

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kenneth Jeremy Laird,
Petitioner,
v.
Charles L Ryan, et al.,
Respondents.

No. CV-17-00482-PHX-JAT

ORDER

Pending before the Court is the Report and Recommendation (“R&R”) of the Magistrate Judge recommending that the Petition for Writ of Habeas Corpus in this case be denied. (Doc. 32). Petitioner, through counsel, has filed objections. (Doc. 33).

I. Legal Standard

This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that the district judge must review the magistrate judge’s findings and recommendations de novo if objection is made, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes that de novo review of factual and legal issues is required if objections are made, ‘but not otherwise.’”); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir. 2009) (the district court “must review de novo the portions of the [Magistrate Judge’s] recommendations to which the parties object.”). District courts are

1 not required to conduct “any review at all . . . of any issue that is not the subject of an
2 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1)
3 (“the court shall make a de novo determination of those portions of the [report and
4 recommendation] to which objection is made.”). Accordingly, the Court will review the
5 portions of the R&R to which Petitioner objected de novo.

6 The Petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is
7 incarcerated based on a state conviction. With respect to any claims that Petitioner
8 exhausted before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must
9 deny the Petition on those claims unless “a state court decision is contrary to, or involved
10 an unreasonable application of, clearly established Federal law” or was based on an
11 unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).
12 In applying “Federal law” the state courts only need to act in accordance with Supreme
13 Court case law. *See Carey v. Musladin*, 549 U.S. 70, 74 (2006). This Court must
14 presume the correctness of the state court’s factual findings regarding a petitioner’s
15 claims. 28 U.S.C. § 2254(e)(1); *Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998).

16 **II. Factual and Procedural Background**

17 The R&R recounts the factual and procedural background of this case. (Doc. 33 at
18 1-3). Neither party has objected to this summary; the Court hereby accepts it.

19 **III. Discussion**

20 As discussed in the R&R, Petitioner is serving a 129 year aggregate sentence for
21 various crimes, and a consecutive life sentence with the possibility of release after 25
22 years for a first degree murder conviction. (Doc. 32 at 2). Petitioner argues that his 154
23 years to life aggregate sentence is the functional equivalent of a life without parole
24 sentence. (Doc. 33 at 3). Petitioner argues that such a sentence violates *Graham v.*
25 *Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012). (Doc. 32 at 1).

26 Petitioner presented this claim to the Arizona Courts and the Arizona Courts
27 denied relief. (*Id.* at 3). Thus, as discussed above, this Court can only grant relief if the
28 Arizona Court’s decision was contrary to or an unreasonable application of Federal law

1 (as determined by the Supreme Court).

2 As the R&R recounts, there are splits among the circuits as to whether a
3 “functional equivalent” sentence qualifies for relief under *Miller* (Doc. 32 at 10) and open
4 questions as to whether *Graham* has any applicability to homicide cases (Doc. 32 at 7-8).
5 Given that there is no directly applicable Supreme Court case law, and splits among the
6 lower courts, the R&R concludes:

7 Because there is no clearly established Supreme Court precedent holding
8 that an aggregate sentence that is functionally equivalent to life
9 imprisonment without the possibility of parole violates the Eighth
10 Amendment, the Arizona Court of Appeals’ decision is not contrary to or
11 based on unreasonable application of clearly established Supreme Court
12 precedent. *See Harrington v Richter*, 562 U.S. 86, 101 (2011) (stating that
13 “[i]t is not an unreasonable application of clearly established Federal law
14 for a state court to decline to apply a specific legal rule that has not been
15 squarely established by [the Supreme Court].”)

16 (Doc. 32 at 10) (additional citations omitted).

17 Petitioner objects to this conclusion. First he argues that the 129 year portion of
18 his sentence (the non-homicide) portion, violates *Graham*, and that the Ninth Circuit
19 Court of Appeals decision in *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) compels this
20 Court to conclude that Petitioner’s sentence violate *Graham*. Both *Moore* and *Graham*
21 involved non-homicide crimes. However, here, Petitioner’s total sentence includes a
22 homicide crime. Therefore, this Court agrees with the R&R that *Moore* is inapplicable in
23 this case. (*See* Doc. 32 at 7-8).

