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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

J.C. DAVIS,	)	
	)	
Petitioner,	)	
	)	CASE NO.: CC 1990-3715.61
	)	CC-1990-3716
	)	
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Court pursuant to a Rule 32 petition, it is hereby ordered as follows: the defendant's claim is due to be granted for the following reasons.

1. This Court takes judicial notice of its own records.

2. On or about May 25, 1990, the defendant was charged with robbery in the first degree. The Court declared the defendant indigent and appointed counsel. Unable to post a $10,000.00 bond, defendant remained in custody through trial.

His jury trial was consolidated with that of co-defendant, Lawrence Posey. On January 15, 1991, following a consolidated trial, Davis and

Posey were convicted as charged and both sentenced to life in prison without the possibility of parole as a habitual offender. Thereafter, Davis pleaded guilty to an accompanying reduced offense (CC-1990-3716) and receiving a concurrent life with parole sentence. The defendant then appealed his jury trial conviction and resulting sentence. (CC-1990-3715)

3. On October 25, 1991, the Alabama Court of Criminal Appeals reversed and remanded Davis' conviction[1]. Thereafter, on November 27, 1991, the Court granted the State's application for re-hearing and withdrew the original opinion and affirmed the conviction and sentence with a substituted opinion.

4. The defendant filed this Rule 32 petition. The State responded by admitting the allegations in the petition, not opposing defendant's request for relief, and requesting that this Court exercise its discretion.

FACTS

Davis is 73 years old. He is serving a life without parole sentence for a robbery first degree conviction pursuant to Alabama Habitual Felony Offender Act (HFOA). To date, he has served approximately 41 calendar years in state custody. His prior convictions are as follows:

[1] This Court has been unable to obtain a copy of the original opinion and the reasons for the initial reversal.

1964 - grand larceny [2],

1969 - grand larceny and burglary second degree (The 1940 Alabama Criminal Code defined "grand larceny" as (generally, but subject to many exceptions) the theft of property worth $25 or more, and punished it as a "felony." Tit. 14, § 331, Code 1940)

1971 - robbery[3];

1978 - unlawfully possessing a check payable to another;

1981 - robbery in the third degree

It appears that the entire prosecution rested on a single eye-witness identification along with a secondary witness. On April 11, 1990, Odessa Washington, the key eye-witness claimed that two men robbed Alley's Drug Store where she was working as a cashier. Washington gave virtually no physical description other than he had "grey hair, stood between 5 feet 6 inches or 5 feet 7 inches tall, and weighed about 180 pounds. (R. 124-125).

Shortly after the robbery, she was shown a photo array, but was unable to identify anyone as being involved. On or about May, 1990 or approximately a month after the robbery, Washington was brought to a live lineup at the city jail. At that time, she did not identify Davis as being

[2] The adoption of the new criminal code abrogated the former "grand larceny" offense.

[3] It is this Court's understanding that the previous 1940 Code of Alabama did not distinguish robbery with various degrees accounting for whether a weapon was used or the amount of harm inflicted.

involved. In fact, she stated that one of the potential suspects looked like or favored the culprit, but she did not think that was him. (R. 92-93).

Thereafter, she had "dreams" about the way he looked. (R. 96). That following Monday, Washington then notified police that she was positive Davis was at least one of the robbery participants.

As to the identification of co-defendant Lawrence Posey, Washington claimed that several months after the robbery, she was asked by the District Attorney's Office to attend Davis' preliminary hearing. While awaiting the proceedings, she observed Lawrence Posey sitting in the courtroom. It is unclear from the record whether this encounter with Posey occurred by coincidence or was planned in advance. Nevertheless, according to her testimony, she positively identified Posey as also being involved in this robbery.

Additionally, Willie McGill, a part-time security guard at the pharmacy, testified. Following the robbery on April 11, 1990, he told police he could not identify any suspects. Thereafter, on or about May 22, 1991, McGill was shown some individual pictures, but was still unable to identify any suspects. In fact, the lead detective even showed McGill a photo-lineup including Davis, but he failed to identify or even recognize him.

Furthermore, there is no record of McGill being shown any pictures including Posey or otherwise identifying him in advance of trial.

Despite his inability to ever identify either defendant for over a year, McGill positively identified both defendants in court. He presumably made this identification, while both defendants were seated in court at counsel table readying for trial. This was the first time he identified anyone as a suspect – after being unable to do so and even denying he could provide any identification.

As to any corroborating evidence, there was no physical evidence tying the defendants to this incident. According to whom you believe, either the video cameras at the pharmacy did not record the incident or had not even been installed. As to fingerprints, the evidence technician was unable to recover any of value. Other individuals initially referenced as witnesses in police reports were never called to testify.

At trial, the defense also raised a Batson motion. After the jury was struck, Davis objected pursuant to Batson, claiming that the State's strikes were racially motivated. The trial court directed the State to articulate its reasons for the strikes. Thereafter, in summary fashion the court overruled the defense motion.

