

No. 17 - _____

IN THE SUPREME COURT OF THE UNITED STATES

NORBERTO SERNA

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In California, a defendant who commits kidnapping for extortion, causes bodily harm to the victim, and does so in the absence of a ransom scheme or a secondary victim is subject to a sentence of life in prison *without* the possibility of parole. Cal. Pen. Code § 209(a).

In contrast, a defendant who commits kidnapping for robbery under otherwise identical circumstances is subject to a maximum sentence of life in prison *with* the possibility of parole. Cal. Pen. Code §209(b)(1).

As a result, similarly situated kidnapper-extortionists and kidnapper-robbers are subject to significantly disparate sentencing schemes in California.

This case presents the following questions:

- I. Whether California violates the Equal Protection Clause by imposing a harsher maximum sentence on kidnapper-extortionists—who harm their victims and who do not target a secondary victim—than it imposes on similarly situated kidnapper-robbers.
- II. Whether California violates the Eighth Amendment’s proscription against cruel and unusual punishment by imposing a harsher maximum sentence on kidnapper-extortionists—who harm their victims and who do not target a secondary victim—than it imposes on similarly situated kidnapper-robbers.

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Petitioner, Norberto Serna, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Sixth Appellate District. The court of appeal affirmed the judgment of the Superior Court of California, Santa Clara County, convicting petitioner of kidnapping to commit extortion in violation of California Penal Code section 209(a), kidnapping to commit robbery in violation of California Penal Code section 209(b), and torture in violation of California Penal Code section 206.

OPINION BELOW

The court of appeal opinion appears as Appendix A.

JURISDICTION

The court of appeal entered its opinion on January 29, 2018. Appendix A. The California Supreme Court denied review on May 9, 2018. Appendix B. This petition is timely filed.

This Court has jurisdiction under title 28 U.S.C. section 1257(a) because petitioner was convicted and sentenced in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides (in relevant part):

All persons born or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

California Penal Code section 209 provides (in relevant part):

(a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) (1) Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 264.1, 288, or 289, shall be punished by imprisonment in the state prison for life with the possibility of parole.

(2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.

STATEMENT OF THE CASE

A. The Crime

Juvenal Reyes told petitioner that his neighbor was a wealthy man. 12 RT 1818. Reyes suggested that the house be burglarized. *Id.* Petitioner introduced Ernesto Gonzales and Juan Fonseca to Reyes. *Id.* Petitioner, Reyes, Gonzales, Fonseca, and petitioner's son, Isaias Serna, planned to burglarize the house. 12 RT

1819.

Wise left his house, and Isaias followed him. 12 RT 1791. Isaias told Gonzales that Wise had left. *Id.* Gonzales, Fonseca, and petitioner went to Wise's house. 12 RT 1820. Gonzales went to watch Wise. 12 RT 1820–1821.

Fonseca forced his way into the house. 12 RT 1821. Two safes were found. *Id.* They were immovable. 12 RT 1822. Gonzales returned to the house. *Id.* Isaias told Gonzales that Wise was on his way home. *Id.* Petitioner and Fonseca said they should leave. *Id.* Gonzales said no. *Id.* Gonzales told them to hit Wise and tie him up when he came home. 12 RT 1824–1825.

When Wise stepped inside his house, “they beat [him] right there on the floor.” 9 RT 357. Wise fell down the front door steps. *Id.* He was tied up and brought inside. 12 RT 1827. He was taken into the kitchen. 9 RT 377; 10 RT 456; 12 RT 1827. He was tied to a chair. 12 RT 1828. He was moved to where the safes were located. 10 RT 392–393.

Gonzales demanded the combination to the large safe. 10 RT 397. Wise refused. *Id.* Gonzales told petitioner to hold Wise. 12 RT 1828. Fonseca and Gonzales beat Wise with pool cues. *Id.* Gonzales cocked a gun and put it into Wise's mouth. 10 RT 399, 396, 405. Gonzales said “give me the combination to this safe, mother f***er, or you'll never see your son again.” 10 RT 396. Wise provided the combination. 10 RT 400. They could not open the safe. *Id.* Wise opened the safe and the contents were taken. 10 RT 401–402.

