No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN CRAIG WHYTE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's *Daubert*/*Kumho Tire* jurisprudence bars presentation of law-enforcement agent "drug experts" testifying regarding plain-English exchanges and common-sense topics within a jury's grasp.

Whether the Sixth Amendment and this Court's jurisprudence within the last twenty years finally call for overturning the conclusions in *Almendarez-Torres v. United States*.

Whether the Eighth Amendment prohibits mandatory life sentences in strict-liability circumstances such as Mr. Whyte's, where even the government's allegations showed Mr. Whyte did not distribute the lethal drugs to the decedent, did not know the decedent, and could not have known how the decedent would use the drugs or that the decedent would overdose on the drugs.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Craig Whyte requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on November 12, 2019, affirming the judgment of the United States District Court for the Western District of Michigan, Southern Division.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at *United States v. Whyte*, ___ F. App`x ___, No. 18-2139, 2019 U.S. App. LEXIS 33667 (6th Cir. Nov. 12, 2019). It is also attached at **Appendix A**.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, is unpublished and is attached at **Appendix B**. The district court's findings in this matter, also unpublished, appear in the records attached at **Appendix C** and **Appendix D**, which include relevant excerpts of transcripts.

JURISDICTION

The United States Court of Appeals decided this case on November 12, 2019. Mr. Whyte did not seek rehearing or rehearing en banc in the Sixth Circuit. He now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). He has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment, in relevant part, provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI.

For its part in this matter, the Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

Title 18, Section 841(b)(1)(C) of the U.S. Code provides, in relevant part:

"(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. 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 of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life

imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both." 21 U.S.C. § 841(b)(1)(C).

Federal Rule of Evidence 702, addressing testimony by expert witnesses, provides:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

STATEMENT OF THE CASE

A. Federal jurisdiction has been proper since this case's inception, and this Court should exercise jurisdiction under Rule 10(c) to settle three important questions of federal law—namely the inadmissibility of law-enforcement "drug experts" and that the Sixth and Eighth Amendments, and this Court's jurisprudence over the past two decades, demand overturning the decision in Almendarez-Torres v. United States*, and a finding that mandatory life sentences under 18 U.S.C. § 841(b)(1)(C) constitute cruel and unusual punishment.*

In accordance with this Honorable Court's Rules 14(1)(g)(ii) and 10(c), Mr. Whyte asks this Court to consider his case and make two critical determinations of

federal law. His case involves three key federal issues for this Court to settle: whether the government can introduce law-enforcement personnel as drug "experts" under Federal Rule of Evidence 702 to offer opinions on matters of common sense and plain English; whether this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overturned; and whether a mandatory life sentence (without the possibility of parole) violates the Eighth Amendment when applied in a strict-liability context.

Federal jurisdiction in this matter has been proper since the case's inception. Mr. Whyte faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The government indicted Mr. Whyte on October 27, 2016, charging him with heroin- and firearm-related charges, violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. §§ 922(g)(1) and 924(c)(1)(A)(i).

The government filed a superseding indictment on March 22, 2017, and the case proceeded to trial. Essentially, the government accused Mr. Whyte of distributing drugs and carrying a firearm in relation to or in furtherance of that distribution, and in two counts, it alleged heroin distribution that resulted in death. At trial, the government would present evidence in an attempt to prove that Mr. Whyte sold heroin to another man (named Corvin Reed) who eventually gave some of that heroin to a man who used it, overdosed, and died. (Corvin Reed, who actually sold the deadly drugs, received an 18-month sentence after cooperating with the government; he testified against Mr. Whyte at trial.)

As trial approached, and again during trial, the defense objected to admission of testimony by an alleged drug-trafficking expert the government indicated it would seek to introduce. After considering the issue, the district court ruled to allow the "expert" to testify. *See* Pet. App. "C" at Trial Trans. I, PageID # 541 & Trial Trans. IV, PageID # 1338, 1345-46.

Trial commenced, and the government's proffered law-enforcement agent "drug expert" testified, as did Corvin Reed and others. After the jury began deliberations, the jurors sent out two separate notes indicating they could not reach a verdict on the resulting-in-death allegations. (One note stated that the jurors were "at an impass" on the death-related counts; the second asked, "Do we need 12 votes for not guilty.") The court instructed the jury to continue deliberating, and jurors ultimately found Mr. Whyte guilty on all counts.

