STATE V. DAVIS: PROPORTIONALITY REVIEW OF NON-CAPITAL SENTENCES UNDER THE EIGHTH AMENDMENT

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I. FACTS

In January of 1999, thirteen-year-old T.E. snuck out of her home with her stepsister, C.M., to meet nineteen-year-old Jason, who drove the girls to the home of his friend, twenty-year-old Anthony Davis ("Davis").[1] When introduced to Davis, T.E. told him that she was fourteen and later that night they engaged in sexual intercourse.[2] T.E. visited Davis several more times during that month, and on January 20, T.E. brought her fourteen-year-old friend, P.T., with her to Davis's home.[3] At that point, P.T. learned that Davis was twenty, and P.T. would later testify that Davis knew she was only fourteen. P.T. and Davis had sex later that evening and again on two other occasions during the following two weeks.[4]

Later that month, Davis and his friends visited P.T. and C.M. while P.T. was baby-sitting.[5] The parents who had hired P.T. to baby-sit returned home early and, after telling Davis and his friends to leave, the couple contacted the girls' parents.[6] Shortly thereafter, the three girls ran away to Davis's house, but P.T. returned home that night.[7] The next morning, the police found T.E. and C.M. at Davis's home.[8]

Initially, when questioned by police, T.E. denied having sex with Davis.[9] However, in a second interview days later, she claimed that they engaged in sexual intercourse two or three times, including once during the preceding weekend.[10] In

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1. State v. Davis, 79 P.3d 64, 66 (Ariz. 2003) (en banc).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*. at 66–67.
7. *Id*. at 67.
8. *Id*.
9. *Id*.
10. *Id*.

addition, doctors who examined P.T. and T.E. for signs of sexual abuse found that T.E. had engaged in sexual relations at some point in the previous week.[11]

During Davis's questioning, he denied ever having intercourse with T.E.[12] Davis did admit to having sex with P.T. on three occasions, but claimed that P.T. had told him she was eighteen when they met.[13] Davis also maintained that P.T. told him she was sixteen the day after the baby-sitting incident and that he did not have sex with her again after learning she was under eighteen.[14]

The state charged Davis with four counts of sexual misconduct with a minor, in violation of Arizona Revised Statutes section 13-1405.[15] Because the two victims were under fifteen years of age, the charges were subject to the mandatory sentencing guidelines of the Dangerous Crimes Against Children Act.[16] The first count was for sexual misconduct with T.E. on January 18, 1999, and the other three counts were for misconduct with P.T. on three separate occasions during the month of January.[17]

The jury convicted Davis on all four counts. However, after learning that Davis would be sentenced to a minimum of fifty-two years in prison, all twelve jurors expressed to the judge that they felt the "punishment for the crime [was] excessive."[18] In the pre-sentence report, the probation officer commented that the mandatory sentence was unwarranted and that neither victim's mother wished to see Davis sentenced for the mandatory term.[19] Even the prosecutor recommended a mitigated term and stated that Davis should be allowed to petition the Board of Executive Clemency for a commutation of the sentence.[20]

At sentencing, the judge stated that the charges were non-dangerous and non-repetitive and entered a special order allowing Davis to petition his sentence to the Board of Executive Clemency.[21] Under the Dangerous Crimes Against Children Act, however, the judge was compelled to sentence Davis to four consecutive thirteen-year sentences, or fifty-two years, without the possibility of parole.[22] On appeal, the Arizona Supreme Court vacated the sentences and held

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11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. ARIZ. REV. STAT. § 13-1405(B) (1997) ("Sexual conduct with a minor who is under fifteen years of age is a class two felony and is punishable pursuant to section 13-604.01.").
16. ARIZ. REV. STAT. § 13-604.01(B) (Supp. 1998).
17. *Davis*, 79 P.3d at 67.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.; ARIZ. REV. STAT. § 13-604.01 (Supp. 1998).

