No. 17-405

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF

1. Respondent refuses to make eye contact with the elephant in the room: a deep split among courts as to the scope of the rule of *Graham v. Florida*,[1] as well as the related rule in *Miller v. Alabama*.[2] In all, over two dozen courts have taken a position on either side of the question of whether *Graham* and *Miller* apply to the aggregate effect of consecutive sentences for multiple crimes.[3]

This vast fault line separating courts across the nation is important for two reasons. First, it demonstrates the need for resolution by this Court.[4] Even if Respondent is ultimately correct on the merits of the *Graham* question – which is almost the entire focus of his Brief in Opposition – those arguments do little to relieve the pressing need for certiorari to resolve this dispute.

Second, the widespread disagreement among courts on this issue reveals how far the court below has strayed from the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in granting *habeas* relief in this case. "Reflecting the lack of guidance from this Court,"[5] many courts have held that *Graham* does not,

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

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

[3] *See* Pet. 25 nn.105 & 106, 28-33. Since the Petition was filed, at least one additional case has been decided. *See Sam v. State*, 401 P.3d 834 (Wyo. 2017).

[4] *See* Sup. Ct. R. 10.

[5] *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

or does not clearly, apply to the aggregate effect of multiple sentences.[6] And since many courts have been persuaded in either direction by "reasonable arguments on both sides," that is all Oklahoma "needs to prevail in this AEDPA case."[7] "This split demonstrates that [Respondent]'s expansive reading of *Graham* is not clearly established."[8] At the very least, AEDPA should require "a persuasive explanation of how so many courts erred so obviously."[9] Yet Respondent gives none.

Respondent attempts to distinguish this Court's recent decision in *Virginia v. LeBlanc*,[10] which reversed a grant of AEDPA relief based on a question left open by *Graham*, by stating that *LeBlanc* presented a different question.[11] Of course it did; the Petition does not argue otherwise. But what Respondent ignores is *LeBlanc*'s statements about *why* review was necessary: the Court of Appeals' holding "created the potential for significant discord in the Virginia sentencing process" because "Virginia courts were permitted to impose – and required to affirm – a sentence like respondent's, while federal courts presented with the same fact pattern were required to grant habeas relief."[12] Thus,

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[6] Pet. 25 n.105; *see also Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), *cert. denied sub nom. Bunch v. Bobby*, 133 S. Ct. 1996 (2013).

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

[8] *Bunch*, 685 F.3d at 552.

[9] *Moore v. Biter*, 742 F.3d 917, 921 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of reh'g *en banc*).

[10] 137 S. Ct. 1726 (2017).

[11] Br. in Opp. 15.

[12] *LeBlanc*, 137 S. Ct. at 1729.

"[r]eversing the Court of Appeals' decision in this case – rather than waiting until a more substantial split of authority develops – spares Virginia courts from having to confront this legal quagmire."[13] The same is true here: under state court precedent, trial courts are allowed to give offenders like Budder multiple consecutive sentences, but the Tenth Circuit's decision – which state courts are not bound by – would require habeas relief for those very same offenders.[14] Indeed, the "significant discord" in this case is even more pronounced than in *LeBlanc*, because other states in the Tenth Circuit (*e.g.*, Colorado and Kansas) are in the same quagmire.[15]

2. The only hint of an attempt by Respondent to address the significant split among courts on this *Graham/Miller* issue is his claim that "the State cites no nonhomicide case where a child received life sentences that undisputably deny any meaningful opportunity for release."[16] In essence, Respondent argues that his sentences are different because they involve the label "life," whereas other courts have addressed consecutive non-life sentences where the result is the same: the total of sentences will not allow for any practical opportunity for parole. But this argument

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[13] *Id.* at 1729-30.

[14] *See* App. 25; *Mardis v. Oklahoma*, No. F-2014-942 (Okla. Crim. App. Feb. 4, 2016), *cert. denied*, 137 S. Ct. 566 (2016).

[15] *See, e.g.*, *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *State v. Redmon*, 380 P.3d 718 (Kan. Ct. App. 2016). Still other states, such as New Mexico and Utah, have yet to see courts decide the issue.

