defendant alone warranted modification of the sentence only in so far as the United States Supreme Court ruled that juveniles could not be sentenced to death. In all other cases, age was only one of many considerations in determining the appropriateness of a particular sentence. Likewise, intoxication alone has not been considered sufficient to warrant sentence modification, but can be considered along with other evidence. In *Stanley v. State*, 1971 OK CR 360, ¶ 12, 489 P.2d 495, relied upon by Appellant, this Court modified the sentence of one year in the county jail for pointing a dangerous weapon due to the defendant's intoxication at the time of the crime and because there were serious evidentiary questions.

In the present case, the record indicates the jury and judge were well aware of Appellant's age and his level of intoxication at the time of the crimes. Appellant testified in some detail to the alcohol and beer he had consumed before the party and at the party, that he had become "plain drunk" and "passed out", and that he had "passed out" or "blacked" out on previous occasions when drinking. However, the evidence also showed that Appellant voluntarily drank to excess and that his conduct during the crimes was not consistent with a person having "passed out" or "blacked out".

There is no indication the evidence of intoxication was in any way ignored by the judge or jury. Based upon this record, we see no reason for modification.

Appellant also contends his sentences were excessive because he was not allowed to present "mitigating evidence" in regard to sentencing at his jury trial and at formal sentencing. In *Malone v. State*, 2002 OK CR 34, ¶¶ 6-7, 58 P.3d 208, 209-210, we held that under 22 O.S.2001, §§ 970-973, when the jury assesses punishment "there simply is no provision allowing for mitigating evidence to be presented in the sentencing stage of the trial" of a non-capital case. Appellant requests this Court reconsider our decision in *Malone* and adopt the reasoning from Judge Chapel's dissent that this Court should "adopt a second, sentencing, stage in non-capital felony proceedings, during which the jury may hear evidence in aggravation and mitigation of the crime, in order to assist in the determination of an appropriate individualized sentence." *Id.*, 58 P.3d at 211.

In *Malone* we explained:

> Oklahoma's criminal statutes allow non-capital defendants, at the time of formal sentencing, to explain to the trial judge "any legal cause" they have why judgment should not be pronounced against them" citing 22 O.S.2001, § 970. But 22 O.S.2001, § 971 qualifies the phrase "any legal cause" by giving specific grounds for such a showing of cause, i.e., insanity and those grounds that would support a motion for new trial in 22 O.S.2001, § 952.

> This appears to be a purely legal matter – except where there is the discovery of new evidence – and the full extent of "allocution" provided under Oklahoma law, except as set forth below.
>
> 22 O.S.2001, § 973 allows "either party" at the sentencing stage to raise "circumstances which may be properly taken into view, either in aggravation or mitigation of punishment," but only in those cases where the issue of punishment has been left to the judge. In all other cases, i.e., when the defendant has demanded the jury to assess punishment or the trial judge has allowed the jury to assess punishment, there simply is no provision allowing for mitigating evidence to be presented in the sentencing stage of the trial. This is a limitation enacted by our Legislature, and the limitation is undoubtedly constitutional.

2002 OK CR 34,¶¶ 6-7, 58 P.3d at 209-210.

We see no reason to depart from this reasoning, and decline Appellant's invitation to reconsider our decision. As Appellant was tried by jury for non-capital offenses we find no error in the absence of any "formal presentation" of mitigating evidence. This statutory limitation on the formal presentation of mitigating evidence did not deny Appellant the opportunity to present his defense. Appellant, like all criminal defendants, had the opportunity to present to the trier of fact any evidence to mitigate or lessen culpability and/or punishment, limited only by relevancy concerns. As we said in *Malone:*

> Certain evidence that may be in fact "mitigating" or "aggravating" will inevitably be introduced throughout any trial, although that evidence is admitted to prove the elements of the crime, to support a legal defense, or to impeach a witness. A criminal defendant's story will in fact be told, by the witnesses he or she chooses and through his or her own testimony.

