

No. 00-01749

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

CHARLES DORSEY,

Petitioner,

v.

STATE OF DAVIS,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF DAVIS

BRIEF FOR THE RESPONDENT

Counsel for Respondent
#181

QUESTIONS PRESENTED

1. Whether a state statute that does not require a minimal level of *mens rea* violates the Due Process clause of the Fourteenth 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?

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time with a pencil compass in his back pocket. Dorsey, a landscaper, might be expected to use a pencil compass in his work. The trial judge instructed the jury that Dorsey did not need to know that he was violating the statute, but to return a verdict based solely on whether or not Dorsey had possessed the compass. Dorsey was again found guilty of violating Davis Code § 11.6. A second conviction under this statute is categorized as a felony.

As this was Dorsey's third felony conviction after two serious felony convictions, Dorsey was sentenced under Davis Code § 12.7, Habitual Offender. This statute required Dorsey to be sentenced to life in prison with eligibility for parole only after a twenty-year minimum sentence has been served.

Dorsey appealed his conviction on the basis that Davis Code § 11.6 violates the Due Process clause of the Fourteenth Amendment to the United States Constitution by failing to require a minimal level of *mens rea*. Dorsey also challenges his life sentence as impermissible under the Eighth Amendment to the United States Constitution. Petitioner filed a petition for a writ of certiorari, which this Court granted on August 16, 2002.

SUMMARY OF THE ARGUMENT

Davis Code § 11.6, which does not include a requirement for a minimal level of *mens rea*, is a public welfare statute and is consistent with the Due Process clause of the Fourteenth Amendment. The Davis Legislature was justified in disposing of a minimal *mens rea* requirement as the proscribed conduct creates a substantial threat to the public welfare under circumstances that make proof of criminal intent difficult or impossible. Davis Code § 11.6 also meets the stringent due process requirements for a public welfare offense identified by this Court, including positive action by the defendant under circumstances that would alert the defendant to possible strict regulation. Dorsey's conviction should be affirmed.

This Court has established that only extreme sentences that are grossly disproportionate to the crime are prohibited under the Eighth Amendment. A second violation of Davis Code § 11.6 is justly considered to be a dangerous felony. Dorsey's two prior dangerous felony convictions demonstrate that Dorsey is incapable of conforming to the norms of society. A sentence of life in prison with eligibility for parole was necessary to prevent further danger. Considered against the background of this Court's decisions and anti-recidivist statutes in almost every American jurisdiction, Dorsey's sentence is not grossly disproportionate and it should be affirmed.

ARGUMENT

- I. Davis Code § 11.6, which does not include a minimal level of *mens rea*, is consistent with the Due Process clause of the Fourteenth Amendment of the United States Constitution.

A statute enacted to protect the public welfare does not run afoul of the Fourteenth Amendment for failure to require a minimal level of *mens rea*. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 64-65 (1910). The necessity for disposing of a minimal *mens rea* results from the distinguishing feature of public welfare offenses-- conduct which creates a significant danger under circumstances that would make proof of criminal intent difficult or impossible. See *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943). Davis Code § 11.6 is a public welfare offense statute that exemplifies this necessity. Davis Code § 11.6 must still conform to certain requirements for due process established by this Court for such statutes. Legislative intent to dispense with a *mens rea* requirement must be clear. See *State v. Shevlin-Carpenter Co.*, 108 N.W. 935, 937 (Minn. 1906). The statute should not criminalize wholly passive conduct. See *Lambert v. California*, 355 U.S. 225, 228 (1957). Finally, the statute should require action under circumstances that would alert the defendant to the potential for strict regulation. See *Staples v. United States*, 511 U.S. 600, 607 (1994). Davis Code § 11.6 specifically meets these stringent requirements for due process.

- A. The Due Process clause does not require a state statute to include a minimal level of *mens rea* in order to criminalize certain forms of conduct that threaten the public welfare.

