

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 2002

Charles Dorsey,

Petitioner

v.

State of Davis,

Respondent

No. 00-01749

August 16, 2002

ORDER

Case below, *State v. Dorsey*, 42 D.3d 700 (2002).

The petition for writ of certiorari to the Supreme Court of the United States is hereby granted limited to the following two questions:

- 1) Whether a state statute that does not require a minimal level of *mens rea* violates the Due Process clause of the 14th Amendment of the United States Constitution?
- 2) Whether a statute that mandates a life sentence upon the conviction of a third felony in the State of Davis is Cruel and Unusual Punishment and a violation of the Eighth Amendment of the United States Constitution?

Probable jurisdiction is noted, and a total of one half hour allotted for oral argument. The briefs of both parties are to be filed with the Clerk of the Court on or before 5:00 p.m. on **Friday, September 20, 2002**. The case is set for oral argument in the October 2002 term of this Court.

**CIRCUIT COURT OF APPEALS FOR THE
WESTERN CIRCUIT OF DAVIS
CRIMINAL ACTION No. 4:37 CR-1978**

Charles DORSEY,

APPELLANT,

v.

STATE OF DAVIS,

APPELLEE

*** **

ORDER AND OPINION

*** **

Judge Abbott delivered the opinion of the court,
and Judges Barker and Carlin joined.

This case comes before this court after the Defendant, Charles Dorsey, was found guilty by a jury trial in the Commonwealth Court of Lewis County, state of Davis.

Facts:

On February 2, 1999, Charles Dorsey entered Davis International Airport to board a flight to Des Moines, Iowa. As he passed through the security checkpoint, Dorsey triggered the alarm. A pat-down search revealed a Swiss Army knife in his pocket. Dorsey was temporarily detained until a police officer on the premises arrived to arrest Dorsey pursuant to Davis Code § 11.6¹ for possession of an object

capable of inflicting harm or injury to a person on airport premises. Dorsey was subsequently sentenced to nine months in the Davis State Penitentiary.² The trial judge ignored Dorsey's claim that he did not know that possession of the object in question violated any state laws on the grounds that § 11.6 contained no mens rea requirement. The trial judge took special consideration of the legislative history of Davis Code § 11.6 when choosing an appropriate sentence.³

² The trial record of Dorsey's February 2, 1999 offense reveals that after the jury returned a verdict of guilty, at the sentencing hearing, the judge considered both the nature of the object and its location on Dorsey's person. The judge determined that the object was of such a dangerous character that a fine was not suitable punishment. However, the judge acknowledged Dorsey's explanation that it was a gift for his father, whom he was en route to visit in Iowa, and did not give Dorsey the maximum sentence permitted.

³ § 11.6 was enacted into the Davis Penal Code in October of 1998, in response to increased complaints from the two major Davis international airports. Security frequently found what they described as "suspicious objects and/or objects viewed as capable of harming the public welfare and safety in both the airport and on an airplane." (Davis Legislative Hearing Notes, August 13, 1998). The Davis State Legislature feared that objects not commonly associated with violence or physical harm may be capable of harming other persons on an aircraft or being used for the purpose of violent acts for individuals to take control of an airplane once it is in the air. (Legislative Hearing Notes, August 13, 1998).

§ 11.6 was also enacted in response to what the Legislature described as an 'alarming increase' in assault crimes statewide. One out of every five assault crimes between 1992-1997 involved the use of a non-conventional item as an assault weapon. The assault statistics were taken from acts of violence in public places, as well as assaults on residential or private property.

The legislature then compared a study of airport security from 1995-1997, which revealed that several of the items being used in assault crimes were frequently viewed on security scanners in a traveler's luggage or on their person, and that these items were not, because of their association with non-violent uses, being confiscated by airport security.

At the August 13, 1998 legislative hearing, local legislators emphasized the need to prevent and

¹ **§ 11.6 – Possession of Objects Capable of Inflicting Harm or Injury to the Person; Airports**

(a) It shall be unlawful for any individual to possess an object capable of inflicting bodily injury or bodily harm to another person in their airport luggage, carry-on luggage, or on their person while on airport premises. Such an offense shall be punishable as a misdemeanor, and carry a sentence of no more than one year in prison, or be fined no more than \$1000.00.

(b) Any person convicted under §11.6 and sentenced to a jail term instead of a fine, upon a second conviction under 11.6(a), shall be charged with a felony, punishable by two to six years in prison.

On November 6, 2000, Dorsey again visited Davis International Airport, carrying a small carry-on bag, with a plane ticket for New York City. He triggered the checkpoint alarm. A search of his person and his carry-on bag revealed a sharp object, a pencil compass, located in his back pocket. Dorsey was ushered away to the security office, where he again was arrested.

