IN THE SUPREME COURT OF MISSISSIPPI

WILLIE NASH **APPELLANT**

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

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

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

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

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

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

Furthermore, Nash's conviction must be reversed because he did not voluntarily bring his cell phone to jail.[1] Courts in other states have held that an arrestee cannot be convicted for possessing contraband in jail if he came to jail involuntarily. *See, e.g.*, *State v. Sowry*, 803 N.E.2d 867 (Ohio App. 2004). That is precisely what happened in this case. Nash cannot be convicted of voluntarily possessing something in jail when he only possessed it there because of his arrest.

Pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, this Court's decision affirming the Newton County Circuit Court's judgment should be vacated, and Nash's conviction should be reversed. Alternatively, Nash's sentence should be vacated.

I. Nash's Cell Phone Possession was Involuntary Because He Was Not Searched According to Jail Policy. Nash Cannot Be Convicted for Something That He Did Involuntarily.

Undoubtedly, the reason that this Court's decision affirming Nash's sentence has met with international shock[2] is that Nash is being punished for something that was

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[1] Although Nash's initial appeal brief did not raise the issue of voluntariness, this Court still should review the issue. At trial, Nash's attorney submitted a jury instruction to direct a verdict of acquittal – thereby preserving for appeal the argument that the evidence did not amount to a *prima facie* case. And on appeal, although Nash's initial brief did not argue voluntariness, it did raise a statutory argument. Alternatively, whether the record contains evidence of a voluntary act implicates Nash's right not to be convicted without proof beyond a reasonable doubt; that right arises from Nash's right to Due Process, which is a fundamental right. *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Evans v. State*, 919 So. 2d 231, 235 (Miss. Ct. App. 2005) ("It is not open to reasonable debate that the right – not to be convicted of an offense unless the State proves beyond a reasonable doubt each and every element of the offense – is a fundamental right anchored in our constitution and the jurisprudence of this state."). And fundamental rights are not waivable. *Rowland v. State*, 42 So. 3d 503, 506 (Miss. 2010) ("[E]rrors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA."). If nothing else, the Circuit Court's failure to demand proof of voluntariness should be reviewed as plain error. *Corbin v. State*, 74 So. 3d 333, 337 (Miss. 2011) ("Under the doctrine of plain error, we can recognize obvious error which was not properly raised by the defendant on appeal, and which affects a defendant's fundamental, substantive right.") (quotation omitted).

[2] *See, e.g.*, Derek Hawkins, "He Got 12 Years for Having a Cellphone in Jail. The Judge Said He was 'Fortunate,'" *Washington Post* (Jan. 15, 2020), https://www.washingtonpost.com/nation/2020/01/15/willienashmississippi/ (last viewed Jan. 21, 2010); Jimmy McCloskey, "Prisoner Gets 12 Year Sentence For Asking Guard to Charge His Phone," *Metro* (Jan. 21, 202o), https://metro.co.uk/2020/01/21/prisoner-gets-12-year-sentence-asking-guard-charge-phone-12096783/ (last viewed Jan. 22, 2020).

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

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

For example, in Ohio, an appeals court reversed an arrestee's conviction for possession of marijuana in jail because he had not voluntarily brought himself (and thus, not voluntarily brought the marijuana) to jail. "That his 'person' and the possessions on his person were in the jail was therefore not a product of a voluntary act on [the arrestee's] part. Rather, those events were, as to him, wholly involuntary." *State v. Sowry*, 803 N.E.2d 867, 745-46 (Ohio App. 2004).

The New Mexico Court of Appeals reached the same decision in *State v. Cole*, 142 N.M. 325, 328 (2007) ("In this case, the undisputed facts show that Defendant did not bring contraband into the [jail]; law enforcement brought him and the contraband in his possession into the facility. . . . The dispositive issue is that Defendant cannot be held liable for bringing contraband into a jail when he did not do so voluntarily."). So did the Washington Court of Appeals in *State v. Eaton*, 143 Wash. App. 155, 163 (2008) ("After all, in this case, Eaton did not bring methamphetamine into the county jail; a police officer brought Easton and the methamphetamine into the county jail."), and the Oregon Court of Appeals in *State v. Tippetts*, 180 Or. App. 350, 354 (2002)

