No. _____

In The
Supreme Court of the United States

JAMES GOINS,

Petitioner,

v.

KEITH SMITH, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an aggregate prison term imposed on a juvenile for nonhomicide offenses that does not permit release before 100 years of age, constitute a sentence of life without parole as prohibited by the Eighth Amendment to the U.S. Constitution?

CORPORATE DISCLOSURE STATEMENT

James Goins, through counsel, makes the following disclosures:

1. James Goins, Petitioner herein, is neither a subsidiary nor an affiliate of a publicly owned corporation.

2. There is no publicly owned corporation, nor a party to the appeal, that has a financial interest in the outcome.

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PETITION FOR A WRIT OF CERTIORARI

James Goins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion affirming the district court's judgment is unpublished but electronically reported at *Goins v. Smith*, 2014 U.S. App. LEXIS 3041 (6th Cir. Ohio, 2014). The United States District Court decision denying habeas relief is unpublished but electronically reported at 2012 U.S. Dist. LEXIS 102418 (N.D. Ohio, July 24, 2012). The Ohio Supreme Court's denial of leave to appeal is reported at 889 N.E.2d 1027 (Ohio 2008). The Ohio Court of Appeals' decision following James' resentencing to the sentence challenged here is unpublished but electronically reported at 2008 WL 697370 (Ohio Ct. App. 2008). Each is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Sixth Circuit's opinion was filed on February 18, 2014. On May 2, 2014, Petitioner requested an extension of time to file his Petition for a Writ of Certiorari until and including June 18, 2014. (No. 13A1099) Justice Kagan granted that extension on

May 7, 2014. This Court's jurisdiction is thus timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At age sixteen, James Goins was charged with multiple nonhomicide offenses. He was convicted after a jury trial. The trial court sentenced him to 86 years in prison, which was later reduced to 84 years in prison. The length of the court's sentence was based on its view that James could *never* be rehabilitated and therefore, since he was a juvenile a longer sentence was necessary to ensure he could not be released until he was 100 years old – or, practically

speaking, he would die in prison. The subsequent holding by the Sixth Circuit Court of Appeals that an 84 year prison term without parole eligibility imposed upon a 16-year-old boy for nonhomicide offenses violates clearly established precedent of this Court and is in direct conflict with the Ninth Circuit's holding on the same issue in *Moore v. Biter,* 725 F.3d 1184 (9th Cir. 2013).

1. Facts

On January 29, 2001, James Goins, age 16, along with his 16-year-old best friend and soon to be co-defendant Chad Barnette, approached an elderly man, William Sovak, outside his home in Youngstown, Ohio. The boys pushed Mr. Sovak into his home and assaulted him and put him in a storage room in the basement so they could escape with his car keys. Mr. Sovak survived but sustained serious injury. Later that same day, the two boys broke into the home of Mr. Sovak's neighbor and demanded money from the two homeowners, Mr. and Mrs. Luchisan. They stole $187 in cash, a 27-inch TV and took their car. Both Mr. and Mrs. Luchisan were hit in the head and sustained injuries.

2. Procedure

James timely filed a notice of appeal to the Seventh District Court of Appeals, Mahoning County, Ohio, and argued "Appellant was denied the ability to remain free from cruel and unusual punishments when the trial court imposed maximum consecutive sentences." On March 21, 2005, the Seventh District Court of Appeals affirmed in part and reversed in part the sentence reducing James' sentence to 74 years in prison.

On May 5, 2005, James filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court raising the following issue: "Maximum consecutive sentences for a juvenile offender, never before sentenced to prison, and necessarily predicated upon findings of commission of the worst form of offense and the greatest likelihood of recidivism, violate both the right to trial by jury . . . as well as the prohibition against cruel and unusual punishments."

On September 7, 2005, the Ohio Supreme Court accepted the appeal on Proposition of Law I and held for decision in *State v. Foster*, 845 N.E.2d 470 (Ohio 2006). On May 3, 2006 the Ohio Supreme Court reversed and remanded to the trial court for a resentencing hearing consistent with *State v. Foster*.

On August 7, 2006, the trial court resentenced James to 84 years in prison. James filed a timely appeal to the Seventh District Court of Appeals, Mahoning County, Ohio raising the following assignment of

error: "The trial court imposed cruel and unusual punishment upon Defendant-Appellant James Goins in violation of the Eighth Amendment to the United States Constitution when it sentenced him to a term of eighty-four years of imprisonment, effectively a life sentence without the possibility of parole." The Seventh District Court of Appeals affirmed on March 10, 2008. (Record Entry No. 8-1, Opinion, Exh. 20, PageID # 378-385).

On April 24, 2008, James filed a timely appeal to the Ohio Supreme Court raising the following propositions of law: "The trial court imposed cruel and unusual punishment upon Defendant-Appellant James Goins, a 16-year old child at the time of these offenses, when it sentenced him to a term of 84 years of imprisonment, effectively a life sentence without the possibility of parole, in violation of the Eighth Amendment to the United States Constitution." The Ohio Supreme Court declined jurisdiction.

Pursuant to 28 U.S.C. § 2254, James filed a Petition for a Writ of Habeas Corpus on July 7, 2009 in the United States District Court for the Northern District of Ohio, asserting the following ground for relief: "Petitioner's sentence must be vacated as the sentences imposed violated the Petitioner's jury trial right and right to be free from cruel and unusual punishment."

On May 18, 2010, James filed a Motion to Establish Briefing Schedule based on this Court's decision in *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011

(2010). On September 7, 2010, the district court granted James' Motion to Establish Briefing Schedule. The district court subsequently denied James' petition on July 24, 2012.

James filed a Motion for Certificate of Appealability which was granted. On February 18, 2014, the Sixth Circuit Court of Appeals affirmed the district court's decision denying James' writ.

REASONS FOR GRANTING THE WRIT

The Court should grant this request for a writ of certiorari because the Sixth Circuit Court of Appeals' opinion directly conflicts with Ninth Circuit Court of Appeals' opinion on the same vital issue of constitutional importance: whether the imposition of multiple consecutive fixed-term sentences that equate to a life sentence with no chance of early release on a juvenile for a nonhomicide offense, violates the Eighth Amendment of the U.S. Constitution.

This Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010) and reaffirmed in *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) set forth the categorical rule that it is a violation of the Eighth Amendment to sentence a juvenile offender to life in prison without parole for a non-homicide offense. The question remains unsettled whether *Graham* clearly established that consecutive, fixed-term sentences for juveniles who commit multiple non-homicide offenses are unconstitutional when they

amount to the practical equivalent of life without parole. According to the Ninth Circuit, the answer to that question is "yes" (*Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013)), according to the Sixth Circuit, the answer is "no." Pet. App. 1. *See also*, *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012). The Sixth Circuit even noted the conflicting opinions in James Goins' decision.

> Several additional courts have addressed the issue in the interim, and the decisions continue to be split. The Ninth Circuit recently held that aggregate consecutive sentences of 254 years for a juvenile non-homicide offender are "materially indistinguishable" from the life sentence without parole at issue in *Graham*. *Moore v. Biter*, 725 F.3d 1184, 1191-92 (9th Cir. 2013). Similarly, in *Thomas v. Pennsylvania*, No. 10-4537, 2012 U.S. Dist. LEXIS 181424, 2012 WL 6678686, *2 (E.D. Pa. Dec. 21, 2012), the district court held that the imposition of aggregate consecutive sentences of 65-to-150 years with eligibility for parole at age 83 on a juvenile non-homicide offender (more than a decade beyond his life expectancy) was unconstitutional under *Graham*. In contrast, in *United States v. Walton*, 537 Fed. Appx. 430, 2013 WL 3855550, *6 (5th Cir. 2013) (unpublished), cert. denied, *Walton v. United States*, 134 S. Ct. 712, 187 L. Ed. 2d 572, 2013 WL 5810157, *1 (Dec. 2, 2013), the Fifth Circuit held that a forty-year sentence imposed on a juvenile for conspiracy to use a firearm in relation to a crime of violence and car jacking

> resulting in death was not an Eighth Amendment violation under *Graham* or *Miller*.

Pet. App. 11-12 at fn. 5. Both *Moore* and *Goins* were cases reviewed under 28 U.S.C. § 2254 and came to diametrically opposing views based on the same deferential standard of review.

James Goins was born on August 16, 1984, and was 16 years old at the time of his offense. He was sentenced to 84 years in prison, a sentence which, if upheld, would allow him to next experience freedom on February 6, 2085. On that very day, he will turn 100 years old, which is not mere coincidence but the result of the expressed intention of the trial court judge. "**It is the intention of this Court that you should not be released from the penitentiary and the State of Ohio during your natural lives**."

To argue that because the words chosen by the judge when imposing "84 years" rather than "life in prison," where the intention and math of the sentencing court were clearly to ensure Mr. Goins died in prison, ignores the spirit of *Graham* and *Miller*. There is no genuine distinction between the sentence imposed by the State of Florida upon Mr. Graham and that imposed by the State of Ohio upon Mr. Goins: the intention of each sentencing court was the same. *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

legal rule must be applied." (internal citations and quotations omitted)).

James Goins satisfies all of the requirements for the recently announced categorical rule: he was 16 years old when he committed these offenses. None of the offenses were homicidal. The facts of James' case are materially indistinguishable from those in *Graham*. Both defendants committed armed robberies when they were 16 years old. Both were with friends at the time of the offense. And both were sentenced to spend the rest of their lives incarcerated with no meaningful opportunity for release. "A state court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The degree to which James' claim fits hand-in-glove with Mr. Graham's is remarkable, and requires review by this Court. James is entitled to a new sentencing hearing where the issue of his age can be considered as a mitigating factor, and his personal potential for rehabilitation can be specifically considered.

1. James' sentence is grossly disproportionate to the severity of his offense and is therefore unconstitutional.

James' sentencing judge referred to him as having a "Michael Meyers type of problem" stating:

> You had to know, and you had to know after you did that when you broke into the Luchesan's [sic] house and busted her over the head with a sawed-off shotgun – I don't know that sitting in a penitentiary or getting older or anything is what solves that problem. That's a problem that – I don't know – it's like a Michael Myers type of a problem. It's a scary problem. It's – it's evil, I can't escape that thought. I can't escape that picture.

(Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 527). These comments by the sentencing judge's characterization betray an (arrogant) knowledge that James possessed an incurable evil personality. The court based its certainty solely on the offense conduct, without any psychiatric evaluation or other consideration of the required factors.

Similarly, a California appellate court determined that a sentence of 84 years for a crime committed while the offender was a juvenile violates the Eighth Amendment. *California v. Mendez*, No. B217683 (Cal. 2d Dist. App. Sept. 1, 2010). Mr. Mendez was 16 years old at the time of the offense, and at 18 years old was sentenced to 84 years in prison. The appellate court in *Mendez* observed that an 84 year sentence is in essence, the same as a life sentence when the average life expectancy of an 18-year-old male is 76, and Mr. Mendez would not be eligible for parole until after he was 88 years old. *Id.* at 17. The appellate court observed the sentencing judge's reference to Mr.

Mendez as a "sociopath" and the judge's statement, "I'm totally convinced that this particular defendant has no conscience, has no conscience for society or other people's lives and property. He just doesn't understand the importance of being a law-abiding member of society, not at all, and he's proven that since age ten." *Id.* at 18. The appellate court found that while Mr. Mendez may be irredeemable, it was unconstitutional for the trial court to make this determination at the outset of the sentence. *Id.*

The sentencing court's analysis of the severity of the sentence cannot be based solely on the *offense*, but rather requires the court to conduct an independent review of the *offender*. The appellate court's complete failure to conduct the required analysis renders its application of constitutional law objectively unreasonable. Any state court's failure to conduct an inquiry that is required by clearly established federal law constitutes an unreasonable application of that law under 28 U.S.C. § 2254(d)(1). *See*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003) (unreasonable state court application of *Strickland v. Washington*, 466 U.S. 669 (1984), for failing to inquire into the reasonableness of defense counsel's strategic decision not to investigate mitigating factors); *also see Harris v. Cotton*, 365 F.3d 552, 557 (5th Cir. 2004) (the state court failed to apply the reasonable probability standard under *Strickland*); and *Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005) (state court's analysis of *Strickland* unreasonably focused on one factor to the exclusion of other relevant factors).

In *Graham*, Chief Justice Roberts conducted the proper proportionality analysis in his concurring opinion finding that a life sentence for Mr. Graham's nonhomicide offense committed while he was a juvenile was disproportionate and unconstitutional. *Graham*, 560 U.S. at 92-93. Based on this analysis, Chief Justice Roberts concluded that there was an inference that Graham's sentence was "grossly disproportionate" and violated the Eighth Amendment. *Id.* Roberts then analyzed the national consensus on sentences of life without parole for juveniles and concluded Mr. Graham's sentence was unconstitutional.

Mr. Goins' circumstances parallel those involving Mr. Graham. The offenses were grave: both defendants committed serious crimes deserving of punishment – armed robberies. However, their punishments were disproportionately severe given their diminished culpability: both defendants committed these crimes when they were 16 and both were in the presence of other juveniles at the time of the offense. *See*, *Graham*, 560 U.S. at 91-92, noting that a juvenile's culpability is further diminished by a "likely enhanced [ ]susceptibility to peer pressure." See also, Mark T. Freeman, *Meaningless Opportunities: Graham v. Florida's "Meaningful Opportunity for Release" for Juvenile Offenders and the Reality of De Facto LWOP Sentences*, 44 McGeorge L. Rev. ___ (2013). Using the proper Supreme Court-mandated analysis, James' sentence is grossly disproportionate.

2. The state court failed to give the required weight to James' diminished culpability as a minor, in violation of *Graham*.

When sentencing an offender who was a juvenile at the time of his offense, a court must consider the offender's diminished culpability based upon his youth. This diminished culpability stems from the recognition that juveniles lack the maturity and sense of responsibility of their adult counterparts. *Graham*, 560 U.S. at 68, citing *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). Furthermore, a juvenile's brain is fundamentally different from an adult's in that it has yet to fully develop the functioning involved with behavior and impulse control. *Id.* Juveniles are also more receptive to rehabilitation. *Id.*

This Court recognized the significance of these inherent differences. The Court also acknowledged that judges and juries could not be trusted to look beyond the nature of the juvenile's offense in order to properly weigh the juvenile's diminished culpability and impose a fair sentence. *Id.* at 71, citing *Roper*, 543 U.S. at 572-73 ("'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.'")

During James' resentencing hearing the trial judge explained his sentencing consideration in black

and white terms, expressly discounting the considerations required as discussed above:

> Well, it's beyond – it's beyond imagination for me to understand what you did there. I – now, all of us grew up, all of us did things in our youth, and a lot of things that we did maybe weren't things that we're proud of or things that we would do again when we get older, but what you did to these people is beyond what's – it's unforgivable is what it is. It's – it's inexcusable. It's unthinkable. I don't know how a child, a 16-year old child, could commit such a crime. And I struggled with that, you know. I would like very much to think that, "Well, it's just because you were a kid and you didn't know any better," but you had to know leaving that guy to die in his basement was as bad a thing as anybody could ever do.

(Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 526-527).

> The Court considers the presentence – it's not really a presentence investigation, and notes the Defendant's statement that he and his codefendant got bored, so they decided to rob two houses that were near them. He says he didn't mean for anyone to get hurt. I don't know how you strike an elderly woman with a sawed-off shotgun and don't expect her to get hurt, but I would think even a 16-year old would know that.

(Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 546).

> So a similar sentence for a similar crime in someone who would strike an elderly woman in the head with a sawed-off shotgun while burglarizing her house and robbing her and participating in those acts against an elderly gentlemen [sic] who went out to pick up his newspaper, beating him, smashing his face with a telephone, taking him and tossing him down the cellar steps, kicking him, sticking him in the basement fruit cellar and locking him in there to die, well persons who commit crimes like that are persons who should suffer maximum sentences. I don't see the opportunity for mercy or reduction in cases like this where crimes are committed by persons without conscience, without – without feeling, without – without anything but evil and hatred and viciousness. Persons who come to court then and ask for mercy certainly showed no mercy toward the victims of these crimes.

(Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 544-545).

The sentencing judge also misunderstood why juveniles have diminished culpability as evidenced by his comment that "he just didn't know any better" and "even a 16-year old would know that." As explained by this Court in *Graham*, juveniles do not have diminished culpability because they do not know right from wrong, but rather because they are not as

capable of *appreciating* the difference and the consequences. Consider the fact that 5 year olds are routinely found competent to testify at trial – a judge will find that the child knows the difference between a lie and the truth, and knows that it is bad to lie, therefore, the child is competent. However, that same child would never be convicted of murder if she or he killed his or her friend – the child would not be presumed to genuinely appreciate how long a lifetime is or how much value life has. There is a substantive difference in knowing right from wrong versus appreciating the consequences of one's actions. This difference, and the sentencing judge's failure to understand it, spotlights the unreasonable application of established Eighth Amendment precedent in James' sentencing.

As stated above, a determination that the juvenile is irredeemable cannot be made at the beginning of a sentence. *Graham*, 560 U.S. at 77. Here, James Goins was sentenced three separate times. The comments made by the sentencing judge cited above occurred in the final sentencing hearing, five years after the offense. James' attorneys attempted to present evidence demonstrating his rehabilitation and maturity: his institutional record, his voluntary entrance into every available program, his genuine remorse and acceptance of responsibility for his crimes, and his financial payment to the victims of crime in a related civil suit. (Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 519-523). James' himself addressed the

judge, thanking him for giving him the time in prison to analyze his life. (Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 525-526). However the judge cut him off, and continued with the court's monopolized focus on the subjectively perceived inexcusable nature of the offense. (Record Entry No. 16-2, Transcript of Proceedings Resentencing, 8/2/2006, PageID # 526).

Finally, this Court should accept this case because the ends do not justify the means. Despite the gravity of the offense conduct, this Court has held that non-homicide offenses committed by a juvenile simply do not justify a life sentence with no possibility of release during the juvenile's natural life expectancy.

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored.

Graham, 560 U.S. at 70-71 (internal citations omitted).

> As for the punishment, life without parole is "the second most severe penalty permitted by law." It is true that a death sentence is "unique in its severity and irrevocability," yet life without parole sentences share some

> characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the 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, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

Id. at 69-70 (internal citations omitted).

Under established Eighth Amendment jurisprudence of this Court, a life sentence with no opportunity for release in his lifetime could not be constitutionally imposed upon offenses committed by James Goins as a 16-year-old, and the Ohio courts have followed an unreasonable application of that jurisprudence in holding otherwise.

CONCLUSION

Given all of the above, this Court should grant certiorari, consider this case on the merits and resolve the split among the lower courts. This issue is of the utmost importance, and particularly to James Goins who will otherwise continue to be subjected to an unusually cruel and unconstitutional sentence.

Respectfully submitted,

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No. 12-4040

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES GOINS Petitioner-Appellant, v. KEITH SMITH, Warden, Respondent-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO (Filed Feb. 18, 2014)

Before SILER, MCKEAGUE, and WHITE, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Petitioner James Goins appeals the district court's denial of his petition for a writ of habeas corpus. Goins was convicted of attempted murder, aggravated burglary, aggravated robbery, kidnapping, and felonious assault by an Ohio state-court jury; four of the counts included gun specifications. The state trial court sentenced Goins to consecutive prison terms for the various offenses totaling 85½ years. On appeal, the Ohio Seventh District Court of Appeals revised Goins sentence down to seventy-four years. The Ohio Supreme Court vacated and remanded for resentencing. On remand, the trial court resentenced Goins to an aggregate term of eighty-four years' imprisonment. The Ohio Seventh District Court of Appeals affirmed

the sentence, and the Ohio Supreme Court denied leave to appeal. On July 7, 2009, Goins filed this timely petition pursuant to 28 U.S.C. § 2254. We AFFIRM.

I.

