COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH J. DAVIS	:	
Appellant	:	No. 1038 MDA 2023

Appeal from the Judgment of Sentence Entered August 27, 2021
In the Court of Common Pleas of Luzerne County Criminal Division at
No(s): CP-40-CR-0000291-2016

BEFORE: LAZARUS, P.J., KUNSELMAN, J., and McLAUGHLIN, J.

OPINION BY McLAUGHLIN, J.: **FILED: MARCH 21, 2025**

Joseph J. Davis appeals from the judgment of sentence imposed following his convictions for two counts each of sexual abuse of children (distribution of child pornography) and criminal use of a communication facility.[1] Davis argues the imposition of a mandatory sentence of confinement for life without the possibility of parole violates the United States and Pennsylvania Constitutions. We affirm.

The court summarized the factual history as follows.

> On July 14, 2014 the Pennsylvania Office of the Attorney General Child Predator Section conducted an online investigation on the eMule network where offenders shared child pornography. A direct one on one connection was made at IP address 98.235.6 9.243 that was making downloads available through a direct connection. Special Agent Justin Led viewed the file *[boy+ plus man] [MB] NEW!! Man & Boy 13Yo.mpg*. The IP address was searched and a search warrant was directed to Comcast Cable to release the subscriber information for the IP address. The IP

[1] ***See*** 18 Pa.C.S.A. §§ 6312(c) and 7512(a), respectively.

> address was determined to be [Davis's] at [Davis's home address]. A search warrant was obtained for the residence, and a search was conducted of [Davis's] premises. At the time of the search, [Davis] was provided with his Miranda Warnings, and advised law-enforcement, that he was the sole user of the only computer at the residence and that there was no child pornography on the computer. [Davis] indicated that he was previously arrested for child pornography and that he did his time for that.
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> On October 4, 2015 Pennsylvania Office of the Attorney General Child Predator Unit was conducting an online investigation on the eMule networks where offenders shared child pornography. A file at IP address 174.59.168.185:6359 was making downloads available through a direct connection. The download was described as *Chinese little boy like 11 yo was fucked by man. Insert ass and cum on face screaming and crying. avi*. The IP address was searched and a subpoena was served on Comcast Cable Communications. Comcast Cable Communications identified the subscriber of the IP address as Joseph Davis [at Davis's home address].
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> A search warrant was obtained and a search of [Davis's] apartment was conducted. [Davis] was provided with his Miranda rights and stated that he lived alone at the apartment and rarely had visitors. [Davis] stated that he knew how sting operations worked and that the Postal Service got him for the same reasons. He made additional statements as to the legality of child pornography in places like Japan and Czech Republic, and did not understand why it was illegal in the United States. He further indicated that he believed you should be able to watch whatever you chose in the privacy of your own home. [Davis] refused to give the password to the computer that was found at his residence. The computer . . . contained a Truecrypt encrypted password.

Trial Court Opinion, filed 12/5/23, at 4-5 (some italicization added).[2]

Upon his arrest, Davis

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[2] Davis refused to give the password to his computer to law enforcement. The Pennsylvania Supreme Court upheld his Fifth Amendment right to do so. ***See Commonwealth v. Davis***, 220 A.3d 534, 550 (Pa. 2019).

> gave statements that he enjoyed watching young boys in the privacy of his home. He gave statements that the United States is too tough on pornography and in other countries it is not illegal. He stated that he liked 10, 11, 12 and 13 year old boys. He described them as a "perfectly ripe apple". He excused his behavior by stating, "I don't see what the big fucking deal is. I'm not taking and raping them. Do I make the child porn? No. There is nothing wrong with watching kids that age in the privacy of my own house. What's so bad about that[?"] (N.T. 3-22-21 pp. 258, 287).

Id. at 20-21.

After a jury convicted Davis of the above-listed crimes, the Commonwealth filed notice of its intent to seek imposition of mandatory lifetime sentences, without the possibility of parole, on the basis that Davis had two prior convictions for receiving child pornography. ***See*** 42 Pa.C.S.A. § 9718.2(a)(2). The notice stated that in 1987, Davis had been convicted in federal court of receipt of child pornography through the mail. ***See*** 18 U.S.C. § 2252(a)(2). In 1991, he was convicted of the same violation and sentenced to a five-year mandatory sentence due to his prior conviction. ***See id.*** at § 2252(b)(1).

