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Hart V. Coiner: Mandatory Life Sentence Pursuant To The West Virginia Recidivist Statute Held Cruel And Unusual Punishment

Finally, courts should simply not admit prior-crimes evidence that fails to meet the requirements of the balancing test. *Woods* provides a good example: the evidence concerning the children who most likely died of diptheria, malnutrition or pneumonia should not have been admitted because it was less conclusive of the defendant's guilt than it was prejudicial. Nevertheless, the majority approved the admission of that evidence, which had increased rather than decreased the likelihood of prejudice at the trial level. While it is difficult to determine the specific effect which that evidence had on the jury, "there is a reasonable possibility that [improper evidence] contributed to the conviction,"[62] and therefore Judge Widener may have been correct in his conclusion that the trial court conviction should have been reversed.[63]

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HART V. COINER: MANDATORY LIFE SENTENCE PURSUANT TO THE WEST VIRGINIA RECIDIVIST STATUTE HELD CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] It has always been assumed that these words prohibit the imposition of barbaric or torturous punishments.[2] While not a clearly defined constitutional principle, it has also been recognized that the amendment applies to punishments which are grossly disproportionate to the underlying offenses.[3] In the recent case of *Hart v. Coiner*,[4] the Fourth Circuit Court of Appeals applied this latter view of the eighth amendment to invalidate a sentence imposed pursuant to the West Virginia recidivist statute.[5]

[62]484 F.2d at 145, *quoting*, Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

[63]Judge Widener's conclusion was based on the assumption that *none* of the prior-crimes evidence should have been admitted. 484 F.2d at 139.

[1]U.S. CONST. amend. VIII.

[2]Furman v. Georgia, 408 U.S. 238, 244-45 (1972) (Douglas, J., concurring); Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

[3]See text accompanying notes 16-30 *infra*.

[4]483 F.2d 136 (4th Cir. 1973).

[5]WEST VA. CODE ANN. § 61-11-18 (1966) provides:

The significance of the Fourth Circuit's decision in *Hart* is twofold. First, the Fourth Circuit struck down a mandatory sentence under a constitutionally valid statute[6] as violative of the eighth amendment; and second, in reaching this result, the court laid down explicit guidelines to be used in determining whether a given sentence is unconstitutionally excessive in relation to the underlying offenses. The *Hart* decision will inevitably affect future application of the West Virginia recidivist statute because the trial courts will now be required, despite explicit legislative intent, to consider the offenses underlying the statute's application to determine whether the mandatory life sentence is disproportionate and therefore invalid. The ramifications of the decision may also carry over to the application of other recidivist statutes with mandatory sentencing provisions.

Hart came before the Fourth Circuit on appeal from a denial by the United States District Court for the Northern District of West Virginia of a petition for a writ of habeas corpus.[7] Dewey Hart had been sentenced under the West Virginia recidivist statute to life imprisonment in the state penitentiary. The basis of Hart's petition was that the mandatory life sentence, as applied to him, was so disproportionate to the offenses underlying the application of the statute that it violated the eighth amendment's prohibition against cruel and unusual punishments.[8] Hart asserted in the alternative that, even if the court found his sentence valid against his eighth amendment challenge, the sentence should be struck down because he had been denied effective assistance of counsel during one of his previous convictions.[9] If there had been ineffective assistance, that conviction

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> When any person is convicted of an offense and is subject to confinement in the penitentiary therefor, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person had been before convicted in the United States of a crime punishable by imprisonment in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, five years shall be added to the maximum term of imprisonment otherwise provided for under such sentence.
>
> When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by a confinement in a penitentiary, the person *shall* be sentenced to be confined in the penitentiary for life.

(emphasis added).

[6]See note 31 *infra*.

[7]Hart v. Coiner, No. C-70-78-E (N.D. W.Va., Sept. 15, 1972).

[8]483 F.2d at 139.

