18-9549 ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MAURICIO LUCAS-LOPEZ-PETITIONER

vs.

TONY TRIERWEILER, WARDEN-RESPONDENT

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

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PETITION FOR WRIT OF CERTIORARI

By: **Mauricio Lucas-Lopez #264686**
Petitioner in *Pro Per*
Bellamy Creek Correctional Facility
1727 W. Bluewater Hwy.
Ionia, Michigan 48846

QUESTION(S) PRESENTED

A. IS PETITIONER'S TWENTY-FIVE YEAR MANDATORY MINIMUM SENTENCE DISPROPORTIONATE TO THE OFFENSE COMMITTED VIOLATING THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT; DO THE FEDERAL COURT' DECISIONS ON PETITIONER'S CLAIM CONFLICT; AND IS GUIDANCE NEEDED FROM THIS COURT TO PROPERLY RESOLVE PETITIONER'S EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAIM?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the coverpage.

☐ All parties **do not** appear in the caption of the case on the coverpage. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

FEDERAL COURT OPINIONS

The Opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to this petition and is reported at: ***Mauricio Lucas-Lopez v Tony Trierweiler, U.S. Court of Appeals for the 6th Circuit File No. 19-1032***

The Opinion of the United States District Court for the Western District of Michigan appears at Appendix B to this petition and is reported at: ***Lucas-Lopez v Trierweiler, Warden,*** **2018 U.S. Dist. LEXIS 204543; U.S. District Court File No. 1:18-CV-1189**

STATE COURT OPINIONS

The opinion of the Michigan Court of Appeals/the highest court to review the merits of the claims appears at Appendix C to this petition and is reported at: ***People v Lucas-Lopez,*** **2018 Mich. App. LEXIS 275; Michigan Court of Appeals Dkt. No. 337603**

The opinion of the Michigan Supreme Court denying leave to appeal appears at Appendix D to this petition and is reported at: ***People v Lucas-Lopez,*** **2018 Mich LEXIS 1261; Michigan Supreme Court Dkt. No. 145327**.

STATEMENT OF JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **March 28, 2019**

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution - Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted." U.S. Const. Amend. VIII.

Michigan Constitution of 1963, Art 1 § 16

"Excessive bail shall not be required; excessive fines shall not be imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1 § 16.

Michigan Compiled Laws Annotated § 750.520b - Criminal sexual conduct in the first degree; penalties, states in relevant part:

Sec. 520b(2)(b)

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

STATEMENT OF CASE

Petitioner argues that the mandatory 25 year sentence that he is serving under Mich. Comp. Laws Ann. 750.520b(2)(b), "is constitutionally excessive under the Eighth Amendment," and is therefore "grossly disproportionate" to the offense committed.

State of Michigan's Analysis of Constitutional Claim

The Michigan Court of Appeals recognized Petitioner's claim as an Eighth Amendment violation and addressed it as follows:

> The Eighth 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; *People v Bullock*, 440 Mich 15, 27 n. 8; 485 NW2d 866 (1992). The Michigan Constitution states, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1 § 16; *Bullock*, 440 Mich at 27 n. 8.
>
> Our Supreme Court in *Bullock*, discussed a four-part test for determining whether a sentence was cruel or unusual under Michigan's Constitution: "the court must (1) weigh the gravity of the offense with the harshness of the penalty; (2) compare sentences imposed on other offenders in the same jurisdiction; (3) compare the sentences imposed for commission of the same crime in other jurisdictions; and, (4) determine whether the sentence imposed furthers the goal of rehabilitation." *Bullock*, 440 Mich at 33-34. "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution. *People v Benton*, 294 Mich App 191, 207; 817 NW2d 599 (2011).
>
> In *Benton* we analyzed this exact argument and determined that the 25-year mandatory minimum under Mich. Comp. Laws Ann. § 750.520b(2)(b) was not cruel or unusual punishment. *Id.* at 207. Regarding the first factor, the Court determined that the 25-year mandatory minimum sentence was not overly severe compared to the gravity of committing a sexual crime against a child. *Id.* at 205-206. The decision was supported by Michigan's policy of protecting children from sexual exploitation. *Id* at 205. Regarding the second factor, the Court determined that the mandatory sentence was not unduly harsh

> compared to penalties for other violent offenses in Michigan. *Id.* at 206. Similar to the first factor, this decision was based on the policy that "[t]he perpetration of sexual activity by an adult with a preteen victim is an offense that violates deeply ingrained social values of protecting children from sexual exploitation." *Id.* Regarding the third factor, we determined that at least 18 other states (Arkansas, California, Delaware, Florida, Georgia, Kansas, Louisiana, Montana, Nevada, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Washington, West Virginia, and Wisconsin) imposed the same penalty for the same offense. *Id.* at 206-207 n.1. We did not discuss the fourth factor.
>
> In this case, defendant admits that *Benton* is controlling Michigan caselaw and that he is only raising the argument to preserve the issue should there be a change in the law. Because we have published caselaw on this exact issue and have determined that the 25-year mandatory minimum is not cruel or unusual punishment, we conclude that defendant has not demonstrated plain error affecting his substantial rights or that the sentence constituted cruel or unusual punishment.

APPENDIX C, *People v Lucas-Lopez*, 2018 Mich App LEXIS 275, @ *7-10 (Feb. 15, 2018).

