IN THE SUPREME COURT OF MISSISSIPPI

WILLIE NASH **APPELLANT**

V. **CAUSE NO. 2018-KA-01587-SCT**

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

> *"The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense."*
>
> *Graham v. Florida, 560 U.S. 48, 59 (2010) (quotation omitted).*

When Willie Nash was arrested and booked at the Newton County Jail, his cell phone was not discovered. There is no evidence that he concealed the phone; rather, it is a virtual certainty that Nash was not searched in accordance with jail policy. In short order, Nash offered up the phone's existence and even provided the code for jailers to unlock the phone. For this, Nash was rewarded with a felony conviction and a 12-year prison sentence.

This Court's decision affirming Nash's sentence is irreconcilable with the Eighth Amendment. Proportionality in sentencing remains "central" to the prohibition on cruel and unusual punishment. *Graham v. Florida*, 560 U.S. 48, 59 (2010). From this Court's mistaken impression to the contrary flows the affirmance of a sentence that would be forbidden in 48 other states and unique in the 49th.

There is still time to right this injustice. Nash's astonishing sentence is grossly disproportionate to the act for which he stands convicted. It is cruel and unusual.

involuntary. The excessiveness of his sentence aside, Nash's story is the story of someone who did nothing wrong: he possessed a cell phone during his arrest (just as the person reading this motion probably possesses a cell phone at this moment), and after his jailers failed to search him upon his arrival at the Newton County Jail, the phone remained in Nash's possession. For that, he was convicted of a felony.

Other states reject that possibility. Those states acknowledge the hornbook rule that "[a] voluntary act, or a volition, is an essential requirement for criminal culpability." Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. Pitt. L. Rev. 443 (Winter 1988).

For example, in Ohio, an appeals court reversed an arrestee's conviction for possession of marijuana in jail because he had not voluntarily brought himself (and thus, not voluntarily brought the marijuana) to jail. "That his 'person' and the

("Defendant, however, did not initiate the introduction of the contraband into the jail or cause it to be introduced in the jail. Rather, the contraband was introduced into the jail only because the police took defendant (and the contraband) there against his will.").

These decisions recognize that a crime necessarily entails both *actus reus* and *mens rea* – and that actions absent complicity generally cannot lead to conviction.

To be sure, some crimes are of strict liability: they require no proof of *mens rea*. But whether a defendant acts voluntarily is not an issue of *mens rea*; it is an issue of *actus reus*, because an involuntary act is no act at all. "According to the actus reus requirement, guilt of a criminal offense ordinarily requires proof that the defendant voluntarily committed a physical or overt act. Some voluntary act thus lies at the foundation of every crime." 22 C.J.S. *Criminal Law: Substantive Principles* § 41. Therefore, the fact that Nash was convicted under a statute with no explicit *mens rea* requirement is irrelevant;[3] even if the statute is strict liability, it still requires an *actus reus* and therefore requires a voluntary act.

In this case, the record lacks any evidence that Nash voluntarily took his cell phone to jail. The only witness who could have established whether Nash was strip-

whether Nash was properly searched. Record at Vol. 2, Page 17. There is literally *zero* evidence that Nash concealed his phone to defeat a search – and therefore no evidence that Nash voluntarily took the unauthorized cell phone into jail.

The State's failure to adduce evidence of Nash's voluntariness is a failure to prove *actus reus*

B. *Harmelin* Illustrated the Proper Use of the *Solem* Test.

Prior to *Harmelin*, *Solem* had established the three-part test to be used in gauging a sentence's disproportionality. *Solem*, 463 U.S. at 290-91 ("First, we look to the gravity of the offense and the harshness of the penalty. . . . Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. . . . Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."). But *Solem* did not explain the mechanics of the test's first step; in other words, *Solem* confirmed proportionality's importance, but it did not demonstrate how to identify an unconstitutionally disproportionate sentence.

Harmelin took that next step. Justice Kennedy's controlling opinion in *Harmelin* identified four principles that guide courts when evaluating a sentence's proportionality.

First, *Harmelin* cautioned due respect for the legislative prerogative. Second, the sentence must serve a legitimate penological theory. Third, *Harmelin* warned that sentences may vary from state to state for the same crime without reaching the point of unconstitutionality. And fourth, *Harmelin* insisted that proportionality "should be informed by objective factors to the maximum extent possible." *Harmelin*, 501 U.S. at 998-

Of those four principles, only two guide the mechanics of the analysis. The first and third principles – respect for the legislative prerogative, and understanding that sentences may differ from state to state – inform the deference that reviewing courts must afford. In contrast, the second and fourth factors guide the analysis itself: requiring a legitimate penological theory, and reviewing the sentence's proportionality objectively.