[9]*Id.* at 138 n.2.

would be void for purposes of applying the recidivist statute.[10]

The three offenses on which the application of the recidivist statute to Hart had been based were a conviction in 1949 for writing a check for $50 on insufficient funds, a 1955 conviction for transporting two forged checks totaling $140 across state lines, and a conviction in 1968 for perjury at the murder trial of his son.[11] The Fourth Circuit reversed the district court's denial of the petition and summarized its decision: "[T]he West Virginia recidivist statute's mandatory life sentence is *so disproportionate* to the seriousness of the underlying offenses, and *so grossly excessive* that it amounts to cruel and unusual punishment forbidden by the eighth amendment."[12]

The majority decided that Hart had received effective assistance of counsel and therefore predicated its decision on the petitioner's first asserted ground for relief, which required an analysis based on the eighth amendment.[13] However, the minority questioned the propriety of reaching this constitutional issue, and argued that the majority's reliance on the eighth amendment was both unsupportable and unnecessary.[14] While reaching the same conclusion as had the majority, the minority would have based its decision on the alterna-

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[10]See text accompanying notes 59-61 *infra*.

[11]483 F.2d at 138. Section 61-3-39 of the West Virginia Code provides the punishment for writing a check for fifty dollars or more on insufficient funds to be not less than one nor more than five years and a fine of not more than $1,000.

Title 18 U.S.C. § 2314 provides the penalty for transporting forged checks in interstate commerce to be a fine of not more than $10,000 or imprisonment for not more than ten years, or both.

Section 61-5-3 of the West Virginia Code provides the punishment for perjury to be not less than one nor more than ten years.

[12]483 F.2d at 138 (emphasis added).

[13]For a historical development of the prohibition against cruel and unusual punishments see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969). *See also* Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846 (1961).

[14]483 F.2d at 145. While the dissenting judge, Senior Circuit Judge Boreman, stated that the decision was unsupportable he gave little indication of why he came to that conclusion. He said only, "I think my brothers will concede that there is a paucity of authority bearing upon the Eighth Amendment and that its application to the severeity of prison sentences has never definitely and conclusively been determined." *Id.* at 149.

It would seem that Judge Boreman questioned whether the mandatory sentence was subject to eighth amendment attack because the West Virginia recidivist statute and the sentence it imposed had been held constitutional by the Supreme Court. *Id.* at 147. See note 31 *infra*. The dissent believed the decision in *Hart* "effectively devitalized" the statute and left too many questions unanswered. 483 F.2d at 149.

tive ground that Hart had been denied effective assistance of counsel during one of his prior convictions. As the dissent emphasized, deciding the case on this rationale would have avoided a direct confrontation between the state statute and the Federal Constitution.[15]

In analyzing the Fourth Circuit's decision, it is necessary to determine whether the eighth amendment actually prohibits punishments which are disproportionate in relation to the underlying offenses. While it is clear that, at a minimum, the eighth amendment prohibits the infliction of inhuman and barbarous punishments,[16] the question of whether it also applies to excessive or disproportionate sentences has never been conclusively decided by the Supreme Court. The argument that there was such an application was first articulated by Mr. Justice Field's dissenting opinion in *O'Neil v. Vermont*:[17]

> The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severeity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.[18]

The issue was not discussed by the Supreme Court again until 1910 in *Weems v. United States*.[19] Weems had been convicted under the laws of the Philippine Islands for falsifying a public document. For this offense he was sentenced to fifteen years of *cadena temporal*, which provided for hard and painful labor with chains at the ankles and wrists, plus certain accessory penalties. The accessory penalties included civil interdiction, perpetual absolute disqualification from voting and holding public office, and subjection to life long surveillance.[20] The Court found that the statute imposed a sentence which was cruel and unusual. Its decision was based on the conclusion that the punishment was excessive in relation to the offense committed. In speaking of the punishment the Court said, "[i]t is cruel in its excess of imprisonment and that which accompanies and follows im-

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[15]See text accompanying note 57 *infra*.

[16]See note 2 *supra*.

[17]144 U.S. 323 (1892).

[18]*Id.* at 339-40. In *O'Neil* the majority did not deal with the eighth amendment issue because it had not been assigned as error and because it was, then, believed that the provisions of the amendment did not apply to the states. In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held that the eighth amendment was applicable to the states through the fourteenth amendment.

[19]217 U.S. 349 (1910).