After this brief three witness trial and sentencing, Davis was sentenced to a mandatory life without parole sentence.[4]

As noted, Davis is 73 years old. He suffers from a number of chronic conditions including - congestive heart failure. This life-threatening illness has required outside hospitalization and care.

It is also noteworthy that the defendant has maintained a good prison record. He has not been cited for any violations in almost 10 years, despite having no expectation or possibility of receiving a reduced sentence.

Finally, Davis' co-defendant was granted relief from his life without parole sentence on or about March, 2009 by Presiding Judge Scott Vowell. Posey has since been released on parole. Posey had been previously convicted of theft of property in the second degree along with two separate robbery offenses.

DEFENDANT'S UNDISPUTED CLAIM

Davis alleges that his sentence is both cruel and unusual and violates the 8th Amendment to the United States Constitution and Section 15 of the Alabama State Constitution along with certain due process rights.[5]

[4] Judge Joseph Jasper presided over the defendant's cases.

[5] Davis further alleges that this claim is not precluded. Regardless, as noted, the State does not oppose his request for relief and has not advanced any grounds for preclusion.

First, with the advent of the sentencing guidelines and other sentencing considerations, it is doubtful, were Davis sentenced today in Alabama, that he would be sentenced to ***life without the possibility of parole*****.** The sentencing guidelines provide an alternative to the HFOA for certain offenses. Also, in 2016, the Alabama legislature downgraded certain offenses to a new class D felony status. Said offenses now cannot be used to enhance a defendant's sentence to life without parole pursuant to the HFOA.

For example, today Davis could seek a possible numbered parolable sentence under the sentencing guidelines. Additionally, at least three of his previous convictions would likely be classified as class D felonies and could not be used for HFOA enhancement.

Also, of note, Lawrence Posey was granted relief from his sentence of life without parole and thereafter paroled and released, despite having three similar prior felonies for robbery and theft related offenses. (Circuit Court Jefferson County Order dated March 17, 2009 – CC-1990-3922)

Five of Davis' priors, predate the adoption of the HFOA. Four of his priors are theft related and do not indicate any threatened force or actual use of force. At least three of his priors could today be classified as possibly misdemeanors or class D felonies.

As to his other priors, the facts of the 1971 robbery conviction are unclear, but it is notable that at the time of that alleged robbery, the criminal code did not distinguish as to whether a weapon or dangerous weapon was used or consider the alleged harm inflicted. At that time, robbery included all fact situations from purse snatching to armed bank robbery. Davis' 1981 Robbery 3rd conviction does make the distinction – indicating that no weapon was used or injury inflicted.

The Eighth Amendment to the United States Constitution prohibits, in relevant part, "cruel and unusual punishment."[6] The prohibition against cruel and unusual punishment guarantees defendants the right not to be subjected to excessive penalties disproportionate to the crimes for which they were convicted.[7] This concept of proportionality is central to the Eighth Amendment.[8]

Importantly for Davis' case, the constitutional understanding of what penalties are proportionate to the crime charged may evolve over time, as society matures and progresses.[9] In other words, a penalty that was once deemed proportionate – and therefore constitutional – may, as society

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[6] U.S. CONST. AMEND. VIII.
[7] *Miller v. Alabama*, 132 S. CT. 2455, 2463 (2012).
[8] *Ex parte Henderson*, 144 SO.3D 1262, 1266 (Ala. 2013) (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)); *see also Solem v. Helm*. 463 U.S. 277, 284-90 (1983).
[9] *See Ex parte Henderson*, 144 SO.3D at 1266.

changes, later be deemed unconstitutional.[10] Regardless, this Court can contemplate few occasions where imposing a life without parole sentence for any individual with this record seems reasonable or proportionate.

In considering whether a sentence is disproportionate to the crimes for which it was imposed, the Supreme Court has suggested that courts consider three factors: (1) the seriousness of the crime and the punishment, (2) other sentences issued within the jurisdiction, and (3) sentences issued for the offense outside the jurisdiction.[11] Here, all three factors weigh in favor of a finding that Davis' life without parole sentence is disproportionate to the crimes for which he was convicted.

As to the first two Helm factors, while Alabama once viewed life without parole sentences appropriate for all class A felony convictions for a person previously convicted of any three prior felony convictions, the Alabama legislature has since adopted sentencing guidelines and other statutory changes to provide alternatives to mandatory non-parolable sentences by considering additional factors.

As another example, until the 2018 amendments were passed, life without parole had previously been the harshest sentence available for

[10] *Id.*; see also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (noting that the Eighth Amendment is more concerned with current societal mores than historical prisms).
[11] *Solem*, 463 U.S. at 290-92 (noting that courts "may" consider these factors, but not requiring courts to constrain themselves to these factors).

trafficking all twelve categories of drugs delineated in § 13A-12-231. In wholly removing life without parole from every subsection of the trafficking sentencing scheme, the Alabama legislature has demonstrated an unwillingness to see even the most egregious offenders sentenced to die in prison.

