IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OTTIS J. CUMMINGS, JR. — APPELLANT

VS. — NO. 2009-KA-0317-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Ottis Cummings, a recidivist, has been convicted of felony D.U.I. By virtue of his status as a habitual offender, Cummings, in the wake of a bifurcated trial, was sentenced to life imprisonment without parole.

This did not sit well with Cummings who now claims, *inter alia*, his sentence is disproportionate to the offense of felony driving under the influence " . . . for essentially drinking a small amount of beer." (Brief of the Appellant at 4) Cummings, like others before him, contends a life sentence without parole, under these circumstances, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

The sentence imposed, although severe, was not "grossly disproportionate given Cummings's status as a habitual offender and his commission of a third DUI offense.

The weight of the evidence supporting Cummings's conviction of felony D.U.I. is also assailed in this appeal.

OTTIS J. CUMMINGS, JR., a fifty-one (51) year old African-American male, resident of Ackerman, and a prior convicted felon previously incarcerated in the state penitentiary on no fewer than four (4) separate occasions (R. 114-15), prosecutes a criminal appeal from his convictions of felony DUI and recidivism following a trial by both jury and judge alone conducted on February 18, 2009, in the Circuit Court of Choctaw County, C. E. Morgan, III, Circuit Judge, presiding.

A separate sentencing hearing focusing on sentence enhancement was conducted on 18 February following trial on the merits. (R. 111-121)

Cummings's indictment, as it originally stood, was returned on July 22, 2008.

It stated that

> OTTIS J. CUMMINGS [o]n or about the 19th day of May, 2008, in Choctaw County Mississippi . . . did wilfully, unlawfully, and feloniously, drive or operate a motor vehicle while under the influence of intoxicating liquor or some other substance which impaired his ability to operate a motor vehicle or while having eight one-hundredths percent (.08%) or more by weight/volume of alcohol in his blood, when he, the said OTTIS J. CUMMINGS then and there had two (2) or more convictions for violation of Miss.Code Ann. §63-11-30(1), as amended, and said convictions and offenses all had occurred within five (5) years of May 19, 2008, to-wit:
>
> (1) DUI, convicted on or about 11/07/2005 in Starkville Municipal Court, Docket No. 05-6069, date of violation: 07/06/2005;
>
> (2) DUI, convicted on or about 03/09/2007 in Chickasaw County Justice Court, Docket No. 171, Page 225, date of violation: 03-04-2007; * * * (C.P. at 3-4)

The indictment was later amended so as to charge Cummings as a habitual offender under Miss.Code. Ann. §99-19-83 by virtue of his prior convictions in1979 of burglary of a dwelling and aggravated assault. (R. 5, 110; C.P. at 42)

After being adjudicated a recidivist during a separate hearing conducted by the circuit judge (R. 111-22), Cummings was sentenced to life imprisonment without the benefit of parole. (R. 120-

21; C.P. at 56-56)

Cummings seeks vacation of his felony DUI conviction and requests a new trial. He also seeks vacation of his sentence of life without parole which, he contends, was "unduly harsh and constitutes cruel and unusual punishment" in violation of the Eighth Amendment. (Brief of the Appellant at 5, 11)

Finally, Cummings seeks a proportionality hearing. (Brief of the Appellant at 9)

Two (2) issues are raised on appeal to this Court:

Issue No. 1. Cummings's sentence, as a habitual offender, to a lifetime in prison without parole for felony driving under the influence is disproportionate to the crime and constitutes cruel and unusual punishment.

Issue No. 2. The trial court erred in denying Cummings's motion for a new trial because the jury verdict was against the overwhelming weight of the evidence.

STATEMENT OF FACTS

On May 19, 2008, John Marolt, a three (3) year veteran of the Mississippi State Highway Patrol, " . . . was sitting stationary [and running radar] on [Highway] 15 here in Choctaw County at Woodmen of the World." (R. 51-52)

Marolt clocked a blue van being driving by Ottis Cummings at a speed of 80 miles hour. (R. 52-53) Marolt, with blue lights flashing, pursued the van for a distance of a mile and a half or two miles before overtaking it. During the pursuit, Marolt's vehicle reached a speed "[i]n excess of 100" miles per hours. (R. 53)

One (1) witness testified for the State during its case-in-chief, arresting officer John Marolt.

Relevant portions of Marolt's testimony is quoted as follows:

Q. [BY PROSECUTOR HOPPER:] All right. So I believe

you're saying the van swerved when you initiated blue lights.

A. Yes, sir. It went off the right side of the road, then crossed back over, coming to rest on the opposite side of the roadway in a driveway at the intersection of 790 and 15.

Q. Okay. Keep going.

A. When I went up to the vehicle, the driver, Mr. Cummings, there, was slumped over the wheel, holding the wheel with his forehead resting on the steering wheel.

Q. When you say Mr. Cummings, do you see him?

A. Yes, sir.

Q. [Is] [t]he person you are calling Mr. Cummings in the courtroom today[?]

A. Sitting there in the blue coat. (Indicated.)

MR. HOPPER: I'd ask the Court to have the record reflect he has identified the defendant.