Gonzales demanded the combination to the other safe. 10 RT 404. Wise

refused. 10 RT 404–405. Fonseca hit Wise and Gonzales struck him several times. 10 RT 407; 12 RT 1828. Gonzales placed pliers inside Wise’s nostrils and squeezed them. *Id.* Wise divulged the combination and items were taken. 10 RT 409–410.

Gonzales, Fonseca and petitioner loaded the items into Wise’s truck. 12 RT 1830. They drove away and unloaded the items into Gonzales’s garage. *Id.*

Gonzales drove the truck into the Santa Cruz mountains. 12 RT 1830. Petitioner and Fonseca followed in Gonzales’s truck. *Id.* Gonzales and Fonseca doused the truck in gasoline set it afire. *Id.* They left in Gonzales’s truck.

Wise removed his restraints and walked to his neighbor’s house. 10 RT 420–421, 423. The neighbor called the police. 10 RT 423. Wise sustained a concussion and multiple facial fractures. 10 RT 429–430, 491–492.

B. Verdict and Sentence

Petitioner was charged with kidnapping for extortion and kidnapping to commit robbery, among other charges. Cal. Pen. Code §§209(a) (kidnapping for extortion), 209(b)(1) (kidnapping for robbery); Augmentation to Clerk’s Transcript 26–35.

On August 21, 2014, the jury convicted petitioner of all counts. 2 CT 381–396. On December 5, 2014, he was sentenced to life in prison *without* the possibility of parole for the kidnapping for extortion count. 15 RT 3001, 3015; 2 CT 449, 452–457. He was sentenced to life *with* the possibility of parole for the

kidnapping for robbery count.¹ *Id.*

C. Appellate Proceedings

Petitioner timely filed a notice of appeal. 2 CT 458. He argued that his “sentence violate[d] his rights to equal protection under the state and federal constitutions” because his “sentence of life in prison without the possibility of parole is disparate and much harsher than the sentences of similarly situated defendants convicted of kidnapping for robbery or robbery.” Appellant’s Second Supplemental Opening Brief at 1, *People v. Serna*, Court of Appeal Case No. H041769.

Petitioner argued that his “sentence of life in prison without the possibility of parole is disproportionate under the state and federal constitutions.” Appellant’s Opening Brief at 61–73, *Serna*, Case No. H041769; *accord* Appellant’s Supplemental Opening Brief at 5, *Serna*, Case No. H041769 (“Appellant’s sentence of life in prison without parole was cruel, unusual and disproportionate. As a result, appellant was denied his constitutional rights under . . . the . . . Eighth . . . Amendment[] to the United States Constitution.”).

The court of appeal denied the appeal. Appendix A at 50–53.

Petitioner repeated these arguments before the California Supreme Court. Petition for Review at 42–44 (Eighth Amendment), 44–46 (Equal Protection), *People*

¹ The sentence for the kidnapping for robbery count was stayed pursuant to California Penal Code section 654, which states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” 2 CT 449, 452–457.

v. Serna, California Supreme Court Case No. S247496. The court denied review.
Appendix B.

REASONS FOR GRANTING THE WRIT

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is “essentially a direction that all persons similarly situated should be treated alike.” *Wood v. Collier*, 836 F.3d 534, 538 (5th Cir. 2016) (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)). Unless a law “impinge[s] on personal rights protected by the Constitution” or classifies “by race, alienage, or national origin,” the law is “presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Cleburne*, 473 U.S. at 440. But “arbitrary and irrational discrimination violates the Equal Protection Clause under even [this Court’s] most deferential standard of review.” *Bankers v. Crenshaw*, 486 U.S. 71, 83 (1988).

California’s sentencing scheme runs afoul of the Equal Protection Clause with respect to kidnapping for extortion *vis-a-vis* kidnapping for robbery. Kidnapper-extortionists who do not hold their victim for ransom are similarly situated to kidnapper-robbers. Yet California irrationally sentences kidnapper-extortionists to a significantly harsher penalty.

