No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

TERRY EUGENE IVERSEN,

Petitioner,

v.

DAVE PEDRO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Graham v. Florida*, this Court applied a categorical approach to the Eighth Amendment in holding that life without parole constituted cruel and unusual punishment when applied to juveniles who commit non-capital offenses, stating: "[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences." 560 U.S. 48, 69 (2010). Mr. Iversen committed public indecency by exposing his genitals in public, a misdemeanor under state law. Two recidivist statutes applied to transform the one-year statutory maximum for a misdemeanor into a sentence to life without parole for public indecency. Despite the petitioner's invocation of *Graham*'s categorical approach, which looks to intra- and inter-jurisdictional comparisons, the Ninth Circuit affirmed the denial of relief, ignoring comparisons with all States, and the treatment of murderers within Oregon. These comparisons establish that life without parole constitutes grossly disproportionate punishment for recidivist public indecency. The question presented is:

> Whether Mr. Iversen's sentence to life without parole for publicly exposing his genitals constitutes cruel and unusual punishment under the Eighth Amendment.

PARTIES TO THE PROCEEDINGS

The parties are named in the caption as the petitioner, Terry Eugene Iversen, an Oregon Department of Corrections prisoner housed at the Eastern Oregon Correctional Institution in Pendleton, Oregon, and the warden as respondent. The Oregon Justice Resource Center participated before the Ninth Circuit as amicus curiae.

RELATED PROCEEDINGS

The only related cases are the prior litigation in this case in state and federal court. In state court: *State v. Iversen*, No. 16CR64906 (Washington County Circuit Court), *affirmed*, 296 Or. App. 360, 435 P.3d 837, *review denied*, 365 Or. 369, 451 P.3d 984 (2019). In federal court: *Iversen v. Washburn*, No. 2:20-cv-1524-AA (D. Or.), *affirmed*, *Iversen v. Pedro*, 96 F.4th 1284 (9th Cir. 2024).

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER

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The petitioner, Terry Eugene Iversen, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 27, 2024, affirming the denial of habeas corpus relief under 28 U.S.C. § 2254.

Opinions Below

The District Court denied habeas corpus relief in an unpublished opinion on January 24, 2022 (Appendix B). After the petitioner filed a timely notice of appeal and a motion for issuance of a certificate of appealability, the Ninth Circuit granted the request for a

certificate of appealability on October 27, 2022 (Appendix D). The Ninth Circuit affirmed the denial of habeas corpus relief on March 27, 2024, in *Iversen v. Pedro*, 96 F.4th 1284 (9th Cir. 2024) (Appendix A). The Ninth Circuit denied panel and en banc rehearing on August 6, 2024 (Appendix C).

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Relevant Statutory And Constitutional Provisions

The Eight Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Oregon's public indecency statute makes it a misdemeanor to expose one's genitals in a public place:

> (1) A person commits the crime of public indecency if while in, or in view of, a public place the person performs:
>
> (a) An act of sexual intercourse;
>
> (b) An act of oral or anal sexual intercourse;
>
> (c) Masturbation; or
>
> (d) An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.
>
> (2) (a) Public indecency is a Class A misdemeanor.

Or. Rev. Stat. § 163.465. Public indecency can be charged as a Class C felony when the individual has a prior conviction for public indecency or a sex crime:

(b) Notwithstanding paragraph (a) of this subsection, public indecency is a Class C felony if the person has a prior conviction for public indecency or a crime described in ORS 163.355 (Rape in the third degree) to 163.445 (Sexual misconduct) or for a crime in another jurisdiction that, if committed in this state, would constitute public indecency or a crime described in ORS 163.355 (Rape in the third degree) to 163.445 (Sexual misconduct).

Or. Rev. Stat. § 163.465(2). Oregon punishes Class C felonies with a maximum term of imprisonment of five years. Or. Rev. Stat. § 161.605(3).

For persons convicted of a third felony sex offense, Oregon requires a presumptive sentence of life without parole:

(1) The presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence.

(2) The court may impose a sentence other than the presumptive sentence provided by subsection (1) of this section if the court imposes a departure sentence authorized by the rules of the Oregon Criminal Justice Commission based upon findings of substantial and compelling reasons.

(3) For purposes of this section:

(a) Sentences for two or more convictions that are imposed in the same sentencing proceeding are considered to be one sentence; and

(b) A prior sentence includes:

(A) Sentences imposed before, on or after July 31, 2001; and

(B) Sentences imposed by any other state or federal court for comparable offenses.

(4) As used in this section, "sex crime" has the meaning given that term in ORS 163A.005.

"Sex crime" is defined to include "Public indecency or private indecency, if the person has a prior conviction for a crime listed in this subsection[.]" Or. Rev. Stat. § 163A.005(5)(t).

The federal habeas corpus statute states in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Statement Of The Case

An Oregon grand jury indicted Mr. Iversen for exposing his genitals with the intent of arousing the sexual desire of himself or another person, in violation of Or. Rev. Stat. § 163.465(d). Without the recidivist provision, the offense constitutes a misdemeanor punishable by no more than one year of imprisonment. Or. Rev. Stat. § 163.465(2)(a). However, the indictment alleged that Mr. Iversen had been convicted of public indecency on five previous occasions, and, 27 years earlier, of rape in the third degree and sodomy in the second degree, resulting in concurrent sentences. Under Oregon's recidivist provisions, a second public indecency conviction converted the offense to a class C felony, the two contact sex offenses were considered a single conviction, and the two or more prior felony

sex offenses were punishable by a presumptive sentence of life without parole. Or. Rev. Stat. § 163.465(b); Or. Rev. Stat. § 137.719(1).

A. State Court Proceedings

Mr. Iversen pleaded guilty to the indictment that included the recidivist provisions. At the sentencing hearing, the judge imposed a sentence of life without parole based on three admitted bases for departure: (1) he had been persistently involved in similar offenses unrelated to the current offense; (2) prior justice system sanctions had not deterred him from reoffending; and (3) he had been on supervision for another offense at the time he committed the current offense. Appendix E. In addition, the prosecutor presented evidence regarding uncharged conduct and conduct that was charged but that did not result in convictions. The evidence at sentencing also included mental health diagnoses and past failures in treatment.

Mr. Iversen appealed, asserting that the life without parole sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment and citing, among other authorities, *Graham v. Florida*, 560 U.S. 48 (2010), and *Solem v. Helm*, 463 U.S. 277 (1983). The Oregon Court of Appeals affirmed with only a citation to a state case approving a life without parole sentence. *State v. Iversen*, 296 Or. App. 360, 435 P.3d 837 (2019). Appendix F. That case, *State v. Althouse*, 359 Or. 668, 375 P.3d 475 (2016), relied on cases involving parole-able sentences. The Oregon Supreme Court denied Mr. Iverson's petition for review of the federal constitutional issue. *State v. Iversen*, 365 Or. 369, 451 P.3d 984 (2019). Appendix G.