> "A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children . . . involving . . . sexual conduct with a minor who is twelve, thirteen or

that under the specific circumstances of the case, Davis's sentence was grossly disproportionate to his offenses and violated the Eighth Amendment of the United States Constitution.[23]

II. THE EIGHTH AMENDMENT'S "CRUEL AND UNUSUAL" CLAUSE AND PROPORTIONALITY REVIEW OF NON-CAPITAL SENTENCES

Both the Eighth Amendment of the United States Constitution[24] and Article II, Section 15 of the Arizona Constitution[25] prohibit punishments that are considered cruel and unusual. However, the United States Supreme Court has long debated the issue of how to apply the "cruel and unusual" clause to non-capital sentences. The Court has addressed the issue in very few cases, and in those cases it has specifically stated that sentences unconstitutional under the Eighth Amendment are "exceedingly rare."[26] There is no consensus on how to interpret the Eighth Amendment with regard to non-capital sentences. In determining whether a defendant's sentence is constitutional, courts have relied on vague and conflicting plurality opinions without objective standards. Historically, therefore, courts have been lacking a clear and distinct precedent to guide them in conducting an examination of defendants' sentences and deciding whether they are constitutional under the Eighth Amendment.

One reason for the ongoing conflict within the Court and the inconsistent interpretation of the law among jurisdictions on the issue of non-capital sentencing is that courts are more willing and able to determine that a death sentence is harsher than a sentence of life imprisonment in a capital case than to discern between terms of years, especially when those terms are mandated by a legislature.[27] In addition, the Court struggles to create a list of factors or a more precise constitutional analysis, as cases tend to vary widely regarding the extenuating circumstances, the crimes committed, the victims affected, the

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> fourteen years of age . . . shall be sentenced to a presumptive term of imprisonment for twenty years."

Id. at § 13-604.01(B). "The presumptive sentences . . . may be increased or decreased by up to seven years pursuant to the provisions of § 13-702, subsections B, C, and D." *Id.* at § 13-604.01(E). "A person sentenced for a dangerous crime against children . . . is not eligible for suspension of sentence, probation, pardon, or release from confinement on any basis . . . until the sentence imposed by the court has been served or commuted." *Id.* at § 13-604.01(F). "The sentence imposed on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time." *Id.* at § 13-604.01(J).

23. *Davis*, 79 P.3d at 74.

24. U.S. CONST. amend. XIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

25. ARIZ. CONST., art. II, § 15 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The court held that the Arizona Constitution and the U.S. Constitution should be interpreted identically for purposes of the particular case. *See* State v. Noble, 829 P.2d 1217, 1219 (Ariz. 1992).

26. Rummel v. Estelle, 445 U.S. 263, 273 (1980).

27. *Id.* at 275.

pertinent laws, and the jurisdictions in which the crime at issue occurred.[28] For instance, the Supreme Court addressed sentencing issues in cases involving crimes charged under recidivist statutes, crimes against property, violent offenses, drug addiction or dealing, falsification of government documents, and sexual misconduct with a minor.[29] In *Davis*, the Arizona Supreme Court relied heavily on the principles from five Supreme Court cases decided in the last twenty-five years to inform its decision and conducted a proportionality review to determine whether Davis's fifty-two-year sentence was so grossly disproportionate to the crime he committed so as to violate the Eighth Amendment.[30]

In the first case, *Rummel v. Estelle*, the trial court sentenced the defendant to life in prison under a Texas recidivist statute for the defendant's third property-related felony offense.[31] While the Court acknowledged that the Eighth Amendment prohibits imposing a sentence that is grossly disproportionate to the crime, it upheld the conviction and the sentence.[32] The Court warned of the danger of substituting judicial opinion for the legislature and stressed the significance of a state's interest in protecting its citizens and imposing legislation regarding sentencing guidelines.[33] The Court also rejected the three-part test from Justice Powell's dissenting opinion.[34] Justice Powell urged the Court to adopt an objective three-part analysis to determine whether a sentence is grossly disproportionate to the crime in order to dissuade reviewing judges from substituting their own subjectivity for the judgment of the trial judge or legislature. The objective test considered: "(i) the gravity of the offense and the 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."[35]

Three years later, in the Supreme Court case *Solem v. Helm*, the Court revisited Justice Powell's objective analysis. Without overruling *Rummel*, the majority adopted the dissent's three-part test and held that a sentence of life imprisonment for a seventh non-violent felony was disproportionate to the defendant's crimes and violated the "cruel and unusual" provision of the Eighth Amendment.[36] The Court stated that the final clause of the Eighth Amendment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[37] However, the Court also reemphasized

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28. Harmelin v. Michigan, 501 U.S. 957, 998 (1991).

29. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003); *Harmelin*, 501 U.S. at 961; Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Davis, 454 U.S. 370 (1982); *Rummel*, 445 U.S. at 264–65; Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910); State v. Davis, 79 P.3d 64, 66 (Ariz. 2003) (en banc).

30. *Davis*, 79 P.3d at 68–75.

31. *Rummel*, 445 U.S. at 264.

32. *Id*. at 271.

33. *Id*. at 274.

34. *Id*.

35. *Id*. at 295.

36. Solem v. Helm, 463 U.S. 277, 303 (1983).

37. *Id*. at 284.

the principles in *Rummel* by noting that incidences in which a sentence would be vacated on constitutional grounds would be rare, and that while no sentence was per se constitutional, reviewing judges should give the highest deference to the legislature and trial judges.[38]

In his plurality opinion in the Supreme Court case of *Harmelin v. Michigan*, Justice Kennedy clarified the purpose of and restrictions on the three-part objective test adopted by the Court in *Solem*.[39] A majority of the Court affirmed the decision of the appellate court and held that the defendant's sentence of life imprisonment without parole for possession of more than 650 grams of cocaine was constitutional.[40] Justice Scalia, delivering the opinion of the Court, stated that because of the "qualitative difference between death and all other penalties," he refused to extend "individualized sentencing" employed in capital cases to sentences in non-capital cases.[41] It is Kennedy's concurring opinion, however, that has proven instructive.

Kennedy was joined by Justices O'Connor and Souter in recognizing a "narrow proportionality" principle embodied in the Eighth Amendment, which prohibits only sentences that are "*grossly* disproportionate" to the crime.[42] He also provided an explanation of the uses and limits of proportionality review based on four principles: (1) the fixing of prison terms is under the jurisdiction of the legislature, not courts; (2) the Eighth Amendment does not mandate adoption of any one penological theory; (3) marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure; and (4) proportionality review by federal courts should be informed by objective factors.[43]

Kennedy proceeded to discuss the utility of the *Solem* analysis, but also reiterated that the three factors are only a guide. He stated that while one factor may be sufficient to determine that a sentence is constitutional, no one criterion is dispositive in determining whether a sentence is unconstitutional.[44] A reviewing judge, as Kennedy argued, should only engage in the inter- and intra-jurisdictional analyses after making the threshold determination that the sentence and the crime are greatly disproportionate.[45] Therefore, the purpose of the second and third prongs of the *Solem* test is to validate a preliminary finding of gross disproportionality.[46] Finally, Kennedy concluded that his opinion is not intended to minimize the Court's decisions in *Rummel* and *Solem* or to reject the inter- and intra-jurisdictional analyses.

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38. *Id*. at 290.
39. Harmelin v. Michigan, 501 U.S. 957, 1004–05 (1991).
40. *Id*. at 996.
41. *Id*. at 995–96.
42. *Id*. at 997 (emphasis added).
43. *Id*. at 998–1001.
44. *Id*. at 1004 (citing Solem v. Helm, 463 U.S. 277, 291 (1983)).
45. *Id*. at 1005.
46. *Id*.

III. THE SUPREME COURT'S APPLICATION OF KENNEDY'S THREE-PART ANALYSIS IN *HARMELIN*

In two recent cases, *Andrade v. Lockyer* and *Ewing v. California*, the Supreme Court held the California three strikes law constitutional and concluded that sentences for twenty-five years to life for petty theft and felony grand theft did not violate the Eighth Amendment.[47] In *Lockyer*, the Court acknowledged the lack of a legal framework and the ambiguity in its preceding decisions involving proportionality review of sentences under the Eighth Amendment.[48] However, the Court also emphasized that *Harmelin*, *Solem*, and *Rummel* all remain good law and that it is appropriate for a reviewing court to turn to these cases for guidance when deciding cases with similar fact patterns.[49] Therefore, in both cases, the Court employed the threshold analysis provided by Kennedy in *Harmelin* to decide that the sentences were not grossly disproportionate to the crimes.[50] In both *Lockyer* and *Ewing*, the Court considered the specific circumstances of the case, including the defendants' criminal history, the discretion allotted to the sentencing judge and the prosecutor in deciding how to charge the defendants under the statute, and the state's interest in protecting its citizens from repeat offenders.[51] Based on these factors, the Court decided that its initial inquiry into whether there was a gross disproportionality between the crimes and their punishment was sufficient.[52] Furthermore, because the Court did not find initial indicia of gross disproportionality, the Court found it unnecessary to conduct the inter- and intra-jurisdictional analyses.[53]