At 73 years old and suffering from a number of chronic conditions, Davis is hardly the hardened repeat offender envisioned by the law. There is no evidence that anyone was harmed or injured for any of his crimes. As discussed, his prior felony convictions include mainly theft related offenses committed in his youth. Significant is that his co-defendant with a similar record has been granted relief and was long ago released from custody.

Finally, even the third factor – sentences for similar offenses in other jurisdictions – favors Davis.

Nationwide, there is a growing consensus that life without parole sentences are excessive and disproportionate. One example of this is the First Step Act, a proposed congressional bill co-sponsored by former Alabama Senator Doug Jones and supported by a bipartisan coalition and former President Donald Trump. Among other reforms, the First Step Act would replace life without parole sentences for third-offense felony drug trafficking convictions with a 25-year sentence and would allow prisoners

sentenced to prior to the Fair Sentencing Act (which adjusted the disparity in sentences between crack and powder cocaine) to retroactively apply for resentencing.[12]

This Court also researched neighboring states HFOA statutes. Unlike a number of other states, the Alabama HFOA permits life imprisonment without parole upon conviction of one robbery with no physical injury required and without considering whether all prior felony offenses were non-violent.

In fact, Tennessee, South Carolina, Texas and Virginia only use certain violent or sex-related prior offenses to enhance a defendant's sentence to such an extent.

For example, Tennessee does not consider non-violent theft, burglary, and drug related offenses in applying its "repeat offender" statute. To even consider a defendant's prior robbery conviction, Tennessee requires that the previous conviction be "aggravated" - including either the use of a deadly weapon or display to lead the victim to believe it to be a deadly weapon or where the victim suffers a serious bodily injury. T.C.A. 40-35-120; 39-13-402.

[12] *See, e.g.,* COMMITTEE ON THE JUDICIARY, FACT SHEET: THE REVISED FIRST STEP ACT OF 2018 (S.3649) (2018), available at https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20-%20First%20Step%20Act%20Summary.pdf.

Virginia similarly does not consider non-violent theft and drug related offenses. Instead, Virginia, like a number of states, considers a narrow list of certain crimes as previous "acts of violence" to enhance a sentence to life without parole, such as: murder, manslaughter, mob-related felonies, any kidnapping, any malicious felony assault or bodily wounding, robbery, carjacking, criminal sexual assault, and arson. VA Code Ann. 19.2.-297.1.

Yet, even if after having been convicted of two or more of these prior offenses along with a subsequent crime of violence and sentenced to a non-parolable sentence, Virginia still provides possible parole relief for non-sex offenders after reaching 60 or 65 years of age. Id.

Arkansas similarly accounts for the age of the offender. Specifically, all life sentences are parole-eligible once the defendant reaches age 55 and reserves life without parole for repeat sex offenders. AR ST 16-93-615.

One of the few outliers joining Alabama in permitting the broad use of life without parole sentences is Mississippi. Yet, even Mississippi is joining the growing chorus of states seeking to reform and offer parole relief for individuals serving both non-violent along with some violent offenses. In the most recent 2021 legislative session, Mississippi expanded parole

eligibility for most offenses with the exception of murder, human trafficking, drug trafficking and sex crimes.

After considering all the relevant factors and unique circumstances of this case, Davis' petition is granted. Davis' underlying life without parole sentence (CC-1990-3715) is set aside and amended to life with the possibility to parole. This sentence is to run concurrently with all other cases including (CC-1990-3716).

Davis should receive the same fair and impartial sentencing available to those current defendants similarly charged and now appearing before this Court and at the least the same consideration granted to his similarly situated co-defendant, Posey.

Finally, it should also be noted that in granting this relief and amending his sentence, Davis will not be automatically released. He still must serve his remaining life with parole sentences. However, he may seek parole status, subject to the Board of Pardons and Paroles.

The Court makes no findings as to the validity of Davis' underlying conviction at trial. While the evidence offered was based solely on some questionable eye-witness testimony, and not any physical or scientific evidence, Davis has not advanced such a claim. The Court also does not

address Davis' Batson motion, except to the extent that certain racially neutral reasons proffered by the prosecution were suspect.

The Clerk is directed to send an updated transcript to DOC Central Records reflecting that defendant's sentence in CC-1990-3715 is amended to life with the possibility of parole and is to run concurrently with all other cases including CC-1990-3716.

In consideration of the above and foregoing finding, **IT IS ORDERED, ADJUDGED and DECREED** as follows:

1. The Rule 32 Petition, filed by Defendant, is granted without opposition from the State.

2. The Clerk is ordered to forward copies of this Order to the defendant in DOC custody and District Attorney Danny Carr by AlaFile.

3. The Clerk is to send revised transcripts to DOC Central Records.

Done and ordered on August 10, 2021.

Stephen Wallace
Stephen C. Wallace
CIRCUIT JUDGE