No. ___ – _____

In the Supreme Court of the United States

GUY ADAM ROOK,

Petitioner,

v.

DONALD HOLBROOK,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Rook filed a federal habeas petition arguing that his life-without-parole sentence for a third-strike conviction of vehicular assault (driving in a reckless manner and causing substantial bodily injury) was grossly disproportionate in violation of the controlling plurality of *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Kennedy, J., concurring). The last reasoned state-court decision in his case had held that the allegedly more protective state constitution was not violated, and therefore the federal constitution was not violated, but did no independent analysis of the Eighth Amendment and neglected to perform the *Harmelin* test. The questions presented are:

1) Whether a demonstration that a state constitutional test is less protective than the federal constitutional test means that an adjudication of the state constitutional test fails to "adjudicate[…] the merits" of the federal constitutional claim under 28 U.S.C. 2254(d), and

2) Whether the test set forth in Justice Kennedy's concurrence in *Harmelin v. Michigan* is controlling Supreme Court precedent and thus "clearly established Federal law," under § 2254(d), or if instead, the test was overruled by *Lockyer v. Andrade*'s reference to the general "gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer v. Andrade*, 538 U.S. 63, 72–73 (2003).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Guy Adam Rook respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The original opinion of the court of appeals (Pet. App. 1a) is unreported but is available at 2021 WL 3739173. The order granting the petition for rehearing with suggestion for rehearing *en banc* and the superseding opinion (Pet. App. 16a) is unreported but available at 2021 WL 5768465. The order denying a second petition for rehearing (Pet. App. 17a) is unreported.

JURISDICTION

The second judgment of the court of appeals was entered December 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(d)(1) provides in relevant part:

> (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….

INTRODUCTION

State courts often contend a state constitutional provision is more protective than the federal analogue, and thus there is no need to perform the federal constitutional test. Sometimes, they are wrong. In the Eighth Amendment context alone, multiple states claim more protective state constitutional provisions, but then utilize complex, multifactor tests that have no clear or necessary relationship to the required first step of the controlling test from Justice Kennedy's concurrence in *Harmelin*: whether "[i]n light of the gravity of petitioner's offense, a comparison of his crime with his sentence [gives] rise to an inference of gross disproportionality." *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part). In Eighth Amendment cases challenging life-without-parole (LWOP) sentences from Washington state, the usually unclear relationship between the two tests becomes clear: the state provision provides blatantly lower protection than its federal counterpart. In addition to employing a multifactor test that omits the first step of the *Harmelin* test, Washington courts are forbidden to consider the difference between LWOP sentences and sentences of life with the possibility of parole, while Eighth Amendment precedent from this Court in *Rummel v. Estelle*, 445 U.S. 263, 280–81(1980), and *Solem v. Helm*, 463 U.S. 277, 297 (1983), requires attention to that difference.

Mr. Rook was convicted in state court of a driving offense with a recklessness mens rea and a requirement that substantial injury—but not death—result. Because he had been convicted of two prior "strike" offenses, this conviction counted as a "third strike" under Washington's harsh Persistent Offender Accountability

Act, and he received a mandatory LWOP sentence. Reviewing a challenge to his sentence under both the Eighth Amendment and Washington's article I, section 14, the state court held that Mr. Rook's state constitutional rights were not violated, and concluded therefore that his Eighth Amendment rights were necessarily also not violated, without separately assessing his Eighth Amendment claim.

On habeas review, Mr. Rook argued that his Eighth Amendment claim had not been "adjudicated on the merits" for the purpose of § 2254(d) because a less protective state test does not suffice to adjudicate the federal test. In the alternative, he argued that because the Washington constitutional test omits the required first step of the controlling *Harmelin* test, using the Washington test as a substitute for the federal test is "contrary to" the clearly established *Harmelin* concurrence.