Leading up to, and at, the sentencing hearing on September 27, 2018, the defense raised multiple objections, including guideline-calculation objections. On Sixth and Eighth Amendment grounds, the defense objected to the mandatory life sentence. The district court denied all of these objections, calculated an offense level of 47 (dropping to 43 because of the cap on the guidelines table) and a criminal-history category of VI, and found an advisory guideline sentencing range of life imprisonment. It also addressed the mandatory sentencing provisions in 21 U.S.C. § 841(b)(1)(C) providing for a life sentence. Then the district court imposed a sentence of life in prison (with an additional five years of imprisonment for the firearm count under 18 U.S.C. § 924(c)). As the court acknowledged, the issue of supervised

release fades in the shade of a life sentence, but the court did impose a term of six years of supervised release, and it imposed a fine of $6,500.00 and a special assessment of $500.00.

Mr. Whyte filed a timely notice of appeal and appealed his convictions and sentence to the Sixth Circuit Court of Appeals. That court exercised jurisdiction under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences. It affirmed the district court.

Mr. Whyte now asks this Honorable Court to grant review and consider his case. He asks the Court to clarify the inadmissibility of law-enforcement agents as "drug experts" at trial when these witnesses explain common-sense concepts and plain-English terms and phrases. He also asks the Court to review its now-eroded conclusions in *Almendarez-Torres* and find that the Sixth Amendment prohibits mandatory life sentences like Mr. Whyte's without a jury finding on the relevant criminal history. Finally, he asks the Court to find that his mandatory life sentence, for a strict-liability offense, violates the Eighth Amendment's prohibition against cruel and unusual punishment.

B. Mr. Whyte's case presents a straight-forward factual scenario and procedural history, and the Sixth Circuit's consideration of these matters underscores the need for this Court's review of jurisprudence in these areas.

The procedural aspects of Mr. Whyte's case present no complications. Mr. Whyte objected multiple times to admission of the government's proffered law-enforcement agent "drug expert." He also objected multiple times to the mandatory

life sentence he received. And he carried these objections through to his appeal in the Sixth Circuit. That court addressed the issues and affirmed the district court.

The appellate court considered Mr. Whyte's arguments related to the government's law-enforcement agent "drug expert" and the admissibility of experts under Federal Rule of Evidence 702. *See United States v. Whyte*, ___ Fed. App`x ___, No. 18-2139, 2019 U.S. LEXIS 33667, at *13-*14 (6th Cir. Nov. 12, 2019). At the crux of the court's findings on this point was its conclusion that, "even if the district court erred in permitting aspects of [the agent's] testimony, any such error was harmless." *Id.* at *15. The court emphasized that the agent had "testified on this subject for only nine transcript pages (in a 1,000 page transcript)," and it found that the testimony did not attempt to relay the government's theory of the case under the guise of jargon interpretation, as agents had done in other cases. *See id.*

The Sixth Circuit also fell back on the abuse-of-discretion standard of review to uphold admission of the agent's testimony. *See id.* It noted that, "[a]lthough a reasonable juror *might* have understood what some of [the allegedly drug-related] phrases meant without [the agent's] testimony, the government was well within its rights to assume otherwise, and to attempt to ensure that the jury understood" the numerous text messages allegedly exchanged. *Id.*

On the issue of Mr. Whyte's Sixth Amendment challenge, the Sixth Circuit recognized the volatility in this area of jurisprudence . . . and the fact that only further review by this Court can alter the jurisprudential landscape: "although some members of the Supreme Court have called *Almendarez-Torres*'s continuing

vitality into question, '*Almendarez-Torres* is still good law and will remain so until the Supreme Court explicitly overrules it.'" *Id.* at *26.

With regard to the Eighth Amendment argument, and the issue of cruel and unusual punishment, the appellate court acknowledged Mr. Whyte's arguments based on his lack of intent to harm the decedent, and the fact that Corvin Reed gave the decedent the fatal dose of heroin. *Id.* at *26-*27. It also considered Mr. Whyte's points about society's "evolving standards of decency" with respect to mandatory-minimum punishments for drug offenses, and Mr. Whyte's citation of the recent passage of the First Step Act as evidence of that evolution. *Id.* at *27. The court conceded that "Whyte is correct that his sentence is severe, and perhaps even misguided as a matter of criminal-justice policy." *Id.* But it found that, "unfortunately for Whyte, binding precedent forecloses this claim, too," and continued: "That is, although the Supreme Court has held that the Eighth Amendment bars legislatures from imposing a 'sentence for a term of years' that is 'grossly disproportionate for a particular defendant's crime,' we have repeatedly rejected Eighth Amendment challenges to the mandatory life-without-parole provisions in 21 U.S.C. § 841(b)(1), even when faced with sympathetic defendants." *Id.* (citation omitted).