B. Federal Court Proceedings

Mr. Iversen filed a timely pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging that life without parole for public indecency was a harsher sentence than received by persons in Oregon who commit murder. With the assistance of counsel, he argued that life without parole for publicly exposing genitalia unreasonably applied clearly established federal law on disproportionate punishment, including citations to *Helm* and *Graham*. He also presented arguments based on intra- and inter-jurisdictional disproportionate punishments. The district court denied relief, finding no gross disproportionality of life without parole "to the crimes of which he was convicted[,]" and declining to address the intra-jurisdictional and inter-jurisdictional comparisons provided by the petitioner. Appendix B.

On appeal to the Ninth Circuit, Mr. Iversen set out in separate sections of his opening brief the holdings of *Helm* and *Graham*, arguing that there are two disproportionality approaches under the Eighth Amendment, one challenging a particular defendant's sentence, and one addressing the categorical punishments that implicate an entire class of offenders. Brief of Petitioner, *Iversen v. Pedro*, 96 F.4th 1284 (9th Cir. 2024) (No. 22-35076, Docket Entry 14) at 18-25. On his individual sentence, he pointed to the difference asserted in *Helm* and *Graham* between parole-able sentences and life without parole:

> The Court in *Graham* strengthened the crucial Eighth Amendment distinction between sentences allowing for the possibility of parole – even severe sentences – and sentences of life without parole, citing [*Helm*]'s

> language about life without parole being "'far more severe than the life sentence we considered in *Rummel* [*v. Estelle*, 445 U.S. 263 (1980)]' because it did not give the defendant the possibility of parole." *Id.* at 70 (quoting [*Helm*], 463 U.S. at 297).

Id. at 25. Mr. Iversen also invoked the separate categorical rule from *Graham* as foreclosing life without parole for the misdemeanor conduct in the present case:

> *Graham* reinforces the application of [*Helm*] to the present case and, further, supports a categorical rule that would foreclose life without parole for misdemeanor offense conduct, even when recidivist enhancements turn that same conduct into a felony. No penological ground for sentencing warrants life in prison for misdemeanor conduct resulting from treatable mental illness as a matter of retribution, deterrence, incapacitation, or, especially, rehabilitation.

Id. at 27 (citing *Graham*, 560 U.S. at 71-75). Mr. Iversen presented a 50-State comparison on treatment of recidivist exhibitionists, demonstrating that Oregon is an extreme outlier in imposing life without parole for recidivist public indecency:

- Almost every jurisdiction treats public indecency as a misdemeanor without recidivism.
- Ten states treat recidivist public indecency as a misdemeanor.
- 24 states have five years as the maximum punishment for recidivist public indecency.
- Eight states have maximums between five and ten years for recidivist public indecency.
- Four states have a maximum of fifteen years for recidivist public indecency.
- Only four jurisdictions have potential punishments greater than 15 years for recidivist public indecency.

Id. at 31-33 (citing Jeff Burthka, *Indecent Exposure Laws by State*, FindLaw (May 17, 2021)).[1] The State was unable to provide a single example of life without parole being imposed for recidivist public indecency outside of Oregon. Thus, from an objective viewpoint, there is a national consensus against life without parole for recidivist public indecency.

Mr. Iversen also cited to the more lenient dispositions available under Oregon law for an array of far more serious offenses, including murder. *Id.* at 28-31. As Mr. Iversen correctly pointed out in his pro se petition, even for aggravated murder, the minimum penalty is life with the possibility for parole after thirty years, a less serious penalty than Mr. Iversen's sentence for public indecency. Or. Rev. Stat. § 163.105. Under Oregon's own mandatory guidelines considering offense severity and criminal history, the presumptive sentence for recidivist public indecency reported in Mr. Iversen's presentence report only called for a sentence between 25 and 30 months, with maximum upward departures doubling the range to 50 to 60 months. *Id.* at 30.

Mr. Iversen further argued that, even at common law at the time of the promulgation of the Eighth Amendment, the punishment of life without parole for recidivist public indecency would be unheard of. *Id.* at 33-36.[2] In its response brief, the State failed to

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[1] Available at https://www.findlaw.com/state/criminal-laws/indecent-exposure-laws-by-state.html.

[2] It was "rare" at common law until the late 18th century to impose a prison sentence for misdemeanor conduct: "the idea of prison as a punishment would have seemed an absurd expense." *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (quoting J.H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, CRIME IN

controvert the extensive evidence of inter- and intra-district disproportionality and the common law history that demonstrated grossly disproportionate punishment.

In its published opinion affirming the district court, the Ninth Circuit held, based on a pre-*Graham* case, that under the Antiterrorism and Effective Death Penalty Act, "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." *Iverson*, 96 F.4th at 1290 (quoting *Gonzalez v. Duncan*, 551 F.3d 875, 882-83 (9th Cir. 2008)). But *Graham*'s categorical approach is clearly established federal law, as is the distinction in *Graham* and *Helm* between life without parole sentences and even harsh parole-able sentences. Instead of referring to the clearly established law, which required a categorical approach and recognized the substantial difference in life without parole sentences, the Ninth Circuit relied on precedent involving parole-able offenses to find that—"while some fair-minded jurists may disagree"—the life without parole sentence was not disproportionate. *Id.* at 1289-90.

ENGLAND 1550-1800, at 43 (J. Cockburn ed. 1977)). It is not clear that serial exhibitionists were even noticed at common law. *Compare* Stuart Green, *To See And Be Seen: Reconstructing The Law Of Voyeurism And Exhibitionism*, 55 Amer. Crim. L. Rev. 203, 212 (2018) ("As was true in the case of voyeurism, there was no separate offense of indecent exposure at common law.") *with* Marilyn Ruth Riley, *Exhibitionism: A Psycho-Legal Perspective*, 16 S.D.L. Rev. 853, 864 (1979) ("At early common law, exhibitionism was considered criminal; public lewdness and lascivious behavior were misdemeanors, punishable by both fine and imprisonment.").

Reasons For Granting The Petition

The Ninth Circuit's published opinion flouts this Court's methodology in *Graham* on categorical challenges under the Eighth Amendment and ignores the distinction drawn in *Helm* and *Graham* between parole-able and non-parole-able sentences. *Graham* supports a categorical rule foreclosing life without parole for public indecency, even when recidivist enhancements turn that same conduct into a felony. Further, *Helm* and *Graham* require a higher degree of scrutiny for life without parole as opposed to parole-able sentences. The result in the published opinion is extraordinary: a citizen is condemned to die in prison for public indecency, an offense that involves no violence or even contact with a victim. The Oregon practice of locking up for life persons who commit public indecency is a question of exceptional importance. Under this Court's rules, this case raises an important question of federal law that should be settled by this Court, while also presenting an important federal question resolved by the lower courts in a manner that conflicts with the decisions of this Court in *Graham* and *Helm*. SUP. CT. R. 10(c).

A. The Ninth Circuit Failed To Apply *Graham*'s Methodology For Determining Categorical Gross Disproportionality.

In the categorical approach set out in *Graham*, "[t]he analysis *begins* with objective indicia of national consensus." *Id.* at 62 (emphasis added). The Ninth Circuit failed to recognize that *Graham*'s categorical approach is clearly established federal law and the question whether a punishment is grossly disproportionate cannot be answered without reference to a national consensus.