The Ninth Circuit Court of Appeals departed from principles of party presentation to question whether the Washington Supreme Court meant what it said when it held repeatedly that "the distinction between life sentences with and without parole is not significant" for the purposes of the state constitutional analysis. *State v. Rivers*, 921 P.2d 495, 503 (Wash. 1996); Pet. App. 10a, 14a n.4. It then reasoned that Mr. Rook's argument was "more apt in addressing" the § 2254(d)(1) analysis, and held that the *Harmelin* test was not controlling because "[t]he Supreme Court has concluded. . . that 'the only relevant clearly established law amenable to the "contrary to" or "unreasonable application of" framework is the gross disproportionality principle, the precise contours of which are unclear,

applicable only in the "exceedingly rare" and "extreme" case.' *Lockyer* [*v. Andrade*], 538 U.S. [63,] 72–73 [(2003)]." Pet. App. 10a.

STATEMENT OF THE CASE

After running a red light and striking a car in an intersection, Mr. Rook was convicted in Washington state court under the recklessness prong of the state's vehicular assault statute. ER-65; Wash. Rev. Code § 46.61.522(1)(a) (prohibiting driving in reckless manner and causing substantial bodily injury). The jury acquitted him of vehicular assault under the separate driving-under-the-influence prong. ER-249; Wash. Rev. Code § 46.61.522(b). Because vehicular assault is considered a strike offense under Washington's Persistent Offender Accountability Act ("POAA"), ER-66, Wash. Rev. Code § 9.94A.030(32)(p), and Mr. Rook had previously been convicted of two other strike offenses, he was subject to a mandatory sentence of life without parole for the vehicular assault. ER-68.[1]

Because the sentence was mandatory, his sentencing proceeding was perfunctory. No mitigation evidence was provided. No psychological evaluations were performed. Although his sisters were permitted to speak at his sentencing, there was little for them to say: "I'm Terri Rook, I'm the sister, and it just—this life in prison for a car accident seems really harsh. I know my brother hasn't made the

[1] According to the Washington Supreme Court, Mr. Rook's sentence is punishment *solely* for the reckless driving offense, as opposed to his prior strike offenses: "POAA sentences are not punishment for the [initial strike offenses] because recidivist statutes do not impose 'cumulative punishment for prior crimes[; rather, t]he repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime.'" *State v. Moretti*, 446 P.3d 609, 616 (Wash. 2019) (quoting *State v. Lee*, 558 P.2d 236, 239 (Wash. 1976)).

best decisions, but I—I can't see this as being something to put him away for life." ER-224. His attorney was equally constrained: "It seems to be a cruel and unusual punishment to sentence Mr. Rook to life in prison for what, essentially, was an accident. . . . I don't have anything further to add, your Honor, I don't think there's much more I can say." ER-223–24.

Mr. Rook's direct-appeal attorney brought both an Eighth Amendment claim and a similar "cruel punishment" claim under article I, section 14 of the Washington constitution and argued them separately, based on discrete bodies of law. ER-131–54. In the Eighth Amendment argument, the brief specifically argued that a life-without-parole sentence has been recognized by the Supreme Court as distinct in both kind and degree from sentences of life with parole, citing *Graham v. Florida*, 560 U.S. 48, 69 (2012), and *Solem*, 463 U.S. at 297. ER-149–50.

As the panel opinion recognized, the resulting Washington Court of Appeals decision "declined to address his Eighth Amendment claim directly." Pet. App. 9a. Instead, since Washington courts have held since 1980 that "[t]he state constitutional proscription against 'cruel punishment' affords greater protection than its federal counterpart," the Washington Court of Appeals concluded, "if the state constitutional provision is not violated, neither is the federal provision." *Id.*; Court of Appeals Op., ER-86 (citing *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980)).[2] As the superseded panel opinion recognized, this reasoning suffices to "adjudicate[

[2] Because the Washington Supreme Court denied review without comment, ER-185, the federal court looks through to the Washington Court of Appeals opinion as the last reasoned opinion. *See Ylist v. Nunnemaker*, 501 U.S. 797, 805–06 (1991).

]" the analogous Eighth Amendment gross-disproportionality claim only if "the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard. *Johnson v. [Tara] Williams*, 568 U.S. 289, 299, 301 (2013)." Superseded Mem. Op. at 3. Any presumption of adjudication is subject to rebuttal. *Id.* (citing *Tara Williams*, 568 U.S. at 301–02).