The Sixth Circuit considered and rejected Mr. Whyte's issues, even pointing toward the need for further review from this Court on issues like that of the Sixth Amendment's application and the viability of *Almendarez-Torres*. Mr. Whyte's case presents an ideal vehicle for reconsidering these issues, overturning *Almendarez-*

Torres, and bringing these aspects of Sixth and Eighth Amendment jurisprudence into line with modern judicial holdings and sensibilities.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari here to clarify that its line of cases running from *Daubert* and *Kumho Tire* bar presentation of law-enforcement agent "drug experts" who testify regarding plain-English exchanges and common-sense topics within a jury's grasp.

This Court hardly needs Mr. Whyte to explain to it the provisions of Federal Rule of Evidence 702, which of course addresses expert testimony and requires a witness testifying under its provisions to be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The proposed witness must have "specialized knowledge" that will help the jury understand the evidence or determine a fact in issue; the testimony must rest on sufficient facts or data; the testimony must be the product of reliable principles and methods; and the expert must have applied, reliably, these principles and methods to the facts of the case." *Id.*

In Mr. Whyte's case, the government's proffered law-enforcement agent "drug expert" simply did not offer specialized knowledge. This agent interpreted messages such as: "If you have 70, I'll make it super fat." The witness "translated" this statement by testifying, "So he's saying 'If you have 70, I'll make it fat,' meaning I'll give you a good quantity for that amount of money." The witness took on another message, one reading, "I'm going to get another half tonight." He defined "half": "Well, depending on who these people are and the quantities they are talking about,

a half could be anything from a half a gram to a half an ounce. But a half would be basically a quantity that they are going to be getting later on that night."

The witness explained "cut" as referring to purity; an "uncut" drug sample would be purer. Merriam-Webster provides, as one definition of "cut," the verbs "dilute" and adulterate." *See* Merriam-Webster, www.merriam-webster.com (definition 2.c. of the transitive verb "cut" addresses dilute/adulterate). The government's witness thus provided no insight into the meaning of "cut"—nothing a juror could not have inferred as an English speaker.

This "cut" "explanation" exemplifies the problems with this kind of testimony. The witness went on to discuss various plain-English words and statements, things like "re-up," and how "[s]ick already and needing to feel better" means "that this person . . . is starting to feel sick because they haven't had heroin in a while so they need to get some pretty quick so they can feel better," and he touched on the meaning of "fronting." In the Sixth Circuit, Mr. Whyte acknowledged that certain terms like "lemon cush real sticky" (perhaps referring to better quality marijuana) may not be in common use, but terms like these did not contribute to the evidence against him in any significant way and did not warrant a proffered expert taking the stand to define them.

The Sixth Circuit even cited these plain-English phrases in discussing this issue. *See United States v. Whyte*, ___ Fed. App`x ___, No. 18-2139, 2019 U.S. LEXIS 33667, at *14-*15 (6th Cir. Nov. 12, 2019). It conceded that a "reasonable juror *might* have understood what some of these phrases meant without [the

agent's] testimony," but concluded, falling back on the abuse-of-discretion standard of review and the idea of harmless error, that "the government was well within its rights to assume otherwise." *Id.* at *15.

Mr. Whyte understands this Court's holdings on abuse-of-discretion review and admission of expert testimony. *See GE v. Joiner*, 522 U.S. 136, 138-39 (1997). But as this Court said in *GE v. Joiner*, "while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye* [*v. United States*, 293 F. 1013 (D.C. Cir. 1923)], they leave in place the 'gatekeeper' role of the trial judge in screening such evidence." *Id.* at 142. Neither *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), nor *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), threw wide the gate for admission of witnesses clothed in the authority of experts (and with the authority of law enforcement in this case) to explain plain-English phrases and common-sense concepts to juries.

As litigants and courts understand, the *Daubert* inquiry involves a focus on "principles and methodology," not on an expert's conclusions. *See GE*, 522 U.S. at 146; *see also Daubert*, 509 U.S. at 595. Here, that focus must leave one scratching one's head because these law-enforcement "drug experts" offer no principles or methodology of any sort; they offer anecdotes. A reliable methodology in this field simply does not exist. By what "methodology" can an "expert" (who is also a law-enforcement agent employed by the government that has effected the prosecution) testify objectively regarding the behavior of alleged drug dealers? And by what

methodology can such an expert "explain" supposed drug jargon, much of which is simply plain English?

The agent here reiterated the plain-English meaning of numerous exchanges. His "definitions" at trial including discussing how, "[i]f it's buying houses and businesses to keep clean money," this supposedly means that the people in the exchange want to "keep making more money and have clean money." And this idea refers, in turn, to "money that's been made illegally say through drug sales and laundering so that it's clean money. A lot of times traffickers will get into buying properties. Buying houses, flipping houses as a legitimate business but using illegitimate money to get into that business. So, it gives an appearance of being what they would say clean money." No methodology at all, other than speaking English (which the jury can do for itself), comes into play with such "defining."