In *Graham*, the Court distinguished the individualized approach in *Helm* from the categorical approach, which uses "categorical rules to define Eighth Amendment standards." *Id.* at 60. The categorical approach considers the validity of "a particular type of sentence as it applies to an entire class of offenders[.]" *Id.* at 61. "[H]ere a sentencing practice itself is at issue." *Id.* With this approach, a reviewing court considering a categorical Eighth Amendment proportionality challenge should first consider whether "there is a national consensus" against the challenged punishment. *Id.*

This Court instructed that the determination of national consensus "should be informed by objective factors to the maximum possible extent." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks omitted). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 560 U.S. at 62 (quoting *Atkins*, 536 U.S. at 312) (internal quotation marks omitted). In *Graham*, the Court attached an Appendix listing 37 states that *permitted* life without parole for juvenile offenders, but, looking to actual sentencing practices, found a national consensus against such punishments. 560 U.S. at 82.

Under the methodology described in *Graham*, life without parole for public indecency, even with recidivist enhancements, constitutes cruel and unusual punishment because objective evidence establishes a national consensus against such punishment. This national consensus is demonstrated by the fact state legislatures have almost uniformly set much lower maximum punishments for recidivist public indecency. Forty-eight states plus the District of Columbia treat simple public indecency as a petty offense or a misdemeanor,

with exceptions for Louisiana (punishable by six months to three years) and Oklahoma (punishable by 30 days to ten years). Ten states, or almost 25% of the United States population, appear to punish recidivist public indecency (not involving a child) as a misdemeanor.[3] Another twenty-four states appear to cap punishment for recidivist public indecency at five years or less,[4] another eight states cap recidivist public indecency at between five and ten years,[5] and another four states cap the maximum recidivist sentence at 15 years.[6]

Of the remaining jurisdictions that permit sentences longer than 15 years for simple public indecency (about 7% of the United States population), only a few states permit life without parole for recidivist exhibitionists but do not appear to actually impose the penalty except Oregon.[7] Oregon's double recidivism statute, which jumps the misdemeanor to a Class C felony, then to life without parole, is grossly disproportionate compared to other jurisdictions' treatment of recidivist public indecency.

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[3] Connecticut, Delaware, District of Columbia, Hawaii, Nebraska, New Jersey, New York, Ohio, Texas, and Wyoming.

[4] California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Mexico, N. Carolina, Pennsylvania, Rhode Island, S. Carolina, S. Dakota, Washington, W. Virginia, and Wisconsin.

[5] Alabama, Arkansas, Idaho, Louisiana, Missouri, Montana, N. Dakota, Oklahoma, and Tennessee.

[6] Arizona, Florida, New Hampshire, and Utah.

[7] Alaska, Michigan, Vermont, and Virginia (which includes a recency requirement that would exclude Mr. Iversen).

The intra-jurisdictional comparison also demonstrates grossly disproportionate punishment. Oregon's treatment of much more serious conduct as subject to lower statutory maximums and as parole-able confirms the grossly disproportionate punishment of life without parole. Even the Oregon mandatory guidelines, with recidivism, permit only up to 60 months with upward departures for recidivist public indecency. Or. Admin. Rule 213-017-0010(25). But the Ninth Circuit never even cited to *Graham* for its holding on categorical challenges to punishment nor for its reasoning requiring examination of national practices and intra-state comparisons.

The Ninth Circuit never mentioned *Graham*'s methodology for categorical challenges to sentencing practices nor the Court's distinction between life without parole and other harsh sentences. Nonetheless, the Ninth Circuit claimed the "precise contours" of this Court's jurisprudence were "unclear." *Iversen*, 96 F.4th at 1289. Not so. On both the categorical approach to Eighth Amendment challenges and the difference in scale of life without parole sentences, this Court's jurisprudence clearly requires both consideration of inter- and intra-jurisdictional objective measures of disproportionality and recognition that life without parole constitutes a uniquely harsh form of punishment. The Ninth Circuit's opinion overlooks this Court's clearly established constitutional precedent.

By ignoring a fundamental and preserved invocation of this Court's precedent on federal constitutional law, the Ninth Circuit violated this Court's rule that, where precedent of the Court has direct application in a case, the courts of appeals should follow the case that directly controls. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023); *accord*

Agostini v. Felton, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). By avoiding the *Graham* categorical approach, the Ninth Circuit also failed in the "virtually unflagging" obligation recognized by this Court to exercise its duty to resolve the issues raised in the appeal. *See Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) ("[A] federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'") (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The failure to address *Graham*'s methodology for categorical challenges under the Eighth Amendment in a published opinion alone warrants grant of a writ of certiorari.

B. The Panel Failed To Apply The *Helm* And *Graham* Distinction Between Life Without Parole And Parole-Able Sentences.

The central arguments before the Ninth Circuit focused on the difference between this Court's jurisprudence on sentences to parole-able terms of years and sentences to life without parole. When the State relied on cases involving parole-able sentences, the petitioner consistently argued that such cases are distinguishable because *Graham* and *Helm* provide the clearly established Eighth Amendment framework for consideration of a sentence to life without the possibility of parole.

But the Ninth Circuit failed to even acknowledge that this Court has set a distinct mode of analysis when life without parole is at issue. The failure to do so ignored that this Court's required analyses for life without parole sentences have resulted in findings of Eighth Amendment violations even for recidivists charged with serious felony offenses. In

Graham, the penultimate punishment was deemed categorically disproportionate for juveniles when applied as a mandatory punishment. 560 U.S. at 82. In *Helm*, the Court vacated a sentence to life without parole for the felony offense of uttering an insufficient funds check based on the Eighth Amendment's prohibition on "sentences that are disproportionate to the crime committed," even though the defendant had previously committed six felonies. 463 U.S. at 284. In both *Helm* and *Graham*, life without parole was held to be grossly disproportionate despite the defendants' serious records of recidivism.

The Ninth Circuit never addressed the contention that, under this Court's governing precedent, life without parole is different from parole-able offenses under the Eighth Amendment, involving a far more severe punishment:

- "As for the punishment, life without parole is 'the second most severe penalty permitted by law'... [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

- "[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, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Id.* at 69-70 (citing [*Helm*], 463 U.S., at 300-01).

- Life without parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 70 (quoting *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989)).

Without addressing the distinction between life without parole and parole-able offenses, the Ninth Circuit affirmed life without parole for public indecency in reliance on precedent

involving parole-able offenses. This Court should grant a writ of certiorari because the Ninth Circuit ignored the fundamental analytical distinction required by *Helm* and *Graham* between cases involving parole-able sentences and those involving life without parole.

C. Life Without Parole For Public Indecency Involves An Extraordinarily Important Question Of Federal Constitutional Law.