Precedent is very clear that there is simply no categorical requirement for a minimal level of *mens rea* to distinguish criminal conduct. In *State v. Shevlin-Carpenter Co.*, 108 N.W. 935, 937 (Minn. 1906), the court stated that, "[a]n evil intent is ordinarily an essential element in all criminal prosecutions, but it may be dispensed with in particular cases by the Legislature."

In *State v. Shevlin-Carpenter Co.*, a state statute authorized punishment of a casual or involuntary trespasser on state lands by requiring a repayment of double the value of any timber taken. On the question of the validity of the law under the Fourteenth Amendment, this Court specifically approved of the lower court's analysis. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 64 (1910). This analysis recognized the need to curb an evil-- the stripping of public lands, and the "great difficulty" in prosecuting violators for such conduct when a specific intent showing was required. *State v. Shevlin-Carpenter Co.*, 108 N.W. at 937. "In these conditions the Legislature deemed the property rights of the state would be best protected by dispensing in the future with the question of evil intent, casting upon the individual the burden of determining at his peril the boundary lines." *Id.* The court

found that such legislation is "sanctioned by sound public policy." *Id.* at 938.

The class of public welfare offenses, which do not require a minimum level of *mens rea*, has been consistently recognized in the subsequent decisions of this Court. See *Staples v. United States*, 511 U.S. 600, 607 (1994); *United States v. Freed*, 401 U.S. 601, 607 (1971); *Morissette v. United States*, 342 U.S. 246, 252-53 (1952); and *United States v. Balint*, 258 U.S. 250, 252 (1922).

B. Davis Code § 11.6 is a public welfare offense statute, in that it prohibits conduct that creates a serious public danger and proof of criminal intent may be difficult or impossible.

A public welfare offense is distinguished by the potential for public harm and by the difficulty of establishing a knowing criminal violation. The need for a public welfare offense statute arises when "one deals with others and his mere negligence may be dangerous to them." *United States v. Balint*, 258 U.S. 250, 252 (1922). In *Balint*, the Court found that in the Anti-Narcotics Act of 1914, Congress had allowed for the possible injustice of punishing an innocent seller of controlled substances in order to combat the evil of illicit drug trafficking. *Id.* at 254. The court noted that the difficulty

to prove knowledge on the part of a violator contributed to this conclusion. *Id.*

This recognition of the difficulty in proving a defendant willed a violation results not from a desire to make convictions more convenient for prosecutors, but from the very nature of a typical public welfare offense. Common, innocent behavior in certain circumstances may give rise to serious danger. Cutting timber or selling drugs are often innocent or even salutary activities. "Many of these offenses are not in the nature of positive aggressions or invasions... Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger." *Morissette v. United States*, 342 U.S. 246, 255-6 (1952).

There may simply be no external manifestations to evidence a criminal intent in certain behaviors, even in circumstances that give rise to grave public danger. It may be impossible to distinguish between the thieving woodsman and the lost woodsman, between the early drug pusher and the home medic. In *United States v. Dotterweich*, 320 U.S. 277, 281 (1943), the Court cited *Balint* and recognized that a typical characteristic of a public welfare offense is that "[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

An otherwise 'innocent' pencil compass certainly may be used as a dangerous weapon. See *Mitchell v. Gibson*, 262 F.3d 1036 (C.A.10 2001) (compass used as a murder weapon); *People v. Herron*, 242 N.W.2d 584 (Mich.App. 1976) (modified compass treated as a potential weapon and found to be unlawfully possessed by an inmate.) Carrying a compass through airport security would, therefore, create a real and substantial public danger. "Let us not forget that the biggest slaughter of civilians in U.S. history was accomplished at the point of box-cutters." David J. Armbruster, *Ashcroft's Stance on Gun Records*, Los Angeles Times, December 11, 2001, at B12.

Proof that a passenger boarding a plane with a compass or a box-cutter had knowingly violated Davis Code § 11.6 would often be difficult, if not impossible. This prohibition of conduct that represents a significant potential danger in circumstances that will typically be absent any extrinsic evidence of a knowing violation demonstrates that Davis Code § 11.6 is a valid public welfare offense statute.