Davis challenged the application of the mandatory sentences, raising the constitutionality of the statute and arguing its application constituted cruel and unusual punishment. The court rejected Davis's challenge and sentenced him to two concurrent mandatory terms of lifetime confinement without the possibility of parole for his convictions for distribution of child pornography.[3]

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[3] The court also imposed two sentences of 14 to 28 months' confinement plus three years' probation on each of the convictions for criminal use of a
(Footnote Continued Next Page)

Davis filed post-sentence motions, which the trial court denied. This appeal followed.[4]

Davis raises a single issue:

> Whether imposition of a mandatory sentence of life without the possibility of parole, under 42 Pa.C.S.A. § 9718.2 is unconstitutional because it is "grossly disproportionate" to the crime committed, constitutes cruel and unusual punishment, and violates the United States Constitution, Eighth Amendment and Article 1, § 13 of the Pennsylvania Constitution?

Davis's Br. at 2.

Davis argues his mandatory life sentences without the possibility of parole violate the Eighth Amendment of the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution. He asserts the sentences are grossly disproportionate to the gravity of the offense, to

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communication facility. These sentences were to be served consecutively to the life sentences but concurrently to each other.

[4] Sentence was imposed on August 27, 2021, and Davis filed a timely post-sentence motion. The court entered an order within 30 days of sentencing, on September 21, 2021, purporting to stay the proceedings due to need for the transcription of the notes of testimony. The transcripts were filed on February 28, 2023. Within the following 120 days, on June 23, 2023, the court entered an order denying the post-sentence motion. Davis filed a notice of appeal within the following 30 days, on July 24, 2023. ***See*** 1 Pa.C.S.A. § 1908; Pa.R.A.P. 107.

Normally, a court must decide post-sentence motions within 120 days of their filing, or they will be automatically denied by operation of law. ***See*** Pa.R.Crim.P. 720(B)(3)(a). The defendant then has 30 days to file the notice of appeal. ***See*** Pa.R.A.P. 903(a). However, if the court enters an untimely notice of the disposition of the post-sentence motions, and the defendant files a notice of appeal within the following 30 days, the appeal will be deemed timely. ***See Commonwealth v. Perry***, 820 A.2d 734, 735 (Pa.Super. 2003); ***Commonwealth v. Braykovich***, 664 A.2d 133, 138 (Pa.Super. 1995).

sentences "similarly situated in this Commonwealth," and to sentences for the same crime in other jurisdictions. ***Id.*** at 7.

Regarding the gravity of the offense, he argues that he "did not solicit minors, nor was it even alleged that he attempted to have contact with minors." ***Id.*** at 12. He points out that he does not have a criminal history that involves any violence or direct contact with minors. ***Id.*** He asserts that although the statute is aimed at preventing recidivism, he "had been without any incursion in the justice system for at least 20 years and not involved again until he was the age of 59 and 60 years respectively." ***Id.*** Davis also contends the Commonwealth did not establish that he disseminated child pornography "beyond that downloaded by the investigators[.]" ***Id.***

Davis also argues that the life sentence is disproportionate to the gravity of the offense because it is vastly different than the guidelines sentence, which was 36 to 48 months in the standard range, given his PRS of 2. ***Id.*** at 13-14. He argues that even if he had been sentenced to the consecutive statutory maximum sentences on each count, including maximum sentences of 5 to 10 years on each child abuse count, his aggregate sentence would only be 17 to 34 years. ***Id.*** at 14. Davis also argues that he would be subject to lifetime SORNA registration, and the Commonwealth could restrict his use of electronic devices and the internet. ***Id.*** at 13.