2002 OK CR 34, ¶ 8, 58 P.3d at 210.

Appellant further argues that 22 O.S.2001, § 973 violates equal protection because he would have been able to present mitigating evidence if he had chosen to be sentenced by the judge. Appellant did not challenge the constitutionality of this statute before the trial court. Therefore, we review his claim only for plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

State laws are presumed valid when analyzing an equal protection claim. *Love v. State*, 2009 OK CR 20, ¶ 6, 217 P.3d 116, 118. *See also State v. Howerton*, 2002 OK CR 17, ¶ 16, 46 P.3d 154, 157 ("[e]very presumption must be indulged in favor of the constitutionality of an act of the Legislature, and it is the duty of the courts, whenever possible, to harmonize acts of the Legislature with the Constitution.") Parties alleging the unconstitutionality of a statute have the burden of proof. *Howerton*, 2002 OK CR 17, ¶ 18, 46 P.3d at 158. Appellant must show that § 973 impermissibly interferes with his exercise of a fundamental right or operates to his disadvantage as a member of a suspect class, or

show that the statute is not rationally related to a legitimate state interest." *Love*, 2009 OK CR 20, ¶ 6, 217 P.3d at 118. Appellant has failed to meet his burden. We have previously found § 973 constitutional. *Malone*, 2002 OK CR 34, ¶ 7, 58 P.3d at 210. Appellant has not convinced us otherwise.

Having reviewed and rejected Appellant's reasons for modifying his sentences, we find that under the facts and circumstances of this case, modification of the sentences in Counts II and IV is not warranted, and further modification of the sentences in Counts I and III to a sentence less than life imprisonment is not warranted.

Finally, we find no abuse of the trial court's discretion in running the sentences consecutively. There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2001, § 976. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. *Id.*, 21 O.S.2001, § 61.1. *See also Riley v. State*, 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535 (Lumpkin, J., concur in results); *Pickens v. State*, 1993 OK CR 15, ¶ 41, 850 P.2d 328, 338. Due to the shocking brutality of the crimes committed by Appellant, we find no abuse of the trial court's discretion in allowing the sentences to run consecutively as our statutes contemplate. This proposition is denied.

In his third proposition of error, Appellant challenges the effectiveness of trial counsel. He argues

counsel was ineffective for 1) failing to object to photographs admitted into evidence, to the prosecutor's leading of the State's witnesses and the prosecutor's closing argument, and to irrelevant evidence and other crimes evidence; 2) waiving opening statement; 3) failing to sufficiently advocate for Appellant regarding sentencing; and 4) failing to present mitigating evidence.

An analysis of an ineffective assistance of counsel claim begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both a deficient performance and resulting prejudice. *Eizember*, 2007 OK CR 29, 151-152, 164 P.3d at 244, *citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Strickland* sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. *Id*. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.* Unless the defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

As the U.S. Supreme Court recently said in *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 791-792, ___ L.Ed. 2d ___ (2011)

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable. (internal citations omitted).

Appellant first complains that counsel failed to raise any objections to the photographs despite the trial court's reservations and warning to the prosecutor concerning the prejudicial and cumulative nature of the photographs. Specifically, Appellant complains about photographs of the victim's healed wounds, two "nearly identical" photos of the victim's belt and bra, and repetitive photographs of the car and its bloody interior.

The admissibility of photographs is a matter within the trial court's discretion and absent an abuse of that discretion; this Court will not reverse the trial court's ruling. *Warner v. State*, 2006 OK CR 40, ¶ 167,

144 P.3d 838, 887. Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. *Id.* The probative value of photographs can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the *corpus delicti* and depicting the crime scene.

Each of State's Exhibits 83-99 was a photograph of a different healed stabbed wound to a different area of the victim's body. The photographs were taken approximately three months after Appellant's assault on K.J. Appellant claims these photos were prejudicial as the jury had already seen photos of the wounds shortly after they were inflicted. However, the photos of the open wounds did not depict each wound; as did the photos of the healed wounds, nor did they adequately illustrate the location of each wound. The photos of the healed wounds clearly showed the location of the wounds on the victim's body and the size of each wound (as they measured by a ruler also seen in the photograph). Apart from K.J.'s testimony and the photographs, no other testimony concerning the stab wounds was admitted. The healed wounds and the resulting visible extensive scarring, was relevant and admissible as it showed the injuries inflicted by Appellant's own hand had lasting consequences for the victim. *See Le v. State*, 1997 OK CR 55, ¶ 25, 947 P.2d 535,548 (photographs of victim's wounds admissible as they showed defendant's "handiwork"). *See also Stouffer v. State*, 2006 OK CR 46, ¶¶ 102-104, 147 P.3d 245, 268 (photographs of victim's scars inadmissible as