Constrained by Washington precedent holding that the "distinction between life sentences with and without parole is not significant" for the purpose of article I, section 14, *Rivers*, 921 P.2d at 503, the Washington Court of Appeals denied Mr. Rook's article I, section 14 claim (and thus his Eighth Amendment claim). ER-86. It employed the distinct three-factor balancing test from *Fain*, which omits the comparison between the gravity of the recklessness offense against the severity of the LWOP sentence (as the *Harmelin* test requires), and conflated the unique severity of a life-without-parole sentence with the lesser severity of a sentence of life with the possibility of parole—repeatedly characterizing Mr. Rook's sentence as a "life sentence" and comparing it to an "indeterminate life sentence" under California law and "potential life sentences" in other jurisdictions. ER-86–91.

The Ninth Circuit panel concluded, however, that Mr. Rook had not shown by this evidence that the Washington standard was less protective than the Eighth Amendment in the context of a challenge to an LWOP sentence. Am. Mem. Op. at 3. In its first opinion, the panel relied on an off-topic case cited by neither party to "reject Rook's contention that Washington state courts are 'required' . . . to disregard the distinction between sentences of life with and without the possibility

of parole." Pet. App. 6a n.3 (citing *In re Grisby*, 853 P.2d 901 (Wash. 1993)). After Mr. Rook pointed out this error, the panel asked the state to address Mr. Rook's contention about the distinction between LWOP and life with the possibility of parole. Pet. App. 15a. The state declined to do so. The panel granted the petition for rehearing, dropped its reliance on *Grisby* but continued to doubt that the Washington Supreme Court meant what it said in *Rivers*, and adhered to its original conclusions. Pet. App. 10a n.4.

The panel also rejected Mr. Rook's alternative "contrary to" argument, in which he had argued that even if the Eighth Amendment claim was "adjudicated" by the Court of Appeals' decision for the purposes of § 2254(d), the Court of Appeals' use of the three-factor *Fain* balancing test was "contrary to" the controlling *Harmelin* concurrence. It held that the *Harmelin* test was not controlling because it had been overruled, at least for habeas cases: "The Supreme Court has concluded. . . that 'the only relevant clearly established law amenable to the "contrary to" or "unreasonable application of" framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the "exceedingly rare" and "extreme" case.' *Lockyer* [*v. Andrade*], 538 U.S. [63,] 72–73 [(2003)]."

REASONS FOR GRANTING THE PETITION

I. The Panel Opinion Drastically Departed from the Principles of Party Presentation When It Insisted That the Washington Supreme Court Did Not Mean What It Had Repeatedly Held.

Repeating the recent error of another Ninth Circuit panel in *United States v. Sineneng-Smith,* the panel below "departed so drastically from the principle of party presentation as to constitute an abuse of discretion," *United States v. Sineneng-*

Smith, 140 S. Ct. 1575, 1578 (2020), when it insisted that the Washington Supreme Court did not mean what it said when it held that "the distinction between life sentences with and without parole is not significant" for the purpose of the state constitutional analysis. *State v. Rivers*, 921 P.2d at 503 (Wash. 1996); *see also State v. Thorne*, 921 P.2d 514, 532 (Wash. 1996) ("This court has held that the distinction between life sentences with and without parole is not significant."); *State v. Thomas*, 83 P.3d 970, 983 (Wash. 2004) ("[I]n *In re Personal Restraint of Grisby*, 121 Wash.2d 419, 427–28, 853 P.2d 901 (1993), this court held that there was no significant difference between a life sentence and life without the possibility of parole. We later reiterated this sentiment in *State v. Rivers*, 129 Wash.2d 697, 714, 921 P.2d 495 (1996), in the context of the three strikes law."); *see* Am. Mem. Op. at 3, 7 n.4.

