Constitutional Law - Eighth Amendment - Cruel and Unusual Punishment - Criminal Law - Proportionality Review in Non-Capital Sentencing

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CONSTITUTIONAL LAW—EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT—CRIMINAL LAW—PROPORTIONALITY REVIEW IN NON-CAPITAL SENTENCING—The United States Supreme Court has held that a sentence of life imprisonment without parole imposed in accordance with a state recidivist statute on a defendant after his seventh non-violent felony conviction constitutes cruel and unusual punishment.


Jerry Buckley Helm, 36, was indicted in 1979 by the state of South Dakota for having written a "no account" check in the amount of $100.1 Helm pled guilty, waived his right to a preliminary hearing, rejected a presentence investigation and insisted on being sentenced without delay.2 It was the seventh felony conviction for Helm, who had earlier been convicted three times for third-degree burglary,3 and one time each for grand larceny,4 obtaining money under false pretenses5 and third-offense driving

1. Solem v. Helm, 103 S. Ct. 3001, 3005 (1983). The statute, in relevant part, provided that:

Any person who, for himself or as an agent or any representative of another for present consideration with intent to defraud, passes a check drawn on a financial institution knowing at the time of such passing that he or his principal does not have an account with such financial institution, is guilty of a Class 5 felony.

S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979). South Dakota law authorizes a maximum penalty of five years imprisonment in the state penitentiary along with a $5,000 fine for a Class 5 felony. S.D. CODIFIED LAWS ANN. § 22-6-1(7) (Supp. 1983).


3. 103 S. Ct. at 3004. Helm's convictions for third-degree burglary occurred in 1964, 1966 and 1969. Id. Third degree burglary consisted of "breaking or entering at any time into any building within the curtilage of a dwelling house but not forming a part thereof . . . or any structure or erection in which property is kept, with an intent to commit larceny or any felony . . . ." S.D. CODIFIED LAWS ANN. § 22-32-9 (1967) (repealed 1976). The punishment was up to 15 years imprisonment. S.D. COMP. LAWS ANN. § 22-32-10 (1967) (repealed 1976). The definitions for third-degree burglary in 1964 and 1966 were essentially the same. 103 S. Ct. at 3004 n.1.

4. 103 S. Ct. at 3004. The conviction occurred in 1972 and the maximum punishment was three years in the state penitentiary or one year in the county jail or a fine three times the value of the property obtained. Id. at 3004 & n.2. See S.D. COMP. LAWS ANN. § 22-41-4 (1967) (repealed 1976).

5. 103 S. Ct. at 3004. At the time, larceny was defined as taking property by stealth or fraud with the intent to deprive another thereof. S.D. COMP. LAWS ANN. § 22-37-1 (1967) (repealed 1976). Grand larceny was committed if the property had a value exceeding $50, was taken from the person of another, or was livestock. S.D. COMP. LAWS ANN. § 22-37-2 (1967) (repealed 1976). Grand larceny was punishable by maximum terms of 10 years in the
while intoxicated. The trial judge, in accordance with South Dakota's recidivist statute, sentenced Helm to life imprisonment without parole.

The sentence was affirmed in 1980 by the South Dakota Supreme Court, which held, in part, that the sentence did not constitute cruel and unusual punishment. Two years later, Helm petitioned the governor of South Dakota for commutation of his sentence and was turned down. Helm then petitioned for habeas corpus relief in the United States District Court for the District of South Dakota. The district court, in a memorandum opinion, held that the sentence, while harsh, did not constitute cruel and unusual punishment in light of the United States Supreme Court's decision in Rummel v. Estelle, which was found to be controlling. In Rummel, the Court held that the recidivist statute of Texas, which allowed for the imposition of a life sentence with the possibility of parole upon a defendant's third felony conviction, did not constitute cruel and unusual punishment under the eighth and fourteenth amendments.

Upon denial of the petition for a writ of habeas corpus, Helm appealed to the United States Court of Appeals for the Eighth Circuit which reversed and remanded with directions to issue the writ.

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6. 103 S. Ct. at 3004. Third-offense driving while under the influence of alcohol is a felony in South Dakota. S.D. CODIFIED LAWS ANN. § 32-23-4 (1976). Helm was convicted under this statute in 1975. 103 S. Ct. at 3004.