they showed work of surgeon and not that of defendant). Accordingly, as the photographs were properly admitted into evidence, counsel's failure to raise any objection does not satisfy the requirements of *Strickland* because any such objections would have been properly overruled. *Cruse v. State*, 2003 OK CR 8, ¶ 11, 67 P.3d 920, 923.

Counsel's failure to object to two photographs of the victim's belt and bra was likewise not indicative of ineffective assistance. Contrary to Appellant's claim, the photographs were not "nearly identical". State's Exhibit 28 primarily depicted the victim's belt as it is shown in the middle of the photo with the bra partially visible in the bottom left corner. State's Exhibit 29 primarily depicted the bloodied bra with the belt partially visible off to the side. These two photos are not so cumulative as to be prejudicial and any such objection by counsel would have been overruled.

With respect to photos of the car, 41 were admitted. (State's Exhibits 1527, 42-69). Thirteen of those showed the car at the crime scene. Of those, four photos showed the interior while nine depicted the exterior of the car. Twenty-eight photos of the car parked in a garage were admitted, with eleven photos showing the exterior and seventeen showing the interior of the car. Each photograph depicts a different angle or area of the car. In the photographs taken at the darkened crime scene, the car is illuminated only by the headlights of two nearby cars, while the garage photos were taken in a fully lighted area. The photographs corroborate the testimony of K.J. and others at the scene that

there was blood everywhere inside and outside of the car. Images of smeared blood and blood droplets, as well as finger and hand prints, also corroborated the victim's description of the attack occurring in various areas of the car. Further, as the car was essentially the "crime scene", the photos helped establish the *corpus deliciti* of the crime. While the trial judge appropriately warned the prosecutor concerning the volume of photographs offered, we find those admitted into evidence were not needlessly cumulative and that counsel was not ineffective for failing to raise objections.

Appellant next argues counsel was ineffective in failing to object to the prosecution's leading questions during his examination of the victim. The record shows defense counsel raised one objection during direct examination and one objection during redirect examination that the prosecutor was leading the witness. At one point in direct, the judge noted that the prosecutor had "been leading all day." (Tr. Vol. I, pg. 211). During re-direct, counsel's objection caused the prosecutor to rephrase his question and brought a warning from the judge that he would cut the prosecutor off if he was merely going to bolster the victim's testimony. (Tr. Vol. I, pg. 292).

Under 21 O.S. 2001, § 2611(D) "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." Here, the record shows the prosecutor did lead the witness to a certain extent. However, a closer look shows the crux of the victim's testimony, namely her account of the physical attack

and rapes, was not established through leading questions. The majority of the leading questions was used to develop that testimony. Having thoroughly reviewed the record, defense counsel's failure to raise additional objections does not satisfy the *Strickland* standard as Appellant cannot show how he was prejudiced by counsel's omissions. *See Jones v. State*, 1976 OK CR 261, ¶ 13, 555 P.2d 261, (leading questions by both prosecutor and defense counsel held not so prejudicial as to affect jury's verdict).

Appellant next finds counsel ineffective for failing to object to testimony by the State's experts, including the serologist and fingerprint examiner from the Oklahoma State Bureau of Investigation (OSBI), and the Sexual Assault Nurse Examiner (SANE) nurse, regarding their general procedures for performing their jobs. Appellant calls this evidence "irrelevant" as it had no application to the case at hand.