We adopt the following facts and procedural history as set forth by the district court:

> On March 12, 2002, an Ohio state-court jury convicted Goins on eleven criminal counts stemming from his participation in two violent home-invasion robberies on January 29, 2001. *State v. Goins,* No. 02-CA-68, 2005 WL 704865, at *21 (Ohio Ct. App. Mar. 21, 2005) (*Goins I*). The evidence at trial showed that Goins and an accomplice, Chad Barnette – both sixteen-years-old at the time – attacked eighty-four-year-old William Sovak as he was picking up his morning newspaper. *Id.* at * 1. The two pushed Sovak "back into his home, repeatedly hit and kicked him, [ ] knocked him to the ground many times," and hit him "on the head with his telephone." *Id.* Goins and Barnette then pushed Sovak "down the stairs to his basement" (at this point, Sovak lost consciousness), dragged him into a fruit cellar, and locked the door to prevent escape. *Id.* Sovak wasn't discovered until later that evening, after a neighbor reported seeing "blood all over" Sovak's house. *Id.* Sovak "sustained a punctured lung, broken ribs and other broken bones." *Id.*

Later that day, Goins and Barnette broke into another home in the same neighborhood. *Id.* In coming upon the residents – sixty-four-year-old (and wheelchair-bound) Louis Luchisan and his wife, Elizabeth – Goins and Barnette demanded money and threatened to kill the Luchisans if they did not comply. *Id.* To prove that they were serious, the two youths "hit Mr. Luchisan over the head with a plate" and "hit Mrs. Luchisan with a telephone." *Id.* And one of the two assailants carried a firearm as they led the Luchisans around the house in a search for money. *Id.* All this brutal treatment for $187, for a 27 [inch] television set, and for the keys to the Luchisans' blue Chevy Malibu. *Id.*

On February 5, 2001, the Youngstown, Ohio, Police Department filed a twelve-count juvenile-delinquency complaint against Goins, alleging that he had committed attempted murder, aggravated burglary, aggravated robbery, kidnapping, and felonious assault. [ ] The juvenile court bound the case over to the Mahoning County Grand Jury, which indicted Goins on the same twelve counts. [ ] Goins was tried as an adult, and was convicted on all but one count.

[T]he state trial court sentenced Goins to the maximum sentence for each count of conviction, all to run consecutively, for a total aggregate prison term of eighty-five-and-a half years. [ ] The sentencing judge explained: "It is the intention of this Court that

you should not be released from the penitentiary and the State of Ohio during your natural li[fe]." [ ]

* * *

Goins appealed his sentence, arguing (1) that the bindover process from juvenile court violated due process; (2) that the trial court's decision to admit purported scientific evidence without first determining its scientific reliability violated due process; (3) that the trial court's decision to allow a witness – Dr. Louis Maddox – to testify about DNA tests performed by others violated the Sixth Amendment; (4) that he was denied the effective assistance of counsel; and (5) that his lengthy sentence was cruel and unusual punishment in violation of the Eighth Amendment. [ ] The Ohio Seventh District Court of Appeals generally rejected Goins's claims, but did revise his sentence down to seventy-four years after concluding that the trial court had incorrectly applied Ohio's merger doctrine and had failed to justify imposing the maximum sentence for one of the aggravated-robbery charges. *Goins I,* 2005 WL 704865, at *21.

Goins then appealed to the Ohio Supreme Court, again arguing that his sentence constituted cruel and unusual punishment [ ]. . . . The Ohio Supreme Court, accepting the appeal only as to Goins's sentence, vacated and remanded for resentencing consistent with its decision in *State v. Foster*, [ ] 845 N.E.2d 470 (Ohio 2006) (severing as unconstitutional

> portions of Ohio's sentencing statutes permitting harsher sentences based on facts found by the sentencing judge rather than the jury and giving trial courts discretion to impose any sentence within the statutory range without first making any findings). *In re Ohio Criminal Sentencing Statutes Cases,* [ ] 847 N.E.2d 1174 (Ohio 2006), *resolving State v. Goins*, [ ] 833 N.E.2d 1246 (Ohio 2005) (*Goins II*) (table).
>
> On remand, the trial court resentenced Goins to an aggregate term of eighty-four years' imprisonment – again, the maximum possible under Ohio law. And Goins again appealed, arguing that this sentence, too, violated (1) the Eighth Amendment, because it was effectively a life sentence without the possibility of parole; and (2) Ohio law, by unnecessarily burdening the state's resources. [ ] The Ohio Seventh District Court of Appeals affirmed the sentence, *State v. Goins,* No. 06-MA-131, 2008 WL 697370 (Ohio Ct. App. Mar. 10, 2008) (*Goins III),* and the Ohio Supreme Court denied leave to appeal, *State v. Goins*, [ ] 889 N.E.2d 1027 (Ohio 2008) (*Goins IV*) (table).

Goins v. Smith, No. 4:90-CV-1551, 2012 WL 3023306, at *1-2 (N.D. Ohio July 24, 2012).

The district court referred Goins's petition to a magistrate judge who recommended that the court deny Goins's petition. *Id.* Goins objected, asserting that in light of *Graham v. Florida,* 560 U.S. 48 (2010), his eighty-four-year sentence violates the

Eighth Amendment's prohibition on cruel and unusual punishment. The district court overruled Goins's objections, adopted the magistrate judge's report and recommendation, and denied Goins's petition. On appeal, Goins argues that his aggregate sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment.

II.

This court reviews a district court's decision to grant or deny a writ of habeas corpus de novo. *Linscott v. Rose,* 436 F.3d 587, 590 (6th Cir. 2006). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a habeas petitioner is not entitled to relief unless the state court's 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). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the

Supreme Court on materially indistinguishable facts." *Boykin v. Webb,* 541 F.3d 638, 642 (6th Cir. 2008) (citing *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000)). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the petitioner's case." *Id.* (citing *Williams,* 529 U.S. at 412-13).

A.

In *Graham,*[1] the Supreme Court held that the Eighth Amendment "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 . . . with some realistic opportunity to obtain release before the end of that term." 560 U.S. at 82.[2] Two years later, in

[1] *Id.* The parties do not dispute that *Graham* applies because it sets forth a new rule prohibiting a certain category of punishment for a class of defendants and can therefore be raised on collateral review notwithstanding *Teague v. Lane,* 489 U.S. 288 (1989).

[2] In adopting a categorical rule that life without parole sentences for juveniles who committed nonhomicide offenses violates the Eighth Amendment, the Supreme Court in *Graham* found that a national consensus has developed against the sentencing practice, and the practice does not serve legitimate penological goals, explaining, "because juveniles have lessened culpability they are less deserving of the most severe punishments," (citing *Roper v. Simmons,* 543 U.S. 551, 569 (2005)). . . .

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Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012), the Court held that *mandatory* life sentences for juvenile offenders, even those sentenced for murder, violate the Eighth Amendment. *Id.*[3] *Miller* did not reach the

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"These salient characteristics mean that '[i]t 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.'" *Graham,* 560 U.S. at 68 (quoting *Roper,* 543 U.S. at 573). "Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" (quoting *Roper,* 543 U.S. at 569). "[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." *Id.* (citing Brief for American Medical Association et al. as *Amici Curiae* 16-24; Brief for American Psychological Association et al. as *Amici Curiae* 22-27).

[3] In finding a violation of the Eighth Amendment, the *Miller* Court observed:

> *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham,* [ ] 130 S. Ct. at 2026. Those cases relied on three significant gaps between juveniles and adults. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Roper,* 543 U.S. at 569 [ ]. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an

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question whether the Eighth Amendment requires a categorical ban on life-without-parole sentences for juveniles. Nor did *Miller* foreclose sentencing courts from imposing such sentences in homicide cases. *Id.* at 2469. The Court did, however, warn:

> But given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper,* 543 U.S., at 573, 125 S. Ct. 1183; *Graham,* 560 U.S., at ___, 130 S. Ct., at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id.

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adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.* at 570.

Miller v. Alabama, 132 S. Ct. at 2464.

Soon after *Miller* was decided, this court addressed *Graham's* application to aggregate consecutive sentences in *Bunch v. Smith,* 685 F.3d 546, 550 (6th Cir. 2012), *cert. denied, Bunch v. Bobby,* 133 S. Ct. 1996 (2013), and held that *Graham* did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple non-homicide offenses are unconstitutional, even when they amount to the practical equivalent of life without parole.[4] Addressing Bunch's consecutive, fixed-term sentence of eighty-nine years for multiple non-homicide offenses, this court held:

> Bunch's sentence was not contrary to clearly established federal law even if *Graham* is considered part of that law. While Bunch claims that his sentence runs afoul of *Graham,* that case 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.

* * *

[4] The defendant in *Bunch* was convicted of robbing, kidnaping, and repeatedly raping a young woman when he was sixteen-years old, and was sentenced to consecutive, fixed terms totaling 89 years. 685 F.3d at 547. Bunch's habeas petition asserted that the trial court violated the Eighth Amendment by sentencing him to "the functional equivalent of life without parole" in contravention of the intervening holding in *Graham. Id.*

> This conclusion is further supported by the fact 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. Some courts have held that such a sentence is a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham*. *See, e.g., People v. J.I.A.,* 127 Cal. Rptr.3d 141, 149 (2011); *People v. Nunez,* 125 Cal. Rptr.3d 616, 624 (2011). Other courts, however, have rejected the de facto life sentence argument, holding that *Graham* only applies to juvenile nonhomicide offenders expressly sentenced to "life without parole." *See, e.g., Henry v. State,* 82 So.3d 1084, 1089 (Fla. Ct. App. 2012); *State v. Kasic,* 228 Ariz. 228, 265 P.3d 410, 415 (App. 2011). This split demonstrates that Bunch's expansive reading of *Graham* is not clearly established. Perhaps the Supreme Court, or another federal court on direct review, will decide that very lengthy, consecutive, fixed-term sentences for juvenile nonhomicide offenders violate the Eighth Amendment. But until the Supreme Court rules to that effect, Bunch's sentence does not violate clearly established federal law.