[20]*Id.* at 364.

prisonment."[21] It was considiered significant that the statute appeared "to be independent of degrees."[22] In other words, even though the statute provided sentences of three different lengths, the minimum sentence of twelve years was imposed regardless of the culpability of the offender, the monetary gain received, or the injury inflicted.[23]

In a recent case, *Furman v. Georgia*,[24] the Supreme Court elaborated on its conceptualization of the eighth amendment. In that case all nine justices wrote separate opinions, so that the exact scope of the decision is difficult to determine. However, the per curiam opinion stated, "[t]he Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[25] The various concurring opinions, which all reached the conclusion that the death sentence as applied was cruel and unusual, were based on such diverse considerations as substantive due process,[26] equal protection,[27] and disproportionality.[28] The opinions of Mr. Justice Marshall and Mr. Justice Brennan considered the death penalty strictly in terms of the eighth amendment and clearly espoused the proposition that the amendment prohibits disproportionate sentences.[29] Thus, while some judges and commentators may still question whether the eighth amendment prohibits excessive or disproportionate punishments,[30] it appears that the Fourth Circuit in *Hart* had ample legal precedent for its interpretation of the amendment.

Even though the eighth amendment may be construed to prohibit excessive or disproportionate sentences, further inquiry must be made to determine whether such an interpretation of the amendment

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[21] *Id.* at 377.

[22] *Id.* at 365. The Court noted:

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

Id. at 366-67.

[23] *Id.* at 365.

[24] 408 U.S. 238 (1972).

[25] *Id.* at 239-40; *accord*, Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970).

[26] 408 U.S. at 310-14 (White, J., concurring).

[27] *Id.* at 240-57 (Douglas, J., concurring).

[28] *Id.* at 257-306 (Brennan, J., concurring); *Id.* at 314-74 (Marshall, J., concurring).

[29] See note 28 *supra*.

[30] *See* 408 U.S. at 375-405 (Bruger, C.J., dissenting). *See also* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964).

was properly applied by the Fourth Circuit to the facts in *Hart*. A careful consideration of the facts is crucial since Hart did *not* attack the constitutionality of the statute, but only its application in his particular case. The West Virginia recidivist statute had twice been upheld by the Supreme Court against a number of constitutional attacks, including a charge that the mandatory sentence imposed by the statute was cruel and unusual *per se*.[31] Nevertheless, the Fourth Circuit took the position that the constitutionality of the statute on its face did not preclude an inquiry to determine whether the punishment imposed on Hart was violative of the eighth amendment.[32] The court summarized this distinction when it said: "We are not precluded from deciding this issue, we think, by the fact that the West Virginia recidivist scheme is constitutional as written, for a concededly valid statute may be applied *in a particular case* in such a way as to violate various constitutional provisions."[33]

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[31]Oyler v. Boyles, 368 U.S. 448 (1962); Graham v. West Virginia, 224 U.S. 616 (1912).

In *Graham* the statute was attacked for violating the due process, equal protection, privileges and immunities, double jeopardy, and cruel and unusual punishments clauses and was upheld. On the subject of cruel and unusual punishment the Court merely said, "[n]or can it be maintained that cruel and unusual punishment has been inflicted." *Id.* at 631.

In *Oyler* the statute was sustained against due process and equal protection attacks. The petitioner claimed that the statute was being applied in an unconstitutional manner because it was not applied to all who were subject to the law. 368 U.S. at 454-56. *See also* Brown, *West Virginia Habitual Criminal Law*, 59 W. VA. L. REV. 30, 37 (1956). However, the Court held that since petitioner had not stated why the statute had not been invoked against all those subject to it, nor had shown selection based on any unjustifiable standard, that no grounds establishing a denial of equal protection had been alleged. 368 U.S. 454-56.

For cases upholding recidivist statutes *see, e.g.*, Spencer v. Texas, 385 U.S. 554 (1967); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). For a detailed discussion of recidivist statutes see Comment, *Recidivism: The Treatment of the Habitual Offender*, 7 U. RICH. L. REV. 525 (1973).

[32]483 F.2d at 139.

[33]*Id.* (emphasis in original).

The court cited three cases in support of its statement that a statute valid on its face can be applied in an unconstitutional manner. The cases are: Brown v. Louisiana, 383 U.S. 131 (1966); Edwards v. South Carolina, 372 U.S. 229 (1963); and Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In *Yick Wo* the Supreme Court invalidated a municipal ordinance which gave the board of supervisors of San Francisco discretion in granting or withholding permission to use wooden buildings as laundries. The Court noted that even if a law is valid on its face it may be applied so as to result in a denial of equal protection. 118 U.S. at 373-74.

