

Docket Number: _____

IN THE UNITED STATES SUPREME COURT

Michael J.W. Potter, *Petitioner*

v.

United States of America, *Respondent*

**On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

Joseph O. McAfee
Counsel of Record
100 West Summer Street
Greeneville, TN 37743
Email: joseph@mcafeeattorneys.com
Phone: (423) 972-4391

Question for Review

Whether entry of a mandatory sentence of life imprisonment violated Appellant's rights under the Eighth Amendment to the United States Constitution.

Parties to the Proceeding

All Parties to this proceeding appear on the cover page of this Petition for Writ of Certiorari and are listed in the caption.

Table of Contents

	<u>Location</u>
1. Opinions Below.....	4
2. Jurisdiction.....	5
3. Constitutional and Statutory Provisions Involved.....	6
4. Table of Authorities.....	8
5. Statement of the Case.....	9
6. Argument.....	10
7. Conclusion.....	14

Index to Appendices

1. Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit (June 11, 2019)	Appendix A
2. Judgment of the United States District Court for the Eastern District of Tennessee (August 6, 2018)	Appendix B
3. 18 U.S.C. § 3551.....	Appendix C
4. 18 U.S.C. § 3553.....	Appendix D
5. 21 U.S.C. § 841.....	Appendix E
6. 21 U.S.C. § 851.....	Appendix F

Opinions Below

- a. The Judgment of the United States Court of Appeals for the Sixth Circuit appears at Appendix A and is reported as follows:
United States v. Michael J.W. Potter, 927 F. 3d 446 (6th Cir. 2019).
- b. The Judgment of the United States District Court for the Eastern District of Tennessee appears at Appendix B and is unpublished.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 11, 2019. This petition is being filed on or before ninety (90) days following entry of the judgment.

The United States Supreme Court has jurisdiction to consider this matter as conferred under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

1. United States Constitution:
Eighth AmendmentText Below:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII.
2. 18 U.S.C. § 3551.....See Appendix C
3. 18 U.S.C. § 3553.....See Appendix D
4. 21 USC § 841.....See Appendix E
5. 21 USC § 846.....Text Below:

§ 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties prescribed for in the offense, the commission of which was the object of the attempt or conspiracy. 21 USC § 846.
6. First Step Act of 2018.....Text Below:

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—
(A) in subparagraph (A), in the matter following clause (viii)—
(i) by striking “If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years” and inserting the following: “If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such

person shall be sentenced to a term of imprisonment of not less than 15 years”; and

(ii) by striking “after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release” and inserting the following: “after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years.”

FIRST STEP Act of 2018, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220 (amending 21 U.S.C. § 841(b)(1)(A)(viii)).

Table of Authorities

Cases

	<u>Page</u>
1. <i>Ewing v. California</i> , 538 U.S. 11 (2003).....	11
2. <i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991).....	11, 13
3. <i>Miller v. Alabama</i> , 132 S.Ct. 2455 (2012).....	11, 12
4. <i>United States v. Potter</i> , 927 F. 3d 446 (6 th Cir. 2019).....	11
5. <i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	11, 12

Statutes

1. 18 U.S.C. § 3551.....	6, 10
2. 18 U.S.C. § 3553.....	6, 10, 13
3. 21 U.S.C. § 841.....	6, 9, 10, 13
4. 21 U.S.C. § 846.....	6, 9
5. 28 U.S.C. § 1254(1).....	5
6. FIRST STEP Act of 2018, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220.....	6, 7, 10, 13
7. U.S. Const. amend. VIII.....	6, 10, 11, 12

Statement of the Case

Following a conviction by jury of Conspiracy to Distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), Petitioner was sentenced to a mandatory minimum term of imprisonment of life. Prior to his conviction in the District Court, the United States filed an Information Filed by United States Attorney to Establish Prior Conviction which set forth that the Petitioner had been convicted of seven (7) prior felony drug offenses in the state courts.

Petitioner has no convictions for crimes of violence as an adult, according to the Presentence Investigation Report prepared in his case prior to the judgment appealed from.

Before sentencing, the Petitioner objected on several grounds to the required Mandatory Minimum sentence of life imprisonment. Petitioner's objections specifically to the imposition of a mandatory minimum term of life imprisonment were overruled. The District Court followed the procedure required to establish the relevant prior felony drug convictions and sentenced Petitioner to a term of life imprisonment. Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit where his sentence was affirmed.

Argument

The District Court made the correct decision under the current law to sentence the Petitioner to a mandatory term of life imprisonment. The United States Court of Appeals for the Sixth Circuit made the correct decision under the current law to affirm the sentence entered by the District Court. Despite both of the aforementioned Courts having made the correct decision under the law, the law should be declared unconstitutional as applied to the Petitioner and others similarly situated.

Pursuant to 18 U.S.C. § 3553(a)(2), District Courts must sentence those convicted before them to sentences which are sufficient not great than necessary. This mandate, however, is not mandatory itself. 18 U.S.C. § 3551(a), with its “[e]xcept as otherwise specifically provided,” language leaves room for statutes elsewhere like 21 U.S.C. § 841(b)(1)(A) to call for mandatory sentences wherein the sentencing judge cannot consider any range of potential sentences under the law.

Since the Defendant’s conviction in December 2017, the First Step Act of 2018 was passed and became law. Currently, Petitioner would be subjected only to a mandatory minimum twenty-five years if he were sentenced today rather than August 2018. FIRST STEP Act of 2018, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220. Had Petitioner been sentenced only a few months later than he was in August 2018, he would not have been subject to the mandatory minimum term of life imprisonment that he received.

