THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JEFFREY DAVIS,

APPELLANT

APPELLATE CASE NO. 2013-002617

Appeal from York County

Lee S. Alford, Circuit Court Judge

Opinion No. 2016-UP-193

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on May 11, 2016. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant Davis raised one issue on appeal: the trial court erred in failing to find that imposing the mandatory life without parole sentence on Appellant Davis violated the Eighth

Amendment's prohibition against cruel and unusual punishment because his three serious strikes were drug offenses.

This Court affirmed Davis' conviction and sentence citing Harmelin v. Michigan, 501 U.S. 957 (1991), for the proposition that the Eighth Amendment does not require strict proportionality between the crime and sentence. This Court also cited State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008) which held that the South Carolina courts have determined that stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment. This Court also cited Williams: "The United States Supreme Court has also held that a state is justified in punishing a recidivist more severely than it does a first offender."

Respectfully, this Court misapprehended this issue.

The Eighth Amendment to the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. XIII. In State v. Harrison, 402 S.C. 288, 741 S.E.2d 727 (2013), the South Carolina Supreme Court outlined the procedure to follow in analyzing proportionality under the Eighth Amendment outside the capital context. The Court relied on the articulation of proportionality as discussed in Solem v. Helm, 463 U.S. 277 (1983) and in Harmelin v. Michigan, 501 U.S. 957 (1991).

In Solem v. Helm, Id., the United States Supreme Court designated three "objective" factors to "guide courts in reviewing the proportionality of sentences under the Eighth Amendment." The courts should first consider the gravity of the offense and the harshness of the offense. Second, the courts should compare the sentence to sentences imposed on other criminals in the same jurisdiction. If more serious crimes carry the same sentence, or less serious sentences, that would be "some indication" that the punishment may be excessive. As the third factor, courts should compare the sentences imposed for the same crime in other jurisdictions.

In Harmelin v. Michigan, *supra,* the United States Supreme Court held that the Eighth Amendment contained no proportionality review. The defendant in Harmelin was convicted of possession of more than 650 grams of cocaine and was sentenced to LWOP. However, in his concurrence in Hamelin v. Michigan, *supra,* Justice Kennedy wrote:

> The Eighth Amendment does not require strict proportionality between the crime and sentence. Rather it forbids only extreme sentences that are "grossly disproportionate" to the crime.

In State v. Harrison, *supra,* the South Carolina Supreme Court held that Justice Kennedy's concurrence was the controlling law of Harmelin v. Michigan, *supra.* The Court then provided the three factor test to analyze proportionality under the Eighth Amendment in non-capital cases. First, the court shall determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality. If not, the analysis ends. If such an inference does occur, then the court looks to whether more serious crimes carry the same penalty or more serious penalties. Then the court looks at the sentences for the same crime in other jurisdictions. The court cited Harmelin, 501 U.S. at 1005, which read: "The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither eviscerates Solem nor abandons the second and third factors."

In applying these three factors to Davis' case, his sentence was grossly disproportionate to the crime. Davis, who was forty-five at the time of trial, had been a drug addict since he was a teenager as he was a lifetime resident of the valley area in York. Davis told the court that he had never physically hurt anyone as he was not a drug dealer. His attorney said Davis had nothing violent on his record other than the drug offenses. Davis could not hold a job because of his addiction. He obtained the .25 grams of crack for the CI Jennings because they had done drugs together for a year, and she was a friend. He was not a big time dealer as he had none of the nice

addiction. He obtained the .25 grams of crack for the CI Jennings because they had done drugs together for a year, and she was a friend. He was not a big time dealer as he had none of the nice things a real drug dealer possessed. His convictions for which he was being sentenced to life were selling near a school a dozen years before the instant offense; trafficking powder cocaine-not crack twenty-one years ago; and selling a small amount to a friend, Shari Jennings. The .25 Davis sold is not the 650 grams of Harmelin. R. 21, ll. 19 - R. 37, ll. 21.

In looking at other crimes in South Carolina as the second factor, murder carries a sentence of thirty years to life in prison. This a more serious crime for which a person could get less or the same as Davis. S.C. Code Section 16-3-20. The crime of voluntary manslaughter, where a person is killed, carries a maximum sentence of thirty years. S.C. Code Section 16-3-50. Homicide by child abuse has a sentence of twenty years to life. S.C. Code Section 16-3-85. Burglary first degree which involves entering the sanctuary of a person's home at night or armed with a deadly weapon has a sentence of fifteen years to life in prison without parole. S.C. Code Section 16-11-311.