The Ninth Circuit's opinion leaves the Eighth Amendment a virtual dead letter in Oregon, in the Ninth Circuit, and, if followed, around the country. This is the rare case where the description of the issue evokes a visceral reaction: Wait! What? Life without parole for public display of genitalia? The unquestionable national consensus is that such a result is unbelievably harsh and utterly disproportionate. Yet we now have a published Ninth Circuit opinion holding that, under this Court's precedential rulings, life without parole for public indecency is neither cruel nor unusual.

If life without parole is not grossly disproportionate punishment for public indecency, the guardrails are gone on extreme punishment for relatively petty offenses. The protections provided by the Eighth Amendment may not be a high bar, but the prohibition on cruel and unusual punishment should provide an unwavering limit where the national consensus, as well as Oregon's own system of punishment, establish that condemning Mr. Iversen to die in prison for showing his penis is grossly disproportionate.

At the time of the Ninth Circuit briefing, five Oregonians were serving life without parole sentences for public indecency. Brief of Petitioner, *Iversen v. Pedro*, 96 F.4th 1284 (9th Cir. 2024) (No. 22-35076, Docket Entry 14) at 29-30 (citing Kelly Officer, *DOC life*

sentences, Oregon Criminal Justice Commission (Jan. 2023)). In addition to the critical importance for Mr. Iversen and other individuals serving life without parole sentences for public indecency, the unconstitutional threat of life without parole has a toxic systemic effect. The right to trial by jury is diminished when the risk of life without parole skews the plea-bargaining process, providing incentives for Oregon defendants to accept extremely harsh sentences to avoid life without parole. *See* American Bar Association, Criminal Justice Section, *Plea Bargain Task Force Report*, 15 (Feb. 22, 2023) (Principle 2: "Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant."). As the ABA Report elaborated: "[T]he threat of capital punishment or *life without the possibility of parole* should never be used to induce a plea of guilty. Such tactics are *inherently coercive*." *Id.* at 16 (emphases added); s*ee generally* Nazish Dholakia, *How the Criminal Legal System Coerces People into Pleading Guilty*, Vera Institute of Justice (April 4, 2024); National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018).

In Oregon, the hammer of life without parole for recidivist public indecency is wielded by 36 different district attorneys according to the discretion of a myriad of line prosecutors. In each case, the prosecutorial power can be exercised by charging the prior convictions, or declining to do so, based on the elected prosecutor's assessment of the individual defendant (which can include implicit biases), available resources, and desire to avoid trial by making an offer that can't be refused. The Ninth Circuit's failure to enforce

the *Graham* and *Helm* Eighth Amendment analyses leaves minor offenders in Oregon to die in jail or accept whatever the prosecutor decides should be imposed to avoid that disastrous potential result.

The importance of the federal constitutional issue is supported by the amicus curiae brief of the Oregon Justice Resource Counsel filed in the Ninth Circuit. Amicus Curiae Brief of the Oregon Justice Resource Center, *Iversen v. Pedro*, 96 F.4th 1284 (9th Cir. 2024) (No. 22-3506, Docket entry 22). The amicus brief sets out the cruelty of the special conditions that those serving life without parole often endure. *Id.* at 7-12. Prison conditions are harsh, with inmates often lacking adequate medical and mental health care. *Id.* at 7. The stress of incarceration and psychological trauma from serving indefinite terms of confinement can contribute to shorter life spans, depressive symptoms, anxiety, and suicidal ideation. *Id.* at 7-8. People serving life without parole are often denied rehabilitative programming like drug treatment, counseling, educational programs, and meaningful work opportunities. *Id.* at 9.

A life without parole sentence is uniquely cruel for people with mental illnesses. *Id.* at 10. The treatment that is available is often limited and inadequate. *Id.* People with mental illnesses are more likely to face harsher discipline, spend time in solitary confinement, and more likely to be physically and sexually abused. *Id.* The amicus curiae brief elaborates on how a sentence to death in prison, and the conditions people serving such sentences endure, make life without parole undeniably different from parole-able sentences, warranting application of *Graham* and *Helm*'s Eighth Amendment protections. *Id.* at 12.

Conclusion

In its precedential opinion, the Ninth Circuit upheld a sentence to life without parole for public indecency with no reference to the categorical analysis required by *Graham* and no mention of the language in both *Graham* and *Helm* that life without parole sentences are different in Eighth Amendment analyses from terms of years and parole-able sentences. This Court should grant the writ of certiorari, vacate the Ninth Circuit's opinion, and remand for full reconsideration in light of *Graham*'s categorical methodology and the heightened Eighth Amendment protections for sentences of life without parole as set out in *Helms* and *Graham*. In the alternative, the Court should grant the writ and set the case for full briefing on the merits.

Dated this 1st day of November, 2024.

Stephen R. Sady
Attorney for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY EUGENE IVERSEN, *Petitioner-Appellant*, v. DAVE PEDRO, *Respondent-Appellee*.	No. 22-35076 D.C. No. 2:20-cv-01524-AA OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted December 7, 2023
Portland, Oregon

Filed March 27, 2024

Before: Jacqueline H. Nguyen and Eric D. Miller, Circuit Judges, and Frank Montalvo,* District Judge.

Opinion by Judge Montalvo

* The Honorable Frank Montalvo, United States District Judge for the Western District of Texas, sitting by designation.

SUMMARY**

Habeas Corpus

The panel affirmed the district court's denial of Terry Eugene Iversen's 28 U.S.C. § 2254 petition for a writ of habeas corpus in a case in which the district court rejected Iversen's claim that a life without parole (LWOP) sentence, imposed after Iversen pleaded guilty to public indecency, was grossly disproportionate to his offense in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

Applying the demanding standard required by the Antiterrorism and Effective Death Penalty Act, and acknowledging that some fair-minded jurists may disagree on the correctness of Iversen's LWOP sentence, the panel held that the Oregon state court's decision concerning Iversen's sentence is not contrary to the Supreme Court's Eighth Amendment jurisprudence. The panel could not conclude that Iversen's sentence raises an inference of gross disproportionality, and held that the sentence pursuant to Oregon's legislatively-mandated sex offender recidivism statute is not constitutionally infirm in light of the gravity of Iversen's offense and criminal history.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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OPINION

MONTALVO, District Judge:

Oregon inmate Terry Eugene Iversen appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. He maintains the district court erred in rejecting a claim that a life without parole (LWOP) sentence imposed after he pleaded guilty to public indecency was grossly disproportionate to his offense.

I

We have jurisdiction over Iversen's appeal under 28 U.S.C. §§ 1291 and 2253. We review *de novo* the district court's denial of his habeas petition. *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). But we are constrained by the Antiterrorism and Effective Death Penalty Act (AEDPA), which governs habeas review of state convictions. *Valerio v.*

Crawford, 306 F.3d 742, 763 (9th Cir. 2002) (en banc). Under AEDPA, we must defer to the last state court's reasoned decision on any claim that was adjudicated on the merits unless that decision is (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Applying AEDPA's "demanding" standard, we affirm the district court's denial of Iversen's habeas petition. *Brown v. Davenport*, 596 U.S. 118, 134 (2022).