Flouting the principle of party presentation, the panel initially relied on a case cited by neither party that was decided three years *before* the controlling precedent in *Rivers*. Superseded Mem. Op. at 6 n.3. (citing *In re Grisby*, 853 P.2d 901 (Wash. 1993)). Neither party cited *Grisby* because it addressed a challenge, pursuant to the Sixth Amendment and *United States v. Jackson*, 390 U.S. 570 (1968), to a trial penalty that raised the defendant's statutory maximum—not a challenge under either the Eighth Amendment or Washington article I, section 14. *Grisby*, 853 P.2d at 905–07. *Grisby* could not have been clearer on this point: "The case before us is not an Eighth Amendment case as is *Solem*. This is, rather, a Sixth Amendment case relating to a defendant's right to a jury trial." *Id.*

When Mr. Rook filed a petition for rehearing drawing attention to this issue, the panel instructed the state to "tak[e] into account Petitioner-Appellant's contention that the state court judge did not consider the distinction in severity between the sentence of life without the possibility of parole, which was imposed on Petitioner-Appellant, as opposed to life with the possibility of parole." Order, Dkt. 39. The state declined to do so. *See* PFR Resp., Dkt. 40. It failed to cite or distinguish *State v. Rivers*, and changed the subject to whether the Washington Supreme Court has held article I, section 14 to be more protective than the Eighth Amendment in contexts entirely outside gross disproportionality analyses of adult noncapital sentences. PFR Resp., Dkt. 40 at 10 (citing *State v. Bassett*, 428 P.3d 343 (Wash. 2018) (state constitution categorically prohibits life without parole for juveniles); *State v. Haag*, 495 P.3d 241 (Wash. 2021) (applying the categorical rule to a de facto life sentence)). The state did argue in passing that the distinction between an LWOP sentence and a sentence of life without parole "does not rest upon a holding of the Supreme Court"—despite *Rummel* and *Solem* holding that distinction key to the outcomes of those cases. PFR Resp., Dkt 40 at 1; *see Rummel*, 445 U.S. at 280–81, and *Solem*, 463 U.S. at 297. But this argument was the state's justification for the Washington rule, not a way to dispute its existence.

Throughout proceedings in the district and appellate courts, the state had never disputed that *State v. Rivers* and its progeny required state courts to ignore the difference between LWOP sentences and sentences of life with the possibility of parole. The panel nonetheless issued an amended opinion continuing to doubt this

could be the rule. Pet. App. 10a, 14a n.4. It accordingly assumed on its own that the Washington Court of Appeals would be free to depart from this rule in adjudicating Mr. Rook's article I, section 14 claim. *Id.* at 14a n.4. But the Washington courts are not free to disregard holdings of the Washington Supreme Court and the state never argued that the last reasoned decision here did so. The panel thus not only violated the principle of party presentation, but second-guessed a state's application of its own constitutional law in violation of *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002) (presuming that state trial courts apply the law announced by the state high court).

The Ninth Circuit panel departed so drastically from the principles of party presentation as to constitute an abuse of discretion. Certiorari should be granted.

II. The Panel Decision's Characterization of Justice Kennedy's *Harmelin* Concurrence Is the Subject of a Lopsided Circuit Split and Contradicts Decisions in Thirty-Six State High Courts.

The panel decision held that the *Harmelin* concurrence was not "clearly established Federal law" because it has been implicitly overruled by *Andrade*'s reference to "the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." Pet. App. 4a-5a (quoting *Andrade*, 538 U.S. at 72–73). Only one other circuit has embraced this theory, in an unpublished habeas case. *See Smith v. Howerton*, 509 F. App'x 476, 480 (6th Cir. 2012) ("[O]nly the [gross disproportionality] principle itself (and not any attendant framework) qualifies as "clearly established" for the purposes of the present habeas review under § 2254(d).").

This Court, at least thirty-six states and the District of Columbia[3], and every Circuit[4]—including the Sixth Circuit when it is addressing federal cases—have