C. Davis Code § 11.6 meets the stringent due process requirements as established by this Court for a public welfare offense statute.

This Court has stated that the police power of a state is among the most illimitable, but that there are still limits imposed by due process on public welfare offense statutes. See

Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70 (1910). The language and subject matter of the statute must show that it was the intention of the legislature to dispense with a requirement for a criminal intent. *State v. Shevlin-Carpenter Co.*, 108 N.W. 935, 937 (Minn. 1906). The proscribed conduct must not be wholly passive. See *Lambert v. California*, 355 U.S. 225, 228 (1957). Finally, a violator should "be alerted to the possibility of strict regulation." *Staples v. United States*, 511 U.S. 600, 607 (1994).

The language and subject matter of Davis Code § 11.6 reflects a legislative intent to dispose of the requirement for a minimal *mens rea*. The language specifically criminalizes possession alone. The subject matter concerns the dangerous combination of airport premises and any "object capable of inflicting bodily injury". Davis Code § 11.6(a). Proof of a criminal intent would be difficult or impossible in many cases where Davis Code § 11.6 had been violated to the great danger of the public. Indeed, an actual criminal intent on the part of the possessor is unnecessary to create a grave risk. For example, an intolerable danger would be created by Dorsey's involuntary provision of the compass to an otherwise unarmed hijacker. To impose an unstated requirement for a minimal *mens rea* would simply undercut the clear intent of the Davis

Legislature to strongly deter all citizens from bringing dangerous objects of any kind onto airport premises.

Davis Code § 11.6 requires positive action. In *Lambert v. California*, 355 U.S. 225, 226 (1957), the defendant simply failed to register as a convicted person. This Court reversed conviction based on the wholly passive nature of the violation, as distinguished from "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.* at 228. In order to violate Davis Code § 11.6, however, Dorsey had to take many positive actions in order to bring himself to be present in the Davis International Airport with a dangerous object in his possession. Dorsey also failed to act in order to investigate and remove the dangerous object even when confronted with conspicuous airport security that would alert him to the potential danger a weapon represents.

Davis Code § 11.6 requires circumstances that would alert the defendant to strict regulations. In *Staples v. United States*, 511 U.S. 600, 611 (1994), the Court noted that some dangerous items, and even a gun, "can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." However, under Davis Code § 11.6, it is not simply the object that alerts the individual to the likelihood of

strict regulation. Any competent adult passenger would be aware of the strict security regulations that pervade the atmosphere of an international airport.

Therefore, Davis Code § 11.6 meets the requirements of the Due Process clause for a valid public welfare offense statute--the language and subject matter of the statute evidence a legislative intent to dispose of any requirement for a minimal *mens rea*, the defendant must take positive action to violate the statute, and the defendant would be alerted to the likelihood of strict regulation at the airport. As a landscaper, Dorsey would know that a knife, a compass or any other sharpened metal object would be "capable of inflicting bodily injury." Davis Code § 11.6. As a passenger, Dorsey would be strongly alerted to strict and conspicuous airport security regulations. Yet, his actions directly resulted in a serious risk of public danger contrary to the prohibition of Davis Code § 11.6. His conviction should be affirmed.

II. Imposition of a life sentence upon the conviction of Charles Dorsey for his third felony in the State of Davis was not Cruel and Unusual Punishment and did not violate the Eighth Amendment of the United States Constitution.

This Court has recognized a "narrow proportionality principle" in the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991). However, outside the context of capital punishment, "successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). This Court has provided some common principles to "give content to the uses and limits of proportionality review." *Harmelin*, 501 U.S. at 998. In particular, only extreme sentences grossly disproportionate to the crime are prohibited. *Id.* at 1000. A second violation of Davis Code § 11.6 is a dangerous felony. Additionally, "persons who have been before convicted of crime may suffer severer punishment for subsequent offenses." *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Dorsey's sentence of life in prison with eligibility for parole is a more severe sentence for a dangerous felony committed by a two-time felony recidivist. It was necessary to protect the public from further danger. It is not grossly disproportionate in light of this Court's decisions in *Harmelin* and in *Rummel* or when compared to other anti-recidivist statutes in almost every American jurisdiction. As such, it does not violate the Eighth Amendment.

