

No. _____

IN THE
Supreme Court of the United States

MAURICE ANDERSON,
PETITIONER,
v.
STATE OF LOUISIANA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Louisiana Chief Justice Johnson described the background to this case dissenting from the denial of writs at the Louisiana Supreme Court:

In 2014, defendant was convicted of theft over \$1500 and simple battery.... The district court sentenced defendant to 10 years imprisonment at hard labor on the theft conviction, and six months imprisonment in parish jail for simple battery, with the sentences be served consecutively. Following habitual offender proceedings, the district court adjudicated defendant a fourth-felony habitual offender, vacated defendant's 10-year sentence on the theft charge, and resentenced defendant to 60 years imprisonment at hard labor, without the benefit of probation or suspension of sentence. ...

[D]efendant has no convictions for crimes of violence. Louisiana's habitual offender law is set forth in La. R.S. 15:529.1. The legislature recently amended this statute to provide for a reduction of sentences under the habitual offender law in certain circumstances. In this case, because neither the underlying offense nor any of defendant's prior convictions were crimes of violence or sex offenses, defendant would only have been sentenced to 20 years imprisonment under the amended habitual offender statute.

This background gives rise to the following questions:

1. Whether imposition of an effective life sentence for theft, based upon four non-violent prior convictions, constitutes cruel and unusual punishment?
2. Whether a life-equivalent sentence is prohibited by the evolving standards of decency when the vast majority of states, including Louisiana, have since now determined that life-equivalent sentences should not be imposed for non-violent offenses?

PARTIES TO THE PROCEEDING

The petitioner is Maurice Anderson, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maurice Anderson, respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Anderson*, 2017 La. App. Unpub. LEXIS 47 (La. App. 1 Cir. 02/17/17).

OPINIONS BELOW

The First Circuit's denial of petitioner's challenge to his sentence is at *State v. Anderson*, 2017 La. App. Unpub. LEXIS 47 (La. App. 1 Cir. 02/17/17). *See* App. A. The Louisiana Supreme Court's order denying review of that decision is reported at *State v. Anderson*, 2018 La. LEXIS 352 (La. Feb. 2, 2018). *See* App. B. Chief Justice Johnson dissented. Justice Crichton would have granted writs. *See id.* at 8a-9a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Louisiana First Circuit Court of Appeal were entered on February 17, 2017. *See* App. A at 1a. The Louisiana Supreme Court denied review of that decision on February 2, 2018. *See* App. B at 8a. This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Prior to 2017, the habitual offender law in Louisiana codified the punishment for second and subsequent offenses at La. R.S. § 15:529.1, which provided:

(4) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then the following sentences apply:

(a) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life.

Subsequently, the Legislature modified the statute to add the following, effective November 1, 2017:

(b) If the fourth felony and no prior felony is defined as a crime of violence under R.S. 14:2(B) or as a sex offense under R.S. 15:541, the person shall be imprisoned for not less than twenty years nor more than twice the longest possible sentence prescribed for a first conviction. If twice the possible sentence prescribed for a first conviction is less than twenty years, the person shall be imprisoned for twenty years.

La. R.S. § 15:529.1(A)(4) (italics indicating new provision). This new provision does not apply to Petitioner.

The Louisiana Legislature provides the following relevant penalties for Theft:

(3) When the misappropriation or taking amounts to a value of ~~seven hundred fifty~~ one thousand dollars or more, but less than a value of five thousand dollars, the offender shall be imprisoned, with or without hard labor, for not more than five years, or may be fined not more than three thousand dollars, or both

La. R.S. § 14:67(B)(1) amended in 2017 by 2017 La. ALS 281, 2017 La. ACT 281, 2017 La. SB 220, 2017 La. ALS 281, 2017 La. ACT 281, 2017 La. SB 220.

The Louisiana Legislature defines simple battery as a misdemeanor:

A. Simple battery is a battery committed without the consent of the victim.

B. Whoever commits a simple battery shall be fined not more than one thousand dollars or imprisoned for not more than six months, or both

La. R.S. § 14:35.

INTRODUCTION

Petitioner's harsh sentence of sixty years imprisonment at hard labor without the benefit of parole is an unconstitutionally disproportionate and excessive punishment for his non-violent crime. The principle of proportionality is "deeply rooted" in our legal system. *Solem v. Helm*, 463 U.S. 277, 284 (1983). This Court has long held that "the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Rummel v. Estelle*, 445 U.S. 263, 271 (1980). In order for a sentence to be proportional to the crime, it must serve one or more of the penological goals guiding criminal sentencing – rehabilitation, deterrence, or retribution. Otherwise, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida*, 560 U.S. 48, 71 (2010). Petitioner's case is a stark example of a sentence lacking any legitimate penological justification.

Petitioner, a forty-seven-year-old man, was effectively sentenced to die in prison for the crime of theft of over \$1500. The sentence exceeds Petitioner's life expectancy and therefore "forswears altogether the rehabilitative ideal." *Id.* at 74. Indeed, "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id.* Likewise, Petitioner's sentence achieves no deterrent objective. There has been little to no evidence that permanent sentences actually provide any sort of deterrent effect.¹ Furthermore, even if harsh punishments did provide a deterrent effect,

¹ For example, there was extensive scholarship on the limited impact of California's Three-Strike law prior to its amendment in 2012. *See, e.g.*, Scott Ehlers, Vincent Schiraldi & Jason Zidenberg,

deterrence itself cannot justify a disproportionate punishment. “A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.” *Rummel*, 445 U.S. at 288 (Powell, J., dissenting).

Lengthy sentences like Petitioner’s – particularly when there has been no involvement in violent crime – are instead a way for the State to compel guilty pleas, punish a defendant for exercising his right to trial, or express retributive outrage over criminal behavior, no matter how minor the crime. To over-emphasize retribution in such a fashion undermines the validity of the principles underlying our criminal justice system. Petitioner’s sentence of sixty years without the benefit of parole, lacking in any penological justification, is a vivid illustration of why the constitutional parameters governing excessive sentences must be re-visited by this Court.

STATEMENT OF THE CASE

There is no dispute regarding the facts. Maurice J. Anderson proceeded to trial and was convicted of theft over \$1500.00 and simple battery, violations of LSA-R.S. 14:67(B)(1) and 14:35, respectively. App. A at 1a. He was initially sentenced to

Justice Policy Inst., *Still Striking Out: Ten Years of California's Three Strikes* 14 (2004); Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 Stan. L. & Pol'y Rev. 65, 67 (1999) ("Counties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to more lenient counties."); Linda S. Beres & Thomas D. Griffith, *Do Three-Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 Geo. L.J. 103 (1998); Tomislav V. Kovandzic et al., *"Striking Out" As Crime Reduction Policy: The Impact of "Three Strikes" Laws on Crime Rates in U. S. Cities*, 21 Just. Q. 207 (2004); Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 Stan. L. & Pol'y. Rev. 75, 75 (1999).

ten years in prison on the theft, and six months in parish jail on the simple battery.² *Id.* The State then filed a habitual offender proceeding against Mr. Anderson, alleging he was a fourth felony offender. *Id.*

At the habitual offender proceeding, the State introduced that petitioner had pleaded guilty theft on July 12, 1989. *Id.* at n.2. The State then introduced evidence that petitioner had pleaded guilty to simple burglary and unauthorized burglary on March 29, 1999. *Id.* The State also presented evidence that petitioner had pleaded guilty on May 12, 2003 and again on November 5, 2004, on separate counts of introducing contraband (allegedly marijuana) into a penal institution. *Id.* The court ultimately vacated Petitioner's ten-year sentence on the theft charge and sentenced him to sixty years imprisonment at hard labor, without the benefit of parole or suspension of sentence.³ *Id.* at 2a.

