ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

STATE OF ARIZONA v. MORTON R. BERGER,
CR-05-0101-PR

PARTIES AND COUNSEL:

Petitioner*:* Morton R. Berger, represented by Laurie A. Herman and Natalee Segal.

Respondent: State of Arizona, represented by Assistant Attorney General Randall M. Howe.

Amicus Curiae: The American Civil Liberties Union, represented by Donald M. Peters of Miller, LaSota & Peters, PLC

FACTS:

Milton Berger was convicted of 20 counts of "sexual exploitation of a minor" for possessing 20 images of child pornography downloaded from the Internet. Because each count alleged a class 2 felony and dangerous crime against children, each carried a minimum ten year sentence, to be served consecutively and without possibility of release. Because of these statutory requirements, Berger faced a total of 200 years in prison.

Berger challenged his potential 200-year sentence on the ground that it constitutes cruel and unusual punishment. The trial court rejected his challenge and sentenced him to the minimum 10 years on each count, with the sentences to be served consecutively and without possibility of early release. The court could have entered a special order under a statute that allows a defendant, whose statutorily mandated sentence the court feels is "clearly excessive," to petition the board of executive clemency for a reduction of sentence. But the court did not do so.

On appeal, a majority of the court affirmed Berger's convictions and sentences. It decided that Berger's sentence was not so grossly disproportionate as to constitute cruel and unusual punishment. It also decided that extraordinary circumstances did not exist that would justify the appellate court's exercise of its statutory authority to reduce an excessive sentence, a power given to the appellate courts independent of the executive clemency statute.

One judge dissented from the majority's conclusions as to cruel and unusual punishment. He found it important that the law had changed while Berger's case was on appeal. When the trial court imposed sentence, the court was required to analyze the constitutional argument (that the sentence is disproportional to the offense committed) by looking only at the nature of the offense generally. The case requiring this analysis was the *DiPiano* case. While the appellate court was considering Berger's case, the Arizona Supreme Court decided the *Davis* case, which overruled *DiPiano*. The Court held in *Davis* that a sentencing court is required to analyze the gross disproportionality of a sentence based on the specific facts of the case as to the nature of the crime(s), the defendant and his conduct. The three-part test to be used is whether

there is an inference of gross proportionality, and, if so, whether intra- and inter-jurisdictional analyses validate the difference. Intra- and inter-jurisdictional comparisons involve looking at punishments for similar or more severe crimes in Arizona and in other states. By adopting a case-specific standard, the Court returned to the analysis used before *DiPiano* was decided. The *Davis* Court recognized that it is the combination of mandatory and consecutive sentences which may render the sentence so extreme given the individual facts as to shock society's conscience. The dissenting judge wrote that the case should be remanded so the trial court could receive and consider evidence relevant to the proper analysis under *Davis*.

ISSUE:

"Are the cruel and unusual punishment clauses of the Arizona and Federal Constitutions violated when a 52-year-old high school teacher with no criminal record is sentenced to a 200 year flat-time sentence with no possibility of early release upon his conviction of possession of child pornography and in the absence of any actual sexual misconduct with children?"

Definitions:

A.R.S. § 13-4037 (B) provides in part:

"Upon an appeal 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."