THE COURT: Let the record reflect that.

Q. Okay. Go ahead. He was . . .

A. He was slumped over the wheel. I could immediately smell the odor of intoxicating beverage. I began talking to Mr. Cummings. Speech was slurred. His pupils were dilated.

Q. What is the significance of pupils dilated?

A. It's usually a sign that the person is under the influence of an intoxicating beverage.

Q. Okay.

A. Asked Mr. Cummings if he had been drinking. He said he had drank one beer. I opened the door and asked him to step out of the vehicle. When he - - when he exited the vehicle, he stumbled. I grabbed his arm. That is when he was placed into custody and transported.

Q. Why did you grab his arm?

A. To keep him from falling.

Q. Keep him from falling[?]

A. (Nodded)

Q. Okay. And you took him into custody; is that correct?

A. Yes, sir.

Q. Did you attempt to - - attempt to run the Intoxilyzer 8000?

A. Yes, sir. At the jail he was offered Intoxilyzer 8000, which he declined to take.

Q. He refused to take it.

A. Yes.

Q. Okay. Did you - - did you do an inventory search of the van?

A. Yes, I did. Before I left the scene transporting him, I done an inventory search and found an open beer, Budweiser beer, beer can, one of the 32-ounce big cans about three-quarters of the way full. It was in the driver's side floorboard.

Q. Okay, How was Mr. Cummings acting?

A. Very uncooperative. Argumentative. Irrational. Once we reached the jail he - - on these felony packets there is a lot of identifying questions - phone number, number of dependents, stuff like that. And he refused to answer any of my question, wouldn't cooperate.

Q. Okay. After he refused this Intoxilyzer, what did you do?

A. He was charged and released to the county for booking. (R. 53-55)

At the close of the State's case-in-chief, Cummings's motion for a directed verdict was

overruled. (R. 72)

> THE COURT: The Court finds taking the evidence in the light most favorable to the State at this point in time that a jury question has been presented and motion for directed verdict is overruled. (R. 72)

The defendant testified in his own defense and claimed that at the time he was stopped for speeding by the officer he had only consumed a portion of a single beer. (R. 75) According to Cummings he had been in Louisville from 4:00 to 10:00 p.m. putting a motor in a car for his nephew. While he was underneath the car some grit allegedly fell into his eyes. (R. 75)

Cummings's explanation for his slurred speech was that he took a lot of medication, approximately 45 pills a day because he was HIV positive. (R. 76)

Cummings stated the officer jerked him out of the van and placed him in handcuffs. (R. 77) He further claimed he didn't do anything wrong. "When I seen the trooper, I punched the cruise control on at 60. So I couldn't have been speeding." (R. 77)

Finally, Cummings told the jury he had consumed a small amount, approximately a fourth, of the beer found by Marolt on the floorboard of his van. (R. 77) He denied he was drunk. (R. 78)

The State produced Officer Marolt in rebuttal. (R. 84) Marolt testified he pulled Cummings over at 9:20 p.m., not after 10:00 p.m. as testified to by Cummings. (R. 84) Marolt also denied he jerked Cummings out of the van. (R. 84)

At the close of all the evidence, Cummings renewed his motion for a directed verdict. It was denied. (R. 86)

Following closing arguments (R. 89-105), the jury retired to deliberate at 1:38 p.m. (R. 105)

Five (5) minutes later, at 1:43 p.m., the jury returned the following verdict: "We, the jury, find the defendant, Ottis Cummings, guilty of felony driving under the influence." (R. 106)

A poll of the jurors, individually, reflected the verdict was unanimous. (R. 106-07)

A sentence-enhancement hearing followed trial-on-the-merits with the trial judge adjudicating Cummings a habitual offender within the meaning and purview of Miss.Code Ann. §99-19-83. (R. 110-21)

Judge Morgan found as an evidentiary fact "a continuing course of criminal conduct since 1978." (R. 120) He thereafter sentenced Cummings to life imprisonment without parole. (R. 120; C.P. at 56)

On February 19, 2009, Cummings filed a motion for a new trial alleging, *inter alia*, "[t]he verdict of the jury is contrary to the law and to the overwhelming weight and sufficiency of the evidence in this case." (C.P. at 64-65)

The motion was overruled in an order entered by Judge Morgan the same day. (C.P. at 66)

Steven Wright, a practicing attorney in Ackerman, represented Cummings quite effectively during the trial of this cause.

Benjamin Suber, an attorney with the Mississippi Office of Indigent Appeals, has been equally proficient in his representation of Cummings in Cummings's appeal to this Court.

SUMMARY OF THE ARGUMENT

ISSUE NO. 1. The trial judge did not abuse his judicial discretion in denying Cummings's motion for a new trial. The evidence fails to preponderate heavily, if at all, in favor of Cummings. To uphold the integrity of the jury's verdict would not work an unconscionable injustice.