The opacity of any "methodology" comes to the forefront in reviewing testimony like that regarding "half" touched on above:

> Prosecutor: What do you understand "half" to be referring to there?
>
> Special Agent Burns: Well, depending on who these people are and the quantities they are talking about, a half could be anything from a half a gram to a half an ounce. But a half would be basically a quantity that they are going to be getting later on that night.

See Pet. App. "C" at Tr. Trans. Vol. IV, PageID # 1348.

While *Daubert* affords trial courts a certain flexibility, and while *Daubert* favors admission, with "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [providing] the traditional and appropriate means of attacking shaky but admissible evidence," *Daubert* did

not create a "free for all" for the presentation of common-sense propositions clothed in expertise, or for the admission of anecdotal evidence with no reliable basis. *See Daubert*, 509 U.S. at 596-97. Regardless of flexibility and the availability of cross-examination, a trial court must, of course, still look to certain key factors and prohibit admission of testimony that fails to satisfy Rule 702's strictures, including:

1) Whether a theory or technique can be (and has been) tested;
2) Whether the theory or technique has been subjected to peer review and publication;
3) Any known or potential rate of error;
4) The existence and maintenance of standards controlling the technique's operation;
5) General acceptance in the relevant scientific community, though this assessment "does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."

Id. 593-94 (citation omitted).

As the agent's own testimony here demonstrated, these "theories" do not undergo testing; they are anecdotal. Peer review and publication, even by other agents (as opposed to *potentially* more valuable review by criminologists), lags, and what "peer review" exists is self-supporting. With no real testing and statistical analysis, and with only anecdotes and officers' personal experience, error rates

hardly play a significant (if any) role in this field. The anecdotal nature of the "expertise" means a complete lack of standards and controls.

Even academic scholars in this area currently rely on anecdote and recognize the lack of research in this field. *See* Bruce A. Jacobs, *Robbing Drug Dealers: Violence Beyond the Law* viii, 4, 20 (2017) (a treatise published by a global textbook publisher and written by an associate professor of criminology and fellow at the Center for Metropolitan Studies at the University of Missouri, St. Louis; the work specifically uses the word "anecdote"). Yet such scholars provide far better potential sources of expertise than government agents. An academic, a "criminologist" or a sociologist who focuses on criminal topics, at least has a more objective and "scientific" approach to analyses of this sort. Someone like Columbia University's Sudhir Venkatesh, author of *Gang Leader for a Day: A Rogue Sociologist Takes to the Streets*, or the City University of New York's Anthony Marcus, author of numerous articles on criminal-justice topics, provide far better examples of true "experts" in criminological fields. An expert of this sort should publish in peer-reviewed journals and employ a recognized and defined methodology to their findings, including statistical analysis to determine patterns (versus anecdotes). An academic setting for one thing (with considerations related to tenure, grant applications, and peer review for publication) contributes to the maintenance of standards. If any sort of expertise exists in this field—if more can be done than explain plain-English exchanges—it should at least be done by academics. *See GE*,

522 U.S. at 149-50 (Breyer, J., concurring) (suggesting usefulness of court-appointed scientist experts).

The advisory-committee notes that accompany Rule 702 shed further light on this inquiry and suggest multiple considerations militating in favor of barring testimony from law-enforcement "drug experts." These factors include:

- Whether the proffered expert will testify about matters growing naturally and directly out of research they have conducted independent of litigation;
- Whether the expert developed their opinions expressly for purposes of testifying;
- Whether the expert has "unjustifiably extrapolated" from an accepted premise to reach an unfounded conclusion;
- Whether the expert has accounted adequately for obvious alternative explanations;
- Whether the expert has used as much care as they would in their regular professional work (beyond paid litigation consulting);
- Whether the field of expertise claimed by the expert has a reputation for reaching reliable results for the type of opinion the expert would offer.

See Fed. R. Evid. 702 advisory committee's note.

The agent's testimony here depended completely on litigation. He conducted no studies or statistical analyses on the subjects of drug trafficking and drug lingo in the abstract or for academic reasons. He simply testified based on his anecdotal experiences as a law-enforcement officer. And this agent developed his theories expressly for the purpose of testifying. Regarding potential alternative explanations, the agent's own testimony underscored the equivocal nature of this

kind of testimony and its failure to account for obvious alternative explanations for supposed drug-related statements and behaviors. This "field of expertise" (and Mr. Whyte decidedly does *not* concede that this area of discussion constitutes a "field of expertise") does not enjoy a reputation for reaching reliable results. As presented by law-enforcement officers, it inherently involves prosecutorial bias. Contrary to the requirements of Rule 702, the "expert" testimony offered at Mr. Whyte's trial did not increase the jury's understanding of the issues. *Compare* Fed. R. Evid. 702(a). Rather, that testimony infringed on the jury's purview by telling the jury how to interpret plain-English exchanges and common-sense topics.