The Court reached a similar result in *Edwards*. It found that in arresting, convicting, and punishing the petitioners for the common law crime of breach of peace, under

By stating the proposition in this manner the court was arguably approving unlimited judicial intrusion into the legislative function. When a court declares unconstitutional a sentence which falls within the limits set by the legislature, the court is, in effect, overriding the express power of the legislature to define crimes and provide for their punishment.[34] While some judicial control over these legislative prerogatives is, of course, necessary if the provisions of the Federal Constitution are to be anything other than advisory, the Supreme Court has yet to provide meaningful standards to be applied by the judiciary in measuring the constitutionality of a particular sentence. However, the courts are conscious of the tremendous power the eighth amendment gives the judiciary and have generally exercised that power only in cases where the sentence involved was "clearly and manifestly cruel and unusual."[35] The Supreme Court noted in *Weems*:

> [P]rominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such

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the circumstances disclosed by the record, South Carolina had infringed the petitioners' constitutional rights. 372 U.S. at 235.

Language used by the Supreme Court in *Brown* is noteworthy. Petitioners were convicted for violating a breach of the peace statute for congregating in a public room of a segregated library. The Court said:

> Accordingly, even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case.

383 U.S. at 142.

A recent case lends strong support to the Fourth Circuit's decision in *Hart*. In Moore v. Coiner, 303 F. Supp. 185 (N.D. W.Va. 1969), the court voided a sentence pursuant to a recidivist proceeding on the ground that the application of the statute in that particular case did not satisfy the purpose of the recidivist statute.

For cases declaring sentences to be cruel and unusual *see, e.g.*, Goss v. Boman, 337 F.2d 341 (6th Cir. 1964); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd.*, 442 F.2d 304 (8th Cir. 1971); Faulkner v. State, 445 P.2d 815 (Alas. 1968); Stephens v. State, 73 Okla. Crim. 349, 121 P.2d 326 (Crim. Ct. App. 1942); Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).

[34]See text accompanying notes 35-36 *infra*.

[35]Schultz v. Zerbst, 73 F.2d 668, 670 (10th Cir. 1934).

> [a] case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked.[36]

Thus, before declaring a punishment violative of the eighth amendment, a court should be convinced that the sentence is so grossly excessive that it has the duty to interfere and enforce the constitutional prohibition.

Therefore, it appears that in order to determine whether a given sentence is grossly disproportionate to the underlying offense, a court should apply a set of carefully delineated standards in order to guard against an improper incursion into the legislative function. While such standards have never been formally provided by the Supreme Court, the concurring opinions of Mr. Justice Marshall and Mr. Justice Brennan in *Furman* do give detailed presentations of standards which can be used to determine whether a given punishment is cruel and unusual.[37] However, these opinions indicate only that a punishment which is grossly disproportionate would be cruel and unusual; they do not provide a framework to be used in determining whether a punishment is grossly disproportionate.

The second significant aspect of the *Hart* decision is that the Fourth Circuit set forth guidelines to be considered cumulatively to test whether a punishment is so grossly disproportionate to the underlying offense that it is cruel and unusual. The factors set forth by the court were: (1) the nature of the offense itself;[38] (2) the legislative purpose behind the punishment;[39] (3) comparison with punishments for the same crime in other jurisdictions;[40] and, (4) comparison with

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[36]217 U.S. at 378.

[37]In *Furman* Mr. Justice Brennan enunciated four principles which, considered cumulatively, provide a test by which a court can judge whether a given punishment is cruel and unusual: (1) a punishment must not be so severe as to be degrading to the dignity of human beings; (2) the State may not arbitrarily inflict a severe punishment; (3) a severe punishment must not be unacceptable to contemporary society; and, (4) *a severe punishment must not be excessive*. 408 U.S. at 274-79.