ISSUE NO. 2. A correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the context of the habitual offender statute. **Oby v. State,** 827 So.2d 731 (Ct.App.Miss. 2002), habeas corpus dismissed by 2005 WL 1172413. *See also Mangum v. Hargett,* 67 F.3rd 80 (5th Cir. 1995), certiorari denied 116 S.Ct. 957, 516 U.S. 1133, 133

L.Ed.2d 880 (1996); *Sones v. Hargett,* 61 F.3rd 410 (5th Cir. 1995).

The sentence of life imprisonment without parole, although severe, was not "grossly disproportionate" to the present offense of felony DUI in light of Cummings's prior felony convictions of dwelling house burglary and aggravated assault. Accordingly, it did not violate the Eighth Amendment.

The trial court's imposition of a life sentence without parole does not give rise in this case to an inference of gross disproportionality. Therefore, an Eighth Amendment proportionality analysis is not required. **Bonner v. State,** 962 So.2d 606 (Ct.App.Miss. 2006); **Forkner v. State,** 902 So.2d 615 (Ct.App.Miss. 2004).

Finally, the sentence imposed is within the limits prescribed by statute. In this posture, no abuse of judicial discretion has been demonstrated here. **Clay v. State,** 881 So.2d 354 (Ct.App.Miss. 2004).

ARGUMENT

ISSUE NO. 1.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN OVERRULING CUMMINGS'S MOTION FOR A NEW TRIAL.

Cummings claims his conviction of felony DUI was against the weight of the evidence.

We think not.

The eight (8) evidentiary facts mentioned in appellant's brief, standing alone, justify the conclusion the evidence as a whole fails to preponderate heavily, if at all, in favor of Cummings and that affirmation of the jury's verdict would not work an unconscionable injustice.

(1) Cummings's motor vehicle, a van traveling 80 miles per hour, left the roadway on the right side, came back onto the roadway, and then crossed back over the north and southbound lanes

prior to coming to rest in a driveway. (Brief of the Appellant at 3-4; R. 53-55)

(2) Upon approaching the van, Officer Marolt observed the driver "slumped over the wheel, holding the wheel with his forehead resting on the steering wheel." *(Id.)*

(3) Upon approaching the van, Marolt "could immediately smell the odor of intoxicating beverage." (*Id.*)

(4) Marolt began to converse with Cummings whose speech was slurred. *(Id.)*

(5) Marolt observed that the pupils of Cummings were dilated. The significance of "dilated pupils" is that "[i]t's usually a sign that the person is under the influence of an intoxicating beverage." *(Id.)*

(6) Cummings admitted he had been drinking, if only a single beer. An open 32-ounce can of Budweiser was found ". . . in the drivers's side floorboard." *(Id.)*

(7) When Officer Marolt opened the door to the van and requested the driver to step out of the vehicle, Cummings stumbled, and Marolt grabbed his arm to keep him from falling. *(Id.)*

(8) Upon being arrested and taken to the station house, Cummings refused the intoxilyzer. *(Id.)*

Add to all this Marolt's testimony that Cummings was "[v]ery uncooperative, [a]rgumentative, [i]rrational [a]nd he refused to answer any of my questions, wouldn't cooperate. (R. 55)

Add also the fact that Officer Marolt had to travel in excess of 100 miles per hour just to catch up to Cummings whose van had been clocked at 80 miles per hour. (R. 53)

These evidentiary facts of prominence are not outweighed by the dubious explanations given by Mr. Cummings at trial.

A motion for a new trial implicates the "weight" of the evidence, as opposed to "sufficiency"

of evidence, and is addressed to the trial court's sound discretion. **Cannon v. State,** 904 So.2d 155 (Miss. 2005); **Dunn v. State,** 891 So.2d 822 (Miss. 2005); **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999) ["A motion for a new trial tests the weight of the evidence rather than its sufficiency."]; **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993); **Smith v. State,** 897 So.2d 1002 (Ct.App.Miss. 2004) [A motion for a new trial challenges the weight of the evidence and implicates the trial court's sound discretion.] *See also* Rule 10.05, Uniform Rules of Circuit and County Court Practice (1995).

The rules of law applicable here are found in **Gary v. State,** No. 2008-KA-00619-COA decided June 16, 2009 [Not Yet Reported], ¶¶ 16, 17, slip opinion at 7-8, as follows:

> "When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush [v. State],* 895 So.2d at 844 (¶18) citing *Herring v. State,* 691 So.2d 948, 957 (Miss. 1997)). On a motion for new trial, the circuit court sits as a thirteenth juror and only in exceptional cases in which the evidence preponderates heavily against the verdict will a new trial be granted. *Id.* (Citing *Amiker v. Drugs For Less, Inc.,* 796 So.2d 942, 947 (¶18) (Miss. 2000)) Our review requires that we weigh the evidence in the light most favorable to the verdict. *Id.*
>
> Looking at the evidence as a limited "thirteenth juror" in this case and viewing the evidence in the light most favorable to the verdict, we cannot say that the guilty verdict would sanction an unconscionable injustice. We find that the evidence does not preponderate heavily against the verdict, and the trial court did not abuse its discretion in denying Gary's motion for a new trial. This issue is without merit." (¶¶ 16, 17, slip opinion at 7-8)