Petitioner sought to appeal; his lawyer filed an *Anders* brief, and sought to withdraw. *Id.* Petitioner pro se challenged the constitutionality of his sentence. *Id.* at 1a. The Court of Appeal rejected Petitioner's pro se challenge to his sentence, and granted his lawyer's motion to withdraw. *Id.* at 7a.

² At the time of the offense, the maximum amount a defendant could receive for theft over \$1500.00 was ten years. In 2014, the maximum amount was reduced to five years. *State v. Anderson*, 2016-1191 (La. App. 1 Cir 02/17/17) ("The sentencing range for defendant's underlying conviction of theft over \$1500.00 was imprisonment, with or without hard labor, for not more than ten years, or a fine not more than three thousand dollars, or both. See LSA-R.S. 14:67(B)(1) (Prior to amendment by 2014 La. Acts, No. 255, § 1).").

³ According to the trial court minutes, Petitioner's habitual offender sentence was imposed without the benefit of probation or parole, and according to the transcript, the sentence was imposed without the benefit of probation and suspension of sentence. See App. B at 9a n.3. Either way, Petitioner is not eligible for parole. La. R.S. § 15.574.4(A)(1)(a) ("A person convicted of a third or subsequent felony offense shall not be eligible for parole.").

Pro se, Petitioner filed writs to the Louisiana Supreme Court. App. B at 8a.

The Court denied writs, with Chief Justice Johnson dissenting.

In this case, the district court based its decision in part on the fact that defendant has an extensive criminal history. Notably, defendant has no convictions for crimes of violence. Louisiana's habitual offender law is set forth in La. R.S. 15:529.1. The legislature recently amended this statute to provide for a reduction of sentences under the habitual offender law in certain circumstances. In this case, because neither the underlying offense nor any of defendant's prior convictions were crimes of violence or sex offenses, defendant would only have been sentenced to 20 years imprisonment under the amended habitual offender statute. See La. R.S. 15:529.1(A)(4)(b). Louisiana law provides that a sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. ... Considering defendant was in his 40s when he was sentenced to 60 years imprisonment, his sentence is effectively a life sentence. In my view, the legislature's recent amendment of the habitual offender statute suggests that a life sentence (or any sentence greater than 20 years), when the offender has no prior convictions for crimes of violence or sex offenses, is disproportionate to the gravity of the offense. Defendant should be entitled to the benefit of the ameliorative provisions in the amended habitual offender statute. ... For these reasons, I find the district court abused its discretion in imposing a 60-year sentence, and defendant's sentence should be set aside.

State v. Anderson, No. 2017-KO-0671, 2018 La. LEXIS 352, at *2-3 (Feb. 2, 2018) (Johnson, C.J. would grant) (citations omitted). Justice Crichton would also have granted writs to adjudicate the case. See *id.* (statement of Justice Crichton) ("I would grant this application to examine the defendant's sentence in light of the recent amendments to La. R.S. 15:529.1. See La. R.S. 15:529.1(A)).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Consider Whether Imposition of A Sixty-Year Sentence on a Forty-Seven Year Old Man for A Non-Violent Offense Is Cruel And Unusual.

Almost three decades ago, in a three-Justice concurrence authored by Justice Kennedy, this Court limited the types of non-capital sentences that were prohibited by the Eighth Amendment to those that were “grossly disproportionate” under a “narrow” proportionality principle. *Harmelin v. Michigan*, 501 U.S. 957, 996-98 (1991) (Kennedy, J., concurring). As discussed at length by Judge Barron in a concurring opinion earlier this year, the time is ripe for this Court to revisit the *Harmelin* concurrence.⁴ The twenty-seven years of experience since this Court’s fractured decision in *Harmelin* have shown that the decision has not provided state and federal courts with the guidance to protect against unconstitutional sentencing. Moreover, as the standards of decency have evolved, *Harmelin* has failed to provide the clarity and protection that it had promised. The result has been a system characterized by harsh and excessive punishment, that undermines confidence in the administration of justice, erring on the side of over-incarceration and deprivation of liberty.

⁴ *United States v. Rivera-Ruperto*, 884 F.3d 25, 48 (1st Cir. 2018) (Barron, J., concurring) (“In my view, a consequence as grave as the one that *Harmelin* requires in a case like this should have the imprimatur of more than only a nearly three-decade old, three-Justice concurrence.”). In *Rivera-Ruperto*, the question before the First Circuit was whether a 161-year and 10-month sentence that was mandatory under 18 U.S.C. § 924, as punishment for the defendant’s participation in six “sham” drug deals, was unconstitutional under the Eighth Amendment. The three-judge panel reluctantly affirmed defendant’s sentence. Judge Barron concurred in the denial of the defendant’s petition for rehearing, but wrote separately to explain why he believed the Supreme Court should re-examine the “grossly disproportionate” standard laid out in *Harmelin*. His concurrence was joined by every judge in the First Circuit able to vote on the matter. The petitioner’s application for an extension of time to file a petition for certiorari in *United States v. Rivera-Ruperto*, No. 17A1208, has been granted by this Court.

A. Eighth Amendment Proportionality Review

This Court has long held that “punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that a sentence of fifteen years of hard labor while chained at the ankles and foot for falsifying public documents was unconstitutional). The Court has also taken the stance that the Eighth Amendment is “not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Id.* at 381. Indeed, Eighth Amendment jurisprudence has always looked to the “evolving standards of decency” as the lynchpin of what constitutes cruel and unusual punishment. *See, e.g., Graham*, 560 U.S. at 58 (Kennedy, J.) (“[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”).

At the very heart of determining whether a sentence is disproportionate is a comparison of the length and intensity of the punishment with the extent and nature of the crime. *See Trop v. Dulles*, 356 U.S. 86, 102-04 (1958) (plurality opinion) (sentence of expatriation was unconstitutional as a punishment for wartime desertion); *Robinson v. California*, 370 U.S. 661, 667 (1962) (criminalization of narcotic drug addiction was cruel and unusual). The current approach to determining proportionality, set forth by a fractured Court in *Harmelin v. Michigan*, eschewed the ideal of fair and just punishment embodied by the Eighth Amendment. 501 U.S. 957 (1991). In *Harmelin*, a three-Justice concurrence

prohibited courts from undertaking a holistic proportionality review, and relegated them to determine in a vacuum whether a sentence was “grossly disproportionate” without any points of comparison. *Id.* at 998.