Id. at 550, 552.[5]

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[5] Several additional courts have addressed the issue in the interim, and the decisions continue to be split. The Ninth Circuit

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The district court applied *Bunch* to the instant case and concluded that "[b]ecause Goins's sentence is not technically a sentence to life imprisonment without the possibility of parole, *Graham's* categorical rule does not 'clearly' apply to him." *Goins,* 2012 WL 3023306, at *6 (citing 28 U.S.C. § 2254(d)). The district court further observed:

> Perhaps more important, the Ohio General Assembly has changed Ohio's sentencing law to markedly improve Goins's ability to pursue release. In particular, Ohio law now permits a defendant to request judicial release after he has served a portion of his sentence. Accordingly, Goins now faces a mandatory prison term of 42 or 45 years, after which he will be able to apply for judicial release. [Doc. 23; 25]. *See* Ohio H. 86, 129th

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recently held that aggregate consecutive sentences of 254 years for a juvenile non-homicide offender are "materially indistinguishable" from the life sentence without parole at issue in *Graham. Moore v. Biter,* 725 F.3d 1184, 1191-92 (9th Cir. 2013). Similarly, in *Thomas v. Pennsylvania,* No. 10-4537, 2012 WL 6678686, *2 (E.D. Pa. Dec.21, 2012), the district court held that the imposition of aggregate consecutive sentences of 65-to-150 years with eligibility for parole at age 83 on a juvenile non-homicide offender (more than a decade beyond his life expectancy) was unconstitutional under *Graham.* In contrast, in *United States v. Walton,* No. 12-30401, 2013 WL 3855550, *6 (5th Cir. July 26, 2013) (unpublished), *cert. denied, Walton v. United States,* No. 13-7111, 2013 WL 5810157, *1 (Dec. 2, 2013), the Fifth Circuit held that a forty-year sentence imposed on a juvenile for conspiracy to use a firearm in relation to a crime of violence and car jacking resulting in death was not an Eighth Amendment violation under *Graham* or *Miller.*

> Gen. Assembly (eff. Sept. 30, 2011) (amending Ohio Rev. Code § 2929.20 to permit offenders to file a motion for judicial release with the sentencing court after the later of one-half of their stated prison terms or five years after expiration of their mandatory prison terms). Although he faces an extremely long sentence, Goins does not face a sentence on the order of the one imposed in *Graham*.

Id. at *7.

B.

Bunch is controlling. Further, even if we were to apply *Graham* to Goins's consecutive, fixed-term sentence for multiple offenses, the district court correctly observed that Goins's meaningful opportunity for parole renders *Graham* inapplicable. *See Graham,* 560 U.S. at 82.

C.

Goins additionally argues that the state appellate court's decision was objectively unreasonable because it failed to correctly apply the proportionality analysis required when sentencing a juvenile, arguing that a state court's failure to conduct an inquiry required by clearly established federal law constitutes an unreasonable application of that law under § 2254(d)(1). *See Wiggins v. Smith,* 539 U.S. 510, 527-28 (2003) (holding that in deferring to counsel's unreasonable decision to limit the scope of investigation

into potential mitigating evidence, the state court of appeals unreasonably applied law clearly established in *Strickland v. Washington,* 466 U.S. 668, 690-91 (1984)).

But consideration of a juvenile's diminished culpability is not a clearly established aspect of the proportionality requirement recognized by the Supreme Court in *Solem v. Helm,* 463 U.S. 277, 290 (1983). Similarly, in *Roper* and *Graham,* although the Supreme Court took the juveniles' diminished culpability into consideration in holding that the death penalty (*Roper*) and life in prison without parole for a non-homicide offense (*Graham*) are categorical violations of the Eighth Amendment, neither case held that a juvenile's diminished culpability must be a factor in a term-of-years proportionality analysis. Further, although *Miller* observed that "*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," 132 S. Ct. at 2475, and this language certainly counsels in favor of considering juveniles' diminished culpability in imposing consecutive term-of-years sentences, *Miller* does not clearly require such an approach where a juvenile faces an aggregate term-of-years sentence. Thus, applying AEDPA, the state appellate court did not unreasonably apply clearly established federal law in failing to require that the sentencing court factor Goins's juvenile status into his sentence.

III.

For these reasons, we AFFIRM the decision of the district court.

2012 WL 3023306

United States District Court for
the Northern District of Ohio
July 24, 2012, Decided; July 24, 2012, Filed
CASE NO. 4:09-CV-1551

James GOINS, Petitioner, v. Keith SMITH, Respondent.

Counsel: For James Goins, Plaintiff: P. Dennis Pusateri, Kura & Wilford, Columbus, OH.

For Keith Smith, Respondent: M. Scott Criss, Office of the Attorney General, Corrections Litigation, Columbus, OH.

Judges: JAMES S. GWIN, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES S. GWIN

Opinion

OPINION & ORDER

[Resolving Doc. No. 1]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

James Goins petitions for a writ of habeas corpus under 28 U.S.C. § 2254. [Doc. 1]. With his petition, Goins seeks relief from his Ohio state-court convictions and sentences for one count of attempted aggravated murder, two counts of aggravated burglary, three counts of aggravated robbery (two with gun

specifications), three counts of kidnapping (two with gun specifications), one count of felonious assault, and one count of receiving stolen property. [Doc. 1; Doc. 16-2]. Respondent Keith Smith, Warden of the prison where the Petitioner is incarcerated, opposes the petition. [Doc. 8]. On February 11, 2010, Magistrate Judge David S. Perelman recommended that the Court deny Goins's petition. [Doc. 11]. Goins objects to that recommendation. [Doc. 12; Doc. 13]. For the following reasons, the Court **OVERRULES** Goins's objections, **ADOPTS** Magistrate Judge Perelman's recommendation, and **DENIES** Goins's petition.

I.

On March 12, 2002, an Ohio state-court jury convicted Goins on eleven criminal counts stemming from his participation in two violent home-invasion robberies on January 29, 2001. *State v. Goins*, No. 02-CA-68, 2005 WL 704865, at *21 (Ohio Ct. App. Mar. 21, 2005) (*Goins I*). The evidence at trial showed that Goins and an accomplice, Chad Barnette – both sixteen-years-old at the time – attacked eighty-four-year-old William Sovak as he was picking up his morning newspaper. *Id.* at * 1. The two pushed Sovak "back into his home, repeatedly hit and kicked him, [ ] knocked him to the ground many times," and hit him "on the head with his telephone." *Id.* Goins and Barnette then pushed Sovak "down the stairs to his basement" (at this point, Sovak lost consciousness), dragged him into a fruit cellar, and locked the door to prevent escape. *Id.* Sovak wasn't discovered until

later that evening, after a neighbor reported seeing "blood all over" Sovak's house. *Id.* Sovak "sustained a punctured lung, broken ribs and other broken bones." *Id.*

Later that day, Goins and Barnette broke into another home in the same neighborhood. *Id.* In coming upon the residents – sixty-four-year-old (and wheelchair-bound) Louis Luchisan and his wife, Elizabeth – Goins and Barnette demanded money and threatened to kill the Luchisans if they did not comply. *Id.* To prove that they were serious, the two youths "hit Mr. Luchisan over the head with a plate" and "hit Mrs. Luchisan with a telephone." *Id.* And one of the two assailants carried a firearm as they led the Luchisans around the house in a search for money. *Id.* All this brutal treatment for $187, for a 27" television set, and for the keys to the Luchisans' blue Chevy Malibu. *Id.*

On February 5, 2001, the Youngstown, Ohio, Police Department filed a twelve-count juvenile-delinquency complaint against Goins, alleging that he had committed attempted murder, aggravated burglary, aggravated robbery, kidnapping, and felonious assault. [Doc. 8-1, at PageID 92-95]. The juvenile court bound the case over to the Mahoning County Grand Jury, which indicted Goins on the same twelve counts. *Id.* at PageID 71-81. Goins was tried as an adult, and was convicted on all but one count.

On March 20, 2002, the state trial court sentenced Goins to the maximum sentence for each count

of conviction, all to run consecutively, for a total aggregate prison term of eighty-five-and-a-half years. [Doc. 8-1, at PageID 132-33; Doc. 16-2]. The sentencing judge explained: "It is the intention of this Court that you should not be released from the penitentiary and the State of Ohio during your natural li[fe]." [Doc. 16-2, at 47].

Goins appealed his sentence, arguing (1) that the bindover process from juvenile court violated due process; (2) that the trial court's decision to admit purported scientific evidence without first determining its scientific reliability violated due process; (3) that the trial court's decision to allow a witness – Dr. Louis Maddox – to testify about DNA tests performed by others violated the Sixth Amendment; (4) that he was denied the effective assistance of counsel; and (5) that his lengthy sentence was cruel and unusual punishment in violation of the Eighth Amendment. [Doc. 8-1, at PageID 136-37]. The Ohio Seventh District Court of Appeals generally rejected Goins's claims, but did revise his sentence down to seventy-four years after concluding that the trial court had incorrectly applied Ohio's merger doctrine and had failed to justify imposing the maximum sentence for one of the aggravated-robbery charges. *Goins I*, 2005 WL 704865, at *21.

Goins then appealed to the Ohio Supreme Court, again arguing that his sentence constituted cruel and unusual punishment and that the trial court erred when it admitted purported scientific evidence without first determining its scientific reliability.

[Doc. 8-1, at PageID 275-79]. Additionally, Goins raised what looks to have been a new argument – that the trial court improperly imposed the maximum available sentence on the basis of facts not found by the jury. The Ohio Supreme Court, accepting the appeal only as to Goins's sentence, vacated and remanded for resentencing consistent with its decision in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470 (Ohio 2006) (severing as unconstitutional portions of Ohio's sentencing statutes permitting harsher sentences based on facts found by the sentencing judge rather than the jury and giving trial courts discretion to impose any sentence within the statutory range without first making any findings). *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 847 N.E.2d 1174 (Ohio 2006), resolving *State v. Goins*, 106 Ohio St.3d 1503, 833 N.E.2d 1246 (Ohio 2005) (*Goins II*) (table).

On remand, the trial court resentenced Goins to an aggregate term of eighty-four years' imprisonment – again, the maximum possible under Ohio law. And Goins again appealed, arguing that this sentence, too, violated (1) the Eighth Amendment, because it was effectively a life sentence without the possibility of parole; and (2) Ohio law, by unnecessarily burdening the state's resources. [Doc. 8-1, at PageID 339]. The Ohio Seventh District Court of Appeals affirmed the sentence, *State v. Goins*, No. 06-MA-131, 2008 WL 697370 (Ohio Ct. App. Mar. 10, 2008) (*Goins III*), and the Ohio Supreme Court denied leave to appeal, *State*

v. Goins, 118 Ohio St.3d 1510, 889 N.E.2d 1027 (Ohio 2008) (*Goins IV*) (table).