Iversen exposed himself and masturbated while sitting behind a young woman on a light rail train in Washington County, Oregon. He was arrested and pleaded guilty to public indecency. At his plea hearing, he acknowledged five prior convictions for public indecency, one prior conviction for rape in the third degree of a 15-year-old female, and one prior conviction for sodomy in the first degree of a 12-year-old female. He further admitted three sentencing enhancement factors applied to him: (1) "this crime involved persistent involvement in similar offenses unrelated to this current offense"; (2) "prior justice system sanctions have not deterred [him] from reoffending"; and (3) he was "on supervision for another offense at the time."

The Probation Officer prepared a presentence report which was considered by the sentencing judge. It noted that in addition to his prior convictions for public indecency, rape, and sodomy, Iversen also had prior convictions for multiple assaults, attempted burglary, and methamphetamine possession. He observed Iversen was diagnosed with "Exhibitionism . . . Paraphilia . . . Hypersexuality of Sexual Impulse Control Disorder . . . Antisocial Personality Disorder." He reported that a sex

offender treatment practitioner "did not believe that Iversen got much benefit from treatment."

At the sentencing hearing, the State outlined Iversen's criminal history, providing testimony and evidence—including several presentence investigation reports and officer testimony—as to the circumstances of his prior convictions and other uncharged or dismissed misconduct. It also presented evidence that Iversen had shown little progress during his rehabilitation.

Because of Iversen's criminal history, two recidivism statutes applied. First, his prior convictions for public indecency converted his instant offense—normally a Class A misdemeanor—into a Class C felony. Or. Rev. Stat. § 163.465(2)(b). Second, his instant and prior felony convictions for public indecency, together with his prior felony convictions for rape and sodomy, triggered a presumptive LWOP sentence pursuant to the Oregon sex offender recidivism statute. Or. Rev. Stat. § 137.719(1). Nevertheless, his counsel argued that a LWOP sentence for public indecency was both cruel and unusual—in violation of Iversen's rights under the Eighth Amendment.

The trial court judge rejected Iversen's arguments. He found Iversen's criminal history "absolutely horrendous." He described Iversen as "very dangerous" based on his previous convictions. He noted Iversen had "been given many, many opportunities . . . to reform," but had not taken advantage of them. He observed that "all we can do is incarcerate you because that's the only thing that works from preventing you to offend again." He explained "I don't find any mitigation whatsoever in this case that would warrant . . . a departure." He concluded Iversen had earned a life without parole sentence. He opined that the Supreme

Court's Eighth Amendment cases did "not declare that a sentence for this type of offense, a life sentence is unconstitutional." He clearly said, "I do not find that it is a[n] unconstitutional sentence." He noted, "[y]es this is a misdemeanor act, but it's the history, the prior convictions, the failures that you have." He then sentenced Iversen to life without parole pursuant to the Oregon sex offender recidivism statute. Or. Rev. Stat. § 137.719(1).

On direct review, the Oregon Court of Appeals affirmed the LWOP sentence with no reasoning other than a citation to *State v. Althouse*, 375 P.3d 475 (Or. 2016).[1] *State v. Iversen*, 435 P. 3d 837 (Or. App. 2019). The Oregon Supreme Court denied further review. *State v. Iversen*, 451 P.3d 984 (Or. 2019).

Iversen did not pursue post-conviction review in the state courts. Iverson's only claim is that the LWOP sentence for

[1] In *Althouse*, the Oregon Supreme Court explained "the Eighth Amendment does not require strict proportionality between crime and sentence[,] but forbids only extreme sentences that are grossly disproportionate to the crime." 375 P.3d at 489 (quotation marks omitted) (quoting *Ewing v. California*, 538 U.S. 11, 23 (2003) (O'Connor, J., plurality opinion)) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). "[T]he inquiry starts 'by comparing the gravity of the offense and the severity of the sentence.'" *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 60 (2010)). "[D]etermining the 'gravity' of a given offense in the context of a sentence imposed under a recidivist statute includes consideration of the defendant's criminal history." *Id.* (citing *Ewing*, 538 U.S. at 29) ("In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions.").

public indecency violated the Eighth Amendment's prohibition against cruel and unusual punishment.

The district court—relying on cases involving recidivist sentences—concluded Iversen could not "demonstrate that the trial court's determination that his sentence [did] not violate the Eighth Amendment was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court." It accordingly denied Iversen habeas relief.

II

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, forbids cruel and unusual punishment. The Supreme Court has held that it prohibits a sentence to a state prison that is disproportionate to the offense. *Weems v. United States*, 217 U.S. 349, 368 (1910) (quoting *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899)). While the Court addressed the proportionality principle in a series of subsequent cases, it has not established "a clear or consistent path for courts to follow" in determining when a particular sentence for a term of years violates the Eighth Amendment. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

In *Rummel v. Estelle*, the Court upheld a life sentence with the possibility of parole under Texas' recidivist sentencing statute where the defendant was charged with the felony of obtaining $120 by false pretenses. 445 U.S. 263, 276, 285 (1980). The defendant's previous convictions included fraudulently using a credit card to obtain $80 worth of goods and passing a forged check in the amount of $28.36. *Id.* at 265. It noted that "successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 272. It added that "the length of the

sentence actually imposed is purely a matter of legislative prerogative" for crimes classified as felonies. *Id.* at 274.

In *Solem v. Helm*, the Court concluded a LWOP sentence under a South Dakota recidivist sentencing statute applied to a conviction for uttering a "no account" check for $100 was "significantly disproportionate" to the crime and violated the Eighth Amendment. 463 U.S. 277, 281, 303 (1983). The defendant's offense "was 'one of the most passive felonies a person could commit,'" *id.* at 296 (quoting *State v. Helm*, 287 N.W. 2d 497, 501 (S.D. 1980) (Henderson J., dissenting)), and his six prior nonviolent felonies "were all relatively minor," *id.* at 296–97. The Court suggested that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

In *Harmelin v. Michigan*, the Court affirmed a mandatory LWOP sentence for possessing more than 650 grams of cocaine without any consideration of "mitigating factors such as, in [defendant's] case, the fact that he had no prior felony convictions." 501 U.S. 957, 994 (1991). The Court suggested that there is "no comparable requirement" for an individualized determination that the punishment is grossly disproportionate "outside the capital context, because of the qualitative difference between death and all other penalties." *Id.* at 995 (Scalia, J.). Justice Scalia, joined by Chief Justice Rehnquist—in a non-plurality opinion, declared that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Id.* at 965. Justice Kennedy, joined by Justices O'Connor and

Souter—the plurality opinion, concurring in part and concurring in the judgment, adopted a "narrow proportionality principle," rather than rejecting any proportionality guarantee under the Eighth Amendment outright. *Id.* at 997 (Kennedy, J.). Though Justice Kennedy acknowledged the three factors set forth in *Solem v. Helm*, he thought the case "did not announce a rigid three-part test." *Id.* at 1004. Rather, he believed the Court should initially examine the "crime committed and the sentence imposed" and only proceed with intra and inter-jurisdictional analyses "in the rare case" where the initial examination "leads to an inference of gross disproportionality." *Id.* at 1005.