[3] *See Lane v. State*, 66 So.3d 830, 831 (Ala. Crim. App. 2010); *Olson v. State*, No. A-11004, 2014 WL 5799571, at *5 (Alaska App. Nov. 5, 2014); *State v. Berger*, 134 P.3d 378, 380–81 (Ariz. 2006); *Benjamin v. State*, 285 S.W.3d 264, 270 (Ark. App. 2008); *In re Coley*, 283 P.3d 1252, 1256, 1264 (Cal. 2012); *Wells-Yates v. People*, 454 P.3d 191, 196 (Colo. 2019); *State v. Higgins*, 826 A.2d 1126, 1146 (Conn. 2003*); Lloyd v. State*, 249 A.3d 768, 784 (Del. 2021); *Cook v. United States*, 932 A.2d 506, 508 & n.3 (D.C. 2007); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011); *State v. Adamcik*, 272 P.3d 417, 458 (Idaho 2012); *People v. Rhoades*, 115 N.E.3d 1238, 1242 (Ill. App. 2018); *State v. Bruegger*, 773 N.W.2d 862, 873 (Iowa 2009); *State v. Gomez*, 235 P.3d 1203, 1208 (Kan. 2010); *Phon v. Commonwealth*, 545 S.W.3d 284, 298 (Ky. 2018); *State v. Mitchell*, 697 So.2d 22, 25 (La. App. 1997); *State v. Stanislaw*, 65 A.3d 1242, 1251 (Me. 2013) (using an allegedly more protective state test that asks the threshold *Harmelin* question—whether, after comparing the gravity of the offense with the severity of the sentence, there is an inference of gross disproportionality—but then limits the validating comparisons to interjurisdictional cases rather than additionally comparing Maine to other states); *State v. Stewart*, 791 A.2d 143, 147 (Md. 2002) (recognizing the *Harmelin* concurrence as controlling but "harmonizing" it with Maryland Eighth Amendment caselaw to produce a threshold gross proportionality "appear[ance]" test that considers "the seriousness of the conduct involved, the seriousness of any relevant past conduct as in the recidivist cases, any articulated purpose supporting the sentence, and the importance of deferring to the legislature and to the sentencing court"); *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992) (acknowledging controlling *Harmelin* concurrence while analyzing more protective state constitutional "cruel or unusual" punishment clause); *State v. Juarez*, 837 N.W.2d 473, 480 (Minn. 2013) (conducting both allegedly more protective state constitutional test and separately applying Justice Kennedy's *Harmelin* concurrence to Eighth Amendment analysis); *Rainey v. State*, No. 2019-CT-01651-SCT, 2022 WL 713379, at *7 (Miss. Mar. 10, 2022); State v. Pribble, 285 S.W.3d 310, 314 (Mo. 2009); *State v. Riley*, 497 N.W.2d 23, 27 (Neb. 1993) (cited in *State v. Morton*, 966 N.W.2d 57, 69 & n.47 (Neb. 2021)); *State v. Serpa*, 187 A.3d 107, 110–11 (N.H. 2018); *State v. Rueda*, 975 P.2d 351, 354 (N.M. App. 1998) (recognizing Justice Kennedy's *Harmelin* concurrence as controlling in dicta); *State v. Whitehead*, 722 S.E.2d 492, 496 (N.C. 2012); *State v. Gomez*, 793 N.W.2d 451, 458–59 (N.D. 2011); *State v. Ryan*, 396 P.3d 867, 875 n.6 (Ore. 2017) (dictum); *State v. Fudge*, 443 P.3d 1176, 1180 (Ore. App. 2019) ("We first analyze whether defendant's sentence as applied to defendant was disproportionate under the Oregon Constitution, and we consider defendant's federal constitution claim only if we conclude that no state constitutional violation occurred."); *Commonwealth v. Baker*, 78 A.3d 1044, 1047–48 & n.4 (Pa. 2013); *McKinney v. State*, 843 A.2d 463,

recognized that Justice Kennedy's *Harmelin* concurrence provides the "controlling" test for gross disproportionality challenges to noncapital sentences for adults. *Graham*, 560 U.S. at 60 ("The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence…."). Many of these courts point out that the concurrence is controlling because it is the narrowest grounds for the result under *Marks v. United States*, 430 U.S. 188, 193 (1977). *See, e.g.*, *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999). And a *Marks* narrowest-ground plurality qualifies as "clearly established Federal law," as required by § 2254(d), under this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007).

