NO. 19-7284

IN THE

Supreme Court of the United States

BOBBY Y. WALLACE JR, PETITIONER,

V.

DARREL VANNOY, WARDEN, RESPONDENT.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE*
THE PROMISE OF JUSTICE INITIATIVE,
THE INNOCENCE PROJECT OF NEW ORLEANS
IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici, Innocence Project New Orleans and the Promise of Justice Initiative are non-profit law offices that provide representation to indigent people in prison in Louisiana.

Innocence Project New Orleans (IPNO) represents people serving life or effective life sentences in prison with provable claims of factual innocence. Since IPNO was founded in 2001, its work has led to the exoneration or release of 36 innocent people from prison who, combined, spent over 873 years wrongly incarcerated for crimes they did not commit. In addition to direct representation, IPNO also promotes policies to make the criminal justice system fairer and reduce unjust incarceration. IPNO has a particular interest in this case because it involves a cause of wrongful conviction with which IPNO is familiar—claims that the defendant made a statement that was interpreted as inculpatory and that was not recorded. In addition, this case presents this Court with an opportunity to address the troubling difficulty of securing Certificates of Appealability in

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[1] Pursuant to this Court's Rule 37, *Amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief. Notice was provided timely. Petitioner and Respondent granted consent.

the Fifth Circuit, and the impact of the Fifth Circuit's obsequious deference to erroneous state court interpretations of this Court's decisions. This case involves a petitioner who was convicted of a non-violent drug offense. Individuals wrongfully convicted of such crimes have been underserved by collateral review.

The Promise of Justice Initiative (PJI) is a private, non-profit organization that advocates for humane, fair, and equal treatment of individuals in the criminal justice system. As part of this mission PJI offers pro bono services to individuals whose sentences violate the 8th Amendment to the United States Constitution. PJI has filed amicus briefs in this Court, and a number of state supreme courts, addressing, among other issues, excessive sentences. This includes the following amicus briefs in cases before this Court: *Glossip v. Gross*, 14-7955; *McCoy v. Louisiana*, 16-8255; and in the state courts such as Washington and Delaware in *Scherf v. State*, No. 888906-6 (Wash. 11/08/2018) and *Rauf v. State*, 145 A.3d 430 (Del. 2016).

SUMMARY OF ARGUMENT

Amici file this Brief to address three issues that weigh in favor of this Court's intervention. First, the evidence used to convict Mr. Wallace is not only legally insufficient, it leaves an intolerable likelihood that Mr. Wallace is factually innocent of the crime for which he is serving life without parole. The case for guilt relied on an allegation that, in an unrecorded statement, Mr. Wallace urged his co-defendant's sister to "take the charges." Many innocent people, including two of IPNO's former clients, have been wrongfully convicted based on similar evidence. The likelihood that Mr. Wallace is factually innocent of the crime for which he is sentenced to die in prison weighs in favor of this Court's intervention. The case underscores the undue deference under the AEDPA that the Fifth Circuit Court of Appeal provides to erroneous state court determinations, gutting the constitutional protections afforded by *Jackson v. Virginia*, 443 U.S. 307 (1979), when it rejected the "no evidence rule" of *Thompson v. Louisville*, 362 U.S. 199 (1960), upon which the courts in Louisiana still appear to rely.

Second, this case presents an opportunity for this Court to intervene in an apparent wrongful conviction of a petitioner incarcerated for a non-violent drug crime. Data from the National Registry of Exonerations shows that such petitioners appear to be being underserved in post-conviction proceedings. In addition, Mr. Wallace appears to be the kind of petitioner who is disproportionately likely to be incorrectly denied a Certificate of

Appealability by the Fifth Circuit. Intervention from this Court does just ensure justice for Mr. Wallace, but corrects the disturbance in the manner in which constitutional protections are given short-shrift in a minority of Circuits.

Third, Petitioner is serving a life without parole sentence for a 10-2 jury verdict[2] on a nonviolent offense which carried a minimum of 5 and a maximum of 30 years imprisonment. Under a narrow proportionality review Petitioner's sentence is grossly disproportionate. However, the Court has not articulated how to address such claims when they arise from state court decisions but are reviewed in federal habeas. This case presents an opportunity for this Court to bring clarity to its gross disproportionality standard.