On July 7, 2009, Goins filed this timely petition for a writ of habeas corpus, asserting five grounds for relief: (1) that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment; (2) that the trial court improperly imposed the maximum available sentence on the basis of facts not found by the jury; (3) that he was denied the right to confront witnesses against him in violation of the Sixth Amendment; (4) that he received ineffective assistance of counsel; and (5) that the bindover process from juvenile court violated due process. [Doc. 1]. The Court referred Goins's petition to Magistrate Judge Perelman for a Report and Recommendation. Magistrate Judge Perelman recommended that the Court deny Goins's petition, concluding that ground one failed on the merits and that Goins had procedurally defaulted grounds two through five. [Doc. 11].

Goins has filed two objections to Magistrate Judge Perelman's recommendation: *First,* Goins says his Confrontation Clause claim was not – as Magistrate Judge Perelman concluded – procedurally defaulted; *second,* Goins maintains that in light of the Supreme Court's decision in *Graham v. Florida,* ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), his eighty-four-year sentence to incarceration violates the Eighth Amendment's prohibition on cruel and unusual punishment. [Doc. 13; Doc. 17]. Accordingly, the Court reviews Goins's Confrontation Clause and Eighth Amendment claims *de novo*. 28 U.S.C.

§ 636(b)(1) (requiring *de novo* review of only those portions of a Report and Recommendation to which the parties have objected).

II.

Generally, a federal court may not reach the merits of any claim that a habeas petitioner procedurally defaulted in state court. *Reed v. Farley*, 512 U.S. 339, 354-55, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994); *Williams v. Anderson*, 460 F.3d 789, 805-06 (6th Cir.2006). A claim might be procedurally defaulted when, for example, a petitioner fails to comply with a state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 748, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). If, as a result, the state court never reaches the merits of the claim and the procedural rule provides an independent ground for precluding relief, the claim has been procedurally defaulted. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986). A claim also might be procedurally defaulted if the petitioner fails to raise and pursue it through the state's "established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). A federal court excuses these procedural defaults only if the petitioner shows "cause" for the default and "actual prejudice" from the alleged error, or if the petitioner shows that he is actually innocent. *Maupin*, 785 F.2d at 138-39.

If a state habeas petitioner can show that his petition is not procedurally barred, a federal court

must review the merits of the claim under the deferential standards set out in the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). AEDPA governs collateral attacks on state-court decisions and prohibits federal courts from granting habeas relief for any claim that the state court adjudicated on the merits unless the adjudication:

> (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 upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).[1]

A state-court decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth [by the Supreme Court], or if it decides a case differently than [the Court] has done on a set of materially indistinguishable facts." *Bell v. Con*e, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (citing

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[1] If the state's final judgment denying relief on a prisoner's federal claim was set forth in an unexplained order, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, ___ U.S. ___, ___, 131 S.Ct. 770, 784-85, 178 L.Ed.2d 624 (2011).

Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Section 2254(d) requires federal courts "to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law as determined by the Supreme Court of the United States that prevails." *Taylor*, 529 U.S. at 387 (citation omitted). Federal courts must evaluate whether federal law is "clearly established" by reference to "the holdings, as opposed to the dicta, of th[e Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

Similarly, a state-court decision is an "unreasonable application" of clearly established federal law if it unreasonably applies Supreme Court precedent to the facts of a state prisoner's case, or if it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. A decision is not "unreasonable" merely because it is wrong; it must be so wrong that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the [Supreme] Court's precedents." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011).

With that in mind, the Court considers Goins's two objections in turn.

A. Goins procedurally defaulted his Confrontation Clause claim

Goins first complains that the state trial court should not have permitted one witness – Dale Laux – to testify about DNA evidence when it was "not clear from the trial record that Mr. Laux was the only 'analyst' of the DNA evidence." As Goins sees it, Laux's testimony violated Goins's Sixth Amendment right to confront the witnesses against him. [Doc. 1, at 15 (citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)); Doc. 13, at 3]. Because Goins did not pursue this Confrontation Clause claim through "one complete round of the State's established appellate review process," *O'Sullivan*, 526 U.S. at 845, he cannot now assert the claim on federal habeas review.

On his first direct appeal to the Ohio Court of Appeals, Goins did challenge one witness's testimony as a violation of the Confrontation Clause – that was Dr. Louis Maddox, who testified about scientific tests he did not himself conduct. *See* [Doc. 8-1, PageID at 166]. But Goins did not – as he does now – challenge Dale Laux's testimony as a violation of the Confrontation Clause. And in his brief to the Ohio Supreme Court Goins didn't raise *any* Confrontation Clause claim. Accordingly, Goins procedurally defaulted this claim because he did not fulfil his obligation to invoke one full round of the state appellate review process. *See Clinkscale v. Carter*, 375 F.3d 430, 436-41 (6th

Cir.2004) (a claim that was never raised before a state's highest court cannot be deemed "fairly presented" and cannot be reviewed by a federal habeas court). Because Goins offers neither evidence of cause or prejudice excusing this default, nor evidence of his innocence, the Court will not overlook his default. *Maupin*, 785 F.2d at 138-39.

What's more, Goins's Confrontation Clause argument – poorly developed as it is – probably fails. In *Williams v. Illinois,* the Supreme Court reaffirmed that a testifying expert may assume the truth of an out-of-court statement – in that case, a DNA profile produced by an outside laboratory – without violating the Confrontation Clause. ___ U.S. ___, 132 S.Ct. 2221, ___ L.Ed.2d ___ (2012) (plurality). The Court explained: "For more than 200 years, the law of evidence has permitted . . . an expert [to] express an opinion that is based on facts the expert assumes, but does not know, to be true." *Id.* at 2228. Goins can hardly complain, then, that Dale Laux's expert opinion relied on DNA tests conducted by others.

B. Goins's eighty-four-year sentence is not "contrary to," or "an unreasonable application of," the Supreme Court's Eighth Amendment cases

Goins also contends that his eighty-four-year aggregate sentence is "contrary to" his Eighth Amendment right to be free from cruel and unusual punishment. For support, Goins points to *Graham*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825, where the Supreme

Court held that the Eighth Amendment prohibits the imposition of life imprisonment without the possibility of parole on a juvenile non-homicide offender.

As an initial matter, Goins and Respondent Smith agree – and the Court will therefore assume – that *Graham* "prohibits[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry v. Lynaugh*, 492 U.S. 302, 329-30, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and therefore applies retroactively, *see Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Nevertheless, Goins's Eighth Amendment claim was adjudicated on the merits in Ohio state court. Accordingly, this Court still must judge the Ohio courts' decisions against only "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see Greene v. Fisher*,___ U.S. ___, 132 S.Ct. 38, 44, 181 L.Ed.2d 336 (2011) ("The retroactivity rules that govern federal habeas review on the merits – which includes *Teague* – are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other.").

Graham was not, of course, available to the Ohio state courts that rejected Goins's Eighth Amendment claim; the Ohio Supreme Court finally rejected that claim in July 2008, nearly 22 months *before* the Supreme Court decided *Graham*. And that raises some question whether AEDPA permits this Court to consider *Graham* as part of the "clearly established" federal law to which the Ohio Courts' decisions might

be "contrary." *Greene*, 132 S.Ct. at 44 (reserving judgment on the question "[w]hether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*."); *see Bunch v. Smith*, No. 10-3426, 2012 WL 2608484 (6th Cir. July 6, 2012). After all, AEDPA "requires federal courts to focus on what a state court knew and did, and to measure state-court decisions against th[e Supreme] Court's precedents as of the time the state-court renders its decision." *Id.* (citation omitted). In any event, because the Court must reject Goins's claim for another reason, it accepts for this opinion the fiction that *Graham* was "clearly established" federal law at the time Goins was sentenced. 28 U.S.C. § 2254(d).

In *Graham,* the Supreme Court held that the Eighth Amendment categorically prohibits sentences to life imprisonment without the possibility of parole for juvenile offenders who did not commit homicide. 130 S.Ct. at 2030. In the Court's view, sentencing a juvenile non-homicide offender to life imprisonment without the possibility of parole necessarily subsumes an improper determination that the juvenile offender, despite his reduced culpability, has no hope for rehabilitation. *Id.* at 2029-30. And the Court concluded that although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must give such offenders "some meaningful opportunity to obtain release based

on demonstrated maturity and rehabilitation." *Id.* at 2030.

Goins now argues that his eighty-four-year sentence – though not formally a sentence to life imprisonment without the possibility of parole – is functionally the same in that it deprives him of any meaningful opportunity to obtain release during his natural life. Accordingly, Goins says, his sentence is contrary to the clearly established law set forth in *Graham*. In light of the Sixth Circuit's recent rejection of a nearly identical argument, *see Bunch*, 2012 WL 2608484, this Court must reject Goins's claim.

In *Bunch,* a juvenile offender (Chaz Bunch) received consecutive, fixed-term sentences for committing multiple non-homicide offenses in the state of Ohio. *Id.* at *1. Taken together, Bunch's sentences on the individual offenses totaled eighty-nine years. *Id.* Bunch appealed, arguing that his sentence violated the Eighth Amendment, but the Ohio Court of Appeals affirmed and the Ohio Supreme Court denied review.

Bunch then sought federal habeas relief. The district court denied his petition and the Sixth Circuit affirmed. The Sixth Circuit concluded that Bunch was not entitled relief because *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

* 1. Instead, the Court said, *Graham* is a categorical rule applying – "clearly," at least, *see* 28 U.S.C. § 2254(d) – only to sentences to life imprisonment without the possibility of parole. *Bunch*, 2012 WL 2608484, at *5. So even though an eighty-nine-year aggregate sentence without the possibility of parole may be – and probably is – the functional equivalent of life without the possibility of parole, because "no federal court has ever extended *Graham*'s holding beyond its plain language to a juvenile offender who received consecutive, fixed-term sentences, [the Sixth Circuit could not] say that sentence was contrary to clearly established federal law." *Id.*

This Court is required to follow the Sixth Circuit and its decision in *Bunch.* According to that court, long, even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham*'s holding unless the sentence is technically a life sentence without the possibility of parole. Because Goins's sentence is not technically a sentence to life imprisonment without the possibility of parole, *Graham*'s categorical rule does not "clearly" apply to him. 28 U.S.C. § 2254(d).