Contrary to Appellant's argument, this testimony was highly relevant as it laid the foundation for establishing the witnesses as experts and as it provided the foundation for how they conducted their jobs in relation to Appellant's case.[2] This testimony was relevant

[2] Appellant specifically points out the SANE nurse, Ms. Spurrier, who testified to her general protocol but also testified she did not follow that protocol in this case. Ms. Spurrier testified that she was not able to strictly follow her usual procedures because the severity of the victim's injuries required immediate surgery and she had to wait until after surgery to do her examination. The relevancy of Spurrier's testimony was not impacted by her inability to perform her usual procedure. Further, while defense counsel did not object during the witnesses' testimony,

in aiding the jury in its determination of the credibility of those witnesses and the weight to be accorded their testimony. Counsel was not ineffective for failing to raise an objection to this relevant evidence.

Appellant further argues defense counsel was ineffective for failing to object to inflammatory and irrelevant other crimes evidence. Specifically he refers to testimony that during his arrest he threatened to kill those at the scene. As addressed in Proposition IV, evidence of Appellant's threats was not other crimes evidence but *res gestae* of the charged offenses. Therefore, as the evidence was properly admitted, counsel was not ineffective for failing to raise an objection which would have been denied.[3]

Appellant further finds counsel ineffective for failing to object to the prosecutor's closing argument. Appellant claims the prosecutor severely distorted his theory of defense by arguing that the defendant claimed there was a conspiracy against him. The record shows that Appellant's defense was that he was framed by the victim's boyfriend and that the State did not prove that he sexually assaulted K.J. To rebut this

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counsel did argue in closing that Spurrier did very little in this case.

[3] The record shows the trial judge questioned the State's intent in presenting the evidence and admonished the prosecutor that further evidence of Appellant's threats ran the risk of giving the defense an issue on appeal. However, the court found the testimony given to that point relevant and admissible. (Tr. Vol. II, pgs. 377-378). The issue was not addressed again until Appellant's testimony where he admitted threatening those present at his arrest. (Tr. Vol. III, pgs. 718-729).

defense and in response to defense counsel's closing argument, the prosecutor essentially argued that Appellant's defense only worked if all of the prosecution witnesses acted together to assault the victim and then to cover it up. While the prosecutor was the first to use the term "conspiracy", his argument was based on the evidence and did not totally distort the theory of defense. Any error in defense counsel's failure to raise an objection did not render the result of the trial unreliable.

Appellant also claims counsel failed to object to the prosecutor's vouching for the victim. Appellant refers us to the prosecutor's statement during closing argument that, "I submit to you what [the victim] has told you about what happened in her car is true. Again, I submit to you what [the victim] has told you is true." (Tr. Vol. IV. pgs. 806-807).

"Argument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' questions in a manner that tended to bolster the credibility of the State's witness." *Pickens v. State*, 2001 OK CR 3, ¶ 42, 19 P.3d 866, 880. Here, the prosecutor's comments were based upon the evidence as he reviewed it for the jury. His comments were not explicit personal assurances of the victim's credibility nor were they a hint at some extrajudicial evidence of guilt. The

comments simply did not constitute improper vouching. Therefore, counsel was not ineffective for failing to raise an objection.

Appellant next finds counsel ineffective for failing to give an opening statement. "Whether to make an opening statement in any case is a strategic decision counsel must make." *Taylor v. State*, 2000 OK CR 6, ¶ 38, 998 P.2d 1225, 1235, overruled on other grounds, Malone v. State, 2007 OK CR 34, ¶ 22, 168 P.3d 185, 196, n. 48. We will not second guess counsel's trial strategy. *Id.*, ¶ 34, 998 P.2d at 1235. Appellant has not shown that trial counsel's decision not to make an opening statement was prejudicial or that it impacted the verdict. *Id.*

Appellant next argues counsel failed to present a complete defense by failing to offer admissible mitigating evidence and argument in regards to the guilt/innocence determination. Specifically, Appellant asserts that counsel should have obtained an expert to explain the possible effects of alcohol, that counsel should not have suggested in closing argument that Appellant did not rape the victim, and that counsel should have asked the jury for mercy in sentencing. Appellant now asserts trial counsel's omissions failed to subject the State's case to proper "adversarial testing".