The “grossly disproportionate” language adopted by the three-Justice concurrence in *Harmelin* was initially used by the Court in *Rummel v. Estelle*, 445 U.S. 263 (1980) (rejecting a challenge to a mandatory life sentence, with parole eligibility after ten to twelve years, under a Texas recidivist statute for crimes of credit card fraud, forgery, and theft). Less than three years later, in *Solem v. Helm*, the Court found unconstitutional a life without the possibility of parole sentence for a seventh nonviolent felony. *Solem*, 463 U.S. at 284. The Court relied on three criteria in finding the sentence disproportionate: first, the gravity of the offense and harshness of the penalty; second, the sentences imposed on other criminals in the same jurisdiction; and third, the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-92. Writing for the majority, Justice Powell suggested that a holistic analysis of these factors would help courts determine whether or not a sentence was grossly disproportionate. *Id.* at 290.

Solem itself provides a useful illustration of how proportionality review should be undertaken. In applying these criteria, Justice Powell noted that Helm's conviction and prior offenses were all minor and nonviolent, but that his sentence was the most severe authorized by South Dakota at the time. *Id.* at 296-97. Justice Powell acknowledged that the states were justified in punishing recidivists more severely, but added that “[w]e must focus on the principal felony –

the felony that triggers the life sentence – since Helm already has paid the penalty for each of his prior offenses." *Id.* at 296 n.21. Justice Powell also noted that Helm's life without parole sentence "is unlikely to advance the goals of our criminal justice system in any substantial way." *Id.* at 297 n.22. All that remained an open question after *Solem*, was just how broadly the “grossly disproportionate” category would extend under an application of the three criteria.⁵

Eight years later, the Court had the opportunity to answer that question in assessing the constitutionality of a mandatory life without parole sentence imposed on a first-time offender convicted of possessing 672 grams of cocaine.⁶ *Harmelin*, 501 U.S. 957. Instead, a fractured Court put out five separate opinions, none of which garnered a clear majority.

In the controlling concurring opinion, Justice Kennedy dialed back from the approach taken by the Court in *Solem* and concluded that the Court’s prior Eighth Amendment cases recognized only a "narrow" proportionality principle that “does not require strict proportionality between crime and sentence.” *Id.* at 1001 (Kennedy, J., concurring). Rather, he decided that the Eighth Amendment “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.* As such, he found that an analysis of intrajurisdictional and interjurisdictional comparisons (the second and third *Solem* factors) “are appropriate only in the rare

⁵ A comparison of *Rummel* and *Solem* shows that the facts of the two cases and crimes are remarkably similar to one other, and to Petitioner’s case, with the main difference being that *Rummel* would be eligible for parole after ten to twelve years. Helm, like Petitioner, was not eligible for parole and had instead been sentenced to die in prison.

⁶ *Harmelin*’s penalty was later struck down under the Michigan Constitution, in part under the state constitutional provision, which forbids “cruel or unusual punishments.” See *People v. Bullock*, 485 N.W.2d 866, 872, 877-78 (Mich. 1992).

case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” *Id.* at 1005. This refashioning of *Solem* forced courts to undertake an objective comparative analysis with absolutely no points of comparison.

The remainder of the opinion demonstrates how the *Harmelin* framework, by its very nature, reduces the analysis to a series of subjective assessments. In applying these modified criteria, Justice Kennedy found that, as a threshold matter, possession of 672 grams of cocaine threatened "grave harm to society" because of the effect on drug users and because of violent crimes committed "as part of the drug business or culture.” *Id.* at 1002. Thus, in his opinion, a mandatory life without parole sentence in *Harmelin*’s case did not lead to an inference of gross disproportionality. *Id.* (“From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in *Solem*. Possession ... of illegal drugs represent[s] ‘one of the greatest problems affecting the health and welfare of our population.’ Petitioner’s suggestion that his crime was nonviolent and victimless ... is false to the point of absurdity.” (citations omitted) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 688 (1989))).

The four dissenting Justices disagreed. They rightly recognized that Justice Kennedy’s application of the first *Solem* factor was both too subjective and too narrow, as he focused mainly on the harm threatened by the amount of drugs and not enough on critical culpability issues such as intent and motive. *Id.* at 1009-23 (White, J., dissenting) (“To be constitutionally proportionate, punishment must be

tailored to a defendant's personal responsibility and moral guilt.”). The dissent also noted that Harmelin was never charged with or convicted of distribution or intent to distribute. *Id.* at 1021-22. In the dissenting Justices’ view, the concurrence reduced the first prong of the analysis to an “empty shell” and rendered any future objective proportionality analysis “futile.” *Id.* at 1018-20. They also noted that “the use of an intrajurisdictional and interjurisdictional comparison of punishments and crimes” had long been an integral part of their Eighth Amendment jurisprudence. *Id.* at 1019. They voiced serious, and legitimate, concerns as to how a proper proportionality analysis could be undertaken without the consideration of objective factors such as “the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made.” *Id.*

Justice Kennedy’s concurrence in *Harmelin* was predicated on the later-proven-insufficient hope that restraint alone would prevent unconstitutionally harsh sentences. Restraint has unfortunately not been sufficient. This has become abundantly clear in the last three decades since the case was decided. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (“Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.”).

B. Case law since Harmelin shows that the three-Justice concurrence must be revisited

The fractured jurisprudence from the past twenty-seven years shows that the concerns voiced by the dissenting Justices in *Harmelin* have indeed come to pass. The cases below make evident the fact that the three-Justice concurrence’s lack of

guidance on proportionality review has led to a plethora of subjective judicial decision-making and unconstitutionally disproportionate sentences.

1. *Ewing v. California*

The Court’s splintered opinion in *Ewing v. California* failed to provide much-needed guidance in how to apply the toothless standard laid out in *Harmelin*. 538 U.S. 11 (2003). Under California’s severe three strikes law, enacted in 1994, Ewing’s minor theft offense of three golf clubs earned him a lengthy sentence of twenty-five years to life – during which he would likely die in prison – based on a dozen non-violent prior convictions over a twenty-year-period. *Id.* at 18-19, 39. Another three-Justice plurality, authored by Justice O’Connor, upheld the sentence under the narrow proportionality principle laid out in Justice Kennedy’s *Harmelin* concurrence. *Id.* at 23-24, 30. In another departure from *Solem*, Justice O’Connor “[put] on the scales not only [Ewing’s] current felony, but also his long history of felony recidivism” in assessing the threshold question of whether there was an “inference” of gross disproportionality. *Id.* at 29. In *Solem*, the Court had explicitly found that “as a matter of principle” a “criminal sentence must be proportionate to **the crime for which the defendant has been convicted.**” *Solem*, 463 U.S. at 290. Instead of assessing Ewing’s lengthy sentence in light of the crime of which he had been convicted, the theft of three golf clubs, Justice O’Connor assessed it in light of Ewing’s prior record – significantly longer than Petitioner’s – in order to find that the sentence was not grossly disproportionate. *Ewing*, 538 U.S. at 28-29.

In their opinions, the four dissenting Justices recognized how subjective the *Harmelin* standard had become, and how it had proven unable to protect against

unconstitutional sentencing practices. Justice Breyer's dissent compared Ewing's sentence using the two touchpoints still available – *Rummel* and *Solem* – and found that Ewing's sentence, offense, and prior criminal record were more similar to Helm's than Rummel's. Based on this relatively simple comparison, Justice Breyer concluded that the “threshold” inference of gross disproportionality had been raised and turned, as instructed by *Harmelin*, to the intra- and interjurisdictional comparisons. *Id.* at 42-47. His findings at those steps were unequivocal: “[o]utside the California three-strikes context, Ewing's recidivist sentence is **virtually unique in its harshness** for his offense of conviction, and by a **considerable degree**.”⁷ *Id.* at 47.