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470 (R.I. 2004); *State v. Harrison*, 741 S.E.2d 727, 732 (S.C. 2013); *State v. Garreau*, 864 N.W.2d 771, 774 (S.D. 2015); *State v. Harris*, 844 S.W.2d 601, 603 (Tenn. 1992); *Winchester v. State*, 246 S.W.3d 386, 389 (Tex. App. 2008) (noting that the majority of Texas appellate courts have followed the Fifth Circuit in applying the test laid out in Justice Kennedy's *Harmelin* concurrence); *In re Stevens*, 90 A.3d 910, 913 (Vt. 2014); *Dunaway v. Commonwealth*, 663 S.E.2d 117, 132 (Va. App. 2008); *State v. Borrell*, 482 N.W.2d 883, 893–94 (Wis. 1992); *Sen v. State*, 390 P.3d 769, 778 (Wyo. 2017).

[4] *United States v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997); *United States v. Reingold*, 731 F.3d 204, 211 (2nd Cir. 2013); *United States v. MacEwan*, 445 F.3d 237, 248 (3rd Cir. 2006); *United States v. Cobler*, 748 F.3d 570, 575 (4th Cir. 2014); *United States v. Thomas*, 627 F.3d 146, 160 n.2 (5th Cir. 2010); *United States v. Jones*, 569 F.3d 569, 574 (6th Cir. 2009); *United States v. Gross*, 437 F.3d 691, 692–93 (7th Cir. 2006); *United States v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997); *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992); *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999); *United States v. Brant*, 62 F.3d 367, 368 (11th Cir. 1995).

A number of states, however, refuse to recognize the concurrence as controlling, superimpose their own state requirements on the *Harmelin* concurrence, or substitute an allegedly more protective state constitutional test, including:

- **Florida**: *See Adaway v. State*, 902 So.2d 746, 750 (Fla. 2005) (describing the conflicting opinions in *Harmelin* and *Ewing* and concluding the defendant's sentence was not grossly disproportionate without specifically citing to the first step of the *Harmelin* analysis or describing its inquiry as seeking an "inference" of gross disproportionality).
- **Hawai'i**: *See State v. Jenkins*, 997 P.2d 13, 40 (Haw. 2000) (asking under both the Hawai'i constitution and the Eighth Amendment whether "the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community"); *cf. State v. Solomon*, 111 P.3d 12, 26–27 (Haw. 2005) (describing test similar to *Fain* test but additionally allowing analysis of the nature of the offender in the first factor).
- **Indiana**: *See Knapp v. State*, 9 N.E.3d 1274, 1291 (Ind. 2014) (quoting *Ewing v. California*, 538 U.S. 11, 20–21 (2003), as holding that "in non-capital cases, the Eighth Amendment contains only a 'narrow proportionality principle,'" but not directly addressing the first *Harmelin* factor).

- **Massachusetts**: *See Commonwealth v. Sharma*, 171 N.E.3d 1076, 1081 (Mass. 2021) (solely conducting allegedly more protective multifactor state test).
- **Montana**: *See State v. Johnson*, 58 P.3d 172, 174 (Mont. 2002) (applying state "shocks the conscience" test); *cf. State v. Rickman*, 183 P.3d 49, 52 (Mont. 2008) (noting that noncapital sentences are also reviewed by a Sentence Review Board).
- **Nevada**: *See Chavez v. State*, 213 P.3d 476, 489 (Nev. 2009) (citing *Harmelin* but superimposing state "shock the conscience" standard).
- **New Jersey**: *See State v. Oliver*, 745 A.2d 1165, 1169 (N.J. 2000) (applying unique state standard while stating, "We have generally avoided entering the debate among the several members of the Supreme Court concerning the Eighth Amendment's proscription against cruel and unusual punishment. *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L.Ed.2d 836 (1991), in which a life sentence without possibility of parole for possession of cocaine was upheld, produced five separate opinions.").
- **New York**: *See People v. Thompson*, 633 N.E.2d 1074, 1079 (N.Y. 1994) (uses allegedly more protective state test that the state court claims is in line with *Solem* and the *Harmelin* dissent).
- **Ohio**: *See State v. Weitbrecht*, 715 N.E.2d 167, 171 (Ohio 1999) (appears to recognize Justice Kennedy's concurrence in *Harmelin* as the narrowest ground for the result, but substitutes an earlier Ohio requirement that an

unconstitutional penalty must be "so greatly disproportionate to the offense as to shock the sense of justice of the community").