As addressed in Proposition II, since this is a non-capital case, Appellant was not legally entitled to present "mitigating evidence". *Malone*, 2002 OK CR 34,¶¶ 6-7, 58 P.3d at 209-210. Therefore, counsel was

not ineffective for failing to present evidence he was not legally entitled to present. In so far as Appellant asserts evidence from an expert to explain the possible effects of alcohol was admissible during the guilt/innocence stage, he concedes the evidence would not have been sufficient to establish a voluntary intoxication defense or "character evidence". (Appellant's brief, pg. 33 n. 9). *See* 21 O.S. 2001, § 153 ("[n]o act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition". *See also Jones v. State*, 1982 OK CR 112, ¶ 13, 648 P.2d 1251, 1255.

Despite the seemingly inadmissible nature of the evidence, Appellant stands firm in his argument that such evidence would have been relevant in the jury's determination of his credibility for guilt/innocence purposes as well as the jury's determination of punishment. We fail to see the relevance of the evidence. Generally speaking, the possible side effects of alcohol are not a topic most laypeople need an expert to set out. Further, it is not clear from the record whether Appellant has been evaluated by any experts concerning the possible side effects of his consumption of alcohol. The relevance of the possible side effects of alcohol on someone other than Appellant is questionable. Additionally, while Appellant sees his alcohol consumption as an addiction, which with supporting evidence could have benefitted his defense, it can also been seen as voluntary conduct which results in Appellant harming others and the presentation of such evidence would be detrimental to Appellant. What could reasonably be

viewed as mitigating evidence to one person may be viewed as aggravating evidence to another. *Murphy v. State*, 2002 OK CR 24, 1154, 47 P.3d 876, 886-887.

The decision to call witnesses is a strategic decision which this Court will not second guess on appeal. *Matthews v. State*, 2002 OK CR 16, ¶ 32, 45 P.3d 907, 919. Based upon the record before us, counsel's decision not to call an expert on the possible side effects of alcohol consumption was reasonable trial strategy which we will not second guess. The record shows counsel extensively questioned Appellant on the amount of alcohol he drank the day and night of the party and the effects of that alcohol. Counsel sufficiently presented the issue for the jury's consideration. Appellant has failed to show that if counsel had presented any expert testimony, that the result of the trial would have been different.

In closing argument, defense counsel told the jury the defense did not mean to diminish the injuries and suffering of the victim, but they questioned whether she was sexually assaulted by Appellant. Counsel based this argument on Appellant's own testimony that he did not remember sexually assaulting the victim, Nurse Spurrier's abbreviated sexual exam, results of DNA testing which did not show "matches" between the DNA taken from the victim and Appellant's DNA, and other evidence suggesting Appellant had been "set up" by the victim's boyfriend. Appellant argues counsel was ineffective because the jury would have resented the attack on the credibility of the victim who had suffered so much. That is always a risk for defense

counsel. It's the job of defense counsel to challenge the victim's credibility and to weigh the benefits of doing so with the risk of alienating the jury. Here, counsel clearly weighed those factors and attempted to minimize any risk by essentially apologizing to the jury for the argument and attempting to make it clear to the jury that the defense did not mean to imply the victim was in any way responsible for the horrendous suffering she endured. Counsel's closing argument does not warrant a finding of ineffectiveness.

Appellant next argues counsel was ineffective for failing to make a plea of mercy before the jury. This was a one stage trial. For counsel to argue for minimal sentencing would have been inconsistent with Appellant's own testimony that he did not attack the victim and would have been a concession of guilt. Counsel's argument regarding sentencing was a matter of trial strategy. Under the circumstances of this case, we find counsel's strategy reasonable and not subject to second guessing.

Appellant next asserts counsel was ineffective for failing to present mitigating evidence and argument to the court at formal sentencing. Specifically, he argues that counsel could have presented to the court evidence contained within affidavits included in his contemporaneously filed *Application for Evidentiary Hearing on Sixth Amendment Grounds*, and that counsel should have insisted that the parole officer who prepared the pre-sentence investigation report testify at the sentencing hearing.