These crimes indicate that more serious crimes where a life is taken or a person's home is invaded in a dangerous manner can carry a significantly lesser sentence or the same sentence as Davis' drug crimes which are not large trafficking cases.

In considering the third factor for the same crime in other jurisdictions, the first study of people serving LWOP for nonviolent offenses in the United States by the American Civil Liberties Union (ACLU) was reviewed. The results of this study were that seventy-nine percent of the 3278 prisoners identified were convicted of drug crimes such as distribution or possession. Twenty percent were for property crimes as theft. Sixty-three percent of the 3278 prisoners were convicted of federal crimes. However, nine states were found to have prisoners serving LWOP for nonviolent crimes mostly drug offenses. These were as follows: Louisana (429); Florida (270); Alabama

(244); Mississippi (93); South Carolina (88); Oklahoma (49); Georgia (20); Illinois (10); and Missouri(1). Only nine states of the fifty have LWOP for lesser drug offenses. See More than 3200 Serving Life Without Parole for Nonviolent Offenses, at www.aclu.org/criminal law.

In Robinson v. California, 370 U.S. 660 (1962), Robinson violated a California statute which made it an offense for a person to be addicted to the use of narcotics, and was sentenced to ninety days imprisonment. The United States Supreme Court held that the this state law which required a sentence of ninety days inflicted cruel and unusual punishment in violation of the Fourteenth Amendment. The Court wrote that they were not "unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government." The Court continued that "there were countless fronts on which those evils may be legitimately attacked."

The trial judge in the instant case also relied on the case of State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008), where the Court of Appeals held that the sentence of LWOP was not cruel and unusual punishment for Williams' three drug offenses. R. 146, ll. 1 – 25. The Court of Appeals wrote that what constituted cruel and unusual punishment as a violation of the Eighth Amendment was determined by "evolving standards of decency that mark the progress of a maturing society." The Court of Appeals relied on State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002) where the South Carolina Supreme Court held that lengthy sentences as LWOP imposed upon juveniles did not violate the contemporary standards of decency so as to constitute cruel and unusual punishment.

However, Williams, *supra,* is distinguished because of Graham v. Florida, 560 U.S. 49 (2010) which was decided two years after Williams. The United States Supreme Court held in Graham v. Florida, *supra,* that the Eighth Amendment prohibited the imposition of LWOP on a juvenile offender who did not commit homicide.

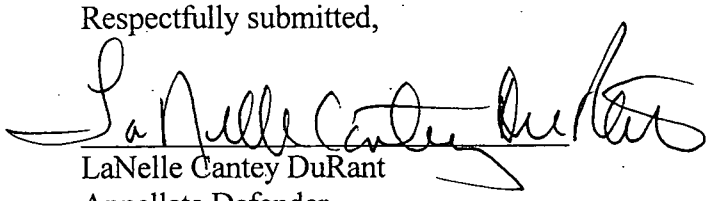
This ruling in Graham would indicate that society is maturing and the law is evolving. In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that mandatory imposition of life without parole sentences on juveniles constituted cruel and unusual punishment. The South Carolina Supreme Court held in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), that Miller v. Alabama, *supra,* announced a new substantive constitutional rule, and therefore could be applied retroactively.

These evolving standards of society would indicate that true drug addicts may now be punished/treated in a different manner than LWOP as in cases like Davis. Based on this apparent evolving standard of decency and law, and the fact that the LWOP sentence in Davis' case was grossly disproportionate to the drug offenses Davis had, his case should be remanded for resentencing.

South Carolina Code Section 17-25-45 (G) provides that the decision to invoke sentencing under this section is in the discretion of the solicitor. This makes LWOP a very subjective decision by one person over which trial courts have no discretion. As indicated above, more severe offense such as murder can have a lesser sentence than Davis. LWOP for Davis' drug convictions was "grossly disproportionate" to the crimes. For a recidivist to be more severely punished is already built into the legal system with harsher sentences such as twenty-five or thirty years for enhancement crimes. However, LWOP for just drug offenses is cruel and unusual punishment in violation of the Eighth Amendment.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Davis' case for resentencing.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 23rd day of May, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jeffrey Davis, #271810, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 23rd day of May, 2016.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day of May, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.