- **Oklahoma**: *See Dodd v. State*, 879 P.2d 822, 826 (Okla. Crim. App. 1994) (citing *Solem*, 463 U.S. at 290–92 ("When addressing an Eighth Amendment proportionality claim, a reviewing court must consider 'the gravity of the offense and the harshness of the penalty' and protect against gross disproportionality.")); *but see Rea v. State*, 34 P.3d 148, 153 (Okla. Crim. App. 2001) (Chapel, J., concurring in part and dissenting in part) (noting that the "shock the conscience" standard of appellate review used by the majority in an "excessiveness" challenge, and relying on an earlier Eighth Amendment case, conflicts with *Solem* and Justice Kennedy's concurrence in *Harmelin*).
- **Utah**: *See State v. Herrera*, 993 P.2d 854, 866–67 (Utah 1999) (avoiding any specific test under the Eighth Amendment because the "analytical framework of what constitutes cruel and unusual punishment under the Eighth Amendment continues to evolve" and implying that the "shocks the conscience" standard of the parallel provision of the Utah constitution applies equally in the Eighth Amendment context).
- **Washington**: *See* instant case; *see also, e.g.*, *State v. Witherspoon*, 329 P.3d 888, 894 (Wash. 2014) (citing *State v. Rivers* to hold that since the state constitution is more protective than the Eighth Amendment, there is no need to "further analyze the sentence under the Eighth Amendment" after conducting the *Fain* analysis); *but see Witherspoon*, 329 P.3d at 901 n.8

(Gordon McCloud, J., concurring in part and dissenting in part) (arguing that reliance on *Rivers* is "inconsistent with United States Supreme Court precedent" in *Graham*, *Rummel*, and *Solem*, because it held that the difference between LWOP sentences and life-with-the-possibility of parole was not significant to the article I, section 14 analysis).

- **West Virginia**: *Compare Kees v. Nohe*, No. 11–1465, 2013 WL 149614, at *11 (W.Va. Jan 14, 2013) (citing *Graham*, 560 U.S. at 60) (implicitly performing *Harmelin* first step in holding, "this Court finds that there is clearly not gross disproportionality here: life with parole eligibility in fifteen years when Petitioner delivered a known dangerous substance that resulted in another's death") *with Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 214 (W.Va. 1981) (adopting a state constitutional proportionality test similar to Washington's, which is usually analyzed in place of an Eighth Amendment challenge).

In some of these states, the refusal to recognize the *Harmelin* concurrence as controlling explicitly infringes on the defendants' rights under the Eighth Amendment. While a number of states have abandoned "shock the conscience" standards as inconsistent with *Harmelin*, *see, e.g.*, *State v. Bonner*, 577 N.W.2d 575, 579 (S.D. 1998), *abrogated on other grounds by State v. Rice*, 877 N.W.2d 75, 82 (S.D. 2016), Hawai'i, Montana, Nevada, Ohio, and possibly Oklahoma and Utah continue to superimpose this requirement on federal Eighth Amendment claims.

In other states, such as Washington, the assumption that the state multifactor test will produce more protective results goes unexamined—even in challenges to

LWOP sentences where the state standard is demonstrably less protective. Federal courts have found inferences of gross disproportionality under the Eighth Amendment for failure-to-register offenses, whereas a multifactor test that incorporates "the nature of the offender" generally, *see, e.g.*, *Solomon*, 111 P.3d at 26–27 (Hawai'i test), *Sharma*, 171 N.E.3d at 1081 (Massachusetts test), would likely not find a constitutional violation in the same case. *See Gonzalez v. Duncan*, 551 F.3d 875, 887 (9th Cir. 2008) (finding an inference of gross disproportionality under *Harmelin* for a 28-years-to-life sentence for a failure-to-register offense, despite the petitioner's long criminal history, including sex offenses involving children, that bore little resemblance to the triggering offense).

Because state courts continue, even after this Court's clear dictum in *Graham*, to evade the controlling *Harmelin* concurrence, this Court's guidance in a merits case is urgently needed.