The courts have been unable to consistently, and objectively, assess what is or is not a constitutional sentence. Compare *Ewing* with *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (a twenty-five-year-to-life sentence for a third shoplifting offense violated the Eighth Amendment).

2. *Lockyer v. Andrade*

Ewing's companion case, *Lockyer v. Andrade*, added yet another flurry of opinions to the mix, but again provides little guidance on how to prevent against unconstitutional sentences. 538 U.S. 63 (2003). In fact, because it was a federal habeas case, the Court did not even reach the constitutional question of whether a

⁷ The dissent also addressed Justice O'Connor's finding that the penological goals of deterrence and incapacitation had been furthered by the three strikes law in some manner. Justice Breyer pointed out that if the goal of the legislature was to deter and incapacitate repeat felons who commit serious and violent crimes, there was no reason that property crimes like Ewing's need qualify as third strikes. *Id.* at 51. This observation applies readily to Petitioner's case, as the Louisiana legislature recognized in 2017 when it amended the state's habitual offender statute.

fifty-year-to-life prison sentence was excessive for two crimes of petty theft. 538 U.S. at 66. Few would argue that the defendant, who twice, unsuccessfully, tried to shoplift \$153.54-worth of children's videotapes from a K-Mart to fund his heroin addiction, would not have been more beneficial to society had he been provided with court-ordered substance abuse treatment, rather than a lifetime in prison.⁸ Andrade's criminal history, including misdemeanor theft, first-degree residential robbery, and transportation of marijuana, did not include any crimes of violence or crimes against the person. *Id.* at 66, 78. As is the case with Petitioner's effective life sentence, it is impossible to find any legitimate penological justification for Andrade to face almost certain death in prison.

Faced with this moral conundrum, the California Court of Appeal was clearly at a loss as to how to properly assess proportionality under the competing precedents of *Solem*, *Rummel*, and *Harmelin* and, with no guidance from this Court as to how to do so, failed to reverse the unconstitutional sentence. *Id.* at 68 (relying solely on a comparison of Andrade's case with *Rummel* in upholding the sentence). Rather than correcting the error, this Court proceeded to muddy the waters further.

Because Andrade, unlike Ewing and Petitioner, came before the federal courts on habeas review, the courts had to find that the California Court of Appeal had engaged in an unreasonable application of clearly-established federal law – an onerous task given the piecemeal state of the law surrounding proportionality review. Nonetheless, the Ninth Circuit Court of Appeals attempted to navigate its

⁸ Since Andrade was thirty-seven years old at the time of the sentencing, he would likely die in prison before becoming parole eligible at the age of eighty-seven. *Id.* at 79.

own path. The panel found that *Rummel* and *Solem* were both good law, and the fact that the state appellate court compared the facts in *Lockyer* to *Rummel* but not *Solem* constituted an unreasonable application of clearly established Supreme Court law for federal habeas purposes. *Andrade v. AG of Cal.*, 270 F.3d 743, 767 (9th Cir. 2001).

Having cleared the federal habeas hurdle, the Ninth Circuit undertook what it understood to be required under *Harmelin*, but what in practice looked very similar to the approach taken by Justice Breyer in *Ewing*, and conducted a threshold assessment simply by finding that Andrade's case was more similar to *Solem* than *Rummel*. *Id.* at 758-61. The panel then proceeded to conduct an intra- and interjurisdictional review and, as could be expected under the circumstances, found that Andrade's sentence was "substantially more severe than sentences for most violent crimes in California and is unusual even when compared to other applications of California's Three Strikes law" and that Andrade "could not have received such a severe sentence anywhere else, with the possible exception of Louisiana." *Id.* at 761-66. With confirmation of its "threshold determination" provided by an extensive analysis of the objective factors, the panel found the sentence grossly disproportionate and remanded.

This Court reversed, explicitly noting that its decision to uphold Andrade's sentence was not a ruling that the sentence itself complied with the Eighth Amendment, but only that habeas relief should not have been granted. *Lockyer*, 536 U.S. at 71. Poignantly, in her opinion for the majority, Justice O'Connor, who

had joined Justice Kennedy's three-Justice concurrence, referred to the inherent problems in applying *Harmelin*. See *id.* at 72 (“[O]ur precedents in this area have **not been a model of clarity.**”); *id.* (“[I]n determining whether a particular sentence for a term of years can violate the Eighth Amendment, **we have not established a clear or consistent path for courts to follow.**”); *id.* (“[Our] cases exhibit[] **a lack of clarity regarding what factors might indicate gross disproportionality.**”). The Court ultimately concluded that Andrade was not entitled to habeas relief because there was **no clearly established law**. *Id.* at 72-73. It is telling that, twelve years later, one of the three Justices that voted for framework adopted in *Harmelin*, critiqued the guidance it provided as well as found that that it did not constitute clearly established federal law.

The other vote for the concurrence in *Harmelin*, aside from Justice Kennedy's, was Justice Souter's. By the time of *Lockyer*, Justice Souter had apparently realized the pitfalls of *Harmelin* as he was now one of the four Justices that dissented. He specifically took issue with the fact that the penological policy of incapacitation underlying California's three strikes law could not justify the “imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense. Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes.” *Id.* at 81-82. Justice Souter concluded with the dark assessment that “[i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning.” *Id.* at 83.

3. *United States v. Rivera-Ruperto*

Other federal judges have called for a re-examination of *Harmelin* while voicing concerns over their inability to rectify unconstitutionally lengthy sentences mandated under 18 U.S.C. § 924. *See, e.g., United States v. Abbott*, 30 F.3d 71, 72 n.1 (7th Cir. 1994); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1247 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006) (both raising concerns as to sentences under § 924(c)). This came to head most recently in the First Circuit’s review of a 161-year and 10-month sentence for numerous crimes stemming from a defendant’s involvement over a period of a few months as a security guard in six “sham” drug deals, during which he was duped by the FBI. *United States v. Rivera-Ruperto*, 852 F.3d 1, 16-19 (1st Cir. 2017). One hundred and thirty years of Rivera-Ruperto’s sentence resulted from mandatory minimums for second and subsequent firearms convictions under § 924(c)(1)(C) – five years for his first conviction and twenty-five year sentences, to be served consecutively, for each of the five subsequent convictions. *Id.*

In reviewing his sentence, the panel majority explicitly stated that they found the length of his sentence troubling. *See id.* at 5 (“Putting aside, as we are required to do, whatever misgivings we might have as to the need for or the wisdom in imposing a near two-life-term sentence to punish a crime that involved staged drug deals, sham drugs, and fake dealers”); *id.* at 16 (“Let us begin by acknowledging that Rivera-Ruperto’s 161-year and 10-month sentence is indeed extraordinarily long.”). However, they ultimately found that their hands were tied

under *Harmelin*'s "narrow proportionality principle," particularly given the Court's more recent decision in *Ewing*. *Id.* at 17.