II. This Court should grant review here to reconsider its Sixth Amendment jurisprudence in light of its sentencing-related decisions of the last twenty years, and finally overturn *Almendarez-Torres v. United States*.

Mr. Whyte's life sentence presents a Sixth Amendment issue and an opportunity for this Court to address the lingering question of the continued viability of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In the past twenty-odd years, this Court has repeatedly affirmed that "only a jury, and not a judge, may find facts that increase a maximum penalty"; yet Mr. Whyte received a life sentence without the jury considering his criminal history. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). Mr. Whyte recognizes that this Court in *Mathis* (and elsewhere) has noted the Sixth Amendment exception "for the simple fact of a prior conviction," but this exception has, of course, come under attack in the last twenty years, and Mr. Whyte would point out well-recognized doubts in the continued viability of *Almendarez-Torres*, from this Court's justices and from the

circuit courts of appeals. *See, e.g.*, *id.* at 2259 (Thomas, J. concurring) (urging reconsideration of *Almendarez-Torres* and describing the exception in that case as "wrong"); *see also United States v. Torrez*, 869 F.3d 291, 309 (4th Cir. 2017) (describing "shaky ground" beneath *Almendarez-Torres* and examining this Court's expressed doubts about the continuing validity of the case).

Precedent, scholarship, and criticism speak of the necessity of readdressing the *Almendarez-Torres* conclusions and reasoning. From the defined perspective of Mr. Whyte's circumstances, an unproved prior possession offense fueled the imposition of a mandatory life sentence. This possession offense involved a 365-day sentence (imposed only after a probation violation—the original sentence involved only two years of probation and credit for 64 days of jail time); the second offense cited by the government to support the sentencing enhancement here involved a six-month sentence (imposed only after a probation violation—the original sentence involved only two years of probation).

Under the First Step Act, which the president signed into law on December 18, 2018, neither of these prior convictions would qualify as "serious drug felonies" for purposes of the new, lower sentencing enhancements. *See* First Step Act, S. 756, 115th Cong., § 401(a) (2018). Mr. Whyte would also note, with regard to any drug-quantity determinations, that the jury did not make any drug-quantity findings.

In considering Mr. Whyte's Sixth Amendment challenge, the Sixth Circuit recognized the volatility in this area of jurisprudence and pointed out that only further review by this Court can alter the jurisprudential landscape, acknowledging

that, "although some members of the Supreme Court have called *Almendarez-Torres*'s continuing vitality into question, '*Almendarez-Torres* is still good law and will remain so until the Supreme Court explicitly overrules it.'" *United States v. Whyte*, ___ Fed. App`x ___, No. 18-2139, 2019 U.S. LEXIS 33667, at *26 (6th Cir. Nov. 12, 2019). The circuit courts all tend toward statements of this sort at this juncture. *See, e.g.*, *United States v. Adams*, 756 F. App`x 884, 886 (11th Cir. 2018) ("We have repeatedly stated that we are bound by *Almendarez-Torres* 'until the Supreme Court explicitly overrules it.'" (citation omitted)).

Members of this Court have been advocating for exactly this reform—for overruling *Almendarez-Torres*—for years. Current sentencing jurisprudence from the Court reflects the need for such a decision. A "crime" includes each "fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." *Apprendi v. New Jersey*, 530 U.S.466,501 (2000) (Thomas, J., concurring). If the legislature defines some core crime and then provides for increased punishment for that crime based upon a finding of some aggravating fact ("including the fact of a prior conviction"), the core crime and the aggravating fact together constitute an aggravated offense. *Id.* This country's tradition of treating recidivism as an element of an offense when such recidivism means lengthier punishment reaches back to the country's founding. *See id.* at 506-07 (Thomas, J., concurring). In Mr. Whyte's case, the jury had to find the death element; it defies logic that this element, situated right beside the prior-conviction enhancement, should require a jury finding while the prior conviction does not. *See* 21 U.S.C. §

841(b)(1)(C) ("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 of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment").

Antebellum case law establishes clearly the tradition of charging and proving prior convictions. *See Apprendi*, 530 U.S. at 507-08 (Thomas, J., concurring) (collecting cases). In his concurrence in *Apprendi*, Justice Thomas amply established, with various citations, the "traditional understanding—that a 'crime' includes *every* fact that is by law a basis for imposing or increasing punishment," and that this tradition "continued well into the 20th century, at least until the middle of the century." *Id.* at 518 (Thomas, J., concurring) (emphasis added).