Mr. Justice Marshall also enumerated four "standards for decision" which were similar to the principles enunciated by Mr. Justice Brennan. Justice Marshall's standards for decision provide that a punishment is cruel and unusual: (1) which involves so much physical pain and suffering that civilized people cannot tolerate it; (2) which is unusual, meaning it was previously unknown as a penalty for a given offense (if such a punishment is intended to serve a humane purpose it may be permissible); (3) *which is excessive and serves no valid legislative purpose*; (4) which is not excessive and serves a valid legislative purpose, but which popular sentiment abhors. 408 U.S. at 330-32.

[38]483 F.2d at 140; Trop v. Dulles, 356 U.S. 81, 101 (1958).

[39]483 F.2d at 141. Legislative purpose was considered by Mr. Justice Marshall in *Furman*. See note 37 *supra*.

[40]483 F.2d at 141. *See also* Trop v. Dulles, 356 U.S. 81, 102 (1958).

punishments available in the same jurisdiction for other offenses.[41] The court analyzed these criteria and determined that the sentence imposed on Hart violated the eighth amendment.

The first factor focuses on the punishment in light of the nature of the offense. The court found it significant that none of Hart's convictions was for a crime which involved violence or danger to any person. The court also closely analyzed Hart's 1949 conviction and noted that it was "very nearly trivial."[42] According to the West Virginia Code,[43] the offense of passing a bad check for less than $50 is punishable by confinement in the county jail and not the penitentiary. Thus, if Hart's check had been for one penny less, the conviction could not have been used in the recidivist proceeding. The court also noted that, while Hart's conviction for perjury was more serious than the bad check convictions, the perjury offense occurred at the murder trial of his son, which forced Hart "to choose between his duty to tell the truth and family loyalty."[44]

After application of the first of its four factors to the facts in *Hart*, the Fourth Circuit then examined the legislative purpose of the West Virginia recidivist statute under which Hart had been sentenced. The primary question in regard to the purpose of the statute was the extent to which a sentence must serve a valid legislative purpose. The approach taken by Mr. Justice Brennan in *Furman* seems reasonable: "Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment."[45] The majority in *Hart* followed this approach. The Supreme Court of Appeals of West Virginia has found the purpose of the statute to be the protection of society from habitual criminals,[46] and the deterrence of criminals from future violations.[47] The sentence of life imprisonment would surely deter Hart from passing any more bad checks and protect society from the inconvenience and monetary loss his actions might cause. However, the court noted that life imprisonment is the

[41]483 F.2d at 142. *See also* Weems v. United States, 217 U.S. 349, 380-81 (1910).

[42]483 F.2d at 141.

[43]WEST VA. CODE ANN. § 61-3-39 (1966).

[44]483 F.2d at 140.

[45]408 U.S. at 280. The third of Mr. Justice Marshall's standards for decision in *Furman* states that a punishment is cruel and unusual if it is excessive and serves no valid legislative purpose. 408 U.S. at 331. See note 37 *supra*.

[46]State v. Stout, 116 W.Va. 398, 180 S.E. 443 (1935).

[47]Dye v. Skeen, 135 W.Va. 90, 62 S.E.2d 681 (1950). *See* Moore v. Coiner, 303 F. Supp. 185 (N.D. W.Va. 1969).

most severe punishment available under West Virginia law[48] and apparently did not believe such severeity was necessary to protect society from an individual like Hart or to deter Hart from committing future offenses.[49]

The third factor considered by the court involved a comparison of the West Virginia recidivist statute with similar statutes in other states.[50] The court's examination of this factor revealed the West Virginia statute to be the most severe of the statutes in force at that time. The court noted that only three other states required a mandatory life sentence, and that even in those jurisdictions, a life sentence was imposed only after conviction for three felonies.[51] The West Virginia statute makes the life sentence mandatory after the third conviction which could result in a sentence in the penitentiary; the word "felony" is not used. Other state statutes which provide for a life sentence after a certain number of felonies allow judicial consideration of the underlying offenses, making the sentence discretionary.[52]

A comparison of Hart's sentence with sentences in the same jurisdiction for other offenses comprised the fourth factor considered by the court. The court noted that in West Virginia a mandatory life sentence is imposed for only three other crimes: first-degree murder, rape, and kidnapping.[53] The court indicated its position that the mandatory sentence required by the recidivist statute was excessive as applied to Hart when it asked: "[C]an it be rationally urged that Hart is as dangerous to society and as deserving of punishment as the murderer, rapist and kidnapper?"[54]

After completing its analysis of these four factors, the majority reached the conclusion that "the sentence imposed upon Hart is constitutionally excessive and wholly disproportionate to the nature of the offenses he committed, and not necessary to achieve any legitimate legislative purpose."[55] This result, although based on substantial precedent, is extraordinary in the breadth of its incursion into the

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[48]483 F.2d at 141.