The harsher sentence applied to kidnapper-extortionists was originally amended into California’s kidnapping statute in response to the spate of ransom kidnappings in the early 20th Century. *People v. Norris*, 40 Cal. 3d 51, 58 (1985)

(Kaus, J., concurring). Nevertheless, California courts have held that the harsh sentences for kidnapper-extortionists apply even in cases in which there is no secondary victim or ransom plot. *See, e.g., People v. Ibrahim*, 19 Cal. App. 4th 1692 (1993).

The subtle difference between extortion and robbery cannot rationally support such a disparate sentencing scheme in the absence of a secondary victim. As such, California's sentencing scheme violates the Equal Protection Clause. The scheme also violates the Eighth Amendment's proportionality principle. *See Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (describing role of intrajurisdictional proportionality review in analyzing Eighth Amendment claims) (cited as controlling opinion in *Graham v. Florida*, 560 U.S. 48, 59-60 (2010)).

Petitioner's constitutional rights were therefore violated when he was sentenced to life in prison without the possibility of parole under California's unconstitutional kidnapping-for-extortion statute. By affirming petitioner's sentence on appeal, the state courts have "decided an important federal question in a way that conflicts with relevant [equal protection and Eighth Amendment] decisions of this Court." Sup. Ct. R. 10(c).

A. The Decision Below Conflicts with This Court's Cases.

"The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."

Reed v. Reed, 404 U.S. 71, 75–76 (1971). California has run afoul of the Equal Protection Clause by allowing defendants found guilty of kidnapping for extortion in the absence of a secondary victim to be given harsher sentences than those convicted of materially identical conduct under the kidnapping for robbery statute.

California’s disparate treatment of kidnapper-extortionists *vis-a-vis* kidnapper robbers further runs afoul of the Eighth Amendment. Life without parole is “the second most severe penalty permitted by law.” *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). This Court has held that “life without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration” *Graham v. Florida*, 560 U.S. at 69–70. Such a 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.” *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989) (as quoted in *Graham*, 560 U.S. at 70). And such a sentence is “grossly disproportionate” to the crime of kidnapping for extortion in the absence of a secondary victim. *See Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring); *and Ibrahim*, 40 Cal. App. 4th at 1699 (“Absent a secondary victim, we can discern no reason for punishing the kidnapper-extortionist far more severely than the kidnapper-robber.”).

1. Kidnapper-Extortionists are Similarly Situated to Kidnapper-Robbers When There Is No Secondary Victim.

Wise was the only victim. There was no plot or attempt to ransom Wise.

Thus, the only difference between petitioner's kidnapping for extortion and a kidnapping for robbery was the underlying crime itself—extortion versus robbery.

To determine whether persons are similarly situated, the Court determines whether they are similarly situated for purposes of the law challenged. *Reed*, 404 U.S. at 75–76. A review of California kidnapping law shows that an extortionist and a robber are similarly situated with respect to the purpose of the aggravated kidnapping statute under which petitioner was sentenced. Cal. Pen. Code §209.

The purpose of the statute prohibiting kidnapping for extortion is to impose a harsher penalty to deter the harming of victims that have been confined as part of an extortion scheme. *See People v. Nguyen*, 22 Cal. 4th 872, 883–885 (2000). The purpose of the statute prohibiting kidnapping for robbery “is to impose harsher criminal sanctions to deter the carrying away of persons during the commission of a robbery in a manner which substantially increases the risk that someone will suffer grave bodily or psychic injury or even death.” *People v. Laursen*, 8 Cal. 3d 192, 198 (1972). Accordingly, in cases in which no secondary victim is involved, the purpose of both laws is to deter harm to victims that have been kidnapped for the purpose of having their property taken. The two classes become similarly situated in the absence of a secondary victim.