The Michigan Supreme Court declined to grant leave to appeal. APPENDIX D, *People v Lucas-Lopez*, 2018 Mich LEXIS 1261 (July 3, 2018).

Federal Analysis of Constitutional Claim

The Federal District Court declined to grant relief under 28 U.S.C. § 2254(d)(1), holding:

> With respect to Petitioner's Eighth Amendment claim, the United States Supreme Constitution does not require a strict proportionality between a crime and its punishment. *Harmelin v Michigan*, 501 U.S. 957, 965; 111 S. Ct. 2680; 115 L. Ed. 2d 836 (1991); *United States v Marks*, 209 F. 3d 577, 583 (6th Cir. 2000). "Consequently, only an extreme disparity between crime and sentence offends the Eighth Amendment." *Marks*, 209 F. 3d at 483; see also *Lockyer v Andrade*, 583 U.S. 63, 77; 123 S. Ct. 1166; 155 L. Ed. 2d 144 (2003) (gross disproportionality principle applies only in extraordinary case); *Ewing v California*, 538 U.S. 11, 36; 123 S. Ct. 1179; 155 L. Ed. 2d 108 (2003) (principle applies only in "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." (quoting *Rummel v Estelle*, 445 U.S. 263, 285; 100 S. Ct. 1133; 63 L. Ed.

> 2d 382 (1980)). A sentence that falls within the maximum penalty authorized by statute "generally does not constitute 'cruel and unusual punishment.'" *Austin v Jackson*, 213 F. 3d 298, 302 (6th Cir. 2000) (quoting *United States v Organek*, 65 F. 3d 60, 62 (6th Cir. 1995)). Ordinarily, "[f]ederal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole." *United States v Thomas*, 49 F. 3d 253, 261 (6th Cir. 1995). Petitioner was not sentenced to death or life in prison without possibility of parole, and his sentence falls within the maximum penalty under state law. Petitioner's sentence therefore does not present the extraordinary case that runs afoul of the Eighth Amendment's ban on cruel and unusual punishment. Consequently, Petitioner's claim is meritless.

APPENDIX B, *Lucas-Lopez v Trierweiler*, U.S. Dist. Ct. File No. 1:18-cv-1189; 2018 U.S. Dist. LEXIS 2045, @ *8-9 (Dec. 4, 2018).

Regarding Petitioner's Eighth Amendment Claim, the Sixth Circuit Court of Appeals held:

> .... the twenty-five-year minimum sentence is not so grossly disproportionate as to violate the Eighth Amendment. See *Austin*, 213 F. 3d at 302.[1] Because reasonable jurists would not find the district court's assessment of the claims debatable or wrong, the application for a certificate of appealability is DENIED.

APPENDIX A, *Mauricio Lucas-Lopez v Tony Trierweiler*, Warden, 6th Cir. File No. 19-1032 (Mar. 28, 2019).

[1] *Austin v Jackson*, 213 F. 3d 298, 302 (6th Cir. 2000).

ARGUMENT

PETITIONER'S TWENTY-FIVE YEAR MANDATORY MINIMUM SENTENCE IS DISPROPORTIONATE TO THE OFFENSE COMMITTED, RESULTING IN A SENTENCE THAT IS CRUEL AND UNUSUAL – THE FEDERAL COURT' DECISIONS ON THE CLAIM ARE CONFLICTED – GUIDANCE IS NEEDED TO PROPERLY RESOLVE THE CLAIM.

Statement of Claim

Petitioner asks this Honorable Court to decide what constitutes "clearly established Federal law" when it comes to the "Principle of Proportionality," and whether or not, Michigan's mandatory minimum sentencing scheme under Mich. Comp. Laws Ann. § 750.520b(2)(b), is subject to a proportionality analysis for cruel and unusual punishment purposes. U.S. Const. Amend. VIII.

Introduction

Why is proportionality so important? Proportionality allows courts to understand and invalidate cruel and unusual punishments that may not be inherently cruel or unusual. A punishment is excessive if it goes beyond what is necessary to achieve the legitimate penological goals of punishment, such as retribution, deterrence, and incapacitation. *Miller v Alabama*, 567 U.S. 460, 469; 132 S. Ct. 2455; 183 L. Ed. 2d 407 (2012).

Historically, the Cruel and Unusual Punishments Clause prohibited excessive and barbaric punishments. Because proportionality review naturally prohibits excessive, barbaric punishments, the Court should accept and use it today. A punishment is disproportionate, and therefore unconstitutional, if it is greater than what the wrongdoer deserves. Consequently, the principle of proportionality increases protection provided to criminal defendants, not society. While proportionality, by itself, is hard to understand, the Supreme Court has used "grossly disproportionate" as a common standard. *Kennedy v. Louisiana*, 554 U.S. 407, 449; 128 S. Ct.

2641; 171 L. Ed. 2d 525 (2008). Further, proportionality review remains objective because it adheres to a greater societal standard. This allows courts to follow civilized, accepted standards of the past and present. Therefore, all courts should employ proportionality within their Cruel and Unusual Punishments Clause analysis. However, to put the principle of proportionality into practice, the Court still needs a standard for guidance.