Judge Torruella dissented and found that Rivera-Ruperto's "draconian sentence" was grossly disproportionate once the crime was compared to that of comparable sentences. *Id.* at 19-20 (pointing out that Rivera-Ruperto would have served a much lower sentence "that would have seen him released from prison during the natural term of his life" if he had, for example, knowingly committed several rapes, second-degree murders, kidnappings, or had brought a gun to two much larger drug deals).⁹ After finding that Rivera-Ruperto had "no difficulty clearing the first of the three step analysis" Judge Torruella claimed that, in his own intrajurisdictional comparison from over forty years of experience on the federal bench, he had "never seen so disproportionate a penalty handed down, particularly where the offense is based on fiction." *Id.* at 24.

Rivera-Ruperto filed for rehearing and rehearing en banc. Although both were denied, Judge Barron wrote a concurrence, which was joined by all of the active judges of the First Circuit.¹⁰ *Rivera-Ruperto*, 884 F.3d. 25. In a plea to this Court to remedy the situation at hand, Judge Barron candidly expressed his frustration that "[d]espite the force of Rivera's argument that his mandatory

⁹ While Judge Torruella appears to differentiate Rivera-Ruperto, as a first offender, from those who were sentenced under recidivist statutes, he does not limit his dissent to so-called "first offenders." *See id.* at 23-24, 33-34. Nor does he ignore the important differences between recidivist offenders with only a history of non-violent crimes – such as Petitioner – and those with a violent felony history. *See id.* at 34 (noting that even in the case of a recidivist, the punishment may violate the Eighth Amendment) citing to *Ramirez*, 365 F.3d 755).

¹⁰ Judge Thompson, who wrote the original opinion, joined in Judge Barron's concurrence, as did Judge Torruella. The other member of the panel, Judge Lipez, took senior status in 2011 and did not have a vote on the petition for rehearing en banc, but did issue a statement expressing his agreement with the concurrence. *Rivera-Ruperto*, 884 F.3d at 52-53.

sentence is so grossly disproportionate as to be unconstitutional under the Eighth Amendment, I am not permitted to conclude that it is ... I am compelled by precedent – and, in particular, by the nearly three-decades old, three-Justice concurrence in *Harmelin v. Michigan* – to uphold Rivera’s greater-than-life sentence.” (citations omitted). *Id.* at 26. Judge Barron, and the rest of the First Circuit judges eligible to vote, urged the Court to revisit the logic of the *Harmelin* concurrence. *Id.* at 27, 41.

Judge Barron did not stop there, but also provided an analysis of why he would properly find Rivera-Ruperto’s mandatory sentence grossly disproportionate under a holistic consideration of the three criteria identified by *Solem*, but would not be able to do the same after *Harmelin*. *Id.* at 28. He noted that in having a three-factor test, “*Solem* recognized the problem with calling upon judges to make this kind of abstract assessment[]” – that “[t]he cruelty and unusualness of punishment has long been understood to be determined, in part, by ‘evolving standards of decency,’ which themselves become knowable in part through a consideration of the actual penal practices of comparable jurisdictions.” *Id.* at 31. In *Rivera-Ruperto*, the active judges of the First Circuit joined the chorus calling for the Court to reconsider *Harmelin*.

4. *Anderson v. Louisiana*

Finally, Petitioner’s case is yet another example – like *Ewing*, *Lockyer*, and *Rivera-Ruperto* – of why this Court should revisit the *Harmelin* concurrence. In considering the constitutionality of Petitioner’s sixty-year sentence for a theft

charge, the Louisiana state courts had no guidance on evaluating its proportionality. Petitioner was convicted of theft over \$1500 and simple battery, and sentenced to ten years imprisonment at hard labor on the theft and six months imprisonment in parish jail on the simple battery. App. A at 1a.

After the state filed a habitual offender bill of information, alleging Petitioner to be a fourth-felony habitual offender and introducing evidence of predicate convictions, the trial court vacated the ten-year sentence for theft and imposed a habitual offender sentence of sixty years at hard labor – six times his original sentence – without the benefit of probation or suspension of sentence. *Id.* at 2a. The state did not allege that any of Petitioner’s previous offenses constituted a crime of violence or a sex offense and the trial court explicitly noted that Petitioner had no felony convictions for a crime of violence. *Id.*

In ruling on Petitioner’s assignment of error that the sixty-year habitual offender sentence imposed on the theft offense was unconstitutionally excessive, the appellate court erroneously referred to the recidivist statute itself to find that “[a]s a fourth-felony habitual offender without specially qualifying offenses” Petitioner was subject to a sentence no less than twenty years and no more than his natural life. *Id.* at 5a. The court did not purport to further undertake any analysis of the proportionality of the punishment, beyond referencing the trial court’s findings that Petitioner had “an extensive criminal history dating back to at least 1987,” and Petitioner had indicated a “lack of remorse for his crimes.” *Id.* at 6a. The appellate court specifically credited the trial court’s claim that it “did not impose a life

sentence” because it “took into account the fact that defendant had no felony convictions for a crime of violence.” *Id.* Indeed, the trial court ensured that Petitioner would remain in prison until he died or turned 107-years-old, whichever came first.¹¹ This farcical proportionality review does not pass constitutional muster, even if the court was only purporting to apply the first factor in *Harmelin*. Rather, the appellate court was required to consider the harshness of the sentence of sixty years without parole – a life without parole sentence for Petitioner – and the gravity of the non-violent theft offense.

The Louisiana Supreme Court also failed correct the disproportionate sentence, over the dissent of Chief Justice Johnson. App. B at 8a. Chief Justice Johnson conducted a holistic proportionality review, as endorsed by *Solem* and Judge Barron’s concurrence in *Rivera-Ruperto*. *Id.* She noted that Petitioner had no convictions for crimes of violence nor sex offenses. She also calculated that Petitioner would only have been sentenced to twenty years imprisonment under the amended habitual offender statute. *Id.* See La. R.S. § 15:529.1(A)(4)(b)) (effective November 1, 2017). Taking into consideration the fact that Petitioner was in his 40s at the time of sentencing, Chief Justice Johnson found that the sixty-year sentence – “effectively a life sentence” – was grossly disproportionate to the severity of the offense, and should be set aside. *Id.* at 8a-9a. Erroneously, the majority of the court did not agree. *Id.* at 8a. Cf. *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga.

¹¹ See *United States v. Grant*, 887 F.3d 131, 145 (3d Cir. 2018) (a de facto life without parole sentence cannot provide a meaningful opportunity for release because it relegates the offender “to spending the rest of his or her life behind prison bars and prohibits him or her from ever reentering society”).

2007) (finding ten-year sentence on an aggravated sex charge for consensual acts between two minors cruel and unusual after subsequent legislation changed defendant's offense into a misdemeanor offense).

Without adequate guidance from this Court as to what an adequate proportionality review entails, which factors must be considered, and what comparable intra- and interjurisdictional crimes and sentences must be taken into consideration, the courts will continue to fail in preventing excessive sentencing in violation of the Eighth Amendment.¹² Besides the entire First Circuit and other state and federal judges, two of the three Justices who joined in the *Harmelin* concurrence have indicated that revisiting it could be beneficial. *See Lockyer*, 536 U.S. at 72, 83.