Perhaps more important, the Ohio General Assembly has changed Ohio's sentencing law to markedly improve Goins's ability to pursue release. In particular, Ohio law now permits a defendant to request judicial release after he has served a portion of his sentence. Accordingly, Goins now faces a mandatory prison term of 42 or 45 years, after which he will be able to apply for judicial release. [Doc. 23; 25]. *See* Ohio H. 86, 129th Gen. Assembly (eff. Sept. 30, 2011)

(amending Ohio Rev. Code § 2929.20 to permit offenders to file a motion for judicial release with the sentencing court after the later of one-half of their stated prison terms or five years after expiration of their mandatory prison terms). Although he faces an extremely long sentence, Goins does not face a sentence on the order of the one imposed in *Graham.*

Without the ability to rely on *Graham,* Goins's Eighth Amendment claim evaporates. This is not the rare case in which a comparison of the crime committed and the sentence imposed leads to an inference that the two are grossly disproportionate. Even though the Supreme Court's "cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality," the gross-disproportionality principle is violated "only in the exceedingly rare and extreme case." *Lockyer v. Andrade*, 538 U.S. 63, 72-73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (internal quotations omitted). And because Goins does not identify a Supreme Court case demonstrating that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law, his petition must be denied. 28 U.S.C. § 2254(d); *see also Friday v. Pitcher*, 99 F. App'x 568 (6th Cir. 2004) (petitioner's focus on his juvenile status as the factor that tips his sentence into a category of "grossly disproportionate" failed to demonstrate his sentence was contrary to, or an unreasonable application of, clearly established federal law).

III.

For these reasons, the Court **OVERRULES** Goins's objections, **ADOPTS** Magistrate Judge Perelman's recommendation, and **DENIES** Goins's petition.

IT IS SO ORDERED.

Dated: July 24, 2012

/s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

James Goins,	:	Case No. 4:09CV1551
Petitioner	:	Judge James S. Gwin
v.	:	Magistrate Judge David S. Perelman
Keith Smith, Warden,	:	
Respondent.	:	**REPORT AND RECOMMENDED DECISION**

In this action in habeas corpus, 28 U.S.C. § 2254, petitioner challenges the constitutionality of his August 2, 2006 re-sentencing to an aggregate term of imprisonment of 84 years, consequent to his conviction pursuant to a jury trial on the following counts. For acts committed against Mr. Sovak, petitioner was convicted of one count of attempted aggravated murder, one count of aggravated burglary, one count of aggravated robbery, and one count of kidnapping. For acts committed against Mr. and Mrs. Luchisan, petitioner was convicted of one count of aggravated burglary, two counts of aggravated robbery, two counts of kidnapping, one count of felonious assault,[1] and one count of receiving stolen property, with four of the counts bearing firearm specifications.

[1] Although he had been charged with two counts of felonious assault, the jury acquitted him of the count for acts committed against Mr. Luchisan.

Petitioner's sentencing history, as well as the facts of his case, were summarized by the state appellate court as follows:

> Goins and Barnette were both juveniles at the time. They pushed Mr. Sovak back into his home, repeatedly hit and kicked him, and knocked him to the ground many times. During this melee, they hit Mr. Sovak on the head with his telephone, causing serious injury. They forced Mr. Sovak to his kitchen where they found a set of keys, which they took. They then pushed Mr. Sovak down the stairs to his basement, where he passed out. The assailants dragged Mr. Sovak to a fruit cellar storage room in the basement and locked the door so that he could not escape. Later that evening, a neighbor of Mr. Sovak telephoned Jerome Jablonski (the victim's half-brother) to report that there was blood all over Mr. Sovak's house. Mr. Jablonski and his brother went to the house and found a trail of blood from the front door to the basement. Mr. Jablonski broke the lock on the fruit cellar and found Mr. Sovak inside, who had sustained a punctured lung, broken ribs and other broken bones.
>
> Also on January 29, 2001, Louis Luchisan, age 64, and his wife Elizabeth, were in their home in the same neighborhood as Mr. Sovak. Mr. Luchisan, who is confined to a wheelchair, had been working at his computer when two assailants kicked in the side door of his house. One of the men was carrying a firearm, which Mrs. Luchisan described

as a sawed-off rifle or shotgun. The two assailants threatened to shoot the Luchisans if they did not give them some money. They hit Mr. Luchisan over the head with a plate, and Mrs. Luchisan saw blood flowing down her husband's head from the wound. Goins and Barnette took Mrs. Luchisan to different rooms in the house looking for money. Mrs. Luchisan gave them about $ 167, while Mr. Luchisan gave them $ 20. Goins and Barnette also hit Mrs. Luchisan with a telephone, and threatened to kill her. She eventually had to have staples put into her head as a result of the injuries.

Just before the attackers left, Mrs. Luchisan heard a car horn beeping, indicating that a third assailant was waiting outside. Goins and Barnette took the keys to Mr. Luchisan's car, a blue Chevy Malibu. They stole the car and a 27-inch television from the Luchisan's home.

The police were notified to be on the lookout for the stolen vehicle. The car was spotted as the police were still inspecting the two crime scenes. Officer Joshua M. Kelly, who was on foot, saw the vehicle and pulled out his service firearm. The car suddenly veered and crashed into a tree. There were four people in the car, including Goins in the front passenger seat. Officers also found a sawed-off rifle in the vehicle, similar in appearance to the weapon used at the Luchisan home. Goins fled from the car after the crash, and was captured soon afterward.

Police found a blue denim jacket in Goins' home. In the jacket pocket they found the keys to the Sovak's house. They also confiscated the clothing that Goins was wearing when he was captured, and blood analysis was later performed on that clothing.

During the investigation the police photographed footprints left in the snow outside both Mr. Sovak's and Goins' residences. The police also examined footprints from the Formica floor in Mr. Sovak's home, as well as a footprint left on the door of the Luchisans' house where it had been kicked in. The shoes of both Goins and Barnette were seized by the police. The tread on those shoes was found to match shoe tread marks left at the crime scene.

On February 5, 2001, a juvenile delinquency complaint was filed against Goins alleging twelve counts, including attempted murder, aggravated burglary, aggravated robbery, kidnapping, felonious assault, and receiving stolen property. The State filed a motion to transfer the case to the adult division of the Mahoning County Court of Common Pleas. On February 22, 2001, the court held a bindover hearing in which it found probable cause for all the offenses except for the kidnapping charges. The court held that the mandatory bindover provisions of R.C. 2151.26 applied to the charges of attempted aggravated murder, the aggravated burglary of the Luchisans, the aggravated robbery of Mr. Luchisan, and the aggravated robbery of

Mrs. Luchisan. The juvenile court then bound the entire case over to the Mahoning County Grand Jury.

On March 22, 2001, the Mahoning County Grand Jury indicted Goins on the following charges: 1) attempted aggravated murder of Mr. Sovak; 2) aggravated burglary of Mr. Sovak; 3) aggravated robbery of Mr. Sovak; 4) kidnapping of Mr. Sovak; 5) aggravated burglary of the Luchisans; 6) aggravated robbery of Mr. Luchisan; 7) aggravated robbery of Mrs. Luchisan; 8) kidnapping of Mr. Luchisan; 9) kidnapping of Mrs. Luchisan; 10) felonious assault of Mr. Luchisan; 11) felonious assault of Mrs. Luchisan; 12) and receiving stolen property. Four of the counts contained gun specifications. The court consolidated the matter with the criminal case proceeding against codefendant Chad Barnette.

On November 28, 2001, Goins and Barnette filed writs of habeas corpus with this Court, challenging whether the Mahoning County Court of Common Pleas, General Division, had jurisdiction over criminal charges that were not bound over from the juvenile division. *Goins v. Wellington* Nos., 01 CA 3503, 2001 Ohio 208. This court denied both writs on December 18, 2001, and the case proceeded to a jury trial beginning on March 4, 2002.

On March 12, 2002, the jury found Goins guilty of all counts except for one count of felonious assault against Mr. Luchisan. The

jury also found Goins guilty of the gun specifications in counts six, seven, eight and nine.

A sentencing hearing was held on March 20, 2002. The trial court filed its judgment on March 21, 2002. The court sentenced Goins to the maximum prison terms on each count, and to three years in prison on each gun specification. The court held that the kidnapping charges merged with robbery charges. The court also determined that all remaining sentences must be served consecutively to each other, for a total of 85 1/2 years in prison.

Goins appealed his conviction and sentence to this court, asserting six assignments of error. Concerning Goins' sentence, this court determined that he could not be sentenced for both aggravated robbery and receiving stolen property that involved the same stolen property. This court also found that the trial court failed to make the required findings to justify imposing the maximum prison sentence for the aggravated robbery of Mr. Sovak. Accordingly, Goins' eighteen-month prison sentence on the charge of receiving stolen property (count twelve in the indictment) was modified to run concurrently with the sentences for the remaining counts. Goins' prison sentence on the charge of aggravated robbery (count three in the indictment) was reduced to three years in prison, to run concurrently with the sentences on the remaining counts. Goins total prison

sentence was modified to an aggregate of seventy-four years in prison.

Goins had also argued that the maximum consecutive sentences violated his right to jury trial under *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. In accordance with established precedent in this appellate district at the time, *State v. Barnette,* 7th Dist. No. 02 CA 65, 2004 Ohio 7211, this court rejected that particular argument and affirmed the trial court's conviction and sentence in all other respects. *State v. Goins,* 7th Dist. No. 02 CA 68, 2005 Ohio 1439.

Both Goins and the State appealed this court's decision to the Ohio Supreme Court in case No. 2005-0809. *State v. Goins,* 106 Ohio St.3d 1503, 2005 Ohio 4605, 833 N.E.2d 1246. Goins again asserted that the maximum consecutive sentences violated his right to a jury trial under *Blakely* and *Apprendi.* The Ohio Supreme Court vacated Goins' sentence in accordance with *State v. Foster,* 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470. *In re Ohio Criminal Sentencing Statutes Cases,* 109 Ohio St.3d 313, 2006 Ohio 2109, 847 N.E.2d 1174.