After the jury returned a guilty verdict, pursuant to the enhancing provision of § 11.6(b), the trial judge had no discretion not to bump the conviction from a misdemeanor to a felony since Dorsey previously was sentenced to prison under § 11.6(a). The trial judge was also required to sentence Dorsey under Davis Code § 12.7⁴, which punishes habitual felony offenders to a life sentence with the possibility of parole in twenty years. § 12.7 was triggered by the 11.6 felony conviction because Dorsey had two prior 'serious' felony convictions on his rap sheet.⁵

deter possible airport attacks by drafting § 11.6 into the Davis Penal Code. Several legislators feared Davis airports would be the next public place where assaults would increasingly occur. (Legislative Hearing Notes, August 13, 1998). The statute's enactment was highly publicized on local and national news and major national newspapers, as well as local state newspapers.

⁴ § 12.7 – Habitual Offender; Sentencing

(a) Any person twice convicted of a serious or violent felony in the state of Davis or other jurisdiction, shall, upon conviction of a third felony, be sentenced to life in prison, and shall not be eligible for parole until after serving a minimum of twenty years.

NOTE: For purposes of this section, "serious" includes crimes that the Davis state legislature believes should be classified as such because of its nature and harmful effects on society. If a crime is considered serious in the state of Davis, it is listed in its respective statute, regardless of whether an element of violence is or can be used in its commission.

⁵ Dorsey was first convicted of a felony on May 11, 1982 for selling heroin to a minor. He received a suspended sentence of two years. The trial court record stated that Dorsey was caught selling the narcotic at the bus stop near the motor park where he lives in Lewis County. He was thirty years old at the time. Dorsey's second felony conviction was for

Dorsey has appealed his conviction on the grounds that reading § 11.6 without a *mens rea* requirement violates his Due Process rights under the 14th Amendment to the United States Constitution. He also argues that his life sentence with no parole eligibility for twenty years constitutes cruel and unusual punishment.

We will first review Dorsey's *mens rea* and Due Process claims regarding § 11.6.⁶ Davis Code § 11.6 mandates that possession of "any object capable of inflicting bodily injury or

first-degree burglary on January 22, 1985. Dorsey entered a neighboring motor home and was caught inside by the Lewis County police. He served a two-year sentence at Davis Penitentiary.

Under Davis law, both convictions are considered serious, which allows § 12.7 to count both as prior 'strikes.'

§ 8.03: Burglary; Punishment; Sentencing

(a) Offense of Burglary: Any person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, tent, vessel, or other building, with intent to commit grand or petit larceny or any felony is guilty of burglary. "Inhabited" means currently being used for dwelling purposes, whether occupied or not.

(b) First Degree Burglary; defined: burglary of an inhabited dwelling house, vessel, which is inhabited and designed for habitation, or a trailer coach, or mobile trailer designed for inhabitation, or the inhabited portion of any other building.

(c) Punishment: Burglary in the first degree: by imprisonment in the state prison for two, four, or six years.

(d) First Degree Burglary, for purposes of other statutes this section may affect, is a felony and shall be construed as 'serious.'

§ 5.11: Sale or distribution of a controlled substance to a minor:

(a) Every person 18 years of age or older who furnishes, administers, gives, or offers to furnish, administer, or give, any controlled substance to a minor 14 years of age or older shall be punished by imprisonment for a period of two, four, or five years.

(b) For purposes of other statutes this section may affect, a crime under § 5.11(a) is a felony, and shall be construed as 'serious.'

NOTE: For purposes of subsection (a) heroin is included as a controlled substance.

⁶ Since this is an issue of first impression in the State of Davis, we will look to other federal and state case law for guidance.

bodily harm to another person,” either in one’s luggage or on one’s person, is illegal. We are called upon today to determine what level of knowledge a person must possess in order to be convicted under the statute, and whether the Due Process clause of the 14th Amendment requires a minimal level of *mens rea* in a criminal statute.

At Dorsey’s trial for his second violation of § 11.6, the trial judge instructed the jury that if the jury found Dorsey had possessed the pencil compass, they must return a guilty verdict under the express language of §11.6, and need not determine whether Dorsey knowingly violated the statute. Appellant argues that the State of Davis should have been required to prove beyond a reasonable doubt that he knew the object he possessed had the prohibited characteristics that brought it within the reach of § 11.6, and was therefore subject to regulation. We agree, and remand the case for such determination.

When reviewing what mental state a statute requires, we must look primarily to the statute’s plain language and secondarily to the intent of the drafting legislature. See *United States v. Hudson*, 11 U.S. 32 (1812); *United States v. Balint*, 258 U.S. 250 (1922).