In *Ewing v. California*, the Court upheld a California three strikes sentence of 25 years to life for the felony grand theft of three golf clubs together worth $1,200. 538 U.S. 11, 28, 30–31 (2003). Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, explained "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." *Id.* at 29 (plurality opinion). The plurality noted "the legislature . . . has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme." *Id.* at 28. It further observed "the State's public-safety interest in incapacitating and deterring recidivist felons" is a "legitimate penological goal." *Id.* at 29.

In *Lockyer v. Andrade*, the Court concluded it was not a clear violation of the federal prohibition on cruel and unusual punishment to impose two consecutive terms of 25 years to life under California's three strikes statutes for defendant's two petty theft crimes, where the defendant also had prior convictions for misdemeanor theft, residential burglary, and transporting marijuana. 538 U.S. at 66–67, 77.

Finally, in *Graham v. Florida*, the Court held the Eighth Amendment prohibited LWOP sentences for juveniles who committed nonhomicide offenses because such sentences are grossly disproportionate to the offenses. 560 U.S. 48, 82 (2010).

We glean several broad principles from these Supreme Court cases. First, the length of a particular sentence is a matter of legislative prerogative. *Rummel*, 445 at 274. The State's public-safety interest in incapacitating and deterring a recidivist felon is a legitimate penological goal. *Ewing*, 538 U.S. at 29. Finally, a defendant's history of recidivism is relevant in weighing both the gravity of his offense and the proportionality of his sentence. *Id.*

These principles are demonstrated in *Gonzalez v. Duncan* where we ultimately reversed and remanded a denial of habeas relief. 551 F.3d 875, 891 (9th Cir. 2008). Gonzalez, a convicted sex offender, was charged with failing to register a change of address pursuant to California's sex offender registration statute. *Id.* at 877. He was convicted, which resulted in him receiving a sentence of 28 years to life under California's Three Strikes law. *Id.* at 878–79. We recognized the State of California's interest in deterring recidivist felons. *Id.* at 886. We reviewed Gonzalez's extensive criminal history and we determined *Gonzalez* was the type of "exceedingly rare" case that demonstrated gross disproportionality. *Id.* at 882, 886–87.

We did not reach that conclusion lightly. In finding an inference of gross disproportionality, we noted that Gonzalez's failure to register was "an entirely passive, harmless, and technical violation of the registration law." *Id.* at 885 (quoting *People v. Carmony*, 26 Cal. Rptr. 3d 365, 372 (2005)). Further still, while Gonzalez's criminal history

"include[ed] convictions for possession of a controlled substance and auto theft in 1988, attempted forcible rape and lewd conduct with a child in . . . 1989, robbery in 1992, and spousal abuse in 1999," *id.* at 886; we discerned no "rational relationship between Gonzalez's failure to update his sex offender registration . . . and the probability he will recidivate as a violent criminal or sex offender," *id.* at 887. Thus, given the passivity of merely failing to register, and the lack of connection between his criminal history and potential recidivism as a sex offender, we concluded the sentence was grossly disproportionate.

III

Turning to Iversen's case, we cannot conclude that his sentence raises an inference of gross disproportionality. Unlike *Gonzalez*, Iversen was not convicted of a harmless regulatory offense. Instead, he was convicted of public indecency for the sixth time. This is in addition to his extensive history of sex offenses. The statute in question in *Gonzalez* was centered on "the need for police to be able to keep track of offenders." 551 F.3d at 889. Here, Oregon's statute is aimed at punishing recidivist felony sex offenders. Oregon has a public safety interest in incapacitating and deterring recidivist felons like this. *Ewing*, 538 U.S. at 29. Iversen's criminal history is directly related to the triggering offense, and he has a clear pattern of recidivism which was considered by the state court.

While some fair-minded jurists may disagree on the correctness of Iversen's LWOP sentence, the Oregon state court's decision concerning his sentence is not contrary to the Supreme Court's Eighth Amendment jurisprudence. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Under the "AEDPA standard we must apply here, '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.'" *Gonzalez*, 551 F.3d at 882–83 (citing *Andrade*, 538 U.S. at 73). This sentence is not constitutionally infirm in light of the gravity of Iversen's offense and criminal history. *Norris v. Morgan*, 662 F.3d 1276, 1296 (9th Cir. 2010).

The state courts (1) considered Iversen's history of adult felony recidivism; (2) acknowledged Iversen's mental health record, reviewed his failed opportunities to reform, and concluded he remained very dangerous to others; (3) determined a LWOP sentence was neither extreme nor disproportionate to Iversen's instant offense after considering his past criminal conduct; (4) observed Oregon's public-safety interest in incapacitating and deterring recidivist felons—like Iversen—is a legitimate penological goal; and (5) sentenced Iversen to LWOP pursuant to Oregon's legislatively-mandated sex offender recidivism statute.

The district court correctly determined the Oregon state court's LWOP sentence for Iversen was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Accordingly, the district court did not err when it denied Iversen's habeas petition.

The judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TERRY EUGENE IVERSEN, Petitioner, v. SUSAN WASHBURN, Respondent.	)))))))))	2: 20-cv-01524-AA OPINION AND ORDER

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AIKEN, District Judge.

Petitioner Terry Eugene Iversen, an inmate at the Eastern Oregon Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2254 in which he challenges his sentence for Public Indecency. For the reasons set forth below, the Court denies the Petition for Writ of Habeas Corpus [2] and dismisses this action with prejudice.

I. Background

On October 12, 2016, petitioner boarded a MAX train and began watching a 23-year-old woman seated at the front of the train and her friend who was seated behind her. When the friend exited the train, petitioner immediately moved to take her vacated seat. The woman in front heard concerning movement and turned to see that petitioner had exposed his penis and was actively masturbating behind her. This continued for several minutes until petitioner eventually got up and got off the train. Shortly thereafter, the victim exited the train and immediately called police. They located petitioner and the victim was able to identify him.

At the time of his plea hearing in the above matter petitioner had numerous prior convictions stretching back more than thirty years: October 1985: public indecency; August 1986: attempted second-degree escape; March 1989: felony attempt to elude police and reckless driving, third-degree rape (involving a 15-year-old girl), second-degree sodomy (involving a 12-year-old girl) and first-degree burglary; January 1997: public indecency, unlawful use of a weapon, resisting arrest, and reckless driving; July 1999: felon attempt to elude police and possession of methamphetamine (police called to the scene because petitioner had parked his car in front of a Baskin-Robbins and was observed watching two young women close the shop); December 2000: two convictions for felony public indecency (petitioner masturbating on the MAX train in front of

16 and 17-year-old girls); July 2005: second-degree assault, third-degree assault, felony hit and run, felony attempt to elude police, misdemeanor attempt to elude police (police called to the scene because petitioner was observed following girls, ages 10 and 14, and two other children, with his car near a shopping mall; when police arrived he fled causing a serious auto accident; police found duct tape, methamphetamine and marijuana in his car).