[16] Br. in Opp. 14-15.

contradicts the entirety of the rest of Respondent's Brief in Opposition: that the focus of *Graham* is a "meaningful opportunity for release" regardless of the "label."[17] The parties agree that the categorical rule[18] of *Graham* is centered on realistic parole eligibility; they disagree as to whether that rule forbids only single sentences for single nonhomicide crimes that deny parole eligibility, or whether it also forbids the aggregate effect of multiple sentences for multiple crimes. Respondent cannot fall back on a semantic difference he elsewhere firmly rejects in order to wish away the split on this issue.

For example, Respondent argues that the Sixth Circuit's decision in *Bunch v. Smith*[19] – which conflicts with the decisions of the Ninth Circuit and the Tenth Circuit below – is distinguishable because that case "involv[ed] stacked term-of-years sentences" of 89 years total, while Budder's involves sentences that

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[17] Br. in Opp. 1 (describing *Graham* as holding "that children convicted of nonhomicide offenses sentenced to life imprisonment without parole must be afforded a meaningful opportunity of release"); *id.* at 12 ("*Graham* focused not on how a sentence is labeled, but eyed a single concern: an irrevocable 'denial of hope.' "); *id.* at 13 ("It is clear that the denial of hope matters, not the sentence label."); *id.* at 15 (Budder, "regardless of the rote label change by the OCCA, has never had any hope" for release).

[18] Contrary to Respondent's suggestion, Petitioner does not advocate for a case-by-case interpretation of *Graham* instead of a categorical bar. Br. in Opp. 14. Rather, Petitioner has always acknowledged the categorical nature of *Graham*'s prohibition. *See* Pet. 14-17, 20, 28-29. The question here is the *scope* of that categorical rule.

[19] 685 F.3d 546 (6th Cir. 2012).

calculate to 131.75 years before parole eligibility.[20] But as Judge O'Scannlain points out in his seven-judge dissent from rehearing *en banc* in *Moore*, that factual distinction "does not make a meaningful difference."[21] It is true that Bunch will not be eligible for parole until he is 95,[22] Moore until he is 144,[23] and Budder until he is 147.75. But the bottom line is that Budder, like Bunch and "like Moore, will not be eligible for parole until well beyond his life expectancy," which in Bunch's case is only to the age of 70.[24] And "nothing in the Sixth Circuit's opinion turns on the possibility that Bunch might outlive his sentence."[25] Tellingly, Respondent does not argue that his sentence would be constitutional if he, like Bunch, were parole eligible at age 95. To the contrary, if his sentence were thus modified after granting of habeas relief, a second habeas petition would be sure to follow.

The many other courts addressing the *Graham* question on direct review have done so in cases involving similar facts, and none of those decisions turn on the inmate being eligible for parole during his natural lifetime. For example, an Arizona court upheld

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[20] Br. in Opp. 15.

[21] *Moore*, 742 F.3d at 921 (O'Scannlain, J., dissenting from denial of reh'g *en banc*).

[22] *Bunch*, 685 F.3d at 551 n.1.

[23] *Moore*, 742 F.3d at 921 (O'Scannlain, J., dissenting from denial of reh'g *en banc*).

[24] *Id.* (citing *State v. Bunch*, No. 06 MA 106, 2007 WL 4696832, at *5 (Ohio Ct. App. Dec. 21, 2007) (Bunch "indicates, with citation to authorities, that his life expectancy is only 70 years.")).

[25] *Id.*

consecutive sentences totaling 139.75 years without parole eligibility,[26] the Louisiana Supreme Court upheld parole ineligibility until the offender is 86 years old,[27] and a Tennessee court upheld against a *Graham* challenge a total term without parole of 225 years.[28] And courts on the other side of the divide – those that agree with Respondent on the underlying *Graham* question – made their decisions based on similarly long aggregates.[29] Try as he might, Respondent cannot avoid the deep divide on this issue.