Ultimately, this case provides a clear example of the complete breakdown in Certificate of Appealability review process identified in *Tomlin v. Patterson*, (19-7127), currently pending before this Court.

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[2] *Wallace v. Cain*, No. 15-cv-2823, 2018 U.S. Dist. LEXIS 222094, at *1 (W.D. La. Nov. 28, 2018) ("A Caddo Parish jury, by a vote of 10 to 2, convicted Bobby Wallace, Jr. ("Petitioner") of possession of more than 28 grams but less than 200 grams of cocaine.") *adopted*, 2019 U.S. Dist. LEXIS 33346 (Mar. 1, 2019).

ARGUMENT

I. THIS CASE EXPOSES THE UNDUE DEFERENCE THE FIFTH CIRCUIT PROVIDES TO ERRONEOUS STATE COURT DECISIONS.

The Louisiana courts are non-compliant with this Court's dictate in *Jackson*, 443 U.S. 307. Nevertheless, the Federal Fifth Circuit Court of Appeal provides obsequious and unreviewing deference to state court determinations – determining that it is not even debatable amongst reasonable jurists whether petitioners like Mr. Wallace received the protections and freedom guaranteed by the Constitution.

According to the last state court opinion addressing the merits of his case, Mr. Wallace was convicted of constructive possession of 28 to 200 grams of cocaine based on the following evidence:

> 1) The Shreveport Police Department recovered 31 grams of cocaine from a baggie found under the cushions of the couch in the front room of a house in Shreveport, Louisiana. *State v. Wallace*, 71 So. 3d 1142, 1146 (La. App. 2 Cir. 2011).
>
> 2) Mr. Wallace was one of five people present in the house when the cocaine was found, but did not live there. *Id.* at 1146, 1151.
>
> 3) Mr. Wallace's fingerprints were found on a pair of scales collected from the kitchen

of the Hattie Street house. *Id.* at 1147.

4) Testimony that Mr. Wallace told another person present at the scene to "take the charges" in an unrecorded statement. *Id.* at 1151.

The court's sufficiency of evidence analysis considered the case against Mr. Wallace jointly with that against his co-defendant, although there was more evidence implicating Mr. Wallace's co-defendant.[3] In an irony lost on the Court of Appeal, the State convicted both Mr. Wallace and his co-defendant of "constructively" possessing the same 200 grams of cocaine – even though neither one of them actually possessed it.

Amici agree with Mr. Wallace that the evidence was legally insufficient to prove his guilt of constructive possession of the cocaine beyond a reasonable doubt and that, even under the doubly deferential 28 U.S.C. 2254(d) standard, he was entitled to *habeas* relief. In addition, *Amici* believe that the evidence is consistent with Mr. Wallace being factually innocent. And, most significantly, *Amici* believe that this is – at the heart of it all – debatable amongst reasonable jurists. Under the

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[3] Mr. Wallace's co-defendant lived in the house in which the cocaine had been found and a witness testified that he had heard the co-defendant refer to the specific quantity of drugs found by police. *Wallace*, 71 So. 3d at 1151.

Magistrate's Report and Recommendation "Reasonable minds could perhaps differ on whether the evidence was sufficient when Jackson was applied on direct appeal" "but once that decision was made by the state court, it was adequate to withstand habeas challenge." *Wallace*, 2018 U.S. Dist. LEXIS 222094, at *10-11.

From *Amici's* perspective, if there were actual doubts amongst jurors – two voted not to convict – and reasonable minds could differ on whether there was sufficient evidence to withstand a conviction under *Jackson*, then it is at least debatable amongst reasonable jurists whether the conviction violated the constitution.

Amici recognize that a petitioner may be factually innocent even though the State presented sufficient evidence to convict beyond a reasonable doubt or that a person could be factually guilty even if the evidence was legally insufficient to convict the petitioner. However, this Court has described a sufficiency of evidence claim as being "as close" as it has come to reviewing the evidence underlying a state conviction in a collateral federal proceeding. *Herrera v. Collins*, 506 U.S. 390, 401 (1993). It also stated that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Id.* at 398. When a factually innocent person has been convicted based on legally insufficient evidence, this surely weighs in favor of judicial intervention – it is at least debatable amongst reasonable jurists.