Before the Sixth Circuit, Petitioner argued his mandatory sentence of life imprisonment for defendants convicted as he was and who also had two prior felony drug convictions violated the Eighth Amendment’s prohibition on cruel and unusual punishments. Petitioner went on ask the Sixth Circuit to extend the Court’s holding in *Miller v. Alabama* to

apply to adults who commit nonviolent crimes. The Sixth Circuit held that such an argument “faces insurmountable obstacles before this court.” *United States v. Potter*, 927 F. 3d 446, 454 (6th Cir. 2019). Petitioner now respectfully suggests that such an argument does not faces any insurmountable obstacle before *this* Court.

Petitioner further recognizes that prior precedents not only in the Sixth Circuit but before the Court are, in fact, obstacles. In *Harmelin v. Michigan*, 501 U.S. 957 (1991) the Court announced that the Eighth Amendment only prohibits those sentences which are grossly disproportionate to the crime. *Id.* at 996-997. *Ewing v. California*, 538 U.S. 11 (2003) the Court upheld a portion of California’s “three strikes law” which resulted in Mr. Ewing’s sentence of 25 years to life imprisonment for stealing three golf clubs. *Id.* at 12-13, 28. Therefore, Petitioner concedes that strict proportionality is not required for purposes of our analysis but we nonetheless submit that his sentence is, in fact, grossly disproportionate as set forth in the following paragraphs.

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court determined that the imposition of the death penalty does not *per se* constitute cruel and unusual punishment. *Id.* at 285. The Court stated that the conclusion of *Woodson* rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. *Id.* at 305. Discussed in *Woodson* was the fact the North Carolina death penalty statute failed to allow particularized consideration of relevant aspects of the character and record of the defendant before sentencing him to death. *Id.* at 304. Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing element. *Id.*

In *Miller v. Alabama*, 567 U.S. 460 (2012), defendant Miller, was convicted of capital felony murder committed at age 14. *Id.* at 467-469. The

Court held that children are constitutionally different from adults for purposes of sentencing because juveniles have diminished culpability and greater prospects for reform. *Id.* at 471. Further, imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violated the Eighth Amendment. *Id.* At 470. The Court held a mandatory life-without-parole sentence for juveniles violates the Eighth Amendment. *Id.* at 470. In a world where juveniles cannot be sentenced to a mandatory minimum sentence of life imprisonment whatever the crime, should we not then extend this type of holding to non-violent drug offenders like Petitioner?

The Petitioner must and does recognize that both *Miller* and *Woodson* above are readily distinguishable from this case. However, the logic applied to both cases by the Court mixed with the current trend toward lowering mandatory minimum sentences as accomplished by the First Step Act, indicate that mandatory life sentences for nonviolent drug offenders are grossly disproportionate to the offenses.

There exist few differences between the mandatory life sentence the Petitioner received and a sentence of death. Both Petitioner and one who receives the death penalty have no hope of release despite what they may achieve or how much they may take advantage of rehabilitation and training in the future. Both Petitioner and one who receives the death penalty will ultimately die while incarcerated. Effectively, then, there is no difference between a sentence of mandatory life and the death penalty but for the fact that the death penalty, no what horrible acts one might commit to receive it, is prohibited by the Eighth Amendment under *Woodson* if the applicable statute calls for death as the mandatory sentence.

The mandatory nature of the punishment itself in dealing with a life sentence is what constitutes the

violation. Here, Petitioner is sentenced pursuant to the statute and, unlike that which is called for in 18 U.S.C. § 3553, the District Court was powerless to enter a sentence which is sufficient but not greater than necessary or to consider the Defendant as an individual human being in any way.

Under Justice Kennedy's concurring opinion in *Harmelin*, Petitioner suggests that in light of the First Step Act's lowering mandatory minimum sentences, he has made a "threshold showing" that his sentence may be grossly excessive under the Eighth Amendment. *Harmelin*, at 1004-1005. This is especially true in light of the fact that each mandatory minimum sentence under 21 U.S.C. § 841 has now been lowered substantially. Close examination of the FIRST STEP Act of 2018 does, however, reveal that the reforms which lowered mandatory minimum sentences moving forward do not apply retroactively to persons like Petitioner who were sentenced prior to its enactment. Petitioner suggests there are few things which exist in the world, aside from the law here, which could be more cruel and unusual than to live each day with the knowledge that had he been sentenced even five months later, Petitioner may have had the chance to earn his release from incarceration before dying.

Petitioner does not suggest he would receive the newly enacted mandatory minimum of twenty-five years. Perhaps so, but this example illustrates the point of Petitioner's request. If his sentence were to be declared unconstitutional, the District Court would be empowered to consider his history and character as well as other factors as set forth in 18 USC § 3553 and sentence him to a punishment which is sufficient but not greater than necessary. 18 USC § 3553(a)(2).

Taking into account the circumstances of this case, the current state of the law, and others similarly situated in the Bureau of Prisons, now may be the time to examine the constitutionality of Petitioner's mandatory minimum sentence of life imprisonment for

a non-violent drug offense. We respectfully request that the Court grant our request.

Conclusion

Wherefore, Petitioner hereby asks the Court to grant this request for a *writ of certiorari* and to place this case on the docket to be fully heard on the merits.

Respectfully Submitted,

/s/ Joseph McAfee

Joseph O. McAfee
Counsel of Record
100 West Summer Street
Greeneville, TN 37743
Email: joseph@mcafeeattorneys.com
Phone: (423) 972-4391

PETN1655AP.001-001