Contrary to his earlier argument, Appellant admits that at formal sentencing counsel did argue there were "mitigating circumstances" for the court to consider before imposing sentence and these included Appellant's young age and the "ravages of alcohol and marijuana". (S. Tr. pgs. 4-5). However, Appellant argues counsel was ineffective for failing to present any evidence in support of his arguments, evidence which could have "provided the court with a balanced view of the pros and cons of running Appellant's sentences concurrently and ordering treatment during incarceration". (Appellant's brief, pg. 41).

In his *Application to Supplement Appeal Record In Regard To Claim of Ineffective Assistance of Trial Counsel and Application for Evidentiary Hearing*, Appellant requests this Court allow supplementation of the record on appeal with documents which were not presented to the trial court but could have been presented through supporting witnesses at Appellant's formal sentencing. These documents include copies of Appellant's records from Cherokee Nation Jack Brown Treatment Center; Kansas, Oklahoma, Public Schools; and Oklahoma Juvenile Authority. (Exhibits A-V).[4]

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[4] Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to "utilize available evidence which could have been made available during the course of trial. . . ." *Short v. State*, 1999 OK CR 15, ¶ 93, 980 P.2d 1081, 1108-1109. Once an application has been properly submitted along with supporting affidavits, this Court reviews the application to see if it contains sufficient evidence to show this Court by

As addressed in Proposition II, the parameters of formal sentencing are very limited. When a defendant has elected to have the jury determine punishment, as in Appellant's case, state statutes do not allow for the presentation of "mitigating evidence" in a non-capital case such as Appellant's. *See Malone*, 2002 OK CR 24, §§ 6-7, 58 P.3d at 209-210 *citing* 22 O.S.2001, §§ 970-973. Prior to the trial court's pronouncement of the sentence, the defendant may offer any legal cause limited to either a reasonable ground for believing the defendant is insane or grounds that would support a motion for new trial. *Id.* If no such legal cause is shown, the trial court must pronounce sentence. *Id.*

Appellant had no legal grounds to present "mitigation evidence" to the jury. Therefore, we will not find counsel ineffective for failing to present evidence he was not legally able to present. Reviewing the affidavits submitted by Appellant in his *Application for Evidentiary Hearing*, they concern Appellant's history of alcohol abuse, troubled home life, school discipline and behavioral problems, and in-patient treatment with Oklahoma Juvenile Authority. None of the affidavits contain any information which supports a claim that Appellant was insane or that a new trial is warranted.

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clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. *Id.* In order to meet the "clear and convincing" standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo. *Id. Simpson v. State*, 2010 OK CR 6, 230 P.3d 888.

Appellant insists that had the trial judge had some documentation of Appellant's troubled history and some scientific evidence, he would not have relied on his own personal experience in rendering sentencing. As discussed above, the evidence Appellant now offers was not the kind of evidence which could be presented at formal sentencing. Further, the judge did not merely rely on his own personal experiences in imposing sentence. In pronouncing sentencing, the judge made his feelings about the case quite clear. He commented that after sitting through the jury trial and reviewing the Pre-Sentence Investigation Report (PSI), "this is probably the cruelest case that I have ever presided over in the twelve years I have been here. Short of killing the victim, I don't know that there was any more degradation that could have been heaped upon this victim that [sic] what was heaped upon her during this episode." (S.Tr. pg.6). The judge momentarily injected a personal note that he had family members who were half Native American and had trouble with alcohol. However, he did not attribute Appellant's alcohol problems with the fact he was Native American. Rather, based upon findings in the PSI and the evidence at trial, the judge said that Appellant was one of those people that when they drink too much alcohol, they "want to hurt somebody". The judge told Appellant, "when you drink too much, you just get mean". (S. Tr. Pg. 7). The judge went on to state that Appellant's age was the only redeeming value and the PSI indicated Appellant was a likely repeated offender. The judge said he found no reason to allow Appellant out of prison "to get drunk and hurt somebody else." (S.Tr.

pgs. 7-8). Appellant has failed to show that any evidence he now offers would have had any impact at formal sentencing.

Having thoroughly reviewed the evidence contained in the affidavits attached to the *Application for Evidentiary Hearing*, we find Appellant has failed to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to present evidence he was not legally able to present at formal sentencing. His request for an evidentiary hearing on this issue is **DENIED**.