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

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

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

In this case, the record lacks any evidence that Nash voluntarily took his cell phone to jail. The only witness who could have established whether Nash was strip-searched was not called at trial;[4] the jail employee to whom Nash gave his cell phone testified that the jail's policy is to strip-search all arrestees ("We take everything, personal belongings, from him."), Record at Vol. 2, Page 16, and that he did not know

[3] Miss. Code Ann. § 47-5-193 ("It is unlawful for any person or offender to take, attempt to take, or assist in taking any weapon, deadly weapon, unauthorized electronic device, contraband item, cell phone or any of its components or accessories . . . on property within the state belonging to the department, a county, a municipality, or other entity that is occupied or used by offenders, except as authorized by law.").
[4] In fact, during a hearing to suppress Nash's phone as evidence, Nash's trial counsel asked the Circuit Court to subpoena the jail employee who would have confirmed that Nash was not searched; the prosecution resisted that effort, and the Circuit Court denied the motion to suppress without bringing in the witness. Record at Vol. 2, Page 18-19.

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

The State's failure to adduce evidence of Nash's voluntariness is a failure to prove *actus reus*. For that reason, Nash's conviction must be reversed, and an acquittal must be rendered.

II. The Eighth Amendment Requires Proportionality. Nash's 12-Year Prison Sentence for Possessing a Cell Phone Because His Jailers Failed to Search Him Violates the Proportionality Requirement.

A. *Harmelin* Did Not Overturn *Solem*. *Harmelin* Reaffirmed *Solem*.

Even if Nash's cell phone possession had been voluntary, this Court still would be obligated to vacate his sentence because it violates the Eighth Amendment.

The cornerstone of the Court's decision affirming Nash's sentence was its belief that the Eighth Amendment entails no guarantee of proportionality. Specifically, the Court explained that although the U.S. Supreme Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983), provided a three-part test to gauge proportionality, that decision "was overruled" by *Harmelin v. Michigan*, 501 U.S. 957 (1991), "to the extent [*Solem*] found a *guarantee* of proportionality in the Eighth Amendment's prohibition against cruel and unusual punishment." Op. at ¶13 (emphasis in original). From that inference sprang the rest of the Court's reasoning.

In support of that conclusion, the Court cited *Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996) – which, in turn, cited pages 965-966 of *Harmelin*. *See* Op. at ¶13. And it is true that page 965 of *Harmelin* closes with the statement, "We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Harmelin*, 501 U.S. at 965.

That statement, though, did not draw majority support from the *Harmelin* Court. Although the statement appeared in Justice Scalia's lead opinion, the portion of Justice Scalia's opinion containing that statement was joined by just one other justice. Seven justices refused to subscribe to Justice Scalia's view.

In contrast, Justice Kennedy's concurring opinion in *Harmelin* – which the U.S. Supreme Court later described as *Harmelin*'s "controlling opinion," *Graham v. Florida*, 560 U.S. 48, 59-60 – repeatedly reaffirmed the existence of "[t]he Eighth Amendment proportionality principle." *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring). *See also id.* ("In *Rummel v. Estelle*, we acknowledged the existence of the proportionality rule for both capital and noncapital cases . . . .") (citation omitted). Justice Kennedy's opinion acknowledged that "[t]hough our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types." *Id.* at 998. But Justice Kennedy's decision did not overturn *Solem*; if anything, it built on *Solem* by clarifying that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 288).[5]

[5] To the extent *Harmelin* modified *Solem* at all – whether one describes it as "abrogating" or "clarifying" – it is not clear that *Harmelin* has survived the U.S. Supreme Court's more recent Eighth Amendment cases. The *Harmelin* decision principally accomplished two things: it clarified that the Eighth Amendment prohibits only "grossly disproportionate" sentences (rather than demanding "strict" proportionality), and it held that the Eighth Amendment required no individualized determination prior to imposing a noncapital sentence. *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring). The Court's more recent Eighth Amendment decisions – some of them written by Justice Kennedy himself – adopt neither of those positions. For example, in *Graham v. Florida*, 560 U.S. 48 (2010) (Kennedy, J.), the Court recounted *Harmelin*'s holding that the Eighth Amendment bars "grossly disproportionate" sentences, *Graham*, 560 U.S. at 60, but the bulk of the opinion describes the Eighth Amendment's prohibition as one forbidding "disproportionate" sentences – i.e., without the word "grossly" attached. *See, e.g., id.* at 59 ("For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment."). Two years later, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Court – in a decision joined by Justice Kennedy – held that the Eighth Amendment required precisely what *Harmelin* said it did not: an