Indeed, the California Court of Appeal has found that “[a]bsent a secondary victim, we can discern no reason for punishing the kidnapper-extortionist far more

severely than the kidnapper-robber. Nor, do we believe, should so great a difference in penalty hinge upon so subtle a distinction as that between extortion and robbery [*i.e.*] whether property was taken consensually by force or fear or nonconsensually by force or fear.” *Ibrahim*, 19 Cal. App. 4th at 1699. As petitioner’s joint conviction under both the kidnapping-for-extortion and kidnapping-for-robbery statutes demonstrates, the “subtle” distinction between extortion and robbery in the kidnapping context is effectively no distinction at all.

The Court in *Ibrahim* expressed its belief that “where, as here, a kidnapping for extortion resulting in death does not involve a secondary victim, the magnitude of the crime is equal to that of a kidnapping for robbery resulting in death, and the two crimes should be equally punished.” *Ibrahim*, 19 Cal. App. 4th at 1699. The language in *Ibrahim* shows that when no secondary victim is involved, kidnapper-extortionists and kidnapper-robbers are similarly situated. They should be sentenced accordingly.

In petitioner’s case, the court of appeal held that “those convicted of kidnapping to commit extortion with bodily harm are not similarly situated to those convicted of kidnapping to commit robbery.” Appendix A at 52. The court relied on its observation that “[n]ot all kidnappings to commit extortion are subjected to a heightened punishment. It is only those kidnappings to commit extortion that result in either bodily harm, death, or intentional confinement that exposes that person to a substantial likelihood of death that are punishable by life in prison without the possibility of parole.” *Id.*

The state court’s reasoning runs afoul of this Court’s Equal Protection jurisprudence. The court of appeal fails to account for the fact that even kidnapper-robbers whose robberies result in “bodily harm, death, or intentional confinement that exposes that person to a substantial likelihood of death” are subject only to life in prison *with* the possibility of parole. Cal. Pen. Code §209. Petitioner is similarly situated to *those* kidnapper-robbers.

The flaw in California’s disparate treatment of kidnapper-robbers *vis-a-vis* kidnapper-extortionists parallels the flaw this Court found in the statute at issue in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). There, this Court addressed a New Mexico statute conferring “annual property tax exemptions . . . to Vietnam veterans [then] residing in New Mexico . . . who served on active duty during the Vietnam War . . . and who w[ere] New Mexico resident[s] before May 8, 1976.” *Hooper*, 472 U.S. at 614 (internal citations omitted). The State argued that the exemption “serve[d] as an expression of the State’s appreciation to its own citizens for honorable military service.” *Id.* at 618–19 (internal quotations omitted).

This Court held that “[o]ne component of this rationale is, of course, plainly legitimate; only recently we observed that our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.” *Hooper*, 472 U.S. at 620 (internal quotations and modifications omitted). This Court found a violation of equal protection, however, because the statute did not “simply distinguish between resident veterans and non-veteran residents; it confer[red] a benefit only on ‘established’ resident

veterans, *i.e.*, those who resided in the State before May 8, 1976.” *Id.* at 621. This distinction “between resident veterans [wa]s not rationally related to the State’s asserted legislative goal.” *Id.* at 622.

Similarly, here, one component of the state’s rationale for harsher sentences for kidnapper-extortionists is plainly legitimate. A harsher sentence for those who cause their victims bodily harm is plainly proper.² But the statute does not “simply distinguish between [those who cause bodily harm] and [those who do not]; it confers a benefit only on” kidnapper-robbers, independently of the level of harm caused. *See Hooper*, 472 U.S. at 621. The state court’s reasoning ignores the fact that kidnapper-robbers who cause bodily harm to their victims are still not eligible for the life without parole sentence. Cal. Pen. Code §209.

Thus, petitioner remains similarly situated to a group of people who have been carved out for more favorable treatment by California’s sentencing scheme—kidnapper-robbers who cause bodily harm to their victims. This distinction between kidnapper-robbers who cause bodily harm and kidnapper-extortionists who cause bodily harm is not rationally related to the goals of either statute.