In this case, petitioner pleaded guilty to Public Indecency. In so doing, he acknowledged that he previously had been sentenced on two felony sex crimes at set forth in ORS 137.719 and admitted to three enhancement factors: (1) that the crime involved persistent involvement in similar offenses unrelated to the current offense; (2) that prior justice system sanctions had failed to deter him from reoffending; and (3) that he was on supervision at the time of the offense.[1] The court sentenced him to LWOP in 2017. On direct review, the Oregon Court of Appeals affirmed the sentence *per curiam* and the Oregon Supreme Court ultimately denied review. *State v. Iverson*, 296 Or. App. 360, 435 P.3d 837 (2019), *rev. denied* 365 Or. 369, 451 P.3d 984 (2019); Respondent's Exhibits 104-108.

Petitioner did not pursue post-conviction relief ("PCR") in state court. On September 3, 2020, he filed this action. His sole ground for relief as set forth in the Petition is as follows:

> Ground One: Eighth Amendment – cruel and unusual punishment
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> Supporting Facts: I would have received less time if instead of exposing myself I would [have] pulled out a knife and killed the person. The crime I committed carries a 1-year max jail term for first time offenders. Mine was a Class C felony which is supposed to carry a 5-year max prison sentence.

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[1] Under ORS 137.719(1), the presumptive sentence for a felony sex crime is life imprisonment without the possibility of parole ("LWOP") if the defendant has been sentenced for felony sex crimes at least two times prior to the current sentence.

Respondent asks the Court to deny relief on the Petition because the trial court did not unreasonably apply clearly established federal law when it imposed the presumptive LWOP sentence in accord with Oregon law.

II. Merits

A. Standards for Habeas Relief

An application for writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that a materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct legal principle from [the Supreme Court's] decisions, but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable. *Id.* at 409-10. 28 U.S.C. § 2254(d) "preserves

authority to issue the writ in cases where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with the Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

When applying these standards, the federal court should review the "last reasoned decision" by a state court that addressed the issue. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). When a state court reaches a decision on the merits but provides no reasoning to support its conclusion, the federal habeas court must conduct an independent review of the record to determine whether the state court clearly erred in its application of Supreme Court law. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). In such an instance, although the court independently reviews the record, it still lends deference to the state court's ultimate decision and can only grant habeas relief if the state court's decision was objectively unreasonable. *Richter*, 562 U.S. at 98; *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

B. Analysis

Petitioner argues that the trial court's decision was objectively unreasonable because in assessing the gravity of his offense, it ignored the de-escalation in the seriousness of his crimes and his amenability to treatment; and it unreasonably relied on uncharged or dismissed conduct in assessing his criminal history. In addition, citing *Solem*, he argues that given he could only have received a harsher sentence if he were convicted of aggravated murder and sentenced to death, his LWOP sentence was grossly disproportionate to his crime. *See Solem v. Helm*, 463 U.S. 277 (1983)(Court overturned as grossly disproportionate under the Eighth Amendment a LWOP sentence under recidivism statute for crime of "uttering a 'no account' check for $100" where defendant had six prior felony convictions which the Court characterized as non-violent and not

crimes against a person.). Respondent maintains that *Solem* is easily distinguishable from the facts in petitioner's case in that: (1) petitioner has a history of serious sex crimes against children; (2) public indecency is a person crime; (3) petitioner had convictions for serious non-sex crimes stemming from his attempts to flee from police upon reports that he was preying on children; and (4) petitioner's lack of demonstrated impulse control over the course of his adult life makes him precisely the type of offender ORS 137.719 is intended to neutralize.

The Eighth Amendment includes a "narrow proportionality principle" in non-capital cases that prohibits sentences "grossly disproportionate" to the crime. *Ewing v. California*, 538 U.S. 11, 20, 23 (2003)(quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 1001 (1991)). To succeed on a proportionality claim, a petitioner must make a threshold showing of gross disproportionality through a "comparison of the crime committed and the sentence imposed." *Id.* at 30 (citing *Harmelin*, 501 U.S. at 1005); *see also Norris v. Morgan*, 622 F.3d 1276, 1287 (9th Cir. 2010)(explaining that "in applying [the] gross disproportionality principle[,] courts must objectively measure the severity of a defendant's sentence in light of the crimes he committed.").

It is exceptionally difficult for a defendant to show that his sentence is unconstitutionally disproportionate. Several Supreme Court cases have upheld sentences that seem harsh in light of the offenses committed. *See, e.g., Ewing* (upholding 25-year sentence of habitual criminal defendant for stealing three golf clubs, holding that states may dictate how they wish to deal with recidivism issues); *Lockyer v. Andrade*, 538 U.S. 63 (2003)(50-years-to-life sentence for stealing $150 of videotapes upheld under California's three-strikes law); *Hutto v. Davis*, 454 U.S. 370 (1982)(40-year prison sentence upheld where defendant was convicted of possession with intent to sell nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263 (1980)(life sentence upheld

where defendant was repeat offender and committed third felony of stealing $120). "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation." *Ewing*, 538 U.S. at 25. Further, "[r]ecidivism has long been recognized as a legitimate basis for increased punishment." *Id.*

In considering a proportionality challenge to a sentence in a non-capital case, a court must begin with a threshold inquiry "comparing the gravity of the offense and the severity of the sentence." *Graham v. Florida*, 560 U.S. 48, 60 (2010)(citing *Harmelin*, 501 U.S. at 1005). "'In the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* (quoting *Harmelin,* 501 U.S. at 1005).

Here, in addition to outlining the circumstances of petitioner's numerous prior convictions at his plea hearing, the State presented information about relevant uncharged conduct. This included the fact that in 1988 petitioner was the primary suspect in approximately 15 public masturbation incidents at homes situated on a golf course, a rape at one of these homes and a confrontation with a groundskeeper who later identified petitioner as the person who threatened him with a knife. Also, in 1996, although no charges were brought, police investigated a woman's allegations that petitioner followed her home and raped her. And within a couple of months of his most recent release from prison in May 2016, petitioner removed his GPS bracelet and absconded. He was detained for 45 days and within a week of release from that detention surveillance videos captured him masturbating behind a 21-year-old woman on the MAX train. He was not charged in that incident which occurred just over a month before the subject crime.

With regard to his amenability to treatment, petitioner's parole and probation officer testified at his plea hearing that he had been referred to treatment to prevent sexual offenses 5-6 times but never successfully completed or even significantly participated in any of these programs. Noting petitioner's persistent previous involvement in sex offenses, several of which involved child victims, the officer recommended that the court impose the presumptive LWOP sentence.