IV. ARIZONA'S HISTORY OF PROPORTIONALITY REVIEW AND NON-CAPITAL SENTENCES

As the Arizona Supreme Court recognized in its initial decision in *State v. Bartlett* ("*Bartlett I*") in 1990, it had been using the three-prong test in *Solem* even before it was articulated by the U.S. Supreme Court.[54] In *Bartlett I*, the court held that, under the specific circumstances of the case, the forty-year sentence for consensual sex with two minors was disproportionate to the defendant's crimes.[55] In resolving whether there was an initial appearance of gross disproportionality between the offense and the punishment, the court measured the gravity of the offense by examining the type of harm threatened or inflicted, and the defendant's culpability.[56] The court also examined several other factors including: (1) the

47. Lockyer v. Andrade, 538 U.S. 63, 77 (2003); Ewing v. California, 538 U.S. 11, 30–31 (2003).

48. *Lockyer*, 538 U.S. 63 at 72–73.

49. *Id*. at 75.

50. *Id.* at 76–77; *Ewing*, 538 U.S. at 28.

51. *Lockyer*, 538 U.S. at 66–74; *Ewing*, 538 U.S. at 28–30.

52. *Lockyer*, 538 U.S. at 71–77; *Ewing*, 538 U.S. at 28–30.

53. *Lockyer*, 538 U.S. at 71–77; *Ewing*, 538 U.S. at 28–30.

54. State v. Bartlett (Bartlett I), 792 P.2d 692, 697 (Ariz. 1990); *see* State v. Mulalley, 618 P.2d 586, 590 (Ariz. 1980).

55. *Bartlett I*, 792 P.2d at 703.

56. *Id*. at 697.

absence of violence or threat of violence; (2) the victim's consent or willingness to participate in the acts; (3) the defendant's lack of a criminal record; (4) the defendant's level of maturity; (5) the fact that post-pubescent sex is not uncommon; and (6) the broad scope of the Dangerous Crimes Against Children Act.[57] However, in light of the decision in *Harmelin*, the case was remanded by the United States Supreme Court and re-heard by the Arizona Supreme Court.

In its 1992 opinion in *State v. Bartlett* ("*Bartlett II*") after remand from the United States Supreme Court, the Arizona Supreme Court interpreted *Harmelin* as a modified analysis of *Solem* and held that, until the Supreme Court reached a majority opinion on the issue, the court should employ Justice Kennedy's threshold analysis that requires the court to assess whether a gross disproportionality exists between the crime and the offense.[58] The court also concluded that "although *Harmelin* narrowed *Solem's* proportionality review, it did not criticize the factors utilized in *Solem* to determine whether the sentence is grossly disproportionate to the crime."[59] Therefore, the court again looked at the specific circumstances of the crime, the defendant's lack of a prior record, and the realities of adolescent life, in addition to conducting an inter- and intra-jurisdictional analysis to determine that the sentence was grossly disproportionate to the crime.[60] The dissent, however, criticized the majority's interpretation of Kennedy's opinion in *Harmelin* and argued that the correct application of Kennedy's test requires the court to base its determination of gross disproportionality only on the threat of the crime to the victim and society as opposed to the specific circumstances of the case.[61]

The dissent's interpretation of *Harmelin* in *Bartlett II* became the majority opinion in *State v. DePiano*, in which the Arizona Supreme Court rejected a mother's claim that her thirty-four-year sentence for child abuse was a violation of the Eighth Amendment.[62] In *DePiano*, the court concluded that the majority in *Bartlett II* had misinterpreted *Harmelin* and that because the court in *Bartlett II* was almost equally divided in its interpretation, the opinion did not have the "sort of precedential value one ordinarily would associate with an opinion of [the Arizona Supreme Court]."[63] The court held that under Kennedy's threshold gross disproportionality analysis, a court should measure the gravity of the crime by the general threat of the crime, not the specific circumstances surrounding the offense.[64] Therefore, by looking only to the charges of child abuse generally and