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

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

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

First, *Harmelin* cautioned due respect for the legislative prerogative. Second, the sentence must serve a legitimate penological theory. Third, *Harmelin* warned that sentences may vary from state to state for the same crime without reaching the point of unconstitutionality. And fourth, *Harmelin* insisted that proportionality "should be informed by objective factors to the maximum extent possible." *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring) (quotations omitted).

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individualized determination prior to imposing a noncapital sentence (specifically, a sentence of life without parole for a child). Finally, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016) (Kennedy, J.), the Court repeatedly explained that the Eighth Amendment bars "disproportionate" sentences; the word "gross" appears *nowhere* in the *Montgomery* decision. *See id.* at 732-33 ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."). Therefore, this Court should note *Harmelin*'s probable overturning and evaluate Nash's Eighth Amendment claim under the traditional *Solem* framework; at the very least, this Court should find *Harmelin* so thoroughly eroded that it no longer provides reliable guidance for decisions under the Mississippi Constitution's ban on cruel or unusual punishment. Miss. Const., art. III § 28. However, even if this Court declines to note *Harmelin*'s probable overturning, Nash still prevails because he satisfies *Harmelin*'s threshold requirement to show that his sentence is grossly disproportionate.

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

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

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

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

The four goals of sentencing are (1) rehabilitation, (2) retribution, (3) separation from society, and (4) deterrence, both general and specific. *Taggart v. State*, 957 So. 2d 981, 994 (Miss. 2007). Sentencing Nash to 12 years for possessing a cell phone *that he only possessed because his jailers failed to search him* serves none of these goals. First, such a remarkably long sentence is not needed to rehabilitate Nash; indeed, there is nothing to rehabilitate, as Nash did not conceal his cell phone (what did the law require Nash to do differently?). Second, the sentence achieves no retributive effect; Nash's actions were victimless, so there is no retribution to be accomplished. Third, there is no need to separate Nash from society for 12 years; possessing a cell phone that one's jailers fails to discover is not the sort of behavior that society must be protected from for upward of a decade. And fourth (perhaps most importantly), sentencing Nash to 12 years carries no deterrent effect at all: to the contrary, such a stunning sentence for such innocuous behavior is more likely to result in prisoners concealing cell phones, rather than offering them up as Nash did, lest they meet Nash's fate.

One commentator has described the *Harmelin* question of gross disproportionality as rational basis review by another name. Christopher J. DeClue, *Sugarcoating the Eighth Amendment: The Grossly Disproportionate Test is Simply the Fourteenth Amendment Rational Basis Test in Disguise*, 41 Sw. L. Rev. 533 (2012). And there simply is no legitimate, rational connection between the goals of sentencing and 12 years' imprisonment for possessing a cell phone that jailers failed to discover by failing to search. Nash's sentence serves absolutely no legitimate penological goal.

2. Sentencing Nash to 12 Years for Possessing a Cell Phone That His Jailers Failed to Discover in a Search is Objectively Unreasonable.

If, rather than asking to recharge his cell phone, Willie Nash had instead burned the Newton County Sheriff's Office to the ground, he would have received a shorter prison sentence than the one he is currently serving. Miss. Code Ann. § 97-17-5 (second-degree arson punishable by up to 10 years).

If, rather than offering up his cell phone to his jailer, Nash had instead punched the jailer and broken his nose, he would have received a shorter prison sentence than the one he is currently serving. Miss. Code Ann. § 97-3-7 (simple assault on a police officer punishable by up to five years).