III. The Decision Below Was Wrong.

The last reasoned decision in Mr. Rook's case either did not effectively adjudicate his case on the merits, because the Washington article I, section 14 test is less protective than the Eighth Amendment in the context of a challenge to an LWOP sentence, or the use of the unique Washington *Fain* test was contrary to the test clearly established by Justice Kennedy's *Harmelin* concurrence because it omitted the first step entirely. It was also contrary to *Solem* and *Rummel* because it did not distinguish, in its interjurisdictional analysis, between mandatory LWOP sentences such as Mr. Rook's and much more common sentences of life with the possibility of parole (for example, California's discretionary 25-years-to-life habitual

offender statute, at issue in *Andrade*, 538 U.S. at 67, and *Ewing*, 538 U.S. at 16 (plurality)). The federal courts should have reached the merits of Mr. Rook's Eighth Amendment argument.

The panel was wrong that the Eighth Amendment claim was adjudicated on the merits: the last reasoned decision was not permitted to consider the difference between an LWOP sentence and a sentence of life without parole. *See Rivers*, 921 P.2d at 503. The fact that the decision accurately described Mr. Rook's sentence in its conclusion that there was no violation does not mean that it weighed the difference between LWOP and a California "indeterminate" sentence in its interjurisdictional analysis, and given the holding of *Rivers*, there is no reason to think the court defied binding state precedent in order to do so. *See* ER-89–91. The last reasoned decision also described Mr. Rook's sentence as a "life sentence for the vehicular assault he committed" in the introduction to the interjurisdictional discussion, implying the unavailability of parole was irrelevant to the analysis. ER-89. The adjudication of the state constitutional challenge to the LWOP sentence was therefore *less* protective than the Eighth Amendment would have been, not more protective, and it did not adjudicate the federal claim on the merits. *See* [*Tara*] *Williams*, 568 U.S. at 301.

If the decision was adjudicated on the merits, the panel's reading of *Andrade* as having overruled the *Harmelin* concurrence for habeas cases was not tenable. The petitioner in *Andrade* did not challenge the state-court decision in his case as having failed to perform the requisite test, so it could not have overruled the

required test. Rather, Andrade argued that *Rummel*, *Solem*, and *Harmelin* "clearly establish a principle that *his sentence* is so grossly disproportionate that it violates the Eighth Amendment." *Andrade*, 538 U.S. at 71 (emphasis added). An argument solely focused on the outcome of the test cannot disturb precedent about the content of the test. And it did not do so here. This Court ultimately stated, "in *this case*, the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." *Id.* at 73 (emphasis added). In another case—such as Mr. Rook's—the relevant clearly established law may be the test itself.

Since every federal circuit court and the majority of state courts recognize the *Harmelin* test as controlling, it is an ordinary holding of this Court. "[C]learly established Federal law" means "the holdings, as opposed to the dicta, of this Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014); *see also Panetti*, 551 U.S. at 949 (holding that *Marks* narrowest-ground pluralities count as "clearly established Federal law"). The *Harmelin* test is clearly established, and the use of the Washington *Fain* test to adjudicate the federal Eighth Amendment claim was "contrary to" *Harmelin* because it omitted the first step of the test.

Once § 2254(d) is avoided or met, the merits are not frivolous. As Mr. Rook's trial attorney stated at sentencing, a comparison of the gravity of Mr. Rook's reckless driving offense with the most severe punishment available in Washington yields an inference of gross disproportionality: "It seems to be a cruel and unusual

punishment to sentence Mr. Rook to life in prison for what, essentially, was an accident." ER-223–24. Mr. Rook further demonstrated in a fifty-state survey that he is the *only person* in the United States serving a mandatory life-without-parole sentence for a reckless driving offense that did not cause anyone's death. ER-19–40; Craig S. Lerner, *Who's Really Sentenced to Life Without Parole?: Searching for "Ugly Disproportionalities" in the American Criminal Justice System*, 2015 Wis. L. Rev. 789, 842 (2015); ER-62. And as a reckless offense that requires only substantial injury, not death, to result, his conviction is the least culpable offense that can trigger an LWOP sentence under the state habitual offender statute. *See* Wash. Rev. Code § 9.94A.030(32)(l) (defining "most serious"—or strike—offenses). If this Court makes clear § 2254(d) either does not apply or is met, Mr. Rook's Eighth Amendment merits argument will be heard for the first time by any court.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 12th day of April 2022.

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