57. *Id*. at 697–99.
58 State v. Bartlett (Bartlett II), 830 P.2d 823, 826 (Ariz. 1992).
59. *Id*. at 828.
60. *Id*. at 828–30.
61. *Id*. at 833 (Corcoran, J., dissenting).
62. State v. DePiano, 926 P.2d 494, 495 (Ariz. 1996).
63. *Id*. at 497.
64. *Id*.

not the individual facts of the case, the court upheld the sentence as constitutional.[65]

V. THE ARIZONA SUPREME COURT'S APPLICATION OF KENNEDY'S PLURALITY OPINION IN *HARMELIN* TO THE FACTS IN *DAVIS*

In *Davis*, the defendant argued that under the circumstances of the case, the fifty-two-year sentence he received was so grossly disproportionate to his crimes as to render it unconstitutional.[66] The primary challenge for the Arizona Supreme Court was to reconcile the vague and conflicting opinions of the United States Supreme Court as well as to interpret Justice Kennedy's modified *Solem* analysis in *Harmelin* based on the splintered opinions from *Bartlett II* and *DePiano*.[67] The court opted to examine the facts and circumstances of the case in *Davis* based on several factors. First, the court looked at the application of Justice Kennedy's opinion in *Harmelin* in light of the more recent Supreme Court cases, *Lockyer* and *Ewing*, in which the Court examined the specific circumstances of the cases in resolving the threshold inquiry of gross disproportionality.[68] Second, the court cited several cases in which federal circuit courts have repeatedly examined the facts and special circumstances when making a proportionality review.[69] Finally, the court reasoned that the legislature, under Arizona Revised Statutes section 13-4037(B), permits the court to consider the circumstances of a given case in order to determine whether the sentence is excessive compared to the crime committed.[70] For the foregoing reasons, the court held that while the analysis provided in *DePiano* seemed to comport with the Supreme Court's holdings in *Harmelin*, *Rummel*, and *Solem* at the time it was decided, it was not in accord with the Court's analyses in *Andrade* and *Lockyer*.[71] Thus, the court overruled the

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65. *Id.* Although the court did not find that the sentence was unconstitutional under the Eighth Amendment, the court did recognize its power to assess the facts and any mitigating factors in the case under Arizona Revised Statutes section 13-4037(B). The court conducted an examination of the circumstances and concluded that a thirty-four-year flat sentence was excessive for the offense and reduced DePiano's sentence to a term of twenty-four years, the minimum mitigated sentence to which she could have been sentenced. *Id.* at 499.

66. State v. Davis, 79 P.3d 64, 67 (Ariz. 2003) (en banc).

67. *Id*. at 70.

68. *Id*.

69. *Id*. at 71; *see* Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001); Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999); United States v. Harris, 154 F.3d 1082 (9th Cir. 1998).

70. *Davis*, 79 P.3d at 71. Arizona Revised Statutes section 13-4037(B) provides in part:

> "Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted."

ARIZ. REV. STAT. § 13-4037(B).

71. *Davis*, 79 P.3d at 70.

decision in *DePiano* on the grounds that although the case was not even a decade old, "when later opinions of the Supreme Court show [the court's] constitutional interpretations to be incorrect, [the court] must overrule them and bring [its] decisions into conformity with Supreme Court precedent."[72] According to the Arizona Supreme Court, the correct approach is to first examine the offense and then, if the sentence imposed is so severe that it appears grossly disproportionate to the crime, the court should examine the individual facts of the case to see if the sentence is indeed cruel and unusual.[73]