Regarding sentences for similar offenses, Davis highlights that a person convicted of rape of a child under 13 years of age is subject to a 10-year minimum sentence for a first offense, or a 25-year minimum sentence for a

second-time offense. ***Id.*** at 15. He argues that even an individual convicted of third-degree murder is only subject to 20 to 40 years' confinement. ***Id.*** at 17. Davis argues he should not be subject to a greater sentence because his crime did not involve direct contact with a minor child or involvement in the production of child pornography. ***Id.*** at 15. He contends that while his conduct can be viewed as creating a "demand" for child pornography, his sentence is not likely to decrease the supply of child pornography, as he did not pay money for the pornography he accessed, and "the creators of child pornography . . . are not driven by monetary gain[.]" ***Id.*** at 16.

Regarding sentences for the equivalent crime in other jurisdictions, Davis states drawing the comparisons would be "daunting and near impossible." ***Id.*** at 17. However, he emphasizes that the United States Supreme Court held a mandatory sentence of life imprisonment without parole imposed for a fourth minor crime did not withstand constitutional scrutiny. ***Id.*** at 18 (citing ***Solem v. Helm***, 463 U.S. 277 (1983)). He argues that in ***Commonwealth v. Baker***, 78 A.3d 1044, 1048-49 (Pa. 2013), the Pennsylvania Supreme Court recognized that the possibility of parole was a determinative factor in the ***Solem*** Court's determination that the life sentence was grossly disproportionate to the crime. ***Id.***

"[T]he constitutionality of a statute presents a pure question of law[.]" ***Commonwealth v. Thompson***, 106 A.3d 742, 763 (Pa.Super. 2014). Thus, "our standard of review is *de novo* and our scope of review is plenary." ***Id.*** We presume "duly enacted legislation" is constitutional and we will not find a

statute unconstitutional "unless it clearly, palpably, and plainly violates the Constitution." ***Id.*** (citation omitted). Any doubt will be resolved "in favor of the statute's constitutionality." ***Id.*** (citation omitted).

The statute Davis seeks to invalidate is Section 9718.2(a)(2), a "third strike" law, which provides a mandatory minimum of life imprisonment for persons who have been convicted three times of an enumerated sexual offense:

> **§ 9718.2. Sentences for sexual offenders**
>
> **(a) Mandatory sentence.--**
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> ***
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> (2) Where the person had at the time of the commission of the current offense previously been convicted of two or more offenses arising from separate criminal transactions set forth in section 9799.14 or equivalent crimes under the laws of this Commonwealth in effect at the time of the commission of the offense or equivalent crimes in another jurisdiction, the person shall be sentenced to a term of life imprisonment, notwithstanding any other provision of this title or other statute to the contrary. Proof that the offender received notice of or otherwise knew or should have known of the penalties under this paragraph shall not be required.

42 Pa.C.S.A. § 9718.2(a)(2).[5]

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[5] Davis was convicted of two counts of distribution of child pornography, 18 Pa.C.S.A. § 6312(c), which is an offense listed in section 9799.14. ***See*** 42 Pa.C.S.A. § 9799.14(c)(2). Davis does not contest that his prior convictions for receipt of child pornography through the mail qualify as "equivalent crimes" under this subsection or argue that the Commonwealth failed to establish those convictions. ***See*** 18 Pa.C.S.A. § 6312(d) (criminalizing the possession of child pornography); 42 Pa.C.S.A. § 9799.14(b)(9).

We first note that a party challenging the constitutionality of a statute must establish either that the statute is facially unconstitutional – that is, unconstitutional in any application – or unconstitutional "as applied" in the present circumstances. ***Thompson***, 106 A.3d at 763-64.

Here, Davis does not argue that this statute is unconstitutional when applied to all sentences flowing from third convictions for enumerated sexual crimes. Rather, Davis argues the sentence of life imprisonment without the possibility of parole is unconstitutional when applied to his sentence, because he did not directly sexually abuse minors, did not commit any violent offenses, did not engage in the creation of child pornography or pay or receive money for the pornography he possessed, and committed his previous offenses two decades ago. We will therefore confine our review to the constitutionality of the statute as applied to Davis. ***See Thompson***, 106 A.3d at 764.