On its face, Davis Code § 11.6 has no knowledge requirement. However, our inquiry does not end here. The element of intent has long been recognized as integral to our legal system, and we will not presume that the legislature meant to do away with the element of intent simply due to the phrasing of the statute. *Morrisette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

When the Davis State Legislature enacted § 11.6 in response to airport security concerns, it recited a list of non-conventional items that were commonly used to commit assault. The list included: ice picks, nail files, Swiss army knives, toolbox items, can/bottle openers, gardening shears, and wine corkscrews.⁷ The Legislature was careful to note that this list was not exhaustive, but instead chose to rely upon “the good common sense of Davis citizens to deter airport travelers from

carrying potentially harmful objects on their person or in their luggage.”⁸

The State of Davis argues that the nature and purpose of § 11.6 show that a presumption of *mens rea* is not applicable in this case because § 11.6 is a so-called “public welfare” offense that does not require proof of *mens rea* to convict. It is true that in certain types of crimes the Supreme Court of the United States has recognized that criminal sanctions can be imposed without being subject to traditional Due Process mechanisms. These “public welfare” offenses must generally not impose a heavy penalty, not carry a damaging stigma, and must rise at least to the level of common-law negligence. *Morrisette v. United States*, 342 U.S. 246, 256 (1952).⁹

However, the Supreme Court has limited these types of offenses to those that involve “a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health and safety.” *Liparota v. United States*, 471 U.S. 419 (1985).

In the past, such offenses have included possession of hand-grenades and drug-related offenses. See *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Dotterweich*, 320 U.S. 277 (1943). It is certainly understandable to expect the general public to know and understand that airport security is subject to

⁸ Davis Legislative Hearing Notes, August 13, 1998, legislator Al Goodacre speaking.

⁹ While it is true that neither *Morrisette* nor any of its Supreme Court progeny explicitly mention the Due Process Clause in connection with the statutory interpretation framework, the cases are replete with references to fundamental notions of fairness and notice that lean decidedly towards Due Process analysis. We are of the opinion that these cases establish a Due Process right to a minimal *mens rea* requirement in all but those cases falling within the “public welfare” category. We are not the first court to find such a connection. See generally *State v. Hy-Vee, Inc.*, 616 N.W.2d 669 (Iowa Ct. App. 2000); *Davis v. Peachtree City*, 304 S.E.2d 701 (Ga. 1983); *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991); *United States v. Unser*, 165 F.3d 755 (10th Cir. 1999); *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960).

⁷ Davis Legislative Hearing Notes, August 13, 1998.

stringent regulation. This is even more so in light of recent world events. In fact, § 11.6 was highly publicized both locally in the State of Davis as well as nationally at the time it was voted into law.

However, we must be careful not to allow a law to “criminalize a broad range of apparently innocent conduct.” *Liparota, supra*, at 426. If ownership of a gun constitutes just such innocent conduct¹⁰, why doesn’t ownership of a pencil compass?¹¹ Certainly the possession of a pencil compass does not alert the average individual to the likelihood of governmental regulation. Mere regulation of an activity, even one as publicized as airport security, does not automatically warrant a presumption that the *mens rea* requirement is foregone. See *Staples* at 613.

Our 14th Amendment Due Process protection is engrained with the concept of notice. *Lambert v. California*, 355 U.S. 225 (1957). Thus, in *Lambert*, the United States Supreme Court held that in order to sustain a conviction under a California statute that required felons to register, knowledge of the statute’s requirement to register or proof of probability of knowledge and failure to comply were necessary. *Id.* The Court held that notice was essential where a person “passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.” *Id.* at 228.

Much like the defendant in *Lambert*, a person entering Davis International Airport could find himself arrested and convicted of a crime for simply carrying an everyday object. Surely this is the type of crime that the Supreme Court, as articulated in *Lambert* would subject to Due Process requirements.¹²

¹⁰ *Staples v. United States*, 511 U.S. 600 (1994).

¹¹ This seems to be particularly true given that Mr. Dorsey is a landscaper by trade.

¹² It is true that Dorsey knew of the existence of Davis Code § 11.6 due to his prior conviction, but his previous offense was triggered by a knife on his person, not a landscaping tool. It is likely that Dorsey knew objects commonly associated with violent crimes, like knives, fell within the scope of § 11.6, but did not know what other types of objects were also prohibited. Of course, these are questions to be considered by the jury on remand, and we

Furthermore, even when dealing with “public welfare” offenses, courts have not completely done away with the requirement of *mens rea*. The defendant is still required to know that his conduct is potentially dangerous. *Posters 'N' Things, LTD., v. United States*, 511 U.S. 513, 523 (1994). See also *Staples, supra*, at 607. A “public welfare” offense is not a strict liability crime. *Id.*

We now consider the possible penalty carried by the statute at issue. Davis Code § 11.6 carries a possible sentence of up to one-year imprisonment or up to a \$1,000 fine. However, due to the enhancement provision found in § 11.6 (b), the possible penalty for a second conviction is a felony sentence of between two and six years. The Supreme Court in *Morissette* mandated that public welfare offenses should not carry heavy penalties or damaging social stigmas. *Morissette, supra*, at 256. The penalty and stigma carried by a conviction under § 11.6 are quite substantial, especially under § 11.6 (b).