In this case, the U.S. District Court for the Western District of Michigan has indicated, "With respect to Petitioner's Eighth Amendment claim, the United States Supreme Constitution does not require a strict proportionality between a crime and its punishment. *Harmelin v Michigan*, 501 U.S. 957, 965; 111 S. Ct. 2680; 115 L. Ed. 2d 836 (1991); *United States v Marks*, 209 F. 3d 577, 583 (6th Cir. 2000)." Yet, the Sixth Circuit Court of Appeals ruling indicates, "... the twenty-five-year minimum sentence is not so grossly disproportionate as to violate the Eighth Amendment." See *Austin*, 213 F. 3d at 302.

The question is – when does a proportionality analysis of a Petitioner's sentence come into play as it relates to a violation of a Petitioner's right to be free from cruel and unusual punishment for Eighth Amendment purposes?

Analysis

The United States Supreme Court has been split, or indecisive, for some time on whether the Eighth Amendment prohibits disproportionate punishments. The principle of proportionality, within the Eighth Amendment, commands that a criminal sentence be proportionate to the committed crime. *Solem v Helm*, 463 U.S. 277; 103 S. Ct. 3001; 77 L. Ed. 2d 637 (1983). Proportionality, in the context of general law, spurs notions of fairness, justice, and balance. In criminal law, proportionality is "the notion that the punishment should fit the crime." *Ewing v California*, 538 U.S. 11, 31; 123 S. Ct. 1179; 155 L. Ed. 2d 108 (2013). Intuitively, most people

agree that there should be a correlation between the severity of a crime and the degree of suffering in the enforced punishment. For over a century, the United States Supreme Court has recognized proportionality as part of the Eighth Amendment cruel and unusual punishment analysis. *Weems v United States*, 217 U.S. 349, 371; 30 S. Ct. 544; 54 L. Ed. 793 (1910).

The Supreme Court has reaffirmed proportionality within the Eighth Amendment jurisprudence in *Graham v Florida*, 560 U.S. 48, 59; 130 S. Ct. 2011; 176 L. Ed. 2d 825 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 422-26; 128 S. Ct. 2641; 171 L. Ed. 2d 525 (2008) (A death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments); *Solem v Helm*, 463 U.S. 277; 103 S. Ct. 3001; 77 L. Ed. 2d 637 (1983) (reversing sentence of life without parole for uttering a no account check for $100, where defendant had six prior felony convictions); and, *Weems v United States*, 217 U.S. 349, 371; 30 S. Ct. 544; 54 L. Ed. 793 (1910) (reversing sentence of fifteen years hard labor and civil disabilities for falsifying a public document). In Many instances, the Supreme Court has denied relief on the issue of proportionality. *Ewing v California*, 538 U.S. 11, 18, 30-31; 123 S. Ct., 1179; 155 L. Ed. 2d 108 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); *Lockyer v Andrade*, 538 U.S. 63, 66; 123 S. Ct. 1166; 155 L. Ed. 2d 144 (2003) (affirming, on habeas review, two consecutive sentences of twenty-five years to life for stealing approximately $150 worth of videotapes, where defendant had three prior felony convictions); *Harmelin v Michigan*, 501 U.S. 957, 956; 111 S. Ct. 2680; 115 L. Ed. 2d 836 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine).

The Supreme Court has also invoked the principle of proportionality to hold that the death penalty is prohibited for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584; 97 S. Ct. 2861; 53 L. Ed. 2d 982 (1977), for offenders who formed no intent to kill, *Enmund v. Florida*, 458 U.S. 782; 102 S. Ct. 3368; 73 L. Ed. 2d 1140 (1982), for juveniles, *Roper v. Simmons*, 543 U.S. 541, 560; 102 S. Ct. 3368; 73 L. Ed. 2d (2005), or are mentally retarded, *Atkins v. Virginia*, 536 U.S. 304, 316; 122 S. Ct. 2242; 153 L. Ed. 2d 335 (2002).

The Circuits disagree over whether the possibility of parole forecloses proportionality analysis of a sentence. The Fourth, Sixth and Eighth Circuits do not require proportionality review for any sentence less than life without parole. See, *U.S. v Malloy*, 568 F. 3d 166, 180 (4th Cir. 2009) (proportionality review not appropriate for any sentence less than life without possibility of parole); *U.S. v Organek*, 65 F. 3d 60, 63 (6th Cir. 1995) (proportionality review not required "except in cases where the penalty imposed is death or life in prison without possibility of parole" quoting *U.S. v Thomas*, 49 F. 3d 253, 261 (6th Cir. 1995)); *U.S. v Meirovitz*, 918 F. 2d 1376, 1381 (8th Cir. 1990) (proportionality review appropriate for life sentence without the possibility of parole). The Third Circuit does not engage in extended proportionality review if parole is available. See, *U.S. v Whyte*, 892 F. 2d 1170, 1176 n. 16 (3d Cir. 1989) (abbreviated proportionality review satisfies 8th Amendment because defendant received less than life sentence without possibility of parole). The Fifth Circuit has indicated that the possibility of parole, although a factor in determining proportionality of a sentence does not foreclose review where a defendant is sentenced for a serious offense. See *U.S. v Lemons*, 941 F. 2d 309, 320 (5th Cir. 1991) (availability of parole for defendant convicted under career offender provisions of Guidelines for manufacturing marijuana not sufficient to trigger *Solem* analysis); The Ninth Circuit has considered the availability of parole when determining the "real-time term" of the

punishment. See, *Ramirez v Castro*, 365 F. 3d 755, 767-769 (9th Cir. 2004) (basing proportionality analysis on 25-year term minimum term of indeterminate life sentences); The Tenth Circuit has held that the availability of parole is relevant to determining whether the length of the sentence violates the Eighth Amendment. See *Gutierrez v Moriarty*, 922 F. 2d 1464, 1473 (10th Cir. 1991) (Life sentence not grossly disproportionate to repeat drug offenses given that defendant was parole after only 7 years imprisonment).