Amici's concern that Mr. Wallace is factually

innocent is motivated by the weight that the court of appeal gave to his alleged statement to someone to "take the charges." *Wallace*, 71 So. 3d at 1151. This point was repeated in the magistrate's report and recommendation adopted by the district court. *Wallace*, 2018 U.S. Dist. LEXIS 222094, at *10 ("There was also the evidence that Petitioner asked Kendra Young to 'take the charges,' which was suggestive of guilt on his part."). As Mr. Wallace explains in his petition, the alleged statement is not an admission of guilt to any crime, let alone the crime for which Mr. Wallace was convicted.[4] *See Petition at 7 n. 7*. Several wrongful convictions, including those of IPNO clients, involve misplaced reliance being placed upon an alleged statement by the defendant that was less than a confession, but imbued with an inculpatory inference.

IPNO client Anthony Johnson was convicted of the murder of his girlfriend based on a police officer's claim that, in an unrecorded interview, he showed "special knowledge of the circumstances

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[4] The court of appeal noted that marijuana and a handgun were found in the kitchen of the house. *Wallace*, 71 So. 3d at 1146-47. Even if Mr. Wallace's statement indicates knowledge that there were contraband items at the house he was visiting and thus charges to take, something he might also have only learned because it was revealed during the police search, this does not establish knowledge of the existence of the cocaine with which he was charged with being in possession.

surrounding the victim's death." *State v. Johnson*, 971 So. 2d 1124, 1126 (La. App. 1 Cir. 2007), *cert. granted*, 983 So. 2d 907 (La. 2008), *remanded*, 23 So. 3d 876 (La. 2009), *cert. dismissed as moot*, 23 So. 3d 878 (La. 2009). Allegedly, Mr. Johnson stated that he would not have killed the victim "like that," "with the pick and the fork." *Id.* at 1126-27. Mr. Johnson spent 23 years in prison before being exonerated when DNA from under the victim's fingernails was matched to a serial killer who had confessed to the crime.[5] The State of Louisiana has recognized that, notwithstanding the claim that he made a statement indicative of guilt, Mr. Johnson was factually innocent.[6]

IPNO client John Floyd was arrested for a murder that occurred on Governor Nicholls Street in

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[5] National Registry of Exonerations: Anthony Johnson https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3327 (last visited Feb. 5, 2020).

[6] The State agreed that Mr. Johnson was entitled to compensation pursuant to La. R.S. 15:572.8, which required proof "by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted . . . nor did he commit any crime based upon the same set of facts used in his original conviction." *See Johnson v. State*, 22nd Jud. Dist. Ct. No. 39701 (Mar. 6, 2012) (agreed compensation judgment).

New Orleans based on claim that, when arguing with a bar owner some days after the crime, Mr. Floyd stated "I already wasted one person" and, when "asked if the victim had been the man who lived around the corner," had answered, "Yeah. On Governor Nicholls." *State v. Floyd*, 435 So. 2d 992, 994 (La. 1984). He was convicted based on this claim and a subsequent custodial confession. *Id.* He was subsequently found to have met the *Schlup v. Delo*, 513 U.S. 298 (1995), innocence standard based on new evidence consisting of fingerprint comparison results, an affidavit from a friend of the victim, post-trial statements by the lead detective, a judicial finding of coercion by the lead detective, evidence from a forensic psychologist, and DNA testing results. *Floyd v. Cain*, 11-CV-2819, 2016 U.S. Dist. LEXIS 124660, at *40-49 (E.D. La. Sept. 14, 2016), *aff'd sub nom.*, *Floyd v. Vannoy*, 894 F.3d 143 (5th Cir. 2018). Ultimately, Mr. Floyd was released and exonerated after 36 1/2 years of wrongful incarceration. The State of Louisiana has recognized that, notwithstanding his alleged statements to the bar owner, Mr. Floyd was factually innocent.[7]

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[7] As with Mr. Johnson, the State agreed that Mr. Floyd was entitled to compensation pursuant to La. R.S. 15:572.8, which required proof "by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted . . . nor did he commit any crime based upon the same set of facts used in his original conviction." *See Floyd v. State*, Orleans Crim. Dist.