While it is true that in certain circumstances a “public welfare” offense may carry a potential penalty of some substance, as in the case of *United States v. Balint*, we feel that the situation at hand is most comparable to that in *Liparota*. The Supreme Court was unwilling to extend the “public welfare” rubric to food stamps, and we are equally unwilling to do so in a context where possession of everyday items while travelling may potentially result in a felony conviction.

In short, we hold today that the Due Process Clause of the 14th Amendment to the United States Constitution requires the State of Davis to show by the facts and circumstances surrounding an offense under Davis Code § 11.6 that the defendant knew that his conduct was prohibited and therefore subject to regulation.

Since this court finds § 11.6 to violate the Defendant’s Due Process rights, this case must be remanded to the trial court for further proceedings, and we need not address Dorsey’s Eighth Amendment claim at this time.

Reversed and Remanded.

express no opinion as to the circumstances of this particular defendant.

SUPREME COURT OF THE STATE OF
DAVIS
CRIMINAL ACTION No. 4:37 CR-1978

State of DAVIS,
APPELLANT,

v.

Charles DORSEY,
APPELLEE

ORDER AND OPINION

Judge Donahue delivered the opinion of the court, in which Judges Ewing and Farland joined.

I. Procedural History

The State of Davis appealed the Court of Appeals decision that § 11.6 of the Davis Code violated the Due Process Clause of the United States Constitution, and required proof that Charles Dorsey knowingly violated the statute before he can be sentenced to jail time. The majority opinion did not address Dorsey's Eighth Amendment claim. Since this Court finds that Davis Code § 11.6 does not violate the Due Process Clause by not requiring proof of *mens rea*, we reverse the Court of Appeals decision.

Because the Court of Appeals summarized the relevant facts sufficiently, we need not reiterate them in our opinion.

II. Davis Code § 11.6

Because this is an issue of first impression in the State of Davis, we look to other federal and state case law to aid in our decision. There is no United States Supreme Court case law that holds that there is any sort of *mens rea* requirement inherent in the Due Process Clause of the 14th Amendment. Nearly all of the U.S. Supreme Court precedent cited by the Court of Appeals are cases involving the

interpretation of federal statutes.¹ None of these cases mention the Due Process Clause.

The sole Supreme Court case cited by the Court of Appeals that actually deals with the Due Process clause is *Lambert v. California*, 355 U.S. 225 (1957). However, *Lambert* is distinguishable from the instant case on several grounds. First, the statute in *Lambert* dealt with registering oneself as a felon in the State of California. If a person failed to do so, he or she was automatically guilty of violating the statute. The Supreme Court stressed the passive nature of the crime, stating that it was "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Lambert*, 255 U.S. at 229. The case at hand is certainly not a passive crime. To violate Davis Code § 11.6, a person has to actively carry an item on his person or in his luggage that is capable of inflicting bodily harm.

Second, *Lambert* rests heavily upon the notice aspect of the Due Process Clause. The defendant in that case had no way of knowing about the registration law and of her wrongdoing. Mr. Dorsey, on the other hand, has had plenty of notice about the existence of § 11.6. Not only was the statute highly publicized on a local and national level and widely discussed upon its enactment in 1998, but Dorsey had already been convicted under the *same statute* once before.

Nor has *Lambert* spawned any sort of similar cases by the Supreme Court. Clearly the Supreme Court is aware of its existence and chooses not to follow its (albeit narrow) holding. Perhaps Justice Frankfurter was correct in his *Lambert* dissent when he said, "I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law." *Lambert* at 232 (*Frankfurter, J. dissenting*).

Because we find no Due Process right to a *mens rea* requirement, the sole issue remaining

¹ See *United States v. Balint*, 258 U.S. 250 (1922); *Morissette v. United States*, 342 U.S. 246 (1956); *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Dotterweich*, 320 U.S. 277 (1943); *Liparota v. United States*, 471 U.S. 410 (1985); *Posters 'N' Things, LTD. v. United States*, 511 U.S. 513 (1994).

as to § 11.6 is one of statutory interpretation. The Davis Court of Appeals acknowledges the importance of legislative intent, but failed to give it weight in this case. The Davis Legislature clearly felt that air safety was being breached in Davis airports. As a result of the alarming statistics of assault with a non-conventional weapon, the Legislature enacted § 11.6 to curb such dangerous situations.

Davis Code § 11.6 falls within the class of legislation that is viewed as regulating "public welfare" offenses. Certainly airport security is an area that a reasonable person should know is subject to public regulation. See *Liparota v. United States*, 471 U.S. 410 (1985); *Staples v. United States*, 511 U.S. 600 (1994).