C. This Court has already retreated from the Harmelin concurrence in several meaningful ways

1. The proportionality of life without parole sentences have become an issue of particular concern for this Court

At the time of the Court's opinions in *Harmelin*, there was a widely-held view that capital sentences were to be treated as a separate entity from non-capital sentences for Eighth Amendment purposes. *See, e.g., Gregg v. Georgia*, 428 U.S.

¹² Nor does the doctrine of *stare decisis* prevent this Court from granting certiorari. As discussed above, Justice Kennedy's three-Justice concurrence in *Harmelin* interpreted the Eighth Amendment to include a "narrow" proportionality principle forbidding "extreme sentences that are grossly disproportionate to the crime." 501 U.S. at 1001. Justice Scalia, joined by Justice Rehnquist, disagreed with this interpretation. Justice Scalia would have overturned *Solem* and held that the Eighth Amendment "contains no proportionality guarantee." *Id.* at 965. As a result, the four dissenting Justices that embraced a more robust proportionality review made up the actual plurality on this issue. The three-Justice concurrence, therefore, should only be given "questionable precedential value" by this Court. *See Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overturning a prior decision, in part, because a majority of the Court had "expressly disagreed with the rationale of the plurality."). Furthermore, whether or not *Harmelin* should be upheld on *stare decisis* grounds is a merits question and not a basis for denying certiorari.

153, 187 (1976) (a death sentence is “unique in its severity and irrevocability”); *Harmelin*, 501 U.S. at 995 (Scalia, J., writing for the Court) (“Our cases creating and clarifying the ‘individualized capital sentencing doctrine’ have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.”); *Id.* at 1000 (Kennedy, J., concurring) (“[B]ecause ‘the penalty of death differs from all other forms of criminal punishment,’ the objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence.” (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (citation omitted))). The strict separation between death and non-death sentences played a role in the *Harmelin* Court’s determination of how proportionality review should be conducted for all non-capital sentences.

Although it has retained the historical remnants of the “death is different” jurisprudence, this Court has over the past decade emphasized on numerous occasions that life sentences also raise special constitutional concerns. Indeed, the Court has characterized these sentences as some of the “most severe punishments” that courts impose, and noted that they “share some characteristics with death sentences that are shared by no other sentences.” *Graham*, 560 U.S. at 69 (“[Life without parole is] the second most severe penalty permitted by law.”). This would suggest that the Court’s last words on what type of proportionality review term-of-years sentences require, especially those without the possibility of parole, may now be dated.

For instance, this Court has expressly acknowledged the permanent and irrevocable nature of life sentences. Like death sentences, a life sentence “alters the offender’s life by a forfeiture that is irrevocable” and “means that good behavior and character improvement are immaterial.” *Id.* at 69-70. The Court has recognized that a life sentence “deprives the [inmate] of the most basic liberties without giving hope of restoration” and “means that whatever the future might hold in store for the mind and spirit of the [offender], he will remain in prison for the rest of his days.” *Id.* at 70. To this end, the body of Eighth Amendment jurisprudence has developed to include special protections and categorical bans around the imposition of life sentences – specifically when applied to juvenile offenders.

In *Graham*, the court held that the Eighth Amendment forbids life without parole sentences for juvenile non-homicide offenders, partially on the basis that, as compared to juvenile homicide offenders, “retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.” *Id.* at 72. The Court also mandated that those offenders be afforded a “meaningful opportunity to obtain release” during their lifetime. *Id.* at 75. In *Miller v. Alabama*, the Court extended *Graham*’s reasoning to bar mandatory life without parole sentences for juvenile homicide offenders, and required individualized sentencing akin to that used in the imposition of the death penalty. 567 U.S. 460, 475-76 (2012). The Court cautioned that juvenile life without parole sentences should “be uncommon” and reserved for only “the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 479-80.

Petitioner acknowledges that *Graham* and *Miller* are not binding in his case, as they are limited to the cases of those who were under 18 years old at the time of their offense. However, these cases and others reveal a new understanding by the Court of what the evolving standards of decency require in the context of life and life-equivalent sentences. Like the juvenile offender in *Graham*, Petitioner is serving what is effectively a life sentence for a nonhomicide and non-violent offense.

2. The Court and other courts have recognized the societal harms of long prison sentences for non-violent offenders

As a court once succinctly stated: “Proportionality is an illusive concept which has developed gradually in response to society's changes.” *State v. Fain*, 617 P.2d 720, 725 (Wash. 1980).¹³ While one can hope that legislative developments around criminal sentencing would timely reflect society’s changes, that is not always the case.¹⁴

In assessing the gravity of the offense at question, the *Harmelin* concurrence put great weight on the fact that it was reasonable for the Michigan legislature to punish possession of drugs, a non-violent crime, with life imprisonment because

¹³ In *Fain*, the Washington Supreme Court considered the proportionality of a life sentence for a third conviction of fraud, where the defendant’s fraudulent acts added up to only a \$470 loss to his victims over 14 years. *Id.* at 727. The court looked to other crimes with comparable sentences and found that the only crime in the state that carried mandatory life imprisonment was first-degree murder. The crime of first-degree theft varied a maximum penalty of only ten years. *Id.* at 728. The court concluded that the defendant’s “three fraudulent acts cause him to face a punishment which the legislature declines to impose on those who commit murder in the second degree, arson, rape, robbery, assault, and other dangerous felonies. ... Under these circumstances, we believe [Defendant’s] sentence to be entirely disproportionate to the seriousness of his crimes.” *Id.*

¹⁴ For example, *Harmelin* referenced a set of Louisiana statutes that provide that “one who assaults another with a dangerous weapon faces the same maximum prison term as one who removes a shopping basket ‘from the parking area or grounds of any store ... without authorization.’” 501 U.S. at 987 (citing La. R.S. §§ 14:37 and 14:68.1 (West 1986)). Society’s norms have certainly progressed beyond the view that those two crimes deserve equal punishment, but these two statutes remain on the books.

“petitioner’s crime threatened to cause grave harm to society.” 501 U.S. at 1002; *see also id.* at 988 (portraying drug use as “odious” and “socially threatening”). Although the Defendant had not been charged with or convicted of any other crime at the time, the Court found that “[q]uite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs can relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture.” *Id.* at 1002.

The Court concluded that “the Michigan Legislature could within reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine ... is momentous enough to warrant the deterrence and retribution of a life sentence without parole.” *Id.* at 1003. “Given the serious nature” of petitioner’s crime, the Court did not believe that a comparative analysis between the petitioner’s sentence and sentences imposed for other crimes in Michigan and for the same crime in other jurisdictions was necessary. *Id.* at 1004.