Once death and a qualifying prior conviction were established here, the mandatory life sentence was just that: mandatory. Had there been a statutory range, with the sentencing court free to exercise its discretion to craft a sentence within that range (as with the U.S. Sentencing Guidelines), no Sixth Amendment violation would have occurred. *See id.* at 519-20 (Thomas, J., concurring). Such discretion and space within the statutory sentencing range, of course, supports the advisory sentencing guidelines and their application. *See United States v. Booker*, 543 U.S. 220, 226-27 (2005).

Justices Stevens, Scalia, and Ginsburg touched on the limits of *Almendarez-Torres* in Section III of the Court's opinion in *Shepard v. United States*, 544 U.S. 13, 25-26 (2005). These three justices emphasized that, "[w]hile the disputed fact here

can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* [*v. United States*, 526 U.S. 227 (1999),] and *Apprendi,* to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Shepard*, 544 U.S. at 25. To avoid serious risks of unconstitutionality, these justices read the Armed Career Criminal Act "to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* [*v. United States*, 495 U.S. 575 (1990),] constrained judicial findings about the generic implication of a jury's verdict." *Id.* at 25-26. In his concurrence in *Shepard*, Justice Thomas pointed out that "*Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Id.* at 27 (Thomas, J., concurring).

Even very recently, these cries have continued. In his dissent in *Sessions v. Dimaya*, 138 S. Ct. 1204, (2018), Justice Thomas admonished, "The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered."

This past summer's decision in *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019), made a powerful statement in favor of such reconsideration. In opening the Court's opinion, Justices Gorsuch, Ginsburg, Sotomayor, and Kagan explained:

> Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government

> to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.

In briefly passing on *Almendarez-Torres*, these justices merely noted that the case did not implicate a prior conviction, one of the exceptions to the general rule under *Apprendi*. *Haymond*, 139 S. Ct. at 2377 n.3. In their dissent in *Haymond*, Justices Alito, Thomas, and Kavanaugh, and the Chief Justice did not need to dwell on Sixth Amendment issues (like those at hand here in Mr. Whyte's case). Rather, they found that "no reasonable person" would have described the postjudgment facts at issue in *Haymond*, facts that went "only to the administration of a previously imposed sentence," to be "'ingredients' or 'elements' of the charged offense." *Id.* at 2398-99 (Alito, J., dissenting). In this vein, they continued: "Insofar as the charged statutory offense has been part and parcel of '*Apprendi*'s core concern,' that concern 'is inapplicable to the issue at hand,' and thus, 'so too is the Sixth Amendment's restriction on judge-found facts.'" *Id.* at 2399 (Alito, J., dissenting) (citing *Oregon v. Ice*, 555 U.S. 160 (2009)).

The Sixth Amendment concerns here in Mr. Whyte's case press more heavily on this Court's jurisprudence than ever before. And even the idea of waiver or stipulation cannot undercut the necessity of addressing these issues, especially in a case like Mr. Whyte's that involves a mandatory *life* sentence. While the Sixth Circuit here acknowledged that the jury did *not* find that Mr. Whyte had committed the prior felony drug offenses that the government relied on for enhancement of Mr. Whyte's sentence, it pointed out that Mr. Whyte had stipulated to that offenses in

accordance with *Old Chief v. United States*, 519 U.S. 172 (1997). *See Whyte*, ___ Fed. App`x ___, 2019 U.S. LEXIS 33667, at *26.

The unsettled nature of the legal landscape in this context, however, makes it far from clear what a stipulation means for a defendant like Mr. Whyte. With the continuing viability of *Almendarez-Torres* looking dubious, a defendant like Mr. Whyte must raise these issues in the lower courts based on the likelihood of a change in the law and a desire to preserve the issue for future review—and review in this Court.