However, like all questions arising under the Eighth Amendment, whether a sentence is grossly disproportionate must be judged by the evolving standards of decency that mark the progress of a maturing society. *Graham v. Florida*, 560 U.S. 48, 58 (2010). In other words, it is not dispositive that a crime has been punished a certain way in the past; the ban on cruel and unusual punishment – and its accompanying prohibition of disproportionate sentences – "remains the same, but its applicability must change as the basic mores of society change." *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)).

1. No Legitimate Penological Theory Supports Nash's 12-Year Prison Sentence.

No one disputes that prohibiting cell phones in jails is a legitimate goal. *See, e.g.*, *United States v. Blake*, 288 Fed. Appx. 791, 795 (3rd Cir. 2008) ("That cell phones can, and have been, used for various dangerous and unlawful purposes in the prison context is, thus, quite clear."). The question is not whether criminalizing the possession of cell phones in prison necessarily violates the Eighth Amendment (it does not); the question is whether a 12-year prison sentence is legitimate for someone who possessed a cell phone only because his jailers failed to search him. It is not.

The four goals of sentencing are (1) rehabilitation, (2) retribution, (3) separation from society, and (4) deterrence, both general and specific. *Taggart v. State*, 957 So. 2d 981, 994 (Miss. 2007). Sentencing Nash to 12 years for possessing a cell phone *that he only possessed because his jailers failed to search him* serves none of these goals. First, such a remarkably long sentence is not needed to rehabilitate Nash; indeed, there is nothing to rehabilitate, as Nash did not conceal his cell phone (what did the law require Nash to do differently?). Second, the sentence achieves no retributive effect; Nash's actions were victimless, so there is no retribution to be accomplished. Third, there is no

distinguishable in critical respects. In Illinois, possessing a cell phone in jail is punishable by up to 15 years, but Illinois law establishes an affirmative defense where "the person . . . possessing contraband in a penal institution had been arrested, and that person possessed the contraband at the time of his or her arrest, and that the contraband was . . . possessed in the penal institution by that person as a direct and immediate result of his or her arrest." 720 Ill. Comp. Stat. 5/31A-1.1(f). And in Arkansas, research reveals no case in which possession of a cell phone has resulted in a 12-year sentence.[6] In other words, there is no indication that anyone outside Mississippi has ever received a sentence as long as Nash's for doing what Nash did.

To be sure, differences of opinion will always exist about whether some crimes are more serious than others. But there is no objectively reasonable basis for punishing possession of a cell phone in jail – when that possession only occurs because jailers failed to perform a search – more harshly than second-degree arson or poisoning with intent to kill. And research reveals nowhere else in America where Nash could have received such an extreme sentence. Nash's sentence is not merely "harsh." It is grossly disproportionate to what he did.

3. The Legislature's Authority to Establish Sentencing Ranges is Not Limitless.

Even cases in which the U.S. Supreme Court has ruled against Eighth Amendment challenges have explained that deference to legislatures is not limitless. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court resisted the invitation to hold that the

[6] Westlaw reveals 17 cases in which Arkansas' prison contraband statute, Ark. Code Ann. § 5-54-119, has been cited; of those 17 cases, three include the word "phone." Two of those cases relate to an inmate named Craytonia Badger; the Arkansas Department of Correct1.2(at1.4(;)1.(;)1.(;o39220>2(C)4.1(h)-9( )7.8(ans2(at1.-2.4(

punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense.") (Kennedy, J.). It is proof that Nash's sentence is grossly disproportionate to what he actually did.

C. With Gross Disproportionality Established, the Second and Third Steps of the *Solem* Test are Easily Satisfied.

Once a threshold showing of gross disproportionality is made, a court reviewing a sentence under the Eighth Amendment proceeds to *Solem*'s second and third steps: comparing the challenged sentence to sentences imposed on other criminals in the same jurisdiction, and comparing the challenged sentence to those available in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 291-92 (1983). *See also Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir. 1983) ("In light of *Harmelin*, it appears *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.' Based on *Harmelin*, . . . only if we infer that the sentence is grossly disproportionate to the offense will we then consider the remaining factors of the *Solem* test[.]" (citations and quotations omitted)).

any sentence fit *what Nash actually did*, not what other crimes are conceivably within the statute's boundaries. *Graham*, 560 U.S. at 59.

And what Nash actually did is far less serious than many other crimes for which he could not have received 12 years. *Supra* at 10 (assaulting a police officer, second-degree arson, and poisoning with intent to kill all punishable by 10 years or less). It cannot be said with a straight face that possessing a cell phone in jail solely because jailers failed to perform a search is more serious than arson.