Since *Harmelin*, there has been a growing national recognition as to the negative fiscal impact of long prison sentences for low-level offenders, especially for non-violent offenders like Petitioner. In 2011, Judge Weinstein of the Eastern District of New York noted that “[m]uch of the cost of incarceration is due to the imprisonment of nonviolent offenders. If the number of such inmates were cut in half, taxpayers would be saved an estimated \$16.9 billion annually.” *United States*

v. Bannister, No. 10-CR-0053, 2011 U.S. Dist. LEXIS 30569, at *89 (E.D.N.Y. Mar. 24, 2011). A recent study found that 39% of the nationwide prison population, or 576,000 people, were currently incarcerated with little public safety rationale – including 364,000 non-violent, lower-level offenders like Petitioner, who would be better served by alternatives to incarceration such as treatment, community service, or probation.¹⁵ Releasing these inmates would save \$20 billion annually.¹⁶

As Justice Kennedy has explained: “Our resources are misspent, our punishments too severe, our sentences too long.” Justice Anthony Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003) (“While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding and caring for the inmate population in the United States is over 40 billion dollars per year. . . . Our resources are misspent, our punishments too severe, our sentences too long.”); *see also* Justice Anthony Kennedy, Testimony before the House Appropriations Subcommittee on Financial Services & General Government (March 23, 2015) (“The Correction System is one of the most overlooked, misunderstood institutions we have in our entire government ... California, my home state, had 187,000 people in jail at a cost of over \$30,000 a prisoner. Compare to the amount they gave to school children, it was about \$3500 a year ... this idea of total incarceration just isn’t working and it’s not humane.”); Justice Stephen Breyer,

¹⁵ Brennan Center For Justice, *How Many Americans are Unnecessarily Incarcerated* 7 (2016), available at https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf

¹⁶ *Id.*

Testimony before the House Appropriations Subcommittee on Financial Services & General Government (March 23, 2015) (“We haven’t given ... nearly enough investigative resources to looking at our correction system. In many respects, I think it’s broken.”).

Taking into consideration the way the courts, including this Court, have stepped back from the hard line taken in *Harmelin* towards non-violent offenders over the past twenty-seven years, the time is ripe for this Court to re-examine the contours of the “narrow” proportionality principle set out in that opinion.

II. This Court Should Grant Certiorari to Consider Whether The Evolving Standards of Decency Prohibit Imposition of an Effective-Life Sentence for a Non-Violent Offense

Even if this Court chooses not to revisit the three-decade-old, three-Justice concurrence in *Harmelin*, the Court should grant certiorari to consider whether Petitioner’s sentence is “grossly disproportionate” in light of the evolving standards of decency, including the fact that the Louisiana Legislature has since amended its recidivist statute so that a non-violent offender like Petitioner would have instead received a maximum sentence of twenty years.

A. The Louisiana Legislature has already amended the recidivist statute in a recognition that the sentences it produced were grossly disproportionate for non-violent offenders like Petitioner

Effective on November 1, 2017, the Louisiana Legislature amended the state’s recidivist statute so that non-violent offenders with prior convictions would no longer be subject to life in prison. Before the amendment, an offender convicted of a fourth felony was sentenced to “not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural

life.” La. R.S. § 15:529.1(A)(4)(a). The sentencing range between not “less than twenty” and “not more than his natural life” provided trial court judges with a great deal of sentencing discretion. On the other hand, if the fourth felony and two of the previous felonies were crimes of violence and/or sex offenses, as statutorily defined, the offender would serve a mandatory sentence “for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.” La. R.S. § 15:529.1(A)(4)(b). It was under this previous sentencing scheme that the trial court judge sentenced Petitioner to sixty years imprisonment at hard labor without the benefit of parole. App. A at 5a. The judge ostensibly “declined” to give Petitioner the maximum “natural life” sentence on the basis that he was a non-violent offender, without giving due notice to the fact that Petitioner would not be eligible for release until well after the end of his natural life. *Id.* The appellate court credited the trial court judge for not giving Petitioner a life sentence when it upheld the sentence over Petitioner’s constitutional challenge on appeal. *Id.* at 6a.

The 2017 amendment added a provision specifically to prevent forth-time offenders like Petitioner from receiving excessive sentences for non-violent offenses. Now, if an offender is convicted of a fourth felony, and none of the felonies were crimes of violence and/or sex offenses, the offender “shall be imprisoned for not less than twenty years **nor more than twice the longest possible sentence prescribed for a first conviction.** If twice the possible sentence prescribed for a first conviction is less than twenty years, the person shall be imprisoned for twenty years.” La. R.S. § 15:529.1(A)(4)(b) (effective Nov. 1, 2017). At the time of his

offense, the maximum sentence Petitioner could receive for his theft charge was ten years and, in 2014, the maximum amount was reduced to five years. *See* LSA-R.S. 14:67(B)(1) (Prior to amendment by 2014 La. Acts, No. 255, § 1). Under no possible application or interpretation of the recidivist statute, in its current form, could Petitioner have been sentenced to more than twenty years for his theft offense, given his previous non-violent criminal record. As his sentence stands now, Petitioner will die in prison.¹⁷ Nothing in his criminal history has shown he is incorrigible, yet Petitioner serves a sentence greater than his life expectancy, which “forswears altogether the rehabilitative ideal.” *Graham*, 560 U.S. at 74.

Throughout its Eighth Amendment jurisprudence, this Court has always emphasized the level of deference that courts are to give to legislative decisions when reviewing the constitutionality of punishment and sentencing. *See, e.g., Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, ... these are peculiarly questions of legislative policy.”); *Solem*, 463 U.S. at 290 (“[R]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.”); *Weems*, 217 U.S. at 379 (“The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their

¹⁷ Notably, if the determination that a life sentence for a non-violent crime was grossly disproportionate had been made by a court in another case as a constitutional matter, rather than by the Legislature, Petitioner would have benefited from this decision and would be entitled to resentencing, as his case is still pending on direct appeal.

wisdom or propriety."); *Harmelin*, 501 U.S. at 998 (“[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’” (quoting *Rummel*, 445 U.S. at 275-276)); *Graham*, 560 U.S. at 62 (“[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.” (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002))).

Thus, in examining whether a “threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,” *Harmelin*, 501 U.S. at 1005, this Court can look to the fact that the Louisiana Legislature provided irrefutable evidence of disproportionality when it chose to amend the statute in the manner that it did. *See Humphrey*, 652 S.E.2d at 507 (Because “no one has a better sense of the evolving standards of decency in this State than our elected representatives,” recent amendments to criminal statutes “reflect a decision by the people of this state that the [punishment imposed on the defendant] make[s] no measurable contribution to acceptable goals of punishment.”) The Legislature sought to prevent excessive sentences for precisely the type of non-violent crimes committed by Petitioner, and amended the recidivist statute so that the maximum penalty in almost every single one of those cases would be no greater than twenty years. In doing so, it specifically confined the type sentence that Petitioner is currently serving – one that will exceed his natural life – to only those offenders who had committed, not just one, but multiple violent crimes and/or sex offenses against minors. The gross disproportionality between Petitioner’s theft

conviction, which is now only punishable by a maximum of five years, and the life without parole sentence that he is currently serving could hardly be more evident. *See* App. B at 8a-9a (“In my view, the legislature's recent amendment of the habitual offender statute suggests that a life sentence (or any sentence greater than 20 years), when the offender has no prior convictions for crimes of violence or sex offenses, is disproportionate to the gravity of the offense.”); *see also Solem*, 463 U.S. 296-97.