Yet at the same time, these defendants have little choice but to proceed according to the state of the law under *Alemendarez-Torres*. Thus, stipulations and waivers related to proving criminal history abound. Given this tension, commentators have suggested various means to protect defendants from prejudice, and methods for addressing criminal history, should this Court overturn *Alemendarez-Torres*. *See, e.g.*, Nancy J. King, *Once a Criminal . . . ?: Regulating the Use of Prior Convictions in Sentencing*, Marquette Lawyer 34 (Summer 2018). As one scholar has admonished, "courts have managed any prejudice just fine," and pointed to "stipulations to limit what the jury hears about the prior conviction," bifurcated trials, "and adjudicating the prior-conviction question only after the jury determines guilt on the other elements" as means to address the prejudice question. *Id.* Courts might also allow defendants to waive a jury for the prior-conviction element alone, or allow defendants to admit that particular element, "something like a partial plea of guilty." *Id.* This critic has reminded readers that courts have "been doing this for nearly 200 years,

ever since Connecticut first chose to adopt bifurcated findings in its habitual-offender cases in the early 1800s." *Id.*

So, courts can and do use—have at their fingertips—means to address prejudice and the Sixth Amendment jury issues. Should this Court overturn *Almendarez-Torres*, lower courts will not face Gordian knots of criminal history, prejudice, and jury determinations. They have options for protecting defendants from undue prejudice *and* preserving Sixth Amendment rights.

In the next section, Mr. Whyte will address recent developments in sentencing law that underscore the cruel and unusual nature of a mandatory life sentence in these circumstances, a life sentence for an essentially strict-liability offense. But this shift in sentencing sensibilities also further erodes the hold of *Almendarez-Torres* by demonstrating an understanding that criminal history should have less effect on sentences, as with the mitigation of recidivism enhancements in the First Step Act. The history that *is* used to support enhancements should be subject to Sixth Amendment rigors.

III. This Court should grant certiorari here to clarify that the Eighth Amendment prohibits mandatory life sentences in strict-liability circumstances such as these, where even the government's allegations showed Mr. Whyte did not distribute the lethal drugs to the decedent, did not know the decedent, and could not have known how the decedent would use the drugs or that the decedent would overdose on the drugs.

Mr. Whyte received a mandatory life sentence, with no chance of parole. He received this sentence based on a strict-liability sentencing scheme and, as discussed above, a criminal history propelled by a basic possession offense. He

received this mandatory life sentence for an offense involving *another* person's actions and mens rea, rather than his own. Even taking all the government's allegations as true, Corvin Reed delivered the lethal drugs to the decedent, not Mr. Whyte. This mandatory life sentence thus violates the Eighth Amendment's prohibition against cruel and unusual punishment.

In terms of severity, of course, Mr. Whyte's sentence is second only to the death penalty. Such a punishment must require more than a prior conviction that involved a sentence of probation and an instant offense involving an extended, attenuated chain of distribution between the defendant and the decedent.

This Court's Eighth Amendment jurisprudence somewhat shares the unsettled nature of its Sixth Amendment jurisprudence related to treatment of prior convictions and recidivism enhancements. Some of this tumult appears at the forefront in *Harmelin v. Michigan*, 501 U.S. 957, 973 (1991). In that case, the Court fractured over a mandatory life sentence (without the possibility of parole) for the offense of possessing 672 grams of cocaine. *Harmelin*, 501 U.S. at 960-61. The *Harmelin* Court traced the development of jurisprudence in this area, and the concept of proportionality analysis. *See id.* at 962-94. The history of the law in this area lends support to the idea that Mr. Whyte's mandatory life sentence here violates the Eighth Amendment. Or at least, that history militates in favor of review of this sentence and reconsideration of the law in this area.

This need for reconsideration becomes especially pronounced because the Eighth Amendment violation here comes in conjunction with the Sixth Amendment

violation and the *Almendarez-Torres* issue discussed in Section II. Historically, punishment has not been "considered objectionable because it is disproportionate," but rather, because it is out of the judge's power, "contrary to Law and ancient practice," without "'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.'" *Harmelin*, 501 U.S. at 973 (citation omitted). The phrase "cruell and unusuall" has been "treated as interchangeable with 'cruel and illegal.'" *Id.*

So while this Court has said that "we think it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid 'disproportionate' punishments," and that "[t]here is even less likelihood that proportionality of punishment was one of the traditional 'rights and privileges of Englishmen' apart from the Declaration of Rights, which happened to be included in the Eighth Amendment," the equation changes when one considers a mandatory life sentence imposed in violation of the Sixth Amendment and a defendant's jury-trial rights. *See id.* at 974.