2. Nash Would Not Have Received a 12-Year Sentence Anywhere Else in America.

Out of 52 American jurisdictions – the 50 states, plus Washington D.C. and the federal system – Mississippi appears to be one of just three jurisdictions where a sentence of more than 10 years is possible for possessing a cell phone in jail. But of the other two, one recognizes an affirmative defense for anyone who possessed the cell phone upon arrest, and the other appears not to have sentenced anyone to more than 10 years for cell phone possession. *Supra* at 10-11 (discussing Illinois and Arkansas). Thirty-eight jurisdictions (36 states, plus Washington D.C. and the federal system) set a maximum sentence of five years or less for possession of a cell phone in a correctional facility. *See* Appendix. Therefore, it appears likely that no one outside Mississippi has ever received 12 years for doing what Nash did.[7]

One particular jurisdiction deserves specific mention. In *Solem*, the U.S. Supreme Court ascribed special importance to the federal system's treatment of the behavior for which the defendant was sentenced. *Solem*, 463 U.S. at 292 (citing *Weems v. United*

[7] For that matter, no one *inside*

States, 217 U.S. 349, 380 (1910)). Like Mississippi law, federal law criminalizes an inmate's possession of a cell phone in a prison. 18 U.S.C. § 1791(d)(1)(F). Unlike Mississippi, federal law allows a sentence of no more than one year. 18 U.S.C. § 1791(b)(4).

D. For Someone Who Only Possessed a Cell Phone in Jail Because His Jailers Failed to Search Him and Discover It, a 12-Year Sentence is Cruel and Unusual.

At bottom, whether a sentence is grossly disproportionate is a judgment of whether the punishment fits the crime – whether the sentence fits *what the defendant actually did*. Under *Harmelin*, "[a] court must begin by comparing *the gravity of the offense* and the severity of the sentence." *Graham*, 560 U.S. at 60 (emphasis added). There simply is no objectively reasonable basis for concluding that someone who possesses a cell phone in jail because his jailers failed to search him deserves 12 years in prison. No legitimate penological theory supports that sentence; Mississippi punishes far more serious crimes with shorter sentences; and no other American jurisdiction

Article III, Section 28 of the Mississippi Constitution differs from the Eighth Amendment; where the Eighth Amendment bans "cruel and unusual punishments,"

second and third steps require that the sentence be out of line with both local and national patterns).

But the Mississippi Constitution is different. Unlike the Eighth Amendment, Section 28 of the Mississippi Constitution is not implicated only by a sentence that is *both* cruel and unusual. Instead, it demands that "[c]ruel *or* unusual punishment shall not be inflicted." Miss. Const., art. III § 28 (emphasis added). The Mississippi Constitution's drafters could have simply adopted the Eighth Amendment's language; their decision to the contrary must be respected. They chose not to forbid only punishments that are both overly punitive and uncommon; they elected to forbid punishments that fit either description. And their decision demonstrates that Nash's sentence cannot stand.

First, Nash's sentence is cruel. It is unsupported by any legitimate penological justification. *Supra* at 9 (no recognized sentencing goal supports Nash's sentence). Sentencing Nash to 12 years because of his jailers' failure to search him serves no purpose except punishment for punishment's sake. Requiring Nash to serve time *at all* in prison for his jailers' failures is shocking; but sentencing Nash *to 12 years for someone else's failure* is repulsive. It is fundamentally cruel.

But second, even if Nash's sentence were not cruel, it still would violate Section 28 of the Mississippi Constitution because it is unusual. *Supra* at 12-15. Nash's behavior would not be punished with a 12-year sentence anywhere else in America; and even in Mississippi, research reveals no case where such an astonishing sentence has been levied against someone acting in good faith. *If anyone in American history has ever been sentenced to 12 years for doing what Nash did, then the case eludes research.* Nash's sentence is almost certainly unique; even if it is not, it is indisputably unusual.

Sentencing Nash to 12 years for possessing a cell phone that his jailers would have discovered in a search is clearly cruel and unusual. But even if it were not, the sentence is indisputably either cruel *or* unusual. Therefore, the sentence violates Article III, Section 28 of the Mississippi Constitution, and must be vacated.

IV. Conclusion: Nash Neither Smuggled His Cell Phone Nor Concealed Its Existence. His Case Lacks Any Suggestion of Bad Faith or Voluntariness. Sentencing Him to 12 Years Because His Jailers Failed to Search Him is Cruel and Unusual.