Cummings's argument that an open beer found on the floorboard on the driver's side *"could have"* caused Officer Marolt to smell intoxicants when Marolt approached the vehicle and that " . . . the effect of the [45 daily] pills *"could have"* had an effect similar to that of being under the influence of alcohol is insufficient to turn the weight of the evidence in Cummings's favor. (Brief of the Appellant at 10)

It took the jury only five (5) minutes to reach its verdict in this case. A reviewing court can easily conclude that to allow the jury's verdict to stand would not sanction an unconscionable injustice. We respectfully submit Cummings's complaint targeting the weight of the evidence used to convict him of felony DUI is devoid of merit.

ISSUE NO. 2.

CUMMINGS'S SENTENCE OF LIFE WITHOUT PAROLE, ALTHOUGH SEVERE, WAS NOT "GROSSLY DISPROPORTIONATE" TO THE DEFENDANT'S OFFENSE GIVEN HIS RECORD OF TWO PRIOR FELONY CONVICTIONS, BOTH OF WHICH INVOLVED CRIMES OF VIOLENCE, AND GIVEN HIS HISTORY OF DRUNKEN DRIVING AND INCARCERATION.

At the time he committed the present offense, Cummings, a recidivist, had prior convictions for burglary of a dwelling house and aggravated assault, both considered crimes of violence. (R. 113-14) Cummings had also been previously incarcerated for jail escape. (R. 114-15) There had been four (4) separate incarcerations in all. (R. 114-15)

In short, Cummings was an incorrigible.

Judge Morgan found as much. We quote:

> THE COURT: * * * The Court finds that the State has met beyond a reasonable doubt - - the State has met its burden under provision of Section 99-19-83 to have Mr. Cummings sentenced as a habitual offender pursuant to that statute.
>
> Having had all this produced to me and listening to the lady from the penitentiary, I would say regardless of the time elements between all of this, this is a continuing course of criminal conduct since 1978.
>
> Mr. Cummings is why they passed the statute. These are the people that, that the statute was intended to apply to so that they would be removed from society. The only bad thing about this, I guess, is that he should have been removed from society long ago.

> I take note that the count - - if you count the felony DUI that he got here today, that makes five felony DUI's. To be convicted of five felony DUI's, you had to be convicted of ten DUI's in addition to that five. So that is 15 DUI's he has had since the '80's. Remarkably, nobody has died in that period of time, and I can only say except for the grace of God.
>
> So Mr. Cummings, fortunately, this time we are going to remove you from society. I sentence you to life on this charge in the custody of the Mississippi Department of Corrections. That sentence cannot be reduced, and you must serve every bit of it. You will not be eligible for probation or parole, and there you are to stay for the rest of your life. * * * (R. 120-21)

Cummings, relying upon **Solem v. Helm,** 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and **Clowers v. State,** 522 So.2d 762, 765 (Miss. 1988), contends "the trial court failed to review the sentence in light of the lessons of **Solem** [and] the defendant was afforded no opportunity to present evidence in mitigation of sentence." (Brief of the Appellant at 17)

In effect, Cummings is suggesting his sentence to life imprisonment without the possibility of parole for the commission of his third offense of felony DUI tried within the context of his prior convictions for burglary and aggravated assault should shock the conscience of the Court. (Brief of the Appellant at 5-9)

Cummings, in the wake of this "shock and awe" complaint, invites this Court to vacate his sentence, remand the case to the trial court for an additional sentencing hearing during which Cummings would be allowed to present evidence in mitigation of sentence and the trial judge given another opportunity to engage in a proportionality analysis. (Brief of the Appellant at 5-9)

This issue is controlled, at least in part, by the following language found in **Bonner v. State,** *supra,* 962 So.2d 606, 610-11 (Ct.App.Miss. 2006), reh denied (2007), where Justice Irving made the following observations:

> Bonner relies on the three-pronged proportionality analysis

announced in *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), to support his argument that his life sentence [without the possibility of parole, reduction, suspension, or probation] is violative of the Eighth Amendment to the United States Constitution. In *Solem,* the United States Supreme Court set the standard for proportionality as follows: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (I) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291, 103 S.Ct. 3001.

However, the Court limited *Solem* in *Harmelin v. Michigan,* 501 U.S. 957, 965, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), to the extent that it found a proportionality guarantee in the Eighth Amendment. "In light of *Harmelin,* it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.' " *Hoops v. State,* 681 So.2d 521, 538 (Miss. 1996) (quoting *Smallwood v. Johnson,* 73
F.3d 1343, 1347 (5th Cir. 1996).