Several state courts have used the principle of proportionality to determine that lengthy sentences are unconstitutional because they are grossly disproportionate. See, *Bradshaw v. The State*, 671 S. E. 2d 485 (Ga. 2008) (a sentence of life imprisonment for a second failure to register as a sex offender is grossly disproportionate to the crime, and therefore unconstitutional); *State v Bartlett*, 164 Ariz. 229; 792 P. 2d 692, 703 (1990) (A forty-year sentence for two convictions of criminal sexual conduct with a minor constituted cruel and unusual punishment under the eighth amendment to the United States Constitution); *People v Guitierrez*, 324 P. 3d 245 (Cal. 2014) (sentencing a minor to life without the possibility of parole for any crime besides murder); *People v Bullock*, supra (held a mandatory life penalty without the possibility of parole for possession of 650 grams or more of cocaine was unconstitutional under Michigan law, even though the same statute was determine to be constitutional under *Harmelin*); *Bult v Leapley*, 507 N.W. 2d 325 (1993) (a life sentence without the possibility of parole for kidnapping and the ten-year sentence for sexual contact with a child under the age of 15 was so shocking , it was unnecessary to engage in the inter-intra jurisdictional analysis to ultimately find the sentence disproportionate); *People v Carmony*, 26 Cal. Rptr. 3d 365, 381 (Ct. App. 2005) (overturning a twenty-five year sentence for failure to register under California's sex offender registration laws); *People v Morris*, 136 Ill. 2d 157; 554 N. E. 2d 235 (1990) (finding disproportionate a mandatory

three-to-seven year prison term for altering the expiration date on a temporary registration permit for one's car); *State v Davis*, 206 Ariz. 377; 79 P. 3d 64 (2003) (52 year mandatory sentence found disproportionate to the crime of sexual misconduct with a minor); *State v Bruce*, 2011 SD 14; 796 N. W. 2d 397 (2011) (10 counts consecutive sentences of 10 years disproportionate for possession of child pornography).

Nevertheless, regardless of the Court relying on the principle of proportionality for over 120 years, the U.S. Supreme Court still remains divided in accepting proportionality within the Eighth Amendment.[2] The Court's Justices over the years have disagreed on whether proportionality applies depending on punishment type or solely unusual punishments (like the death penalty or torture), and whether the Eighth Amendment forbids grossly disproportionate punishments, or how to objectively determine whether a punishment is disproportionate to a crime.

Petitioner argues that proportionality should naturally be read into the Eighth Amendment and that U.S. District Courts should routinely conduct a proportionality analysis of a State habeas petitioner's sentence when it is alleged that the sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

I. History of The Eighth Amendment and Proportionality

The Supreme Court has not been clear on whether all sentences should be proportional to a completed crime. The Court has acknowledged that the proportionality principle governs both capital and non-capital sentences; however, it does not apply the principle equally. Overall, the Supreme Court has ruled that the Eighth Amendment forbids some punishments entirely, while

[2] The proportionality principle was first referred to by a dissenting judge in the case of *O'Neil v Vermont*, 144 U.S. 323; 12 S. Ct. 693; 37 L. Ed. 450 (1892), but *Weems* was the first decision in which the holding was based upon a requirement of proportionality.

prohibiting other punishments that are excessive in comparison to the crime. Nonetheless, Eighth Amendment proportionality jurisprudence lacks clarity. Thus, courts have struggled in determining whether the Eighth Amendment prohibits disproportionate punishments.

The Supreme Court first suggested that the Eighth Amendment requires the punishment be proportional to the offense in *O'Neil v. Vermont*, 144 U.S. 323, 340; 12 S. Ct. 693; 36 L. Ed 450 (1892) (O'Neil was convicted of 307 offenses of selling intoxicating liquor without authority. He was fined $6,638.72 and required to be committed until the fine was paid. If the fine was not paid by a certain date, he would be confined at hard labor . . . for approximately fifty-four-and-a-half years.) *Id.* at 330. At this time, the Eighth Amendment had not yet been applied to the states. In his dissent, Justice Field stated that the Cruel and Unusual Punishments Clause not only prohibited torture, but "all punishments which by their excessive length or severity are greatly disproportioned to the offense charged." *Id.* at 339-340.