24 Next Petitioner argues that his consecutive sentence on his homicide conviction
25 violates *Miller* because it is effectively a life without parole sentence. The R&R
26 concludes that *Miller* does not clearly apply to consecutive sentences. (Doc. 32 at 8-9).
27 The Court agrees with the R&R neither *Miller* nor *Montgomery’s*¹ interpretation of *Miller*
28 expressly state that a life-with-the-possibility-of-parole-after-25-years sentence, that is
consecutive to other sentences, falls under *Miller’s* prohibition on mandatory life without
the possibility of parole sentences (for juveniles). Given that the holding of *Miller* does
not expressly apply to Petitioner’s case, this Court cannot conclude that the state court’s

¹ *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

1 decision was contrary to or an unreasonable application of clearly established (by the
2 Supreme Court) Federal law.

3 Thus, the Court accepts the R&R's recommendation that the Court deny relief and
4 overrules Petitioner's objections.

5 **IV. Certificate of Appealability**

6 The R&R recommends that this Court deny the issuance of a certificate of
7 appealability ("COA"). Petitioner objects to this recommendation.

8 A judge may issue a COA "only if the applicant has made a substantial showing of
9 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standards for granting a
10 COA are the same for petitions under § 2254 and § 2255. *See United States v. Martin*,
11 226 F.3d 1042, 1046 n.4 (9th Cir. 2000). "Where a district court has rejected the
12 constitutional claims on the merits, the showing required to satisfy § 2253(c) is
13 straightforward: The petitioner must demonstrate that reasonable jurists would find the
14 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*
15 *McDaniel*, 529 U.S. 473, 483-84 (2000); *see also id.* (describing the COA determination
16 as deciding whether the issues presented are "adequate to deserve encouragement to
17 proceed further" [quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)]). "When the
18 district court denies a habeas petition on procedural grounds without reaching the
19 prisoner's underlying constitutional claim, a COA should issue when the prisoner shows,
20 at least, that jurists of reason would find it debatable whether the petition states a valid
21 claim of the denial of a constitutional right and that jurists of reason would find it
22 debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S.
23 at 484.

24 The rule for issuing a COA amounts to but a "modest standard" and the Ninth
25 Circuit has cautioned that "we must be careful to avoid conflating the standard for
26 gaining permission to appeal with the standard for obtaining a writ of habeas corpus."
27 *Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 342 (2002),
28 quoting *Lambright v. Stewart*, 220 F.3d 1022, 1024, 1025 (9th Cir. 2000). Finally, "any

1 doubts” about granting a petitioner’s request for a COA “must be resolved in his favor”
2 and a court should issue a COA unless the claims are “utterly without merit.” *Silva*, 279
3 F.3d at 833, quoting *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000). However,
4 “A prisoner seeking a COA must prove something more than the absence of frivolity or
5 the existence of mere good faith on his or her part.” *Miller-El v. Cockrell*, 537 U.S. 322,
6 338 (2003) (internal quotations omitted).

7 Here, although the Court has found Petitioner is not entitled to relief, the Court
8 finds that jurists of reason could find this Court’s conclusions debatable. Therefore, the
9 Court will sustain Petitioner’s objection to the R&R with respect to the issue of whether
10 to grant a COA.

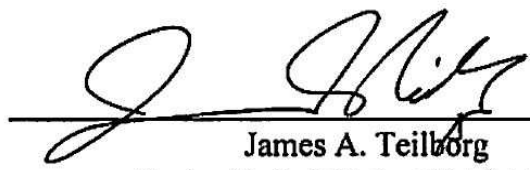
11 **V. Conclusion**

12 Based on the foregoing,

13 **IT IS ORDERED** that the R&R (Doc. 32) is accepted except as specified above;
14 the objections (Doc. 33) are overruled or sustained as specified above; the Petition for
15 Writ of Habeas corpus is denied, with prejudice, and the Clerk of the Court shall enter
16 judgment accordingly.

17 **IT IS FURTHER ORDERED** that a certificate of appealability is granted as to
18 Petitioner’s sole claim for relief regarding his sentencing (*see* Doc. 1 at 7-8).

19 Dated this 29th day of August, 2018.

20
21
22
23 
24 **James A. Teilborg**
25 **Senior United States District Judge**
26
27
28