A. A second conviction under Davis Code § 11.6 warrants punishment as a dangerous felony.

While a first conviction under Davis Code § 11.6 may require leniency, a second conviction must call for a harsh penalty to deter or prevent further danger from those that would repeatedly expose the public to such grave risk. In *Solem v. Helm*, 463 U.S. 277, 292 (1983), this Court listed the harm caused or threatened as the first factor to consider in evaluating the gravity of an offense. The Court also called for an evaluation of the culpability of the offender. *Id.*

Davis Code § 11.6 explicitly addressed the culpability of the offender by making a first offense a misdemeanor and a second offense a felony. Dorsey had nine months in prison to serve as notice that the Davis Legislature would not tolerate the carriage of any possible weapon onto airport premises. These nine months failed to deter Dorsey from exposing the public to almost exactly the same danger less than two years after the first offense. Nine months is close to the maximum penalty that may normally be imposed on a misdemeanant. Dorsey provides a compelling example of why a felony penalty is necessary to protect the public from what is, at minimum, highly dangerous criminal negligence.

It is difficult to overstate the seriousness of the harm threatened to society by the introduction of a potential weapon

into the secured areas of an international airport. Michigan prohibits the attempt to get on an aircraft while possessing a "[r]azor, box cutter, or item with a similar blade" as a felony, punishable by up to 10 years in prison. Mich. Comp. Laws § 259.80f (2002). Connecticut allows for a penalty of up to five years for anyone who "fails to comply with security measures or procedures in operation at any airport." Conn. Gen. St. § 15-69 (2002). The tragic events of September 11, 2001 certainly testify to the prudence of the Davis Legislature in enacting Davis Code § 11.6. A second violation is rightfully punished as a dangerous felony.

B. Charles Dorsey's life sentence imposed after his conviction for three dangerous felonies was necessary to prevent further danger to the public, was not grossly disproportionate, and, therefore, did not violate the Eighth Amendment.

This Court has recognized that the "basic line-drawing process" necessary to assign penalties to criminal offenses is pre-eminently within the province of the legislature. *Rummel*, 445 U.S. at 275. In 1998, one study reported that forty-seven state legislatures had enacted some form of anti-recidivist law with over 80% imposing life sentences, most of these precluding parole. Erik G. Luna, *Foreward: Three Strikes in a Nutshell*, 20 T. Jefferson L. Rev. 1, 1 (1998). The legislative interest expressed in all recidivist statutes is "in dealing in a harsher

manner 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*, 445 U.S. at 276. The Davis Legislature could with reason choose to prevent any further public danger by imposing a life sentence on Dorsey.

In *Rummel*, the Court upheld a mandatory sentence of life with eligibility for parole after approximately twelve years which was imposed on a two-time felony recidivist charged with obtaining \$120.75 by false pretenses. *Id.* at 266. The two prior convictions in *Rummel* were fraudulent use of a credit card to obtain \$80 worth of goods and services and passing a forged check in the amount of \$28.36. *Id.* at 265. The Court noted that previous decisions were all consistent with the principle that for felony crimes, "the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.* at 274.

Dorsey's sentence is marginally more severe than the sentence imposed on the Defendant in *Rummel*. Dorsey's crimes are arguably much more serious. However, distinctions between different substantive crimes and between different terms of years, in this case before eligibility for parole, are the kinds of distinctions that the Court in *Rummel* felt should be left to the legislature. "Like the line dividing petty theft from larceny, the point at which a recidivist will be deemed to have

demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Id.* at 285.