Eighteen years later, the principle of proportionality was used to overturn the sentence given in *Weems v. United States*, 217 U.S. 349, 368; 30 S. Ct. 544; 54 L. Ed. 793 (1910). *Weems* was charged with falsifying public and official documents for the purposes of defrauding the government. *Id.* at 357. He was convicted and sentenced to fifteen years of incarceration, which included being chained from wrist to ankle and being compelled to do "hard and painful labor." *Id.* at 364. Delivering the opinion of the Court, Justice McKenna determined that the fifteen-year prison sentence constituted cruel and unusual punishment in violation of the Eighth Amendment because to serve *Weems*' sentence would have been "repugnant to the Bill of Rights." *Id.* at 382. Justice McKenna reasoned, "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367. Chief Justice White, in his dissent, asserted that the Cruel and Unusual Punishments Clause embraced prohibitions against "inhuman bodily

punishments of the past," as well as application of customary bodily punishments in an unusually severe manner, or judicial infliction of unusual, "not bodily," punishments that were not authorized by statute or were not otherwise within the discretion of the court to impose. *Id.* at 390. He did not agree with the majority in that there was "any assumed role of apportionment" that the punishment fit the crime. *Id.* at 398. (White, J. dissenting) *Weems* can be viewed as establishing the "principle of proportionality," where the punishment should be relative to the crime.

Since *Weems*, Supreme Court Justices have turned away from reading proportionality into the Eighth Amendment and have instead adopted the position that the Eighth Amendment only insures certain punishments are forbidden regardless of the circumstances. Certain punishments that have been unequivocally prohibited by the Eighth Amendment, in violation of the Cruel and Unusual Punishments Clause, include taking away citizenship from an American citizen, *Weems v United States*, 217 U.S. at 367, executing a minor convicted of a crime, *Roper v Simmons*, 543 U.S. 551; 125 S. Ct. 1183; 161 L. Ed. 2d 1 (2005), and sentencing a minor to life without the possibility of parole for any crime besides murder. *Miller v Alabama*, 567 U.S. 460; 132 S. Ct. 2455; 183 L. Ed. 2d 407 (2012).

Some punishments, including lethal injection, hanging, firing squad, and electric chair, have been challenged as violations of the Eighth Amendment, but the Courts have determined that they are not cruel and unusual. *Baze v. Rees*, 553 U.S. 35, 62; 128 S. Ct. 1520; 170 L. Ed. 2d 420 (2008). The majority of Americans still find lethal injection, hanging, the firing squad, and the electric chair to be justifiable punishments. In reality, lethal injection is the standard form of capital punishment that is still practiced, although one person was executed in Utah by

firing squad in 2010 and one by electrocution in Virginia in 2010 as well. No one has been executed by hanging in the United States since 1996.

The Eighth Amendment was not applied to the states until the decision in *Robinson v California*, 370 U.S. 660; 82 S. Ct. 1417; 8 L. Ed. 2d 758 (1962). The Court held the statute in *Robinson* to be unconstitutional because it punished the status of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction or had committed any act. *Id.* at 678. Additionally, the Court reasoned addiction is an illness that physiologically compels the victim to do drugs. *Id.* at 671. *Robinson* stands for either the proposition that one may not be punished for a status in the absence of some act, or the broader principle that it is cruel and unusual to punish someone for conduct she is unable to control, a holding of sweeping consequence. Justice Stewart did not explicitly refer to proportionality, but argued one depended on the relationship between the offense committed and the punishment to determine whether the punishment is cruel and unusual. *Id.* at 667. He stated, "to be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be answered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "'crime' of having a common cold." *Id.* The concurrence of Justice Douglas invoked proportionality more directly: "The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments' ... The principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." *Id.* at 676.

The Court in *Powell v. Texas*, 392 U.S. 514; 88 S. Ct. 2145; 20 L. Ed. 2d 1254 (1968), took the latter view of Robinson – that it is cruel and unusual to punish someone for conduct she is unable to control. The Court invalidated a conviction of an alcoholic for public drunkenness. *Id.* at 532.

The Current State of Proportionality within the Eighth Amendment

The Court has gone back and forth in its recognition of proportionality in noncapital cases. Particularly, the Supreme Court has suggested that proportionality should only be applied to certain types of punishment. For example, *Rummel v. Estelle*, 445 U.S. 263, 295; 100 S. Ct. 1133; 63 L. Ed. 2d 382 (1980), upheld a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies were minimal. ("In total, the three crimes involved slightly less than $ 230."). The rule that came out of *Rummel* appeared to be that states might punish any behavior that is classified as a felony with any length of imprisonment. Justice Rehnquist argued that the Court should not invalidate the imprisonment on proportionality grounds and instead suggested that the proportionality principle was clearer with respect to specific modes of punishment (such as torture) than with respect to differences of degree (such as terms of imprisonment). *Id.* at 275.

In *Solem v. Helm*, 463 U.S. 277; 103 S. Ct. 3001; 77 L. Ed. 2d 637 (1983), the Court held unequivocally that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "there is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences." *Id.* at 288. The Court viewed Helm's sentence of life imprisonment without the possibility of parole as more severe than the one described in *Rummel. Id.* at 301. The Court in *Solem* spelled out the objective criteria by which proportionality issues

should be judged: "(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 290-292. Using these objective factors, the Court held Helm's sentence was cruel and unusual because it was significantly disproportionate to his crime, and was therefore prohibited by the Eighth Amendment. *Id.* at 288. Despite this holding, the Court was closely divided, particularly in regard to the facts (crime of uttering a "no account" check for $ 100). *Id.* at 296. Chief Justice Burger's dissent focused on the majority's inability to respect precedent. *Id.* at 304. The dissent argued that proportionality is not included in the Eighth Amendment and such a principle went against stare decisis with respect to *Rummel*. *Id.*

In 1991, the Court again changed its course with its decision in *Harmelin v. Michigan*, 501 U.S. 957, 956; 111 S. Ct. 2680; 115 L. Ed. 2d 836 (1991). The Court held that it is not unconstitutional for one to get life imprisonment for a non-violent drug crime (possession of 672 grams of cocaine). *Id.* at 996. Justice Scalia argued, "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Id.* at 965. He also argued "only certain modes or methods of punishment were prohibited." *Id.* at 979. With respect to the length of the sentence, Justices Kennedy, O'Connor, and Souter argued that there is a narrow proportionality principle in the Eighth Amendment. *Id.* These three Justices concurred in Scalia's plurality opinion, however, emphasizing the fact that the crime was severe and not grossly disproportionate to the sentence given. *Id.* at 1108. Therefore, the Court held that severe mandatory penalties might be cruel, but were not necessarily unusual because states have been employing such sentences throughout history. *Id.* at 994-995.