If, rather than possessing a cell phone in jail, Nash instead had bribed a political candidate, or sold a child, or possessed 25 grams of a Schedule V drug with intent to distribute, *or poisoned someone in an attempt to kill them*, he would have received a shorter sentence. Miss. Code Ann. § 97-11-11 (bribery of political candidate punishable by up to 10 years); Miss. Code Ann. § 43-15-23 (selling a child punishable by up to five years); Miss. Code Ann. § 41-29-139(b)(4)(C) (possession of between 10-30 grams of Schedule V drug with intent to distribute punishable by up to 10 years); Miss. Code Ann. § 97-3-61 (poisoning with intent to kill punishable by up to 10 years).

And if Nash's case had arisen anywhere else in America, it is virtually certain that he would have received a shorter sentence. Out of 52 jurisdictions (the 50 states, plus Washington D.C. and the federal system), Mississippi appears to be one of just three states where a 12-year sentence is theoretically possible for possessing a cell phone in jail. *See* Appendix (survey of maximum sentences available for cell phone possession in correctional facility). The other two states are Arkansas and Illinois, and both are

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

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

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

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

[6] Westlaw reveals 17 cases in which Arkansas' prison contraband statute, Ark. Code Ann. § 5-54-119, has been cited; of those 17 cases, three include the word "phone." Two of those cases relate to an inmate named Craytonia Badger; the Arkansas Department of Corrections' website shows that Badger is serving 10 years for violating Section 5-54-119. The third case is *Simpson v. State*, 2009 Ark. App. 853, 2009 WL 4851205 (2009), in which a conviction of Section 5-54-119 resulted in a five-year sentence.

Eighth Amendment requires *strict* proportionality, but even *Rummel* acknowledged that legislatures are not free to set whatever sentencing ranges they please. *Id.* at 274 n.11 ("That is not to say that a proportionality principle would not come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment.").

And neither should this Court allow a grossly disproportionate sentence to stand simply because it falls within a legislatively enacted sentencing range. When it affirmed Nash's decision, this Court relied heavily on the fact that Nash is not the first Mississippian to receive such an extreme sentence for possessing a cell phone in prison. Op. at ¶17 (citing *Smith v. State*, 275 So. 3d 100, 103 (Miss. Ct. App. 2019), and *Houston v. State*, 150 So. 3d 157 (Miss. Ct. App. 2014)). This is completely irrelevant. It says nothing about Nash's grossly disproportionate sentence that other Mississippians also have received grossly disproportionate sentences.

Additionally, neither *Smith* nor *Houston* – nor any other case that research reveals – involved a detainee, like Nash, whose cell phone possession occurred only because his jailers failed to search him and find it. Nash's behavior is worlds apart from *Smith*, where the defendant confessed to a smuggling operation to bring phones into a prison with the help of a guard. *Smith*, 275 So. 3d at 104. Similarly, in *Houston*, the defendant concealed a SIM card and, once discovered, disavowed any knowledge. *Houston*, 150 So. 3d at 158.

That Nash – whose behavior showed no signs of culpability – could have received a sentence comparable to those in *Smith* and *Houston* is unmistakable proof that Nash's sentence was not graduated to fit his offense. This is the very definition of the gross disproportionality that Justice Kennedy discussed in *Harmelin*. *See Graham v. Florida*, 560 U.S. 48, 59 (2010) ("Embodied in the Constitution's ban on cruel and unusual

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

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

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

Those questions confirm that Nash's sentence is cruel and unusual: his 12-year sentence is substantially greater than what he could have received for far more serious crimes in Mississippi, and likely greater than what he would have received anywhere else in America.

1. Far More Serious Crimes Than Nash's are Punishable By Shorter Sentences.

There is no disagreement that cell phone possession in prison is a potentially serious crime. *See, e.g.*, *Smith*, 275 So. 3d at 104. But the facts of Nash's case must remain front and center: proportionality under the Eighth Amendment requires that

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

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

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

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

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

[7] For that matter, no one *inside* Mississippi has ever gotten 12 years for doing what Nash did; the only comparable cases that the January 9 decision cited were cases in which inmates intentionally possessed and concealed cell phones. Nash, of course, did nothing of the sort.

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

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

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

III. The Mississippi Constitution's Ban on "Cruel *or* Unusual Punishment" is Broader Than the Eighth Amendment and Forbids Nash's Sentence.