The trial court resentenced Goins on August 2, 2006. For counts one through five (attempted aggravated murder, aggravated burglary, aggravated robbery, kidnapping,

> aggravated burglary), the trial court sentenced Goins to ten years in prison on each. For counts six through nine (aggravated robbery, aggravated robbery, kidnapping, kidnapping), the court sentenced Goins to ten years in prison on each, plus three years on each for the gun specification. The court held that the kidnapping charges merged with the robbery charges. The court also sentenced Goins to eight years in prison on count eleven (felonious assault). Lastly, the court ordered that all the sentences be served consecutively for an aggregate prison term of eighty-four years.

Petitioner appealed his August 2, 2006 resentencing to the Ohio Seventh District Court of Appeals alleging two assignments of error:

1. The trial court imposed cruel and unusual punishment upon Defendant-Appellant James Goins in violation of the Eighth Amendment to the United States Constitution when it sentenced him to a term of eighty-four years of imprisonment, effectively a life sentence without the possibility of parole.

2. The trial court erred when it imposed a sentence of eighty-four years of imprisonment upon Defendant-Appellant James Goins, as this sentence will unnecessarily burden Ohio's resources in violation of R.C. § 2929.13(A).

On March 10, 2008 the appellate court affirmed the sentence imposed by the trial court.

Petitioner appealed the appellate court ruling to the Ohio Supreme Court alleging propositions of law which paralleled those raised to the lower appeals court. On July 9, 2008 the state supreme court denied petitioner leave to appeal and dismissed the appeal as not involving any substantial constitutional question.

On July 7, 2009 the petitioner filed the instant petition, in which he raises the following four claims for relief:

A. GROUND ONE: The Petitioner's sentence must be vacated, as the sentences imposed violate the Petitioner's jury trial right and the right to be free from cruel and unusual punishment.

Supporting FACTS: The Petitioner first submits that his sentences must be vacated, as the imposition of such sentences: (1) violates his jury trial right, and (2) constitutes cruel and unusual punishment for his offense.

B. GROUND TWO: The Petitioner's conviction and sentence must be vacated, as he was denied the right to confront and cross-examine witnesses against him.

Supporting FACTS: At Petitioner's trial, the State presented DNA evidence, which was critical, because of uncertain

identifications made by victims, to the State meeting its burden of proof.

C. GROUND THREE: The Petitioner did not receive constitutionally effective assistance of counsel.

Supporting FACTS: The failure of Petitioner's trial counsel to object to, move in limine, move to strike, or otherwise confront the criminalists' testimony – as discussed in Section IV, *supra,* by way of a "Daubert" hearing, deprived him of his constitutional right to the effective assistance of counsel as guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution.

D. GROUND FOUR: The trial court did not have jurisdiction over the Petitioner's case; therefore, the convictions violate due process.

Supporting FACTS: The Appellant next submits that because the procedure used to bind over his case from the juvenile court system was fatally flawed, the court of conviction never had proper jurisdiction over the case, thus, the kidnapping convictions violate due process.

The provisions of the Antiterrorism and Effective Death Penalty Act, "AEDPA," Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 26, 1996) are controlling herein

as the instant petition was filed after the Act's effective date. *Lindh v. Murphy,* 521 U.S. 320 (1997).[2]

The respondent asserts that petitioner's second, third and fourth claims for relief are subject to dismissal as procedurally defaulted in light of petitioner's failure to raise them in his appeal to the state supreme court.

The exhaustion doctrine requires that before filing a petition in federal habeas corpus a defendant must utilize all available state remedies, through a motion or petition for review by the state's highest court, by which he/she may seek relief based upon an alleged violation of constitutional rights. *Granberry v. Greer,* 481 U.S. 129, 133 (1987). Under the exhaustion doctrine a petitioner must "fairly present" each federal constitutional claim to the state courts before seeking relief in federal court. *Baldwin v. Reese,* 541 U.S. 27 (2004); *Hannah v. Conley,* 49 F.3d 1193, 1196 (6th Cir. 1995). In so doing, state courts are afforded "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999).

Fair presentation of the factual and legal basis for a federal constitutional issue to the state's courts may be made in four ways:

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[2] There are no issues of untimeliness in this case.

> (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.

McMeans v. Brigano, 228 F.3d 674, 681 (6th Cir. 2000), citing *Franklin v. Rose,* 811 F.3d 322, 326 (6th Cir. 1987), *cert. denied,* 532 U.S. 958 (2001). *Accord, Whiting v. Burt,* 395 F.3d 602, 613 (6th Cir. 2005); *Blackmon v. Booker,* 394 F.3d 399, 400 (6th Cir. 2004). It is not enough to present the facts giving rise to the federal claim raised in habeas corpus; a petitioner must present the same legal theory to the state courts as is presented to the federal courts in order to preserve the claim. *Wong v. Money,* 142 F.3d 313, 322 (6th Cir. 1998). Even if a claim is related, but distinct, the claim is nonetheless defaulted. *Lott v. Coyle,* 261 F.3d 594, 607, 619 (6th Cir. 2001).

In addition, merely "mak[ing] a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court[,]" does not sufficiently apprise the state court of a specific federal constitutional guarantee so as to exhaust the claim. *Gray v. Netherland,* 518 U.S. 152, 162-63 (1996), citing *Picard v. Connor,* 404 U.S. 270, 271 (1971) and *Anderson v. Harless,* 459 U.S. 4, 7 (1982). For example, use of the term "ineffective

assistance" also fails to alert the state courts of the federal nature of a claim. *Baldwin v. Reese, supra.*

Where a petitioner has failed to fairly present the factual and legal basis for a federal constitutional issue and where petitioner would be barred from pursuing relief on that claim in the state courts, the petition should not be dismissed for failure of exhaustion in light of the fact that there would be no available state remedies to exhaust. *Hannah v. Conley, supra* at 1195-96; *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). Under a longstanding Ohio procedural rule, a claim which could have been but was not raised on direct appeal would be barred from being raised in a delayed appeal or in a petition for post-conviction relief. *See, Collins v. Perini,* 594 F.2d 592, 593 (6th Cir. 1978). However, the petitioner must then demonstrate cause for failure to fairly present the claims to the state courts and actual prejudice to petitioner's defense at trial or on appeal. *Gray v. Netherland, supra* at 162; *Coleman v. Thompson,* 501 U.S. 722, 750-51 (1991); *Deitz v. Money,* 391 F.3d 804, 808 (6th Cir. 2004).

This Court agrees with the respondent that although petitioner raised the arguments articulated in his second, third and fourth claims for relief in his appeal to the Ohio Seventh District, he failed to raise them on appeal to the state supreme court.

In his appeal to the supreme court, petitioner raised a sentencing issue which parallels the argument in his first claim for relief in these proceedings,

as well as a proposition of law which challenged the admission of scientific evidence, including "blood evidence, DNA evidence, and 'footprint analysis' evidence," without conducting a "gatekeeping hearing" to determine the "reliability of the testing procedure and that the person who conducted the test does indeed have the expertise to present that evidence to a trial jury," a proposition for which he refers to the testimony of Ms. Donna Rose, the "shoe print 'expert,'" whose testimony he asserted was unreliable.

A different issue was raised in petitioner's second claim for relief in these proceedings where, as can be found in the brief attached to his petition, he challenges the admission of the testimony of Mr. Dale Laux, a serologist from the Ohio Bureau of Criminal Investigation and Identification, arguing that since Mr. Laux did not analyze the DNA evidence, he should not have been permitted to testify as to the results, as such testimony denied petitioner his right to confront and cross-examine witnesses against him.

In his third claim for relief, petitioner argues that he was denied the effective assistance of trial counsel by reason of counsel's failure to object to the foregoing testimony of Mr. Laux, which is once again a different issue than that which was raised on appeal to the state supreme court.

Petitioner's fourth claim for relief presents a challenge to the jurisdiction of the trial court based on what he perceived to have been a "fatally flawed" process which was used to "bind over his case from

the juvenile court system," an issue which was not raised on appeal to the supreme court.

Petitioner would be unable to pursue relief on these claims in the state courts in light of the fact that he could have raised them on direct appeal, but did not, which causes them to be barred by the doctrine of res judicata. *State v. Perry,* 10 Ohio St.2d 175 (1967). In turn, in light of the fact that the claims could have been but were not raised on direct appeal to the state supreme court, petitioner would be barred from raising them in a delayed appeal or in a petition for post-conviction relief, which would in turn bar a decision on those claims upon habeas review. *Leroy v. Marshall,* 757 F.2d 94, 100 (6th Cir. 1985). Having failed to demonstrate cause or prejudice for the procedural default, or evidence of a miscarriage of justice, petitioner's second, third, and fourth claims for relief are procedurally defaulted and subject to dismissal.

Turning to merits review of the remaining claim for relief, the provisions of the Antiterrorism and Effective Death Penalty Act, "AEDPA," Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 26, 1996) are controlling herein as the instant petition was filed after the Act's effective date. *Lindh v. Murphy,* 521 U.S. 320 (1997).

The role of a federal district court in habeas corpus is set forth in Title 28 U.S.C. § 2254(d) which provides:

> (d) 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.

The United States Supreme Court has held that the clauses "contrary to" and "unreasonable application of" as found in § 2254(d)(1) have independent meanings; *Williams v. Taylor,* 529 U.S. 420 (2000), with the state court adjudication being "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that of the Supreme Court];" and with the state court adjudication involving an "unreasonable application of clearly established Federal law, as determined by the

Supreme Court" "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or "if the state court either unreasonably extends a legal principal from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principal to a new context where it should not apply or unreasonably refuses to extend that principal to a new context where it should apply." 120 S.Ct. at 1519-1520. In deciphering the "unreasonable application" clause this Court must inquire as to whether "the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 1521. Even if the state court decision resulted in an incorrect application of federal law, if that decision is reasonable it will stand. *Id. See, Machacek v. Hofbauer,* 213 F.3d 947, 953 (6th Cir. 2000).

The petitioner argues that his sentence violated his right to a jury trial and that it constituted cruel and unusual punishment.

Specifically, in the first portion of this claim for relief petitioner challenges the consecutive sentences imposed by the trial court which he contends "exceeded the statutory maximum" prison term without reliance upon factual findings made by a jury to enhance his sentence under the law, in violation of the rule of law set out by the United States Supreme Court in *Blakely v. Washington,* 542 U.S. 296 (2004)

and by the Ohio Supreme Court in *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470 (2006).