Moreover, in *Ewing v. California*, 538 U.S. 11, 13; 123 S. Ct. 1179; 155 L. Ed. 2d 108 (2003), the Court upheld a recidivist statute against an Eighth Amendment challenge. *Id.* California's three-strikes law was under review for the possibility that the sentence being imposed was grossly disproportionate. *Id.* at 30. The implicated crime was theft of golf clubs, a crime that the Court did not consider to be particularly serious. *Id.* at 28. *Ewing* was a plurality opinion, but the Court ultimately held that California's three-strikes law was not grossly disproportionate, and therefore not unconstitutional. *Id.* at 29-30. The plurality upheld the broad *Solem* approach to the Eighth Amendment. Three Justices reiterated that the Eighth Amendment contains a narrow proportionality principle.[3] *Id.* at 24-25. Justice Breyer rearticulated the "threshold of gross disproportionality" in his dissent. *Id.* at 36-37. Two Justices, Scalia and Thomas, argued that the Eighth Amendment contains no proportionality guarantee at all. *Id.* at 32.

In its 2012 *Miller v. Alabama*, 567 U.S. 460; 132 S. Ct. 2455; 183 L. Ed. 2d 407 (2012) decision, the Court, by a slim five-to-four majority, held that the Eighth Amendment forbids the mandatory sentencing of life in prison without the possibility of parole ("LWOP") for juvenile homicide offenders. *Id.* at 2475. Writing for the majority, Justice Elena Kagan argued that children are constitutionally different from adults for sentencing purposes. *Id.* at 2464. She further concluded that while LWOP for adults does not violate the Eighth Amendment, such a sentence is an unconstitutionally disproportionate punishment for children. *Id.* at 2469 Once again, Justice Scalia, joined by Justice Thomas, emphasized the absence of proportionality within the Cruel and Unusual Punishments Clause. *Id.* at 2483.

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[3] Interestingly, Justice O'Connor announced the opinion of the Court, with Chief Justice Rehnquist and Justice Kennedy concurring. See id. Note that in Harmelin, Chief Justice Rehnquist joined Justice Scalia in claiming that the Eighth Amendment contained no proportionality principle, but joined Justice O'Connor's assertion in Ewing that the Eighth Amendment did contain a narrow proportionality principle, applicable to both capital and non-capital punishments.

The Court's most recent decision in cruel and unusual jurisprudence is *Glossip v. Gross*, 135 S. Ct. 2726; 192 L. Ed. 2d 761 (2015). In *Glossip*, the Court once again doubled back and disregarded the principle of proportionality when determining whether a certain type of drug used in lethal injections violated the Eighth Amendment. *Id.* at 2726. Additionally, in his concurring opinion, Justice Thomas explicitly stated that the proportionality principle has long been discredited. *Id.* at 2751. After *Glossip*, lower courts continue to struggle with what to make of the principle of proportionality. Nonetheless, never having been explicitly overruled, *Ewing v. California*, 538 U.S. 11 (2013), represents the law today: the only limit to the Eighth Amendment in place is whether the punishment is "grossly disproportionate" to the crime.

Michigan Law

In *People v Bullock*, 440 Mich 15; 485 N. W. 2d 866 (1992), the Michigan Supreme Court found that a mandatory life sentence for possession of illegal drugs was cruel under its constitution. The Michigan Supreme Court used *Bullock* to interpret its own constitution more broadly than the Eighth Amendment as applied in *Harmelin*. The *Bullock* court rejected Justice Kennedy's proportionality analysis in *Harmelin*, and resurrected a formula used twenty years earlier by its own court in *People v Lorentzen*, 387 Mich 167; 194 N. W. 2d 827 (1972). In *Lorentzen*, the Michigan Supreme Court held imposing an excessive sentence violated the Michigan Constitution and the Eighth Amendment. The *Lorentzen* court adopted a three-part proportionality test similar to the *Solem* test.

Applying this *Lorentzen-Solem* analysis, the *Bullock* court held a mandatory life penalty without the possibility of parole for possession of 650 grams or more of cocaine was unconstitutional under Michigan law even though the same statute was determined to be

constitutional under *Harmelin*. The court noted it is the penalty itself, as opposed to the inherent mitigating factors that compel its conclusion. The court said:

> "The penalty is imposed for mere possession of cocaine, without proof of intent to sell or distribute. The penalty would apply to a teenage first offender who acted merely as a courier. Indeed, on the basis of the information before this Court, it appears that prior to the offense giving rise to this case, defendant Bullock, a forty-eight-year-old grandmother, had never been convicted of any serious crime and had held a steady job as an autoworker for sixteen years." *Id.* at 875-876.