This Court continued to recognize that "substantial deference" should be granted to the legislature in "determining the types and limits of punishments for crimes" in *Solem v. Helm*, 463 U.S. 277, 290 (1983). However, the Court did apply proportionality analysis to invalidate a sentence of life imprisonment without eligibility for parole imposed on a recidivist convicted of uttering a bad check for \$100. *Id.* at 281. The defendant had also been found guilty of six other nonviolent, "relatively minor" felonies. *Id.* at 296. The court evaluated the minor nature of the offenses, compared the penalty imposed to those that could be imposed on other criminals in the same jurisdiction and to the penalty that would be imposed on others convicted of the same crime in other jurisdictions. *Id.* at 296-300. The court distinguished *Solem* from *Rummel* largely based on the fact that the *Solem* Defendant would not be eligible for parole. *Id.* at 300.

Dorsey's sentence may also easily be distinguished from *Solem* based Dorsey's potential for parole. More importantly, Dorsey was convicted of selling heroin to a minor, of first degree burglary and of repeatedly introducing a dangerous weapon

into an international airport. "Comparisons can be made in light of the harm caused or threatened to the victim or society." *Solem*, 463 U.S. at 292. The threat posed to society by Dorsey's conduct was vastly greater than that posed by the defendant's conduct in *Solem*.

More recently, the Court upheld a life sentence without the possibility of parole over an Eighth Amendment challenge in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, the defendant was a first time offender convicted of possessing over 672 grams of cocaine. *Id.* at 961. Justice Scalia, joined by Chief Justice Rehnquist, held that proportionality analysis is only applicable to death sentences. *Id.* at 994. Justice Kennedy, in a concurring opinion joined by Justice O'Connor and Justice Souter, held that a "narrow proportionality principle" could be applied to a term of imprisonment. *Id.* at 998.

Justice Kennedy sought to reconcile earlier proportionality decisions including *Rummel* and *Solem* through the application of "common principles". *Id.* at 996-8. Justice Kennedy recognized that prison terms reflect a substantive penological judgment that is properly left to the legislature, that the Eighth Amendment did not mandate any single penological theory, that divergences in such theories and in sentencing were inevitable, and that objective factors must guide any proportionality review. *Id.* at 998-1000. Justice Kennedy finally noted that

all of these principles informed the final principle that the Eighth Amendment does not mandate strict proportionality, but only forbids penalties that are grossly disproportionate. *Id.* at 1001. Justice Kennedy found that the crime in *Harmelin* "threatened to cause grave harm to society" and that the Michigan Legislature could with reason conclude that the threat warranted "the deterrence and retribution of a life sentence without parole." *Id.* at 1002-3.

Dorsey's crime of introducing a dangerous weapon onto airport premises also threatened grave harm to society. Also directly analogous to *Harmelin*, Dorsey's crime was a crime of possession. However, Dorsey is not a one-time offender. Dorsey had also been involved with illicit drugs, only Dorsey had been convicted of more than possession-- he was convicted of selling a dangerous drug to a minor. Yet, Dorsey's sentence is actually more lenient than the life sentence without eligibility for parole upheld in *Harmelin*.

Dorsey's sentence is not grossly disproportionate when considered alongside the sentences in *Rummel*, *Solem* and *Harmelin*. Dorsey's offenses, by almost any measure, would substantially exceed the gravity of the offenses that justified a life sentence in *Rummel*, while his sentence is comparable. Dorsey's sentence and crimes are easily distinguished from those in *Solem*. Finally, Dorsey's offenses are arguably more serious

than the single offense in *Harmelin*, yet Dorsey's sentence is more lenient. The Davis Legislature mandated the sentence that was necessary to prevent any further danger from Dorsey to the citizens of Davis.

While it is true that Dorsey was apprehended before any serious harm was done, the proper proportion of prevention to crime is arguably even more difficult to measure than that for retribution to crime. In this case, the Davis Legislature mandated the proportion to be used. The Supreme Court of Davis affirmed that decision. Most other state legislatures have made very similar decisions. Dorsey's sentence is not grossly disproportionate as measured by this Court's decisions in *Harmelin* and in *Rummel*. Therefore, Dorsey's sentence is not Cruel and Unusual Punishment and its imposition does not violate the Eighth Amendment.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to affirm the ruling of the Supreme Court of the State of Davis.

Respectfully submitted,
Counsel for Respondent #181

September 19, 2002