A. Gross Disproportionality

In order to decide whether Davis's sentence appeared grossly disproportionate to his crimes, the court considered many of the same factors present in *Bartlett I* and *II*. For instance: (1) Davis's sexual relations with both girls was consensual and the girls sought Davis out; (2) Davis had no previous criminal record; (3) post-pubescent sex is still as common as it was a decade ago; (4) there is evidence that Davis has a lower intelligence and maturity level than that of a normal young adult; and (5) Davis was caught in the very broad scope of the provisions in the Dangerous Crimes Against Children Act.[74] Also, in order to determine if the statute violates the Eighth Amendment, the court must examine the "sentence-triggering criminal conduct," or the offender's "actual behavior or other offense-related circumstances."[75] In this case, the court felt that it was clear that Davis did not threaten violence or use force to engage his victims in intercourse.[76] Based on these factors, coupled with the provisions of Arizona Revised Statutes section 13-4037(B), Supreme Court precedent on Eighth Amendment analysis, and the concerns of the trial judge, the mothers of the victims, and the jurors at trial, the court found that the threshold test under *Solem* was met and that Davis's sentence appeared to be grossly disproportionate to his crimes.[77]

B. Intra-Jurisdictional Analysis

Although the modified *Solem* analysis does not require an examination of inter- and intra-jurisdictional factors, the Arizona Supreme Court conducted such an examination to "validate the court's initial impression of gross disproportionality."[78] The court performed an intra-jurisdictional analysis by comparing the sentences in Arizona for more serious crimes than Davis's and found that second-degree murder, sexual assault, and continued sexual abuse of a minor under fifteen-years-old all mandate the same presumptive sentence as Davis's.[79] Furthermore, other dangerous crimes against children including

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72. *Id*. at 71.
73. *Id*. at 70.
74. *Id*. at 71–72.
75. *Id*. at 74.
76. *Id*.
77. *Id*. at 71–72.
78. *Id*. at 72.
79. *Id*.

kidnapping, child abuse, aggravated assault, or commercial sexual exploitation of a child all carry a lesser presumptive sentence.[80] Finally, other crimes not involving children such as burglary, sexual assault, arson of an occupied building, and kidnapping, are all eligible for more relaxed sentences and may be served concurrently.[81]

The court also considered and rejected evidence offered by the State of cases where longer sentences were upheld as constitutional.[82] The court pointed out that these cases revealed "enormous differences in the nature of the crimes, the harm to the victims and to society, and the culpability of the defendants."[83] According to the court, the drastic factual and circumstantial differences in these cases, which were categorized in the same statute and charged under the same mandatory sentencing guidelines, are further evidence that it is necessary for the court to consider the facts of a case when conducting a proportionality review.[84]

C. Inter-Jurisdictional Analysis

The third portion of the *Solem* test is the inter-jurisdictional analysis in which a court engages in a comparison of mandated sentences for similar crimes in other jurisdictions.[85] In *Davis*, the mandatory minimum sentence was much more severe than the minimum sentence Davis could have received in any other state in the country.[86] In fact, in most states, Davis would have received five years imprisonment and in no other state would Davis have received more than a twenty-year sentence for his crimes. In addition, even in the states in which he could have received twenty years, the sentencing judge would have the discretion to mitigate the sentence.[87] Because of these factors and the overwhelming difference in sentencing guidelines between jurisdictions for the same crime, the court found that Davis's sentence failed the last portion of the *Solem* test.[88]

D. Consecutive vs. Concurrent Sentences

The court in *Davis* also addressed the fact that Davis had to serve all four thirteen-year sentences consecutively.[89] Typically, the court would not address the question of whether a defendant should serve consecutive or concurrent sentences.[90] In *Davis*, however, the court deviated from its normal practice because the lack of discretion afforded the sentencing judge on the matter contributed to

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80. *Id.* at 73.
81. *Id*.
82. *Id*.
83. *Id*.; *see* State v. Taylor, 773 P.2d 974 (1989); State v. Jones, 937 P.2d 1182 (Ariz. Ct. App. 1996); State v. Hamilton, 868 P.2d 986 (Ariz. Ct. App. 1993); State v. Ross, 804 P.2d 112 (Ariz. Ct. App. 1990); State v. Crego, 742 P.2d 289 (Ariz. Ct. App. 1987).
84. *Davis*, 79 P.3d at 74.
85. *Id*.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*. at 74–75.

the disproportionality between the sentence and the offense.[91] The court acknowledged the legislature's right to impose mandatory sentences and to instruct that they are served consecutively; however, it refused to uphold sentences that are "unconstitutionally disproportionate to the crimes committed because the sentences are mandatorily lengthy, flat, and consecutive."[92] The court also noted that the circumstances in *Davis* differ from those in the Supreme Court cases, *Lockyer* and *Ewing*, because the trial court judge and the prosecutor both had discretion in whether the "third strike" would be counted as a misdemeanor or felony charge.[93]