[49]*Id.*

[50]*Id.*

[51]*Id.* The court only listed three other states which require a mandatory life sentence, but it appears that Washington also has such a statute. IND. ANN. STAT. § 9-2207 (Burns repl. vol. 1956); KY. REV. STAT. ANN. § 431.190 (1973); TEX. PENAL CODE art. 63 (1952); WASH. REV. CODE ANN. § 9.92.090 (1961).

According to the appendix in *Hart*, forty-five states have habitual offender statutes, 483 F.2d at 143-44.

[52]483 F.2d at 142.

[53]*Id.*

[54]*Id.*

[55]*Id.* at 143.

legislative function. However, the gravity of this incursion is somewhat mitigated by the explicit and detailed standards the majority provided by which to judge whether a given sentence is unconstitutionally disproportionate. The court's selection of these standards further mitigates this incursion in that at least two of the court's standards necessitate careful consideration of legislative judgments.[56]

While the opinion of the majority seems to be a well reasoned application of eighth amendment analysis as developed by the Supreme Court in *Weems* and *Furman*, the dissenting opinion is of particular importance in that Judge Boreman, though agreeing with the result, provided another basis for the decision. Judge Boreman took the position that the majority should not have decided the eighth amendment issue because to do so involved "reaching beyond the well established bounds imposed upon the federal judiciary by principles of self-restraint, comity, and the wise exercise of discretion in the uses of judicial power."[57] He would have overturned the sentence on Hart's alternative ground for relief, namely that Hart had been denied effective assistance of counsel in his 1949 conviction. Hart had raised this issue at the trial level and a hearing had been conducted to determine the validity of his conviction, but the district court ruled that there had been effective assistance of counsel, and the majority of the Fourth Circuit agreed with that conclusion.[58]

The issue of the right to counsel has been intensly litigated in the last two decades.[59] This right has a significant effect on the applica-

[56]See text accompanying notes 38-41 *supra*. The third standard set out by the court involved a comparison of the mandatory life sentence given Hart with punishments for the same crime in other jurisdictions. The fourth standard involved a comparison of Hart's sentence with punishments available in the same jurisdiction for other offenses. Both of these standards are evidence of the weight the Fourth Circuit gave to legislative determinations. Thus while the court questioned the constitutionality of the mandatory sentence as applied to Hart, it did so within a legislative framework.

[57]483 F.2d at 147. *See* Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 211 (1960); United States v. Rumely, 345 U.S. 41, 48 (1953); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[58]483 F.2d at 138 n.2.

[59]The right to counsel, granted by the sixth amendment, took on added significance after the Supreme Court's decision in Powell v. Alabama, 287 U.S. 45 (1932), which held that in a capital case due process of law required the appointment of counsel in those cases where the defendant was unable to employ his own attorney.

This holding has been greatly enlarged by two recent Supreme Court decisions. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that counsel must be furnished to all indigent defendants charged with felonies. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court enlarged the rights guaranteed by the sixth amendment to include misdemeanors and petty offenses which involve the possibility of a jail sentence.

tion of recidivist statutes because of the decision of the Supreme Court in *Burgett v. Texas*.[60] In *Burgett* the Court held that to admit prior convictions where the defendant had been without counsel in order to impose a more severe sentence under a recdivisit statute was inherently prejudicial. Therefore, only convictions in which the defendant had been represented by counsel could be used in determining the applicability of the recidivist statute.[61]

It has been further recognized that if the right to counsel is to afford any protection to defendants, that right must include the requirement of effective assistance of counsel.[62] Several Fourth Circuit cases reflect the well established principle that late appointment of counsel raises a presumption of ineffective assistance which the state can rebut only by bringing forth clear proof that no prejudice resulted.[63]

This requirement of effective assistance of counsel is significant because Hart contended that his assistance by counsel in 1949 had been ineffective. Counsel had not been appointed for Hart until the day he entered his guilty plea,[64] and Hart testified that he had spoken with his attorney for only a short time immediately before he entered his guilty plea.[65] When the appointed attorney asked him if he was guilty, Hart "told him that I was guilty for they had my name on the check."[66] The charge was not discussed further. The majority concluded that no prejudice resulted from the late appointment of counsel because "the accused in fact had no information to communicate to the lawyer which could have been helpful to the defense."[67] Hart's statement to his attorney was apparently viewed by the Fourth Circuit as an admission of guilt.