3. Sidestepping the questions about whether review is warranted in this case, Respondent instead focuses almost exclusively on arguments as to why *Graham* should be read to extend its prohibition to the aggregate effect of multiple, consecutive sentences. Respondent, for example, argues that the penological interests discussed in *Graham* counsel for a similar result in this case. But as pointed out in the Petition – and as Respondent has failed to respond to – the penological interests at stake in *Graham* differ from the penological interests at stake in this case.[30] That *Graham* never addressed these particular penological interests

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[26] *State v. Kasic*, 265 P.3d 410, 413, 415-16 (Ariz. Ct. App. 2011).

[27] *State v. Brown*, 118 So.3d 332, 335 (La. 2013).

[28] *State v. Merritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at *6 (Tenn. Crim. App. Dec. 10, 2013).

[29] *See, e.g.*, *Henry v. State*, 175 So.3d 675, 679-80 (Fla. 2015) (parole ineligible until 95 years old), *cert. denied*, 136 S. Ct. 1455 (2016); *State v. Boston*, 363 P.3d 453, 454 (Nev. 2016) (parole after 100 years); *State v. Moore*, 76 N.E.3d 1127, 1133 (Ohio 2016) (parole ineligible until 92 years old).

[30] Pet. 20-23.

(which relate to deterrence, incapacitation, and retribution) demonstrates that the question of the aggregate effect of consecutive sentences was not before the *Graham* Court. And "because that question was not presented," habeas relief is unwarranted.[31]

Respondent instead suggests that, despite the Court in *Graham* never mentioning the Eighth Amendment's application to the aggregate effect of multiple sentences, "[t]he *Graham* Court . . . took full account of the multiple violent offenses" simply because it cited the trial court judge's comments on Terrance Graham's "escalating pattern of criminal conduct."[32] Thus, Respondent argues, Petitioner's interpretation of *Graham* "would have foreclosed relief for Terrance Graham himself."[33]

This is simply not true. The *Graham* Court, although noting Graham's multiple crimes, explicitly evaluated only whether his single sentence of life without parole for a single crime violated the Eighth Amendment, and never addressed the constitutional implications of his second sentence, were it to be run

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[31] *LeBlanc*, 137 S. Ct. at 1728-29. Respondent also points to this Court's statements on the categorical difference of a single homicide crime and a single nonhomicide crime. Br. in Opp. 10-11. But the Court never suggested that a *single* simple homicide offense, such as a negligent or involuntary manslaughter, always involves more moral culpability and reflects more "permanent incorrigibility" than *many* repeated violent rapes and vicious assaults. Logic and common sense would counsel otherwise.

[32] Br. in Opp. at 11, 13 n.5 (citing *Graham*, 560 U.S. at 57-58, 73).

[33] Br. in Opp. 13.

consecutively.[34] The Court, for example, did not direct the Florida courts on remand to ensure his sentences were not run consecutively if that would result in a total sentence that functionally meant life without parole. Whatever Graham's criminal history prior to his appearance before this Court, both the majority and dissent were singularly focused on the constitutionality of a single sentence. Indeed, the fact that Graham's case involved multiple sentences but the Court only explicitly addressed its decision to one of those sentences – with nary a mention of the potential cumulative effect of consecutive sentences – demonstrates that *Graham* did not "clearly establish" the Eighth Amendment's scope with respect to the aggregate effect of multiple sentences for multiple crimes.

This is made most clear by the fact that, as argued in the Petition, the sentences included in the *Graham* Court's survey of the prevalence of the sentence at issue did *not* include any juveniles with multiple consecutive sentences where no individual sentence amounted to life without parole.[35] Meanwhile, many individuals who were sentenced by the time of *Graham* would have their sentences invalidated using the rule adopted by the court below, even though they were not listed by

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[34] *See Graham*, 560 U.S. at 63 (stating that the "case concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense"); *id.* at 52-53 (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").