7. Normally the crime committed would have called for a sentence of five years in the state penitentiary and a $5,000 fine. 103 S. Ct. at 3005. See S.D. COMP. LAWS ANN. § 22-37-3 (1967) (repealed 1976).

8. 103 S. Ct. at 3005-06. The sentence for a Class 1 felony is life imprisonment but South Dakota law provides that a person under life imprisonment "is not eligible for parole by the board of pardons and paroles." See S.D. CODIFIED LAWS ANN. § 24-15-4 (1979).

9. 103 S. Ct. at 3006. Helm also raised issues of abuse of the trial judge's discretion and denial of due process of law. See 287 N.W.2d at 498.

10. 103 S. Ct. at 3006. If the governor had commuted his life sentence to a term of years, Helm would have been eligible for parole when he had served three-fourths of this fixed sentence. Id. See S.D. CODIFIED LAWS ANN. 24-15-5(3) (1979).

11. 103 S. Ct. at 3006.


of habeas corpus if Helm was not resentenced within sixty days.\textsuperscript{15} The court of appeals unanimously found that the sentence of life imprisonment without parole received by Helm was disproportionate to the crimes committed and therefore the sentence constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.\textsuperscript{16} Based on the decision of the court of appeals, the state of South Dakota petitioned the United States Supreme Court for certiorari, which the Court granted.\textsuperscript{17} The Supreme Court held, in a 5-4 decision,\textsuperscript{18} that the South Dakota recidivist statute providing for life imprisonment without parole constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.\textsuperscript{19}

Justice Powell, writing for the majority, first established that the cruel and unusual punishment clause of the eighth amendment was meant to deal with, among other aspects, disproportionate prison sentencing in non-capital cases.\textsuperscript{20} Justice Powell traced the historical roots of the eighth amendment and proportionality from the Magna Carta through English Common Law.\textsuperscript{21} He then explained that the Court has recognized the proportionality analysis since \textit{Weems v. United States},\textsuperscript{22} decided in 1910.\textsuperscript{23} South Dakota had asserted that felony prison sentences should not be subject to pro-

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\item \textsuperscript{15} Helm v. Solem, 684 F.2d 582, 587 (8th Cir. 1982). The opinion was written by Circuit Judge Bright who was joined by Chief Judge Lay and Circuit Judge Ross. \textit{Id.} at 582.
\item \textsuperscript{16} \textit{Id.} at 582. In order to so hold, the court of appeals had to distinguish the case at hand from Rummel v. Estelle, 445 U.S. 263 (1980), which it did primarily by distinguishing between the sentences of life imprisonment with parole and life imprisonment without parole. The court also stated that the Supreme Court in \textit{Rummel} had not completely rejected proportionality of sentence review and this review could apply to non-capital as well as capital offenses. 684 F.2d at 584.
\item \textsuperscript{17} Solem v. Helm, 103 S. Ct. 339 (1982). Certiorari was granted to consider the eighth amendment question. \textit{Id.}
\item \textsuperscript{18} 103 S. Ct. at 3004. The majority opinion was written by Justice Powell who was joined by Justices Brennan, Marshall, Blackman, and Stevens. \textit{Id.} The dissent was written by Chief Justice Burger who was joined by Justices White, Rehnquist, and O'Conner. \textit{Id.} at 3017 (Burger, C.J., dissenting).
\item \textsuperscript{19} \textit{Id.} at 3003.
\item \textsuperscript{20} \textit{Id.} at 3006.
\item \textsuperscript{21} \textit{Id.} at 3006-07.
\item \textsuperscript{22} 217 U.S. 349 (1910). Weems was convicted for falsifying a public document and sentenced to \textit{cadena temporal} for fifteen years. \textit{Cadena temporal} included hard labor in chains and the loss of various civil rights and liberties. Among these were the right to control and dispose inter vivos of his property and the rights of parental and marital authority. It also included surveillance of the criminal for the rest of his life and the denial of the right to vote or hold public elective office. \textit{Id.} at 364.
\item \textsuperscript{23} 103 S. Ct. at 3007-08.
\end{itemize}
portionality review. Justice Powell rejected this argument, stating that it would make little sense for the eighth amendment to apply to bailments and fines at the lower end of the sentencing scale and to the greatest punishment—death—at the other end, yet exclude proportionality review of the intermediate punishment of imprisonment.25

After dealing with the capacity of the Court to pass upon proportionality of sentencing in non-capital cases, the majority adopted a three-pronged objective test to be used in passing upon proportionality of sentencing.26 The first part of the test examines and compares the "gravity of the offense and the harshness of the penalty."27 The majority mentioned several factors which they believed could be used to determine the gravity of the offense. Primarily, the discussion focused on comparisons which consider the harm threatened or inflicted on the victim or society and the defendant's degree of culpability.28 In assessing the harm to the victim or society, the majority maintained, courts can consider the magnitude of the crime, whether the crime was violent or non-violent, whether the offense was a lesser included offense, whether the accused was an accomplice or the principal, and whether the crime was attempted or completed.29 In weighing culpability, the majority noted, a court may look to such distinguishing factors as negligent versus intentional conduct and the defendant's motivation in committing the crime.30

The second part of the majority's proportionality test consists of examining "sentences imposed on other criminals in the same jurisdiction."31 Here the majority stated that excessiveness might be found if crimes of a greater severity are penalized to the same or a lesser degree.32

The third and final part of the test for proportionality review

24. Id. at 3009.
25. Id.
26. Id. at 3010. This test for proportionality was rejected by the court in Rummel, but Justice Rehnquist, writing for the majority, did concede that proportionality review could be acceptable in exceedingly rare cases. See Rummel, 445 U.S. at 272. One example given was if a legislature made overtime parking a felony carrying a punishment of life imprisonment. Id. at 274 n.11.
27. 103 S. Ct. at 3010.
28. Id. at 3011.
29. Id. The court makes it clear that its list of factors is only illustrative of some of the factors which may be considered and is not exhaustive. Id.
30. Id. See supra note 29.
31. 103 S. Ct. at 3010.
32. Id.
"compares the sentences imposed for the commission of the same crime in other jurisdictions."33 Here Justice Powell noted the capital punishment tests of proportionality34 and the non-capital proportionality review in Weems v. United States where the Court had mentioned that the sentence under federal law was only two years imprisonment as opposed to the fifteen years imprisonment given to the defendant.35

In discussing a court's ability to compare sentences within and without the same jurisdiction, Justice Powell stated that while it is difficult, not in comparing years but in ascertaining when the line of an eighth amendment violation is crossed, it is not impossible.36 Justice Powell made an analogy to the sixth amendment where such lines must be drawn in tests concerning the rights to a speedy trial and trial by jury.37 In determining the right to a speedy trial, he explained, the court should consider objective factors and the particular circumstances of the case.38 In deciding when a defendant has a right to trial by jury, Justice Powell noted, that the Court had set the line at any case where the defendant could be imprisoned for more than six months.39 The six month line was drawn by examining the time limits used by jurisdictions throughout the country.40

After stating the proportionality test, the majority applied the test to the case at hand. In comparing the severity of the crime and the harshness of the penalty, the majority stressed the small amount of money involved in the "no account" check, the non-violence of the defendant's seven felony convictions41 and that, bar-

33. Id.
34. See Enmund v. Florida, 102 S. Ct. 3368 (1982). Justice Powell quoted from Enmund that "only about a third of American jurisdictions would ever permit a defendant (such as Enmund) to be sentenced to die." 103 S. Ct. at 3010 (quoting 102 S. Ct. at 3374). Justice Powell also referred to Coker v. Georgia, 433 U.S. 584 (1977) (the Court, in considering the imposition of the death penalty for rape, in absence of murder, found it significant that only a minority of the states in the country authorized the death penalty for the crime). 103 S. Ct. at 3010.
36. 103 S. Ct. at 3012.
37. Id.
38. Id. Some of the factors a court is to use in determining if the defendant has been denied the right to a speedy trial are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).
40. 103 S. Ct. at 3012.
41. Id. at 3012-13.
ring a remote possibility of executive clemency, Helm had received the most severe penalty authorized by South Dakota statutory law for any crime. In discussing sentences imposed on other criminals in South Dakota, the majority relied primarily on South Dakota crimes of third offense heroin dealing and aggravated assault, neither of which authorized a life sentence. Third, in comparing Helm's sentence to sentences imposed in other states which had recidivist statutes, only one other state, Nevada, allowed for a penalty of life without parole.

Justice Powell, at this point, confronted the Court's decision in Rummel, which upheld the sentence of life imprisonment with the possibility of parole mandated by Texas' recidivist statute. South Dakota had argued that, under its statute, Helm did have a possibility of receiving a commutation by the governor of South Dakota which would reduce the life sentence to a fixed term of years. Justice Powell rejected this argument and pointed to the Court's ability in Rummel to be virtually certain that Rummel would most likely receive parole within the state's average of twelve years. Justice Powell concluded that the chances of Helm being paroled were too remote and uncertain to be relied upon or compared with the Texas system of parole in Rummel. The sentence of life without parole under the South Dakota statute was therefore deemed unconstitutional.

42. Id. at 3013, 3016 n.29. The Court was referring to the fact that a life sentence had last been commuted in 1975 and that Helm had already been turned down. Brief for Appellant at 26-29, Solem v. Helm, 103 S. Ct. 3001 (1983). For a list of paroles considered and their disposition, see affidavit by Ben Dearduff, Legal Liaison of the South Dakota State Penitentiary, in Solem v. Helm, Joint Appendix to Petitioner and Respondent Briefs (Dec. 23, 1982).

43. 103 S. Ct. at 3013-14. Murder required a life sentence without the possibility of parole, there being no death penalty in South Dakota. Other first offenses allowing a court to impose a life sentence without the possibility of parole, the majority explained, were treason, first degree manslaughter, first degree arson, and kidnapping. Id.

44. Id. at 3014.

45. Id. The Court noted that it was not aware of Nevada's ever having imposed the life without parole sentence on a defendant whose crimes were as "minor" as Helm's. Id.

46. Id. at 3015.


48. Id. at 3016.

49. Id.
Chief Justice Burger, in a dissenting opinion, attacked the majority opinion on three grounds: stare decisis, proportionality review and intrusion upon the legislature’s territory.\(^{51}\) Chief Justice Burger contended that proportionality review regarding solely the length of sentences is something that not only was rejected in *Rummel* but which also has been rejected historically by the Court.\(^{52}\) He dismissed *Weems* as a decision in which the Court had not dealt solely with the length of the sentence but also with the physical manner in which it was carried out.\(^{53}\)

In *Rummel*, Chief Justice Burger submitted, the Court specifically rejected each part of the three-pronged proportionality test.\(^{54}\) He stated that the test was rejected because of the subjectivity necessarily involved: the sentences received in other states are too difficult to compare—especially when dealing with the habitual offender statutes—and the weighing of sentences imposed by a state against other criminals within the same state for different crimes infringes on the policy-creating capacity of the state’s legislature.\(^{55}\)

Chief Justice Burger, in arguing that stare decisis required the Court to once again reject the proportionality test, explained why *Rummel* and the present case were not substantially distinguishable.\(^{56}\) The Chief Justice noted that the defendant in *Rummel* had committed three non-violent crimes while in *Helm* the three burglaries and driving while intoxicated were in essence violent.\(^{57}\) Chief Justice Burger reasoned that the crimes committed by Helm were violent because of the risk potential involved.\(^{58}\) He also took exception with the majority’s distinguishing between life sentences with and without parole.\(^{59}\) Chief Justice Burger stated that since 1964, of forty-seven requests for commutation in South Dakota, twenty-two life sentences were commuted to a term of years while twenty-five requests were denied.\(^{60}\) He concluded from this that

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\(^{51}\) *Id.* at 3017-24 (Burger, C.J., dissenting).

\(^{52}\) *Id.* at 3018 (Burger, C.J., dissenting).

\(^{53}\) *Id.* See *supra* note 24.

\(^{54}\) 103 S.Ct. at 3019 (Burger, C.J., dissenting).

\(^{55}\) *Id.*

\(^{56}\) *Id.* Here Chief Justice Burger referred to the possible differences in importance placed on sentencing horse thieves in Texas as opposed to Rhode Island or Washington. *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 3019-20 (Burger, C.J., dissenting).

\(^{59}\) *Id.* at 3022-23 (Burger, C.J., dissenting).

\(^{60}\) *Id.* at 3023 (Burger, C.J., dissenting).

\(^{61}\) *Id.*

\(^{62}\) *Id.* A discrepancy between the commutation statistics of the majority and dissent-
Helm had a “significant probability” of being released early.63

Finally, Chief Justice Burger stated throughout his dissenting opinion his belief that the Court was intruding upon legislative territory in dealing with proportionality review.64 In determining sentencing, he believed that the state legislatures are better suited to deal with the balancing of interests, both personal and public, when drawing the necessarily arbitrary lines required for sentencing guidelines.65

All of these arguments led Chief Justice Burger to conclude that if the country is to be ultimately guided by the law as set forth in Rummel, then Rummel must be followed and proportionality review of criminal sentences must be kept out of the hands of the various appellate courts.66

The road to the Court’s holding in Solem v. Helm,67 that the length of a criminal sentence could be so disproportionate to the offense as to constitute cruel and unusual punishment, began in the 1892 dissent in O’Neil v. Vermont.68 Although the issue was not raised in O’Neil’s appeal to the Supreme Court,69 dissenting Justice Field wrote that the eighth amendment could be, and was, violated when O’Neil was sentenced to fifty-four years for 307 offenses involving the sale of intoxicating liquors in violation of Vermont law.70 Justice Field raised the idea that the eighth amendment could apply to sentences which, solely in terms of length, were disproportionate to the offense committed.71

The idea of disproportionate sentencing in non-capital cases was adopted by a majority of the Court in Weems v. United States.72

63. Id. at 3023 (Burger, C.J., dissenting).
64. Id. at 3017-24 (Burger, C.J., dissenting).
65. Id. at 3022 (Burger, C.J., dissenting).
66. Id.
67. 103 S. Ct. 3001 (1982).
68. 144 U.S. 323, 337 (1892) (Field, J., dissenting).
69. Id. at 331. The issue of a violation of the eighth amendment to the United States Constitution was raised by the defendant in the state court but he failed to assign it as error to the United States Supreme Court, and the Court consequently did not decide the issue. Id.
70. Id. at 337-39 (Field, J., dissenting). The defendant was a New York wholesaler and retailer of liquor who mailed out 307 orders to Vermont residents over a three year period. He was also fined $6,638.72. Id.
71. Id. at 339-40 (Field, J., dissenting). Justice Field, in a famous quote, noted that the eighth amendment can be directed “against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” Id.
72. 217 U.S. 349 (1910). The Court stated that “punishment for crime should be grad-
The Court in *Weems* discussed the disproportionality to the crime of the punishment received, as involving more than simply the length of the sentence. The Court, however, did quote from a Supreme Judicial Court of Massachusetts decision which raised the possibility that the length of a sentence alone could be sufficiently disproportionate so as to constitute cruel and unusual punishment.

After these early twentieth century decisions, the Supreme Court was relatively silent on the issue of proportionality review of non-capital sentencing until the late 1950's and the early 1960's when *Trop v. Dulles* and *Robinson v. California* were decided. Neither of those cases, although finding the non-capital sentence to be in violation of the cruel and unusual punishment clause, relied on the length of the sentence as being the cause of the eighth
amendment violation. In *Trop*, the Court found denationalization to be barred *per se* by the eighth amendment. The Court stated that its prior interpretation of the eighth amendment was never intended to be set in cement, and that as the standards of decency set by society advance naturally, so too must the Court’s interpretation of the eighth amendment be allowed to mature. The *Robinson* Court found it cruel and unusual punishment for a person to be convicted of being addicted to narcotics.

Throughout the 1970’s, there was a growing acceptance in the federal courts of the idea of proportionality review in non-capital sentencing. Ultimately, the most significant of these cases was *Hart v. Coiner*, where the United States Court of Appeals for the Fourth Circuit struck down a mandatory life sentence given to the defendant who had been convicted under West Virginia’s recidivist

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79. 356 U.S. at 102; 370 U.S. at 667.
80. 356 U.S. at 101. Trop was convicted in a court martial for desertion in 1944 during World War II while stationed in Morocco, sentenced to serve three years at hard labor and dishonorably discharged. Trop lost his citizenship because of the conviction and dishonorable discharge for desertion during wartime as per section 401(g) of The Nationality Act of 1940. Id. at 87-88.
81. Id. at 100-01.
82. 370 U.S. at 667. Justice Douglas, in a concurring opinion, made a general statement that a punishment disproportionate to the offense might bring it under the cruel and unusual punishment provision of the eighth amendment. Id. at 676 (Douglas, J., concurring).
83. Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978). Judge Mulligan, writing for the majority, cited several cases in support of this point. Id. at 408.
84. *See, e.g.*, Bellavia v. Fogg, 613 F.2d 369 (2d Cir. 1979) (conviction for possession of drugs in an automobile, with a 15 year to life sentence, was not excessively disproportionate, especially in light of the drug trafficking problems which faced the state of New York); Griffin v. Warden, 517 F.2d 756 (4th Cir.), *cert. denied*, 423 U.S. 990 (1975) (defendant received a life sentence under a West Virginia recidivist statute after convictions of burglary, breaking and entering, and grand larceny, which were seen by the court as more serious than the crimes in *Hart*, and therefore the life sentence did not constitute cruel and unusual punishment); Downey v. Perini, 518 F.2d 1288 (6th Cir.), *vacated and remanded*, 423 U.S. 993 (1975) (defendant’s conviction of both possession and sale of marijuana and sentence of 10-20 years on the first charge and 20-40 years on the second was cruel and unusual punishment in light of the nature of the offense and comparisons with other state offenses); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974) (petition for writ of certiorari untimely filed); Ralph v. Warden of the Maryland Penitentiary, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1971) (convicted rapist’s sentence of death was held disproportionate because the victim’s life was not taken or put in danger); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970) (an 18-year-old draft resister’s maximum sentence of five years was excessive and disproportionate to the offense, especially in light of his willingness to serve as a conscientious objector, although the eighth amendment was not specifically mentioned).
Recent Decisions

The court of appeals, in so deciding, stated that the mandatory life sentence was disproportionate and thus a violation of the eighth amendment as applied to the Hart facts. There the court of appeals established a four-pronged objective test of disproportionality, of which three of the criteria were ultimately adopted by the Supreme Court in Solem. The four criteria used by the Fourth Circuit were: the nature and gravity of the offense, the legislative purpose behind the statute, the punishment for the same crime in other jurisdictions, and how the punishment compared to the punishments for other crimes in the same jurisdiction.

The Supreme Court decided in Rummel v. Estelle, to confront head-on the issue of disproportionality of felony sentencing in non-capital cases. The Rummel Court held that a Texas recidivist statute which mandated life imprisonment with the possibility of parole was not in violation of the eighth amendment clause forbidding cruel and unusual punishment. Rummel's three felony convictions for theft and theft-related offenses, which triggered the recidivist statute, involved a total of $229. In striking down the challenge to the cruel and unusual punishment clause, the Court looked at the four objective criteria proposed by Rummel, which had been applied earlier in Hart. In its examination of the nature and gravity of the offense, the Court noted both that violence, or the lack thereof, did not always affect the interests of society in deterrence of the offense and that the amount of money stolen involved an analysis which was prone to subjectivity and therefore a matter for the legislature. In examining how criminals were punished for similar crimes in other jurisdictions, the Rummel Court

86. Id. at 143.
87. Id. Hart was convicted under West Virginia's recidivist statute after convictions for writing a bad check for $50, taking forged checks worth $140 across state lines, and committing perjury at his son's murder trial. He received a mandatory life imprisonment sentence. Id. at 138.
88. Id. at 140-42.
90. 483 F.2d at 140.
91. Id. at 141.
92. Id.
93. Id. at 142.
95. Id. at 264-85.
96. Id. at 285.
97. Id. at 265-66.
98. Id. 275-76, 282.
99. Id. at 275.
stated that a comparison of recidivist statutes is a task too complex to be done properly. 100 A more general comparison with punishments in other jurisdictions, was also rejected by the Rummel Court, which pointed out that rational people can have valid disagreements as to the merits in punishing crimes of one type in a harsher manner than others. 101 On its face, Rummel might have been seen as bringing a virtual end to eighth amendment proportionality review of sentencing in non-capital cases, an interpretation vigorously adhered to by the federal courts. 102

If there was any lingering doubt or resistance among the lower courts, and no doubt there was at least some in the Fourth Circuit, the Supreme Court set out in Hutto v. Davis 103 to deal with this reticence. 104 Davis was given a sentence of forty years imprisonment and a $20,000 fine for his conviction on two counts of possession of less than nine ounces of marijuana. 105 The United States Court of Appeals for the Fourth Circuit held that the punishment was grossly disproportionate to the crime and therefore a violation of the eighth amendment. 106 The Supreme Court then vacated and

100. 445 U.S. 263, 279-81. Rummel claimed that Texas was less lenient regarding its recidivist statute than were all other states. The Court, in discussing the complexity involved in ascertaining the leniency of any particular state's recidivist statute, mentioned that the factors involved in triggering recidivist statutes may vary as to the number of felonies, the fact that some are mandatory while others rely on judge or jury discretion and some require "violent" felonies while some do not. Also, adding to complexity in comparisons is that prosecutors can, in many cases, exercise their discretion to invoke a recidivist statute in order to "screen out 'petty' offenders who fall within the literal terms of such statutes." Id.