Even if Nash's 12-year sentence for possessing a cell phone in jail because his jailers failed to search him did not violate the U.S. Constitution, it still must be vacated because it offends the Mississippi Constitution.[8]

[8] Although Nash's initial brief to this Court did not expressly cite Article III, Section 28, his brief's attack against the proportionality of his sentence should be construed broadly. Proportionality is a component of both the Eighth Amendment and Section 28. *Davis v. State*, 724 So. 2d 342, 348 (Miss. 1998) (Mills, J., dissenting). *See also Kleckner v. State*, 109 So. 3d 1072, 1089 (Miss. 2012) (appellant's argument of overly

Article III, Section 28 of the Mississippi Constitution differs from the Eighth Amendment; where the Eighth Amendment bans "cruel and unusual punishments," Section 28 of the Mississippi Constitution forbids "cruel *or* unusual punishment." Miss. Const., art. III § 28 (emphasis added). The difference is linguistically small but substantively enormous, for two noteworthy reasons:

> First, as a matter of substance, a punishment can be quite cruel though often imposed to the point where it may not be said unusual. . . . Second, the draftsmen of the Mississippi Constitution had available the text of the Eighth Amendment. The Mississippi draftsmen were presumably aware of the Eighth Amendment's conjunctive prescription that a punishment must be both cruel and unusual before a violation has occurred. In this context, the disjunctive 'or' in section 28 should be regarded as purposeful choice made by the constitutional draftsmen and enforced as such.

Encyclopedia of Mississippi Law § 19:115 (Right to Be Free from Cruel or Unusual Punishments).

Although the U.S. Supreme Court has never provided in-depth discussions of the terms "cruel" and "unusual," its Eighth Amendment jurisprudence accords with those words' commonly understood meanings. The word "cruel" means "disposed to inflict pain or suffering: devoid of humane feelings." Merriam-Webster, http://merriam-webster.com/dictionary/cruel (last viewed Jan. 19, 2020). The word "unusual" means "not usual: uncommon, rare." Merriam-Webster, https://merriam-webster.com/dictionary/unusual (last viewed Jan. 19, 2020). The U.S. Supreme Court's treatment of the Eighth Amendment reflects these definitions: to violate the Eighth Amendment, a sentence must both be both overly punitive (i.e., gross disproportionality requires absence of a legitimate penological theory) and uncommon (i.e., *Solem*'s

long sentence arose under both Eighth Amendment and Section 28). Particularly considering the remarkable and unique facts of Nash's case, he should not suffer because of a scrivener's omission.

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

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

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

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED this Twenty-Third day of January 2020.

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

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

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

Jurisdiction	Possession statute	Sentencing statute (if different)	Maximum sentence
Alabama	Ala. Code § 14-11-50	Ala. Code § 13A-5-6	5 years
Alaska	Alaska Stat. § 11.56.380	Alaska Stat. § 12.55.135	1 year
Arizona	Ariz. Rev. Stat. Ann. § 13-2505	Ariz. Rev. Stat. Ann. § 13-702	2.5 years
Arkansas	Ark. Code Ann. § 5-54-119	Ark. Code Ann. § 5-4-401	20 years
California	Cal. Penal Code § 4576		90 days lost time credit
Colorado	Colo. Rev. Stat. § 18-8-204.2	Colo. Rev. Stat. § 18-1.3-501	1.5 years
Connecticut	Conn. Gen. Stat. Ann. § 53a-174b	Conn. Gen. Stat. § 53a-36	1 year
Delaware	Del. Code Ann. tit. 11 § 1256	Del. Code Ann. tit. 11 § 4205	3 years
Florida	Fla. Stat. § 944.47	Fla. Stat. § 775.082	5 years
Georgia	Ga. Code Ann. § 42-5-18(d)(1)	Ga. Code Ann. § 17-10-3	1 year
Hawaii	Haw. Rev. Stat. § 710-1023	Haw. Rev. Stat. § 706-660	5 years
Idaho	Idaho Code Ann. § 18-2510		5 years
Illinois	720 Ill. Comp. Stat. § 5/31A-1.1		5 years
Indiana	Ind. Code § 35-4.1-3-8	Ind. Code § 35-50-3-2	1 year
Iowa	Iowa Code § 719.7A	Iowa Code § 902.9	5 years
Kansas	Kan. Stat. Ann. § 21-5914	Kan. Stat. Ann. § 21-6804	26 months
Kentucky	Ky. Rev. Stat. Ann. § 520.050	Ky. Rev. Stat. Ann. § 532.060	5 years
Louisiana	La. Stat. Ann. § 14:402		10 years
Maine	Me. Stat. tit. 17-A § 757	Me. Stat. tit. 17-A § 1604	5 years
Maryland	Md. Code Ann., Crim. Law § 9-417		5 years
Massachusetts	Mass. Gen. Laws Ann. ch. 268, § 28		5 years
Michigan	Mich. Comp. Laws § 800.283a	Mich. Comp. Laws § 800.285	5 years
Mississippi	Miss. Code Ann. § 47-5-193		15 years
Nebraska	Neb. Rev. Stat. § 28-936	Neb. Rev. tat. § 28-106	1 year