Further, we find counsel was not ineffective for failing to require the preparer of the PSI to appear at sentencing. Contrary to Appellant's argument, the Confrontation Clause does not apply at sentencing proceedings. *United States v. Martinez*, 413 F.3d 239, 242-243 (2nd Cir. 2005) *citing Williams v. Oklahoma*, 348 U.S. 576, 584, 79 S.Ct. 421, 426, 3 L.Ed. 516 (1959). The court quite clearly considered the information contained in the PSI prior to sentencing and Appellant has failed to show he was prejudiced by the inability to cross-examine the preparer.

Finally, Appellant finds counsel ineffective for failing to argue that the sentences should be run concurrently. Based upon the trial court's comments at sentencing, any such request for concurrent sentences would have been overruled, Appellant has not shown any prejudice by counsel's omission.

Having thoroughly reviewed Appellant's claims of ineffective assistance of counsel, we find Appellant has

failed to carry his burden to show either deficient performance by counsel, or prejudice from the omission of this specific evidence. Merely because appellate counsel may have defended the case in a different manner is not grounds for finding trial counsel ineffective. *See Shultz v. State*, 1991 OK CR 57, ¶ 9, 811 P.2d 1322, 1327. This proposition is denied.

In his fourth proposition, Appellant contends the trial court erred in admitting evidence of uncharged offenses. Specifically, Appellant refers to testimony regarding his threats made at the scene of the crime that "he was going to kill everyone", that "he was going to scalp him or something like that", and he "threatened to send people after us to kill and all that". (Tr. Vol. II, pgs. 326-27, 350, 371). Appellant did not raise any objection to this evidence, therefore, we review only for plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 695.

The record reflects Appellant's statements were made while he was being arrested. Both T.J. and his friend D.M. testified to finding Appellant at the scene as described by K.J. – "passed out" in the back seat of the car with his pants down. The witnesses testified they had to wake Appellant up and it was clear he was intoxicated. The witnesses testified Appellant was combative, cursed and threatened those at the scene and even attempted to leave then [sic] scene prior to the police chief's arrival. This conduct continued through his arrest.

Title 12 O.S.2001, 2404(B) prohibits the admission of evidence of "other crimes, wrongs, or acts" to prove the character of a person in order to show action in conformity therewith absent one of the specifically listed exceptions. *Eizember v. State*, 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230. An act that is not a violation of the criminal law is nonetheless governed by § 2404(B) where it carries a stigma that could unduly prejudice an accused in the eyes of the jury. *Id.* When the State seeks to introduce evidence of a crime other than the one charged, it must comply with the procedures in *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds, Jones v. State*, 1989 OK CR 7, 772 P.2d 922. *Id.* Evidence of bad acts or other crimes may also be admissible where they form a part of an "entire transaction" or where there is a "logical connection" with the offenses charged. *Id.* 2007 OK CR 29, ¶ 77, 164 P.3d at 230. This *res gestae* exception differs from the other listed exceptions to the evidence rule; in that in the listed exceptions, the other offense is intentionally proven, while in the *res gestae* exception, the other offense incidentally emerges. *Id.* "Evidence is considered *res gestae*, when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *Id.*

The evidence in this case was not introduced as evidence of other crimes, but as evidence of the charged crimes and the surrounding circumstances. Although the evidence in this case occurred after the commission

of the criminal offenses, it still falls under the *res gestae* exception as it helped to give the jury a full picture of the crime. *Fontenot v. State*, 1994 OK CR 42, ¶ 47, 881 P.2d 69, 83. As this Court stated in *McElmurry v. State*, 2002 OK CR 40, 60 P.3d 4:

> It is not the duty of the court to anesthetize a crime in order to protect a defendant from the natural consequences of his own intentional acts. The State is permitted to re-create the circumstances known to the witnesses that occurred simultaneously with the crime and incidental to it as part of the res gestae of the crime. These events can be established by both expert and lay witnesses. Res gestae are those things, events, and circumstances incidental to and surrounding a larger event that help explain it.