Due to the specific circumstances and facts of the case, the Arizona Supreme Court held that Davis's sentence was grossly disproportionate to his offenses and failed the inter- and intra-jurisdictional analyses, therefore violating the Eighth Amendment.[94] The court vacated the sentences and remanded the case for resentencing as class two, non-dangerous felonies.[95]

VI. ARIZONA'S SUBSEQUENT INTERPRETATION OF THE PRINCIPLES IN *DAVIS*

Approximately four months after *Davis* was decided, the Arizona Court of Appeals decided *State v. Long* based upon the principles of *Davis* and reiterated that *DePiano* was an improper test for analyzing disproportionality between a crime and its punishment.[96] In *Long*, the defendant contested his twenty-year sentence for the sexual exploitation of a minor under the age of fifteen on the grounds that it was cruel and unusual punishment.[97] Long argued that many of the same factors that were influential in *Davis* and *Bartlett I* and *II* were also present in his case, including that: (1) the acts were consensual; (2) his victim suffered no physical harm; (3) he lacked a criminal record; (4) sexual conduct between post-pubescent teenagers was prevalent; and (5) he was caught up in the broad sweep of the statute.[98] However, the court rejected these arguments based on the fact that Long's victim was significantly younger than Long, he had developed a position of trust with her as a quasi-parental figure, and there was no evidence to support that

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91. *Id*.
92. *Id*. at 75.
93. *Id*.
94. *Id*. Justice McGregor was the lone dissenter from the majority opinion. She agreed with the majority that the correct approach in determining whether a sentence was unconstitutional was to use Justice Kennedy's opinion in *Harmelin*, which allowed the court to consider the facts of the offense. However, she disagreed with the majority's opinion for three reasons: 1) the majority interpreted *Harmelin* too broadly by looking at the culpability of the defendant and the fault of the victims; 2) the majority actually applied the original *Solem* analysis and not the modified analysis as outlined in *Harmelin*; and 3) the majority examines factors that should not be used in a constitutional evaluation. *Id*. at 78–79. (McGregor, J., concurring in part, dissenting in part).
95. *Id*.
96. State v. Long, 83 P.3d 618, 623 (Ariz. Ct. App. 2004).
97. *Id*. at 622.
98. *Id.* at 624.

he was immature or of lower intelligence.[99] In addition, the court found that the facts differed from those in *Davis* and that Long, unlike Davis, was not caught in the broad scope of the statute.[100] Accordingly, the court held that there was no initial appearance of gross disproportionality between the crime and the punishment and affirmed the sentence as constitutional.[101]

VII. CONCLUSION

In its decision in *Davis*, the Arizona Supreme Court resolved to some extent the issue of what may constitute "cruel and unusual punishment" under the Eighth amendment for non-capital sentences. The court's opinion has two important implications. First, the court interpreted Kennedy's opinion in *Harmelin* as instructing that, in performing the threshold inquiry of gross disproportionality, the court should examine the specific circumstances and facts of a given case. Second, the court employed several factors in its analysis of gross disproportionality that may prove useful for reviewing courts in future cases. Some of these factors were used in *Bartlett I* and *II* and were also examined in *Long*. These factors include: (1) the victim's consent or willingness to participate in the act; (2) the absence or presence of violence; (3) the defendant's criminal record; (4) the defendant's level of maturity; (5) societal norms and behavior; and (6) the scope of the statute. Although these factors have only been utilized in cases regarding the Dangerous Crimes Against Children Act thus far, the second through fifth factors appear to be appropriate for future use in comparing the gravity of the offense with the sentence for the majority of crimes. Although critics may consider *Davis* a case of judicial activism where the court substituted its judgment for that of the legislature, the court explicitly denies any such intention.[102] In fact, the court held that its decision was limited to the facts and circumstances of the case and that a sentence only violates the constitution when "it is so disproportionate to the offenses that it shocks the moral sense of the court and the community."[103]

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99. *Id*.
100. *Id*.
101. *Id*. at 625.
102. *Davis*, 79 P.3d at 75.
103. *Id*.