In *Graham v. Florida*, 560 U.S. 48, 59 (2010) the Court (again quite fractured) stepped back from the *Harmelin* conclusions and affirmed that "[t]he concept of proportionality is central to the Eighth Amendment." Embodied in the Constitution's ban on cruel and unusual punishments lies the precept of justice that punishment for an offense should be graduated and proportioned to that offense. *Graham*, 560 U.S. at 59. In non-capital cases, the Court will consider the sentence imposed with regard to the circumstances of the offense. *See id.* In that context, "the

Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Id.* Using this approach, the Court has held unconstitutional a sentence of life without parole for a defendant's seventh nonviolent felony, namely the crime of passing a worthless check. *Id.*

Applying the *Graham* approach here, modern sentiments on imposition of a sentence of life without parole simply cannot countenance a sentence like the one imposed in Mr. Whyte's case, involving only allegations of an attenuated substance-distribution chain, and a lack of Sixth Amendment protections. The applicable sentencing scheme as a whole fails constitutional muster in this strict-liability context. *See id.* at 61. (Regarding proportionality and the evolution of Eighth Amendment jurisprudence, very recently, this Court confirmed that, like the Eighth Amendment's protections against cruel and unusual punishment and excessive bail, "the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority" and is fundamental to a scheme of ordered liberty, having deep roots in this country's history and tradition. *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (finding that the Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment). In *Timbs*, the Court noted that proportionality, at least in some contexts, remains a critical concern for states. As Indiana itself reported in *Timbs*, "all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by *requiring proportionality*." *Id.* at 689 (emphasis added).)

As Mr. Whyte pointed out at sentencing in the district court, and as this Court well knows, courts in other nations would not have meted out a life sentence. In Germany, France, and Italy, Mr. Whyte could not have received this sentence. *See, e.g.*, *United States v. Rivera-Ruperto*, 852 F.3d 1, 32-33 (1st Cir. 2017) (Torruella, J., dissenting) (discussing how sentences of life without parole are unconstitutional in these countries and applied "only very rarely" in other European nations).

While Mr. Whyte recognizes that "death is different" and that this Court has expressed reluctance over extending proportionality analysis far beyond the capital context, this Court has concluded that "it violates the Eighth Amendment, because of disproportionality, to impose the death penalty upon a participant in a felony that results in murder, without any inquiry into the participant's intent to kill." *See Harmelin*, 501 U.S. at 994. The same lack of inquiry into intent arises here, with a sentence just one step away from the death penalty. This "Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 69.

In considering this matter as courts of appeals are currently looking at it, it bears reiterating that recidivism enhancements and statutory directives, of course, cannot turn disproportionate, cruel, and unusual sentences into constitutionally sound sentences, especially when evolving legislation (like the First Step Act) revises these provisions to lower mandatory minimum sentences and require more

serious prior offenses for application of enhancements. Any statutory support for such sentences only means the statute is unconstitutional. This Court's review of Mr. Whyte's case would give the Court the opportunity to affirm this aspect of the law. Courts that have pointed to statutory mandates to uphold extreme and shocking sentences have failed to acknowledge their power to declare those statutory schemes unconstitutional. *See, e.g.*, *Rivera-Ruperto*, 852 F.3d at 17 (relying on statutory scheme to uphold sentence). And looking to the idea of recidivism to uphold these sentences does not change the equation: concepts of recidivism provide no stronger grounds for supporting these unconstitutional sentences than do statutory mandates. *See, e.g.*, *Rivera-Ruperto*, 852 F.3d at 17 (equating recidivism and statutory enhancements).

Regardless of concepts of recidivism, courts should, as many jurists have argued, examine a proposed mandatory life sentence in light of the offense and offender and comparable sentences and the proportionality of the proposed sentence. *See, e.g.*, *id.* at 16-17. Such an examination in Mr. Whyte's case reveals the unconstitutionality of this sentence. A mandatory life sentence, based on prior offenses that received sentences of probation and an instant offense that involved no direct connection between the defendant and the decedent, defies modern ideas of justice, as so recently demonstrated by passage of the First Step Act, which itself may not bear directly on the issues at hand but provides instructive background.

Congress, the courts, and the U.S. Sentencing Commission have participated in a sentencing "shift" of sorts in the last decade, with a recognition of the need for

sentencing reform. From the Fair Sentencing Act of 2010, to recent sentencing guideline amendments and the presumption in favor of non-custodial sentences for certain first-time offenders, to the First Step Act itself, the country has seen a marked shift in approaches to sentencing. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010); U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines* 73-76 (April 30, 2018), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf; First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

The government's argument in the Sixth Circuit that "Congress's view of drug dealers who kill has not changed" (with the government pointing out the First Step Act's lack of effect on 21 U.S.C. § 841(b)(1)(C)) rings hollow in Mr. Whyte's circumstances in that there is simply no allegation that he was a drug dealer who intended to kill. No one has argued that Mr. Whyte intended, planned, or even anticipated or foresaw the death. This Court should grant review in this case to reaffirm concepts of just punishment and proportionality.

CONCLUSION

For these reasons, Mr. Steven Craig Whyte asks this Honorable Court to grant this Petition for a Writ of Certiorari, vacate the Judgment of the Sixth Circuit Court of Appeals, and remand for further proceedings.

Respectfully submitted,
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