2. There is No Rational Basis for Treating Kidnapper-Extortionists More Harshly than Kidnapper-Robbers.

If, as here, similarly situated groups are treated differently, the government must have a rational basis for the distinction. *Reed*, 404 U.S. at 76. The Equal

² While escalating the penalty imposed on kidnapper-extortionists is plainly legitimate in the abstract, the ultimate sentence of life without the possibility of parole is “grossly disproportionate” to the crime in violation of the Eighth Amendment. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. *Rinaldi v. Yeager*, 384 U.S. 305, 308–309 (1966). Otherwise, the state could arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes. *See Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring).

To meet the rational basis test, the disparate treatment “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the [law].” *Reed*, 404 U.S. at 76. Sentencing kidnapper-extortionists to life in prison without parole while granting the possibility of parole to kidnapper-robbers is not rational when there is no secondary victim.

The California Court of Appeal has recognized that “the difference in penalty [between kidnapping for extortion and kidnapping for robbery] is rooted in the common . . . involvement of multiple victims—primary and secondary—in kidnappings for extortion.” *Ibrahim*, 19 Cal. App. 4th at 1698–1699. The Honorable Justice Kaus’s concurring opinion in *Norris*—with which the Chief Justice and Justice Grodin joined—drives this point home:

The statutory scheme makes it clear that the Legislature intended to reserve the more drastic penalty of subdivision (a) for cases involving the typical kidnaping for ransom scenario, where the kidnaping victim is held for some period of time to extort some collateral act. Subdivision (a) was not intended to apply to cases which fit the typical robbery mold, where the victim is required, by force or fear, immediately to part with a wallet, a car or some other property. The facts of this case, however, are obviously closer to the “robbery” than

to the “extortion” model.

Norris, 40 Cal. 3d at 58 (Kaus, J., concurring).³

The court in *Ibrahim* noted that “where there is no secondary victim, the distinction between kidnapping to commit extortion and kidnapping for robbery can be subtle.” *Ibrahim*, 19 Cal. App. 4th at 1698. This “subtle” distinction cannot rationally justify imposing a harsher sentence on kidnapper-extortionists.⁴ The court “urge[d] the Legislature to reconsider the sentencing schemes for these offenses.” *Id.* at 1699. Twenty-five years later, the Legislature has yet to correct the problem. Cal. Pen. Code §209.

The kidnapping-for-robbery and kidnapping-for-extortion statutes differ in three respects. None of the differences rationally supports harsher treatment for kidnapper-extortionists.

First, kidnapping for robbery includes the element that the victim be moved a substantial distance (“asportation”). *People v. Rayford*, 9 Cal. 4th 1, 11–12 (1994). Kidnapping for extortion does not include this element. *People v. Macinnes*, 30 Cal. App. 3d 838, 844 (1973); *Rayford*, 9 Cal.4th at 12 fn.8; *People v. Ordonez*, 226 Cal.

³ “Kidnapping for ransom” is defined as: “The offense of unlawfully seizing a person and then confining the person, usually in a secret place, while attempting to extort ransom.” Black’s Law Dictionary 948 (9th ed. 2009). “In addition to the abductor, a person who acts as a go-between to collect the ransom is generally considered guilty of the crime.” *Id.*

⁴ That no material difference exists between kidnapping for robbery and kidnapping for extortion in the absence of secondary victim is demonstrated here by petitioner’s simultaneous conviction for both offenses, as well as for simple robbery. 15 RT 3001, 3015; 2 CT 449, 452–457.

App. 3d 1207, 1227 (1991). Asportation makes kidnapping for robbery inherently *more* dangerous than kidnapping for extortion. *People v. Vines*, 51 Cal. 4th 830, 870 (2011); *Nguyen*, 22 Cal. 4th at 885–886; *People v. Simmons*, 233 Cal. App. 4th 1458, 1472 (2015). Thus, the lack of the asportation requirement cannot rationally justify treating kidnapper-extortionists more harshly.

Second, the underlying crimes of extortion and robbery are different. *In re Stanley*, 81 Cal. App.3d 415, 420 (1978) (“[T]he two crimes are distinguished by the fact that in extortion the property is taken with the victim’s consent whereas in robbery it is taken against his will.”). As noted, California has recognized that “so great a difference in penalty [should not] hinge upon so subtle a distinction as that between extortion and robbery—whether property was taken consensually by force or fear (Pen. Code, § 518) or nonconsensually by force or fear (Pen. Code, § 211).” *Ibrahim*, 19 Cal. App. 4th at 1699.