Bonner contends that the trial judge had the responsibility to review, and possibly modify, his life sentence. Bonner relies on *Clowers v. State,* 522 So.2d 762, 765 (Miss. 1988), to support his argument. We find that *Clowers* offers no support for Bonner's contention that the trial court had an obligation to automatically review, and possibly modify, his life sentence. It is true that the trial judge in *Clowers* refused to sentence Clowers, a habitual offender, to the statutorily-mandated sentence of fifteen years, finding instead that the mandated sentence was disproportionate to Clowers' crime: uttering a forged $250 check. On appeal, the Mississippi Supreme Court affirmed, finding that "the trial court did not commit reversible error in reducing what it found to be a disproportionate sentence under the facts of this case."

We interpret *Clowers* to hold that, if warranted by the special and unique facts of a case, a trial judge may depart from the sentencing mandates of our recidivism statutes if the judge determines that the mandated sentence is disproportionate to the crime. As we have already stated, *Clowers* does not stand for the proposition that a trial judge must automatically review a recidivist's statutorily-mandated sentence.

Bonner's life sentence complies with Mississippi Code

Annotated section 99-19-83 (Rev.2000) which provides:

[statutory language omitted]

> The Mississippi Supreme Court has held that when a trial court imposes a sentence which complies with statutory limitations, the court will not be held in error and will not have abused its discretion. *Johnson v. State,* 461 So.2d 1288, 1292 (Miss. 1984) (citing *Contreras v. State,* 445 So.2d 543, 546 (Miss. 1984).
>
> In *Huntley v. State,* 524 So.2d 572 (Miss. 1988), the Mississippi Supreme Court stated, "[t]his is not the first time that Mississippi's habitual offender statute has been challenged as cruel and unusual punishment. This Court has consistently held that sentences under Mississippi Code Annotated section 99-19-83 do not constitute cruel and unusual punishment." *Id.* at 575 [additional citations intentionally omitted].
>
> In light of the gravity of Bonner's current offense, and his prior predicate offenses (grand larceny, forgery, and robbery), the trial court's imposition of a life sentence does not give rise to an inference of gross disproportionality; thus, we do not proceed with an Eighth Amendment proportionality analysis.

In any event, under our law Cummings's sentence to life imprisonment was mandatory, extenuating circumstances notwithstanding. This is not to say the trial judge, in his discretion, cannot depart from the sentencing mandates of our recidivism statutes if the judge determines that the mandated sentence is disproportionate to the crime. **Bonner v. State,** *supra*, 962 So.2d 606, 611 (Ct.App.Miss. 2006).

Judge Morgan did not abuse his judicial discretion in finding, implicitly, if not directly, that Cummings's sentence was not "grossly disproportionate" to the crimes charged - burglary of a dwelling house and aggravated and assault, both of which, according to the testimony, are considered crimes of violence. (R. 114)

We argue the sentence imposed, although severe, was not "grossly disproportionate given Cummings's status as a habitual offender and the commission of two crimes involving violence.

In addition to this, the sentence imposed was within the limits prescribed by statute. It should not be disturbed for this reason, if for no other. **Johnson v. State,** 904 So.2d 162 (Miss. 2005); **Sykes v. State,** 895 So.2d 191 (Ct.App.Miss. 2005); **Clay v. State,** 881 So.2d 354, 358 (Ct.App.Miss. 2004),quoting from **Johnson v. State,** 461 So.2d 1288, 1292 (Miss. 1984).

The sentence imposed reflects the gravity of Cummings's most recent offense, not as it stands alone, but in the light of his prior offenses. **McGruder v. Puckett,** 954 F.2d 313 (5th Cir. 1992), certiorari denied 113 S.Ct. 146, 121 L.Ed.2d 98 (1992). When the punishment imposed is viewed in this context, it is clear that Cummings's sentence is not "shockingly" or "grossly" excessive. *See* **Forkner v. State,** *supra*, 902 So.2d 615, 625 (Ct.App.Miss. 2004) which cited and relied upon **McGruder** in holding that a sentence of life without parole for burglary of a storehouse imposed pursuant to our habitual offender statute did not violate the Eighth Amendment. *See also* **Clay v. State,** *supra*, 881 So.2d 354 (Ct.App.Miss. 2004) [Life in prison without parole not grossly disproportionate to the offense of grand larceny.]

Cummings's prior criminal history was explained in great detail by Gloria Gibbs, a custodian of state penitentiary records. (R. 111-17) Cummings, we learn, had been incarcerated on four (4) previous occasions. (R. 115)

Ottis J. Cummings, without a doubt, is an incorrigible - a career criminal, if you please - who is incapable of conforming his conduct to the standards required by law. Cummings is worthy of the harsh sentence imposed.