2002 OK CR 40, ¶ 63, 60 P.3d at 21-22:

Further, during direct examination, Appellant admitted making the threats. He explained that he fell asleep in K.J.'s car and woke up on the ground. He said he was pushed around and his pants were pulled down. He admitted at least three times to threatening those at the scene because he didn't understand why he was being arrested, his requests to pull his pants up were ignored, he was falsely being accused of rape, he was angry and people were laughing at him. (Tr. Vol. III, pgs. 718-729).

Therefore, even if the evidence of the threats should not have been introduced by the State, the evidence came in through Appellant's own testimony and

he cannot now complain of error. *Lott v. State*, 2004 OK CR 27, ¶ 103, 98 P.3d 318, 345 (an appellant will not be permitted to profit by an alleged error which he or his counsel in the first instance invited by opening the subject or by their own conduct). We find Appellant was not prejudiced by the evidence. Therefore, no relief is warranted and this proposition is denied.

In his final proposition of error, Appellant contends the accumulation of error warrants reversal of his convictions and at the very least modification of his punishment. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732 (and cases cited therein). However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.*

In the present case we found that Appellant's sentences of life without the possibility of parole in Counts I and III for First Degree Rape were illegal and those sentences have been appropriately modified. No further errors have been found to warrant relief. Reviewing the cumulative effect of any errors we find they do not require reversal or further sentence modification as none were so egregious or numerous as to have denied Appellant a fair trial. *Id.* Accordingly, this proposition of error is denied.

DECISION

The Judgments in Counts I – IV are ***AFFIRMED.*** The Sentences in Counts II and IV are ***AFFIRMED,*** and the Sentences in Counts I and III are ***MODIFIED*** **TO LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE.** The *Application to Supplement Appeal Record In Regard To Claim of Ineffective Assistance of Trial Counsel and Application for Evidentiary Hearing* is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

APPEARANCES AT TRIAL	**APPEARANCES ON APPEAL**
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OPINION BY: LUMPKIN, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
SMITH, J.: CONCUR

RB

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KEIGHTON JON BUDDER, Appellant,	)	
v.	)	Case No. F-2010-555
STATE OF OKLAHOMA Appellee.	)	

ORDER DENYING REHEARING AND DIRECTING ISSUANCE OF MANDATE

(Filed Nov. 29, 2011)

Appellant was convicted in a jury trial before the Honorable Robert G. Haney, District Judge, of two counts of First Degree Rape, Assault and Battery with a Deadly Weapon and Forcible Oral Sodomy, in the District Court of Delaware County, Case No. CF-2009-369. The jury recommended as punishment imprisonment for life without the possibility of parole for both counts of First Degree Rape, life imprisonment on the Assault and Battery conviction and twenty (20) years for the Forcible Sodomy conviction. On appeal, this Court affirmed the convictions and sentences in *Budder v. State*, opinion not for publication, October 24, 2011, except that the sentences imposed for the two First Degree Rape convictions were modified to life in prison with the possibility of parole.

Appellant is now before the Court on a Petition for Rehearing, Rule 3.14, *Rules of the Court of Criminal*

Appeals, 22 O.S.2001, Ch. 18, App. According to Rule 3.14, a Petition for Rehearing shall be filed for two reasons only:

(1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) That the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

In his sole ground for rehearing, Appellant contends we did not fully address all aspects of his arguments based upon *Graham v. Florida*, {BLANK} U.S. {BLANK}, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010) for modification of his sentences of life without the possibility of parole for First Degree Rape.

This Court fully considered all of Appellant's argument raised in the direct appeal brief and did not overlook any issue duly submitted. This Motion for Rehearing is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 29th day of November , 2011.

/s/ Arlene Johnson
ARLENE JOHNSON, Presiding Judge

/s/ David B. Lewis – Dissent
DAVID B. LEWIS, Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN, Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Clancy Smith
CLANCY SMITH, Judge

ATTEST:

/s/ Michael S. Richie
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEIGHTON BUDDER, Petitioner-Appellant, v. MIKE ADDISON, Warden, Respondent-Appellee.	No. 16-6088

ORDER

(Filed May 2, 2017)

Before **BRISCOE, MATHESON, and PHILLIPS,** Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk