IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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NO. 94-30163
Summary Calendar

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GREGORY WIMBERLEY, Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary Respondent-Appellee.

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Appeal from the United States District Court for the
Eastern District of Louisiana
(CA-93-3923-J)

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November 17, 1994

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM[1]:

Gregory Wimberley ("Wimberley") pleaded guilty to six counts of armed robbery in Louisiana state court; he was sentenced to six concurrent 99-year terms of imprisonment.[2] After the state voluntarily agreed to resentence Wimberley during the pendency of a previous federal *habeas* action, Wimberley filed a second petition for federal *habeas* relief, alleging that his new sentence was

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that his opinion should not be published.

[2] *State v. Wimberly*, 618 So.2d 908, 910 (La. App.), *writ denied*, 624 So.2d 1229 (La. 1993).

excessive, that he was denied his right "to face his accuser" and that the state court lost jurisdiction over him by not resentencing him within the time provided by the federal district court's order. The district court denied Wimberley's petition, but granted Wimberley a certificate of probable cause to bring this appeal.

Wimberley contends that his 99-year sentence for armed robbery is constitutionally excessive. In *Solem v. Helm*,[3] the United States Supreme Court held that courts should conduct a three-part analysis to determine whether a sentence was unconstitutionally disproportionate. Under this test the court considers: 1) the gravity of the offense relative to the harshness of the penalty; 2) the sentences imposed for other crimes in the jurisdiction; and 3) the sentences imposed for the same crime in other jurisdictions.[4] Although there was no clear majority, this approach was altered by *Harmelin v. Michigan*.[5]

Relying on *Harmelin*, this Court has held that the Eighth Amendment prohibits disproportionate sentences, but the three-part *Solem* test is not used in each case.[6] Under the new approach the Court makes a threshold comparison of the gravity of the offense against the severity of the sentence. Only if the sentence is grossly disproportionate to the offense does the Court consider the

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[3] 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

[4] *Id.* at 463 U.S. at 292.

[5] 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

[6] *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 146, 121 L.Ed.2d 98 (1992).

last two *Solem* factors.[7]

Wimberley pleaded guilty to robbing a convenience store with Dennis Taylor ("Taylor").[8] Although Wimberley carried a pellet gun, Taylor carried a .38 caliber revolver. Taylor robbed at least ten customers and forced them to lie on the floor during the robbery while Wimberley robbed the store clerk. After they robbed the convenience store, Wimberley and Taylor went to a drive-in movie theater. An employee of the theater pulled a gun on them, after observing gun and money in Wimberley's car. Wimberley and Taylor fired on the gun-wielding employee, but struck and killed a woman selling tickets instead. At the time of sentencing, a first-degree murder charge was pending against Wimberley.

Wimberley's excessive-sentence claim does not rise above the threshold question expressed in *Solem* and *Harmelin*. Wimberley's sentence was not unconstitutionally excessive. *Cf. McGruder*, 954 F.2d at 317 (a life sentence without parole for conviction of auto burglary was not grossly disproportionate where petitioner had two prior convictions for crimes of violence).

Wimberley next contends that his Sixth Amendment right to confront witnesses was violated when hearsay testimony was admitted at his resentencing hearing. The challenged testimony consists of statements by the prosecuting attorney concerning the trial judge's reasons for imposing sentence. Wimberley argues that the prosecutor should not have been allowed to testify for the

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[7] *Id.*

[8] *See Wimberly*, 618 So.2d at 910.

sentencing judge. A state court's evidentiary ruling does not present a cognizable *habeas* claim unless it violates a specific constitutional right or renders the trial fundamentally unfair.[9] Hearsay is admissible for sentencing purposes.[10] Wimberley has not shown that the admission of hearsay at his resentencing violated his constitutional rights.

Wimberley's final contention is that the state court lost jurisdiction to resentence him by not acting within the time set out in the district court's resentencing order. The court did not grant *habeas* relief in the form of resentencing. Rather, in response to Wimberley's federal petition, the state filed a "Motion To Return Defendant From A State Institution For Resentencing." The district court then ordered that Wimberley be resentenced within sixty days. While the court may have been able to threaten a "conditional use" of the *habeas* writ to insure the state's compliance with the order, *see Smith v. Lucas*, 9 F.3d 359, 366 (5th Cir. 1993), *cert. denied*, ___U.S.___, 115 S.Ct. 98 (1994), the order reflects no such warning. We find that Wimberley has presented no persuasive authority that suggests that the state was somehow divested of jurisdiction by failing to comply with the resentencing order. AFFIRMED.

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[9] *Pemberton v. Collins*, 991 F.2d 1218, 1226 (5th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 637, 126 L.Ed.2d 596 (1993).

[10] *See United States v. Young*, 981 F.2d 180, 187 (5th Cir. 1992), *cert. denied*, ___U.S.___, 113 S.Ct. 2983, 125 L.Ed.2d 680 (1993) (direct appeal from federal criminal conviction); *United States v. Ammirato*, 670 F.2d 552, 556-57 (5th Cir. 1982) (28 U.S.C. § 2255 case).