

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
 BIRMINGHAM DIVISION**

ROBERTO CRUZ,	)	
	)	
Petitioner,	)	
	)	CASE NO.:    CC 2003-5406.62
	)	
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**ORDER GRANTING DEFENDANT’S RULE 32 PETITION**

This matter coming before the Court pursuant to a Rule 32 petition, it is hereby ordered as follows: the defendant’s claim is due to be granted for the following reasons.

1. This Court takes judicial notice of its own records.
2. On or about August 10, 2005, the defendant was convicted of trafficking in illegal drugs (Marijuana), as charged in Count 1 of the indictment, in Case Number CC-03-5406.
3. The defendant was later sentenced to a **mandatory life without the possibility of parole.**<sup>1</sup> On or about August 18, 2006, the

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<sup>1</sup> Judge Gloria Bahakel, the undersigned Judge’s predecessor, presided over the defendant’s case.

Alabama Court of Criminal Appeals affirmed the conviction and resulting sentence. The defendant filed this Rule 32 petition with the undersigned Judge. Thereafter, the Court appointed the Public Defender's Office to assist and represent the defendant.

### **FACTS**

Cruz is 71 years old. He is serving a life without parole sentence for a drug trafficking in marijuana offense. He has served approximately 15 years and 10 months. His co-defendant, Osvaldo Reyes, the driver of the car where the marijuana was located, received a 3-year split sentence, but was soon deported prior to completing his custodial sentence.

Despite the enormity of the punishment, it appears that there were few issues seriously contested at trial. The State's case rested primarily on circumstantial evidence suggesting that since the defendant was a passenger in the vehicle and marijuana has a strong odor, then he must have known about the drugs.

In addition to this circumstantial evidence, although Reyes was unavailable to testify or be cross-examined, the trial court allowed the arresting officer to simply testify in summary fashion that Reyes admitted to

him that Cruz knew about the presence of the marijuana in the vehicle.<sup>2</sup> According to the officer, Reyes was to receive \$2,000.00 for transporting the marijuana to an individual named “Max,” and Reyes intended to pay Cruz \$500.00 for accompanying him.

Even accepting the State’s case, there was no evidence that Cruz was any more than a drug courier in this exchange. Also, relative to Reyes, who received a short custodial sentence, Cruz played a subordinate and minor role.

After a brief two-day trial, Cruz was convicted of the trafficking offense. Thereafter, with virtually no mitigating evidence offered or objection to the use of certain prior convictions from 1985, the defendant was sentenced to life without parole.<sup>3</sup> He has now been incarcerated for over 15 calendar years.

### **DEFENDANT’S CLAIM**

Cruz alleges that the Court was without jurisdiction to impose any life sentence in this matter, particularly life without parole. He claims that at the time of his sentencing, he had only one qualifying prior felony for purposes of sentencing under the Alabama Habitual Felony Offender

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<sup>2</sup> The statement was neither recorded or written and as noted Reyes was unavailable to testify or be cross-examined.

<sup>3</sup> Again, Judge Gloria Bahakel, the undersigned Judge’s predecessor, presided over the defendant’s cases.

Sentencing Act. This Court agrees that the original sentencing judge mistakenly held that Cruz had three prior qualifying felony convictions, thus subjecting him to a mandatory life or life without parole sentence. The trial court did not have the discretion to then elect to sentence the defendant to a life without parole sentence.

Although the record is not entirely clear, it appears that the trial court relied on three felony convictions arising from a Federal multi-count indictment—N.D. GA 1:85-cr-108. On or about 1985, Cruz was convicted of the following felonies stemming from a single indictment and course of conduct: one count of possession with the intent to distribute a controlled substance, one count of conspiracy to distribute a controlled substance and one count of carrying a firearm during or in relation to a drug trafficking offense in violation of § 18 U.S.C. 924 (c).

Despite no objection being made at the sentencing hearing to the use of these felonies, none of these convictions qualify for sentencing enhancements under the Alabama Habitual Offender Sentencing Act. First, neither of Cruz's two felony drug offenses from 1985 count as enhancements, as the Habitual Felony Offender Act did not apply to drug convictions prior to October 21, 1987. See, Dobbins v. State, 716 So. 2d 231 (Ala. Crim. App. 1997).