Where, as here, the sentence imposed as a habitual offender is life without the possibility of parole, the sentence, at least on a former day, was a prime candidate for scrutiny under the Eighth Amendment. This truth is found in **Ashley v. State**, 538 So.2d 1181, 1185 (Miss. 1989), where this

Court stated the following:

> In *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the Supreme Court held that a recidivism sentence of life imprisonment without parole was subject to scrutiny under the cruel and unusual punishment clause of the Eighth Amendment to the Constitution of the United States. When faced with such an issue, trial courts are charged to engage in proportionality analysis under the Eighth Amendment
>
> > guided by objective criteria, including (I) harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentence imposed for commission of the same crime in other jurisdictions.
>
> 463 U.S. at 292, 103 S.Ct. at 3011, 77 L.Ed.2d at 650. *See also Jenkins v. State*, 483 So.2d 1330 (Miss. 1986); and *Presley v. State*, 474 So.2d 612 (Miss. 1985).

Four (4) years later, on the other hand, this Court said in **Stromas v. State**, 618 So.2d 116, 123 (Miss. 1993), that "[d]eclaring a sentence violative of the Eighth Amendment to the U.S. Constitution carries a heavy burden and only in rare cases should this Court make such a finding." *See also* **White v. State**, 742 So.2d 1126 (Miss . 1999) ["One seeking to prove a sentence violative of the Eighth Amendment carries a heavy burden."]; **Adams v. State,** 794 So.2d 1049, 1059 (Ct.App.Miss. 2001), citing **Stromas v. State**, *supra*, ["Declaring a sentence in violation of the Eighth Amendment to the U.S. Constitution carries a heavy burden and only in rare cases should this Court make such a finding."]

Three (3) years prior to **Stromas**, this Court said in **Barnwell v. State**, 567 So.2d 215, 221-22 (Miss. 1990), that

> **[a]part from the factual context of *Solem* - a sentence of life in prison without the possibility of parole - or a sentence which is manifestly disproportionate to the crime committed** (e.g. life sentence for overtime parking, *see, Rummel*, 445 U.S. at 274 n. 11,

> 100 S.Ct. At 1139 n. 11) **extended proportionality analysis is not required by the Eighth Amendment.** * * * Though no sentence is "per se" constitutional, this Court, in the context of our habitual statutes, as well as in sentencing other offenders, has recognized the broad authority of the legislature and trial court in this area and has repeatedly held that where a sentence is within prescribed statutory limits, it will generally be upheld and not regarded as cruel and unusual. [citations omitted; emphasis supplied]

In 1996 this Court decided **Hoops v. State,** 681 So.2d 521, 538 (Miss. 1996), which suggested, if not asserted, " . . . that **Solem** is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of '*gross* disproportionality.' " [emphasis ours]

We respectfully submit the trial judge did not abuse his judicial discretion in finding, implicitly, if not directly, that no such inference exists here.

The Court in **Hoops** also observed:

> **Rummel v. Estelle,** 445 U.S. 263, 265-66, 100 S.Ct. 1133, 1134-35, 63 L.Ed.2d 382 (1980), serves as a guide in the determination of this threshold comparison. [Federal citations omitted] The defendant in *Rummel* was sentenced to life in prison with the possibility of parole under a recidivist statute for a third non-violent felony conviction. Although the total loss from the three crimes was less than $250.00, the United States Supreme Court found Rummel's sentence to be proportionate and not violative of the Eighth Amendment.

In 1999 this Court, citing the **Hoops** case, stated the following in **Young v. State,** 731 So.2d 1120, 1124, para. 19, 20, 21 (Miss. 1999):

> **This Court has noted that a trial judge acts with the broadest of discretion as long as she sentences a defendant within the applicable statute.** See *Hoops v. State*, 681 So.2d 521, 537 (Miss. 1996) (holding sentencing is within discretion of trial court and not subject to appellate review if it is within limits prescribed by statute). * * * * * *

> As a constitutional matter, proportionality of a sentence under the Eighth Amendment was previously addressed by this Court under the three pronged analysis found in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). *Hoops*, 681 so.2d at 538. **As noted in *Hoops* however, *Solem* has been limited by the Supreme Court.**
>
> In *Harmelin v. Michigan*, the Supreme Court held that absent a punishment which falls outside the bounds of those traditionally implemented under the old Anglo-Saxon system, the realm of proscribing punishment is generally left to the various states. *Harmelin v. Michigan*, 501 U.S. 957, 991-92, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (referring to *Weeks v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910) in which a defendant was sentenced under a Spanish Penal Code provision to a life of hard labor for minor embezzlement. For want of a ready definition, **this court in Hoops noted that *Harmelin* stands for the proposition that no proportionately requirement exists under the Eighth Amendment absent a threshold showing of "gross dis proportionality." *Hoops*, 681 So.2d at 538 (citing *Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir. 1996)). Without this initial showing, we will not employ the three pronged *Solem* analysis outlined in *Hoops*.** [emphasis supplied]

While conceding, as he must, that sentencing is within the complete discretion of the trial judge, Cummings fails to suggest an inference of "gross disproportionality." (Brief of the Appellant at 5-9) No Eighth Amendment proportionality analysis is required here because a "threshold showing" of "gross disproportionality" was never made. Given the seriousness and violent nature of both of Cummings's prior felony offenses, his life sentence without parole, under our recidivist statute, is not "grossly disproportionate" to his fifth conviction for felony DUI (R. 120) when viewed in light of Cummings's prior convictions for two violent crimes as well as his prior convictions for felony DUI.