An intrajurisdictional review of comparative sentences confirms the inference of gross disproportionality. Under both the current and previous iterations of La. R.S. § 15:529.1, Petitioner would have received a life sentence if he committed three or more offenses that constituted a “crime of violence.” Pursuant to La. R.S. § 14:2, a crime of violence is an offense that involves the use of physical force against the person or property of another and, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or, an offense that involves the possession or use of a dangerous weapon. Enumerated offenses include solicitation for murder, first and second degree murder, aggravated or first degree rape, aggravated kidnapping, assault by drive-by shooting, terrorism, and human trafficking. Petitioner also would have received a life sentence if he committed three or more offenses that constituted a sex offense under La. R.S. § 15:541 and the victim was a minor at the time. Those offenses include trafficking of children for sexual purposes, felony carnal knowledge of a juveniles, pornography involving juveniles, molestation of a

juvenile, and aggravated rape. Thus, Petitioner, who has an altogether non-violent criminal history and was convicted only of a theft charge, is serving the same sentence as those in Louisiana who have committed multiple murders, rapes, kidnappings, acts of terrorism, and/or sex crimes against a minor. The fact that a life sentence is grossly disproportionate compared to the gravity of his offense is unmistakable.

B. Interjurisdictional review of comparative sentences

An interjurisdictional review of comparative sentences further confirms that Petitioner's sentence is grossly disproportionate, and that a life-equivalent sentence for a non-violent offense violates the evolving standards of decency. In his dissent in *Ewing*, Justice Breyer demonstrated how the Court might proceed in an interjurisdictional analysis under *Harmelin* after finding that the sentence at issue raised the "threshold" inference of gross disproportionality. Justice Breyer examined sentencing practices rather than sentencing statutes alone, noting that in nine states besides California the law might make it legally possible to impose a sentence of 25 years or more for an offense like Ewing's, but that such sentences were almost certainly imposed infrequently. 538 U.S. at 46-47. Like the sentence in *Ewing*, sentences of life without parole for nonviolent offenses are imposed infrequently.¹⁸ Although 22 states allow sentences of life without parole for nonviolent offenders, in only eight states and the federal system are nonviolent

¹⁸ Because Petitioner was forty-seven years old at the time of his sentencing, his sentence of 60 years without parole was for all intents and purposes a sentence of life without parole. See *Grant*, 887 F.3d at 145.

offenders currently serving sentences of life without parole.¹⁹ Across the country, only 2.3% of all state prisoners serving life and effective life sentences committed a non-violent property offense like Petitioner.²⁰ Rather, 38% of state prisoners serving life and effective life sentences have been convicted of first degree murder.²¹ 20.5% have been convicted of second degree or another type of murder.²² Another 32.6% have been convicted of some other type of violent crime – 17% for sex offenses and 15.6% for aggravated assault, robbery, or kidnapping.²³ The numbers are even lower in the federal system: less than 1% of prisoners serving life and virtual life sentences had been convicted of property offenses.²⁴

Even compared to others who were sentenced under habitual offender or recidivist statutes, Petitioner's sentence is unusually severe. After the 2017 amendment to La. R.S. § 15:529.1(A)(4)(b), only nine states and the federal government mandate or allow a sentence of life without parole for a sequence of entirely nonviolent crimes.²⁵ Of those states, only Delaware, Georgia, and Nevada

¹⁹ Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 Case W. Res. L. Rev. 525, 539 (2015). Those states are Alabama, Florida, Georgia, Illinois, Louisiana, Mississippi, Oklahoma, and South Carolina.

²⁰ The Sentencing Project, *Still Life: America's Increasing Use of Life And Long-Term Sentences* (2017) *available at* <http://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. Legis. & Pub. Pol'y 1101, 1127 (2013). Those states are Alabama, Arkansas, Delaware, Georgia, Illinois, Iowa, Nevada, South Dakota, and Virginia. Four states and the federal government mandate a sentence of life without parole for a sequence of entirely nonviolent crimes (those states are Alabama, Georgia, Illinois, and Iowa; since 2013, Louisiana, Michigan, and Oklahoma repealed their respective statutes mandating sentences of life without parole for a

allow a sentence of life without parole for a current offense of theft over \$1,500 and less than \$5,000, and only in Georgia is such a sentence mandatory.²⁶ Moreover, no prisoners are currently serving sentences of life without parole for nonviolent crimes in Delaware and Nevada; other than Louisiana, Georgia is the only state in which a prisoner *may* be serving a life sentence without parole for a crime of theft over \$1,500 and less than \$5,000.²⁷ Because only a small fraction of the states actually impose sentences of life without parole for nonviolent crimes, and because in only one other state besides Louisiana is it possible that a prisoner is serving a life sentence without parole for theft over \$1,500 and less than \$5,000, this Court should find that an interjurisdictional analysis further confirms that Petitioner's sentence is grossly disproportionate.

sequence of entirely nonviolent crimes). Six states and the federal government allow a sentence of life without parole for a sequence of entirely nonviolent crimes (those states are Alabama, Arkansas, Delaware, Nevada, South Dakota, and Virginia; since 2013, Louisiana and Missouri repealed their respective statutes allowing sentences of life without parole for a sequence of entirely nonviolent crimes). Alabama mandates a sentence of life without parole for nonviolent offenses in certain cases and allows it in others.

²⁶ In Iowa, Michigan, Missouri, Oklahoma, and Virginia life without parole is only allowed for a current drug crime. Hall, *supra* note 24, at 1185-1189. In Alabama, life without parole is allowed for a Class A felony if the actor has three or more prior felony convictions of any type. *Id.* at 1187. In Alabama, theft of \$4,999.99 is a Class B felony. Code of Ala. § 13A-8-3(d). In Arkansas, life without parole is allowed for a Class Y felony other than a serious felony involving violence or a felony involving violence if the actor has 1-4 prior felonies of any type. Hall, *supra* note 24, at 1187. In Arkansas, theft of \$4,999.99 is a Class D felony. A.C.A. § 5-36-103(b)(3)(A). In Illinois, life without parole is mandated for a third or subsequent conviction of a Class X felony. Hall, *supra* note 24, at 1186. In Illinois, theft of \$4,999.99 is a Class 3 felony. 720 ILCS 5/16-1(b)(4). In South Dakota, life without parole is allowed for a Class 2 felony if the actor has three or more prior convictions for any felony, and for a Class 1 felony if the actor has one or more prior felony convictions of any type. In South Dakota, theft of \$4,999.99 is a Class 5 felony. S.D. Codified Laws § 22-30A-17. In Delaware and Nevada life without parole is allowed for the fourth or subsequent conviction for any felony. Hall, *supra* note 24, at 1188. In Georgia, life without parole is mandated for the fourth or subsequent conviction for any felony except purchase or possession of drugs or manufacture, sale, etc. of marijuana. *Id.* at 1186.

²⁷ Hall, *supra* note 24, at 1127.

“Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes.” *Graham*, 560 U.S. at 85 (Stevens, J., concurring). An intrajurisdictional review of sentences imposed in Louisiana, and an interjurisdictional review of sentences imposed in other states, and the decision of the Louisiana State Legislature to amend the statute under which Petitioner was sentenced all point to the same conclusion: Petitioner’s sentence was a mistake. “Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time.” *Id.* Petitioner’s sentence is such a punishment. In light of evolving standards of decency across the nation, and out of respect for the Louisiana State Legislature’s decision to amend La. R.S. §15:529.1(A)(4) to reflect those standards, this Court should grant certiorari to review Petitioner’s sentence of sixty years imprisonment at hard labor, without the benefit of parole, for a nonviolent crime.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 4th day of June, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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