Next, we observe that although Davis brings his claim under both the federal and state constitutions, he does not argue that Article I, Section 13 of the Pennsylvania Constitution provides greater protection than the Eighth Amendment of the United States Constitution. Nor does he argue we should make this finding through an ***Edmunds*** analysis. ***See Commonwealth v. Edmunds***, 586 A.2d 887 (Pa. 1991). We will therefore apply Eighth Amendment jurisprudence to Davis's as-applied claim. ***See Baker***, 78 A.3d at 1048; ***see also Thompson***, 106 A.3d at 763 (stating, "It is well-settled that the guarantee against cruel and unusual punishment contained in the Pennsylvania Constitution, Article 1, Section 13, provides no broader

protections against cruel and unusual punishment than those extended under the Eighth Amendment to the United States Constitution") (quotation marks and citation omitted).

The Eighth Amendment prohibits "cruel and unusual punishments." ***See*** U.S. Const. amend. VIII. This prohibition "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime." ***Baker***, 78 A.3d at 1047 (citation omitted). To determine whether a sentence is grossly disproportionate, a court must employ the three-prong test from ***Solem***, by examining "(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." ***Baker***, 78 A.3d at 1047 (citation omitted).

A court need not reach the second and third prongs of the test unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." ***Id.*** (citation omitted). When considering the gravity of an offense in comparison to the sentence imposed under a recidivist statute, we must consider the state's "legitimate penological goal" in imposing "dramatically enhanced sentences" for habitual offenders and take into account the defendant's history of recidivism. ***Ewing v. California***, 538 U.S. 11, 28, 29 (2003). A state has an interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established

by its criminal law." ***Id.*** at 29 (citation omitted); ***see also id.*** at 30 (finding recidivist statute imposing 25 years to life for multiple violent felonies constitutional where defendant stole three golf clubs; stating statute "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated"). For this reason, successful Eighth Amendment challenges to recidivist sentencing statutes are "extremely rare." ***Baker***, 78 A.3d at 1048.

In ***Baker***, our Supreme Court considered whether another subsection of the statute at issue today – Section 9718.2(a)(1) – was unconstitutional under the Eighth Amendment. This "second strike" subsection provides for a mandatory sentence of 25 to 50 years confinement if the offender has previously been convicted of an enumerated sexual crime. ***See*** 42 Pa.C.S.A. § 9718.2(a)(1). The appellant had been convicted of possession of child pornography after having been previously convicted of the same offense, and the court imposed the mandatory minimum sentence of 25 to 50 years' confinement under subsection (a)(1).

Applying the first prong of the ***Solem*** test, the ***Baker*** Court found the sentence was not grossly disproportionate to the gravity of the offense. It observed that "[t]he fact that [the a]ppellant is a repeat offender certainly goes to the gravity of his instant offense." ***Baker***, 78 A.3d at 1051. It also noted the United States Supreme Court has "articulated that the prevention of sexual exploitation and abuse of children constitutes a government

objective of surpassing importance" and "has recognized that child pornography is the product of a supply-and-demand, underground industry that is 'difficult, if not impossible, to solve . . . by only attacking production and distribution.'" ***Baker***, 78 A.3d at 1050-51 (quoting ***New York v. Ferber***, 458 U.S. 747, 757 (1982) and ***Osborne v. Ohio***, 495 U.S. 103, 110 (1990)). The ***Baker*** Court rejected the notion that the appellant's possessory offense was "non-serious," stating,

> [W]e cannot view [the a]ppellant's crimes as he suggests, in a manner that detaches them from the devastating victimization that child pornography produces. [The a]ppellant's participation in the criminal subculture of viewing images of child sexual abuse for personal gratification is part and parcel of that victimization. [The a]ppellant's crime is his continued participation as an enabler of sexual crimes against children via his status as a possessor of child pornography. Although [the a]ppellant did not personally commit the underlying sexual abuse, he was certainly a willing voyeuristic participant in its commission after the fact, and it is his demand to possess images of child sexual abuse which permits and, to an extent, causes, the production of child pornography. . . . His crime is more accurately understood as secondary or indirect participation in the sexual abuse and exploitation of innocent children for personal gratification. That is a very serious and grave offense.