This issue then is controlled, in part, by this Court's long established rule " . . . that a trial court will not be held in error or held to have abused [its] discretion if the sentence imposed is within the limits fixed by statute." **Johnson v. State,** 461 So.2d 1288, 1292 (Miss. 1984), and the cases

cited therein. *See also* **Barnwell v. State,** *supra,* 567 So.2d 215, 221 (Miss. 1990) [Save for instances where the sentence is "manifestly disproportionate" to the crime committed, extended proportionality analysis is not required by the Eighth Amendment]"; **Hart v. State,** 639 So.2d 1313 (Miss. 1994); **Edwards v. State,** 615 So.2d 590 (Miss. 1993); **Reed v. State,** 536 So.2d 1336 (Miss. 1988).

A sentence of life without parole is authorized, if not required, by virtue of Miss.Code Ann. Section 99-19-83.

In **Hopson v. State,** 625 So.2d 395, 404 (Miss. 1993), this Court, citing **Harmelin v. Michigan,** *supra,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), observed that the Supreme Court of the United States questioned the proportionality analysis created by **Solem v. Helm,** *supra,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Nevertheless, this Court concluded: "[E]ven though **Harmelin** questions the proportionality analysis, there is language in the case to indicate that a 'gross proportionality' analysis is still in order." 625 So.2d at 404. **Hoops**, which requires a threshold showing of "gross disproportionality" post-dates **Hobson** by three years.

Harmelin was a case where the Supreme Court of the United States held that a mandatory term of life imprisonment without the possibility of parole for possessing 672 grams of cocaine did not constitute cruel and unusual punishment under the Eighth Amendment. **Harmelin**, we submit, is persuasive here.

The Court of Appeals has, within the context of our habitual offender statutes, upheld the integrity of life sentences without the benefit of probation or parole. *See* **Shumaker v. State,** 956 So.2d 1078 (Ct.App.Miss. 2007) [A life term predicated on one's habitual offender status is constitutional.]; **Gray v. State,** 926 So.2d 961 (Ct.App.Miss. 2006), reh denied [Sentence of life

imprisonment as habitual offender was within statutory range and was in fact mandatory, and defendant was unable to demonstrate gross disproportionality to crime.]; **Forkner v. State,** *supra*, 902 So.2d 615 (Ct.App.Miss. 2004), reh denied, cert denied [Sentence of life imprisonment without parole under the habitual offender statute for the crime of burglary does not violate the defendant's Eighth Amendment rights.] *See also* **Burrell v. State**, 726 So.2d 160 (Miss. 1998) [Sentence of habitual offender to life without parole for the *sale of cocaine* within 1500 feet of a school was neither cruel nor unusual punishment nor disproportionate and was within the statutory limits of section 99-19-83.]; **Huntley v. State**, 524 So.2d 572 (Miss. 1988) [Sentence of habitual offender to life without parole for *receiving embezzled funds* was neither cruel nor unusual punishment.]; **Bandy v. State,** 495 So.2d 486 (Miss. 1986) [Imposition of life sentence without probation or parole imposed upon defendant who was convicted of *child fondling* and who had two (2) prior felony convictions involving sexually related offenses did not constitute cruel and unusual punishment.] *See also* **Burrell v. State,** 727 So.2d 761 (Ct.App.Miss. 1998) [Because sentence of life imprisonment without the possibility of parole for the sale or transfer, as an habitual offender, of a controlled substance " . . . was within the guidelines set out by the legislature in Mississippi Code Annotated §99-19-83 (Rev. 1994), we find no error."] *Cf.* **Evans v. State,** 813 So.2d 724 (Miss. 2002) [Defendant was sentenced to serve a term of life imprisonment without parole after being convicted under Miss.Code Ann. 99-19-83 of possessing a firearm as a convicted felon]; **Tran v. State,** 785 So.2d 1112 (Ct.App.Miss. 2001) [Defendant was sentenced to serve life without parole after being convicted as an habitual offender of transferring cocaine.] (In both **Evans and Tran**, the duration of sentence was not an issue.)

When making an Eighth Amendment proportionality analysis, the pivotal inquiry is not, as

Cummings might suggest, whether the defendant's sentence of life without parole is disproportionate to his most recent offense but whether the sentence imposed under the habitual offender statute is disproportionate to the most recent offense *in light of his prior offenses.* **McGruder v. Puckett,** *supra*, 954 F.2d 313 (5th Cir. 1992), certiorari denied 113 S.Ct. 146, 121 L.Ed.2d 98 (1992).