101. Id. at 282 n.27.

102. For several decisions which used Rummel to deny an eighth amendment cruel and unusual punishment challenge, see United States v. Compton, 704 F.2d 739, 742 (5th Cir. 1983); United States v. Nichols, 695 F.2d 86, 93 (5th Cir. 1982); United States v. Schell, 692 F.2d 675 (10th Cir. 1982); Fowler v. Parrott, 682 F.2d 746, 758 (8th Cir. 1982); United States v. Dazzo, 672 F.2d 284, 290 (2d Cir. 1982); United States v. Fleming, 671 F.2d 1002, 1003 n.1 (7th Cir. 1982); United States v. Valenzuela, 646 F.2d 352, 354 (9th Cir. 1980); Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1982); Government of the Virgin Islands v. Berry, 631 F.2d 214, 218 (3d Cir. 1980); McLaren v. Fairman, 532 F. Supp. 60, 62-63 (N.D. Ill. 1982); Cassesse v. New York, 530 F. Supp. 694, 695 (E.D.N.Y. 1982). But see Terrebone v. Blackburn, 624 F.2d 383, 1387 (5th Cir.), vacated panel opinion to consider en banc, 646 F.2d 997, 1001 (5th Cir. 1981) (special panel interpreted Rummel as not striking down proportionality review, however, the court sitting en banc vacated the panel opinion and pointed out that Rummel rejected the four-pronged proportionality test).


104. Id. at 374-75. The Supreme Court, in reversing the court of appeals, referred to the court of appeals as having "failed to heed [its] decision in Rummel." Id. at 372.

105. Id. at 371. The defendant was sentenced to 20 years and a $10,000 fine for each count, with the sentences of imprisonment to run consecutively. Id.

106. Id. at 372. In a panel decision, the court of appeals held in Davis v. Davis, 585 F.2d 1228, 1229 (4th Cir. 1978), that the defendant had not shown that the sentence vio-
remanded the case to the court of appeals to reconsider in light of Rummel. The court of appeals again affirmed the district court's holding of cruel and unusual punishment. This prompted the Supreme Court in Hutto to state that it had recognized the four-part Hart test and had consciously disapproved of all the "objective" factors set forth in Hart. The Hutto Court then went on to reiterate what the Rummel Court had said—that proportionality review of sentencing could be accomplished in exceedingly rare cases. Justice Powell, who was to write the majority opinion in Solem, wrote an opinion, in Hutto, concurring in the judgment, in which he emphasized that the Rummel Court had not rejected proportionality analysis of sentencing, though he noted that the Rummel decision did severely limit appellate review of sentences that could be considered cruel and unusual. Justice Powell further stated in Hutto that while arguably Davis' sentence could be seen as cruel and unusual punishment, he felt constrained to concur in the result, mainly because of his belief that Rummel's offenses were less serious than those of Davis.

While the Supreme Court in Solem went one step further by establishing proportionality of sentencing review in non-capital cases, the ultimate effect of the Solem decision is, at least for the time being, in some doubt. The three-part proportionality test is, for now, almost seen as mandatory—a conclusion one can draw from the response by the lower federal courts and the state courts in the short time following the decision. In the four months following the Solem decision, at least eight federal and state courts made at least a cursory examination of sentences in light of the Solem decision. In one of these cases, a New Jersey intermediate court
found the sentence of interdiction\(^{116}\) in a criminal anti-trust case to be a violation of the eighth amendment under the *Solem* test.\(^{117}\) Also, in *Marrero v. Wainwright*,\(^{118}\) the Supreme Court granted certiorari, vacated judgment, and remanded to the court of appeals for consideration in light of *Solem*.\(^{119}\)

Even though there now exists a three-part proportionality test, there are still aspects of the test which appear to be unclear. One of the general problems with the application of the test, noted by Chief Justice Burger in his *Solem* dissent, is whether all three criteria must exist and how they are to be weighed against one another.\(^{120}\) The majority in *Solem* referred only to a “combination” of factors needed to perform a proportionality analysis,\(^{121}\) and although the *Solem* majority found all three factors to be relevant,\(^{122}\) they never stated whether this was a necessity.\(^{123}\)

Also, there appear to be several possible definitional problems which are likely to arise in the future regarding the specific criteria. The majority opinion in *Solem* discussed the seriousness of the crimes yet seemed to discuss seriousness in terms of what actually

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\(^{117}\) *Id.* The defendants unreasonably restrained “the business of providing garbage collection service to customers in the relevant area.” *Id.* at 597.