Id. at 1051-52.

The Court also observed that the United States Supreme Court has denied Eighth Amendment challenges to longer sentences imposed under recidivist statutes for lesser conduct, such as "receiving $120.75 by false pretenses or shoplifting three golf clubs." ***Id.*** at 1052 (citing ***Rummel v. Estelle***, 445 U.S. 263 (1980) and ***Ewing***, 538 U.S. at 30-31). The ***Baker*** Court also found that 25 to 50 years' confinement was "not tantamount to a

life sentence without the possibility of parole," noting the appellant was 33 years old and presuming "an average longevity." ***Id.*** at 1052.

The ***Baker*** Court did not reach the second and third prongs of the ***Solem*** test. It further noted that the appellants' arguments regarding the difference between the sentence imposed and the sentences for first and second offenses for the same crime fall under the second prong of the test. ***Id.*** at 1052 n.9.[6]

Here, Davis was not convicted of possession of child pornography, but of dissemination.[7] This is more egregious than a solely possessory offense.

Davis's repeated commissions of child pornography offenses also contribute to the gravity of his instant crimes. ***Baker***, 78 A.3d at 1051. The challenged sentence was imposed on Davis's third and fourth convictions regarding child pornography. His receipt of a five-year mandatory sentence on his second conviction clearly did not curb his behavior. To the contrary,

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[6] Therefore, Davis's arguments that he would have received a lesser sentence for a first or second strike, pursuant to the guidelines ranges and the statutory maximums, falls under the second prong of the ***Solem*** test, and not the first.

[7] The applicable subsection states:

> **(c) Dissemination of photographs, videotapes, computer depictions and films.--**Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any child sexual abuse material or artificially generated child sexual abuse material commits an offense.

18 Pa.C.S.A. § 6312(c).

following his arrest on the instant charges, Davis made statements protesting the legitimacy of the legislature's prohibition on disseminating or possessing child pornography.

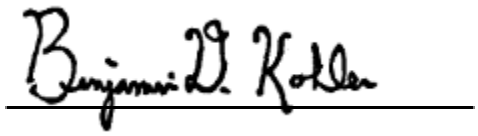
Finally, the trial court found the videos Davis disseminated were "extremely graphic," and the court found his acts to be "grave offenses." Trial Ct. Op. at 17, 20; ***see also id.*** at 19-20 (describing videos). We agree with this assessment and find the sentence here is not grossly disproportionate to Davis's conduct.

We recognize that in ***Solem***, the United States Supreme Court struck down a recidivist statute that imposed life confinement without the possibility of parole. The statute at issue there made a felony conviction subject to life imprisonment without parole when the defendant had been convicted of at least three prior crimes. ***Solem***, 463 U.S. 281-82. The defendant in that case had a record of non-violent offenses and pleaded guilty to passing a $100 bad check. ***Id.*** at 280-81. The Court found the crime "was 'one of the most passive felonies a person could commit,'" as it "involved neither violence nor threat of violence" and did not involve a very large monetary sum. ***Id.*** at 296 (citation omitted). The defendant's prior crimes were also "relatively minor." ***Id.*** at 296-97. Noting that only capital punishment would be a greater penalty, the Court concluded the life sentence was disproportionate because the defendant "received the penultimate sentence for relatively minor criminal conduct." ***Id.*** at 297, 303.

In contrast, as stated above, Davis's distribution of child pornography was not "relatively minor" criminal conduct. Moreover, Davis's previous convictions were for the same type of gravely serious criminal conduct, not unrelated minor offenses. Finally, even after two prior convictions, Davis is remorseless and still operates under the belief that this conduct should not be criminalized. In this scenario, we find no unconstitutionality in the application of the statute to permanently incapacitate Davis due to his inability to conform to the laws surrounding child pornography. ***Ewing***, 538 U.S. at 29-30. The sentence here does not raise an inference gross disproportionality. We therefore end our analysis.

Judgment of sentence affirmed.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 3/21/2025