Similarly, Cruz's conviction for carrying a firearm during a drug offense does not qualify as an enhancement under the HFOA. "As long as there is a state counterpart for a federal crime, federal offense may be used for purposes of habitual felony offender statute." Gwynne v. State, 499 So. 2d 802 (Ala. Crim. App. 1986). There is no state counterpart felony for carrying a firearm during a drug crime.<sup>4</sup>

At the time of Cruz's conviction, he had only one qualifying previous felony, a 1994 federal drug conviction. Therefore, pursuant to the Habitual Felony Offender Act, Cruz's sentencing range in this matter should have been 15 to 99 years. Section 13A-5-9(a) (Ala. Code 1975). Thus, Cruz's life without parole sentence was unlawfully imposed, since it exceeded the maximum allowed by law. Al. R. Crim. P. 32.1(b) and (c)

This Court therefore finds that Cruz's petition is timely and he has otherwise shown that both good cause exists for raising this issue now, and that the failure to entertain said petition would be a miscarriage of justice. The Court also finds that the claims raised in this petition are distinguishable from those previously brought in his direct appeal and original petition.

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<sup>4</sup> Alabama does have a firearm enhancement for certain felonies, but there is no stand-alone statute.

Although this petition is decided on separate grounds as outlined above, defendant's life without parole sentence also raises important Eighth Amendment concerns. The prohibition against cruel and unusual punishment guarantees defendants the right not to be subjected to excessive penalties disproportionate to the crimes for which they were convicted.<sup>5</sup> This concept of proportionality is central to the Eighth Amendment and provides further context to this case and resulting sentence.<sup>6</sup>

Importantly for Cruz's case, the constitutional understanding of what penalties are proportionate to the crime charged may evolve over time, as society matures and progresses.<sup>7</sup> In other words, a penalty that was once deemed proportionate – and therefore constitutional – may, as society changes, later be deemed unconstitutional.<sup>8</sup> Regardless, this Court can contemplate few occasions where imposing a life without parole sentence for a non-violent marijuana possession or trafficking offense seems reasonable or proportionate.

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<sup>5</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

<sup>6</sup> *Ex parte Henderson*, 144 So.3d 1262, 1266 (Ala. 2013) (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)); see also *Solem v. Helm*, 463 U.S. 277, 284-90 (1983).

<sup>7</sup> See *Ex parte Henderson*, 144 So.3d at 1266.

<sup>8</sup> *Id.*; see also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (noting that the Eighth Amendment is more concerned with current societal mores than historical prisms).

In considering whether a sentence is disproportionate to the crimes for which it was imposed, the Supreme Court has suggested that courts consider three factors: 1) the seriousness of the crime and the punishment, (2) other sentences issued within the jurisdiction, and (3) sentences issued for the offense outside the jurisdiction.<sup>9</sup> Here, all three factors weigh in favor of a finding that Cruz's life without parole sentence is disproportionate to the crimes for which he was convicted.

As to the first two Helm factors, while Alabama once viewed life without parole penalties appropriate for drug trafficking crimes, it no longer does based solely on the weight of the drugs involved. Until the 2018 amendments were passed, life without parole had previously been the harshest sentence available for trafficking all twelve categories of drugs delineated in § 13A-12-231. In wholly removing life without parole from every subsection of the trafficking sentencing scheme, the Alabama legislature has demonstrated an unwillingness to see even the most egregious drug offenders sentenced to die in prison.

Bennett Wright, the Executive Director with the Alabama Sentencing Commission, also provided the Court with statistics for those persons

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<sup>9</sup> *Solem*, 463 U.S. at 290-92 (noting that courts "may" consider these factors, but not requiring courts to constrain themselves to these factors).

serving life without parole sentences in Alabama. Approximately 1,530 inmates are serving a life without parole sentence in Alabama. Most of these offenders are serving non-parolable sentences for capital murder (742), non-capital murder (256), robbery first degree (255), and rape first degree (111). More disturbing, Cruz is one of only four individuals in Alabama serving a life without parole sentence for a marijuana trafficking offense.

<b>Alabama Department of Corrections: Inmates as of October 2018 Life Without Paroles Sentences</b>	
<b>Offense</b>	<b># of Inmates</b>
Capital-Murder	742
Murder	256
Robbery 1 <sup>st</sup> Degree	255
Rape 1 <sup>st</sup> Degree	111
Burglary 1 <sup>st</sup> Degree	51
Kidnapping 1 <sup>st</sup> Degree	41
Sodomy 1 <sup>st</sup> Degree	30
Attempted Murder	15
Trafficking-Cocaine	14



Trafficking-Marijuana	4
Arson 1 <sup>st</sup> Degree	3
Manufacturing Contr. Sub.	2
Domestic Violence 1 <sup>st</sup> Degree	2
Conspiracy-Murder	1
Trafficking-Hydromorphone	1
Trafficking-Opium	1
<b><u>TOTAL</u></b>	<b>1,530</b>

Finally, even the third factor – sentences for similar offenses in other jurisdictions – favors Cruz. Nationwide, there is a growing consensus that life without parole sentences for drug trafficking convictions are excessive and disproportionate.