Wrongful convictions based on misplaced reliance on a claim that the defendant said something inculpatory that was not a confession are not unique to Louisiana:

- In Montana, Chester Bauer was convicted at a trial at which the State's evidence included the arresting officer's claim that, when he was arrested for rape, Mr. Bauer stated "Which bitch did it?" *State v. Bauer*, 683 P. 2d 946, 951 (Mont. 1984). Fourteen years after he was convicted, Mr. Bauer was exonerated when DNA testing proved that he did not commit the crime.[8]
- In New York, Kareem Bellamy was "was convicted mostly because of what he said at the time he was picked up for drinking beer in public." *People v. Bellamy*, 20 Misc. 3d 1131(A) (N.Y. Sup. Cr. 2008). Mr. Bellamy allegedly stated "this must be a mistake—somebody must have accused me of murdering someone." *Id.* In 2011, sixteen years after he was convicted, Mr. Bellamy was exonerated based on undisclosed police reports and post-conviction investigation that

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Ct. No. 280-729 (Jan. 23, 2020) (agreed compensation judgment).

[8] National Registry of Exonerations: Chester Bauer, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3016 (last visited Feb. 7, 2020).

each implicated the same alternative suspect.[9]

- In Maryland, Kirk Bloodsworth was convicted and sentenced to death for murdering a child based on circumstantial evidence that included a claims that he "said he had done something bad" and that "he discussed the girl, her clothes, the bloody rock, and a man who was with him who he claimed was supposed to have done the crime." *Bloodsworth v. State*, 307 Md. 164 169, 171, 186 (Md. 1986). He was exonerated by DNA evidence that eventually identified the actual perpetrator.[10] The federal grant program for post-conviction DNA testing is now named after Mr. Bloodsworth.[11]

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[9] National Registry of Exonerations: Kareem Bellamy, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3956 (last visited Feb. 7, 2020).

[10] National Registry of Exonerations: Kirk Bloodsworth, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032 (last visited Feb. 7, 2020).

[11] National Institute of Justice: Exonerations Resulting from NIJ Postconviction DNA Testing Funding, https://nij.ojp.gov/topics/articles/exonerations-resulting-nij-postconviction-dna-testing-funding (last visited Feb. 7, 2020).

Because of the wrongful convictions based on evidence similar to that relied upon in this case, *Amici's* knowledge and experience lead them to believe that the evidence used to convict Mr. Wallace was neither legally sufficient nor factually reliable.

As significantly, this is exactly the type of issue that reasonable jurists outside the Fifth Circuit debate. See *Macdonald v. Hedgpeth*, 907 F. 3d 1212 (9th Cir. 2018) (granting certificate of appealability on issue of whether there was sufficient evidence to support gang sentencing enhancement in habeas case and holding evidence insufficient even under doubly deferential standards); see *id* at 1222 ("Federal courts do not allow such suspicion and speculation to support a jury verdict, even under the dual layers of judicial deference accorded to Jackson claims in federal habeas proceedings."); *Gipson v. Sheldon*, 659 Fed. Appx. 871, 876-77 (6th Cir. 2016) (conducting full review of sufficiency of evidence claim following grant of Certificate of Appealability by court of appeal); *DiBiase v. Eppinger*, 659 Fed. Appx. 261, 266 (6th Cir. 2016) (conducting full review of sufficiency of evidence claim following grant of Certificate of Appealability by district court); *Ely v. Erickson*, 712 F. 3d 837 (3rd Cir. 2013) (finding of double deferential nature of standard of review resulted in a close case); see *id.* at 862-863 (Cowen J., dissenting).

II. THIS CASE UNDERSCORES THE PROBLEM WITH THE FIFTH CIRCUIT'S TOTAL DEFERENCE TO THE LOUISIANA COURTS, COMBINED WITH THE STATE COURTS' REPEATED REJECTION OF SUFFICIENCY CLAIMS.

Mr. Wallace is serving life without parole for a non-violent drug offense. Defendants convicted of such crimes are underrepresented among the exonerated – in part due to the apparent indifference of the state courts and the lack of oversight by the federal courts. Indigent *pro se* non-capital petitioners are especially vulnerable to misapplication of the Certificate of Appealability standard that appears to be pervasive in the Fifth Circuit.