The Court of Appeals holding that § 11.6 should be read with a *mens rea* requirement based on the potential sentence it carries is also flawed. The Supreme Court has upheld statutes as "public welfare" offenses even where they carry a punishment of up to five years. *United States v. Balint*, 258 U.S. 250 (1922). Davis Code § 11.6 carries a potential penalty vastly less harsh. The only reason that Mr. Dorsey was subjected to a harsher penalty is because of his previous conviction under § 11.6 that resulted in a prison term. The sentencing judge under § 11.6 has the discretion not to impose a prison term at all if the circumstances surrounding the commission of the crime do not warrant it.

As such, we would not require that convictions under § 11.6 be predicated upon a showing of knowledge, but instead would classify airport security as an area of the law that falls within the heading of a "public welfare" offense.

III. Eighth Amendment Issue

Since we find no Due Process violation, we must address whether Dorsey's life sentence, received under § 12.7 that was triggered by his § 11.6 conviction, constitutes Cruel and Unusual Punishment.

The State of Davis Constitution states when an Eighth Amendment claim is at issue, federal case law will govern. D. CONST. amend. VIII, § 2. The Eighth Amendment prohibits punishments that are "cruel and unusual." This

includes prohibiting sentences that are grossly disproportionate to the severity of the crime. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Most states have adopted and approve of recidivist sentencing because it furthers important societal and legislative goals of deterrence and lengthy incarceration for those who appear, by continuing to commit serious criminal acts, incapable of rehabilitation into society as law-abiding citizens.

The Supreme Court of the United States has not found the consideration of a defendant's prior criminal acts by a recidivist statute unconstitutional for Double Jeopardy purposes. "The accused is not again punished for the first offense" because "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." See *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Recidivist sentencing statutes aim to punish the crime of recidivism by attaching a "stiffened penalty" to the latest crime, deemed an "aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

State legislatures are permitted to deal more harshly with "those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel v. Estelle*, 445 U.S. 263, 276 (1980). Dorsey is clearly a repeat offender. Prior to his 2000 conviction under § 11.6, he committed and was convicted for two 'serious' felonies.² If a Davis citizen chooses to repeatedly commit felonious acts, receipt of a harsher sentence upon the third conviction is not grossly disproportionate because the accused is now also guilty of being a repeat felony offender.³ There is also a long

² Although Dorsey did not actually serve jail time for his §5.11 violation, a 'conviction' includes a suspended sentence in the State of Davis.

³ Had Dorsey only received a fine upon his first conviction, his second § 11.6 offense would not have triggered the felony bump. The Davis Legislators entrusted the trial judges' ability to assess the degree of danger when a person violates this law. Legislator Al Goodacre stated that the broad sentencing

— history of judicial deference to legislative decisions in the Eighth Amendment context. See *Chapman v. United States*, 500 U.S. 453, 467 (1991) (noting that it is within legislative power to define criminal punishments without giving the courts any discretion to interfere in the sentence imposed). Davis legislators are “far better equipped than we (judges) are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes.” *Solem v. Helm*, 463 U.S. 277, 314 (1983).

— Let us not forget that Dorsey will be eligible for parole within twenty years. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Defendant’s mandatory life sentence without the possibility of parole was upheld by the Supreme Court. *Harmelin*, 501 U.S. at 961. It was noted that, “[M]andatory penalties may be cruel, but they are not unusual in the constitutional sense...” *Harmelin*, 501 U.S. at 994.

— In *Rummel*, the Court declared a life sentence with the possibility of parole in twelve years not cruel and unusual for a three-time non-violent felon.⁴ Dorsey argues that *Rummel* is factually distinguishable because his sentence without parole for twenty years is the functional equivalent of a life sentence. This court disagrees. “An Eighth Amendment analysis necessarily considers the punishment for the offense, taking into account only those personal circumstances that may mitigate one’s culpability in committing the crime.” *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002), (emphasis added). Here, Dorsey is clearly culpable enough to warrant such a sentence. His prior felonies are thus necessarily considered since his life sentence is imposed not for the latest crime, but for the crime of recidivism.

Dorsey also points out that the Davis statute, by permitting felony offenses that at

their core are misdemeanors to trigger § 12.7, makes the Davis law one of the toughest recidivist statutes in the country. However, California’s statute is virtually the same. Although no other state’s law operates quite like § 11.6, in California, petty theft with a prior bumps a misdemeanor theft conviction to a felony. See generally CAL. PENAL CODE § 666, 667. In the interests of both legislative deference and the preservation of federalism, inevitably some states will punish some crimes more harshly than their bordering states. Each state has a right to punish within its borders as it sees fit, so long as the punishment is within constitutional boundaries. See *Solem*, 463 U.S. at 309.

Moreover, this is not one of those ‘rare instances’ as the dissent opines where a proportionality analysis will overturn state legislative sentencing on Eighth Amendment grounds. The Supreme Court noted in *Rummel*, that “successful challenges to the proportionality of particular sentences” are “exceedingly rare.” *Rummel*, 445 U.S. at 272.