This argument was raised on direct appeal of his original sentence, and the Ohio Supreme Court ultimately ordered petitioner to be re-sentenced upon the authority of *State v. Foster, supra.* Petitioner omitted this argument in his appeals challenging his sentence *upon re-sentencing,* which is a procedural impediment to considering it in these proceedings. *See, Wright v. Lazaroff,* Case No. 1:07CV1022, 2009 U.S.Dist. LEXIS 115694, at *75 (Report and Recommendation of Magistrate Judge Timothy S. Hogan May 15, 2009) (Where petitioner failed to raise a claim on direct appeal of the trial judge's decision after re-sentencing it was procedurally defaulted on habeas corpus.) However, in light of the January 14, 2009 decision of the United States Supreme Court in *Oregon v. Ice,* 555 U.S. ___, 2009 U.S. LEXIS 582 (2009), which abrogated portion of the *Foster* decision, and thus expanded the scope of judicial factfinding discretion in sentencing, by holding that judicial factfinding to determine whether consecutive sentences should be imposed does *not* violate *Apprendi/Blakely,* even if this claim was to be considered petitioner could not succeed.

As to that portion of the first claim for relief in which petitioner argues that the sentences imposed upon re-sentencing are disproportionate to the offenses committed and, therefore, constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution, this Court disagrees.

The Sixth Circuit Court of Appeals has summarized the case law pertinent to this issue in *Friday v. Pitcher,* 99 Fed. Appx. 568, 573-574, 2004 U.S.App. LEXIS 4401 (6th Cir. 2004), as follows:

> The United States Supreme Court has held that the *Eighth Amendment* does not require strict proportionality between the crime and sentence. *Harmelin v. Michigan,* 501 U.S. 957, 965, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991) (plurality opinion). *See also Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980); Solem v. Helm,* 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983). Rather, it only forbids "extreme sentences" that are "grossly disproportionate" to the crime. *Harmelin, 501 U.S. at 1001*. Further, as the Supreme Court recently observed in *Lockyer v. Andrade, 538 U.S. 63, 155 L.Ed.2d 144, 123 S.Ct. 1166 (2003)*, "our precedents in this area have not been a model of clarity." *Id. at 72* (AEDPA case). Nonetheless, "through this thicket of *Eighth Amendment* jurisprudence, one governing legal principle emerges as 'clearly established' under *§ 2254(d)(1):* A gross disproportionality principle is applicable to sentences for terms of years." *Id. See also Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179, 1185, 155 L.Ed.2d 108 (2003)*. ("The *Eighth Amendment,* which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' "). On the other hand, as the Supreme Court observed in *Lockyer,* its cases "exhibit

> a lack of clarity regarding what factors may indicate gross disproportionality." *Lockyer, 538 U.S. at 72*.

The petitioner in that case, as does the petitioner in these proceedings, attempted to argue that because he was a juvenile when he committed the crimes, his lengthy sentence was "grossly disproportionate," a proposition rejected by the Sixth Circuit:

> Petitioner focuses on his juvenile status as the factor that tips his sentence into a category of "grossly disproportionate." The aforementioned Supreme Court cases do not provide any direct support for this argument. *Cf. Lockyer, 528 U.S. 63* (holding that state court decision affirming the petitioner's two consecutive terms of twenty-five years to life in prison for a "third strike" conviction was not "contrary to" or an "unreasonable application" of "clearly established" gross disproportionality principles set forth by *Rummel, Solem,* and *Harmelin*); *Harmelin, 501 U.S. 957, 115 L.Ed.2d 836* (holding that life imprisonment without possibility of parole for possessing cocaine did not raise an inference of gross proportionality even though the defendant was a first-time offender); *Solem, 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001* (holding that a life sentence without possibility of parole for a seventh nonviolent felony violated the *Eighth Amendment*). Here, Petitioner, although a first-time offender, committed a violent felony without justification. Furthermore, because he received a lesser

> offense of second-degree murder, parole is a possibility. In sum, it cannot be said that the Michigan Court of Appeals decision is contrary to, or an unreasonable application of, clearly established federal law. The district court did not err in denying the petition for writ of habeas corpus on this basis.

In the present case, the state appellate court upheld the sentence imposed by the trial court, holding in pertinent part as follows:

> The Eighth Amendment to the Constitution of the United States and Section 9, Article I of the Ohio Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370-371, the Ohio Supreme Court observed:
>
> "Historically, the Eighth Amendment has been invoked in extremely rare cases, where it has been necessary to protect individuals from inhumane punishment such as torture or other barbarous acts. *Robinson v. California* (1962), 370 U.S. 660, 676, 82 S.Ct. 1417, 1425, 8 L.Ed.2d 758, 768. Over the years, it has also been used to prohibit punishments that were found to be disproportionate to the crimes committed. In *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 30 O.O.2d 38, 203 N.E.2d 334, this court stressed that Eighth Amendment violations are rare. We stated that '[c]ases in which cruel and unusual punishments have been found are limited to

those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' *Id.* at 70, 30 O.O.2d at 39, 203 N.E.2d at 336. Furthermore, 'the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.' *Id. See, also, State v. Chaffin* (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46, paragraph three of the syllabus."

In order to determine whether the sentence imposed is disproportionate to the offense committed, a tripartite analysis is employed. "First, we look to the gravity of the offense and the harshness of the penalty * * *. Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. * * * Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." *Id.,* quoting *Solem v. Helm* (1983), 463 U.S. 277, 290-291, 103 S.Ct. 3001, 77 L.Ed.2d 637.

A reviewing court need not reach the second and third prongs of the tripartite test except in the rare case when a threshold comparison of the crime committed and the sentence imposed lead to an inference that the two are grossly disproportionate. *Weitbrecht* at 373, fn. 4, citing *Harmelin v. Michigan* (1991), 501 U.S. 957, 1005, 111 S.Ct. 2680, 115

L.Ed.2d 836, (Kennedy, J., concurring); *State v. Keller* (June 1, 2001), Montgomery App. No. 18411.

Here, Goins appears to at first advance a proportionality argument. However, perhaps because of the brutal nature in which his offense were carried out, Goins makes no attempt to examine the gravity of the offense in relation to the harshness of the penalty. Consequently, it does not appear that this is the type of rare case where a threshold comparison of the crime committed and the sentence imposed lead to an inference that the two are grossly disproportionate.

Rather, Goins argues that he was effectively handed a life sentence since he will never be eligible for parole and will be one-hundred years old when his sentence is completed. Goins points out that Ohio reserves a life imprisonment sentence for only the offenses of murder and rape of a child less than thirteen years of age. Although Goins' victims included three elderly people, he stresses that no one was killed and none of the offenses for which he was convicted involved children.

For those offenses for which life imprisonment is an available sentence, Goins emphasizes that even in those instances, the offenders become eligible for parole. He will have no such chance, he contends. To illustrate his point, Goins cites *State v. Vlahopoulos,* 154 Ohio App.3d 450, 2003-Ohio-5070, 797 N.E.2d 580. Vlahopoulos was

convicted of three counts of rape and sentenced to nine years to life imprisonment on each count, to be served consecutively. On appeal, Vlahopoulos argues that since he was forty-nine years old at the time, the sentence amounts to a sentence of life imprisonment without the possibility of parole. Addressing this argument, the Eighth District Court of Appeals observed:

"The flaw with Vlahopoulos' argument is that he neglects to consider that he was sentenced to an indefinite term of incarceration. While it may be that were he denied parole on any of the individual offenses it would amount to a life sentence, the fact remains that he is eligible for release on the nine-year minimum sentences. Since it is far from certain that he will remain in prison for the rest of his natural days, we cannot say that the sentence amounted to a term of life without parole." *Id.* at ¶3. *See, also, McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 30 O.O.2d 38, 203 N.E.2d 334 (sentence of one to twenty years for operating motor vehicle without owner's consent was not cruel and unusual punishment, where person convicted would have been eligible for parole after serving ten months).

Goins' argument in this regard is misguided for it belies the serious nature of his offenses. Goins ignores the sheer number of violent, felony offenses for which he was convicted. And, as indicated earlier, he conveniently does not address the brutal nature in which

the offenses were carried out and how his sentence might compare to that of other criminal defendants similarly situated.

We addressed a similar argument advanced by Goins' codefendant, Chad Barnette in *State v. Barnette,* 7th Dist. No. 06 MA 135, 2007-Ohio-7209. Barnette was convicted of the same crimes as Goins and received the same eighty-four year sentence. In *Barnette,* this Court observed:

"Although [Barnette] urges that his total sentence of eighty-four years is constitutionally too high, this is a conclusory allegation with no factual argument or support. Considering the facts of the offenses, the sentences are not so greatly disproportionate to the offenses so as to shock the sense of justice in the community. *See Weitbrecht,* 86 Ohio St.3d at 371.

"It was found by a jury that [Barnette] purposely tried to kill an elderly victim of a burglary and that [Barnette] locked him up hoping to ensure his death. This was not an isolated event as he continued his rampage at a nearby house where he terrorized a disabled man and his wife. [Barnette] was a juvenile, but he already had a sizeable and related criminal record. As such, it was not unreasonable for the trial court to determine that the savage occurrences in the case at hand establish that [Barnette's] persona was too tainted for rehabilitation and that he required long-term incarceration to protect the

> community from his flawed sense of entitlement. This is not the rare case where the cruel and unusual punishment argument merits consideration." *Id.* at ¶¶ 43-44. These observations apply equally to Goins.
>
> Accordingly, Goins' first assignment of error is without merit.

The state appellate court having upheld the trial court's imposition of the sentences, those sentences were within the penalty set by statute, and neither sufficiently "extreme" or "grossly disproportionate" so as to violate the Eighth Amendment. Consequently, petitioner cannot meet the overall burden of showing that the state court ruling was either contrary to or involved an unreasonable application of federal law and his first claim for relief must fail.

In light of all the foregoing it is concluded that no claim of constitutional violation has been presented requiring further proceedings prior to disposition on the merits, and it is, therefore, recommended that the petition be dismissed without further proceedings.

s/DAVID S. PERELMAN
United States Magistrate Judge

DATE: February 11, 2010

OBJECTIONS

Any objections to this Report and Recommended Decision must be filed with the Clerk of Courts within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See, United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See, also, Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).