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[60]389 U.S. 109 (1967).

[61]The holding of *Burgett* was recognized and followed by the Fourth Circuit in Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968). *See* State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968), in which the Supreme Court of Arizona held that an otherwise valid misdemeanor conviction may not be the basis for a defendant being sentenced under a recidivist statute, if the defendant was not represented by and did not voluntarily waive counsel at the first trial. *See* Comment, *Right to Counsel—Valid Misdemeanor Conviction Cannot be Used as Basis for Recidivist Sentence if Defendant Was Not Represented by Counsel at Misdemeanor Trial*, 43 N.Y.U. L. REV. 1012 (1968).

[62]McMann v. Richardson, 397 U.S. 759, 771 n.14. *See Powell*, 287 U.S. at 71.

[63]*See* Stokes v. Peyton, 437 F.2d 131 (4th Cir. 1970); Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966); Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963); Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963).

[64]483 F.2d at 145.

[65]*Id.*

[66]*Id.*

[67]*Id.* at 138-39 n.2, *quoting* Turner v. Maryland, 318 F.2d 852, 854 (4th Cir. 1963).

The majority's consideration of this issue does not seem to have recognized the importance of the time element in effective representation. If an attorney is to represent a defendant effectively he must be given the time necessary to investigate the facts of the case and to formulate a defense to the charge.[68] Hart's attorney would have had a much greater chance of formulating a valid defense had he been given sufficient time to reflect on the case.[69]

Judge Boreman's analysis of the circumstances surrounding Hart's 1949 conviction leads to the conclusion that Hart was in fact denied effective assistance of counsel. He took the position that the late appointment of counsel and the lack of clear proof[70] that no prejudice had resulted provided convicing evidence that Hart's rights had been violated.[71] Further support for this position was available since the facts tended to show that an invocation of the recidivist statute was threatened to coerce Hart to plead guilty in the 1949 proceedings.[72] The case then could have been decided on other grounds and "[a]n unseemly clash between the federal constitution and the provisions of a state statute, as applied, would thus be avoided."[73]

Although the majority's eighth amendment analysis seems to be sound, it also appears that there is substantial support for the dissent's position that a decision upon alternative grounds would have been more appropriate. By deciding the eighth amendment issue, the Fourth Circuit has apparently overridden express legislative intent without actually declaring the West Virginia statute itself unconsti-

[68]*See* Martin v. Virginia, 365 F.2d 549, 552 (4th Cir. 1966).

[69]In Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963), the court noted, "it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist." *Id.* at 353.

[70]Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963).

[71]483 F.2d at 146 (Boreman, J., dissenting).

[72]Hart had a prior bad check conviction in Indiana. 483 F.2d 138-39 n.2. At the hearing held by the district court, Hart testified that his appointed counsel informed him that the prosecutor intended to proceed against him as a second offender if he did not plead guilty. *Id.* at 145. Hart's attorney in the 1949 proceeding testified that the prosecutor told him: "[I]f he wants to plead guilty, we will forget his previous conviction, and won't add the additional five years. If we have to go to all the bother of trying the case, and he is found guilty, why then we will put the five years onto it." *Id.* at 145 n.1.

In Carr v. Coiner, 296 F. Supp. 1058 (N.D. W.Va. 1969), the court took the position that if a promise not to invoke the recidivist statute induces a plea of guilty which would not otherwise have been entered, the plea would be considered involuntary. If the plea was involuntary then the conviction is void and cannot be used in a recidivist proceeding. McClure v. Boles, 233 F. Supp. 928, 930 (N.D. W.Va. 1964).

[73]483 F.2d at 147.