The court relied heavily on Justice White's dissent in *Harmelin*, particularly his intra-jurisdictional analysis:

> "As Justice White also noted, no other state in the nation imposes a penalty even remotely as severe as Michigan's for mere possession of 650 grams or more of cocaine." Id. at 877. "Of the remaining 49 states, only Alabama provides for a mandatory sentence of life imprisonment without the possibility of parole for a first-time drug offender, and then only when a defendant possesses ten kilograms or more of cocaine." Id. at 877 (citing *Harmelin*, 501 U.S. at 1026)

The Michigan Supreme Court recognized that the defendants in *Bullock* were punished more severely than they could have been for second-degree murder, rape, mutilation, armed robbery, or other exceptionally violent crimes. *Bullock*, 40 Mich at 40. The Michigan Court concluded that "the penalty at issue is that it constitutes an unduly disproportionate response to the serious problems posed by drugs in our society. However understandable such a response may be, it is not consistent with our constitutional prohibition of "cruel *or* unusual punishment." Thus, the Michigan Supreme Court found the penalty of life imprisonment for a first-time drug offender was unconstitutional. *Bullock*, 40 Mich at 40.

Petitioner asks that this Honorable Court adopt the *Solem* test to analyze a Petitioner's sentence for proportionality when they are presented to the federal courts on habeas review.

Solem Test - Proposed Constitutional Standard

The *Solem* Court held, "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant [is] convicted." 463 U.S. at 290. The Court set forth a three-part test to determine the constitutionality of a given sentence: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the commission of the same crime in other jurisdictions. Id. at 292. The Court stated:

> Application of the factors we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and non-capital punishment case, for the death penalty is different from other punishments in kind rather than degree. For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

Solem, 463 U.S. at 294 (footnotes omitted).

Application of *Solem* to Petitioner's Case

Petitioner contends that his sentence, the mandatory minimum sentence of 25 years, is grossly disproportionate to the offense committed in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. This case involves a complaint that Petitioner sexually abused a child, 4-6 to eight years old. These allegations were not made until years later, when the alleged victim was 15 years old. It is Petitioner's position that the allegations are false and were made up because of an ongoing child visitation and custody dispute between the victim's mother and himself. The circumstances of this case are such that the mandatory minimum contained in Mich. Comp. Laws Ann. § 750.520b(2)(b) should not apply to his case.

Michigan Compiled Laws Annotated § 750.520b - Criminal sexual conduct in the first degree; penalties, states in relevant part:

Sec. 520b(2)(b)

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

Petitioner contends that the circumstances of his case are such as to require a different sentence. Petitioner maintains his innocence, and adamantly denies that the alleged criminal sexual conduct occurred.

Inter-Jurisdictional Evaluation of Petitioner's Sentence

In looking at the harshness of the penalty, the first comparison is of punishments for other crimes in the State of Michigan. Criminal sexual conduct in the first-degree has a mandatory minimum sentence if a child is less than 13 years of age. Mich. Comp. Laws Ann. § 750.520b(2)(b). Criminal Sexual conduct in the second-degree does not include a mandatory minimum sentence when the conduct occurs when a child is less than 13 years of age. Mich. Comp. Laws Ann. § 750.520c. Further, the punishment for other, more serious offenses do not require that a defendant be subject to a mandatory minimum sentence.

In contrast, assault with intent to murder, Mich Comp. Laws Ann. § 750.83; armed robbery, Mich Comp. Laws Ann. § 750.529; second degree murder, Mich Comp. Laws Ann. § 750.317; kidnapping, Mich Comp. Laws Ann. § 750.349; and, taking of hostages by penal inmates, Mich Comp. Laws Ann. § 750.349a, all carry minimum terms of "life *or any term of years*." As is the case on numerous instances, a person can be convicted of one of these serious crimes and receive a sentence far less than an individual such as Petitioner. See, *People v Pritchell*, 2014 Mich App LEXIS 321, (defendant was sentenced to 18 years 9 months to 25

years for second-degree murder, and 10 years 6 months to 15 years for assault with intent to murder); *People v Blythe*, 417 Mich 430 (1983) (one defendant sentenced to 6 months to 4 years for armed robbery, other defendant sentenced to 7 years 6 months to 30 years for armed robbery); *People v Jahner*, 433 Mich 490 (1989) (conspiracy to commit first-degree murder punishable by life imprisonment with an eligibility for parole after serving just 10 years).

Because the sentence in this case is a mandatory minimum, Petitioner had a difficult time finding cases where the defendant was convicted of the same crime and received a different sentence. Petitioner would like to point this Court to *PEOPLE v. GERONIMO LUCAS,* Kent County Circuit Court No. 16-011299-FC, where defendant was charged with criminal sexual conduct in the first-degree, person under 13, same charge as in this case. In *Lucas*, it was alleged that defendant repeatedly molested the alleged victim (E.B) and had committed criminal sexual conduct in the second-degree against her older sister, Chica, several years prior. A bench trial was conducted and the trial court found Lucas guilty of the first-degree criminal sexual conduct, person under 13, for the conduct which occurred with E.B, but acquitted him of the second-degree for the alleged conduct with Chica. The trial court chose not sentence defendant to the mandatory minimum of 25 years pursuant to Mich. Comp. Laws Ann. § 750.520b(2)(b), and sentenced defendant to 10 to 30 years.