Mr. Wallace is before this court of last resort because the United States Court of Appeals for the Fifth Circuit denied him a Certificate of Appealability. *Pet. App. A.* In capital cases, this Court has reversed the Fifth Circuit due to the misapplication of 28 U.S.C. 2253 and the incorrect denial of Certificates of Appealability. *See Buck v. Davis*, 137 S. Ct. 759, 780 (2017); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Banks v. Dretke*, 540 U.S. 668, 689 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (finding Fifth Circuit used "too demanding a standard"). While these cases reveal that the Fifth Circuit misapplies 28 U.S.C. 2253, thus far this Court has only intervened in capital cases.

There is, however, no reason to believe that

the Fifth Circuit only errs when applying 28 U.S.C. 2253 in capital cases. The Fifth Circuit's rules allow an even *less* rigorous review in non-capital cases; allowing, as occurred in this case, review by a single judge. 5th Cir. Rule 27.2.3. The available data also states that the Fifth Circuit is far less likely to grant a Certificate of Appealability in a non-capital case: a dataset of non-capital cases found that a Certificate is granted by the court in 7% of cases, but a dataset of capital cases found a 41.4% grant rate.[12]

While this Court has limited resources and—in recognition of the fact that "death is different"—may have focused its resources on reviewing the misapplication of 28 U.S.C. 2253 in capital cases, Mr. Wallace is a *pro se* indigent petitioner sentenced to life without parole based on legally insufficient evidence as punishment for a crime he appears not to have committed. In these circumstances, it "would be a rather strange jurisprudence" that distinguished between death and life without parole. *Herrera*, 506 U.S. at 405. Consistent with this, "[i]n recent years this Court has recognized that,

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[12] N. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 Fed. Sentencing Reporter 308, 3010 (2012) (analyzing Certificate of Appealability grant rate in sample of non-capital cases); Petition for Writ of *Certiorari* at 26, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 3162257 (summarizing petitioner's Appendix F detailing research on Certificate of Appealability grants in capital cases).

although death is different, 'life without parole sentences share some characteristics with death sentences that are shared by no other sentences.'" *Campbell v. Ohio*, 138 S. Ct. 1059, 1059 (2018) (Sotomayor, J. concurring in denial of *cert*.) (quoting *Graham*, 560 U.S. at 69.

"Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down." *McGee v. McFadden*, 139 S. Ct. 2608, 2611 (2019) (Sotomayor, J. dissenting from denial of *cert*.). "[A]ny given filing—though it may feel routine to the judge who plucks it from the top of a large stack—could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence." *Id.* Whether due to his lack of counsel, indigence, the non-violent nature of the crime for which he was convicted, or his non-capital conviction, Mr. Wallace's conviction and life without parole sentence have been insufficiently reviewed. As detailed in his petition and this Brief, there are good reasons why this Court should intervene to remedy this.

There is no reason to believe that convictions for non-violent offenses are more reliable or deserve less consideration from the courts. Nevertheless, they do appear to receive less consideration. According to the Bureau of Justice Statistics, only 18.2 % of state court felony convictions are for violent offenses.[13] However, according to the

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[13] Dept. of Justice, Bureau of Justice Statistics, Sean Rosenmerkel, Matthew Durose, and Donald

National Registry of Exonerations, fully 73.9% of exonerations are of people wrongly convicted of violent crimes.[14] Consistent with this, only 327 of the 2551 exonerations on the National Registry (12.8%) are for drug offenses, but 33.4% of felony convictions are for such crimes. Further, these 327 drug case exonerations are not evenly spread around the country; the majority are from either Cook County (Chicago), Illinois, (74 cases)[15] or Harris County (Houston), Texas, (150 cases)[16]. This shows that people who are wrongfully convicted of drug

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Farole, *Felony Sentences in State Courts, 2006-Statistical Tables*, p. 3 (rev. Nov. 22, 2010).

[14] Of the 2551 entries in the registry, 1844 are for violent crimes (Accessory to Murder (4), Assault (99), Attempt-Violent (4), Attempted Murder (57), Child Abuse (9), Child Sex Abuse (280), Dependent Adult Abuse (1), Kidnapping (15), Manslaughter (49), Murder (983), Other Violent Felony (9), Other Violent Misdemeanor (2), Sexual Assault (332)), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Feb. 7, 2020).

[15] National Registry of Exonerations: Drug Possession or Sale: https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Crime&FilterValue1=8_Drug%20Possession%20or%20Sale (last visited Feb. 7, 2020).

[16] *Id*.

possession outside of Houston or Chicago have a negligible chance of being exonerated.