[1] For eight states, research did not reveal statutes criminalizing possession of a cell phone in a correctional facility. Those states are Minnesota, Missouri, Montana, New Mexico, South Carolina, South Dakota, Vermont, and Wisconsin. However, this is not entirely unexpected, as *The Washington Post* reports that "[i]n some states, cellphone possession by inmates is not a crime punishable by prison time." Derek Hawkins, "He Got 12 Years for Having a Cellphone in Jail. The Judge Said He was 'Fortunate,'" *Washington Post* (Jan. 15, 2020), https://www.washingtonpost.com/nation/2020/01/15/willienashmississippi/ (last viewed Jan. 22, 2020). Notably, a bill pending in the South Carolina Legislature (Senate Bill 156) would establish cell phone possession in prison as a misdemeanor punishable by up to three years.

Appendix (continued)

Jurisdiction	Possession statute	Sentencing statute (if different)	Maximum sentence
Nevada	Nev. Stat. § 212.165(3)	Nev. Stat. § 193.130	4 years
New Hampshire	N.H. Rev. Stat. Ann. § 642:7	N.H. Rev. Stat. Ann. § 651:2	7 years
New Jersey	N.J. Stat. Ann. § 2C:29-10	N.J. Stat. Ann. § 2C:44-1	5 years
New York	N.Y. Penal Law § 205.25	N.Y. Penal Law § 70.00	7 years
North Carolina	N.C. Gen. Stat. § 14-258.1(g)	N.C. Gen. Stat. § 15A-1340.17	8 months
North Dakota	N.D. Cent. Code 12.1-08-09	N.D. Cent. Code 12.1-32-01	5 years
Ohio	Ohio Rev. Code Ann. § 2921.36	Ohio Rev. Code Ann. § 2929.24	180 days
Oklahoma	Okla. Stat. tit. 57 § 21(E)		2 years
Oregon	Or. Rev. Stat. § 162.185	Or. Rev. Stat. § 161.605	5 years
Pennsylvania	18 Pa. Cons. Stat. § 5123	18 Pa. Cons. Stat. § 1104	5 years
Rhode Island	R.I. Gen. Laws Ann. § 11-25-14.1		5 years
Tennessee	Tenn. Code Ann. § 39-16-201	Tenn. Code Ann. § 40-35-112	4 years
Texas	Tex. Penal Code Ann. § 38.11(j)	Tex. Penal Code Ann. § 12.34	10 years
Utah	Utah Code Ann. § 76-8-311.3	Utah Code Ann. § 76-3-204	6 months
Virginia	Va. Code Ann. § 18.2-431.1	Va. Code Ann. § 18.2-10	5 years
Washington	Wash. Rev. Code § 9.94.041	Wash. Rev. Code § 9A.20.021	5 years
West Virginia	W. Va. Code § 61-5-8(g)(1)		5 years
Wyoming	Wyo. Stat. Ann. § 6-5-213		1 year
Washington D.C.	D.C. Code § 22-2603.02	D.C. Code § 22-2603.03	2 years
Federal	18 U.S.C. § 1791		1 year

CERTIFICATE OF SERVICE

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

SO CERTIFIED this Twenty-Third day of January 2020.

/s/ *Will Bardwell*
William B. Bardwell