Intra-jurisdictional Evaluation of Petitioner's Sentence

In this case, the potential disproportion between the sentence defendant received and those sentences actually imposed in other jurisdictions is actual. A few representative illustrations can be found at: See, *People v Baker*, 20 Cal. App. 5th 711; 229 Cal. Rptr. 3d 431 (2018) (Cal. Pen. Code § 269. Aggravated Sexual Assault of a Child, penalty - 15 years to life; Cal. Pen. Code § 288 Lewd or Lascivious Acts involving Children, penalty - 15 years to life);

State v Taylor G, 315 Conn. 734; 110 A. 3d 338 (2015) (Conn. Gen. Stat. § 53a-70 Sexual Assault in the First Degree - penalty 10 years mandatory minimum for child under 10 years of age); *Farhoumand v Commonwealth*, 288 Va. 338; 764 S. E. 2d 95 (2014) (Va. Code Ann. § 18.2-67.3 Aggravated Sexual Battery - complaining witness under 13, penalty not less than one year nor more than 20 years); and, *United States v Farley*, 2008 U.S. Dist. LEXIS 104437 (N.D. Ga., Sept. 2, 2008) (a thirty-year mandatory minimum sentence for crossing a state line with the purpose of engaging in sexual conduct with a person under twelve years old is grossly disproportionate in violation of the Eighth Amendment).

Petitioner believes that his sentence has satisfied the proportionality analysis of *Solem* and shown that his sentence is disproportionate to the offense committed, resulting in a sentence that violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Conclusion

The Supreme Court has been reviewing punishments under the Cruel and Unusual Punishments Clause for over more than a century, and yet the doctrine remains unclear. This Court has failed to explicitly answer whether the principle of proportionality is legitimate, leaving Eighth Amendment jurisprudence confused. Given the Supreme Court's unsettled views on the principle of proportionality, lower courts are having trouble interpreting the Court's Eighth Amendment precedents. Such disagreement within the Court contributes to inconsistent and ineffective interpretations of the Cruel and Unusual Punishments Clause. Further, the Court today has - and in the near future will have - an unusual focus on the Eighth Amendment, particularly with death penalty cases. Therefore, the Court should have a workable, flexible test to analyze excessive punishments.

Thus, there should be an Eighth Amendment proportionality doctrine, within this test, the *Solem* factors should become the guidelines for determining when any given case violates the "Principle of Proportionality," leaving the courts with a workable test to measure proportionality.

In taking apart the words of the Cruel and Unusual Punishments Clause, "cruel" is defined as "causing pain or suffering," and "unusual" means "not habitually or commonly done or occurring." Common law dictates that practices that enjoy long usage are presumptively reasonable and enjoy the consent of the people. Taking the Clause literally would mean that a painful punishment that is contrary to common usage would be considered unjust and unconstitutional. Every criminal punishment involves inflicting some kind of pain or suffering, whether physical or psychological. Therefore, courts need to determine whether such pain or suffering is unconstitutionally "unusual." To do so, early courts have compared a punishment to what has been previously permitted at common law. This practice comports with the *Solem v. Helm* factors that guide courts to determine an acceptable range of sentences accepted in all jurisdictions.

Further, unlike the Eighth Amendment's Excessive Bail and Excessive Fine Clauses, the Cruel and Unusual Punishments Clause does not clearly reference proportionality. This is why Justice Scalia argued that the Clause does not prohibit disproportionate punishments. In *Harmelin v. Michigan*, supra Justice Scalia asserts that the textual basis for proportionality is implausible because "cruel and unusual" is an "exceedingly vague and oblique" way to forbid excessive punishments. 501 U.S. at 977. Nevertheless, when one looks at the history of the Eighth Amendment, the Cruel and Unusual Punishments Clause forbids excessive punishments. The Court, in *Solem v. Helm*, noted that the language of the Clause originated from the English Bill of Rights and can be read as a prohibition against excessive or disproportionate

punishments. 463 U.S. at 285-286. Additionally, from the beginning of western civilization to the Framers and other early Americans, the Clause has been interpreted to encompass proportionality. Furthermore, the Clause is flexible and "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." In other words, the Clause changes with an evolving society. Ultimately, the Court has also followed an ahistorical approach in interpreting the Eighth Amendment. Therefore, the principle of proportionality is justifiable on a historical level.

A proportionality requirement within the Eighth Amendment is consistent with the goals of criminal law - deterrence, incapacitation and rehabilitation. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." A standard for excessive punishments encompasses society's standard of decency of today and yesterday. It is for these reasons that Petitioner asks this Honorable Court to establish a proportionality standard that the federal district courts must adhere to in reviewing a petitioner's sentence under 28 U.S.C. § 2254.

RELIEF REQUESTED

Petitioner prays the this most Honorable Court will hold that the State of Michigan's mandatory minimum sentencing scheme contained within Mich. Comp. Laws Ann. § 750.520(b)(2)(b) is unconstitutional in violation of the Eighth Amendment's prohibition against cruel and unusual punishment; order that Petitioner's sentence be vacated and order a remand for resentencing; in the alternative, remand this matter to the federal district court for a proportionality analysis consistent with *Solem v Helm*, supra.

Respectfully Submitted,

Date: May 24, 2019

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