In opting for the presumptive sentence the trial court stated:

> And I've looked at everything here. I've heard all the testimony here. I mean it's just – there –I just can't find any – mitigation here on part of the defendant. I mean it's just incarceration, failure, doesn't get treatment, failure, doesn't get treatment, gets released, reoffends, doesn't do treatment, re-offends. It's just that's been your life most of your life and you've been in prison, alright, and in essence this statute is a habitual offender statute. There's a number of these that have different impacts on different sentence issues where of repeat over and over and also incorporates you know, the inability or the ability to reform, and you just haven't sir. You've been given so many opportunities [ ] to reform, and you haven't completed one single probation, one single you know, you're -- you're released out in the community, you re-offend again, and you're off to prison, and what do you do there? Do you address your issues? No. *** Your – your criminal history is horrendous, absolutely horrendous, you know, and in comparison to the case – the Supreme Court cases that – or the case that came out. One was a Court of Appeals case, I'm sorry, that came out. In reviewing the you know, they don't – they do not declare that a sentence for this type of offense, a life sentence is unconstitutional. They were pretty clear on that. You know, in essence what – what you need to look at is your past, the prior record, and is there anything there that shows that there's an ability to reform, that you may not be here, not be revolving back and forth.
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> ***
>
> You know you have been given many, many opportunities, many, many opportunities to reform and you haven't taken advantage of them. You haven't done it, alright, so here's my you know, in considering your criminal history, your inability to – to reform and the risk that you present to the public, which I think is substantial, you know is you know, you're – you're very dangerous, you know, whether it be just another public indecency or something further than that, you know.

Respondent's Exhibit ("Resp. Ex.") 103, at 127-29 [19-1].

The isolated triggering offense here is not severe relative to the sentence, but as petitioner acknowledges, in examining the gravity of the offense in the recidivism context, courts must consider a defendant's criminal history. Moreover, petitioner's reliance on *Solem* notwithstanding, that case actually underscores the reasons he cannot prevail here. In stark contrast to the facts at issue in *Solem*, petitioner committed numerous person crimes, including serious sex offenses against children. There is ample support in the record for the trial court's findings concerning: petitioner's criminal history, including the facts that he was convicted of serious sex offenses against children in the past and more recent convictions for serious non-sex offenses stemming from his attempts to flee from police responding to reports of him appearing to be preying on children; his inability to reform; and the significant danger he poses to the public.[2] Accordingly, assessing the threshold proportionality question, the Court concludes that petitioner cannot establish that his LWOP sentence is grossly disproportionate to the crimes of which he was convicted. Because the Court determines that this is not the rare case where the threshold comparison leads to an inference of gross disproportionality, the Court need not and does not analyze intra-jurisdictional and inter-jurisdictional comparisons.

For these reasons, petitioner cannot demonstrate that the trial court's determination

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[2] Petitioner contends that the trial court failed to consider the deescalating nature of his crimes. However, during the plea hearing when petitioner's counsel argued that his more serious person crimes all occurred decades ago and his subsequent crimes mainly involved public masturbation, the court noted that he had been in prison most of that time and was not out in the public living a normal life. Resp. Ex. 103, at 158 [19-1]. Moreover, while the court heard testimony about uncharged conduct, it did not reference such conduct in its ruling or otherwise suggest that it was necessary to its decision to impose the presumptive sentence.

that his sentence does not violate the Eighth Amendment was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that its decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the Court denies relief on this claim.

CONCLUSION

Based on the foregoing, the Court DENIES the Petition for Writ of Habeas Corpus [2] and DISMISSES this action with prejudice. The Court DENIES a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right.[3]

IT IS SO ORDERED.

DATED this 24th day of January, 2022.

/s/Ann Aiken
Ann Aiken
United States District Judge

[3] A petitioner seeking relief under §2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a Certificate of Appealability ("COA") from a district or circuit court judge. A Certificate of Appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

FILED

AUG 6 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY EUGENE IVERSEN, Petitioner-Appellant, v. DAVE PEDRO, Respondent-Appellee.	No. 22-35076 D.C. No. 2:20-cv-01524-AA District of Oregon, Pendleton ORDER

Before: NGUYEN and MILLER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. 51, is **DENIED**.

FILED

OCT 27 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY EUGENE IVERSEN, Petitioner-Appellant, v. SUSAN WASHBURN, Respondent-Appellee.	No. 22-35076 D.C. No. 2:20-cv-01524-AA District of Oregon, Pendleton ORDER

Before: SCHROEDER and BYBEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is granted with respect to the following issue: whether appellant's sentence constitutes cruel and unusual punishment under the Eighth Amendment. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due January 24, 2023; the answering brief is due February 23, 2023; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If Susan Washburn is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

unconstitutional to this. I -- I believe that it's clearly different than the other cases because of your history that's been well documented here, alright. It's been completely documented here, your entire history, and your failures and the opportunities that were given to you, and you failed, you know. In essence a habitual offender is there's just -- that means you're constantly back and forth so all we can do is incarcerate you because that's the only thing that works from preventing you to offend again. That's it.

COURT'S SENTENCE

THE COURT: Alright so I am going to impose the presumptive sentence here of life without the possibility of parole in this case. I've made my findings, alright. I don't find any mitigation whatsoever in this case that would warrant a -- a departure of any type, so I don't get to section two, so I don't address those questions that are being presented here, so that is what I'm imposing, and I do not find that it is a unconstitutional sentence, and it would shock the conscious of -- of the -- of the Court or anyone else, because it's just not the act that you look at. Yes this is a misdemeanor act, but

it's the history, the prior convictions, the failures that you have. Everything that went on between that time, and the repeat over and over, and looking at it as a whole, that is -- that is a appropriate sentence for this situation, so in terms of financials, (indiscernible), or anything I'm not going to impose any financials. I don't find that. He has no ability to it so I'll waive any financial obligations. I'll impose the life sentence and that's it. Anything else from the State?

MS. BROWN: No, thank you.

THE COURT: Anything else from defense?

MR. BEACH: No.

THE COURT: Okay, last thing I need to inform you, sir is your notice of right to appeal, alright. Your attorney will go over a form with you and notice of right to appeal. You have a right to appeal my decisions to file a notice of appeal, alright, once the judgment's signed, and you have a right to a Court appointed lawyer, so there'll be a form you go over. That's what you need to be aware of. Alright? That's it, we're done. Thank you.

(Proceeding Concluded)

296 Or.App. 360
Court of Appeals of Oregon.

STATE of Oregon, Plaintiff-Respondent,
v.
Terry Eugene IVERSEN, Defendant-Appellant.

A164628
|
Submitted January 17, 2019.
|
February 27, 2019

Washington County Circuit Court, 16CR64906, Oscar Garcia, Judge.

Attorneys and Law Firms

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Mary M. Reese, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Rolf C. Moan, Assistant Attorney General, filed the brief for respondent.

Before Powers, Presiding Judge, and Egan, Chief Judge, and DeVore, Judge.

Opinion

PER CURIAM

***360** Affirmed. *State v. Althouse*, 359 Or. 668, 375 P.3d 475 (2016).

All Citations

296 Or.App. 360, 435 P.3d 837 (Mem)

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365 Or. 369
(This disposition is referenced in the Pacific Reporter.)
Supreme Court of Oregon.

STATE
v.
IVERSEN, Terry Eugene

(A164628) (S066694)

July 18, 2019

(296 Or. App. 360)

Opinion
Review Denied

All Citations

365 Or. 369, 451 P.3d 984 (Table)

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