Post-conviction review is often focused on violent crimes where DNA may exist and *pro bono* representation is triaged to death penalty cases.[17] However, there is no suggestion that the seriousness of the crime correlates with the accuracy of the adjudication. And, while many defendants wrongfully convicted of non-violent crimes may draw some comfort from receiving a relatively light sentence, Mr. Wallace is sentenced to die in prison and so can draw no such comfort.

III. THIS COURT SHOULD GRANT *CERTIORARI* AND REMAND FOR FULL CONSIDERATION BY THE COURT OF APPEAL BECAUSE WHETHER PETITIONER'S LIFE SENTENCE IS EXCESSIVE IS AT LEAST DEBATABLE AMONGST REASONABLE JURISTS.

Even under the narrow review announced in *Harmelin v. Michigan*, 501 U.S. 957 (1991), Petitioner is entitled to relief. The state court erroneously failed to "address the gravity of the offense compared to the harshness of the penalty." *Ewing v. California*, 538 U.S. 11, 28 (2003). That court's decision was objectively unreasonable in not applying *any* legal test set forth by the Court. The

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[17] Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U.L. Rev. 779, 780 (2018).

federal courts compounded the error in making the determination that the state court decision was not contrary to, or an unreasonable application of, any clearly established Supreme Court precedent *because* "the Court admitted that its precedents in the area were not clear, which makes it difficult to obtain habeas relief under the deferential Section 2254(d) standard." *Wallace*, 2018 U.S. Dist. LEXIS 222094, at *12. While the gross disproportionality principle may lack clarity, it is not so opaque that state court decisions, like the one here, are forever insulated from debate among reasonable jurists. *Matthews v. Cain*, 337 F. Supp. 3d. 687 (E.D. La. 2018) (granting relief to fourth felony offender under *de novo* review); *Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004)) (granting recidivist relief notwithstanding AEDPA deference).

A. *The Gravity of the Offense Compared to the Severity of the Sentence Imposed Raises a Strong Inference This Sentence is Grossly Disproportionate*

Petitioner's life without parole sentence for purportedly possessing 31 grams of cocaine is extraordinarily harsh and completely unlike the nearly pound and a half of cocaine seized from the defendant in *Hamelin* during the crack cocaine epidemic of the late 1980s. Here, the underlying offense carried a sentence between 5 and 30 years. La. R.S. 40:967(F)(1)(a) (West 2007). However, it was ultimately punished the same as Louisiana punishes first degree murder, second degree murder, first degree rape, aggravated kidnapping,

and treason. The offense was also punished more harshly than armed robbery, second degree rape, second degree kidnapping, aggravated arson, and human trafficking. Moreover, a life without parole sentence, in Louisiana, means death in prison. 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." *Graham v. Florida*, 560 U.S. 48, 69-70 (2010) (internal citation omitted).

As discussed above, the Petitioner's purported involvement in the offense was also not particularly aggravating, and the evidence against him so far from overwhelming two jurors voted to acquit. The two predicate felonies used to enhance Petitioner's sentence to death in prison were convictions for manslaughter and for possession of marijuana with intent to distribute. *Wallace*, 71 So.3d at 1149, n.2. Petitioner was 16 years of age at the time he committed the manslaughter. As this Court has recognized juveniles have a diminished culpability due to their "transient rashness, proclivity for risk, and inability to assess consequences." *Miller v. Alabama*, 567 U.S. 460, 472 (2012). The marijuana charge resulted in probation. While Petitioner was on probation for this second offense at the time he purportedly committed his last offense, he was only one day away from completing probation at the time of arrest.

In placing all three of these offenses on the "scales" to determine the gravity of the offense, as

Ewing instructs, none reflect a long or continued history or pattern of persistent criminal conduct, nor do they outweigh the harshness of the sentence such that there can be no inference this sentence is grossly disproportionate.

Importantly, the state court wholly failed to apply the threshold comparison articulated in *Harmelin* and *Ewing*. The state court did not engage in the required analysis at all. *Wallace*, 71 So.3d at 1152. In addressing this claim, the court of appeal cited no precedent, applied no legal test, and merely cherry picked certain disputable facts to find the sentence proportionate. In arriving at its decision, the court focused solely on the fact that the Petitioner disputed the government's evidence, but had no regarding to other factors, including the doubts of the two dissenting jurors.