A proportionality challenge is so rare, in fact, that no circuit other than the Ninth has overturned a conviction pursuant to a recidivist statute post-*Harmelin*. See *Andrade v. California*, 270 F.3d at 771 (Sneed, J. dissenting in part). See, e.g., *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992) (applied the *Harmelin* test to affirm a life sentence without even the possibility of parole for an habitual offender when the triggering offense was auto burglary); See also *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997); *United States v. Prior*, 107 F.3d 654 (8th Cir. 1997)). Accordingly, this Court declines to adopt a proportionality analysis or follow the Ninth Circuit’s erroneous conclusion, especially because other Circuits are so clearly correct in their application of Eighth Amendment precedent.

Finally, the Defendant argues that his 1982 and 1985 convictions are too far apart in time to be fairly considered prior ‘strikes.’ We disagree. Although there is no case law on point in this state, the Eleventh Circuit has held that a nineteen year-old conviction was permitted as a strike for purposes of an Alabama recidivist statute, noting that nothing in *Rummel* allows for such a distinction because of the date that the

language of § 11.6 would leave “to our state judges the ability, considering the nature of the object at issue and its location, to decide the appropriate punishment on a case-by-case basis.” Davis Legislative Hearing Notes, August 13, 1998.

⁴ In *Rummel*, the Supreme Court also gave deference to the Texas legislature. The Texas recidivist laws saw fit to punish even repeat non-violent offenders harshly. *Rummel*, 445 U.S. at 274.

criminal conviction occurred. *Williams v. Johnson*, 845 F.2d 906 (11th Cir. 1988). See *United States v. Bredy*, 209 F.3d 1193 (10th Cir. 2000).

This court does not find Davis Code § 12.7 nor its application to the Defendant to be Cruel and Unusual punishment.

For these reasons, we reverse the Court of Appeals' judgment and enter final judgment reinstating Dorsey's conviction.

Reversed and Final Judgment reinstated.

Green, J. and Holland, J., concurring in part and dissenting in part.

While we agree with the majority's holding on the Due Process *mens rea* issue, we disagree with their holding on the Eighth Amendment issue.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Kennedy's concurrence has been recognized as the "position taken by those members who concurred in the judgment on the narrowest grounds." *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992). His opinion recognized that the Eighth Amendment has been historically interpreted to include a "narrow" proportionality principle. *Harmelin*, 501 U.S. at 997; See also *Weems v. United States*, 217 U.S. 349, 371 (1910); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that a death sentence is grossly disproportionate for the crime of rape). Kennedy explained that the Eighth Amendment, while not requiring strict proportionality between the crime and the sentence imposed, forbids those "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001.

Kennedy's test requires a threshold comparison of the crime committed and the sentence imposed. If by the comparison an inference of gross disproportionality is raised, the court may then consider other factors such as the comparison of sentences that other criminals receive in the same jurisdiction, and the sentences received for committing the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1005; See also *Solem v. Helm*, 463 U.S. 277, 291 (1983). Clearly that inference is raised

here. Dorsey will be sentenced to life in prison without the possibility of parole for a minimum of twenty years. A life sentence triggered by a statute that at its core punishes only a misdemeanor offense, despite the goal of recidivist punishment, is on its face grossly disproportionate⁵ under Kennedy's test.

A. Gross Disproportionality

The Ninth Circuit, applying Kennedy's test, recently held that a life sentence without eligibility for parole for twenty-five years constituted Cruel and Unusual Punishment when the triggering offense was petty theft with a prior, an offense that California law bumps from a misdemeanor to a felony, similar to § 11.6 of the Davis Code. *Andrade v. California*, 270 F.3d 743 (2001); see also *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002). Just as the California classification of petty theft indicates the state legislature's choice to regard it is a minor offense, the same holds true for the Davis classification of § 11.6. See *Andrade*, 270 F.3d at 760.

Although we acknowledge that § 12.7 aims to punish not just the latest offense by the accused, but also the crime of recidivism; this is the rare case where the punishment does not fit the crime. To sentence a person to life in prison for a misdemeanor crime meets the historical definition of 'cruel and unusual.' See *Weems v. United States*, 217 U.S. 349 (1910).

B. Comparison of Davis laws to Other States

The combination of § 11.6 and § 12.7 in this case creates the most disproportionate punishment in the nation. Even California permits prosecutorial discretion to punish a petty theft conviction with a prior as *either* a misdemeanor or a felony. See *Andrade*, 270 F.3d at 749. The Davis state prosecution has no discretion in § 11.6 to avoid such a harsh

⁵ The Supreme Court has even acknowledged that the proportionality principle may apply in some extreme, non-felony cases. See *Rummel v. Estelle*, 445 U.S. 263, 275, n. 11 (1980).