Vacating Nash's sentence requires no sweeping changes to precedent: the facts that led Nash to this Court make his case incredibly rare, if not unique. Nash never concealed his cell phone; it might never have been discovered if Nash had not offered it up, nor might his ownership had been established if Nash had not given his passcode to unlock it. Nash did everything right. Sentencing him to 12 years for that behavior is not merely "harsh" – it is perhaps unprecedented. Even in Mississippi, which appears to be one of just three American jurisdictions that conceivably allow such long sentences, no case resulting in a comparable sentence has arisen from comparable facts. *Supra* at 12-13 (distinguishing *Smith*, 275 So. 3d at 104, and *Houston*, 150 So. 3d at 158).

The U.S. Supreme Court has cautioned that finding a sentence grossly disproportionate will be "exceedingly rare." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 289-90). But the facts of Nash's case are exceedingly rare. Under those exceedingly rare facts, a 12-year sentence is cruel and unusual in violation of the Eighth Amendment. Alternatively, the sentence violates Article III, Section 28 of the Mississippi Constitution because it is either cruel *or* unusual.

However, the Court need not reach the issue of the sentence's disproportionality, because the State failed to introduce evidence that Nash voluntarily possessed an unauthorized cell phone and thereby failed to make a *prima facie* case.

The Court should GRANT Nash's Motion for Rehearing, VACATE its decision dated January 9, 2020, REVERSE his conviction, and RENDER a judgment of acquittal. Alternatively, the Court should GRANT Nash's Motion for Rehearing, VACATE its decision dated January 9, 2020, VACATE Nash's sentence, and REMAND his case to the Newton County Circuit Court for resentencing.

RESPECTFULLY SUBMITTED this Twenty-Third day of January 2020.

/s/ *Will Bardwell*
William B. Bardwell
Counsel for Willie Nash

OF COUNSEL:
William B. Bardwell (Miss. Bar No. 102910)
Lindsey Rubinstein (Miss. Bar No. 105985)
Southern Poverty Law Center
111 E. Capitol Street, Suite 280
Jackson, Mississippi 39201
Phone: (601) 948-8882
Fax: (601) 948-8885
E-mail: will.bardwell@splcenter.org
E-mail: lindsey.rubinstein@splcenter.org

Appendix:
American jurisdictions' treatments of cell phone possession in a correctional facility[1]

Jurisdiction	Possession statute	Sentencing statute (if different)	Maximum sentence
Alabama	Ala. Code § 14-11-50	Ala. Code § 13A-5-6	5 years
Alaska	Alaska Stat. § 11.56.380	Alaska Stat. § 12.55.135	1 year
Arizona	Ariz. Rev. Stat. Ann. § 13-2505	Ariz. Rev. Stat. Ann. § 13-702	2.5 years
Arkansas	Ark. Code Ann. § 5-54-119	Ark. Code Ann. § 5-4-401	20 years
California	Cal. Penal Code § 4576		90 days lost time credit
Colorado	Colo. Rev. Stat. § 18-8-204.2	Colo. Rev. Stat. § 18-1.3-501	1.5 years
Connecticut	Conn. Gen. Stat. Ann. § 53a-174b	Conn. Gen. Stat. § 53a-36	1 year
Delaware	Del. Code Ann. tit. 11 § 1256	Del. Code Ann. tit. 11 § 4205	3 years
Florida	Fla. Stat. § 944.47	Fla. Stat. § 775.082	5 years
Georgia	Ga. Code Ann. § 42-5-18(d)(1)	Ga. Code Ann. § 17-10-3	

Appendix (continued)

Jurisdiction	Possession statute	Sentencing statute (if different)	Maximum sentence
Nevada	Nev. Stat. § 212.165(3)	Nev. Stat. § 193.130	4 years
New Hampshire	N.H. Rev. Stat. Ann. § 642:7	N.H. Rev. Stat. Ann. § 651:2	7 years
New Jersey	N.J. Stat. Ann. § 2C:29-10	N.J. Stat. Ann. § 2C:44-1	5 years
New York	N.Y. Penal Law § 205.25	N.Y. Penal Law § 70.00	7 years
North Carolina	N.C. Gen. Stat. § 14-258.1(g)	N.C. Gen. Stat. § 15A-1340.17	8 months
North Dakota	N.D. Cent. Code 12.1-08-09	N.D. Cent. Code 12.1-32-	

CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, simultaneous with its filing, a copy of the foregoing Motion for Rehearing was served on all counsel of record via the Court's electronic filing system.

SO CERTIFIED this Twenty-Third day of January 2020.

/s/ *Will Bardwell*
William B. Bardwell