Had the state court applied the threshold comparison, the facts and circumstances of this case clearly give rise to an inference of gross disproportionality, requiring the further inquiry required by *Solem v. Helms*, 463 U.S. 277, 290-292 (1983).

B. *Petitioner's Life Without Parole Sentence is Disproportionate compared to other criminal sentences in other jurisdictions*

A comparative review of sentences in other jurisdictions further confirms that Petitioner's sentence is grossly disproportionate, and violates the evolving standards of decency. In his dissent in

Ewing, Justice Breyer demonstrated how the Court should proceed in an interjurisdictional analysis after finding that the sentence at issue raised the "threshold" inference of gross disproportionality. Justice Breyer examined sentencing practices rather than sentencing statutes alone, noting that in nine states besides California the law might make it legally possible to impose a sentence like Ewing's, but that such sentences were almost certainly imposed infrequently. 538 U.S. at 46-47. Like the sentence in *Ewing*, sentences of life without parole where the last offense is nonviolent are imposed infrequently. Across the country, only 2% of all state prisoners serving life and virtual life sentences committed drug offenses like Petitioner.[18] Whereas, 38% of state prisoners serving life and effective life sentences have been convicted of first degree murder, 20.5% have been convicted of second degree or another type of murder, 32.6% have been convicted of some other type of violent crime – 17% for sex offenses and 15.6% for aggravated assault, robbery, or kidnapping.[19]

An intrajurisdictional review of sentences

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[18] The Sentencing Project, Still Life: America's Increasing Use of Life And Long-Term Sentences (2017) *available at* http://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/

[19] Id.

imposed in Louisiana, and an interjurisdictional review of sentences imposed in other states, and the decision of the Louisiana Legislature to amend the statute under which Petitioner was sentenced all point to the same conclusion: Petitioner's sentence was a wasteful mistake and is now grossly disproportionate. "Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time." *Graham*, 560 U.S. at 85. Petitioner's sentence is such a punishment.

This Court should now grant *Certiorari* and remand for full consideration by the Court of Appeal, as fairminded jurists could have come to differing conclusions. *See e.g. Ramirez v. Castro*, 365 F.3d 755, 756 (9th Cir. 2004); *United States v. Rivera-Ruperto*, 852 F.3d 1, 34 (1st Cir. 2017).

C. *This Court Should Grant Certiorari to Address the Concerns Acknowledged in Lockyer v. Andrade*

Should this Court not grant *Certiorari* on the merits of Petitioner's sentencing error, the Court should nonetheless grant *Certiorari* to clarify what constitutes objective unreasonableness on federal habeas review where there are no "contours" to the gross disproportionality principle. *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

The root of this confusion can be fairly traced to the differing and contrary framework found in *Solem*, *Rummel v. Estelle*, 445 U.S. 263 (1980), and *Harmelin*. In *Lockyer* Petitioner came before the

federal courts on habeas review. Like the Petitioner encountered here, the courts had to find that the state court had engaged in an unreasonable application of clearly-established federal law. The Court of Appeals concluded *Rummel* and *Solem* were both good law, and the fact that the state court applied one and not the other constituted an unreasonable application of clearly established law. *Andrade v. AG of Cal.*, 270 F.3d 743, 767 (9th Cir. 2001). This Court reversed.

In her opinion for the majority, Justice O'Connor, who had joined Justice Kennedy's three-Justice concurrence in *Harmelin*, referred to the inherent problems in applying the Court's precedent in this area. *See id.* at 72 ("[O]ur precedents in this area have not been a model of clarity."); *id.* ("[I]n determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow."); *id.* ("[Our] cases exhibit[] a lack of clarity regarding what factors might indicate gross disproportionality."). Yet the Court provided no clarity.

Here, the District Court when faced with the same challenge the federal courts faced in *Lockyer* nearly seventeen years ago decided to throw up its hands and conclude it is "difficult to obtain habeas relief under the deferential Section 2254(d) standard," yet did so without engaging in any meaningful analysis or applying any of the Court's substantive precedents, as aside of *Lockyer*. *Wallace*, 2018 U.S. Dist. LEXIS 222094, at *12.

The court should now grant *Certiorari* so that the courts get clarity on what standard must be applied when addressing these claims on federal habeas review of state court decisions.

CONCLUSION

For the foregoing reasons, the petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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