— sentence and must charge a second violation of
— that statute as a felony⁶.

— In *Andrade*, the Court of Appeals found
— that while at least forty states have some form of
— a recidivist statute, only four other states besides
Davis would permit Andrade's petty theft with a
prior to trigger it. *Id. at 763*. While we do not
question the per se constitutionality of § 12.7; as
applied to this defendant, to impose such a
disproportionate penalty is the very essence of
the meaning 'cruel and unusual.'

Accordingly, we respectfully dissent and
hold that the trial court erred in imposing a
sentence because the disproportionate nature of
Dorsey's sentence to the actual crime he
committed clearly violates the Eighth
Amendment based on his particular
circumstance.

⁶ The Honorable Judge Lee of the Lewis County Trial Court noted on the record at Dorsey's sentencing hearing for his second §11.6 violation that "my hands are tied. A pencil compass is such an object that, but for §11.6(b)'s mandatory enhancement provisions, would only deserve the most minimal punishment permitted."

NOTICE

Please note, the following issues shall not be briefed or argued during the competition even if the facts of the problem raise these points:

- WHETHER THE STRICT LIABILITY STATUTE IS OVERBROAD OR VAGUE
- ANY EQUAL PROTECTION ISSUES REGARDING THE THREE STRIKES STATUTE
- ANY POSSIBLE PROCEDURAL ERROR BY THE TRIAL JUDGE (e.g. IMPROPER JURY INSTRUCTIONS)
- ANY SENTENCING GUIDELINES ISSUES, OR CASE PRECEDENT RELATING TO SENTENCING

The Moot Court Executive Board may add to this list as the need arises and as competitors pose questions to the Board. Please consult the Moot Court Bulletin Board for a complete list of these additional non-problem issues.

Advocacy Resources for Davis Competitors

The following books and videotapes may be helpful to you in preparing for the Davis Competition. They are all on reserve in the law library.

Alan Hornstein, Appellate Advocacy in a Nutshell (KF9050 .Z9 H668 1998)

Robert Stern, et al., Supreme Court Practice (KF9057 S8 2002)

Lynn Squires, et al., Legal Writing in a Nutshell (KF250.S68 1996)

Nancy Schultz, et al., Legal Writing and Other Lawyering Skills (KF250.S38 1998)

Lewis LaRue, Guide to the Study of Law (KF283.L36 2001)

Barbara Bucholtz, The Little Black Book: A Do-It Yourself Guide for Law School Competitions (2002) (This book is also available at the law bookstore.)

Appellate Argument Series (videorecording) 3 cassettes and manual (KF9050.A66)

Crafting the Winning Argument (videorecording) 1 cassette and study guide (KF8915.Z9 C7 2002)

Making the Oral Argument (videorecording) 1 cassette and study guide (KF8915.Z9 M34 1996)

There are also web resources which you might want to investigate. Westlaw has a database containing Supreme Court briefs (SCT-BRIEF) and transcripts (SCT-ORALARG). Northwestern has a site devoted to the Supreme Court which includes audiotapes of Supreme Court arguments (oyez.nwu.edu).

Good luck, everyone!

GUIDE TO EFFECTIVE ORAL ARGUMENTS

****The absolute best way to learn is to watch others -- check out videos of the Davis rounds****

I. Initial Setup

- Facing the bench, the Petitioner (P) sits on the left, and the Respondent (R) sits on the right.
- Take as little material as possible to the table with you. You should have your argument, a copy of the pleadings and record, scratch paper and a pen.
- Stand when the judge enters the courtroom and remain standing until instructed to sit.
- When asked if you are ready, **stand up** and reply:
 "Yes, your Honor, P/R is ready" or
 "P/R is ready, your Honor"
- Address cases as Smith against Jones, *not* Smith versus Jones. This is easy to remember if you write them in your outline as "Smith a. Jones."

II. Appearance and Demeanor

- Proper business attire
- Practice in front of a mirror or with a friend may be helpful, especially for your first argument.
- **Take minimal paper to the podium**
 - outline of your argument and maybe a copy of the record.
 - various outlining styles
- Don't gesture too much or too wildly. If you have trouble remembering this, put both hands on the podium and keep them there.
- **Eye contact with the judges is key.** This is often easier with a panel than with just one judge, because you can scan the panel.
 - When you answer one judge's question, be sure and also look at the other judges
- Avoid annoying habits like shifting weight or weaving at the podium
 - be careful not to unconsciously play with rings, fingernails, watches, bracelets, etc... (leave them at the table if necessary)

III. Decorum

- This is one of the most important parts of a good oral argument, and its very obvious when decorum is lacking.
 - shows respect for judge and professionalism of the counsel.
 - **striving for an intellectual and respectful conversation**
- Good rule of thumb: everytime your mouth opens, especially in answering questions, the words "your Honor" should come out somewhere.
 - "Well, your Honor, ..."
 - "No, your Honor, ..."
 - "Yes, your Honor, ..."