[35] Pet. 16-20.

this Court as having the type of sentence prohibited by *Graham*.[36] Thus, for example, Timothy Willbanks of Missouri, Roosevelt Moore of California, and Chaz Bunch of Ohio would all have their aggregate sentences invalidated by Respondent's proposed rule, even though they were sentenced at the time of *Graham* and were excluded from *Graham*'s tally of individuals with the type of sentence prohibited by *Graham*.[37] The fact that so many states will have sentences overturned by the rule Respondent advocates – but not by *Graham*'s rule – is in part why 17 states as *amici* have urged this Court to grant certiorari.[38]

Respondent has no response to this irrefutable inconsistency between *Graham* and the holding of the court below as to what *Graham* "clearly established." At most, Respondent quibbles with the methodology of the Petition's survey of the issue, arguing in a footnote that the survey of individuals ineligible for parole for at least 45 years due to consecutive sentences "is of no value here" because Budder's "punishment is

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[36] *See id.*

[37] Pet. 18-19. Petitioner notes that Budder *was* included in *Graham*'s tally given his sentence at the time of *Graham*, and misleadingly contends that this indicates Budder's *current* sentence was "clearly" intended by the Court to be prohibited by *Graham*. Br. in Opp. 12 n.4. But of course, Budder was only so included because two of his individual sentences were each life without parole, regardless of the cumulative impact of his multiple sentences. The OCCA corrected that error such that Budder's sentence as referenced in *Graham* no longer exists. *See* App. 99-102. Rather, it is the OCCA's opinion taking *Graham* into account that is under review.

[38] *See* Brief of *amici curiae* Kansas et al. 1.

unquestionably more severe than a 45-year aggregate sentence."[39] In other words, Respondent takes issue only with where Petitioner's survey drew the line. Petitioner reasonably drew this line based on how other courts have determined the timeframe of functional parole ineligibility.[40] Regardless of which States should or should not be included in Petitioner's tally at the margin,[41] Respondent's objection misses the larger point. Because *Graham* did not take *any* of these sentences into account in its own pivotal survey, it stands to reason that *Graham* cannot be said to "clearly" cover those situations.[42]

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[39] Br. in Opp. 15 n.6; *cf.* Pet. 19-20.

[40] *See, e.g.*, *Bear Cloud v. State*, 334 P.3d 132, 136, 141-42 (Wyo. 2014) (aggregate sentence of "just over 45 years" without the possibility of parole was "for practical purposes a lifetime in prison" and thus "the functional equivalent of life without parole").

[41] Notably, many of the individuals were sentenced far beyond the contested 45-year baseline. Wisconsin, for instance, reported six individuals facing anywhere from 120 to 220 years in prison without an opportunity for release. *See also* Pet. 18-19. It cannot be disputed that these cases were not considered in *Graham*, and any suggestion that they are not comparable to Budder's case is without merit.

[42] Although Respondent focuses on comments from the trial judge who originally sentenced him to life without the possibility of parole, Br. in Opp. 2-3, that sentence was modified by the Oklahoma Court of Criminal Appeals (OCCA), App. 129, and is not the subject of this Petition or the habeas decision below. *See Greene v. Fisher*, 565 U.S. 34, 40 (2011) (federal habeas courts review "the last state-court adjudication on the merits"); *Coleman v. Thompson*, 501 U.S 722, 735 (1991) (same). And the OCCA decision under review approved running Respondent's sentences consecutively because of the "shocking brutality of the crimes," App. 106, not because of the trial court's comments. In any event,

4. Finally, Respondent fails to make any argument on the Second Question Presented: "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?"[43] Respondent simply omits the question from his "corrected" list of Questions Presented.[44] But whether Respondent acknowledges it or not, the Courts of Appeals are divided 3-2 on the question of whether law can ever be clearly established for purposes of habeas review when there is such deep disagreement on the existence of the underlying right.[45] Review is warranted on this issue, and Respondent does not argue otherwise.

CONCLUSION

For these reasons, Petitioner, joined by seventeen other states as *amici*, asks this Court to grant the writ

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the OCCA addressed the trial judge's statements, finding that the judge "did not attribute Appellant's alcohol problems with the fact he was Native American." App. 121.

[43] Pet. i.

[44] *See* Br. in Opp. i-ii.

[45] Pet. 35-36.

of certiorari, either to summarily reverse the judgment of the Tenth Circuit or to grant review on the merits.

Respectfully submitted,

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