In **McGruder** the Court of Appeals for the Fifth Circuit held that McGruder's sentence by a Mississippi court to life without parole was not grossly disproportionate to the gravity of the offenses upon which it was based, even though the most recent offense only involved auto burglary. The Court stated:

> McGruder's argument seems to be that his sentence of life imprisonment without parole is not proportionate to his offense of auto burglary, thus violating the requirements of the Eighth Amendment. We think that this argument ignores the essence of the statute under which he was sentenced. Upon his conviction for auto burglary, he was sentenced under the habitual offender statute. **Under that statute, his sentence is imposed to reflect the seriousness of his most recent offense, not as it stands alone, but in the light of his prior offense.** See Wilson v. State, 395 So.2d 957, 958 (Miss. 1981). /3 We there review his sentence. [emphasis supplied; text of note 3 omitted.

See also two other cases born in Mississippi that found their way to the Court of Appeals for the 5th Circuit, *viz.*, **Mangum v. Hargett,** 67 F.3d 80 (5th Cir. 1995), cert denied 116 S.Ct. 957, 516 U.S. 1133, 133 L.Ed.2d 880 (1996), and **Sones v. Hargett,** 61 F.3d 410 (5th Cir. 1995).

This was precisely the context in which Judge Morgan imposed Cummings's sentence of life without parole. (R. 196-98)

In **Huntley v. State,** *supra*, 524 So.2d 572, 575 (Miss. 1988), this Court upheld a sentence of life imprisonment without eligibility for parole imposed pursuant to the habitual offender statute. The Court stated:

> The Supreme Court also recognized the need for habitual

offender statutes in *Rummel v. Estelle*, 446 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) stating:

> The purpose of the recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced to other crimes.

445 U.S. at 284, 100 S.Ct. At 1144-45.

> **This is not the first time that Mississippi's habitual offender statute has been challenged as cruel and unusual punishment. This Court has consistently held that sentences under Miss.Code Ann. Section 99-19-83 do not constitute cruel and unusual punishment.** [Numerous citations omitted; emphasis ours]

See **Shumaker v. State,** *supra*, 956 So.2d 1078 (Ct.App.Miss. 2007); **Bonner v. State,** *supra*, 962 So.2d 606, reh denied, cert denied; **Gray v. State,** *supra*, 926 So.2d 961 (Ct.App.Miss. 2006).

Finally, in **Beckam v. State**, 556 So.2d 342 (Miss. 1990), this Court affirmed a conviction of escape and recidivism brought under Miss.Code Ann. Section 99-19-83. The fact that Beckham was sentenced to life without parole was not an impediment to the affirmation of both his convictions and his sentence. *See also* **Bridges v. State**, 482 So.2d 1139 (Miss. 1986); **Baker v. State**, 394 So.2d 1376 (Miss. 1981).

Cummings, to be sure, is a multiple loser, having been previously convicted in Mississippi of dwelling house burglary, aggravated assault, jail escape, and felony DUI on no fewer than five (5) separate occasions. (R. 13-15, 120) The burglary and assault as predicate offenses are serious and

violent crimes. The circuit judge placed great emphasis on these facts, observing that " . . . this is a continuing criminal conduct since 1978." (R. 120)

In our opinion, this prisoner has more than sufficiently demonstrated he is a threat to the good order of the State of Mississippi and to the safety and well-being of its citizens. Cummings, who has a history of drinking and driving, has demonstrated he is either unwilling or unable to comport with the basic requirements of civilized conduct.

Accordingly, his sentence must be affirmed.

CONCLUSION

Contrary to Cummings's assertion, he was not sentenced to life imprisonment for consuming a " small amount of beer." (Brief of the Appellant at 4) Rather, he was sentenced to a term of life for the reasons stated by the circuit judge at R. 120-21, all of which took into account the "big picture."

Appellee respectfully submits that no reversible error, If any error at all, took place during the trial of this cause.

Accordingly, the judgments of conviction of felony DUI and recidivism, together with the life sentence without parole imposed by the trial judge, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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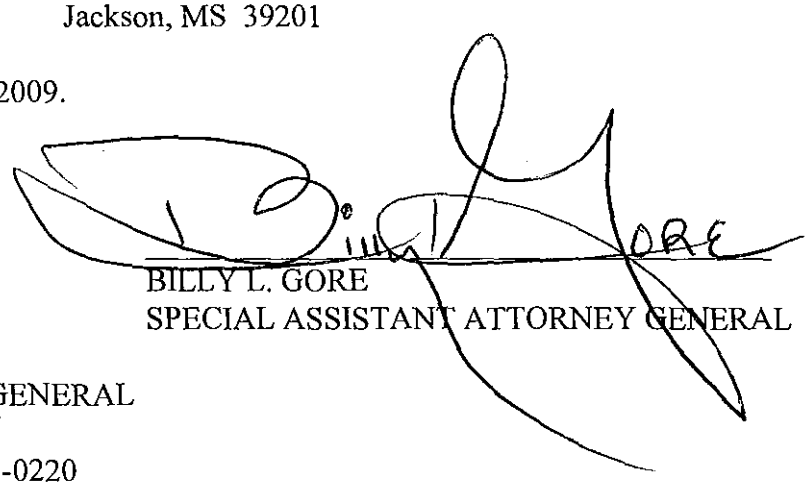
This the 31st day of July, 2009.



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