“Thank you for your time, your Honor.”

- When a judge starts talking, SHUT UP.
 - make sure they’ve asked their total question before you start to respond.
 - answer the question asked. Evasion is an affront to the Court.
- STOP when time is called.
 - if you are in mid-sentence, or if the judge just asked a question:
 - “Request permission to finish your Honor?”
 - they have complete discretion in letting you finish.
 - if you get permission, finish your thought, thank the Court, and sit down.

IV. Speaking in General

- Talk loud enough for judge to hear, but don’t blast them (especially if you have a microphone)
 - use a typical public speaking tone
- Don’t talk too fast – judges tend to get glazed over in the eyes
 - and vary your tone, so you don’t put the bench to sleep.
- This is not a great speech or oration.
 - **Be respectfully conversational**
 - Strike balance between being too stiff and too casual.
- You are educating the Court while also trying to persuade them.
- If you get through your argument and you have time left (like a minute, not like 5 minutes), go ahead and conclude.
 - It’s a lot better to end it quickly than to randomly fill the time.

V. Introduction

- What I consider to be the most important part of any argument, because this your first impression on the Court.
- **MEMORIZE IT!!!! LOOK ‘EM IN THE EYE!!!**
- “May it please the Court, my name is _____, and I represent _____, R/P in this matter.”
 - If you are P, then you add “At this time, I respectfully request ____ minutes for rebuttal”
 - the judge will usually nod or acknowledge this in some way.
- Then have one or two sentences (also memorized) that basically say “**I win because...**”
 1. Roadmap introduction – preview of the form of your argument
 2. Zinger sentence introduction – this is a more advanced form of intro and can open you up immediately to hard questions. Still, it is very effective if done well.
 - Think of an “I win because” sentence, then ask yourself “Why?” over and over until it evaporates down into a clear, concise and effective statement.
- Its also a good idea to know (not necessarily have memorized) the first topic in the body of your argument. This make the argument flow more smoothly.

VI. Body of Argument

- Be prepared to speak for the entire time. You never know when you will get a cold bench.
- **Make your strongest argument first**, so you can get to the heart of the issue immediately.
 - you may get sidelined by questions later
 - if both or all of your arguments are balanced, pick the one with which you are the most comfortable. But usually there is a stronger(est) argument.
- *Do not* skew the facts or the law and do not over dramatize.
 - Sure its bad that your client was run over 5 times, but the Court will become annoyed if you mention it in every breath.
- *Do* use the facts to cultivate your argument and make your case fit into or be distinguishable from precedent.
- Do tell “**why**”
 - use same technique as in introduction. If you can tell me “why” right off the bat, you will rob me of the question I was about to ask.

VII. Handling Questions

- Answer the question. Tell “Why” and then get back to your argument.
 - try to make your answer dovetail back into your argument
 - “Likewise...”
 - “In addition, to X, also Y”
- Answer questions fully and don’t evade a question that hurts your side.
 - **answer it and move on...don’t dwell.**
 - if the judge wants to hear more he/she will ask.
- If you are caught flat-footed or the question is confusing...
 - “Could you rephrase the question, your Honor?”
- If you have no clue about what you’ve been asked, don’t fudge it. They can tell.
 - Be professional
 - “I am not familiar with that (case, statute, dissent, concurrence, etc ...”), your Honor.
- Never, ever, ever say things like
 - “R/P argues” or “R/P would argue” or “R/P respectfully disagrees with the Court.”
 - this grates on the ears of the judges
 - **tell is like it is...like it’s the Gospel truth.**
 - “Your Honor, this does not substantially affect interstate commerce because....”
 - “No, your Honor, in *United States against Lopez*, Justice Kennedy noted”

VIII. Conclusion

- **MEMORIZE IT!!!**
 - its easy to rearrange or rephrase your introduction or draw it all together in one sentence.

- Then add something along the lines of
“For these reasons, R/P respectfully requests that this Court ... (do what ever you’re advocating...vacate lower court, affirm lower court, etc...)”
- Sometimes you won’t have time to use your canned conclusion, but **ALWAYS thank the Court for its time.**
“Thank you for your time, your Honor.”

IX. Rebuttal

- You have a few minutes to remind the Court why you are right and why your opponent should lose.
- **Only go up with 1-3 things to address**
“Your Honor, I would like to address (1,2 or 3) points in my rebuttal.”
 - enumerate them quickly just so the Court know what you’re going to address.
- Two approaches to rebuttals
 1. Address the main faults or errors of your opponent’s argument
 2. Address parts of your argument for which you ran out of time.
 - many times these two approaches will lead to the same result, but you may have to respond to one of your opponent’s arguments and then also bring up your last point.