\(^{118}\) 103 S. Ct. 3567 (1983).

\(^{119}\) *Id.*

\(^{120}\) 103 S. Ct. at 3022 (Burger, C.J., dissenting).

\(^{121}\) *Id.* at 3010 n.17.

\(^{122}\) *Id.* at 3012-16.

\(^{123}\) *Id.* at 3010-11 and at 3022 (Burger, C.J., dissenting).
happened. In contrast, Chief Justice Burger raised what he called the "harsh potentialities for violence." One might wonder if, in assessing the seriousness of the crime, a court ought to take into account what the legislature had in mind when making the offense a crime and not simply whether the actual result of the crime was violent in the particular case. Comparisons with other jurisdictions might also encounter several problems. First, Chief Justice Burger raised the hypothetical that several jurisdictions may punish severely a crime which the particular reviewing court sees as rather minor. Furthermore, the Court in *Rummel* found that recidivist statutes were too complex to deal with objectively. It is unlikely, however, that a state can circumvent an eighth amendment proportionality analysis by designing punishments which due to a complex nature would make impossible a comparison with crimes outside as well as inside of the state.

There is also a question regarding whether the *Solem* proportionality analysis will ultimately be applied narrowly or broadly. In the most immediate future, it would seem that the *Solem* test will have a rather narrow effect within its application. First, there is the qualification that eighth amendment proportionality review will be found only in "exceedingly rare" cases, a qualification that has been echoed since *Weems* and is present in the three most recent cases—*Rummel*, *Hutto* and *Solem*. Eventually, the Court will have to define what "exceedingly rare" means in terms more definitional than the extreme example of felony overtime parking cited in *Rummel*. It could be that only by finding an eighth amendment violation, such as life imprisonment without parole in the present case, will definable boundaries in sentencing be established. One lower court has already used "exceedingly rare" to keep the effect of *Solem* narrow. Finally, the narrowness of the majorities in *Rummel* and *Solem*, both 5-4 decisions, seems to sug-

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124. 103 S. Ct. at 3013.
125. 103 S. Ct. at 3023 (Burger, C.J., dissenting). Chief Justice Burger raised the point that the crimes could have been violent if there had been a guard at the scene of the burglaries or if someone had been killed as a result of Helm's drunk driving. *Id.*
126. *Id.* at 3022 (Burger, C.J., dissenting).
127. *See supra* note 102.
128. *See supra* note 118.
129. *See Rummel*, 445 U.S. at 272; *Hutto*, 454 U.S. at 374; *Solem*, 103 S. Ct. at 3009.
130. *See* 445 U.S. at 274 n.11. The Court conceded that if the legislature made overtime parking a felony punishable by a sentence of life imprisonment it might be subject to proportionality analysis. *Id.*
gest that the Court might not take an expansive view of the case. This is not to say that ultimately the Court will not expand the application of the Solem test. The majority in Solem did, after all, point out that the list of factors to be considered was not exhaustive.\textsuperscript{132} If the Solem decision is to have a wide application and effect on sentencing, it would seem in the final analysis to rely on the idea put forth by Justice Rehnquist in Rummel.\textsuperscript{133} There Justice Rehnquist raised the point that the interpretation of the eighth amendment will rely on as yet evolving standards of decency and purpose.\textsuperscript{134} This would depend then on what society will ultimately demand. Society could demand that more concern be given to the victim rather than the criminal, thus further reducing the ultimate effect of Solem. On the other hand, society might become more concerned with the criminal and the effect of Solem would then be expanded. The road to Solem and proportionality analysis of sentencing in non-capital cases was a slow process.\textsuperscript{135} As to what path the Court will follow in the future, to quote Justice Rehnquist, "we have no way of knowing in which direction that road lies."\textsuperscript{136}

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\textsuperscript{132} 103 S. Ct. at 3011.

\textsuperscript{133} See 445 U.S. at 283-84.

\textsuperscript{134} See id. at 283.

\textsuperscript{135} See 144 U.S. at 340 (Field, J., dissenting).

\textsuperscript{136} See 445 U.S. at 283.