The State is particularly unjustified in imposing harsher sentences on kidnapper-extortionists because California treats robbers *more harshly* than extortionists when there is no kidnapping component. *Compare* Cal. Pen. Code §213(a)(1) (robbery in the first degree is punished by three, six or nine years in prison or three four and five years in prison); *and* Cal. Pen. Code §213(a)(2) (robbery in the second degree is punished by two, three or five years in prison), *with* Cal. Pen. Code §520 (Extortion is punished by two, three or four years in prison). The additional context of a kidnapping does not alter the relative harm of extortion *vis-a-vis* robbery when there is no secondary victim or ransom scheme. As such, it is

irrational to punish extortionists *less* harshly than robbers while punishing kidnapper-extortionists *more* harshly than kidnapper-robbers.

Third, the kidnapping for extortion statute requires that the victim suffer “death or bodily harm” in order to trigger the life without parole provision. Cal. Pen. Code §209(a). This provision cannot save the disparate treatment of kidnapper-robbers *vis-a-vis* kidnapper-extortionists because it fails to distinguish between the two groups when a kidnapper-robber causes bodily harm to his victim.

Because there is no rational basis to impose harsher sentences on kidnapper-extortionists than on kidnapper-robbers, the statute under which petitioner was sentenced violates the Equal Protection Clause.⁵

The absence of a rational basis for imposing harsher sentences on kidnapper-extortionists further demonstrates the Eighth Amendment violation at issue in appellant’s case. Intra-jurisdictional proportionality analysis can “validate an initial judgment that a sentence is grossly disproportionate to a crime.” *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). As argued above, life without the possibility of parole is grossly disproportionate to the crime of kidnapping for extortion in the absence of a secondary victim. Under *Harmelin*, this gross disproportionality is confirmed by the significantly less severe sentences afforded to kidnapper-robbers *vis-a-vis* kidnapper-extortionists despite the materially indistinguishable nature of

⁵ The court of appeal below did not reach the question of whether any rational basis supported the disparate treatment of kidnapper-robbers and kidnapper-extortionists based on its erroneous finding that the two groups were not similarly situated. Appendix A at 53.

the two crimes.⁶

B. This Court's Guidance is Necessary to End the Constitutional Violations Created by California's Sentencing Scheme.

As demonstrated by petitioner's case, the California state courts are unwilling to remedy the equal protection violation created by the irrationally harsh punishment of kidnapper-extortionists who had no secondary victim and who did not attempt to hold their victim for ransom. As demonstrated by the California Legislature's inaction in response to *Ibrahim's* call for a change to kidnapping-for-extortion sentencing laws, the California Legislature is similarly unwilling to remedy the equal protection violation described above. The disparate treatment of kidnapper-robbers and kidnapper-extortionists in California violates equal protection and the Eighth Amendment.

This Court alone has the power to resolve these important issues.

CONCLUSION

This Court should end the unequal and disproportionate treatment of kidnapper-extortionists *vis-a-vis* kidnapper-robbers in California. Unless this Court intervenes, prosecutors will continue to leverage a law whose harsh penalty was originally intended to deter ransom kidnappings to sentence kidnapper-extortionists to life without parole while similarly-situated kidnapper-robbers

⁶ The gross disproportionality of appellant's sentence is further borne out by the significantly less severe sentences afforded to first-degree murderers whose crimes are not death-eligible. *See* Cal. Pen. Code §§190, 190.2 (maximum penalty of "imprisonment in the state prison for a term of 25 years to life" for first-degree murderers whose crimes are not death-eligible).

cannot be sentenced to that term. There is no rational basis for this disparate, cruel, and unusual treatment.

Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

DATED: July 25, 2018

Respectfully submitted,



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NORBERTO SERNA
Counsel of Record

CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 17 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 18 pages long.



JAMES S. THOMSON