One example of this is the First Step Act, a proposed congressional bill co-sponsored by Alabama Senator Doug Jones and supported by a bipartisan coalition and the President. Among other reforms, the First Step Act would replace life without parole sentences for third-offense felony drug trafficking convictions with a 25-year sentence and would allow prisoners sentenced prior to the Fair Sentencing Act (which adjusted the disparity in

sentences between crack and powder cocaine) to retroactively apply for resentencing.<sup>10</sup>

Moreover, the recreational use of cannabis is now legalized in 11 states (Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington).<sup>11</sup> Another 16 states and the U.S. Virgin Islands have decriminalized marijuana. Commercial distribution of cannabis is allowed in all jurisdictions where it has been legalized, except for Vermont and the District of Columbia.

This Court also researched corresponding trafficking statutes from neighboring states. As noted, in Alabama, trafficking marijuana is a Class A felony with a weight threshold of at least 2.2 pounds or greater and a punishment of 10 years to 99 years or life. Ala Code § 13A-12-231(1)(a).

In contrast, in Florida, the marijuana trafficking threshold amount is 25 pounds or greater with a mandatory minimum sentence of three years. Florida Statute § 893.135. Trafficking in this context is considered a felony of the first degree with a term to not otherwise exceed 30 years. Florida Statute § 775.082.

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<sup>10</sup> See, e.g., COMMITTEE ON THE JUDICIARY, FACT SHEET: THE REVISED FIRST STEP ACT OF 2018 (S.3649) (2018), available at <https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20-%20First%20Step%20Act%20Summary.pdf>.

<sup>11</sup> "[MARIJUANA OVERVIEW](#)". National Conference of State Legislatures. Retrieved December 31, 2017.

Interestingly and even more in stark contrast, in Tennessee, there is no corresponding marijuana trafficking statute or required mandatory minimum sentence. Instead, possessing with intent to distribute one-half ounce nor more than ten pounds is a Class E felony - with a punishment of not less than 1 year and not more than 6 years.<sup>12</sup> Tenn. Code §§ 39-17-417 (g)(1); and 40-35-111(b)(5). The next category for possessing not less than 10 pounds nor more than 70 pounds of marijuana is a Class D felony - with punishment not less than 2 years and not more than 12 years. Id.

Finally, Georgia's trafficking statute rests in between both Florida and Tennessee in weight and severity of punishment. In Georgia, the marijuana trafficking threshold amount is 10 pounds, but less than 2,000 pounds or greater - with a sentencing range of 5 years to 30 years. Georgia Statute § 16-13-31.

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<sup>12</sup> A Class E felony represents Tennessee's least serious felony category.

<b>STATE</b>	<b>Minimum Weight Thresholds for Marijuana Trafficking Offenses</b>	<b>Range of Punishment</b>
Alabama	> 2.2 pounds	10 years to no more than 99 years or life
Georgia	> 10 pounds	5 years to 30 years
Florida	> 25 pounds	3 to 30 years
Tennessee	No Trafficking statute; ½ ounce to 10 pounds >10 to 70 pounds	1 year to 6 years 2 years to 12 years

Compared with these neighboring states, Alabama's statute has the lowest trafficking weight threshold accompanied by a far lengthier and severe range of punishment.

After considering all filings, Cruz's petition is granted, as the original sentencing court mistakenly enhanced his sentence using 3 prior felony convictions and thus subjecting him to a life without parole sentence. Although decided on separate grounds, this case also offers a compelling argument of a potential Eighth Amendment violation for cruel and unusual punishment.

Regardless, the defendant is re-sentenced under the correct sentencing range for a term of 15 years and 10 months or time served.<sup>13</sup> Clerk is directed to send an updated transcript to DOC Central Records reflecting that the sentence in count one is amended to a term of 15 years and 10 months.

In consideration of the above and foregoing finding, **IT IS ORDERED, ADJUDGED and DECREED** as follows:

1. The Amended and Unopposed Rule 32 Petition, filed by Defendant, is granted.
2. The Clerk is ordered to forward copies of this Order to the defendant in DOC custody and District Attorney Danny Carr by AlaFile.
3. The Clerk is to send revised transcripts to DOC Central Records.

**Ordered this the 7<sup>th</sup> day of May, 2020.**

**s/ Stephen C. Wallace**  
**Circuit Judge**  
**Stephen C. Wallace**

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<sup>13</sup> A separate sentencing order will be entered.